THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0237

Laurie A. Ortolano

v.

City of Nashua

BRIEF OF *AMICUS CURIAE* STATE OF NEW HAMPSHIRE IN SUPPORT OF THE CITY OF NASHUA

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Matthew Broadhead
Bar No. 19808
Senior Assistant Attorney General

Samuel Burgess
Bar No. 274685
Attorney

Transportation and Construction Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
603/271-1250

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ISSUES PRESENTED

I. Whether the superior court erred when it ordered the City of Nashua to restore unsearchable data from back-up tapes, conduct a search, and disclose any responsive email records without conducting the required statutory analysis set forth in RSA 91-A:4, III-a and III-b;

II. Whether back-up tapes are "government records" within the meaning of RSA 91-A:1-a, III and IV.

INTEREST OF AMICUS CURIAE

Every executive branch agency in the State of New Hampshire is subject to RSA chapter 91-A. Generally speaking, the Department of Information Technology maintains digital back-ups of almost every executive branch agency computer, email, server, personal shared drives, and, in some cases, cell phones in service. The back-ups are not maintained in searchable form, similar to the City of Nashua, and must be converted in order to be searched. Every executive branch agency in the State of New Hampshire has a duty to adhere to RSA chapter 91-A. The outcome of this case is therefore of immense importance to the operations of the executive branch of state government.

STATEMENT OF THE CASE AND FACTS

On June 16, 2021, Plaintiff Laurie Ortolano filed a Right-to-Know request pursuant to RSA chapter 91-A with the City of Nashua's Assessing Department. Tr. 28.[1] Ortolano sought the disclosure of, in pertinent part, emails sent and received by a specific employee in the Department during

[1] "Tr._" refers to the trial transcript;
"SA._" refers to the State's appendix as attached to this brief.

the months of November and December 2020. *Id.* Nashua's email retention policy was initially 45 days but increased to 90 days at the onset of the COVID-19 pandemic, and then again increased to 120 days later in 2020. *Id.* at 74–75. Nashua conducted a search of the employee's Outlook application and her personal U-drive. *Id.* at 47. At the time of Ortolano's request, however, the bulk of the subject emails had already been deleted in compliance with Nashua's email retention policy, *id.* at 42, and Nashua denied the request to the extent it sought documents stored on back-up tapes, *id.* at 44. Nashua later provided Ortolano with certain responsive documents not stored on back-up tapes. *Id.* at 47.

Ortolano filed a petition in superior court seeking disclosure of the records stored on back-up tapes. *See* SA 3–14. In her petition and during the hearing below, Ortolano alleged that Nashua's document retention policy did not comply with RSA 91-A:4 and RSA 33-A:3-a. *See* Tr. 12, 20–21, 66 –67, 102, 106, 113. The court (*Temple*, J.) held a bench trial on the petition on December 6, 2021, during which it heard testimony about the Nashua Assessing Department's document retention policies and practices. *See id.* at 42. It also heard from Nashua's Deputy Director of Information Technology, Nick Miservitch, regarding Nashua's storage and retrieval practices for back-up tapes. *See id.* at 65–68, 73–79. Miservitch testified that it is possible to restore records from unsearchable data on these back-up tapes, convert them into a readable format, and then search them. Tr. 84, 90; *see* SA 5. He said that such a process for Ortolano's request would take a "couple of hours" to restore the emails from the back-up tapes.[2] Tr. 81–84.

[2] Miservitch did not specify how long it would take to search these backup tapes once restored.

