

THE STATE OF NEW HAMPSHIRE

GRAFTON, ss

SUPERIOR COURT

No. 215-2001-CR-199, 200

STATE OF NEW HAMPSHIRE

v.

ROBERT TULLOCH

**PARTIALLY ASSENTED-TO MOTION OF THE
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE,
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS INCLUDING ITS NEW
HAMPSHIRE CHAPTER, THE DISABILITY RIGHTS CENTER-NH,
THE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND
NEW HAMPSHIRE LEGAL ASSISTANCE
FOR LEAVE TO FILE A MEMORANDUM OF LAW
AS AMICI CURIAE IN SUPPORT OF DEFENDANT**

NOW COME the American Civil Liberties Union of New Hampshire (“ACLU-NH”), the National Association of Social Workers including its New Hampshire Chapter (“NASW”), the Disability Rights Center-NH (“DRC-NH”), the New Hampshire Association of Criminal Defense Lawyers (“NHACDL”), and New Hampshire Legal Assistance (“NHLA”), and hereby submit this Partially Assented-to Motion for Leave to File a Memorandum of Law as *Amici Curiae* in support of the Defendant’s argument that the New Hampshire Constitution prohibits the imposition of a sentence of life in prison without the chance for parole on a defendant whose offense was committed as a child, prior to the age of 18. Furthermore, as explained in the brief, even if a life without parole sentence is not imposed, this Court should not impose a sentence of such a length that it is a *de facto* life sentence where the defendant is effectively denied “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *See Graham v*

Florida, 560 U.S. 48, 75 (2010). This proposed brief is attached as Exhibit 1. The Defendant assents to this motion. The State of New Hampshire objects.

In support, proposed *Amici Curiae* states as follows:

1. The ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union (“ACLU”)—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.7 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under the United States and New Hampshire Constitutions, as well as under our state and federal civil rights laws. In cases across the country, including before the United States Supreme Court and the New Hampshire Supreme Court, the ACLU-NH and ACLU have asserted that allowing children to be treated and punished as adults is contrary to the global consensus that children should not be held to the same standards of responsibility as adults. This work has included the submission of *amicus* briefs by the ACLU-NH in *In re State of N.H.*, 166 N.H. 659 (2014) (holding that four inmates [including Defendant], who had received mandatory sentences of life without parole for first-degree murders committed when they were 17, were entitled to the retroactive benefit of the *Miller* rule in postconviction proceedings) and the ACLU in *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that death penalty may not be applied to juvenile offenders) and *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013) (holding that the discretionary imposition of a sentence of life imprisonment without the possibility of parole on juvenile homicide offenders violates the Massachusetts Declaration of Rights “because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders”).

2. The National Association of Social Workers (NASW), including its New Hampshire Chapter, is the largest association of professional social workers in the U.S. with 110,000 members and 55 chapters. NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education, develops and enforces the *NASW Code of Ethics*, and develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW supports the elimination of the imposition of life sentences without the possibility of parole for juveniles convicted of a capital offense in an adult court.¹ NASW also supports legislative and judicial action applying the principles of *Miller v. Alabama*, 567 U.S. 460 (2012) to prohibit the imposition of a life sentence without parole on minors. NASW participated in an amicus brief to the U.S. Supreme Court in *Miller v. Alabama*, filed by the American Psychological Association and joined by several other professional mental health provider groups, which addresses the scientific research demonstrating the fundamental differences between juvenile and adult minds, as well as the fact that juveniles have greater immaturity, vulnerability, and changeability than adults.

3. DRC-NH protects, advances, and strengthens the legal rights and advocacy interests of all people with disabilities. DRC-NH provides information, referral, advice, legal representation, and advocacy to individuals with disabilities on disability-related issues including education, juvenile justice, access and accommodation, employment and housing discrimination, voting, home and community-based services, and Medicaid. As part of its mission, DRC-NH monitors and investigates facilities that care for people with disabilities to ensure that conditions

¹ NASW Policy Statement: Juvenile Justice and Delinquency Prevention, Social Work Speaks 198, 202 (11th ed. 2018).

are protective of their rights. DRC-NH seeks to have the justice system, including the juvenile justice system, and department of corrections, place people with disabilities in the least restrictive setting with proper services and supports, including education. For these reasons, DRC-NH seeks to avoid juveniles receiving life sentences. More information about DRC-NH can be found at www.drcnh.org.

4. NHACDL is a voluntary, professional association of the criminal defense bar in New Hampshire. Founded in 1988, NHACDL is the largest independent statewide organization devoted to criminal defense. It has approximately 250 attorney members, including state court public defenders, federal defenders and private practitioners. Collectively, NHACDL's members practice in every courthouse in the state and handle every type of criminal case. NHACDL is an affiliate of the National Association of Criminal Defense Lawyers. NHACDL's ultimate mission is to ensure, safeguard and promote the effective assistance of counsel in criminal cases and to represent the interests of criminal defendants by seeking to preserve the fairness and integrity of the criminal legal system. NHACDL also takes public policy positions on issues of importances to the criminal legal system. Thus, when a judicial decision is likely to impact the fairness of future criminal adjudications, NHACDL will take a stand. The issues presented in this case are of direct concern to NHACDL, its members and their clients.

5. NHLA is a non-profit law firm working to make justice a reality for and with people who experience economic hardship that threatens their basic human needs. Through representation and systemic advocacy, NHLA offers civil legal aid that addresses the effects and root causes of poverty. NHLA has played two key roles which inform its work as a co-amicus in this case. First, NHLA's Youth Law Project ensures that at-risk children and youth have access to the community-based education and services they need to finish high school and to minimize their likelihood of

lifelong criminal involvement. Life sentences without the possibility of parole deny these children the opportunity to rehabilitate from their mistakes and become productive adults. Second, for four decades, NHLA has represented inmates (male and female) in efforts to improve conditions of confinement, facilities, programs, and services in New Hampshire's state prisons. That advocacy has given NHLA a detailed picture of the conditions of confinement that inmates face. Thus, NHLA has a unique perspective to serve as co-amicus for individuals seeking to avoid life sentences in those same prisons.

6. Because the ACLU-NH, the NASW, DRC-NH, NHACDL, and NHLA have a longstanding interest in ensuring that children are not treated as adults in the criminal justice system, this case is of concern to these organizations. Proposed *Amici Curiae* believe that their experience in the legal issues surrounding these issues will make their brief of service to the Court. *See also* N.H. Sup. Ct. R. 30(2) ("The motion shall concisely state the nature of the movant's interest, the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.").

7. The State of New Hampshire will suffer no prejudice from the submission of this brief. It can respond to any arguments presented in this *amicus* brief if and when it responds to Defendant's February 20, 2024 Pre-hearing Memorandum. Further, trial courts in both the New Hampshire state and federal system often exercise their discretion to accept *amicus* briefs because such briefs can illuminate certain issues present before the court and where the outcome of a trial court's ruling may have a significant impact on interested non-parties to the case. *See State v. Bergeron*, No. 211-2019-cr-00163 (Belknap Cty. Super. Ct. June 12, 2020) (granting assented-to motion to file *amicus* brief), attached as Exhibit 2 (with case summary); *Estate of Hagen Esty-Lennon v. State of New Hampshire*, No. 217-2015-cv-00376 (Merrimack Cty.

Superior Court Apr. 4, 2015) (granting assented-to motion to file a memorandum of law as *amicus curiae*), attached as Exhibit 3 (with case summary); *Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC et al.*, No. 1:22-cv-00078 (D.N.H. May 25, 2022) (federal district court granting partially assented-to motion to file an *amicus* brief even in the absence of district court local rules discussing *amicus* brief procedures), attached as Exhibit 4 (with case docket); *Spofford v. NHPR*, No. 218-2022-cv-00803 (Rockingham Cty. Super. Ct. Jan. 26, 2023) (granting contested partially-assented-to motion by ACLU-NH to file *amicus* brief), attached as Exhibit 5; *accord Portland Pipe Line Corp. v. City of S. Portland*, No. 2:15-cv-00054-JAW, 2017 U.S. Dist. LEXIS 2592, at *14 (D. Me. Jan. 9, 2017) (“In dealing with *amici* motions, this Court has elected to follow the practical advice of then-Judge Samuel Alito, who essentially suggested that, assuming the other criteria are met, the court could grant the motion for leave to file an *amicus* brief and take the brief for what it is worth.”).

8. Further, as such briefs are allowed and deemed valuable at the New Hampshire Supreme Court, it follows that such briefs can be similarly valuable before the state trial courts in New Hampshire. *See* N.H. Sup. Ct. R. 30(1) (“A brief of an *amicus curiae* may be filed only after leave is granted by order of the supreme court on motion or when accompanied by written consent of all parties to the case.”). ACLU-NH has, since June 2013, filed approximately 20 accepted *amicus* briefs with that Court on important civil rights and constitutional issues. Those briefs, like the one here, were written by the ACLU-NH and other signatories.

