

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

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2020 TERM  
CASE NO. 2020-0536

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PETITION OF WHITMAN OPERATING CO., LLC  
D/B/A CAMP WALT WHITMAN & a.

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**BRIEF OF WICOSUTA OPERATING CO., LLC D/B/A CAMP  
WICOSUTA, WHITMAN OPERATING CO., LLC D/B/A CAMP  
WALT WHITMAN, AND WINAUKEE OPERATING CO., LLC  
D/B/A CAMP WINAUKEE, PETITIONERS-APPELLANTS**

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(Oral Argument)  
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**TABLE OF CONTENTS**

<b><u>Description</u></b>	<b><u>Page Number</u></b>
Table of Contents .....	2
Table of Authorities.....	4
Questions Presented for Review.....	6
Text of Relevant Authorities .....	7
Statements of the Facts and Case .....	9
A. State Action Impacting Petitioners’ Operations .....	10
B. GAP Fund Application .....	11
C. First and Second Requests for Rehearing .....	15
Standard of Review .....	20
Summary of Argument.....	21
Argument .....	23
I. Petitioners have standing to bring their claims under RSA 541, as well as under the State and Federal Constitutions .....	23
II. GOFERR’s Denial of eligibility for GAP funding to Petitioners’, based solely on the personal wealth of individual owners, rather than the finances of <i>Petitioners</i> , was not only unjust and unreasonable but also harmed Petitioners, compared to similarly situated applicants, in violation of Petitioners’ equal protection rights .....	25
A. Equal Protection Violations .....	25
B. Error of Law; Unjust and Unreasonable Agency Action .....	29
III. The absence of notice to Petitioners of the arbitrary criterion used to exclude them from GAP funding, coupled with the inability to appeal the Denial, violated Petitioners’ due process rights and was unjust and unreasonable .....	31

A. Substantive Due Process Violations.....	32
B. Procedural Due Process Violations.....	37
Conclusion .....	42
Oral Argument .....	44

## TABLE OF AUTHORITIES

### Cases

<i>Amsden v. Moran</i> , 904 F.2d 545, 552, 748, 753 (1st Cir.1990) (quoting <i>Armstrong v. Manzo</i> , 380 U.S. 545, 552 (1965) (quoting <i>Morrissey v. Brewer</i> , 408 U.S. 471, 481 (1972) .....	32, 37, 39
<i>Appeal of Conservation L. Found.</i> , No. 2020-0049, 2021 WL 357535, at *6 (N.H. Feb. 2, 2021) .....	37, 38, 40
<i>Appeal of Hollingworth</i> , 122 N.H. 1028, 1032 (1982) .....	18, 24
<i>Appeal of Marmac</i> , 130 N.H. 53, 58 (1987).....	25
<i>Appeal of Mullen</i> , 169 N.H. at 396.....	22
<i>Appeal of Nguyen</i> , 170 N.H. 238, 242, 243 (2017) .....	20, 31, 32
<i>Appeal of Panaggio</i> , 172 N.H. 13, 15, (2019) .....	20
<i>Citizens United v. Federal Election Commission</i> , 558 U.S. 310, 340-41, 343 (2010) .....	19,21, 28, 29, 30, 34, 43
<i>Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432, 439 (1985) .....	25
<i>Cook County, III v. U.S. ex rel. Chandler</i> , 538 U.S. 119, 127 (2003) .....	28, 30
<i>Doe v. State</i> , 167 N.H. 382, 414 (2015).....	37
<i>Double A Corp. v. Babauta</i> , No. CV 1:19-00005, 2019 WL 6499216, at *5 (D. N. Mar. I. Dec. 3, 2019).....	23, 39
<i>First Nat. Bank of Bos. v. Bellotti</i> , 435 U.S. 765, 780 n.15 (1978).....	23
<i>In re Sandra H.</i> , 150 N.H. 634, 637, 638 (2004).....	25, 26
<i>In re Union Tel. Co.</i> , 160 N.H. 309, 313, 321, 322 (2010).....	23, 24, 34, 36, 38
<i>Lambert</i> , 949 F.3d at 28.....	40
<i>Monell v. New York City Dept. of Social Servs.</i> , 436 U.S. 658, 687–88 (1978)..	28, 30
<i>New Hampshire Bankers Ass’n v. Nelson</i> , 113 N.H. 127, 130 (1973).....	36, 41

<i>N. New England Tel. Operations, LLC v. City of Concord</i> , 166 N.H. 653, 656 (2014)	23
<i>Saviano v. Director, N.H. Div. of Motor Vehicles</i> , 151 N.H. 315, 320 (2004)	31,32,42
<i>State v. Furgal</i> , 161 N.H. 206, 213 (quoting <i>United States v. Salerno</i> , 481 U.S. 739, 746 (1987))	33
<i>State v. Haas</i> , 155 N.H. 612, 613 (2007)	33
<i>Wilkinson v. Austin</i> , 545 U.S. 209, 221 (2005)	31
<i>Zinerman v. Burch</i> , 494 U.S. 113, 126 (1990)	40

### Questions Presented for Review

(1) Whether the exclusion of Petitioners from eligibility for New Hampshire General Assistance & Preservation Fund (“GAP Fund”) grants based solely on consideration of the personal wealth of certain of its individual owners—as opposed to consideration of *Petitioners’* corporate finances—violated Petitioners’ rights to due process and equal protection.

(2) Whether the denial of GAP Fund grants to Petitioners, not based on any criteria made available to Petitioners at the time their application was submitted, but rather based upon a single criterion that was only revealed to Petitioners *ex post facto*, was unjust and unreasonable pursuant to RSA 541.

(3) Whether the denial of GAP Fund grants to Petitioners, not based on any criteria made available to Petitioners at the time their application was submitted, but rather based upon a single criterion only revealed to Petitioners *ex post facto*, was arbitrary and capricious for which a writ of certiorari should issue pursuant to Rule 10 regarding appeals from agency determinations.

(4) Whether the absence of notice to Petitioners of the criterion used to exclude them from GAP Fund grants, coupled with the inability to appeal a decision based on that criterion, violated Petitioners’ right to due process.