On February 7, 2022, the superior court issued an order granting Ortolano's Motion to Compel Nashua to search its back-up tapes for further responsive documents. *See* SA 3–14. Citing to Miservitch's testimony as to the capacity of Nashua to search back-up tapes, and principally relying on federal caselaw analyzing petitions brought under the Freedom of Information Act ("FOIA"), the court found that such a search was not unreasonably burdensome. *Id.* at 10–12 (citing *Long v. U.S. Immigration & Customs Enforcement*, 149 F.Supp.3d 39, 55–56 (D.D.C. 2015) and *Ayuda, Inc. v. U.S. Fed. Trade Comm'n*, 70 F.Supp.3d 247, 275 (D.D.C. 2014)). The court held that nothing in the record indicated that Nashua "lack[ed] the manpower or technological capabilities to conduct such a search." *Id.* at 11. Accordingly, the court found that Nashua had not conducted a reasonable search in response to Ortolano's request. *Id.* at 12–13. The court ordered Nashua to: (1) conduct a reasonable search of its back-up tapes; and (2) with limited explanation, to participate in remedial training. *Id.* at 10–11.

SUMMARY OF THE ARGUMENT

This brief raises two arguments. *First*, in ordering the restoration and search of back-up tapes, the superior court ignored the plain meaning of RSA 91-A:4, III-a and III-b. The court, instead, supplanted a federal FOIA standard over the unambiguous statutes. Under New Hampshire law, a public body or agency is not required to conduct a reasonable search for information if that information had been "initially and legally deleted." RSA 91-A:4, III-b. In light of the plain language of RSA 91-A:4, III-a and III-b, the superior court erred by improperly relying on FOIA where that

statute is not *in pari materia*[3] with the Right-to-Know provision in question.

Second, this Court should reverse the superior court's decision because information stored on back-up tapes for disaster recovery purposes does not constitute "governmental records" under the plain language of RSA 91-A:1-a, III; therefore, it is not subject to disclosure under the Right-to-Know Law.

ARGUMENT

On appeal, questions of law regarding the interpretation of RSA chapter 91-A are subject to a *de novo* review. *38 Endicott St. N., LLC v. State Fire Marshal, New Hampshire Div. of Fire Safety*, 163 N.H. 656, 660 (2012). When interpreting the Right-to-Know Law, the Supreme Court looks for the "plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous." *Reid v. N.H. Att'y General*, 169 N.H. 509, 522 (2016) (citing *Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 676 (2011)).

I. THE SUPERIOR COURT ERRED IN IGNORING THE PLAIN LANGUAGE OF RSA 91-A:4, III-B AND INSTEAD IMPROPERLY RELIED ON FEDERAL CASELAW INTERPRETING FOIA, WHICH DOES NOT CONTAIN ASIMILAR PROVISION.

RSA 91-A:4, I, grants citizens the right, during regular business hours, "to inspect all governmental records in the possession, custody, or control of … public bodies or agencies … except as otherwise prohibited by statute or RSA 91-A:5." When a citizen submits an RSA 91-A request for documents, agencies are required to conduct a "reasonable search."

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[3] *In pari materia* is latin for "in the same manner." *In Pari Materia Definition*, Black's Law Dictionary (11th ed. 2019); *see Clay v. City of Dover*, 169 N.H. 681, 685–86 (2017) (noting that the New Hampshire Supreme Court looks to FOIA when interpreting the Right-to-Know Law where the two statutes contain similar provisions).

ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 753 (2011). The adequacy of an agency's search is judged by the standard of reasonableness:

> The search need not be exhaustive. Rather, the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents. Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requestor to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith.

Id. The plain language of RSA 91-A:4, III-b expressly excludes from the required search records in electronic form that have been initially and legally deleted. Here, the court erred in ignoring the plain language of RSA 91-A:4, III-b and instead relied on caselaw interpreting FOIA, which does not include a similar provision.

RSA 91-A:4, III-a provides that "[g]overnmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts." For instance, municipalities such as Nashua must retain their records for the minimum time periods set forth in RSA 33-A:3-a. To the extent Nashua creates or maintains records in electronic form, it must keep and maintain those records for the same retention periods set forth in RSA 33-A:3-a. *See* RSA 91-A:4, III-a.