4. Defendant assents to this motion. The State of New Hampshire objects.

5. Accordingly, the *Amici* submit the attached brief for this attached as Exhibit 1.

WHEREFORE, the *Amici* request that this Honorable Court grant it leave to file the *Amicus Curiae* brief attached as Exhibit 1.

Date: August 6, 2024

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
FOUNDATION, THE NATIONAL ASSOCIATION OF SOCIAL
WORKERS, DISABILITY RIGHTS CENTER-NH, NEW
HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, AND NEW HAMPSHIRE LEGAL ASSISTANCE,

By their attorneys,

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Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record.

/s/ Henry Klementowicz
Henry Klementowicz

August 6, 2024

Proposed Amicus Brief

THE STATE OF NEW HAMPSHIRE

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v.

ROBERT TULLOCH

BRIEF OF *AMICI CURIAE*
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IN SUPPORT OF DEFENDANT

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Interests of Amicus Curiae

The ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union (“ACLU”)—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.7 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under the United States and New Hampshire Constitutions, as well as under our state and federal civil rights laws. In cases across the country, including before the United States Supreme Court and the New Hampshire Supreme Court, the ACLU-NH and ACLU have asserted that allowing children to be treated and punished as adults is contrary to the global consensus that children should not be held to the same standards of responsibility as adults. This work has included the submission of *amicus* briefs by the ACLU-NH in *In re State of N.H.*, 166 N.H. 659 (2014) (holding that four inmates, who had received mandatory sentences of life without parole for first-degree murders committed when they were 17, were entitled to the retroactive benefit of the rule in *Miller v. Alabama*, 567 U.S. 460 (2012), in postconviction proceedings) and the ACLU in *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that death penalty may not be applied to juvenile offenders) and *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013) (holding that the discretionary imposition of a sentence of life imprisonment without the possibility of parole on juvenile homicide offenders violates the Massachusetts Declaration of Rights “because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders”). Because the ACLU-NH has a longstanding interest in ensuring that children are not treated as adults in the criminal justice system, this case is of concern to the ACLU-NH, as well as its members and supporters.

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the opportunity to rehabilitate from their mistakes and become productive adults. Second, for four decades, NHLA has represented inmates (male and female) in efforts to improve conditions of confinement, facilities, programs, and services in New Hampshire's state prisons. That advocacy has given NHLA a detailed picture of the conditions of confinement that inmates face. Thus, NHLA has a unique perspective to serve as co-amicus for individuals seeking to avoid life sentences in those same prisons.

Introduction

In New Hampshire, a sentence of life in prison without the possibility of parole is the most severe punishment available under the law. In this case, the State of New Hampshire may be seeking such a sentence for a defendant who committed a crime while he was a child.

Despite decades of consensus that children are less culpable than adults and more capable of change and rehabilitation, New Hampshire to this day allows for the imposition of this irrevocable punishment on juveniles before the age of 18 if they are certified as an adult—including when the person was as young as 13. In allowing for this uniquely harsh sentencing practice, New Hampshire is now a clear national and international outlier. No country in the world other than the United States allows children to be sentenced to life in prison without the possibility of parole. Within the United States, a majority of states have now eliminated this punishment, and it has become exceedingly rare. New Hampshire is among just a handful of states that allows for the imposition of such a sentence. Moreover, judges who are asked to impose this sentence both in New Hampshire and in the minority of states that still allow this practice are forced into a game of impossible guesswork, attempting to forecast who will turn out to be “irreparably corrupt” or “permanently incorrigible”—a prediction that even expert psychologists cannot make with any

confidence or reliability. The result is that a defendant who was a child when the offense was committed faces a sentence that not only is exceedingly severe, but also largely arbitrary.

The punishment of youth in this way is intolerable in a civilized society. It does not serve the state's interests, it undermines respect for the rule of law, and it denies children who are capable of change the opportunity to ever demonstrate their rehabilitation. The New Hampshire Constitution—and specifically its prohibition on cruel or unusual punishment—was written to protect the people of our state, including our children, from such a practice. The time has come to do away, once and for all, with sentencing children in New Hampshire to die in a prison cell with no hope of ever being even considered for release.

Legal Background

Defendant was 17 years old at the time of his offense, which occurred in 2001. He has been incarcerated for over 23 years, and he is now 40 years old. In the over two decades since his offense, “the evolving standards of decency that mark the progress of a maturing society,” *Estelle v Gamble*, 429 US 97, 102 (1976), have led to a sea change in the way children are treated in our criminal justice system. At the federal constitutional level, a trio of groundbreaking United States Supreme Court cases—*Roper v Simmons*, 543 U.S. 551 (2005), *Graham v Florida*, 560 U.S. 48 (2010), and *Miller v Alabama*, 567 U.S. 460 (2012)—led the way.

First, in *Roper*, the United States Supreme Court held that the Eighth Amendment prohibits our country's most severe sentence, the death penalty, from being imposed on those who were under the age of 18 when their crimes were committed. In reaching this holding, the Court noted that a majority of states had rejected the imposition of the death penalty on children. *Roper*, 543 U.S. at 568. And the Court recognized the growing consensus of scientific and sociological research demonstrating that children are categorically different from adults: their “lack of maturity

and an underdeveloped sense of responsibility,” resulting in impetuous and reckless behavior; their heightened vulnerability to negative outside influences such as peer pressure and a lack of control over their own environment; and that their character and personality traits are “more transitory” and “less fixed,” such that even a heinous crime is not conclusive evidence of an “irretrievably depraved character” incapable of reform. *Id.* at 569-570. In light of these differences, the Court concluded that the penological justifications for the death penalty apply with less force to youth, as “retribution is not proportional if law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, or a substantial degree, by reasons of youth and immaturity,” and “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.” *Id.* at 571. The Court further concluded that a categorical prohibition was needed rather than a case-by-case approach, as in any given case “an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth,” and because “it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 573. The Court noted, as well, “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,” which is prohibited by international agreements and authorities. *Id.* at 575.

Next was *Graham*, in which the Supreme Court applied a similar framework and rationale to hold that sentences of life without the possibility of parole are categorically unconstitutional for those convicted of non-homicide offenses committed before the age of 18. As the Court later summarized:

[*Graham*] emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile

offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.

Similarly, incapacitation could not support the life-without-parole sentence . . . [because] [d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. [*Miller*, 567 U.S. at 472-473 (cleaned up).]

Finally, in *Miller*, the Court reaffirmed that “children are constitutionally different from adults for purposes of sentencing,” *id.* at 471, and held that any statutory scheme that mandates a life-without-parole sentence for an offense committed before the age of 18 is unconstitutional. The Court reasoned that when the punishment is mandated, courts are unable to consider (i) the youth's “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”; (ii) “the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional”; (iii) “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him”; (iv) “that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys”; and (v) “the possibility of rehabilitation even when the circumstances most suggest it.” *Id.* at 477-478. These factors, the Court held, counsel against irrevocably sentencing a child to a lifetime in prison, and must be considered by the sentencing court. *Id.* at 480. Although the Court did not categorically ban life-without-parole sentences for youth under the Eighth Amendment, it stated that appropriate

occasions for imposing the sentence would be uncommon. “That is especially so,” the Court observed, “because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 479-480.

Since *Miller*, the Supreme Court has twice more addressed life-without-parole sentencing for youth. In *Montgomery v Louisiana*, 577 U.S. 190, 195 (2016), the Court held that *Miller* must be applied retroactively, emphasizing that, under the Eighth Amendment, “a lifetime in prison is a disproportionate sentence for all but the rarest of children” and may be imposed, if at all, only on youth “whose crimes reflect irreparable corruption.” Most recently, in *Jones v Mississippi*, 141 S. Ct. 1307 (2021)—although the Court held that “a separate factual finding of permanent incorrigibility” was not required by the Eighth Amendment to impose a life-without-parole sentence—the Court reaffirmed that youth and its attendant characteristics must be considered as mitigating factors, and specifically noted that “states may impose additional sentencing limits” and ultimately “may categorically prohibit life without parole for all offenders under 18.” *Id.* at 1323.

I. A Discretionary Sentence Of Life Imprisonment Without The Possibility Of Parole For A Juvenile Defendant Violates Part I, Article 33 Of The New Hampshire Constitution.

Under New Hampshire’s system that existed in 2001 when Defendant committed his offense, 17-year-old children charged with first-degree murder were automatically tried as adults. In New Hampshire, upon conviction of first-degree murder, these children were required to be sentenced to life imprisonment without eligibility for parole. See RSA 630:1-a, III. While *Miller* categorically struck down this regime mandating a sentence of life imprisonment for children convicted of first-degree murder, the *Miller* Court stopped short of categorically finding all juvenile-life-without-parole sentences unconstitutional. The Court observed that, “given all that

we have said in *Roper*, *Graham*, and *Miller* about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Miller*, 567 U.S. at 479. But the Court left open the possibility of this “uncommon” sentence in New Hampshire and elsewhere. Here, *amicus curiae* urge this Court to take one step beyond *Miller* and find as a categorical matter that life without parole sentences for juveniles violate Part I, Article 33 of the New Hampshire Constitution.

