THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0087

Granite State Trade School, LLC

v.

New Hampshire Mechanical Licensing Board & a.

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

BRIEF FOR THE DEFENDANT

STATE OF NEW HAMPSHIRE MECHANICAL LICENSING BOARD

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(*Oral Argument Not Requested*)

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ISSUES PRESENTED[1]

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II. Did the trial court correctly rule that Saf-MEC 610.02's auditing procedures are, on their face, a reasonable exercise of the State's police power and therefore not arbitrary and capricious as a matter of law? *See* PA 26–27 (V. Am. Pet.) ¶¶ 35–42; PA 47–49 (Bd.'s Mot. Dismiss) ¶¶ 38–44; PA 7–10 (Order on Bd.'s Mot. Dismiss).

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[1] In setting forth the questions presented for review in its brief, GSTS has not complied with the Court's rule requiring parties to "make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue." *Sup. Ct. R.* 16(3)(b). The Court may "disregard or strike" GSTS's brief "in whole or in part" for this reason alone. *Id*.

[2] Citations to the record are as follows:

"PB __" refers to Plaintiff's brief and page number.
"PA __" refers to Plaintiff's appendix and page number.

STATEMENT THE CASE

I. Factual Background

a. The Underlying Regulatory Framework

The Mechanical Licensing Board ("Board") is responsible for implementing the State of New Hampshire's program for the licensure of various mechanical trades, including the trade of fuel gas fitting. *See* RSA 153:27-a, II(b); *see generally* RSA 153:27-a through RSA 153:38 (setting forth the general statutory framework for this licensing program). This program involves the training and testing of prospective licensees. *See* RSA 153:29 [Examinations; Licenses]; *see also* RSA 153:27-a, II(c); RSA 153:28, I(a); RSA 153:28, I(b).

In charging the Board with this responsibility, the Legislature has specifically directed the Board to both:

- "Review and approve educational programs and providers," RSA 153:27-a, II(c); *see* RSA 153:28, I(b) (referring to "training programs approved by the [B]oard"); and

- Adopt educational and testing standards for license applicants. RSA 153:28, I(a); *see* RSA 153:29, I (directing the Board to "establish, through rulemaking pursuant to RSA 541-A, the nature of the examinations required for issuance of fuel gas fitter licenses," specifying that "[t]he scope of such examinations and the methods of procedure shall be prescribed by the [B]oard," and noting how "[t]his may include an outside organization approved by the [B]oard").

In furtherance of these statutory directives, the Board has adopted rules that govern what an organization must do to apply for training or testing program approval in the first instance, as well as rules that set forth continuing obligations an organization must meet to maintain Board approval once gained. *See* Saf-MEC pt. 308 [Approval of Training and

Testing Programs for Licensure]; Saf-MEC pt. 610 [Continuing Obligations for Training Schools and Programs].

i. Applying for approval (Saf-MEC pt. 308)

Saf-MEC 308.01 governs the approval of new training programs, and Saf-MEC 308.02 governs the approval of new testing programs. *See* Saf-MEC 308.01 [Approval of Training Programs for Licensure]; Saf-MEC 308.02 [Testing Organization Approval].

With respect to new training programs, Saf-MEC 308.01 requires "[a]n applicant that wants to have its training program accepted under these rules [to] submit" a variety of material to the Board for review, including "[a] copy of the training program's educational material," "[c]opies of quizzes, worksheets, handouts and chapter exams," and "[a] biography of the training program instructors that demonstrates proof of the educational and trade experience required to instruct students on the requested subject matter." Saf-MEC 308.01(c)(2), (4), (6).

As to new testing programs, Saf-MEC 308.02 similarly requires "[a]pplicants seeking approval of their testing program [to] submit," among other things, "[c]opies of the exams that demonstrate the validity of the exam questions as they relate to the adopted codes, standards, and these rules specifically related to licensing endorsement, or trade applied for," as well as evidence that the applicant meets a variety of standards "of exam integrity" and "for the proctoring of exams." Saf-MEC 308.02(a)(2), (4), (5).

To the extent a training or testing program was already Board-approved at the time these application requirements first took effect, Saf-MEC 308.03 provides that "[t]he passage of these rules shall not be deemed to discontinue the approval of any training or examination program approved prior to the effective date of these rules." Saf-MEC 308.03(c).

ii. Maintaining approval (Saf-MEC pt. 610)

After the Board approves an organization's training or testing program, the organization must thereafter meet a variety of continuing obligations to maintain the approval.

