THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0237

Laurie A. Ortolano

v.

City of Nashua

BRIEF OF *AMICUS CURIAE* DANA ALBRECHT IN SUPPORT OF PLAINTIFF LAURIE ORTOLANO, AND ALSO, ON BEHALF OF ANY OTHER INDIVIDUAL TAXPAYER, WHO AGREES.

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ISSUES PRESENTED FOR REVIEW

1. Does N.H. Const. pt. 1, art. 8 (as amended 2018), require that consent to the filing of a brief of any *amicus curiae* is unnecessary when the brief is presented for "any individual taxpayer eligible to vote in the State" (*Id.*) on appeal of a decision by the Superior Court "declar[ing] whether the State or political subdivision in which the taxpayer resides, has ... violated a law, ordinance, or constitutional provision?" (*Id.*)

2. What is the correct phrase origin of the saying, "lies, damned lies, and statistics?"

3. Has the the City of Nashua, or the State of New Hampshire, improperly promulgated any "lies, damned lies, [or] statistics?"

4. Pursuant to N.H. Const. pt. 1, art. 8, were, *inter alia*, "all the magistrates and officers of government [the people's] substitutes and agents, and at all times accountable to them?"

5. Without reaching the issue of whether "all other means of redress are ineffectual," have "the ends of government [been] perverted, and public liberty manifestly endangered," within the meaning of N.H. Const. pt. 1, art. 10?

PREFACE

"The cost of a thing is the amount of what I will call life which is required to be exchanged for it, immediately or in the long run."

– Henry David Thoreau[1]

"The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."

– Article 10, New Hampshire State Constitution.

"Live Not By Lies"[2]

– Aleksandr Solzhenitsyn

1 Thoreau, Henry David. *Walden*. Signet Classics, 2012, p. 26. Cf. Thoreau's statement in *Civil Disobedience* that "When I meet a government which says to me, 'Your money or your life,' why should I be in haste to give it my money?" ApxI. 69.

2 On the day Solzhenitsyn was arrested, February, 12, 1974, he released the text of *Live Not by Lies*. The next day, he was exiled to the West, where he received a hero's welcome. Solzhenitsyn equates "lies" with ideology, the illusion that human nature and society can be reshaped to predetermined specifications. And his last word before leaving his homeland urges Soviet citizens as individuals to refrain from cooperating with the regime's lies. The text is reproduced, in full, in the first appendix to this brief, at ApxI. 28-32.

STATEMENT OF THE CASE

Introduction

On occasion, when a peaceful individual encounters the town's local tax-collector, the consequences reverberate throughout history. *See*, e.g., Thoreau, *Civil Disobedience*. ApxI. 58-75 (reproduced in full)[3]

By comparison, while at first glance, this case is about the Petitioner Laurie Ortolano's "right of access to governmental proceedings and records" (N.H. Const. pt. 1, art. 8) that "shall not be unreasonably restricted," (*Id.*) it is, in actuality, about far more.

Construed somewhat more broadly, this case is also about that "Government … should be open, accessible, accountable and responsive." (*Id.*)

If truth be told, however, this case is really about the proper relationship between government, and the people, and this case also strikes to the very heart of that relationship.

3 In 1846, Henry David Thoreau left his cabin at Walden Pond for a brief walk into town, encountered the local tax collector Sam Staples, and ended up spending a night in jail for failing to pay his poll-tax. This experience led him to deliver a powerful lecture on the "relation of the individual to the State," later published in 1849 as *Resistance to Civil Government*, and now more widely known as *Civil Disobedience*. This masterful essay has influenced generations of activists, including Mahatma Gandhi, and Dr. Martin Luther King, Jr. It is reproduced in its entirety in the appendix to this brief, at ApxI. 58-75.

Indeed, "all government of right originates from the people, is founded in consent, and instituted for the general good." N.H. Const. pt. 1, art. 1. Consequently, "all the magistrates and officers of government are [the people's] substitutes and agents, and [are] at all times accountable to them." N.H. Const. pt. 1, art. 8.

In the instant case, however, this author argues that "the ends of government [have been] perverted, and public liberty manifestly endangered," (N.H. Const. pt. 1, art. 10) thereby raising the issue of what are, or ought to be, the effectual "means of redress" (Cf. *Id.*) to be granted by this Honorable Court, on the grounds that "the doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." (*Id.*)

Background

In 2014, shortly after Plaintiff Laurie Ortolano and her husband, Michael (hereto "the Ortolanos") purchased their home in Nashua, the City's Assessors increased its assessment from $469,800 to $706,300, an abrupt increase of more than 50%. At this time, the Ortolanos observed that the City of Nashua had just conducted a reevaluation of property values in 2013 (which had established the $469,800 assessment) and neighbors'/area homes that were larger, nicer, and undeniably more valuable, enjoyed assessed values

considerably lower than that of the Ortolanos' property. This caused the Ortolanos to believe that Nashua was not conducting a system of uniform real estate taxation.[4]

Insofar as this belief had any legitimate basis, it immediately suggests a potential violation of the Ortolanos' rights to due process and equal protection, under both the New Hampshire and United States Constitutions."

Redress and remedy.

Indeed, "All taxation must be equal. This is merely an example of the universal equality of right which the [state] constitution secures to all." *State v. Pennoyer*, 65 N.H. 113, 114 (1889) (internal citations omitted).[5] *See also*, e.g., *Opinion of the Justices*, 137 N.H. 260 (1993) (articulating constitutional jurisprudence of N.H. Const. pt. 1, art. 14), and the Fourteenth Amendment's Equal Protection Clause.