A. Article 33 Of The New Hampshire Constitution Provides Greater Protections Than The Eighth Amendment.

Established in 1783, Part I, Article 33 of the New Hampshire Constitution states that “[n]o magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.” N.H. Const. pt. I, art. 33 (emphasis added). Part I, Article 33 provides greater protections than those provided by the Eighth Amendment.²

Such a conclusion is not unprecedented. This Court has long had a tradition of interpreting the New Hampshire Constitution as affording greater protection in various circumstances. *See State v. Mack*, 173 N.H. 793, 814, 816 (2020) (“given the substantial linguistic differences between the First Amendment and Part I, Article 5, we should not rely heavily on federal precedent when interpreting Part I, Article 5”; “In reaching this conclusion, we are not alone. Other state supreme

² The New Hampshire Supreme Court has not yet determined whether Article 33 affords greater protection than the Eighth Amendment, but has assumed, without deciding, that Article 33 is broader than the Eighth Amendment. *See State v. Addison*, 165 N.H. 381, 565 (2013) (“The defendant argues that because Article 33 prohibits punishments that are ‘cruel or unusual,’ we ought to interpret it as affording greater protection than the Eighth Amendment’s prohibition against punishments that are ‘cruel and unusual’ We need not decide this issue because, even assuming Part I, Article 33 affords greater protection than does the Eighth Amendment, application of settled principles for construing our State Constitution leads us to reject the defendant’s facial challenge under Part I, Article 33.”).

courts have also concluded that their state constitutions provide greater protection for the free exercise of religion than does the Free Exercise Clause of the Federal Constitution.”); *Opinion of the Justices (Breath Test Samples)*, 160 N.H. 180, 186-87 (2010) (greater protection under New Hampshire Constitution than under Federal Due Process Clause); *State v. Veale*, 158 N.H. 632, 638-39 (2009) (greater protection under New Hampshire Constitution’s due process guarantee than under U.S. Constitution in competency context); *State v. Beauchesne*, 151 N.H. 803, 812 (2005) (greater protection under New Hampshire Constitution than under Fourth Amendment); *State v. Fleetwood*, 149 N.H. 396, 405 (2003) (greater protection under New Hampshire Constitution in *Miranda* context); *State v. Roache*, 148 N.H. 45, 49 (2002) (“The relevant text of Part I, Article 15 is broader than the Fifth Amendment.”); *State v. McLellan*, 146 N.H. 108, 115 (2001) (greater due process protections under New Hampshire Constitution); *State v. Pellicci*, 133 N.H. 523, 532-533 (1990) (police use of dogs to smell for contraband is a search under Part I, Article 19, but not under the Fourth Amendment); *State v. Ball*, 124 N.H. 226, 234-35 (1983) (construing Part I, Article 19 broader than the Fourth Amendment).

The reason to invoke this tradition here is that the text of Article 33, itself, is broader than the Eighth Amendment. While the Eighth Amendment prohibits punishments that are “cruel and unusual,” Article 33 of the New Hampshire Constitution prohibits punishments that are “cruel or unusual.” Courts in multiple jurisdictions have attributed significance to Article 33’s use of the disjunctive, as it indicates a prohibition on two types of punishments: those that are cruel and those that are unusual. The Eighth Amendment’s use of the conjunctive indicates that it prohibits only one category of punishment: those that are cruel and unusual. See *People v. Carmony*, 127 Cal. App. 4th 1066, 1085 (Ct. App. 2005) (describing difference between “or” and “and” as “purposeful and substantive, rather than merely semantic”); *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000)

(“used of the word ‘or’ instead of ‘and’ in the Clause indicates that the framers [of the Florida Constitution] intended that both alternatives (i.e. ‘cruel’ and ‘unusual’) were to be embraced individually and disjunctively within the Clause’s proscription”); *State v. Mitchell*, 577 N.W.2d 481, 488, 490 (Minn. 1998) (describing difference in wording as “not trivial”).³ As a matter of plain English, as well as the New Hampshire Supreme Court’s prior precedents,⁴ there is no question that the disjunctive “or” is distinct from the conjunctive “and”; this distinction matters and must be given meaning. *See Hale v. Everett*, 53 N.H. 9, 125 (1868) (“In written constitutions, the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated.”) (internal quotations omitted).⁵ And this linguistic distinction, without more, provides a basis for this Court to depart from analogous U.S. Supreme Court decisions interpreting the Eighth Amendment.

Given that the very text of Article 33 confers greater protection than the Eighth Amendment, this Court must then determine whether even a discretionary imposition of a lifetime sentence, without the possibility of parole, on juvenile offenders convicted of first-degree murder

³ *But see State v. Kido*, 654 P.2d 1351, 1353 n.3 (Haw. Ct. App. 1982) (difference “appears to be only one of form and not of substance”); *Thomas v. State*, 634 A.2d 1, 10 n.5 (Md. 1993).

⁴ *See, e.g., In re Hoyt*, 143 N.H. 533, 536 (1999) (“The statute’s use of the disjunctive term ‘or’ manifests an intent that either provision be available as a basis for license qualification.”); *Unit Owners Ass’n of Summit Vista Lot 8 Condo. v. Miller*, 141 N.H. 39, 45 (1996) (“We find that the use of the disjunctive ‘or’ manifests a clear intent to award multiple damages for either knowing or willful acts.”); *State v. Wong*, 125 N.H. 610, 618 (1984) (“The legislature’s use of the disjunctive ‘or’ in the body of the negligent homicide statute to distinguish section I and section II of the statute, RSA 630:3, evinces a clear intent to require proof of either section I or section II of the statute in order to sustain a conviction of negligent homicide.”)

⁵ Since the Federal Constitution, including much of the Bill of Rights, was modeled on the Massachusetts Constitution (which, itself, was a model for the New Hampshire Constitution)—*see, e.g., Commonwealth v. Upton*, 476 N.E.2d 548, 555 (Mass. 1985)—we may infer that “or” was changed to “and” in the Eighth Amendment based on a conscious choice to require a greater showing before a punishment could be found unconstitutional at the federal level.

violates the New Hampshire Constitution. For at least the four reasons below, this Court should find that it does.⁶

B. Life-Without-Parole Sentences For Juveniles Are “Unusual.”

The inquiry into the current state of the “evolving standards of decency that mark the progress of a maturing society” supports the conclusion that any sentence imposed on a juvenile of lifetime imprisonment without the possibility of parole is “unusual” and therefore violates Article 33. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (articulating evolving standard of decency test); *see also State v. Evans*, 127 N.H. 501, 504 (1985) (citing *Trop* standard as “useful backdrop for analysis” of New Hampshire’s constitutional law claim); *Addison*, 165 N.H. at 567 (stating that “we have never determined whether this [‘evolving standards of decency’] inquiry [under *Trop*] is applicable to our State Constitution,” but assuming, without deciding, that this analysis applies).

With respect to the appropriateness of such sentences, the world is no longer evolving. It has evolved. There is a “global consensus” that has condemned the practice of putting children in prison for the rest of their lives without any opportunity for parole. *See Graham*, 560 U.S. at 80 (“A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice.”) (emphasis added). Currently, the United States stands alone in permitting juvenile-life-without-parole sentences.⁷ No person is known to be serving such a

⁶ Even if the Court does not find Article 33 to be more expansive than the Eighth Amendment, it must still find such a sentence unconstitutional, as it is both “cruel” *and* “unusual” as explained in more detail below.

⁷ Notwithstanding the U.S. Supreme Court’s assessment of Israeli law in *Graham*, Israel has made it clear that, although it permits juveniles to be given life sentences, juveniles will be considered for parole in all instances. *See* C. de la Vega and M. Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 1002-04 (2008) (“The authors have received official clarification and commitment from the Israeli government that its laws allow for

sentence anywhere in the world other than the United States. *See Graham*, 560 U.S. at 81 (“As we concluded in *Roper* with respect to the juvenile death penalty, the United States now stands alone in a world that has turned its face against life without parole for juvenile nonhomicide offenders.”) (internal quotations omitted); C. de la Vega and M. Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 986-87 (2008) (“Based on the authors’ research, there is only one country in the world today that continues to sentence child offenders to LWOP terms: the United States.”); Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole: Unusual. Unequal.* (Nov. 2023), p. 5, <https://cfsy.org/wp-content/uploads/Unusual-Unequal-JLWOP.pdf> (“the United States is the only country in the world that permits JLWOP as a sentencing option”).⁸

Indeed, consistent with *Jones*’ command “states may impose additional sentencing limits” and ultimately “may categorically prohibit life without parole for all offenders under 18,” *Jones*, 141 S. Ct. at 1323, other states’ practices have indeed shifted, remarkably and significantly, when it comes to life-without-parole sentencing for youth. At the time *Miller* was decided in 2012, all but five jurisdictions either mandated or allowed the sentence.⁹ But in the decade since, the majority of states have come to reject it. Thirty-three states plus the District of Columbia have

parole review of juvenile offenders serving life terms, even those sentenced for political or security crimes in the Occupied Territories, those children for which the authors were most concerned.”).