Following the expiration of the required retention period, RSA 91-A:4, III-b provides:

> A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record

> to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

RSA 91-A:4, III-b. The language of RSA 91-A:4, III-b is plain and unambiguous. RSA 91-A:4, III-b excludes from disclosure government records in electronic form that have been "initially and legally deleted." It is clear from the statutory scheme that paragraph III-b's reference to "initially and legally deleted" relates back to paragraph III-a's mandate that a document be maintained for the "applicable retention or archival period." An electronic document that is deleted as a matter of practice pursuant to a legally permissible document retention policy is not subject to disclosure under the Right-to-Know Law. RSA 91-A:4, III-b.

Documents stored on back-up tapes have been "deleted" for purposes of RSA 91-A:4, III-b. The plain language of the statute provides, "[f]or purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency *itself*." RSA 91-A:4, III-b (emphasis added). The paragraph continues to explain that the "mere transfer of an electronic record to a readily accessible 'deleted items' folder or similar location *on a computer* shall not constitute deletion of the record." RSA 91-A:4, III-b (emphasis added). The above-emphasized terms (referring to documents accessible to the agency "itself" and on a "computer") establish a clear legislative intent that electronic records are not subject to disclosure when they are no longer accessible to or in the custody of the actual public agency responding to the Right-to-Know request, as opposed to information contained in an information technology department maintaining back-up tapes. RSA 91-A:4, III-b's contrasting example, noting that information remains readily accessible where it is transferred to a "deleted items" folder on a "computer" held at the agency is consistent with the requirement that

agencies conduct a reasonable search—it likely only takes a matter of seconds to recover an email in a "deleted items" folder as opposed to the time-consuming process of restoring data no longer maintained on a computer but which exists solely on back-up tapes.

The superior court's order creates an unworkable precedent. The court here ordered data to be restored where there was evidence that it could take "a couple of hours." Tr. at 81–84. At what point would it be considered too burdensome to order the government to restore from a back-up? Data recovery times vary wildly based on the medium the data is stored on and the size of the files that are being backed-up. SA 25–26. Some may take two hours to restore while others could take as much as two days. *Id*. Ironically, if the superior court's decision were to be upheld, whether an agency is required to search back-up tapes would again be subject to a case-by-case analysis, notwithstanding the statutory text contained in RSA 91-A:4. This individualized, case-by-case approach is the very same analysis this Court urged the legislature to avoid by encouraging it to enact legislation addressing electronic documents. *See Hawkins v. N.H. Dept. of H.H.S.*, 147 N.H. 376, 380 (2001) ("Unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case-by-case basis"). The legislature responded by subsequently codifying RSA 91-A:4, III-a & III-b. The legislature could not have intended the absurd result created by the superior court's decision in this case. Given the potentially large burden of restoring and searching back-up tapes, even if this Court holds that responding to Ortolano's back-up tape requests is not burdensome here, the Court should confine its decision to the facts of this case.

Moreover, back-up tapes, by their nature, contain data that is neither immediately accessible nor searchable by the agency "itself" within the meaning of Paragraph III-b. As described in the record below, the emails to and from Nashua's Assessing Department, once deleted, are neither maintained by that Department nor are they accessible or searchable by that Department. *See* Tr. 77–79. Instead, access to back-up tape data requires relying on the technical expertise of an information technology official to expend hours to restore, convert, and search for responsive records. *See id.* at 81–84.

The State of New Hampshire has consistently interpreted the provisions of RSA 91-A:4, III-b to mean that records maintained on back-up tapes that were initially and lawfully deleted pursuant to a record retention schedule are no longer subject to disclosure under the Right-to-Know Law. *See* SA 15–23; *see also* Mem. from Atty. Gen. Joseph A. Foster, N.H. Dep't of Justice, at 23 (Mar. 20, 2015), https://www.doj.nh .gov/civil/ documents/right-to-know.pdf. Pursuant to the plain language of the statute, electronic records—after they have been retained for the required period under RSA 91-A:4, III-a and deleted pursuant to a lawful retention policy—are no longer subject to the Right-to-Know Law if they exist solely on back-up tapes. RSA 91-A:4, III-b.[4]

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[4] Further, were this Court to find RSA 91-A:4, III-b ambiguous, it would then be able to consider legislative history. *Reid v. N.H. Att'y General,* 169 N.H. 509, 522 (2016). RSA 91-A:4, III-a and III-b were adopted by the legislature in response to *Hawkins v. N.H. Dept. of H.H.S.*, 147 N.H. 376 (2001), in which this Court stated:

> The issues in this case foreshadow the serious problems that requests for public records will engender in the future as a result of computer technology. Unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case-by-case basis.