In 2014, of course, the proper remedy ought to have been that the City "should [have been] open, accessible, accountable and responsive," (N.H. Const. pt. 1, art. 8) by facilitating the Ortolano's "right of access to governmental proceedings and records;" (*Id.*) and, in particular, to have ensured that "[t]he books and records of the assessors

4 These facts are taken from the complaint (at 2) in *Laurie Ortolano v. City of Nashua et. al.*, No. 1:22-cv-00326 (D.N.H. 2022). While this author has no reason to doubt them, for purposes of this author's argument, it need only be presumed that the Ortolanos believed the government might not be conducting a system of uniform taxation.

5 See ApxI. 54-57 for the complete text of this decision.

shall … at all times [have been] open to public inspection during office hours." Nashua City Charter, § 71.

Instead, however, the City undertook the opposite course of action, stonewalling the Ortolanos, in an apparent bureaucratic attempt to avert future accusations of policy error or wrongdoing by deflecting responsibility in advance.

Indeed, the City appears to have demonstrated a perverse risk-averse mentality at complete odds with accountability and responsibility, though possibly intended to be helpful to protect the careers of particular individuals within it.

To be sure, the City has essentially engaged in a type of overall institutional corruption wherein this author argues that "the ends of government [have been] perverted, and public liberty manifestly endangered," (N.H. Const. pt. 1, art. 10) thereby requiring *some* form of redress.

In this author's opinion, for this instant case, the proper remedy is a precedential opinion by this Honorable Court, that not only upholds the trial court's decision, but that <u>the people</u> also deem <u>effectual</u>.

Indeed, this Court ought also to re-affirm its prior interpretive constitutional jurisprudence, re-affirm its prior recognition of those rights that are "natural" and "Rights of Conscience," and further recognize the people's "common understanding" of what is the proper relationship between

the people, and the government, as set forth in our State Constitution.

Finally, it should articulate, what are any proper further remedies, given “the ends of government are perverted, and public liberty manifestly endangered,” (Cf. N.H. Const. pt. 1, art. 10.) in light of the facts of the instant case, and grant equitable relief.

Scienter

Concerning the relevant City records, this then raises the question of what particular City (or State) employees knew, when they knew it, why they made every effort to avoid disclosure, the means undertaken to avoid disclosure, the lengths gone to for such purposes, and the resultant cost to the taxpayers.

Further, whether there is any additional significant information that ought to be considered, concerning their culpability.

Other relevant facts of the case

The reader is invited to review those more detailed facts set forth in the Petitioner’s Brief, for all other relevant facts.

SUMMARY OF ARGUMENT

The author first argues what standard(s) of review this Honorable Court should follow. In particular, where actions taken by the State are unconstitutional, this Honorable Court has jurisdiction to grant equitable relief.

Next, the author undertakes a review of relevant provisions in our State Constitution; namely, Articles 1, 2, 3, 4, 8, 10, 12, and 14, as well as associated case law, with particular emphasis on historical analysis and Articles 8 and 10. The author then establishes standing; and, in particular, the standing of "any individual taxpayer."

Next, the author construes the origin, and meaning, of the phrase "liars, damned liars, and expert witnesses" that subsequently gave rise to the more well-known phrase "lies, damned lies, and statistics," both of which are central to the author's main argument. The author then goes on to offer a critique of the roles that lawyers and expert witnesses play in legal proceedings, citing highly relevant case law.

With this foundation, the author then articulates his central thesis; namely, that the City of Nashua, and the State of New Hampshire, were <u>not</u> "at all times accountable to the people," but instead engaged in an unconstitutional pattern of "lies, damned lies, and statistics." Moreover, that the City, and State, attempted to conceal this, and have engaged in unfair collusion. Consequently, the ends of

government have been perverted, and public liberty manifestly endangered.

The author then laments that "individual taxpayers" have no desire to watch such fare, nor to watch the two "mediocre and schlocky ... sequels" to this case that are also presently pending before this Honorable Court. Indeed, this author argues, the "individual taxpayers" already understand quite clearly what:

> **"The public's right of access to governmental proceedings and records shall not be unreasonably restricted,"**

ought to mean, and why. All they require is enforcement, i.e., equitable relief.

The author concludes by pondering whether this Honorable Court will offer equitable relief, and by expressing his concern for the future of New Hampshire.

STANDARD OF REVIEW

Where "actions taken by the State are unconstitutional," this Honorable Court has jurisdiction to grant equitable relief. *Lorenz v. N.H. Administrative Office of the Courts*, No. 2004-0552 (September 29, 2005), citing *Claremont School Dist. v. Governor (Costs and Attorney's Fees)*, 144 N.H. 590, 593 (1999).

In interpreting an article in our constitution, "[this Court] will give the words the same meaning that they must have had to the electorate on the date the vote was cast." *Grinnell v. State*, 121 N.H. 823, 826 (1981), citing *Smith v. State*, 118 N.H. 764, 768, 394 A.2d 834, 838 (1978).

More recently, in *New Hampshire Motor Transport Association v. State of New Hampshire*, No. 2003-0641 (April 19, 2004), this Honorable Court further observed that:

> In construing a provision of the state constitution, we examine its purpose and intent. "Reviewing the history of the constitution and its amendments is often instructive,[6] and in so doing, it is the duty of the court to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances." *Warburton v. Thomas*, 136 N.H. 383, 387 (1992) (quotation omitted). "[T]he language used ... by the people [emphasis added] in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Opinion of the Justices*, 121 N.H. 480, 483 (1981).

Insofar as an exercise in interpretive constitutional jurisprudence is now warranted, this author thereby invites

6 A history is provided at ApxI. 10-27.

this Honorable Court to re-affirm, and uphold, its prior decisions, *supra*, concerning how it construes provisions of our New Hampshire State Constitution.

Further, this Honorable Court is also invited to re-affirm, and uphold, its prior opinions concerning what its powers are to grant equitable relief, if any New Hampshire statute or administrative rule is unconstitutional, or if any other action taken by any other governmental body in New Hampshire is unconstitutional.

RELEVANT CONSTITUTIONAL PROVISIONS

Natural Rights and Rights of Conscience

N.H. Const. pt. 1, art. 2. recognizes that "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."