For instance, Saf-MEC 610.01 provides that "[a]pproved training programs and institutions shall," among other things, "[s]eek board approval for any changes in the approved curriculum," "[s]eek board approval for any changes in instructors, teachers, or laboratory training providers," and "[s]eek board approval for any changes in the testing or examination questions or procedures . . . ." Saf-MEC 610.01(a), (b), (c).

Likewise, pursuant to Saf-MEC 610.02, an organization "desiring to maintain approvals obtained under Saf-MEC 308.01 or Saf-MEC 308.02" must submit certain information to the Board for review "no less than once every 2 years." Saf-MEC 610.02 [Auditing Procedures for Educational Institutions and Programs]. The information that must be submitted for Board review pursuant to Saf-MEC 610.02's auditing procedures includes "[c]opies of tests, quizzes, and exams including any and all questions used for licensure or certification," "[c]opies of student handbooks, educational materials, and power point presentations that apply to licensing or certification course(s) offered by the educational provider," and "[a]ny additional supporting materials requested by the board for evaluation." Saf-MEC 610.02(d), (g), (h).

b. <u>GSTS's Refusal to Submit Information to the Board</u>

GSTS operates training and testing programs that were initially approved prior to the Board's adoption of the application requirements now set forth in Saf-MEC pt. 308.

When the Board notified GSTS in or around October 2020 that GSTS would need to submit its training and testing materials to the Board

to maintain its program approvals, GSTS informed the Board that it would not do so. PA 20–21 (V. Am. Pet.) ¶¶ 5, 9, 12; PA 62 (Fusco Aff.) ¶¶ 11–12, 14. Upon receiving subsequent notification that the Board would stop approving GSTS's programs unless GSTS submitted its materials for Board review within 30 days, GSTS filed the underlying lawsuit against the Board. PA 22 (V. Am. Pet.) ¶ 13; PA 62 (Fusco Aff.) ¶ 15.

II. Procedural Background

In the underlying action, GSTS asserted that it was "grandfathered and exempt" from the continuing obligations set forth in Saf-MEC 610.02 because its programs pre-existed these rules and Saf-MEC 308.03(c) provides that "[t]he passage of these rules shall not be deemed to discontinue the approval of any training or examination program approved prior to the effective date of these rules." PA 20, 23 (V. Am. Pet.) ¶¶ 5–7, 20, 22. Alternatively, GSTS claimed that the continuing obligations set forth in Saf-MEC 610.02 were "overly burdensome, arbitrary and capricious" because GSTS's materials are "proprietary" and providing them to the Board would create a "security issue" for GSTS. PA 21–24, 26–28 (V. Am. Pet.) ¶¶ 9, 13, 16, 21, 24–26, 35–42. In addition to seeking declaratory relief on these two claims, GSTS also demanded an injunction that would enjoin the Board from requiring GSTS to submit its training and testing materials to the Board. PA 26–28 (V. Am. Pet.) ¶¶ 30–42, prayers A–D.

The Board moved to dismiss the action below on the basis that GSTS had failed to state a claim for the relief it was seeking. *See* PA 34–39 (Bd.'s Mot. Dismiss); *see also* PA 50–60 (GSTS's Obj.); PA 67–73 (Bd.'s Reply). Specifically, the Board argued that GSTS's claim that it was "grandfathered and exempt" from Saf-MEC 610.02'S auditing procedures was based on a deeply flawed interpretation of Saf-MEC 308.03(c), PA 42–

46 (Bd.'s Mot. Dismiss) ¶¶ 23–37, and that the obligations imposed by Saf-MEC 610.02 were a legitimate exercise of the State's police power and therefore not arbitrary and capricious, PA 47–49 (Bd.'s Mot. Dismiss) ¶¶ 38–44.

The trial court (*Kissinger*, J.) heard oral argument on the Board's motion on December 3, 2021, and by narrative order issued December 22, 2021, granted the Board's motion to dismiss. *See* PA 1–11 (Order on Bd.'s Mot. Dismiss).