## Text of Relevant Authorities

### **RSA 541:13 Burden of Proof.**

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

**Source.** 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

### **N.H. Const. Pt. 1, Art. 2**

All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

### **N.H. Const. Pt. 1, Art. 12**

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

### **N.H. Const. Pt. 1, Art. 15**

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right

to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

**U.S.C. Const. Amend. XIV, § 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 and Case

This is an appeal from the New Hampshire Governor’s Office for Emergency Relief and Recovery (“GOFERR’s”) unjust and unreasonable denial of funding to the Petitioners under the federally funded GAP Fund.<sup>1</sup> The denial of funding – for which Petitioners were afforded no recourse by GOFERR – was based on a single criterion, not disclosed to Petitioners (or, indeed, any other applicants) upon applying for the GAP Fund: the personal wealth of certain *individual* owners of the Petitioners—rather than the corporate finances of Petitioners. GOFERR made an error of law—and was unjust and unreasonable—in piercing the corporate veil and ignoring Petitioners’ corporate personhood under the law to consider the financial condition of Petitioners’ owners and apply it to Petitioners’ actual, corporate finances, resulting in the denial of Petitioners’ GAP Fund application and causing them severe harm. This Court should reverse GOFERR’s decision not

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<sup>1</sup> As raised in Petitioners’ Rule 10 Petition, and as reflected in the Questions Presented in this Brief, Petitioners argue, in the alternative, that the same denial of funding by GOFERR was also arbitrary and capricious. Since this Court granted the appeal without reference to it being a writ for certiorari, which would involve this Court’s “arbitrary and capricious” standard, Petitioners dedicate the majority of this Brief to arguing the “unjust or unreasonable” standard for Rule 10 appeals from agency determinations. However, where appropriate, Petitioners incorporate case law weighing in on the analogous “arbitrary and capricious” standard applied in other jurisdictions. Regardless, Petitioners maintain that it should be granted relief under *either* standard, for the reasons stated throughout this Brief.

only because it was an error of law that was unjust and unreasonable, but also because it violated Petitioners' due process and equal protection rights.

#### A. State Action Impacting Petitioners' Operations

Petitioners are owners and operators of three summer camps located in the State of New Hampshire. They derive essentially all of their income and revenues from registrations for the summer camping season. On June 15, 2020, pursuant to Executive Order 2020-04 and amendments thereto, Governor Christopher T. Sununu issued Emergency Order 52 with specific guidance for the overnight camp industry. Although Emergency Order 52, which was extended until September 1, 2020 by Emergency Order 61, did not specifically order overnight camps to suspend their normal operations throughout Summer 2020 (in effect, an entire business year), it had that same *practical* effect. Brief Appx. BA-311–BA-316. The State of New Hampshire recognized this significant burden in Emergency Order 62, which stated: “while Summer Camps are permitted to operate under guidance issued as part of Exhibit B to Emergency Order 52, as extended by Emergency Order 61, due to the COVID-19 pandemic many Summer Camps have chosen . . . [due to a determination they have an] inability to comply with the guidance based on business-models and financing, and out of an abundance of caution, not to open for the Summer of 2020.” Brief Appx. BA-314–BA-316.

## B. GAP Fund Application

On or about July 21, 2020, GOFERR announced that Governor Christopher T. Sununu had authorized the allocation and expenditure of \$30 million from the pool of federal funding New Hampshire had received under the CARES Act. These federal funds were designated by GOFERR to be distributed to recipients across the State, including several programs targeted specifically to all manner of *businesses* with operations in New Hampshire. The first of these general business grants, the “Main Street Relief Fund” (sometimes referred to as “MSRF 1.0”), resulted in hundreds of businesses, including 18 overnight camps, receiving significant monetary grants. Indeed, Petitioners were at one point approved for a Main Street Relief Fund in the amount of \$350,000.00—they were initially denied, subsequently approved, and then denied again, on the basis that their “principal business location as registered with the New Hampshire Secretary of State was a location not in the State of New Hampshire”—while other New Hampshire based camps received grants in the hundreds of thousands of dollars. Brief Appx. BA-004–BA-014. Following MSRF 1.0, GOFERR created the New Hampshire General Assistance & Preservation Fund (the “GAP Fund”). The stated purpose of the GAP Fund was “to provide emergency financial relief to New Hampshire *businesses* and nonprofit organizations impacted by the COVID-

19 pandemic, but that have been unable to access support from other existing state and federal programs,” including MSRF 1.0. Appx. 004 (emphasis added).<sup>2</sup>

GOFERR listed the following “for-profit eligibility criteria” (while stating, without explanation, that this list was non-exhaustive):

- Be a for-profit business
- Have at least one (1) non-owner employee
- Have its principal place of business in New Hampshire or conduct a significant portion of it[s] operation in New Hampshire
- Demonstrate that the business was fully operational prior to March 13, 2020
- Not currently be in bankruptcy
- Not have permanently ceased operations
- Be in Good Standing with the New Hampshire Secretary of State
- Demonstrate a quantifiable financial impact on [its] business due to the COVID-19 pandemic

Appx. 004. Applications under the program were due on August 4, 2020. Of note, unlike prior programs offered through GOFERR (e.g., the Main Street Relief Program), the GAP Fund program was not limited to businesses based on their corporate income. Further, individual owners’ *personal wealth* was not described as a basis for eligibility, nor should it have been as a matter of law.

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<sup>2</sup> “Appx.,” “Appx. Vol. II,” and “Appx. Vol. III” refer to Petitioners’ Appendices (as amended and supplemented) to its Rule 10 Petition. Appendix Volume II was amended, pursuant to this Court’s January 28, 2021 Order, on February 5, 2021. Appendix Volume III was filed for *in camera* inspection on the same date according to the same Order. “Brief Appx.” cited *infra*, refers to Petitioners’ Appendix to this Opening Brief submitted herewith.

Indeed, and rightly so, this criterion – which would require the state administrators of the GAP Fund to pierce the Petitioners’ corporate veil and ignore their corporate personhood – had never been used before.<sup>3</sup>

On or about July 31, 2020, Petitioners timely submitted their application for GAP funding (the “Application”). Appx. Vol. II, C-001; *see also* Appx. 006; Appx. Vol. II, C-004–C-084; Appx. Vol III. Additional documents, and correspondence, in connection with the Application were submitted on a rolling basis, within the timeframe provided by GOFERR and the New Hampshire Business Finance Authority (“BFA”), which helped administer the GAP Fund. *See* Appx. 006, 010.