In this case, instead of applying the plain language of New Hampshire's Right-to-Know Law, the superior court relied on federal caselaw analyzing the reasonableness of document searches under FOIA. SA 8–12. This Court only looks to the decisions of other jurisdictions interpreting similar public access laws, such as FOIA, when those laws are *in pari materia* with the State's Right-to-Know Law because such decisions are interpretively helpful. *Montenegro v. City of Dover*, 162 N.H. 641, 645 (2011) (quoting *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 582 (2006)). The Court's use of statutes *in pari materia* with the Right-to-Know Law, however, presupposes that the statutory authorities contain similar or identical language. *See Censabella v. Hills Cnty. Atty.*, 171 N.H. 424, 428–29 (2018). While there are provisions of FOIA that do contain language analogous to the Right-to-Know Law, such as the exemptions listed in RSA 91-A:5, *see Montenegro*, 162 N.H. at 645–46, it is not proper to look to FOIA where it does not contain provisions analogous to RSA 91-A: 4, III-a and III-b. *Censabella*, 171 N.H. at 428–29; *see generally* 5 U.S.C. § 552. Accordingly, the superior court improperly relied on FOIA caselaw in interpreting RSA 91-A: 4, III-b.

Id. at 380; *see also* Laws 2008, 303:4 (H.B. 1408) (adopting RSA 91-A:4, III-a and III-b). The legislative history of RSA 91-A:4, III-b reveals that the legislature did not intend for all items to be considered governmental records:

> Retention is different from a record. A record can be ephemeral. You can get a pink slip. Your secretary hands you a pink slip, saying "So-and-so called on the telephone." You look at that; you crumple it up; you throw it in the waste basket. That was a government record very, very briefly. Once it's in the waste basket and gone, it's no longer a government record.

Hearing on HB 1408-L Before the Senate Committee on Public and Municipal Affairs, at 42 of 91, 2008 Session (N.H. 2008) (Statement of John Lassey, Vice Chair of the Right-to-Know Oversight Commission). The waste basket in the example is a metaphor for the back-up tapes at issue, which store deleted records for the purpose of catastrophic recovery. Accordingly, if this Court finds RSA 91-A:4, III-b ambiguous, the legislative history shows that the legislature did not intend for back-up tapes to be government records discoverable through Right-to-Know requests.

The superior court began its analysis correctly, noting that Nashua conducted a reasonable search of the employee's Outlook files and U-drive. *See* SA 7. The proper inquiry should have then been whether Nashua properly maintains and deletes its records pursuant to a record retention policy that complies with RSA 91-A:4, III-a and RSA 33-A:3-a. If it does, then Nashua's response obligation concerns only records within the record retention period and Nashua cannot be forced to search back-up tapes for records outside of the record retention period. In *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. Of Commrs.*, the Ohio Supreme Court found that, unless a challenging party makes a *prima facie* showing that a government entity deleted records in violation of its policies, the entity and its employees "will be presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner." 899 N.E.2d 961, 970 (Ohio 2008). The Ohio Court's analysis supported its general rule that "[i]n cases in which public records, including emails, are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to those records." *Id.* Consistent with the Ohio Supreme Court's analysis, this Court should construe RSA 91-A:4, III-b based on its plain language and remand this case to the superior court for further proceedings.