This Honorable Court observed in *Burrows v. City of Keene*, 121 N.H. 590 (1981) that the rights mentioned in N.H. Const. pt. 1, art. 2. are not bestowed by that constitutional provision but rather are recognized to be among the natural and inherent rights of all humankind. This provision of our Bill of Rights "has been held to be so specific that it 'necessarily limits all subsequent grants of power to deal adversely with it.'" *Metzger v. Town of*

Brentwood, 117 N.H. 497, 502, 374 A.2d 954, 957 (1977) (quoting *Woolf v. Fuller*, 87 N.H. 64, 68, 174 A. 193, 196 (1934)).

N.H. Const. pt. 1, art. 4. further recognizes that "Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience."

In *State v. Mack*, 249 A. 3d 423, 432-433 N.H. (2020), this Honorable Court most recently recognized, again, the "Rights of Conscience," citing precedent dating back to *Hale v. Everett*, 53 N.H. 9, 61 (1868). Indeed, *Mack* recognizes that:

> As we [previously] explained: "The framers of the constitution were very careful to state and declare the distinction between mere civil or political rights, although they were 'natural, essential, and inherent' rights belonging to 'all men' (Art. II), and the 'rights of conscience,' which had the additional quality and excellence of being 'unalienable.' These merely civil or political rights could be surrendered to the government or to society (Art. III) in order to secure the protection of other rights, but the rights of conscience could not be thus surrendered," we continued, nor could the government or society "have any claim or right to assume to take them away, or to interfere or intermeddle with them, except so far as to protect society against any acts or demonstrations of one sect or persuasion which might tend to disturb the public peace, or affect the rights of

> others." Indeed, we observed that such rights of conscience are not "conferred" by the State Constitution, but, rather, are "declared, stated, asserted, as something inherent in the people—a right they had before this declaration of rights, as much as after." We have reaffirmed these principles over the years. (internal citations omitted)

The origin and object of government

Concerning the origin and object of government, "All men are born equally free and independent; Therefore, all government of right originates from the people, is founded in consent, and instituted for the general good." N.H. Const. pt. 1, art. 1.

This author argues, however, that while Art. 1 appears "first" in the New Hampshire State Constitution, as adopted June 2, 1784, it is, properly, fully subordinate to Art. 2 and Art. 4, and is consequently limited thereto.

To illustrate the reasons, let us remember that Adolf Hitler gained power, in the 1934 German referendum, with nearly 90% of the popular vote, which clearly demonstrates that the Nazi Regime was "founded in consent." (Cf. N.H. Const. pt. 1, art. 1.) While the Nazi Regime was, arguably, not "instituted for the general good," (Cf. *Id.*) the basis for this argument lies squarely in that regime's utter repudiation of such "natural rights" as are clearly

recognized by Articles 2 and 4 of our New Hampshire State Constitution.

This demonstrates, by way of a painful history lesson, a very good reason why these "Natural Rights" and "Rights of Conscience" are foundational, and are recognized, rather than "bestowed," by our State Constitution.

By way of contrast, those rights granted to the government by Articles 1 and 3 of our State Constitution, are bestowed, rather than "recognized."

Accountability of magistrates and officers

"All power residing originally in, and being derived from the people, all the magistrates and officers of government, are their substitutes and agents, and at all times accountable to them." N.H. Const. pt. 1, art. 8. (June 2, 1784). ApxI. 79.

At the time of its adoption (*See Warburton* at 387), Article 8 did not contain any other provisions. This does not mean, of course, that the framers did not intend any remedy, should the people ascertain that their magistrates and officers were somehow not "at all times accountable to them." (Article 8, as initially adopted). Rather, the intended remedy, in 1784, is quite clear:

> Government being instituted for the common benefit, protection, and security, of the whole community, and

> not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.
>
> N.H. Const. pt. 1, art. 10.

All the declarations of right are imbued with the same spirit

While after June 2, 1784, substantial changes were made to our State Constitution on numerous occasions, there were no amendments made to the first fourteen articles of our state Bill of Rights prior to the twentieth century.

Consequently, when this Honorable Court decided *State v. Pennoyer*, 65 N.H. 113 (1889) on June 1, 1889, even after the Seventh constitutional convention met in Concord on January 2, 1889, it considered the first fourteen articles of our state Bill of Rights, exactly as they were first adopted, on June 2, 1784. Cf. *Warburton* at 387. Indeed, in *Pennoyer* at 114, this Honorable Court held:

> The law cannot discriminate in favor of one citizen to the detriment of another. The principle of equality pervades the entire constitution. The bill of rights declares

> expressly that all government is "instituted for the general good, for the common benefit, protection, and security of the whole community, and not for the private interests or emolument of any one man, family, or class of men;" that "every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property ... is therefore bound to contribute his share in the expense of such protection," and is "entitled to a certain remedy by having recourse to the laws for all injuries he may receive in his person, property, or character." Bill of Rights, arts. 1, 10, 12, 14. All the declarations of right are imbued with the same spirit. With them the body of the constitution is in full conformity.

Notably, while the *Pennoyer* Court clearly stated that "the principle of equality pervades the entire constitution," (emphasis added) it singled out exactly four specific articles (1, 10, 12, and 14) for direct quotation, to elucidate this principle, with, in this author's opinion, the clear intent to carefully articulate what is the proper relationship between government, and the people.