It is undisputed that Petitioners met all of the above-listed “for-profit eligibility criteria.” Petitioners operate three historic camps in New Hampshire, employ a number of non-owner New Hampshire employees (including W-2 employees), conduct a significant portion of their operations in New Hampshire, and are organized as limited liability companies in good standing with the New Hampshire Secretary of State. They were fully operational as of March 13, 2020, had not permanently ceased operations or declared bankruptcy as of the Application date, and demonstrated a

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<sup>3</sup> *See, e.g.*, the “eligibility criteria” described at <https://www.goferr.nh.gov/mainstreet>.

“quantifiable financial impact on their business due to the COVID-19 pandemic.” In particular, Petitioners’ Application demonstrated losses in the millions of dollars specific to the three New Hampshire camps due to the COVID-19 pandemic.

On or about September 10, 2020, Petitioners received three denial letters from GOFERR (collectively referred to as the “Denial”), stating that funding had been denied as to each of the three operating companies/camps, without a specific explanation as to why the Application was denied. *See* Appx. 014 (three denial letters). On September 17, 2020, in response to a request for a written explanation for the Denial, James Key-Wallace, executive director of the New Hampshire Business Finance Authority, provided the following explanation, via email:

This application was denied because a review of the **owners’ personal financial statements indicated a high level of net worth and personal liquidity**. Unfortunately, that is not on the list of appealable decision criteria which can be found here [link to GOFERR], and also listed below for your convenience.

Appx. 028 (Ex. B to Request for Rehearing)(emphasis added). These criteria were nearly identical to the above-listed “for-profit eligibility criteria,” with slight variations immaterial to the Denial of Petitioners’ Application.

### C. First and Second Requests for Rehearing

On September 24, 2020, one week following the Denial, Petitioners submitted the first Request for Rehearing (“First Request”), addressed to Key-Wallace at the BFA. Appx. 020. In an email dated October 1, 2020, Key-Wallace informed Petitioners that the First Request had been passed along to Attorney Nancy J. Smith, counsel for GOFERR, and that GOFERR was “the operative body for [Petitioners’] request.” Appx. 034. The First Request stated that the email explanation for the Denial was “insufficient—particularly in the absence of any meaningful opportunity to appeal or otherwise contest it.” Appx. 021. Absent additional information, Petitioners argued, the Denial must be reversed as “unjust and unreasonable.” Appx. 021.

The First Request also explained why wealth-based considerations of the individual owners, “failed to capture the Applicant’s actual need.” Appx. 022. First, as a result of the State’s efforts to control the pandemic (including, as is relevant here, imposing industry-specific restrictions on summer camps during the summer of 2020), Petitioners anticipated, at best, the realization of “very little income for two years.” Appx. 022. Petitioners as separate operating corporate entities were, in fact, “hurting financially” due to COVID-19 and the state action taken as a result of the pandemic.

Second, Petitioners explained that individual owners were not in a position and were not legally required to relieve Petitioners of the “significant losses, in the millions of dollars, the Applicant has experienced” due to COVID-19. Appx. 022. Accordingly, it was “unjust and unreasonable” to “assume that individual owners could stop the Applicant’s significant losses in operating camps, such that the Applicant was no longer eligible for GAP funding.” Appx. 022. GOFERR’s position in this regard is tantamount to piercing the corporate veil of Petitioners to reach the individual owners’ personal wealth by effectively compelling them to provide additional capital to keep Petitioners operating.

On October 5, 2020, Attorney Smith, as counsel for GOFERR, responded to the First Request. The letter asserted that RSA 541 did not govern Petitioners’ request for a rehearing—or, for that matter, any “decisions under the Governor’s emergency powers”—and therefore GOFERR “decline[d] to act upon [Petitioners’] request for a rehearing.” Appx. 037. The letter further explained the reasons why Petitioners “did not receive an award.” Appx. 037. First, the letter stated:

We understand that your clients may have had a financial impact from COVID. That alone, however, was not the basis for the awards from the GAP Fund. The State has had to make many hard decisions about criteria for providing funding. As a result, the State targeted the limited aid available to those

entities that do not have other resources to more likely enable them to weather this pandemic crisis. Of note, the financials submitted by your clients indicated that several of the largest percentage owners have tens of millions in net worth and more significantly, tens of millions in cash liquid assets.

Appx. 037.

Next, the letter listed a set of general “considerations” that “BFA’s recommendation to GOFERR applied . . . to its review of personal financial data required by the application”—without a specific explanation as to how they were applied.<sup>4</sup> Appx. 037. Together, these explanations reflect the first time Petitioners were informed of the specific “considerations” applied to them other than Key-Wallace’s brief explanation, on September 17, 2020, that individual owners’ wealth was relied upon to deny the Application.

On October 8, 2020, three days after GOFERR’s letter “declining to act” on the First Request, Petitioners filed a Second Request for Rehearing (the “Second Request”), addressed to GOFERR directly, and raising additional issues that followed from GOFERR’s response. Appx. 038. As an

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<sup>4</sup>These general “considerations” were as follows: “(a) High net worth alone was not disqualifying; (b) Liquidity of an applicant’s assets was a weightier factor against an award; (c) A high level of liquid assets relative to a business’s capital needs, or ability to easily and quickly obtain adequate private financing at a reasonable cost without permanently impairing a business or household also weighed against an award; (d) A comparison of the available liquidity and ability to obtain private financing against scope of needs presented in application to make individualized judgment of extent of need; and (e) Applicants were not expected to liquidate retirement accounts.” Appx. 037.

initial matter, Petitioners disputed GOFERR's assertion that RSA 541 did not apply, noting that, unlike other administrative agencies with organic statutes (which either do, or do not, specify the application of RSA 541), "there is no statute or regulation that can explain the circumstances under which a rehearing is permitted following an adjudicative proceeding conducted by GOFERR." Appx. 039. Even if this Court were to determine that RSA 541 does not apply, Petitioners noted that the Court "routinely accepts appeals from administrative agencies *notwithstanding* the inapplicability of RSA 541, as a petition for writ of certiorari under Rule 10." Appx. 039 (citing *Appeal of Hollingworth*, 122 N.H. 1028, 1032 (1982)). Under *either* standard of review, Petitioners asserted they would succeed in reversing the Denial on appeal because the individual owners' "wealth-based decision factors, which were revealed only in response to the First Request, must be deemed arbitrary, unreasonable, and capricious." Appx. 039. Accordingly, Petitioners asked GOFERR to consider both requests notwithstanding their disagreement regarding procedure.