II. THE BACK-UP TAPES CREATED AND MAINTAINED BY INFORMATION TECHNOLOGY DEPARTMENTS ARE NOT GOVERNMENT RECORDS WITHIN THE MEANING OF RSA 91-A:1-A AND THEREFORE ARE NOT SUBJECT TO A RIGHT-TO-KNOW REQUEST.

Back-up tapes maintained by an information technology department (hereinafter "ITD") of a public agency or body exist solely for disaster recovery and not for the transaction of official business. SA 24. Accordingly, ITD back-up tapes are not subject to Right-to-Know requests.

RSA 91-A:1-a, IV defines "information" as "knowledge, opinions, facts, or data of any kind …." The Statute defines "governmental records" as "any information created, accepted, or obtained by, or on behalf of, any… public agency *in furtherance of its official function*." RSA 91-A:1-a, III (emphasis added).[5] Information stored on back-up tapes cannot be considered governmental records unless the tapes were created, accepted, or obtained by an agency in furtherance of its official function. *See Brent v. Paquette*, 132 N.H. 415, 421 (1989) (discussed below); *see also Griffin Indus., Inc. v. Ga. Dep't of Agric.*, 313 Ga.App. 69, 74 (Nov. 10, 2011) (finding that emails maintained on a back-up tape, outside of an agency's computer system, were not existing public records that the agency needed to disclose).

Brent, and *Menge v. City of Manchester*, 113 N.H. 533, 537 (1973), clarify that when records serve a government purpose and when they do not. In *Brent*, a school superintendent recorded the remarks of a citizen on a personal recording device in anticipation of a lawsuit for slander. 132 N.H. at 420–421. This Court considered whether the recordings were subject to disclosure under the Right-to-Know Law. *Id.* The Court found that the purpose of the tape was personal and that "[t]he public is not entitled to those tapes made by the record-keeper which do not have an official purpose." *Id.*

By contrast, in *Menge*, the Supreme Court found that field record cards used to assess real estate tax values were subject to the Right-to-Know Law. 113 N.H. at 534. There, the City of Manchester had converted tax assessment cards from physical form to a computerized tape. *Id.* at 536. Unlike the personal tapes used by superintendent in *Brent*, however, the

[5] The Statute also states that "governmental records" includes "public records." RSA 91-A:1-a, III.

City's computerized tapes "were actually used by the City in arriving at real estate tax assessments." *Menge*, 113 N.H. at 534.

Here, the information at issue is not a complete copy of a person's files and is not generated in furtherance of an official function of state government. Information stored on back-up tapes is not "actually used" for any official governmental purpose, i.e., they are not used as a method for maintaining or archiving files or for data retention purposes. SA 24. Nor are back-up tapes analogous to documents stored in an archives library that serve as a repository for governmental records that have an official purpose. Rather, back-up tapes temporarily hold copies of data that exist as a "snapshot" of a moment in time. Tr. 77–79. The reason that public agencies maintain back-up tapes is the same reason that private non-governmental entities have them—to ensure the continuity of operations only in case of a catastrophic event. SA 21; *see* SA 24. In other words, snapshots in time of information maintained on government computers serve no official governmental purpose, as discussed *supra* n.4.

Lastly, *Twomey*, a superior court (*McNamara*, J.) order, previously addressed this argument and ultimately concurred with the State of New Hampshire's interpretation of the Right-to-Know Law. *See* SA 15–23. That case involved a citizen who sued the New Hampshire Department of Justice ("DOJ") over a policy memorandum issued by the DOJ.[6] SA 15. The citizen challenged the DOJ's policy to treat "'legally deleted' materials that continue to exist on back-up tapes [as] … not subject to the Right to Know Law." *Id.* The *Twomey* Court found, in part, that back-up tapes of state agencies were not governmental records within the meaning of RSA 91-A on statutory interpretation grounds. *See id.* at 5–8. Citing the

[6] The facts of *Twomey* are on all fours with the facts of the present case insofar as the two cases analyze whether information stored on government back-up tapes is discoverable through a Right-to-Know request based on the language of RSA 91-A. *See* SA 15–23.