⁸ These sentences are contrary not just to international practice, but to international treaties and laws. For example, the U.N. Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, explicitly prohibits juvenile life without parole sentences. *See* U.N. Convention on the Rights of the Child, art. 37, 1577 U.N.T.S. 3 (Nov. 20, 1989). Similarly, the prohibition of these sentences has been recognized as an obligation of the International Covenant on Civil and Political Rights, which the United States ratified in 1992. *See* International Covenant on Civil and Political Rights, art. 14(4), 999 U.N.T.S. 17 (Dec. 19, 1966).

⁹ Campaign for the Fair Sentencing of Youth, *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Youth* (2018), p. 5, <https://cfsy.org/wp-content/uploads/Tipping-Point.pdf>.

either abolished the sentence or have no one serving it, including through judicial action.¹⁰ See, e.g., *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) (holding that a sentence of life without the possibility of parole for a juvenile offender violated Iowa Const. art. I, § 17); *Diatchenko v. District Attorney for Suffolk*, 1 N.E.3d 270, 276, 285-88 (Mass. 2013) (holding that, under Article XXVI of the Massachusetts Declaration of Rights, “the discretionary imposition of ... a sentence [of life in prison without the possibility of parole] on juvenile homicide offenders also violates art. 26 because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders”); *State v. Bassett*, 428 P.3d 343 (Wash. 2018) (holding that a defendant sentenced under Wash. Rev. Code § 10.95.030 to consecutive life sentences without parole or early release for three counts of aggravated first degree murder that he committed when he was 16 years old was entitled to resentencing because the sentences constituted cruel punishment in violation of Wash. Const. art. I, § 14); *State v. Kelliher*, 873 S.E.2d 366 (N.C. 2022) (holding that it violates both U.S. Const. amend VIII and N.C. Const. art. I, § 27 to sentence a juvenile homicide offender who has been determined to be neither incorrigible nor irredeemable to life without parole).

State legislatures have led the way as well. This state legislative trend away from juvenile-life-without-parole sentencing was especially pronounced in the immediate wake of the Supreme Court’s 2012 *Miller* decision:

- In February 2013, the Governor of Wyoming signed legislation abolishing life-without-parole sentencing for children. See 2013 Wyoming Laws ch. 18 (H.B.

¹⁰ Campaign for the Fair Sentencing of Youth, *States That Ban Life Without Parole for Children*, <https://cfsy.org/media-resources/states-that-ban-jvenile-life-without-parole/> (accessed June 28, 2024) (“As of 2023, a majority of US states have banned juvenile life without parole (JLWOP). In total, 33 States and DC have banned or have no one serving life without parole for children.”); *Juvenile Life Without Parole: Unusual. Unequal.*, *supra*, p. 3 (“Today, 28 states have completely banned the practice, representing a complete flip of the number of states that legally accepted the practice to those that legally abolish it.”).

23)¹¹; *see also* Wyo. Stat. § 6-10-301 (“[a] person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration”).

- While Texas had abolished life-without-parole sentences for most children prior to *Miller*, it still remained a viable sentencing option for 17 year olds. In July 2013, Texas eliminated juvenile life-without-parole sentences as a punishment option for 17 year olds and replaced it with a mandatory minimum sentence of 40 years. Acts 2013, 83rd Leg., 2nd C.S., ch. 2 (S.B. 2); *see also* Tex. Penal Code § 12.31(a)(1); Tex. Gov’t Code 508.145(b) (“[a]n inmate serving a life sentence under Section 12.31(a)(1), Penal Code, for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years.”); *see also* “12 Texas Inmates are Serving Banned Juvenile Life Sentence,” CBS News (July 31, 2017), <https://www.cbsnews.com/texas/news/12-texas-inmates-banned-juvenile-life-sentence/> (“State lawmakers in 2009 passed legislation banning life without parole for offenders 16 and younger and then, four years later, prohibited the sentence for 17-year-olds as well. The law now mandates a sentence of life with the opportunity for parole after 40 years for juveniles who commit certain crimes — but some advocates say even that is too long.”).
- Just three weeks after *Miller*, the Governor of Iowa commuted 38 such sentences.¹²
- In 2012, California passed the Fair Sentencing of Youth Act, which retroactively provides re-sentencing and parole opportunities to nearly all of 300 defendants serving life without parole sentences that they received as children. *See* 2012 Cal. Legis. Serv. Ch. 828 (S.B. 9) (West), <https://legiscan.com/CA/bill/SB9/2011>; *see*

¹¹ *See* Campaign for the Fair Sentencing of Youth, *Wyoming Abolishes Life Without Parole for Children* (2013), <https://cfsy.org/wyoming-abolishes-life-without-parole-for-children/#:~:text=Wyoming%20Governor%20Matt%20Mead%20signed,for%20children%20in%20that%20state.>

¹² The Governor of Iowa commuted the sentences of all these individuals to 60 years imprisonment before eligibility for parole. *See* James Q. Lynch, et al., “Branstad commutes life sentences for 38 Iowa juvenile murderers,” *The Gazette (Cedar Rapids)* (July 16, 2012), *available at* <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/>. With respect to one defendant, a 60-year sentence was deemed the functional equivalent of a life sentence without the possibility of parole in violation of *Miller*’s requirement for an individualized sentencing hearing. *State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) (“[T]he unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time [W]e hold [that] *Miller* applies to sentences that are the functional equivalent of life without parole. The commuted sentence in this case is the functional equivalent of a life sentence without parole.”).

also Cal. Pen. Code § 1170(d)(1)(A) (“When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing.”).

- In 2012, North Carolina and Pennsylvania passed laws abolishing juvenile-life-without-parole sentencing in second-degree and felony murder cases. See 2012 N.C. Sess. Laws 148 (S.B. 635), <https://www4.ncleg.net/EnactedLegislation/SessionLaws/HTML/2011-2012/SL2012-148.html>; 2012 Pa. Laws. 1655 (S.B. 850); see also 18 Pa. Cons. Stat. § 1102.1(c).

See also Def.’s Pre-Hearing Memo., at pp. 10-11 (listing other states). Especially in light of *Miller*, it is clear that an already “unusual” practice is quickly becoming more and more “unusual” even in the United States, the world’s one outlier country.¹³

And for those states that continue to impose this sentence on youth, it is exceedingly rare: only 12 states have imposed it at all from 2018 to 2023 (for a total of 65 cases), and only four states have imposed it more than five times during that five-year time frame.¹⁴ Those states are Alabama, Georgia, Mississippi, and Michigan.¹⁵ If New Hampshire were to impose a life without parole sentence here, New Hampshire would join this minority of states and become a national

¹³ There is, of course, no “majority rule” requirement for a practice to be considered constitutionally “unusual” under either the New Hampshire or U.S. Constitution. See, e.g., *Graham*, 560 U.S. at 62 (holding life-without-parole sentence for non-homicide juvenile offenders is unconstitutionally “cruel and unusual” notwithstanding the fact that 39 states utilized the practice).

¹⁴ *Juvenile Life Without Parole: Unusual. Unequal.*, *supra*, pp 2, 4 (“Thirty-eight states have not sentenced a child to life without the possibility of parole in the past five years. Thus, even among the states that have not banned JLWOP, the imposition of JLWOP is rare.”).

¹⁵ *Id.*, p 4.

outlier. Because the United States stands alone in allowing it,¹⁶ New Hampshire would earn the unfortunate distinction of “leading” the world in imposing this most severe punishment.¹⁷

As explained in the brief submitted by the National Association of Social Workers (“NASW”), the American Psychological Association, and other professional organizations to the U.S. Supreme Court in *Miller*—which is attached in an addendum to this brief—scientific research demonstrates the fundamental differences between juvenile and adult minds, as well as the fact that juveniles have greater immaturity, vulnerability, and changeability than adults. And the New Hampshire Supreme Court has also long recognized “the common-sense fact that a child does not possess the discretion and experience of an adult, and that special procedures are required to protect juveniles, who possess immature judgment.” *State v. Benoit*, 126 N.H. 6, 11 (1985) (in case concerning 15-year old juvenile, concluding that juvenile had not voluntarily waived his *Miranda* rights when the police officer read the juvenile his rights, without explanation, from the police department’s standard form used for adults). For example, “[i]n recognition that children often act imprudently and lack the capacity to understand the full consequences of their acts,” *id.*, New Hampshire law provides multiple statutory protections for juveniles. *See* Def.’s Pre-Hearing Memo. at pp. 17-18.

