THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2026-0030

Adele Robertson & a.

v.

Secretary of State & a.

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

BRIEF FOR THE NEW HAMPSHIRE SECRETARY OF STATE DAVID SCANLAN AND NEW HAMPSHIRE ATTORNEY GENERAL JOHN FORMELLA

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NEW HAMPSHIRE ATTORNEY GENERAL

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(Fifteen-minute oral argument requested.)

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ISSUE PRESENTED

I. Whether the superior court erred in granting the State Defendants' motion to dismiss, finding Plaintiffs failed to state a claim upon which relief could be granted.

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STATEMENT OF THE CASE AND THE FACTS

In 2024, New Hampshire's General Court, through the passage of House Bill 1569, amended RSA 659:13 to require every person voting in-person on election day to present proof of identification in order to receive a ballot. The following year, in 2025, New Hampshire's General Court, through the passage of Senate Bill 287, adopted RSA 657:17-c, which provides:

> I. Every applicant for an absentee ballot shall provide verification before being issued an absentee ballot. Verification shall be satisfied by one of the following methods:
>
> (a) Including a copy of the voter's photo identification with the absentee ballot application. The identification shall meet the requirements of RSA 659:13, II(a);
>
> (b) Including a notarized signature on the absentee ballot application form; or
>
> (c) Personally presenting a qualifying photo identification, as defined in RSA 659:13, II(a), to the city or town clerk or their designee prior to the issuance of the absentee ballot.
>
> II. No absentee ballot shall be issued unless one of the verification methods under paragraph I has been satisfied.

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Following the passage of Senate Bill 287 but before its effective date, Plaintiffs filed suit in Rockingham County Superior Court seeking declaratory and injunctive relief. Apx.3-18. Plaintiffs' complaint contained only one count which alleged that the new statutory provision violated "the

free and equal elections clause of the New Hampshire Constitution, by burdening the fundamental right to vote[.]". Apx.15-17. Specifically, Plaintiffs alleged that the new statutory requirement "imposes severe and unreasonable burdens" on the rights held by New Hampshire voters under the first sentence of Part 1, Article 11 of the New Hampshire Constitution, which provides: "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election." Apx.15-17.

The Defendants—New Hampshire's Secretary of State and Attorney General, in their official capacities—moved to dismiss. Apx.19-32. The Defendants' motion points out that, while the New Hampshire Constitution directs the legislature to provide for absentee voting in certain circumstances, that does not change the fact that absentee voting is a special accommodation and, therefore, the Legislature may reasonably limit the scope of or the terms of that accommodation without impacting an individual's fundamental right to vote. Apx.24-25. Defendants explained that: "Where, as here, the Legislature did not … impose any limit on absentee voting, but merely made it conform to the standards required of in-person voting … there is no impingement on the fundamental right to vote." *Id.* Said another way, because Plaintiffs like all citizens can vote in-person, "and there is no indication (or even allegation) that they are absolutely prohibited from voting by the State[,]" Plaintiffs can only raise a claimed violation of their fundamental right to vote if they had claimed that "the universal practice of requiring identification before" a ballot is issued is an unconstitutional burden. Apx.26-27.

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Plaintiffs filed an objection to the Defendants' Motion to Dismiss. Add.33-35. In this filing, Plaintiffs asserted for the first time that "absentee voting … is a constitutional right" under the New Hampshire Constitution. Apx.39. However, despite this passing statement, Plaintiffs offered no articulation of the contours of this alleged constitutional right, instead shifting back to discussing the established fundamental right to vote and the law applicable to restrictions placed on that right. Add.36-47.

The superior court ultimately granted Defendants' Motion to Dismiss. Add.36-38. In reaching its conclusion, the court began by finding that RSA 657:17-c's identification requirements "are not severe and do not unreasonably burden the right to vote" nor were they discriminatory in nature. Add.36-37. The court then considered the State's justifications for imposing RSA 657:17-c's identification requirements and found them to be sufficient to pass constitutional muster. Add.37-38. Plaintiffs now appeal from this order.