Next, Petitioners raised three additional issues arising from GOFERR's response to their First Request. *First*, Petitioners asserted that GOFERR's suggestion of "no avenue of appeal for any aggrieved party subject to an adjudicative decision of GOFERR" implicated Petitioners' due process rights.

Appx. 040. “The Applicant most certainly was aggrieved by the Denials, and those Denials presumably were the result of an adjudication directed to the Applicant specifically. The Applicant therefore has a due process right to appeal, whether through RSA 541 or otherwise through Rule 10.” Appx. 040.

*Second*, while Petitioners acknowledged GOFERR’s response to the First Request had, for the first time, provided Petitioners with (belated) notice of the individual wealth-based factors, they argued that the “*ex post facto*” nature of this information not only was “a textbook example of an arbitrary and capricious decision” but also “impinges on the Applicant’s due process rights, with grave economic consequences,” particularly given GOFERR’s stated position that no appeal could result from this *ex post facto* decision (except for the set of “appealable” factors). Appx. 040.

*Third*, Petitioners cited the federal Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 343 (2010), to argue that Petitioners, whose parent company is a limited liability company operating in multiple states, “should not be treated any differently from any other associations, or even ‘natural persons,’ simply because of the *individual* wealth of certain of [their] minority owners.” Appx. 040. Petitioners argued they should be “assessed on [their] own merits—as New Hampshire based camps that have experienced significant economic losses and face real concerns

about their future viability” due to COVID-19. Appx. 040. Finally, GOFERR’s refusal to limit its assessment to *Petitioners’* finances implicated *Petitioners’* due process and equal protection rights, as it prejudiced *Petitioners* relative to other camps in the State, including camps with “different corporate structures yet other wealthy owners.” Appx. 040.

On October 21, 2020, GOFERR declined to “reopen” its original decision in response to the First Request, Appx. 042. As a result of state action, *Petitioners* were denied much-needed funding which was being provided by the State to similarly situated companies because of the State’s understandable decision to impose severe restrictions on *Petitioners’* industry for a summer (in effect, an entire business year). This appeal followed.

### **Standard of Review**

The Court “will not disturb [an administrative agency’s] decision absent an error of law, or unless, by a clear preponderance of the evidence, [the Court] find[s] it to be unjust or unreasonable.” *Appeal of Panaggio*, 172 N.H. 13, 15, (2019); *see also* RSA 541:13. “The appealing party has the burden of demonstrating that the [agency’s] decision was erroneous.” *Appeal of Panaggio*, 172 N.H. at 15. “All findings of the [agency] upon questions of fact properly before it are deemed to be *prima facie* lawful and reasonable.” *Id.* By contrast, the Court reviews an agency’s rulings of law *de novo*. *Appeal of Nguyen*, 170 N.H.

238, 242 (2017). Similarly, constitutional arguments raised on appeal with respect to agency decision-making are reviewed *de novo*. *See id.* at 243.

### **Summary of Argument**

GOFERR's Denial of GAP funding to Petitioners was based on an error of law and was also unjust and unreasonable.<sup>5</sup> *First*, as a substantive matter, GOFERR committed legal error by ignoring Petitioners' personhood under *Citizens United* and piercing Petitioners' corporate veil to consider its individual owners' personal wealth. GOFERR's decision was also unjust and unreasonable since it incorrectly assumed that the personal wealth of certain *individual* owners could serve as a proxy for the corporate finances of Petitioners. This assumption was particularly arbitrary in light of the ongoing pandemic and economic harms suffered by overnight camps. Setting aside the irrelevance of the financial position of the individual owners, as corporate entities, Petitioners faced severe financial losses as a result of COVID-19 restrictions imposed by state action in the form of emergency orders.

*Second*, as a procedural matter, GOFERR unreasonably withheld its explanation for the single, previously undisclosed criterion excluding

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<sup>5</sup> As stated *supra* in footnote no. 1, Petitioners argue, in the alternative, that the same Denial of funding by GOFERR was also arbitrary and capricious. While this standard is analogous to the "unjust or unreasonable" standard, which Petitioners understand to apply based on the Court's acceptance of this Appeal, to be clear, Petitioners assert that the Denial should be reversed under *either* standard—in addition to the constitutional grounds for reversal.

Petitioners from funding, while denying Petitioners any meaningful opportunity to contest it. Petitioners had no advance notice the criterion existed or would be used against them. Together, these substantive and procedural errors resulted in substantial harm to Petitioners while other, differently structured, camps in New Hampshire received funding.

*Third*, although a constitutional violation is not *required* to show GOFERR's Denial was "unjust or unreasonable" under RSA 541:13, clearly it would be a *sufficient* basis for such a finding. As stated above, GOFERR violated Petitioners' constitutional rights under one or more of the following doctrines: equal protection, substantive due process, and procedural due process (or a combination of all three). RSA 282-A:67 is instructive. Among the reasons for overturning a decision of a Department of Employment Security appeal tribunal (a form of process far beyond what Petitioners experienced here), is a "violation of *constitutional* or statutory provisions," or "other error of law." RSA 282-A:67 (emphasis added); *see Appeal of Mullen*, 169 N.H. at 396. Thus, by analogy, any one of the above constitutional violations would clearly meet the standard for overturning GOFERR's decision-making—untethered to any particular statute—on the basis of it being based on an error of law and "unjust or unreasonable." RSA 541:13.