Further, long after the passage of the 1976 amendment to Article 8, this Honorable Court again recognized *Pennoyer*, and re-iterated in *Opinion of the Justices*, 144 N.H. 374 (1999) that Article 10:

> has commonly been regarded as enumerating a citizen's right to reform an ineffectual or manifestly corrupt form of government. See *City of Claremont v. Craigue*, 135

> N.H. 528, 533-34, 608 A.2d 866, 869 (1992); *Nelson v. Wyman*, 99 N.H. 33, 50, 105 A.2d 756, 770 (1954). We have recognized for over one hundred years, however, that this provision is imbued with "[t]he principle of equality [that] pervades the entire constitution," *State v. Pennoyer*, 65 N.H. 113, 114, 18 A. 878, 879 (1889), and as such, Article 10 provides support for the maxim that "[t]he law cannot discriminate in favor of one citizen to the detriment of another." *Id*. Thus, Part 1, Article 10 has been recognized as providing for more than a "right of revolution"; rather, it is one of many provisions in our Bill of Rights that forms the basis for a citizen's right to equal protection. See, e.g., *Town of Chesterfield v. Brooks*, 126 N.H. 64, 67, 489 A.2d 600, 602 (1985) (zoning ordinance violated equal protection rights guaranteed by Part 1 Articles 1, 2, 10, 12, and 14); *Gazzola v. Clements*, 120 N.H. 25, 29, 411 A.2d 147, 151 (1980) (statute violated equal protection rights guaranteed by Part 1, Articles 1, 10, 12, and 14).

Article 10 remains unchanged since its adoption in 1784. However, there has since been a second, subsequent additional amendment to Article 8; namely, in 2018. Nevertheless, this author argues that *Pennoyer's* longstanding principle that:

> "All the declarations of right are imbued with the same spirit. With them the body of the constitution is in full conformity."

still remains just as valid today, as it was, in 1889.

The body of the constitution remains in full conformity.

As previously argued, the body of our State Constitution remains in full conformity, wherein all the declarations of right are imbued with the same spirit.

Both "natural rights" (Article 2) and "Rights of Conscience" (Article 4) are possessed by the people, and are <u>recognized</u>, rather than "bestowed" by our Constitution.

By way of contrast, "all power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them." (Article 8) Indeed, "every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." (Article 14).

Finally, "Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance

against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." (Article 10).

Having reviewed the relevant constitutional provisions and case law, we turn now, to the main argument.

ARGUMENT

I. N.H. Const. pt. 1, art. 8 (as amended 2018), requires that consent to the filing of a brief of any *amicus curiae* is unnecessary when the brief is presented for "any individual taxpayer eligible to vote in the State" (*Id.*) on appeal of a decision by the Superior Court "declar[ing] whether the State or political subdivision in which the taxpayer resides, has ... violated a law, ordinance, or constitutional provision." (*Id.*)

This Honorable Court may interpret, but not re-write, our State Constitution. Insofar as any statute, or rule of this Honorable Court is unconstitutional, this Honorable Court has jurisdiction to grant equitable relief. *Claremont School Dist. v. Governor (Costs and Attorney's Fees)*, 144 N.H. 590, 593 (1999).

Pursuant to N.H. Const. pt. 1, art. 8 (as amended 2018), "any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court ... and shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer."

N.H. Sup. Ct. R. 30(3) provides that "Consent to the filing of a brief of an *amicus curiae* is unnecessary when the brief is presented for the State of New Hampshire by the attorney general (as *amicus* and not as a party); for any State agency authorized by law to appear on its own behalf by its appropriate legal counsel; or for any political subdivision of the State by its authorized law officer."

However, in light of the 2018 constitutional amendment, the notion that the State (or any State agency) has a "right" to file an *amicus* brief, but consent must somehow be sought for a brief that is presented for "any individual taxpayer eligible to vote in the State" (*Id.*) on appeal of a decision by the Superior Court "declar[ing] whether the State or political subdivision in which the taxpayer resides, has … violated a law, ordinance, or constitutional provision," (*Id.*) is both obnoxious to the 2018 amendment in particular, and obnoxious to the principle of equality that pervades our State Constitution.

To be clear, the author is not suggesting, on this issue, that anyone has done anything wrong. The author respectfully suggests, however, that revision and/or clarification of N.H. Sup. Ct. R. 30, especially in light of the 2018 amendment, is now warranted.

II. The correct phrase origin of the saying, "lies, damned lies, and statistics," arises out of earlier nineteenth century English commentary on legal opinion, condemning "liars, damned liars, and expert witnesses," in the context of law, and prior to any general usage popularized by Mark Twain, or any known attribution to Benjamin Disraeli.

In the instant case, it is instructive to look at such lies as have been perpetrated by our public servants.[7] Broadly speaking, these lies may be classified as either "lies," "damned lies," or "statistics" – but, in the first instance, the origin of this phrase is a matter of some debate.

Mark Twain popularized the saying in *Chapters from My Autobiography*, first published in 1907. "Figures often beguile me," Twain wrote, "particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli[8] would often apply with justice and force: 'There are three kinds of lies: lies, damned lies, and statistics.'" *North American Review*, page 471, Vol. 185, 1907. ApxI. 35.

This reference is quoted a number of times in federal case law, with a federal circuit split concerning whether it should be attributed to Mark Twain, or Benjamin Disraeli.[9]

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7 RSA 640:2, II defines "public servant."

8 Benjamin Disraeli (21 December 1804 – 19 April 1881) was a British statesman and Conservative politician who twice served as Prime Minister of the United Kingdom.

9 In *Stamp v. Metropolitan Life Ins.* Co., 531 F. 3d 84 (1st Cir. 2008), the First Circuit Court of Appeals upheld the trial court's decision (*Stamp v. Metropolitan*

However, “The lawyer’s truth is not Truth, but consistency or a consistent expediency.” Thoreau, *Civil Disobedience*. ApxI. 74. Consequently, this author rejects “the lawyer’s truth” that is “a consistent expediency” concerning existing attributions in federal case law, in favor of *de novo* review, to ascertain the Truth (Cf. Thoreau) of the matter.