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SUMMARY OF THE ARGUMENT

The superior court granted Defendants' motion to dismiss finding that any burden imposed on Plaintiffs' fundamental right to vote was reasonable and nondiscriminatory, subjecting it to the lowest level of scrutiny, and that the State's justification for imposing such a burden was constitutionally sufficient. *See* Apx.36-38. This ruling was correct and should be affirmed for at least two reasons. First, the Plaintiffs have no fundamental right to vote by absentee ballot. Rational basis review therefore applies and the statute at issue is supported by a rational basis. Second, even if the *Akins/Guare* balancing test applies to absentee voting, the statue imposes a minimal burden that does not go beyond the ordinary burdens of voting. The State's compelling interests therefore outweigh the ordinary, minimal burden imposed.

Nevertheless, the Plaintiffs argue that the superior court erred by failing to credit Plaintiffs' factual allegations. *See* Appellants' Opening Brief, P.17. This argument fails because the nature of Plaintiffs' claim renders their factual allegations irrelevant and, as a substantive matter, the superior court did credit the Plaintiffs' factual allegations. Plaintiffs also argue that the superior court erred in "concluding that any state interest justified the burdens imposed by" the statutory change. *See* Appellants' Opening Brief, P.22. This argument fails because the superior court applied the *Akins/Guare* balancing test appropriately.

Accordingly, this Court should affirm the superior court's dismissal order.

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ARGUMENT

I. THE PLAINTIFFS DO NOT PROVIDE SUFFICIENT FACTS TO ALLEGE A VIOLATION OF THEIR FUNDAMENTAL RIGHT TO VOTE, NOR DO THEY REQUEST THIS COURT FIND THEY HAVE A SEPARATE FUNDAMENTAL RIGHT TO CAST AN ABSENTEE BALLOT.

It is well-established federal law that restrictions placed on absentee voting are not subject to the same level of scrutiny when challenged under the United States Constitution as restrictions place on in-person voting because absentee voting laws, "which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [persons] the exercise of the franchise." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969).

While it is true that the New Hampshire Constitution discusses absentee voting, something the federal constitution does not, that does not change the state of the law as applicable to this case because Plaintiffs do not raise a claim under the absentee voting provision of the New Hampshire Constitution, nor does the text, structure, and history of the New Hampshire Constitution support recognition of a fundamental right to vote absentee.

Part I, Article 11 of New Hampshire's Constitution contains seven sentences, each addressing a different voting-related issue. The present version[1] reads as follows:

> All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.

[1] A full discussion of how Part I, Article 11 has been amended since its inception in 1784 can be found in *Fischer v. Governor*, 145 N.H. 28 (2000).

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> Each person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile. No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses. The general court shall provide by law for voting by qualified voters who at the time of the biennial or state elections, or of the primary elections therefore, or of city elections, or of town elections by official ballot, are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person, in the choice of any officer or officers to be elected or upon any question submitted at such election. Voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election. The right to vote shall not be denied to any person because of non-payment of any tax. Every inhabitant of the state, having the proper qualifications, has equal right to be elected into office.

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This Court has previously held that the first and last sentences of Part I, Article 11 each confer an individually held fundamental right, one to vote and one to be elected to office. *See Akins v. Sec'y of State*, 154 N.H. 67 (2006); *Guare v. State*, 167 N.H. 658 (2015).

Plaintiffs' complaint initiating this litigation claims that RSA 657:17-c violates their fundamental right to vote, citing the first sentence of Article 11 which provides: "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election." Apx.15-17. In making their argument, Plaintiffs rely upon this Court's established precedent setting the standard to be applied to claimed violations of the individual fundamental rights contained in the first and last sentences of Part I, Article 11. *See Akins v. Sec'y of State*, 154 N.H. 67 (2006); *Guare v. State*, 167 N.H. 658 (2015); *N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312 (2021) (hereinafter *NHDP*). Plaintiffs fail to cite the fourth sentence related to absentee voting nor do they articulate any legal argument as to why that sentence should be read to create an individual, fundamental right to cast one's ballot absentee.

Furthermore, Plaintiffs' complaint also lacks the factual allegations to establish that they are individuals who would have such a fundamental right to vote absentee even if one existed. The Constitution directs "the general court" to "provide by law for voting by qualified voters who at the time of the … elections … are absent from the city or town of which they are inhabitants, or who by reason of physical disability are *unable* to vote in person[.]" N.H. Const. Part I, Article 11 (emphasis added). Plaintiffs allege facts sufficient to establish they are individuals with physical disabilities, as they each allege to have various levels of visual impairment. Apx.4-5. However, Plaintiffs allege no facts from which one can conclude that they are *unable* to vote in person by reason of this visual impairment. Presumably, the Plaintiffs would not be interested in arguing that one is per se unable to vote in person simply because he or she has a visual

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impairment and/or is legally blind. Plaintiffs assert no additional facts regarding their ability or inability to vote in person, particularly given the constitutional requirement that all polling places be made easily accessible to all persons with disabilities. N.H. Const. pt. I, art. 11.