In its order, the trial court explained that Saf-MEC 308.03(c) did not "grandfather" or "exempt" GSTS from having to comply with Saf-MEC 610.02 auditing procedures because the rule merely states that the Board's adoption of new program application standards in Saf-MEC pt. 308 did not automatically render then-approved programs unapproved. *See* PA 4–7. In the trial court's words:

> Saf-Mec 308.03(c) relates to the scenario where a training program was approved by the state before the rules came into effect. In that scenario, the mere existence of the new rules does not extinguish a training program's prior approval. Here, the programs offered by GSTS were approved prior to the passage of the new rules. Thus, a previously approved training program, like that of GSTS, would not have to undergo the application process outlined in the rules to obtain approval of their programs a second time. According to the plain and ordinary meaning of its language, however, Saf-Mec 308.03(c) has no relation to an approved program's continuing obligations outlined in Saf-Mec 610. Extending Saf-Mec 308.03(c) to relieve prior approved programs from their continuing obligations would add language to the rule that the Board did not see fit to include. Further, a contrary interpretation would lead to absurd and illogical results. If GSTS's programs and exams were exempt from audit, then the Board would need to take GSTS at its word that its programs and exams meet the required specifications for the rest of time.
>
> This scenario cannot be what the legislature intended when it directed the Board to 'review and approve educational

> programs and providers.' RSA 153:27-a, II. Under GSTS's interpretation, all programs approved after the adoption of the rules would be subject to rigorous audit whereas all prior approved programs would be free to craft whatever programs and exams they like into the future. This is also an illogical result. In short, GSTS's interpretation would be inconsistent with the broader policy sought to be advanced by the regulatory scheme, *i.e.*, that licensees and education programs be kept up to rigorous standards to protect the public from untrained fuel gas fitters.

PA 6–7 (internal case citations omitted).

The trial court next explained that the auditing procedures set forth in Saf-MEC 610.02 were "a valid exercise of the state's police power and not arbitrary or capricious." PA 8. Recognizing that "the state has a vested interest in preventing unqualified individuals from working on fuel gas lines" due to the risks of "explosions, serious bodily injury, and death" that come with such work, the trial court reasoned as follows:

> The regulatory system established by the statutes and rules seeks to ensure that individuals are qualified and properly trained before they begin working in such a dangerous field. As part of this system, the rules regulate the educational and licensing exam providers to ensure that individuals are properly educated and tested. To this end, Saf-Mec 610.02 imposes an audit requirement every two years on educational institutions to ensure that their offerings continue to meet the relevant standards. Such a requirement is reasonable to effectuate the purpose of the regulatory system as a whole. Without it, an educational institution might fail to keep its materials up to current standards without the Board's knowledge, leading to potentially unqualified individuals becoming licensed fuel gas fitters. Such a result is something the regulatory framework is designed to prevent. Accordingly, it is prudent for the Board to periodically review the materials of each educational institution that seeks to maintain its regulatory approval.

PA 8–9.

GSTS filed a timely motion for reconsideration on January 3, 2022, PA 12–15 (GSTS Mot. Recons.), which the trial court denied by order of January 19, 2022, PA 12 (margin order). On February 16, 2022, GSTS filed a timely notice of appeal in this Court.

SUMMARY OF THE ARGUMENT

The trial court dismissed the action below upon rulings that (a) Saf-MEC 308.03(c) does not exempt GSTS from Saf-MEC 610.02's biannual auditing procedures, and (b) Saf-MEC 610.02's auditing procedures are reasonable exercises of the State's police power on their face and therefore not arbitrary and capricious as a matter of law. Both rulings are correct, and the Court should therefore affirm the judgment below.

With respect to Saf-MEC 308.03(c), the rule says nothing more than that programs operating with the Board's approval at the time Saf-MEC pt. 308 was adopted would not be deemed discontinued when those new rules took effect. Thus, to say that Saf-MEC 308.03(c) also exempts the organizations running such programs from ever having to comply with post-approval continuing obligations adds language to the rule and would undermine the underlying statutory and regulatory scheme that is intended to protect public safety by ensuring that licensees are adequately trained.

As to Saf-MEC 610.02, the biannual audit process set forth therein is clearly a rational means of protecting the public from risks of serious harm that will befall life and property in the event that fuel gas fitters are under- or wrongly-trained. Meanwhile, the complaints GSTS has voiced about having to comply with the rule amount to no more than brash and conclusory accusations and wholly speculative and conspiratorial concerns that are far from what would be needed to show that it is suffering palpably unreasonable and arbitrary oppression because of Saf-MEC 610.02.