The recognition that children are not considered as responsible for their misbehavior as adults also influenced the very development of a separate juvenile court system in New Hampshire. As the New Hampshire Supreme Court has explained, “the legislature, in recognition of the inherent differences between children and adults, has provided for special treatment of juveniles

¹⁶ Rovner, *Juvenile Life Without Parole: An Overview*, Sentencing Project (April 7, 2023), <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/>.

¹⁷ *See States That Ban Life Without Parole for Children*, *supra* note 10; *Juvenile Life Without Parole: Unusual. Unequal.*, *supra* note 10, p 5.

under the juvenile justice statute.” *Benoit*, 126 N.H. at 12; *see also* RSA ch. 169-B. Indeed, “[t]he juvenile justice system differs both in philosophy and procedure from the adult penal system, and this court has ... reaffirmed that the purpose of the juvenile justice system is *not penal*, but *protective*.” *Benoit*, 126 N.H. at 12 (emphasis in original). As further explained by the New Hampshire Supreme Court, “[t]he primary purpose of the Legislature [in enacting RSA chapter 169-B] was to shield children under eighteen from the environment surrounding adult offenders and inherent in the ordinary criminal processes. As an incident to the accomplishment of this purpose, proceedings involving children under eighteen are so conducted as to prevent attachment of the ‘stigma of a criminal’ by reason of conduct resulting from immature judgment.” *State v. Lemelin*, 101 N.H. 404, 406 (1958) (quoting *United States v. Fotto*, 103 F. Supp. 430, 431 (S.D.N.Y. 1952)); *see also In re Perham*, 104 N.H. 276, 276-77 (1962) (In the juvenile system, “the juvenile is not tried for a crime, not convicted of a crime, not deemed to be a criminal, and no public record is made of his alleged offense. The determination to be made therein is not that of criminal guilt but of delinquency.”).

C. Life-Without-Parole Sentences For Juveniles Are “Cruel.”

Juvenile life-without-parole sentences are also unconstitutionally “cruel.” Part I, Article 33—like the Eighth Amendment—“guarantees individuals the right not to be subjected to excessive sanctions.” *Roper*, 543 U.S. at 560. This is a “right” that “flows from the basic ‘precept of justice that punishment for crime be graduated and proportioned’ to both the offender and the offense.” *Miller*, 567 U.S. at 469 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). By definition, “excessive” sanctions are disproportionate and, therefore, unconstitutionally “cruel.” *See Commonwealth v. O’Neal*, 339 N.E.2d 676, 679 (Mass. 1975) (interpreting Article XXVI of the Massachusetts Constitution, which is identical to Article 33, and concluding that “[i]t

is only when the level of cruelty is disproportionate to the magnitude of the crime, and as a consequence does not serve the needs of society, that a court will find the punishment too cruel and, thus, ‘cruel’ within the meaning of art. 26”). As explained above, this penalty is out of keeping with contemporary standards of decency; indeed, as a practical matter, the penalty is unusual precisely because it is cruel.

Whether measured in absolute terms (number of years in prison) or relative terms (percentage of life spent in prison), life-without-parole sentences for juveniles are disproportionately harsh when compared to the same punishment for adults. Such sentences effectively sentence a juvenile to die in prison—a “death sentence without an execution date.” William W. Berry, III, *More Different than Life, Less Different than Death*, 71 Ohio St. L.J. 1109, 1124 (2010). As the U.S. Supreme Court noted in *Graham*:

Life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The state does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

560 U.S. at 69. In the case of juveniles, these considerations are magnified. “[L]ife without parole is an especially harsh punishment for a juvenile.” *Id.* at 50. A “juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Id.* A “16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” *Id.* at 70. The application of life-without-parole sentences to children offends contemporary standards of decency in such a sentence’s unique and inherent capacity to inflict pain for 50, 60, 70 or even 80 years for each individual so sentenced. *See also* Paul Litton, *Symposium: Bombshell or Babystep? The Ramifications of Miller v. Alabama for Sentencing Law and Juvenile Crime Policy*, *Symposium Foreword*, 78 Mo. L. Rev. 1003, 1008 (2013) (“If juvenile

LWOP is truly akin to death, justifying the invocation of the Court's capital jurisprudence, the [U.S. Supreme] Court will have to acknowledge that the 'foundational principle' of *Roper* prohibits juvenile LWOP, as well.”).

Moreover, in the new post-*Miller* discretionary world, a juvenile-life-without-parole sentence will inevitably be applied in an arbitrary, capricious, and discriminatory manner. Post-*Miller*, mandatory juvenile lifetime without parole sentences are no longer an option. As a result, to the extent life sentences continue to be authorized for juveniles convicted of first-degree murder, courts or juries will necessarily be asked to determine, as a matter of discretion, if children convicted of that crime should be sentenced to life without parole or life with the possibility of parole. And this decision to give children either a glimmer of hope or absolute and permanent hopelessness will in each and every case be made blind, without an adequate track record, and with inevitable inconsistency and unreliability. The age of the juvenile defendants who will be subjected to the choice, and their immaturity, and amenability to growth and change, guaranty that the line between the uncommon few who receive life-without-parole sentences and the rest who do not, will be arbitrary and capricious, and, therefore, “cruel” under Part I, Article 33. As the U.S. Supreme Court states:

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation.

Roper, 543 U.S. at 573.

Finally, and most fundamentally, the imposition of a lifetime sentence, without the possibility for parole, on a juvenile fails to take into account the many significant differences between children and adults. These differences, all of which are crucially important with regard

to sentencing, include three especially relevant considerations identified by the U.S. Supreme Court in both *Graham* and *Miller*: (i) children have a “lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking”; (ii) children are “more vulnerable ... to negative influences and outside pressures, including from their family and peers,” as well as a lack of “control over their environment” and a lack of ability “to extricate themselves from horrific, crime-producing settings”; and (iii) children’s characters are “not as well formed as an adult’s,” and their actions are “less likely to be evidence of irretrievable depravity.” *Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68.

D. Interpreting A Provision Of The Massachusetts Constitution That Is Identical To Article 33, The Massachusetts Supreme Judicial Court Has Held That Life-Without-Parole Sentences For Juveniles Are Unconstitutional.

Support for this conclusion also comes from the Massachusetts Supreme Judicial Court. On December 24, 2013, that Court held in *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 1 N.E.3d 270 (Mass. 2013), that, under Article XXVI of the Massachusetts Declaration of Rights, “the discretionary imposition of ... a sentence [of life in prison without the possibility of parole] on juvenile homicide offenders also violates art. 26 because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders.” *Id.* at 276, 285-86 (noting that life with parole was a suitable remedy for both federal and state constitutional claims). Critical here is the fact that Article XXVI in the Massachusetts Declaration of Rights—which reads, in part, that “[n]o magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments”—is identical to Article 33 of the New Hampshire Constitution. *See* Mass. Const. part 1, art. XXVI (emphasis added). Because of the shared historical roots of the New Hampshire Constitution and Massachusetts Constitutions, this Court has noted the persuasive value of decisions interpreting

parallel provisions of the Massachusetts Constitution. *See, e. g., Opinion of the Justices (Tax Plan Referendum)*, 143 N.H. 429, 437 (1999) (“Because much of the New Hampshire Constitution was taken from the Massachusetts Constitution, ... this court gives weight to interpretations of relevant portions of the Massachusetts Constitution when interpreting similar New Hampshire provisions”); *see also State v. Mack*, 173 N.H. at 802. The *Diatchenko* Court’s conclusions apply with equal force under Article 33 of the New Hampshire Constitution.

E. Part I, Article 18 Of The New Hampshire Constitution Supports The Finding That Life-Without-Parole Sentences For Juveniles Are Unconstitutional.

Part I, Article 18 of the New Hampshire Constitution, which highlights that the “true design of all punishments” is “to reform” and has no analogue under the United States Constitution also supports this conclusion, even if Article 18’s principles are only advisory. *See State v. Elbert*, 125 N.H. 1, 15 (1984) (“The strongest expressions of opinion have favored the advisory alternative.”). In declaring that “[a]ll penalties ought to be proportioned to the nature of the offense” and that the “true design of all punishments [is] to reform,” this provision “forbids only gross disproportionality between offense and penalty.” *Id.* This “rehabilitation” constitutional value is especially salient when dealing with juvenile offenders who, as the U.S. Supreme Court has held, “have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.” *See Miller*, 567 U.S. at 490. Article 18 articulates a principal, even if advisory, that these juveniles must be given the opportunity, at some point in their lives, to show that they are able to reenter society. Without such an opportunity, rehabilitation would be meaningless and, as explained above in Section I.C, such a lifetime sentence is, by definition, disproportionate.

II. Even if a Life Without Parole Sentence Is Not Imposed, This Court Should Not Impose a Sentence of Such a Length That it is a *De Facto* Life Sentence Where the Defendant is Effectively Denied “A Meaningful Opportunity To Obtain Release Based On Demonstrated Maturity And Rehabilitation.”