Plaintiffs' appellate brief, like its complaint below, focuses on a claimed violation of their fundamental right to vote, relying upon the established case law applying a balancing test to such claims. *See* Appellant's Opening Brief.

Plaintiffs' choice to rely upon established rights, rather than to ask this Court to recognize a new fundamental constitutional right, is consistent with the text and history of the New Hampshire Constitution, which would make any alleged constitutional right to vote absentee highly suspect.

As discussed above, the language used in Part I, Article 11's fourth sentence is directed at "the general court" and obliges it to "provide by law for voting by qualified voters who at the time of the … elections … are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person[.]" N.H. Const. pt. I, art. 11. This language is notably distinct from the two sentences of Part I, Article 11 that this Court has recognized confer an individually held fundamental right as both of those sentences expressly grant to the inhabitants of the state "an equal right" to vote and to be elected to office. *See Akins v. Sec'y of State*, 154 N.H. 67 (2006); *Guare v. State*, 167 N.H. 658 (2015).

Furthermore, the historical context undercuts any suggestion that there is any individually held right, let alone a fundamental one, to vote absentee. When first adopted in 1784, Part I, Article 11 contained no

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express provision for absentee voting and provided only that "[a]ll elections ought to be free, and every inhabitant of the State, having the proper qualifications, has equal right to elect and be elected into office." *Fischer*, 145 N.H. at 32 (citing N.H. Const. pt. I, art. 11, *reprinted in The New Hampshire Manual of Useful Information* 42 (1889)). In the 1860s, the New Hampshire legislature considered enacting provisions in law to allow certain military members to vote despite being absent from their home at the time of the election. *Opinion of the Justices*, 44 N.H. 633 (1863).[2] However, the New Hampshire Supreme Court declared the concept of absentee voting to be unconstitutional. *Id.*

In reaching this conclusion, this Court explained:

> By the common law, in elections of public and municipal corporations, and in all other public elections, every vote must be personally given. … The history of the origin of the powers of towns in New-England, and of the nature and usages of their meetings, shows that in this respect the practice here, before and at the date of the adoption of the Constitution, was in accordance with the general rule of the common law. As the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption, … and as at that time, both by the common law and by the settled usage here, the right of voting for public officers was a right that must be exercised personally by the voter at the meeting held for

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[2] In substance, the legislation would have enabled every qualified voter of the State engaged in military or naval service for the State or the United States, whose name was on the check-list in the town in which he had his home and who was located outside the limits of the State as a result, to be present by his attorney and vote by ballot at elections. *Id.* at 633.

> the purpose, it follows that, if no different provision is made in the Constitution, the right of suffrage established by it is to be exercised by the voter in person, at the meetings duly held for the purpose.

Id. at 634-35.

Approximately fifty years later, in *Opinion of the Justices*, 80 N.H. 595 (1921), this Court again reaffirmed the proposition that not only were individuals not entitled to vote absentee but that the Constitution prohibited the legislature for authorizing such absentee voting.[3] As such, for the first 150 years of New Hampshire's constitutional government, not only was there not a constitutional right to vote absentee but provision for absentee voting by action of the legislature was strictly prohibited by the provisions of Part I, Article 11's granting inhabitants the equal right to vote. As this Court explained: the fact that the New Hampshire Constitution prohibits absentee voting "was settled … not only in this state but in others with similar constitutional provisions as to all offices created by the several state constitutions." *Id.* at 603.

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It is against the backdrop of this case law that, in 1942, Part I, Article 11 of the New Hampshire Constitution was amended to expressly authorize the legislature to provide for absentee voting in general elections. N.H. Const. pt. I, art. 11 (1942). The purpose and effect of this amendment was clear by its terms, granting the general court the authority

[3] In this instance, the legislature had attempted to pass a bill that would permit absent voters or those with physical disabilities rendering them unable to vote in person to vote absentee. *Id.*

to provide for absentee voting in certain circumstances, an authority they did not previously have. *Id.*

Given the structure and plain language of Part I, Article 11, as well as its history, it is unsurprising that the Plaintiffs in this case have chosen to forgo an argument that they, individually, hold a fundamental right to vote absentee. Instead, Plaintiffs argue that RSA 657:17-c violates their well-established fundamental right to vote. But this claim fails as Plaintiffs factual allegations are that the statute impedes their ability to receive an absentee ballot and not that it somehow denies them "the exercise of the franchise." *McDonald*, 394 U.S. at 807.