For these reasons, as fully explained below, the trial court's judgment should be affirmed.

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ARGUMENT

I. The Trial Court Correctly Ruled That Saf-MEC 308.03(c) Does Not Exempt GSTS From The Biannual Auditing Procedures Set Forth In Saf-MEC 610.02.

a. Standard of review.

The trial court's ruling that Saf-MEC 308.03(c) does not exempt GSTS from Saf-MEC 610.02's auditing procedures is a question of law subject to *de novo* review. *See Appeal of Cook*, 170 N.H. 746, 749 (2018) ("We review the interpretation of statutes and regulations *de novo*.").

To conduct this review, the Court must interpret Saf-MEC 308.03(c) using well-settled principles of statutory and regulatory construction. *See Appeal of Old Dutch Mustard Co., Inc.* ("*Old Dutch Mustard*"), 166 N.H. 501, 506 (2014) (explaining that "[w]e use the same principles of construction when interpreting both statutes and regulations"). The "goal" of these principles "is to apply [the] regulations in light of the [rule maker's] intent in enacting them, and in light of the policy sought to be advanced by the entire statutory and regulatory scheme." *Id*.

In doing so, the Court "construe[s] all parts of a . . . regulation together to effectuate its overall purposes and to avoid absurd or unjust results." *Girard v. Town of Plymouth*, 172 N.H. 576, 582 (2019). The Court "will not consider what the . . . administrative agency might have said or add language that the . . . administrative agency did not see fit to include." *Id*. Instead, it must interpret regulations "in the context of the overall . . . regulatory scheme and not in isolation," *Old Dutch Mustard*, 166 N.H. at 506, and when the language of a regulation is "plain and unambiguous" in its context, the Court "need not look beyond the . . . regulation itself for further indications of legislative or administrative intent." *Girard*, 172 N.H. at 582.

For the reasons stated below, the trial court's ruling that Saf-MEC 308.03(c) does not exempt GSTS from the obligations of Saf-MEC 610.02 is correct.

b. By its plain language, Saf-MEC 308.03(c) simply means that the adoption of Saf-MEC pt. 308 did not automatically discontinue then-existing program approvals.

Saf-MEC 308.03(c) states only that the passage of Saf-MEC pt. 308 "shall not be deemed to discontinue" any approval that existed immediately prior to the adoption of those rules. The intent of this rule is clear from the plain meaning of this language: To the extent an organization's training or testing program was already approved at the moment Saf-MEC pt. 308 became effective, that then-existing approval would not automatically end at that moment. In other words, upon the adoption of Saf-MEC pt. 308, organizations with pre-existing approvals (like GSTS) did not need to immediately re-apply for approval in order to carry on with their training programs or licensing examinations. Instead, they were free to carry on for the time being.

But nothing in Saf-MEC 308.03(c) states that these organizations were to subsequently be forever exempt from other rules related to what an organization must do to maintain Board approval of its training or testing programs over time. Had the Board so intended, it could quite easily have said so. Instead, it simply said that approvals existing at the time Saf-MEC pt. 308 came into effect were not deemed discontinued at that time. Thus, to say that Saf-MEC 308.03(c) operates to broadly exempt organizations like GSTS from having to subsequently comply with rules related to maintaining program approval over time requires one to add new language to the rule that the Board did not see fit to include itself. *See Girard*, 172 N.H. at 582.

c. GSTS's proposed interpretation would lead to absurd results that are contrary to the remedial purpose of the statutory and regulatory scheme.

To interpret Saf-MEC 308.03(c) to exempt GSTS from biannual Board review under Saf-MEC 610.02 would mean that training and testing programs approved prior to the adoption of Saf-MEC pt. 308 are Board approved as a matter of law *ad infinitum*. If this were the case, GSTS's training and testing programs would effectively be shielded from any regulatory oversight regardless of whether they are consistent with then-current industry standards and codes. Played out to its logical conclusion, if Saf-MEC 308.03(c) means what GSTS says it means, then GSTS will be able to offer the same training and testing programs in 2050 and beyond as it offers today, regardless of how much fuel gas technology changes between now and then. Such a result would be absurd in light of the remedial purpose of the overall statutory and regulatory scheme within which Saf-MEC 308.03(c) exists.[3]