It is true that, in *State v. Lopez*, 174 N.H. 201 (2021) and *State v. Dingman*, No. 2018-0662, 2021 N.H. LEXIS 63 (N.H. Apr. 20, 2021), the New Hampshire Supreme Court held that sentences of forty-five years to life (*Lopez*) and forty years to life (*Dingman*) were not *de facto* life sentences and did not violate the Eighth Amendment to the United States Constitution. However, this Court should be mindful that a sentence of such a long period of time that the defendant will effectively die in prison may also be constitutionally problematic, as such a sentence would be tantamount to life. Given their capacity to change, “the State...must give [juvenile defendants] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75. While some juveniles “will remain behind bars for life” given the heinousness of their offenses, the Eighth Amendment prohibits “States from making the judgement *at the outset* that those offenders never will be fit to reenter society.” *Id.* (emphasis added).

In *Miller v. Alabama*, the Supreme Court incorporated *Graham*’s mandate of “some meaningful opportunity to obtain release” in reaching the decision that mandatory life without parole sentences for juveniles, even those convicted of homicide, also violate the Eighth Amendment. 567 U.S. at 479. Like in *Graham*, the *Miller* Court reasoned that children have “greater prospects for reform.” *Id.* at 471. And, therefore, because life without parole “forfeits altogether the rehabilitative ideal,” it is “at odds with a child’s capacity for change.” *Id.* at 473 (quoting *Graham*, 560 U.S. at 74).

Neither *Graham* nor *Miller* comprehensively explain what a “meaningful opportunity to obtain release” might entail, especially in the context of long-term sentences that offer only a small chance of release towards the end (or perhaps past) a juvenile’s expected lifespan. However,

Graham’s sophisticated description of rehabilitation suggests that a “meaningful opportunity” would include a “chance for fulfillment outside prison walls,” “a chance for reconciliation with society,” and “the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.” 560 U.S. at 74; *see also* *People v. Contreras*, 411 P.3d 445 (Cal. 2018) (discussing the same). The achievement of rehabilitation—not just a last breath of air outside the prison walls but a life *rejoined* to society—necessarily contemplates more than a “de minimus quantum of time outside prison.” *Contreras*, 411 P.3d at 454. Indeed, the Supreme Court

viewed the concept of “life” in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for “life” if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Casiano v. Comm’r of Correction, 115 A.3d 1037, 1046-47 (Conn. 2015); *Cf.* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 383 (2014) (interpreting “meaningful opportunity” under Supreme Court jurisprudence to entail (1) release at a meaningful point in time, (2) a realistic likelihood of release, and (3) meaningful participation in the parole process).

Accordingly, high courts in California, Connecticut, Iowa, Maryland, New Jersey, Ohio, Oregon, Wyoming, and Tennessee have held that sentences over 50 years do not provide juvenile offenders with a meaningful opportunity for rehabilitation as required by *Graham*. *See Contreras*, 411 P.3d at 454 (50- and 58-year nonhomicide sentences); *Casiano*, 115 A.3d at 1046-47 (50-year sentence); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (effective 52.5-year sentence); *Carter v. State*, 192 A.3d 695, 702 (Md. 2018), *reconsideration denied* (Oct. 4, 2018) (effective 50-year sentence); *State v. Zuber*, 152 A.3d 197, 213 (N.J. 2017) (effective 55-year sentence); *White v. Premo*, 443 P.3d 597, 605 (Or. 2019), *cert. dismissed sub nom. Kelly v. White*, 140 S. Ct. 993 (2020) (nearly 67-year sentence); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (45-year

sentence); *see also Williams v. State*, No. 121,815, 2020 WL 5996442, at *14 (Kan. Ct. App. Oct. 9, 2020) (“We are unaware of any state high court that has found a single sentence in excess of 50 years for a single homicide provides a juvenile with a meaningful opportunity for release.”); *State v. Booker*, 656 S.W.3d 49, 52, 63 n.16 (Tenn. 2022) (holding that Tennessee’s automatic life sentence with a minimum of 51 years when imposed on juveniles violated the Eighth Amendment to the U.S. Constitution; distinguishing *Lopez* because, there, a sentence was imposed of less than fifty years); *see also Fletcher v. State*, 532 P.3d 286 (Alaska Ct. App. 2023) (holding that a defendant, who was convicted of three murders committed when she was 14 years old and was sentenced to 135 years in prison, was entitled to a resentencing in which her youth and its attendant characteristics were properly considered because Alaska Const. art. 1, § 12 required Alaska courts to affirmatively consider a juvenile offender’s youth and the attendant characteristics of youth before sentencing a juvenile offender tried as an adult to a sentence of life without parole or its functional equivalent). And the New Jersey Supreme Court concluded that a law that required two juveniles to serve a minimum of 30 years in prison with no possibility of parole violated the New Jersey Constitution’s prohibition on cruel and unusual punishment because it imposed lengthy sentences with substantial periods of parole ineligibility that could not be reviewed at a later time. *See State v. Comer*, 266 A.3d 374, 379 (N.J. 2022) (holding that, under the State Constitution, juveniles could petition the court to review their sentence after 20 years to show they had matured, to present evidence of their rehabilitation, and to try to prove that they were fit to reenter society).

Conclusion

Accordingly, *amici* respectfully pray that this Honorable Court conclude that the New Hampshire Constitution prohibits the imposition of a sentence of life in prison without the chance for parole on a defendant whose offense was committed as a child, prior to the age of 18.

Furthermore, even if a life without parole sentence is not imposed, this Court should not impose a sentence of such a length that is a *de facto* life sentence where the defendant is effectively denied “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”
See Graham, 560 U.S. at 75.

Date: August 1, 2024

Respectfully submitted,

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NEW HAMPSHIRE FOUNDATION, THE
NATIONAL ASSOCIATION OF SOCIAL
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NEW HAMPSHIRE, NEW HAMPSHIRE
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Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record.

/s/ Henry Klementowicz
Henry Klementowicz

August 6, 2024

Nos. 10-9646, 10-9647

IN THE
Supreme Court of the United States

EVAN MILLER,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,

v.

RAY HOBBS,
Respondent.

ON WRITS OF CERTIORARI TO THE ALABAMA COURT OF
CRIMINAL APPEALS AND THE ARKANSAS SUPREME COURT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL
ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION,
AND NATIONAL ASSOCIATION OF SOCIAL WORKERS AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE¹

The American Psychological Association is a voluntary nonprofit scientific and professional organization with more than 150,000 members and affiliates. Since 1892, the Association has been the principal organization of psychologists in the United States. Its membership includes the vast majority of U.S. psychologists holding doctoral degrees from accredited universities.²

An integral part of the Association's mission is to increase and disseminate knowledge regarding human behavior and to advance psychology as a science, profession, and means of promoting health, education, and human welfare. Based on the well-developed body of research distinguishing the developmental characteristics of juveniles from those of adults, the Association has endorsed the policy reflected in the United Nations Convention on the Rights of the Child, which rejects life imprisonment without possibility of parole for offenses committed by individuals under 18 years of age.

¹ The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters of consent are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

² Amici acknowledge the assistance of Elizabeth Cauffman, Ph.D., Thomas Grisso, Ph.D., Terrie Moffitt, Ph.D., Laurence Steinberg, Ph.D., and Jennifer Woolard, Ph.D., in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer-review process preceding publication in a scholarly journal.

The American Psychiatric Association, with roughly 35,000 members, is the principal association of physicians who specialize in psychiatry. It has an interest in this Court’s understanding of the lessons of scientific study and professional experience as the Court applies constitutional principles to individuals who often are patients of the organization’s members.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with nearly 145,000 members and 56 chapters throughout the United States and abroad. NASW conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on relevant issues of importance. NASW opposes any legislation or prosecutorial discretion permitting children to be charged and punished under adult standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), this Court held that the Eighth Amendment prohibited life sentences without the possibility of parole for juveniles convicted of non-homicide offenses. The special characteristics of juveniles that this Court identified in *Graham*—and that are supported by a large and growing body of research—apply equally to juveniles convicted of homicide offences.

In *Graham*, this Court reiterated the critical differences between juveniles and adults that it set out in *Roper v. Simmons*, 543 U.S. 551 (2005)—differences that do not absolve juveniles of responsibility for their crimes, but that do reduce their culpability and undermine any justification for definitively ending their free lives. The Court noted that juveniles lack adults’ ca-

capacity for mature judgment; that they are more vulnerable to negative external influences; and that their characters are not yet fully formed. *Graham*, 130 S. Ct. at 2026-2027; *Roper*, 543 U.S. at 569-570, 573. “The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’” *Roper*, 543 U.S. at 570. Juveniles’ vulnerability and lack of control over their surroundings “mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their ... environment.” *Id.* And “[j]uveniles are more capable of change than are adults,” meaning that “their actions are less likely to be evidence of ‘irretrievably depraved character,’” even in the case of very serious crimes. *Graham*, 130 S. Ct. at 2026-2027; *see Roper*, 543 U.S. at 570. Accordingly, “[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential”—with “no chance to leave prison before life’s end”—because “[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.” *Graham*, 130 S. Ct. at 2032.