Absentee voting restrictions, even ones which entirely preclude certain classes of persons from voting absentee, do not—without more—implicate the fundamental right to vote. *Id.* at 808. To bring a claim that a statute burdens the exercise of the fundamental right to vote the record must contain facts supporting an assertion that people are being wholly precluded from voting and not simply precluded from receiving an absentee ballot. *Id.* Plaintiffs' complaint does not contain such facts. As discussed above, Plaintiffs allege facts sufficient to establish they are individuals with disabilities. Apx.4-5. However, they allege no facts from which one could conclude that they are unable to vote in person by reason of this visual impairment or otherwise. Consequently, Plaintiffs have failed to allege a constitutional violation. The trial court's dismissal should therefore be affirmed on this basis alone.

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II. THE SUPERIOR COURT DID NOT ERR BY FAILING TO CREDIT PLAINTIFFS' FACTUAL ALLEGATIONS.

Plaintiffs claim the superior court erred in failing to credit their factual allegations at the motion to dismiss stage. This claim fails because the factual allegations were not relevant given the nature of the facial constitutional challenge being brought and, contrary to Plaintiffs' assertion, the superior court did credit the factual allegations when ruling on the motion to dismiss.

A. Plaintiffs' claim does not turn on any individual factual allegations.

In 2021, this Court considered the standard that should be applied to facial challenges brought under the New Hampshire Constitution's fundamental right to vote provision as is the claim brought by the Plaintiffs in this case. *N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 324 (2021) (hereinafter *NHDP*). Under the standard articulated by this Court:

> [A] facial challenge is best understood as a challenge to the terms of the statute, not hypothetical applications, and is resolved simply by applying the relevant constitutional test to the challenged statute.

Id. While articulated in a slightly different manner, this standard seems to be similar to the one applied by federal courts where a plaintiff cannot succeed with a facial challenge to legislation when the law has a "plainly legitimate sweep."[4] *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

[4] When a plaintiff brings a facial challenge to a statute under the U.S. Constitution, he "cannot succeed … unless he 'establish[es] that no set of circumstances exists under which the [law] would be valid,' or he shows that the law lacks a 'plainly legitimate sweep.'" *Moody*, 603 U.S. at 723 (quoting *United States v. Salerno*, 481 U. S. 739, 745 (1987); *Washington State Grange v. Washington State Republican Party*, 552 U. S. 442,

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In resolving a facial challenge "by applying the relevant constitutional test" to the "terms of the statute"—or in determining if the statute has a plainly legitimate sweep—it is hard to understand how the individual facts and circumstances of any particular plaintiff's situation would be relevant to resolution of the case beyond perhaps when determining standing. *NHDP*, 174 N.H. at 324. Particularly in a case like this where the facial challenge to the statute has been brought pre-enforcement, the Plaintiffs' assertions regarding future "hypothetical application" are no more relevant to resolution of the appeal than hypothetical applications offered by the State. *Id.*

B. The superior court did not fail to credit Plaintiffs' factual allegations but, rather, simply disagreed with the legal conclusion that followed from those facts.

As accurately articulated by the superior court, in ruling on motions to dismiss courts are to draw all reasonable inferences in the plaintiff's favor but are not required to accept assertions that amount merely to conclusions of law. Add.32.

Plaintiffs' complaint contains a variety of factual allegations. Apx.11-13. Many of these facts are likely to be largely uncontested. For example, Plaintiffs emphasize how under RSA 657:17-c absentee voters must comply with the new statutory requirements every time they request an absentee ballet and this will require them to: (1) access technology like a

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449 (2008)). In deciding *NHDP*, this Court expressly disavowed application of the first of these standards. *NHDP*, 174 N.H. at 324. However, in application, the second of these federal standards appears to be what this Court directed and to call for parties to apply the relevant constitutional test to the challenged statute without consideration of a series of hypothetical applications. *See Washington State Grange*, 552 U. S. at 449-50 ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

photocopy machine or a camera/scanner and printer to make a physical or electronic copy of their identification; (2) access a notary, either through technology or through travel, and pay any associated fee; or (3) travel to a local municipal building in their city or town. *Id*. Plaintiffs then assert that many poor, elderly, and disabled/visually impaired individuals will find these burdens difficult to overcome because they cannot drive, have limited money or transportation, may not use credit cards, and are generally less efficient with technology.[5] *Id.*