Specifically, the Board is a product of RSA ch. 153, which the Legislature has expressly declared is "necessary for the public safety, health, peace and welfare, is remedial in nature, and shall be construed liberally . . . ." RSA 153:25 [Construction of Chapter]. In furtherance of protecting public safety, the Legislature has accordingly directed the Board

[3] Although the Court need not examine legislative history because Saf-MEC 308.03(c) is clear on its face, the history of mandatory fuel gas fitting licensure in New Hampshire illuminates the remedial purpose of the Board's rules. In short, in 2003, five-year-old Amilia Luhrmann was killed when her family's home on Lake Winnipesaukee exploded after a subcontractor neglected to shut off the gas after doing some work on a gas line in the home. PA 35–36 (Bd.'s Mot. Dismiss) ¶ 4. At the time, the State of New Hampshire did not set forth any mandatory training standards for individuals who performed gas fitting work. PA 36 ¶ 5. Recognizing the extraordinary dangers involved with such work, the Legislature subsequently passed "Amilia's Law," which established a mandatory educational and licensing scheme for fuel gas fitters in New Hampshire, as now codified in RSA ch. 153. PA 36–37 ¶¶ 6–7.

to not only "approve educational programs and providers" like GSTS, but also to "[r]eview" those programs and providers. RSA 153:27-a.

In accordance with its legislative directive, the Board has adopted rules that govern not only the approval of training and testing programs in the first instance, *see* Saf-MEC pt. 308 [Approval of Training and Testing Programs for Licensure], but also the review of those programs on a biannual basis thereafter, *see* Saf-MEC pt. 610 [Continuing Obligations for Training Schools and Programs]. The important remedial purpose of such review is expressly illustrated by the following regulation concerning the Board's review of licensing exams: "Tests shall be validated by the testing entity and audited by the board, biannually, *to insure reliability to current industry standards, accepted practices and concurrence with applicable codes and standards*." Saf-MEC 308.02(4)(a) (emphasis added).

Where the Legislature has charged the Board to review the training that prospective fuel gas fitters receive and to establish the nature, scope and procedure for their licensing examinations, it would be nothing short of absurd to interpret Saf-MEC 308.03(c) to forever exempt GSTS's training and testing programs from Board review. *Cf. Board of County Commissioners of County of La Plata v. Colorado Department of Health and Environment*, 488 P.3d 1065, 1071 (Colo. 2021) ("Here, it is undisputed that counties own the great majority of landfills throughout Colorado. In these circumstances, it would be illogical and absurd for us to conclude that counties are exempt from the regime of statewide regulatory enforcement set forth in the [Solid Wastes Disposal Sites and Enforcement Act]. Assuredly, the legislature did not create a statewide regulatory regime for managing solid wastes and then exempt most landfills from the reach of the regulation.").

d. GSTS's proposed interpretation is based on an erroneous standard of statutory interpretation.

The absurdity of GSTS's proposed interpretation of Saf-MEC 308.03(c) is underscored by the rule of interpretation it applies to make its argument. Specifically, although GSTS at firstly openly acknowledges understanding that "the court must take the statute/rule on its face," it then immediately switches gears and says that the "statute/rule" is "*subject to modification* if the statute/rule is not clear."[4] PB 14 (emphasis added). Based on this "subject to modification" rule, GSTS vaguely asserts that "[t]he statutes/rules are ambiguous" and therefore "it [sic] may be subject to modification of the status [sic] . . . ." *Id*. This interpretative approach is erroneous as a matter of law.

Putting aside that Saf-MEC 308.03(c) is unambiguous for the reasons already stated, the rule would not be "subject to modification" even if ambiguity did exist. Instead, the Court would "turn to the legislative history to aid in [its] interpretation of the meaning of the statutory language." *Old Dutch Mustard*, 166 N.H. at 507; *see id*. at 506 ("We use the same principles of construction when interpreting both statutes and regulations"). Such history would include the Board's historic interpretation of the rule, which would be accorded "substantial deference" by the Court, *id*. at 507, so long as it was "consistent with the language of the regulation and with the purpose which the regulation is intended to serve," *id*. at 506 (quoting *Vector Mktg. Corp. v. N.H. Dep't of Revenue Admin.*, 156 N.H. 781, 783 (2008)). In looking to this history, the Court would continue to interpret the rule "as written" and would "not consider

[4] It is unclear why GSTS repeatedly refers to Saf-MEC 308.03(c) as a "statute/rule."

what the legislature or administrative agency might have said or add language that the legislature or administrative agency did not see fit to include."[5] *Girard*, 172 N.H. at 582. In other words, under no circumstances would the Court ever "subject [Saf-MEC 308.03(c)] to modification."