As was true in *Graham*, “[n]o recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.” 130 S. Ct. at 2026. Rather, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” *Id.* In fact, an ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions. Compared to adults, juveniles are less able to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and avoiding unduly risky behaviors; and less

oriented to the future and thus less attentive to the consequences of their often-impulsive actions. Research also continues to demonstrate that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. *Roper*, 543 U.S. at 569. Thus, even after their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment and decision-making, especially in the social contexts in which criminal behavior is most likely to arise.

Moreover, because juveniles are still in the process of forming coherent identities, adolescent crime often reflects the “signature”—and transient—“qualities of youth” itself, *Roper*, 543 U.S. at 570, rather than an entrenched bad character. Research into adolescent development continues to confirm the law’s intuition that “incurability is inconsistent with youth.” *Graham*, 130 S. Ct. at 2029. And although some youthful offenders will develop into criminal adults, it remains essentially impossible “even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper*, 543 U.S. at 573. As *Roper* recognized, that is true even of juvenile offenders who have committed the most serious crimes.

Recent neuroscience research suggests a possible physiological basis for these recognized developmental characteristics of adolescence. It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance. That anatomical and functional immaturity is con-

sonant with juveniles’ demonstrated psychosocial (that is, social and emotional) immaturity. During puberty, juveniles evince a rapid increase in reward- and sensation-seeking behavior that declines progressively throughout late adolescence and young adulthood. This effect is amplified by exposure to peers, and it corresponds with significant changes in certain elements of the brain’s “incentive processing system”—especially the parts that process rewards and social cues. By contrast, the ability to resist emotional impulses and regulate behavior develops gradually throughout adolescence, and that behavioral development corresponds with gradual development of the brain structures and systems most involved in executive function and impulse control. The disjunction between these developmental processes—which is greatest in early and middle adolescence and narrows as individuals mature into young adulthood—is consistent with the familiar features of adolescence that this Court recognized in *Roper* and *Graham*.

In short, research continues to confirm and expand upon the fundamental insight underlying this Court’s previous decisions: Juveniles’ profound differences from adults undermine the possible penological justifications for punishing a juvenile offender with a sentence that “guarantees he will die in prison without any meaningful opportunity to obtain release.” *Graham*, 130 S. Ct. at 2033. Nor does the scientific literature provide any reason to distinguish between homicide and non-homicide convictions in this regard. In either case, the signature qualities of adolescence reduce juveniles’ culpability and increase their capacity for change. Condemning an immature, vulnerable, and not-yet-fully-formed adolescent to live every remaining day of his life in prison—whatever his crime—is thus a constitutionally disproportionate punishment.

ARGUMENT

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY

In *Roper* and *Graham*, this Court concluded that “marked and well understood” developmental differences between juveniles and adults both diminish juveniles’ blameworthiness for their criminal acts and enhance their prospects of change and reform.³ *Roper*, 543 U.S. at 572. Current research continues to reinforce that conclusion, confirming that the three developmental characteristics of juveniles that this Court has identified—their immaturity, their vulnerability, and their changeability—render them, as a group, very different from adults. As this Court has recognized, those differences are central to the calculus of culpability and the proportionality of punishments imposed on juvenile offenders.

³ We use the terms “juvenile” and “adolescent” interchangeably to refer to individuals aged 12 to 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the “qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from 16- and 17-year-olds. Nonetheless, because adolescents generally share certain developmental characteristics that mitigate their culpability, and because “the age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” this Court’s decisions have recognized age 18 as a relevant demarcation point. *Graham*, 130 S. Ct. at 2030; see *Roper*, 543 U.S. at 574. The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

A. Juveniles Are Less Capable Of Mature Judgment Than Adults

As this Court has recognized, adolescents have less capacity for mature judgment than adults, and as a result are more likely to engage in risky behaviors. “[A]s any parent knows and as ... scientific and sociological studies ... tend to confirm, ‘[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.’” *Roper*, 543 U.S. at 569.

As this Court noted in *Roper*, “‘adolescents are overrepresented statistically in virtually every category of reckless behavior.’” 543 U.S. at 569. Indeed, such behavior is “‘virtually a normative characteristic of adolescent development.’”⁴ Juveniles’ risky behavior frequently includes criminal activity; in fact, “‘numerous rigorous self-report studies have ... documented that it is statistically aberrant to refrain from crime during adolescence.’”⁵ Both violent crimes and less serious offenses “‘peak sharply” in adolescence and “‘drop precipi-

⁴ Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339, 344 (1992).

⁵ Terrie Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychol. Rev.* 674, 685-686 (1993). Moffitt posits that there are two groups of adolescent offenders who may engage in similar antisocial behavior: a majority whose offending is limited to adolescence, and a minority who will persist into adulthood.

tously in young adulthood.”⁶ This “age-crime curve” is “[o]ne of the most consistent findings across studies.”⁷

Adolescents’ striking tendency to engage in risky and even illegal behavior stems in part from their lesser capacity for mature judgment. Research has shown that adolescents’ judgment and decision-making differ from adults’ in several respects: Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even older adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity.⁸

1. Empirical research confirms that adolescents are less capable of self-regulation than adults and, accordingly, are less able to resist their social and emotional impulses. For example, one study of maturity of judgment found that adolescents, including 17-year-olds, scored significantly lower than adults on measures of “temperance,” which included “impulse control” and

⁶ *Id.* at 675 & fig. 1 (depicting age-crime curve with steep peak in late adolescence); Arnett, *supra* note 4, at 343; Terrie Moffitt, *Natural Histories of Delinquency*, in *Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 29 (Elmar Weitekamp & Hans-Jürgen Kerner eds., 1994).

⁷ Rolf Loeber et al., *Violence and Serious Theft* 77 (2008); see also Moffitt, *supra* note 6, at 7; Kathryn Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 *Developmental Psychol.* 1654, 1654 (2009).

⁸ Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *Ann. Rev. Clinical Psychol.* 47, 55-56 (2008).

“suppression of aggression.”⁹ More recent studies confirm this result. In one example, researchers examined differences in impulsivity between ages 10 and 30, using both self-report and performance measures, and concluded that impulsivity declined throughout the relevant period, with “gains in impulse control occur[ring] throughout adolescence” and into young adulthood.¹⁰ In short, “adults tend to make more adaptive decisions than adolescents,” in part because “they have a more mature capacity to resist the pull of social and emotional influences and remain focused on long-term goals.”¹¹

As explained below, *infra* pp. 25-31, researchers have an increasingly well-developed understanding of aspects of the adolescent brain that may help explain this relative deficit in mature self-control. It is now well-established that the brain continues to develop throughout adolescence and young adulthood in precisely the areas and systems that are regarded as most

⁹ Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000).

¹⁰ Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 Developmental Psychol. 1764, 1774-1776 (2008).

¹¹ Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Research on Adolescence 211, 220 (2011); *see also* Adriana Galvan et al., *Risk Taking and the Adolescent Brain*, 10 Developmental Sci. F8, F13 (2007) (finding, in study of individuals aged 7 to 29, that impulse control continues to develop throughout adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681, 684-686 (2007) (reporting significant decline in impulsivity from ages 14-16 to 20-22).

involved in impulse control, planning, and self-regulation. But juveniles also lack experience navigating the changing social and environmental contexts, and regulating the new emotional pressures, of adolescence. *See Roper*, 543 U.S. at 569. “[T]he developing adolescent can only learn his or her way to fully developed control by experience,” and that “process will probably not be completed until very late in the teen years.”¹² Thus, “expecting the experience-based ability to resist impulses ... to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.”¹³

2. Adolescents not only struggle to regulate their behavior in response to their emotional impulses, but also respond differently to perceptions of risk and reward. “In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults.”¹⁴ For example, one study comparing adolescent and adult decision-making found that, when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely

¹² Franklin Zimring, *Penal Proportionality for the Young Offender*, in *Youth on Trial* 271, 280 (Thomas Grisso & Robert Schwartz eds., 2000).

¹³ *Id.* at 282.

¹⁴ Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1012 (2003); *see* Arnett, *supra* note 4, at 350-353 (summarizing evidence that adolescent recklessness relates to poor “probability reasoning”); Susan Millstein & Bonnie Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in *Adolescent Risk and Vulnerability* 15, 34-35 (Baruch Fischhoff et al. eds., 2001).

than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.¹⁵ Similarly, a recent study that employed a gambling task to measure reward-seeking and risk-avoidance behavior in a group of more than 900 individuals aged 10 to 30 found that “adolescents and adults evince[d] significantly different patterns of approach [*i.e.*, reward-seeking] and avoidance [*i.e.*, risk-averse] behavior.”¹⁶ Whereas adolescents improved their performance over time by being drawn to the bets with the best rewards, adults improved by avoiding bets with the worst losses. The authors concluded that the “present study, as well as previous work, demonstrates that decision making ... improves throughout adolescence and into young adulthood but that this improvement may be due not to cognitive maturation but to changes in affective processing. Whereas adolescents may attend more to the potential rewards of a risky decision than to the potential costs, adults tend to consider both, even weighing costs more than rewards.”¹⁷

Similarly, adolescents are particularly attuned to *immediate* rewards, and display much steeper “tempo-

¹⁵ Bonnie Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001). Even greater differences prevailed between adults and younger adolescents. *See id.* at 268.