## Argument

### **I. Petitioners have standing to bring their claims under RSA 541, as well as under the State and Federal Constitutions.**

As an initial matter, courts have repeatedly recognized the standing of corporate entities, including limited liability companies such as Petitioners, to bring claims to redress legal wrongs. *See, e.g., N. New England Tel. Operations, LLC v. City of Concord*, 166 N.H. 653, 656 (2014) (considering equal protection claim brought by LLC against municipality); *In re Union Tel. Co.*, 160 N.H. 309, 321 (2010) (considering due process and agency error claims); *see also Double A Corp. v. Babauta*, No. CV 1:19-00005, 2019 WL 6499216, at \*5 (D. N. Mar. I. Dec. 3, 2019) (rejecting defendants’ argument that due process protects only natural persons). As the U.S. Supreme Court observed with respect to the Due Process Clause in 1978, by then “[i]t ha[d] been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment.” *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

Corporate entities including limited liability companies may establish standing to assert constitutional and other legal claims by demonstrating that, at the corporate level, they have suffered a legally cognizable injury. *In re Union Tel. Co.*, 160 N.H. 309, 313 (2010) (recognizing standing for corporation to challenge agency determination). Here, Petitioners have standing to assert

their claims against GOFERR, as they were “directly affected by” GOFERR’s decision, made specifically *as to Petitioners*, resulting in an “injury in fact” (the Denial of funding). *Id.* Among other things, this deprivation of funding clearly implicated Petitioners’ property interests, at the corporate level.

Standing is proper under RSA 541 for all of the reasons articulated in Petitioners’ Rule 10 Petition (which argued, in the alternative, that this appeal could also be accepted as a petition for writ of certiorari under Rule 10).<sup>6</sup> The Rule 10 Petition further argued this Court’s jurisdiction to consider the Appeal. *See, e.g., Appeal of Hollingworth*, 122 N.H. 1028, 1032 (1982); *see also* RSA 490:4. These jurisdictional arguments have been resolved based upon this Court’s acceptance of the appeal through normal appellate procedure, but Petitioners reserve the right to argue them further if necessary. At bottom, Petitioners clearly have met the *In re Union Telephone Company* standard of having directly suffered an “injury of fact” due to the State’s actions.

GOFERR would have this Court hold otherwise—since, according to the agency, the particular (previously unknown) category of denial is simply

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<sup>6</sup> In relevant part, Petitioners argued that in the absence of an organic statute construing the powers and responsibilities of GOFERR, which was created by emergency order of the Governor of New Hampshire, RSA 541 should apply to provide aggrieved parties a meaningful avenue of appeal from the decisions of GOFERR. This is particularly true given the constrained internal appeal process which GOFERR applied with respect to the grant at issue here.

non-appealable. Yet, this provides all the more reason for this Court to recognize Petitioners' standing to bring constitutional and administrative law claims since, if RSA 541 did not apply, certiorari would be "the only avenue by which [Petitioners] may seek relief." *In re State*, 162 N.H. 64, 66 (2011).

**II. GOFERR's Denial of GAP funding to Petitioners, based solely on the personal wealth of individual owners, rather than the finances of *Petitioners*, was not only unjust and unreasonable, but also harmed Petitioners, compared to similarly situated applicants, in violation of Petitioners' equal protection rights.**

A. Equal Protection Violations

The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Federal equal protection offers no greater protection than [New Hampshire's] equal protection guarantee." *In re Sandra H.*, 150 N.H. 634, 637 (2004).

"[T]he equal protection guarantee is 'essentially a direction that all persons similarly situated should be treated alike.'" *Id.* (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)).

"The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *Appeal of Marmac*, 130 N.H. 53, 58 (1987). "[A]bsent some infringement of a

fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality.” *In re Sandra H.*, 150 N.H. at 638.

Petitioners are similarly situated to other applicants for GAP funding who also satisfied the eligibility criteria published by GOFERR and were awarded GAP funding. *See e.g.*, Brief Appx. BA-058–BA-062 (identifying Pierce Camp Birchmont Inc. and K&E Camp Corporation as applicants approved to receive GAP funding). Although Petitioners’ choice of corporate association should have no bearing on its eligibility, the practical effect of its particular method of incorporation—as limited liability companies falling under a single corporate parent, which in turn, is closely held by more than 50 individuals and entities—has resulted in disparate exposure to GOFERR’s undisclosed criterion regarding *personal* financial wealth of individual owners. Were the corporate parent to issue stock to its “owners,” the personal wealth of those “owners” (stockholders) would not be readily ascertainable by GOFERR, let alone relevant to any rational analysis of the *corporation’s* finances.

Were the individual camps owned by some, but not all, of the individual owners of the corporate parent—*i.e.*, if the corporate entities were structured any *differently* than the particular approach that Petitioners, and the

corporate parent of which they are subsidiaries, chose in organizing—there would be fewer personal financial statements to assess. Finally, if the camps were not organized as corporations at all, but rather as enterprises run by individuals, or even smaller groups of individuals — toward which the “personal wealth” criterion appears more targeted — Petitioners presumably would have been approved for GAP funding (as they were, initially, under MSRF 1.0) and the financially devastating result may well have been averted.

Yet none of these hypothetical forms of ownership bear *any* rational relationship to whether *Petitioners* are entitled to GAP funding. In fact, the wealth of individual, minority owners of Petitioners are not in any way indicative of the financial circumstances and needs of the Petitioners as ongoing corporate entities. As Petitioners explained, to no avail, they ought to be considered on their *own* merits—as New Hampshire based camps owned and operated by separate corporate entities which have experienced significant economic losses and face real concerns about their future viability.

The United States Supreme Court has made clear that state and federal governments should not favor persons or entities based on the choice of corporate formation. As explained, Petitioners’ corporate formation had the *practical* effect of making Petitioners particularly vulnerable, without any rational basis, to an undisclosed application criterion that excluded them

completely from the grant at issue. While in the context of a First Amendment claim, the Supreme Court in *Citizens United* emphasized the importance of treating all speakers equally, regardless of association or corporate form:

[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers . . . The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.

*Citizens United*, 558 U.S. 310, 340-41 (2010). For these reasons, the Court “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” *Id.*; *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 687 (1978) (“[C]orporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”); *see also Cook County, III v. U.S. ex rel. Chandler*, 538 U.S. 119, 127 (2003) (collecting cases). Similarly, Petitioners as GAP Fund applicants should not be treated differently or denied due process and equal protection under the law merely because they are not “natural persons” (or simply because they were organized differently as corporate entities).