Indeed, on November 21, 1891, and long before its popularization by Twain, W.D. Gainsford remarked that:

> DEGREES OF FALSEHOOD (7th S. xii. 288). – There used to be a somewhat better version of this saying current in Lincoln’s Inn[10] years ago, of a judge who recognized three degrees in liars: the liar simple, the [damned] liar, and the expert witness. The point lies in the fact that expert witnesses are allowed to give evidence as to what is their opinion, and hence are out of the reach of an indictment for perjury, which always hangs over the head of the ordinary witness, who can testify to fact only. To whom the saying was attributed I am sorry to say I forget – probably to any one whom it

Life Ins. Co., 466 F. Supp. 2d 422, 432 (D.R.I. 2006)) noting that “In his autobiography, Twain attributes the phrase to Benjamin Disraeli, but Disraeli scholars dispute that the English Prime Minister ever wrote or spoke the phrase, so the Twain attribution stands.” The Ninth Circuit concurs, crediting Twain, without any mention of Disraeli. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 993 F. 3d 774 (9th Cir. 2021). The Eighth Circuit, however, credits Disraeli, with no mention of Twain. *West v. Swift, Hunt & Wesson*, 847 F. 2d 490 (8th Cir. 1988). The D.C. Circuit mentions Twain, but ultimately credits Disraeli. *County of Los Angeles v. Shalala*, 192 F. 3d 1005 (D.C. Cir. 1999).

10 The Honourable Society of Lincoln’s Inn is one of the four Inns of Court in London to which barristers of England and Wales belong and where they are called to the Bar.

fitted. In those days it probably would have fitted Sir George Jessel.

See *Notes and Queries*, 7th S. XII. Nov. 21, 1891 pp. 413-414. ApxI. 51-52.

On August 12, 1889, still earlier, we read in the *Pall Mall Gazette*:

A JUDICIAL OPINION OF "EXPERT" WITNESSES

The Maybrick[11] case (says "S. O.") is being tried over again. The decision will be "not proven," this is clear. A painful case like this ought to teach a lesson. Will it do so? Trial by jury we cannot dispense with. Witnesses there must be; and, of course, there must be a verdict. An eminent judge is said to have expressed his opinion of paid witnesses as follows: – "There are liars, and d––d liars, and experts." The Maybrick case was principally settled by experts, and the judge may have had the opinion as above. Witnesses are examined on oath. An expert, being an educated man, may wish to respect the oath. But he is retained to win, so that he indirectly, and frequently unknowingly, becomes an advocate. The judges in their experience find expert witnesses, in civil cases as in Parliamentary Committees, now on one side

11 "James Maybrick died on May 11, 1889. … It was alleged that James Maybrick died from poison [i.e. arsenic], intentionally administered to him by Florence E. Maybrick [his wife], and that she was, at the assizes held at Liverpool on July 25, 1889, tried and convicted upon an indictment charging her with the wilful murder of James Maybrick. The sentence of death passed upon Florence E. Maybrick was afterwards commuted to penal servitude for life." *Cleaver v. Mutual Reserve Fund Life Association [1892]*, 1 Q.B. 147, 148 (Court of Appeal, England, 1891). ApxI. 36-50.

> now on the other side. Barristers the same. This is demoralizing, and a judge must think so; but then he may have practised in the Law Courts and at the Parliamentary Bar, and his perceptions may have become in a degree blunted. Again, a judge cannot elect the witnesses, though in some cases he may dispense with a witness, and in his summing-up may disparage parts of the evidence. Truth, absolute truth, is the foundation of civil society. It is a terrible charge to make against a man, a body of men, or a nation, that they are liars. If it were possible to reverse the expert witnesses in the Maybrick case, how would the evidence stand?

See "Retrying the Maybrick Case," *Pall Mall Gazette*. August 12, 1889, page 7. ApxI. 53.

Still earlier, a minute of the "X Club" meeting held on December 5, 1885, recorded by Thomas Henry Huxley himself, noted that the club "Talked politics, scandal, <u>and the three classes of witnesses: liars, d—d liars, and experts.</u>" Huxley, Leonard. *The Life and Letters of Thomas Henry Huxley (2 vols)*, London: Macmillan 1900, Vol. I, pp. 255, 257–258.[12]

This author concludes that the phrase, in its original form, concerned "liars, damned liars, and expert witnesses," and likely originated in England, ca. 1885, in the context of various legal proceedings. Yet it remains highly relevant today.

12 Available from Project Gutenberg at https://www.gutenberg.org/ebooks/5084

Standards of review, concerning truth.

As Thoreau observed, "the lawyer's truth is not Truth, but consistency or a consistent expediency. Truth is always in harmony with herself, and is not concerned chiefly to reveal the justice that may consist with wrong-doing." ApxI. 74. Indeed, when Pilate asked, "What is truth?" (John 18:38), the Defendant "took the Fifth."

By way of contrast, when experts decided the fate of Florence Maybrick, concerning her husband's alleged ingestion of arsenic, lawyers then argued about it, all while the public, and press, opined about "liars, damned liars, and expert witnesses." More experts later concluded that "the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure." *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In service to "consistent expediency," lawyers argued about this also. Years later, Jason Daubert and Eric Schuller were both born with serious birth defects. Yet more experts then opined about the ingestion of pyridoxine / doxylamine / dicycloverine during pregnancy, and lawyers then argued about this as well. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Meanwhile, the individual taxpayer, observing it all, and especially in this instant case, is likely quite nauseous, and her blood pressure spikes.

III. The City of Nashua, and the State of New Hampshire, have improperly promulgated "lies, damned lies, and statistics," both to the trial court, and to this Honorable Court.

Nevertheless, to the "common people" the discernment of what are "lies, damned lies, and statistics" by our public officials is often plain enough, even if it eludes many experts or lawyers. Cf. *Nix v. Hedden*, 149 U.S. 304 (1893) (deferring to the common language of the people, rather than botanists, by finding that tomatoes are vegetables, not fruits).

Lies.