intended purpose of the tapes, the Court found that: (1) the State agencies did not have access to the back-up tapes and the tapes were neither searchable nor necessarily complete; (2) the agencies' intention in creating the tapes was solely for disaster recovery; and (3) "[t]he law does not require the State to make back-up tapes and the back-up tapes are not made in connection with the transaction of official business." *Id.* at 7. Consequently, when a city or the State officially retains government records on computers for the statutory retention period, they comply with the Right-to-Know Act. *Id.*; *see Stewart v. United States Dep't of Justice*, 554 F.3d 1236, 1244 (10th Cir. 2009) (finding that the U.S. Department of Justice complied with the Freedom of Information Act where it stored back-up tapes solely for disaster recovery).

Finally, although the cost to an administrative agency is generally not a factor determining whether a document is a public record, *see Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376, 370 (2001), the Court may consider the extraordinary burden placed on an agency when interpreting a statutory scheme in order to avoid an outcome that triggers an absurd result, *see State v. Villeneuve*, 160 N.H. 342, 246 (2010).

Construing the term "governmental records" to include back-up tapes would lead to an absurd result. First, if data held on back-up tapes were "governmental records," then the back-up tapes containing such records would themselves need to be held for as long as the pertinent document retention period required pursuant to RSA 91-A:4, III-a. Moreover, if backup tapes were governmental records, they would also have to remain "accessible" and held by the agency at its regular office as required by RSA 91-A:4, III. By its nature, however, information stored on back-up tapes is *not* readily accessible because back-up tapes hold data in

binary code and are not keyword searchable (*see* SA 24–25); further, converting back-up tape to a readable format can be done only with substantial effort. *See* SA 26–27 (outlining the arduous and time-consuming process of recovering data from backup tapes).

While the superior court may have found the specific back-up tapes in this case "readily accessible" based on the testimony of Miservitch (*see* SA 5–6, 9),[7] fulfilling such requests would not be replicable as a normal course of business for the State without significant additional resources. The State Department of Information Technology has calculated the approximate costs that the State would incur were this Court to treat backup data as discoverable under the Right-to-Know Law. SA 24–28. Not only would it take significant working hours to recover deleted materials from backup data, the financial costs to the State would be astronomical. *See id.*; *see Parker v. U.S. Immigration and Customs Enforcement*, 289 F.Supp.3d 32, 44 (D.D.C. 2017) ("An agency is not required to obtain new equipment to process a FOIA request"). Moreover, the same extraordinary demand would likely apply to municipalities across the State. Interpreting RSA 91-A to require a case-by-case analysis of the reasonableness of searching back-up tapes would: (1) place an enormous burden on the State and municipalities; and (2) inundate DoIT and its municipal counterparts with Right-to-Know requests, preventing them from performing their basic functions. Accordingly, this Court should adopt the State's suggested analysis and remand to the superior court for further proceedings.

[7] Although, the State would dispute that documents that take four hours to convert are "readily accessible" within the definition of RSA 91-A:4, III-b.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment below.

The State requests to be heard at oral argument by sharing a portion of the time allocated to the City of Nashua. If permitted, Matthew Broadhead will present argument on behalf of the State.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

JOHN M. FORMELLA
Attorney General

ANTHONY J. GALDIERI
Solicitor General

/s/ Matthew Broadhead
Matthew Broadhead
NH Bar ID No. 19808
Senior Assistant Attorney General
Samuel Burgess
Bar No. 274685
Attorney
Transportation and Construction Bureau
New Hampshire Department of Justice
33 Capitol St.
Concord, NH 03301-6397
603-271-3671

August 16, 2022

CERTIFICATE OF COMPLIANCE

I, Matthew Broadhead, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains fewer than 9,500 words. Counsel relied upon the word count of the computer program used to prepare this brief.

August 16, 2022

/s/ Matthew Broadhead
Matthew Broadhead

CERTIFICATE OF SERVICE

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

August 16, 2022

/s/ Matthew Broadhead
Matthew Broadhead