The superior court's order does not repeat all these factual allegations. Add.36-37. However, it also does not ignore or otherwise fail to credit them. Instead, the superior court simply rejected the Plaintiffs' legal claim that these burdens were severe and instead concluded that the burdens were ordinary, reasonable, and non-severe. *Id.* This is a legal conclusion and a reasonable one at that. The United States Supreme Court has explained that the burdens associated with obtaining a photo identification are nothing more than ordinary burdens easily justified by a State's compelling interest in safeguarding voter confidence by checking voter qualifications and preventing voter fraud. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191-98 (2008). Obtaining a photo identification usually requires a person to produce relevant paperwork and appear at a government office, and it is of the same type as the ordinary burden complained of in this case. As such, both burdens are easily overcome by the same compelling government interests.

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[5] It is worth noting that Plaintiffs do not raise any claim that getting an identification itself imposes a severe burden on their right to vote.

While Plaintiffs talk extensively about how some voters may struggle with technology, this overlooks the ubiquitous nature of the technology at issue here. The technology implicated is not complicated new technology but rather commonly used devices such as printers or copy machines.[6] Furthermore, as the superior court pointed out, the statute provides for three alternative options for absentee voters such that a voter who finds compliance with any one option to be difficult, he or she may use another. For example, voters who find it difficult to access even ubiquitous technology such as a printer or copy machine to make a physical copy of their identification, can instead travel to their local municipal building during normal business hours.

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III. THE JUSTIFICATION FOR RSA 657:17-c WAS SUFFICIENT TO PASS CONSTITUITONAL MUSTER.

The State does not concede that it is appropriate to apply the *Akins*/*Guare* balancing test applicable to burdens imposed on an individual's fundamental right to vote when the individual challenges a regulation of absentee voting as discussed earlier. *See McDonald*, 394 U.S. at 807-08. However, even if such a balancing test applied, the superior court did not err in finding RSA 657:17-c constitutional.

As discussed in the above section, any burden placed on voters by RSA 657:17-c is reasonable, nondiscriminatory, and ordinary; it is not

[6] New Hampshire has a specific process in place to accommodate individuals with print disabilities which allows those individuals to complete their ballots on the computer. *See* N.H. Secretary of State, Voting with Disabilities, ttps://www.sos.nh.gov/elections/voting-disabilities (last visited 5/28/26). This accommodation, specifically designed for individuals like the plaintiffs with visual impairment, requires the use of the kind of ubiquitous technology at issue here like a home printer. *Id.*

severe. It is reasonable to require voters wishing to vote absentee to access ubiquitously available technology like printers and copy machines, to travel to a local town office during normal business hours, or to access a notary. Like the need to get an identification in the first place, this is a minor, ordinary administrative burden. As such, "the State's important regulatory interests are generally sufficient to justify the" imposition of such a burden. *NHDP*, 167 N.H. at 663 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Additionally, ensuring public confidence and legitimacy in elections is a significant governmental interest. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

RSA 657:17-c was designed to bring the identification requirements for voters requesting a ballot to vote absentee more closely in line with the identification requirements for voters requesting a ballot in person on election day. N.H.H.R. Jour. Vol. 47, No.16, at 132 (June 5, 2025) (discussing SB 287). These identification requirements help safeguard the electoral process by helping to confirm important voter qualifications and deterring voter fraud. These are just the kind of "important regulatory interests" that justify the imposition of reasonable, nondiscriminatory burdens, particularly in situations such as this where the reasonable, nondiscriminatory burden will enhance public confidence in the legitimacy of New Hampshire's elections.

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CONCLUSION

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

The State requests a fifteen-minute oral argument to be offered by Senior Assistant Attorney General Mary A. Triick.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Mary A. Triick, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,318 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.

May 29, 2026 */s/ Mary A. Triick*
Mary A. Triick

CERTIFICATE OF SERVICE

I, Mary A. Triick, hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them.

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May 29, 2026 */s/ Mary A. Triick*
Mary A. Triick