The Denial of funding to Petitioners, however, was based solely on the finances of other persons, individual owners, uncoupled from the actual finances of the Petitioners applying for the grant. Where the basis for the

Denial had no rational connection to the application itself – which reflected that Petitioners suffered financial harm as a result of COVID-19 – it was unreasonable. *Cf. AID Atlanta, Inc. v. United States Dep’t of Health & Hum. Servs.*, 340 F. Supp. 3d 1, 4 (D.D.C. 2018) (requiring, under APA analysis, a “rational connection between the facts found and the choice made” and further stating that an agency’s decision may be found arbitrary and capricious, among other reasons, “if the agency has relied on factors which Congress has not intended it to consider”). Therefore, the *substance* of the decision, and its practical effect, was unjust and unreasonable and therefore must be overturned under RSA 541.

B. Error of Law; Unjust and Unreasonable Agency Action

GOFERR’s decision to pierce the corporate veil to apply irrelevant and extraneous financial information supplies a further basis for this Court to overturn an agency’s decision-making under RSA 541: an error of law. This legal error—essentially, piercing the corporate veil without a valid basis to do so and refusing to consider the personhood of *Petitioners* as New Hampshire LLCs in violation of *Citizens United* – is separate and apart from the procedural and substantive constitutional violations.

As a matter of substance, GOFERR’s assumption that the personal finances of certain minority owners of the corporate entities could be

attributed to those entities—its only explanation for why it applied the personal wealth criterion to Petitioners—amounted to a “fail[ure] to make a finding on a material issue of fact;” therefore, “its determination on this point must be set aside for failure to observe procedure required by law.” *Drukker Commc’ns, Inc. v. N.L.R.B.*, 700 F.2d 727, 736 (D.C. Cir. 1983) (setting aside agency’s decision under APA). Moreover, were the consideration of *other* persons’ finances *not* an error of law, then the clear import of *Citizens United*, that corporate entities should be treated on equal ground as similarly situated natural persons for purposes of asserting legal rights, would ring hollow. *See also Cook County, III*, 538 U.S. at 127; *Monell*, 436 U.S. at 687–88. As described below, the direct result of GOFERR’s decision was to deny Petitioners’ much needed funding where others received it, solely on the basis of the corporate form and their individual owners’ financial condition.

Further, as stated below under the substantive due process analysis in Section III, A., and for all of the reasons stated herein, GOFERR’s stated basis for the Denial was irrational. There was simply no rational connection between the wealth of individual owners to the stated criteria for eligibility, since it took into account finances of natural persons *other than* the corporate entities themselves which applied for GAP funding. Because this irrational decision harmed Petitioners more than similarly situated applicants, it violated

Petitioners' right to equal protection. *See e.g.*, Brief Appx. BA-058–BA-062. As described below in Section III it also violated Petitioners' right to due process. Under either theory, or as a matter of this Court's review of agency decision-making, it was legal error under RSA 541, as well as both unjust *and* unreasonable under Rule 10.

**III. The absence of notice to Petitioners of the arbitrary criterion used to exclude them from GAP funding, coupled with the inability to appeal the Denial, violated Petitioners' due process rights and was unjust and unreasonable.**

“The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The New Hampshire Constitution similarly provides, in relevant part: “No subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land . . . .” N.H. CONST. pt. I, art. 15. “Law of the land in this article means due process of law.” *Appeal of Nguyen*, 170 N.H. 238, 243 (2017) (quotation omitted). “The ultimate standard for judging a due process claim is the notion of fundamental fairness.” *Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320 (2004). “Fundamental fairness requires that government

conduct conform to the community’s sense of justice, decency and fair play.” *Id.*

This Court “engage[s] in a two-part analysis in addressing procedural due process claims: first, [it] determine[s] whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, [it] determine[s] what process is due.” *Appeal of Nguyen*, 170 N.H. at 243. “At its most basic level, the requirement to afford due process forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair.” *Id.* (quotation omitted) (describing same “fundamental fairness” standard, involving “justice, decency and fair play,” as described in *Saviano*).

#### A. Substantive Due Process Violations

A “substantive due process claim implicates the essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government’s conduct, regardless of procedural swaddling, was in itself impermissible.” *Amsden*, 904 F.2d at 753. “As distinguished from its procedural cousin . . . a substantive due process inquiry focuses on ‘what’ the government has done, as opposed to ‘how and when’ the government did it.” *Id.* at 754. Substantive due process protects a party against state actions that are “arbitrary and capricious.” *Id.*; *see*

*also State v. Furgal*, 161 N.H. 206, 213 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)) (“So-called ‘substantive due process’ prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty.”). When the interest at stake is not a fundamental right, the Court will apply a rational-basis test to determine whether the action survives a substantive due-process challenge. *See State v. Haas*, 155 N.H. 612, 613 (2007). The rational basis test requires government action to be “rationally related to a legitimate governmental interest.”

Even assuming GOFERR afforded Petitioners adequate process in denying Petitioners’ GAP application, GOFERR’s decision was nevertheless arbitrary and capricious—and, when considering its practical effect, conscience-shocking—by excluding Petitioners’ otherwise valid application based on extraneous and irrelevant information concerning its individual owners’ financial condition. GOFERR expressly based its decision to deny Petitioners’ GAP application on the basis of *individual* owners’ finances (a criterion it withheld from *all* applicants, including Petitioners, until Petitioners specifically requested an explanation for the Denial, at which point GOFERR expressly foreclosed any avenue of administrative review or redressability), and disregarded the financial circumstances of Petitioners as persons and

corporate applicants. Wealth of individual owners – particularly minority owners – has no bearing on the actual financial circumstances of Petitioners and whether Petitioners are entitled to GAP funding. In fact, Petitioners satisfied all eligibility criteria published by GOFERR. Thus, presumably, GOFERR had no legitimate basis for denying Petitioners GAP funding.