For these reasons, the very foundation of GSTS's argument about the meaning of Saf-MEC 308.03(c) is wholly contrary to settled law.

II. The Trial Court Correctly Ruled That The Auditing Procedures Set Forth In Saf-MEC 610.02 Are, On Their Face, A Reasonable Exercise Of The State's Police Power And Therefore Not Arbitrary And Capricious As A Matter Of Law.

a. Standard of review.

The trial court's ruling that Saf-MEC 610.02's auditing procedures are reasonably within the State's police power, and therefore not arbitrary and capricious, is subject to *de novo* review. *See Akins v. Secretary of State*, 154 N.H. 67, 70 (2006) ("Whether or not a statute is constitutional is a question of law, which we review *de novo*.")

b. Saf-MEC 610.02's audit procedures are not palpably unreasonable as a matter of law.

The State's police power has a "broad scope" that "extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the state; and person and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity." *Dederick v. Smith*, 88

[5] If the interpretation of Saf-MEC 308.03(c) required an examination of the legislative history regarding gas fitting licensure in New Hampshire, the history briefly summarized above in Footnote 1 would confirm: (a) that Saf-MEC 308.03(c) is part of a remedial scheme intended to protect the public from serious harms including death; and (b) that the rule is therefore not intended to forever exempt any training or testing programs from Board review.

N.H. 63, 67 (1936). "It is, therefore, established law in this jurisdiction that when the police power of the state is invoked by the Legislature in the enactment of a statute for a proper purpose, such a statute will not be declared unconstitutional merely because it restricts some of the rights secured to individuals by the fundamental law." *Id*.

Thus, only when "the restriction of a private right is oppressive, while the public welfare is enhanced only in slight degree," is the police power exceeded. *L. Grossman & Sons, Inc. v. Town of Gilford*, 118 N.H. 480, 483 (1978). A regulation must therefore be "palpably unreasonable or arbitrary" to be deemed beyond the broad scope of the State's legitimate police power. *Kennedy v. Town of Sunapee*, 147 N.H. 79, 83 (2001).

In light of the risks of serious harm to life and property associated with fuel gas work, the regulation of training and testing programs for prospective fuel gas fitters is clearly a legitimate exercise of the State's police power. *See, e.g.*, *Associated Builders & Contractors v. Michigan Dept. of Labor and Economic Growth*, 543 F.3d 275, 278, 282 (6th Cir. 2008) (observing that "this case plainly implicates a matter of public concern—a State's police-power interest in regulating the safety and training of new apprentice electricians" and that "no one disputes that the States have long regulated apprenticeship standards and training or that this topic of regulation falls *well within* their traditional police powers") (emphasis added); *Stine v. Kansas*, 458 S.W.2d 601, 607 (Mo. 1970) ("Statutes regulating the business of plumbing and the licensing of plumbers are exercises of the state's police power in the area of the public health and safety. The purpose of requiring the examination and licensing of plumbers is to protect the public against the hazard to health of work done by those not competent to do it."); *Independent Electricians & Elec. Contractors' Ass'n v. New Jersey Bd. of Examiners of Elec. Contr.*, 256 A.2d 33, 35 (N.J. 1969) ("Plaintiffs concede the right of the state under the

police power to assure the competency of electrical work through a licensing system because of the danger to life and property from faulty work."); *Horwith v. City of Fresno*, 168 P.2d 767, 770 (1946) ("We may concede that the examination and licensing of electricians comes under the general police powers as an endeavor to protect property and promote the safety of citizens.").

Although GSTS made various complaints to the trial court about having to comply with Saf-MEC 610.02's audit process, none concerned palpably unreasonably or arbitrary burdens on GSTS as a matter of law. Instead, each complaint was based on either purely brash accusation unsupported by well-pleaded facts, wholly speculative and conspiratorial concerns about Board members or staff potentially being tempted to engage in improper conduct, or both.