The City, and *amici*,[13] essentially argue that the "common people" (Cf. *Nix*) somehow ought to believe they are to be denied access to "governmental proceedings and records" (N.H. Const. pt. 1, art. 8.) simply because it took "approximately two hours" for a City employee to restore a back-up tape, that was already known to contain responsive records. Tr. 84.

"And, as a result, a lawyer in and of himself ends up being merely some kind of diligent and shrewd legal tradesman, a crier of legal actions, a singer of legal formulas, a trapper of syllables," (Cicero, *De Oratore* 1.236.7) if he honestly expects that the "common people" (Cf. *Nix*) are, *somehow*, also expected to believe that this

13 *Viz. Amici Coniuratī. Cf. Amici Curaie.*

denial constitutes a "reasonable restriction" within the meaning of N.H. Const. pt. 1, art. 8.

Further, the State even boldly claims that "adherence to the trial court's decisions in this case and the Related Case,[14] which utilize a balancing test to determine whether the City must search its back-up tapes under the facts of these cases, will create "an unworkable precedent" and will lead to "absurd results".

However, nothing could be further from the truth!

Rather, it is the adoption of *per se* rules, likely begetting the adoption of further *per se* rules, that likely then will require further modification as various "absurd results" inevitably arise, that will create "an unworkable precedent."

As *verum amicus curiae* Braun correctly observes, "This Court has historically and consistently (including when overruling *Fenniman*)[15] applied a balancing test when deciding if governmental records are subject to disclosure." Indeed, this case, and the Related Case,[16] "exemplify perfectly why this Court should always use a balancing test, and should refrain from ever adopting a *per se* rule

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14 Case No. 2022-0399 of this Court, trial court docket 226-2021-CV-00306.

15 See *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) and *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 N.H. (2020), overturning *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993).

16 *Supra* note 14.

categorically exempting any category or class of governmental records from disclosure."

Braun goes on, again correctly to observe, that it is "plainly wrong and a bit insulting to suggest that NH courts cannot be relied upon to sift through differing fact patterns in differing cases and apply the law correctly."

This author further opines that it is even more plainly wrong, and even more insulting, to suggest that the "common people" ought not to be able to rely on the plain and common language of their State Constitution (i.e. N.H. Const. pt. 1, art. 8) concerning their "right of access to governmental proceedings and records," (*Id.*) and that "all the magistrates and officers of government are [the people's] substitutes and agents, and [are] at all times accountable to them." (*Id.*)

Furthermore, the people's requests for records, should be presumed to adhere to standards of reasonableness, and the government should bear any burden of proof, if the government alleges that they somehow do not. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746 (2011).

Consequently, requests by the people ought (normally) to be fulfilled, in good faith, by the government, and in a timely fashion. N.H. Const. pt. 1, art. 14.

To the degree there are any legitimate competing interests requiring adjudication, these are best addressed by

a trial court through the use of appropriate balancing tests; e.g, in the instant case:

> **(1)** whether any back-up tapes potentially relevant to the request existed; **(2)** if so, whether their responsive material would be reasonably likely to add to what was already produced; and **(3)** if the first two questions were answered in the affirmative, whether there was a "practical obstacle to searching them."

See *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504 (D.C. Cir. 2011).

However, our government (both the City and State), sees fit to complain, to this Honorable Court, that, *somehow*, it was *wrong* for a government employee to spend two hours of time searching a back-up tape, in response to a citizen's reasonable request; but, that, *somehow*, it is *right* that the people ought to spend countless hours of their time, and countless amounts of their taxpayer dollars, to litigate this issue before this Honorable Court.

Consequently, the position of the City, and the State is, fundamentally, a lie.

Damned Lies.

Next, we turn to the "damned lies" promulgated in this case; specifically, by the City's attorneys.

By Christmas Day in 2020, the City's retention period for emails in Outlook was 120 days.[17] Both Mr. Bolton and Ms. Clay either knew this, or should reasonably have known this, based on their interactions with Mr. Misiervitch, the City's Deputy Director of Information Technology ("IT").

Thereafter, in a related matter, on March 11, 2021, a different resident of Nashua, Ms. Laura Colquhoun, submitted a Right-to-Know request to the City of Nashua for "all email communications between Ms. Kleiner and Mr. Richard Vincent for the period of January 1, 2021 to March 1, 2021."[18]

However, on April 5, 2021, in the Colquhoun matter, Mr. Steven Bolton then promulgated to the trial court, in that matter, the "damned lie" that "our information technology department … tells us that … [t]hey have … [emails] set to delete …. after 45 days. They encourage, if you don't need it, delete it."[19] Cf. Tr. 74-75 in this case.

---

17 Mr. Misiervitch, the City's Deputy Director of Information Technology ("IT"), testified at trial in this case that the retention of emails by the City was originally 45 days; however, that in March 2020, it was extended to 90 days, and that in the summer of 2020 it was extended to 120 days. Tr. 74. Indeed, when Ms. Clay specifically queried Mr. Misiervitch whether, "by December 25th of 2020 [i.e. Christmas Day], the city's retention period for emails in Outlook was 120 days," Mr. Misiervitch responded, "Correct." Tr. 74-75. Further, Mr. Bolton was also present, at trial, and observed this exchange.

18 ApxII. 10-11. See also ApxIV. 36. (Tr. 3) where the request was described as "specific emails between two specifically identified people during a limited period of time."

19 ApxIV. 47. (Tr. 14).

By the December 6, 2021 trial court hearing in this case, an extensive exchange occurred between Ms. Clay and Mr. Miseirvitch concerning the 120-day email retention policy in place by Christmas 2020. Tr. 74-75. Mr. Bolton was also present at this hearing to observe this exchange.