Moreover, the practical effect of withholding the sole criterion for denying funding—and that criterion being completely separated from any consideration of the actual need for *Petitioners* to access a GAP Fund benefit in order to stem the tide of severe financial losses due to state-enacted COVID-19 measures—shocks the conscience for two reasons. *First*, it removes the *applicant* (Petitioners) from the process of applying for a grant, and assumes an ability of certain minority shareholders to fund Petitioners’ coffers. *Second*, it bypasses Petitioners’ undisputed eligibility notwithstanding a previously unknown disqualifying factor. Put simply, Petitioners were denied property (GAP funding) to which they were entitled based on GOFERR’s own published criteria. *See In re. Union Tel. Co.*, 160 N.H. at 322 (describing property interest based on “existing rules or understandings that stem from an independent source”). That they were denied that property based on an *unknown* criterion examining *other persons’* finances – which was erroneous as a matter of law under *Citizens United* – is conscience-shocking.

As a procedural matter, the particular sequencing that GOFERR employed, whip-sawed Petitioners into having no recourse, except through this Court. First, GOFERR provided a list of eligibility criteria for the grant, all of which Petitioners, undisputedly, met. Petitioners submitted their application. After it was initially granted, GOFERR later denied it without explanation. Only *after* Petitioners requested some explanation were Petitioners finally notified of the criterion used to deny them funding—a criterion completely divorced from the actual, corporate finances of Petitioners (and therefore absent from every other, publicly available, eligibility criterion). “It is a fundamental principle of administrative law that an agency is bound to adhere to its own regulations.” *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008).

GOFERR not only did not follow its own set of limited application instructions, but it also failed to provide *any notice* to Petitioners that it would depart from that set of instructions—further compounding the arbitrariness and unreasonableness of the decision. *Cf. Bean v. Perdue*, No. CV 17-0140 (RC), 2017 WL 4005603, at \*6 (D.D.C. Sept. 11, 2017) (petitioner adequately pled claim of “arbitrary and capricious” decision under federal Administrative Procedure Act where he alleged he was not made aware of receipt of loan

servicing materials that tolled time period for him to apply for loan under agency's own regulations).

Worse still, at the same time GOFERR finally provided Petitioners with an explanation for the Denial of funding, GOFERR also informed Petitioners that they could not appeal from that decision, *precisely because* the previously unknown (and unknowable) criterion, was not on a predetermined list of “appealable” factors, determined by GOFERR alone. Petitioners were denied any basis of recourse, except through petition to this Court. *See Nelson*, 113 N.H. at 130. This is the essence of an “unjust” procedure, whether or not it rose to the level of a *constitutional* violation of due process. *See, e.g., Old Dominion Dairy Prod., Inc. v. Sec’y of Def.*, 631 F.2d 953, 966–67 (D.C. Cir. 1980) (denial of contracts based on an excluding factor applied without prior notice “could have continued indefinitely with absolutely no recourse for the contractor,” and government agency “cannot invoke suspension procedures after-the-fact and claim those procedures were adequate”).

It was unjust for Petitioners to be deprived of this valuable aid where similarly situated, but differently organized, camps, could receive the same funding. Whether viewed through the prism of “process” or “substance,” and whether coupled with separate constitutional violations or not, *see, e.g., In re Union Tel. Co.*, 160 N.H. at 321, the action was both unjust and unreasonable.

For all of the reasons stated above, GOFERR’s denial lacked a rational basis—and indeed was both arbitrary and capricious *and* conscience-shocking. Therefore, under any of the various standards elucidated by courts, the Denial of funding violated Petitioners’ substantive due process rights.

### B. Procedural Due Process Violations

“The basic purport of the constitutional requirement [of due process] is that, before a significant deprivation of liberty or property takes place at the state’s hands, the affected individual must be forewarned and afforded an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir.1990) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Appeal of Conservation L. Found.*, No. 2020-0049, 2021 WL 357535, at \*6 (N.H. Feb. 2, 2021) (describing right to be heard as “fundamental requisite”). “There is no mechanical formula by which the adequacy of state procedures can be determined. To the contrary, ‘due process is flexible and calls for such procedural protections as the particular situation demands.’” *Amsden*, 904 F.2d at 753 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see also Doe v. State*, 167 N.H. 382, 414 (2015) (same).

Procedural due-process violations occurred at nearly every turn in Petitioners’ application for GAP funding. These procedural flaws, as applied to Petitioners, were fundamentally unfair, *irrespective* of any rational basis

GOFERR may have had (although no rational basis is discernible). Therefore, as applied to Petitioners, the particular *manner* in which they were deprived of property (GAP funding) was plainly unconstitutional.

Petitioners suffered the direct harm of being denied GAP funding by GOFERR. Its “legitimate claim of entitlement” to GAP funding—a property interest that was far more than a mere “abstract[ion]”—was based, not on Petitioners’ own “unilateral expectation,” but on the “existing rules [and] understandings” that GOFERR provided all applicants prior to accepting applications. *In re. Union Tel. Co.*, 160 N.H. at 322. Specifically, while GOFERR published clear guidance on the eligibility factors for receipt of a GAP Fund grant, all of which Petitioners undisputedly met, GOFERR denied Petitioners’ application for GAP funding based solely upon a criterion (personal wealth of individual owners) that was absent from GOFERR’s list of criteria. Worse still, Petitioners were denied any ability to appeal this determination, since it was not included on a list of appealable factors—meaning the harm was total. *See Appeal of Conservation L. Found.*, 2021 WL 357535, at \*6 (“The fundamental requisite of due process is the right to be heard at a meaningful time and in a meaningful manner.”).

The loss of GAP funding due to GOFERR’s Denial directly implicates and infringes upon Petitioners’ property interests and denies Petitioners due

process under the law. Since GOFERR has foreclosed any possibility of an appeal on the basis of individual owners' wealth, these clear, legally cognizable injuries may only be redressed by this Court. *See, e.g., Double A Corp. v. Babauta*, No. CV 1:19-00005, 2019 WL 6499216, at \*6 (D. N. Mar. I. Dec. 3, 2019) (“Defendants did not give even minimal due process. At the very least, they could not deny the permit without notifying [plaintiff] of their reasons and offering a meaningful opportunity to respond.”).