Specifically, GSTS's complaints ranged from a bald accusation about how the Board "has no member with any knowledge or [sic] proper educational standards," PA 22–23 (V. Am. Pet.) ¶ 19; to speculative concern about the "security" of GSTS's training and testing materials once submitted to the Board, PA 21 ¶ 9; *see* PA 27 ¶ 39 ("To now demand the educational materials and exams is not only a violation of proprietary work product created over many years, it jeopardizes the integrity and security of the training and testing developed by GSTS in satisfaction of state requirements for many years"); to GSTS's dissatisfaction with having to submit materials to the Board now after never having to do so before the new rules were adopted, PA 24 ¶¶ 25 ("GSTS has successfully trained and educated licensees over many years and kept their proprietary tools and materials secured. It makes no sense why this standard of practice should change now."); to its bare opinions about how the continuing obligations of Saf-MEC pt. 610 are "very controlling," how "[n]o business should be subjected to such a recordkeeping burden or administrative oversight," and

how "we feel [some of the rules] violate a student's rights to privacy," PA 23 ¶ 21.[6]

Clearly, GSTS prefers not to be subject to biannual audit under Saf-MEC 610.02. But where Saf-MEC 610.02 legitimately protects the public from the significant dangers to life and property that would flow from having under- or wrongly-educated individuals performing fuel gas fitting work, GSTS's conclusory and speculative complaints are insufficient as a matter of law to show that the rule imposes palpably unreasonable oppression on GSTS. *See Kennedy*, 147 N.H. at 83; *L. Grossman*, 118 N.H. at 483.

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[6] For the first time on appeal, GSTS raises a concern about its proprietary training and testing materials being subject to public disclosure pursuant to RSA ch. 91-A. PB 15 (asserting that "there is no statute or rule that protects [its] materials from public view, dissemination, as [RSA ch. 91-A is] written"). Because GSTS did not present this issue to the trial court, it did not preserve the issue for appeal. *See Miller v. Blackden*, 154 N.H. 448, 456–457 (2006) ("It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial.").

Nevertheless, even if the issue were preserved, GSTS's unsupported suggestion that its materials are subject to disclosure under RSA ch. 91-A lacks merit. For one, the New Hampshire Uniform Trade Secrets Act ("UTSA") (codified at RSA ch. 350-B) prohibits the disclosure of GSTS's proprietary trade secrets; therefore, pursuant to RSA 91-A:4, I, GSTS's proprietary training and testing materials are exempt from disclosure under RSA ch. 91-A. *See CaremarkPCS Health, LLC v. New Hampshire Department Administrative Services*, 167 N.H. 583, 590 (2015) ("[B]ecause disclosure of the designated information by the Department would be a misappropriation of Caremark's trade secrets under the UTSA, we conclude that disclosure of that information is 'prohibited by statute' under RSA 91-A:4, I, and therefore, we hold that the designated information is exempt from disclosure under RSA 91-A:4, I."). Further, GSTS's "confidential" and "commercial" information and its "test questions, scoring keys, and other examination data used to administer a licensing examination" would be exempt from disclosure under RSA 91-A:5, IV, under the applicable balancing test where (a) GSTS has a strong economic interest in such information remaining private, and (b) the public also has a strong interest in the information remaining private because public disclosure would threaten the integrity of the underlying licensing scheme. *See Union Leader Corporation v. Town of Salem*, 173 N.H. 345, 355 (2020).

CONCLUSION

For the foregoing reasons, the trial court correctly ruled: (a) that Saf-MEC 308.03(c) does not exempt GSTS from the auditing procedures of Saf-MEC 610.02; and (b) that those procedures are, on their face, a reasonable exercise of the State's police power and therefore not arbitrary and capricious. The Court should accordingly affirm the judgment below.

The State does not request oral argument in this matter. If the Court is inclined to hold oral argument, Nathan W. Kenison-Marvin will present oral argument on behalf of the Board.

Respectfully Submitted,

STATE OF NEW HAMPSHIRE
MECHANICAL LICENSING BOARD

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SOLICITOR GENERAL

June 15, 2022

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CERTIFICATE OF COMPLIANCE

I, Nathan W. Kenison-Marvin, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,461 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

June 15, 2022 /s/ *Nathan W. Kenison-Marvin*
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CERTIFICATE OF SERVICE

I, Nathan W. Kenison-Marvin, hereby certify that a copy of the State's brief shall be served on Daniel J. Corley, counsel for GSTS, through the New Hampshire Supreme Court's electronic-filing system.

June 15, 2022

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