Nevertheless, a mere seven weeks later, during the January 27, 2022 oral arguments before this Honorable Court in Ortolano, the following exchange then occurred between this Honorable Court, and Ms. Clay, that Mr. Bolton also observed (ApxIV. 26-27. Tr. 24-25):

> **Justice Donovan:** How long does the City retain its emails?
>
> **Ms. Clay:** Now?
>
> **Justice Donovan:** At the time. [i.e. March 2021]
>
> **Ms. Clay:** At the time, 45 days. And it was an automatic purge out of each individual's City user's email program that after 45 days the email would be purged unless it had been saved in a special file that the user would have to set up, or that may exist outside of the email program.
>
> **Justice Donovan:** So had the city retained any of these emails from when those requests came in, or had that time already expired?
>
> **Ms. Clay:** The were a number retained. I believe those are the ones that were produced later, after the lawsuit was filed. But certainly, there were emails retained from that

time period at the time of the request. There were also some that were beyond the 45-day retention period and would no longer exist in the email programs.

Justice Hanz Marconi: And that was explained in the City's answer?

Ms. Clay: Yes.

Consequently, Mr. Bolton observed Ms. Clay repeat the same "damned lie" to this Honorable Court, during oral arguments in Colquhoun, that Mr. Bolton himself promulgated, to the trial court, in Colquhoun; namely, that by Christmas 2020, the City's email retention policy was allegedly 45 days, when in fact it was 120 days.

Insofar as naughty children lie about what email retention policies of the City were in place by Christmas day, 2020, both to this Honorable Court, and to the trial court, they deserve coal in their stockings.

They do not deserve *amicus*[20] briefs, in support of their behavior, written by the State, and at taxpayer expense.

Statistics

The State's *amicus* brief and its appendix are replete with various "statistics." The State represents (SApx. 27) it spends $550 per month to Microsoft for one TB of cloud storage. This author represents (ApxIII. 3-5) he spends $12

20 *Viz.* *Amici Coniuratī.*

per month, to Google, for slightly under one TB of cloud storage.

It is unclear to this author what it costs the State to pay for disk back-up, but it recently cost this author $104 to purchase a 5TB disk back-up drive from Amazon. ApxIII. 6.

The State represents it takes 4-5 hours (Sapx. 25) to back-up ~1.1TB. This author represents it recently took his laptop[21] approximately 2 hours to back-up its 1TB internal drive[22] to his 5TB external back-up disk.

The State represents that it somehow cannot search its cloud storage, or disk back-ups, without first restoring them. This author represents that he has no difficulty, whatsoever, directly searching the contents of his 5TB external back-up disk, or directly searching the contents of his Google cloud-storage.

The State concerns itself (SApx. 24) with what "17 billion pages of Word documents" looks like. Having never seen such a spectacle, this author is more concerned with what a picture (worth a thousand words!) looks like, or, for example, how much space is required (~3.87 GB), for this author's most recent cell-phone video footage.[23]

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21 A Lenovo T430S, now nearly a decade old, albeit also having had various upgrades, over the years.

22 An example of one such upgrade.

23 i.e., Justice Marconi's recent presentation, on September 22, 2022, to the Governor's Commission on Domestic Violence, Sexual Assault, and Stalking. The PDF transcript takes considerably less storage space, at ~270 KB.

Of course, labor costs are also a concern. This author estimates that 30 minutes of oral argument, before this Honorable Court, is "worth" approximately $200 in salary payments to the five justices, likely vastly underestimating the total labor (and cost!) required by this Honorable Court to decide an appeal. ApxIII. 7.

By way of contrast, the <u>two hours</u> of labor by Mr. Miseirvitch, of such great concern to the City, and the State, is estimated to represent roughly $120 in total salary payments to Mr. Miserivitch. ApxIII. 7.

In the instant case, this author further admits "figures often beguile me," quoting Twain. The author is not an accountant, further opining that any "accounting" of the City or State's overall finances is far above this author's pay grade.

The author respectfully directs the reader, to Mr. Stephen C. Smith, the current New Hampshire Director of Audits, Office of the Legislative Budget Assistant, for further information, whose time, it appears, is worth approximately $75 per hour. ApxIII. 7.

In any event, the "common person," or "individual taxpayer," (Cf. N.H. Const. pt. 1, art. 8) never has any trouble figuring out "<u>what</u>" her tax bill is. She struggles only to figure out "<u>why</u>" her tax bill is, for such figures "often beguile [her]."

IV. Pursuant to N.H. Const. pt. 1, art 8, "all the magistrates and officers of government" that are "[the people's] substitutes and agents," were not "at all times accountable to them."

A single example suffices. On Monday, July 18, 2022, the Plaintiff requested the assistance of Attorney General John Formella, concerning her complaints against the City, wherein she spent $178,000 on attorney's fees, before prevailing in the trial court. ApxII. 16. On Friday, July 22, 2022, the Attorney General's Office (Anne M. Edwards) provided an unhelpful response to the Plaintiff. ApxII. 17.

Unbeknownst to the Plaintiff, however, just one week prior, on Friday, July 15, 2022 at 1:00 pm, a meeting was held, between both the City's attorneys and the State's attorneys, to discuss "Ortolano." ApxII. 12-14.

The author opines this was a "dubious deal." Cf. *Briseño v. Henderson*, 998 F. 3d 1014, 1018 (9th Cir. 2021). *Briseño* was about unfair collusion, and summed up the problem as follows:

> "Two Virginians and an immigrant walk into a room/diametrically opposed/foes/ They emerge with a compromise/Having opened doors that were previously closed/Bros/... No one else was in the room where it happened ... No one really knows how the game is played/ The art of the trade/How the sausage gets made/ We just assume that it happens/But no one else is in the room where it happens."

– Hamilton: An American Musical (2016).[24]

Briseño at 1031.

Applied to the instant case, concerning this meeting of City and State attorneys at "Laeca's House,"[25] the author finds it deeply disturbing that "no one else was in the room where it happened." *Id*.

This single event, is directly contrary, to what any "ordinary person" would view as constitutional, pursuant to N.H. Const. pt. 1, art. 8.