At a minimum, Petitioners should have received advanced notice of the eligibility criteria that GOFERR would apply uniformly to GAP applicants. While GOFERR published a list of “for-profit eligibility criteria,” it did not actually apply that criteria in denying Petitioners’ application. Rather, GOFERR’s stated basis for denying Petitioners’ application was the individual wealth of Petitioners’ owners—a criterion that was *not* included in the fulsome list of factors impacting an applicant’s eligibility and has no bearing on Petitioners’ financial circumstances.

Despite Petitioners’ constitutional entitlement to be “forewarned” of the eligibility criteria for GAP applications, Petitioners had no notice of the sole eligibility criterion that excluded them from funding. *Amsden*, 904 F.2d at 753. This procedural shortcoming was made complete when GOFERR expressly denied Petitioners any opportunity to contest this “non-appealable”

factor—meaning Petitioners not only were not “forewarned” of the reason they would be excluded from funding but also were given no meaningful opportunity to contest that sole basis for exclusion. *Id.* Put simply, Petitioners had no “meaningful” opportunity to be heard. *Appeal of Conservation L. Found*, 2021 WL 357535, at \*6. While GOFERR – after having initially granted the Petitioners’ grant applications – denied the first of Petitioners’ two requests for rehearing on the basis of the individual owners’ financial condition, much of its response was dedicated to outlining the agency’s procedural position that—apart from Petitioners having no recourse to contest the agency’s decision with GOFERR itself—Petitioners should have no right to appeal to *this* Court, since, according to GOFERR, RSA 541 did not apply.

GOFERR’s response only magnified the unfairness of GOFERR’s decision under a due process analysis, as Petitioners were left with no adequate “remedies for erroneous deprivations.” *Zinermon v. Burch*, 494 U.S. 113, 126 (1990); *see also Lambert*, 949 F.3d at 28 (petitioners must “allege the unavailability of constitutionally-adequate remedies under state law”). Unlike in other cases where this Court has held an administrative agency granted an adequate right to be heard “at a meaningful time and in a meaningful manner,” here there was no adequate remedy or right to be heard. *Compare Appeal of Conservation L. Found*, 2021 WL 357535, at \*6 (observing petitioner

was afforded “an ample and meaningful opportunity to present its objections . . . including a five-day hearing during which it presented testimony and cross-examined . . . witnesses and the Council accepted exhibits”), *with New Hampshire Bankers Ass’n v. Nelson*, 113 N.H. 127, 130 (1973) (observing agency’s letter “foreclos[ing] any further administrative proceeding on a motion for rehearing under RSA 541:3” was the agency’s “final words on the matter, thereby making it useless for the plaintiff to continue before the commissioner and leaving the courts as his only recourse”).

GOFERR’s refusal to recognize Petitioners’ right to be heard *meaningfully*—even in this Court— coupled with its failure to provide notice of the basis on which the agency denied Petitioners GAP funding, violated procedural due process. Indeed, an express denial of any process due, is hardly due process. These procedural flaws were fundamentally unfair, *irrespective* of any rational basis GOFERR may have had; although, no rational basis is discernible. Therefore, as applied to Petitioners, the particular *manner* in which they were deprived of property (GAP funding) was plainly unconstitutional.

Indeed, the unfairness of the substantive and procedural due process flaws—the very essence of that constitutional provision—has direct bearing on the *unjustness* of GOFERR’s action. The failure of GOFERR to meet even the rational-basis test in defense of Petitioners’ substantive due process and

equal protection claims equally implicates the *unreasonableness* of the action. Finally, the error of law GOFERR made by piercing the corporate veil and applying the finances of individual owners to Petitioners themselves is an independent reason to overturn the decision, irrespective of any findings Petitioners' constitutional rights were violated, under RSA 541.

While the touchstone of due process is fundamental fairness, *see Saviano*, 151 N.H. at 320, that analysis is necessarily more complex than a mere finding of generalized unfairness. No such constraint is present under this Court's review of agency determinations under RSA 541. "Unjust or unreasonable" means exactly what it says. Whether viewing the harms Petitioners faced—including the inability to meaningfully redress those harms—as procedural in nature, or in terms of the substantive effects of the deprivation, Petitioners were treated unjustly throughout the process. Moreover, that process was unreasonable.

### **Conclusion**

State action in response to the COVID-19 pandemic forced the Petitioners to suspend their operations in the Summer of 2020. State action caused significant economic losses for Petitioners. State action through GOFERR later established a mechanism for ameliorating the economic losses sustained by business entities operating summer camps in New Hampshire so long as they met certain enumerated

criteria. It is undisputed that Petitioners met those criteria. Yet, GOFERR denied the grant of an award to Petitioners.

GOFFER, as a government agency, committed an error of law in its Denial by imposing a new criterion which effectively pierced the corporate veil of the Petitioners to consider the relative financial condition of Petitioners' individual owners. As a result of ignoring Petitioners' corporate personhood in contravention of the principles articulated in *Citizens United*, GOFERR not only relied on an unlawful criterion but in its Denial reversing its initial decision, GOFERR also treated Petitioners disparately than other similarly situated GAP Fund applicants.

The particularly arbitrary, unjust, and unreasonable nature of the Denial not only satisfies this Court's standard for overturning agency decisions pursuant to either RSA 541 or Rule 10 but also implicates Petitioners' due process and equal protection rights as limited liability companies operating in New Hampshire. The Court has the opportunity to right this wrong by ensuring that associations including New Hampshire limited liability companies, like natural persons, are treated fairly and equitably, the cornerstones of due process and equal protection.

The Petitioners respectfully request that this Court set aside GOFERR's Denial of GAP funding because the Denial of funding violated Petitioners rights to due process and equal protection and because it was unjust and unreasonable.

**Oral Argument**

The Petitioners respectfully request 5 minutes of oral argument to be presented by Attorney Ovide M. Lamontagne.

**Word Count Certification**

I hereby certify that the foregoing brief complies with New Hampshire Supreme Court Rules 16(1) and 26(7) and contains 7830 words, excluding the cover page, Table of Contents, Table of Authorities, and Appendix.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date I am filing this document through the Court's electronic filing system pursuant to the Court's Supplemental Rules for Electronic Filing.

/s/ Matthew J. Saldaña  
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