V. "The ends of government [have been] perverted, and public liberty manifestly endangered," within the meaning of N.H. Const. pt. 1, art. 10; however, this Court need not reach the issue of whether "all other means of redress are ineffectual."

As previously argued, the body of our State Constitution remains in full conformity, wherein all the declarations of right are imbued with the same spirit, and the magistrates and officers of government are the people's

24 Pursuant to N.H. Sup. Ct. Supp. R. 11(f), the reader is respectfully requested to be sure to listen to it on youtube, by clicking on:

- https://www.youtube.com/watch?v=WySzEXKUSZw

25 In the year 63 B.C., on the night of November 6, Cataline held a secret assembly of conspirators at the house of Marcus Porcuis Laeca, and made the final preparations for revolt, expressing his impatient desire to join the camp of Manlius. He laid great stress on the necessity of doing away with Cicero, whereupon two men, the senator Lucius Vargunteius and the knight Gaius Cornelius, agreed to murder him that same night. According to Cicero's account, the attempt was made, but failed, owing to the fact that Cicero had information of all the conspirators' actions from a woman named Flavia, the mistress of one of Cataline's associates. See Cicero, *Catilinarians*.

substitutes and agents, and are at all times accountable to them. By way of contrast, in the instant case, the ends of government have been perverted, and public liberty manifestly endangered.

Consequently, would an "individual taxpayer" or "any objective, disinterested observer," entertain any "significant doubt that justice would be done in this case?" _Tapply & Zukatis_, 162 N.H. 285 (2011). N.H. Const. pt. 1, art. 35.

And, if so, what is the remedy?

While the principle of equality pervades our entire State Constitution, the present situation reeks of the Orwellian nightmare described in Animal Farm, wherein "some animals are more equal than others." How is Napoleon's residence, at 4 Rockland Street, assessed, and why? ApxII. 3-4. Two canines, that are members of the bar, are barking, and snarling, with their "damned lies," before this Honorable Court. The State, in response, offers its "statistics."

Briseño (at 1028) provides some guidance. In passing, the Ninth Circuit Court of Appeals noted that "George Lucas promising no more mediocre and schlocky Star Wars sequels[26] shortly after selling the franchise to Disney ...

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26 The author is eternally grateful that the Ninth Circuit granted "the people" declaratory, if not equitable, relief – concerning what is plain to the common man. The sequels to the original trilogy were, in fact, mediocre, and schlocky.

would be illusory." The Ninth Circuit's point, however, concerned injunctive powers.

Pending before this Honorable Court, are <u>two more</u> "mediocre and schlocky ... sequels" (Cf. *<u>Id</u>*.) to this case. What distinguishes this case from *<u>Briseño</u>* are the powers of this Honorable Court to grant equitable relief, concerning what should be done – about any "mediocre and schlocky ... sequels" whether perpetrated by Disney, or perpetrated by the City of Nashua and the State of New Hampshire.

The "common man" or "individual taxpayer" has no desire to watch such fare. He or she is already perfectly capable of reading the numbers on a tax bill, and lacks only the power to understand the reasons and motivations behind them. He or she is perfectly capable of using email, searching it, and (if need be) even backing it up. He or she is also perfectly capable of reading the plain language of our State Constitution, and already has a perfectly good notion of what:

> **"the public's right of access to governmental proceedings and records shall not be unreasonably restricted"**

<u>ought</u> to mean, and <u>why</u>!

Thus, the "common man" or "individual taxpayer" waits, hoping for equitable relief from this Honorable Court.

CONCLUSION

"*Quō ūsque tandem abūtere, Imperium, patientia nostra? Quam diū etiam furor iste tuus nōs ēlūdet? Quem ad fīnem sēsē effrēnāta iactābit audācia? ... O tempora, o mores!*" – Which is to say, "When, O public servants,[27] do you mean to cease abusing our patience? How long is that madness of yours still to mock us? When is there to be an end of that unbridled audacity of yours, swaggering about as it does now? ... Oh, what times! Oh, what behavior!"[28]

Moreover, in his exhortation to "Live Not By Lies," Solzhenitsyn presents to us all a stark choice: "Either truth or falsehood: towards spiritual independence or towards spiritual servitude." ApxI. 32. Which will we choose?

Consequently, concerning any opinion of this Honorable Court, or equitable relief, this author wonders – what will be New Hampshire's motto?

Is it now to become, "Lies, Damned Lies, and Statistics?"

Or, conversely, is it to remain "Live Free or Die?"

---

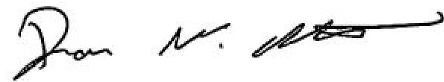
27 RSA 640:2, II.

28 Cf. Cicero, *Catilinarians*. This author lacks the brevity, and wit, of Cicero, and is thereby reduced to quoting him.

ORAL ARGUMENT

Insofar as oral arguments might take place in this appeal, the author requests 15 minutes of time pursuant to N.H. Sup. Ct. R. 16(10).

Respectfully submitted,



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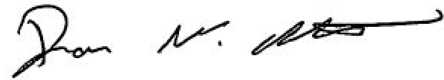
October 8, 2022.

CERTIFICATE OF WORD COUNT

I, Dana Albrecht, hereby certify that pursuant to N.H. Sup. Ct. R. 16(11), this brief contains less than 9,500 words, exclusive of pages containing the table of contents, and tables of citations, as determined by the word count of the computer program used to prepare this brief.

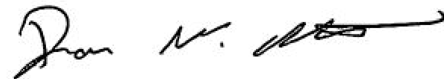


DANA ALBRECHT

October 8, 2022

CERTIFICATE OF SERVICE

I, Dana Albrecht, hereby certify that a copy of this brief shall be served on all parties of record through the New Hampshire Supreme Court's electronic filing system.



DANA ALBRECHT

October 8, 2022

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