¹⁶ Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193, 204 (2010).

¹⁷ *Id.* at 204, 206.

ral discounting” than adults.¹⁸ Juveniles are emotionally primed for spur-of-the-moment, reward- and sensation-seeking behavior without offsetting, adult sensitivities to corresponding risks and longer-term consequences. Indeed, studies have shown that perceptions of reward, not risk, are better predictors of adolescent antisocial behaviors.¹⁹ This less mature weighing of risk and reward renders adolescents more likely to engage in criminal activity, as well as other kinds of risk-taking.²⁰

3. Finally, juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that they will fully apprehend the potential negative consequences of their actions.²¹ Moreover, adolescents are less able than adults to envision and plan for the future, a capacity still developing during adolescence.²² The study of maturity of judgment discussed above found

¹⁸ Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 39 (2009); Steinberg, *supra* note 8, at 58.

¹⁹ Louk Peters et al., *A Review of Similarities Between Domain-Specific Determinants of Four Health Behaviors Among Adolescents*, 24 Health Educ. Research 198, 216 (2009).

²⁰ Arnett, *supra* note 4, at 344, 350-351 (relating skewed adolescent risk- and reward-perception to fact that 50% or more of adolescents report drunk driving, unprotected sex, illegal drug use, or some form of criminal activity).

²¹ *Id.* at 351-352; Zimring, *supra* note 12, at 280.

²² See Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 28-29 (1991); Steinberg et al., *supra* note 18, at 35-36.

that adolescents' future orientation is weaker than adults': Comparing over 1,000 subjects, it found that even 17-year-olds scored lower than adults on measures of "perspective," which encompassed "the ability to see short and long term consequences," as well as the ability to "take other people's perspectives into account."²³ Similarly, studies have shown that, among 15- to 17-year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.²⁴

The ability to resist and control emotional impulses, to gauge risks and benefits in an adult manner, and to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to make mature, fully considered decisions. Empirical research confirms that even older adolescents have not fully developed these abilities and hence lack an adult's capacity for mature judgment. "[I]t is clear that important progress in the development of [social and emotional maturity] occurs sometime during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."²⁵

²³ Cauffman & Steinberg, *supra* note 9, at 746, 748, 754 & tbl. 4.

²⁴ Nurmi, *supra* note 22, at 28-29; *see* Steinberg et al., *supra* note 18, at 35-36.

²⁵ Cauffman & Steinberg, *supra* note 9, at 741, 756, 758 (noting that the most dramatic increase in psychosocial maturity occurs between ages 16 and 19); *see* Halpern-Felsher & Cauffman, *supra* note 15, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence[.]").

It should be noted that multiple abilities contribute to mature judgment, and those abilities develop at different rates. Sound judgment requires both cognitive and psychosocial skills, but the former mature earlier than the latter. Studies of general cognitive capability show an increase from pre-adolescence until about age 16, when gains begin to plateau.²⁶ By contrast, social and emotional maturity continue to develop throughout adolescence. Thus, older adolescents (aged 16-17) often have logical reasoning skills that approximate those of adults, but nonetheless lack the adult capacities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment,²⁷ especially in emotionally charged settings.²⁸ Younger adolescents are thus doubly disadvantaged, because they typically lack not only those social and emotional skills but basic cognitive capabilities as well.²⁹

²⁶ See, e.g., Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 343-344 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities); Daniel Keating, *Cognitive and Brain Development*, in *Handbook of Adolescent Psychology* 45, 64 (Richard Lerner & Laurence Steinberg eds., 2d ed. 2004) (cognitive functions exhibit robust growth at earlier ages but approach a limit in the 14- to 16-year-old group).

²⁷ Cauffman & Steinberg, *supra* note 9, at 743-745; Halpern-Felsher & Cauffman, *supra* note 15, at 264-271; Steinberg, *supra* note 8, at 55-59.

²⁸ Albert & Steinberg, *supra* note 11, at 216-220.

²⁹ The dissent in *Roper* criticized the American Psychological Association for taking allegedly inconsistent positions regarding adolescent maturity with respect to severe criminal sanctions for

B. Juveniles Are More Vulnerable To Negative External Influences

As this Court has also recognized, “juveniles are more vulnerable ... to negative influences and outside pressures, including peer pressure.” *Roper*, 543 U.S. at 569. Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment, and their actions are shaped directly by family and peers in ways that adults’ are not. “Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control.”³⁰ Difficult family and neighborhood conditions are major risk factors for juvenile crime, includ-

juveniles (in *Roper*) and the competence of minor females to obtain abortions absent parental notification (in *Hodgson v. Minnesota*, 497 U.S. 417 (1990)). See 543 U.S. at 617-618 (Scalia, J., dissenting). These are different questions concerning distinct aspects of mature judgment. *Hodgson* addressed *competence* to make medical decisions that can be made in a relatively unhurried manner in consultation with medical professionals, and the Association’s brief thus focused on adolescents’ *cognitive* abilities, which approximate those of adults by mid-adolescence. The questions presented in *Roper*, *Graham*, and this case concern the degree of *culpability* and *reformability* of adolescents who commit criminal acts that often evince impulsivity and ill-considered choices resulting from *psychosocial* immaturity. See Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 Am. Psychologist 583, 592-593 (2009); Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 226-235 (1995).

³⁰ Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial*, *supra* note 12, at 47.

ing homicide.³¹ Yet, precisely because of their legal minority, juveniles lack the freedom to remove themselves from those negative external influences. Put simply, juveniles lack the control over themselves and their lives that adults possess, mitigating their blameworthiness for remaining in destructive or “‘criminogenic’” situations. *Roper*, 543 U.S. at 569.

Juveniles are also especially vulnerable to the negative influence of peer pressure. Research has shown that susceptibility to peer pressure to engage in antisocial behavior increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18.³² For instance, one major study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among

³¹ *Id.* at 47-48; see Rolf Loeber & David Farrington, *Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood* 61 & tbl. 4.1 (2011) (noting high likelihood that homicide offenders came from broken family or bad neighborhood); Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth on Trial*, *supra* note 12, at 372, 389-391.

³² Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 *Developmental Psychol.* 608, 612, 615-616 (1979); Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Dev.* 841, 848 (1986); Fagan, *supra* note 31, at 382-384 (discussing coercive effect of social context on adolescents).

young adults.³³ “[T]he presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions.”³⁴

This study was recently replicated using fMRI technology, allowing researchers to measure variations in the activation of different brain areas under different experimental conditions. Because of technological constraints, the “peer pressure” variable was limited to manipulating whether test subjects were observed by peers or not while performing the task. Strikingly, mere awareness that peers were watching encouraged risky behavior among juveniles, but not adults.³⁵ The neuroimaging also showed different activation in different brain areas across the experimental variables. Adults showed significantly greater activation in brain regions involved in executive functions and the regulation of impulses, whether or not they were being observed by peers. By contrast, adolescents showed significantly greater activation in brain areas associated with reward processing when they were told that their peers were watching than when they were not being observed.³⁶

³³ Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 41 *Developmental Psychol.* 625, 626-634 (2005).

³⁴ *Id.* at 634; see Laurence Steinberg & Kathryn Monahan, *Age Differences in Resistance to Peer Influence*, 43 *Developmental Psychol.* 1531, 1538 (2007) (same).

³⁵ Jason Chein et al., *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain’s Reward Circuitry*, 14 *Developmental Sci.* F1, F7 (2011).

³⁶ *Id.* at F5-F8.

Juveniles' lesser ability to resist peer influence affects their judgment both directly and indirectly. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."³⁷

Adolescents are thus more likely than adults to engage in antisocial behavior in order to conform to peer expectations or achieve respect and status among their peers.³⁸ Not surprisingly, juvenile crime is significantly correlated with exposure to delinquent peers,³⁹ and adolescents are "far more likely than adults to commit crimes in groups."⁴⁰ "No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."⁴¹ Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive."⁴² "A

³⁷ Scott & Steinberg, *supra* note 32, at 38-39; *see also* Moffitt, *supra* note 5, at 686; Zimring, *supra* note 12, at 280-281.

³⁸ *See* Moffitt, *supra* note 5, at 686.

³⁹ *See id.* at 687-688.

⁴⁰ Scott & Steinberg, *supra* note 32, at 39.

⁴¹ Zimring, *supra* note 12, at 281; *see* Joan McCord & Kevin Conway, *Co-Offending and Patterns of Juvenile Crime* 5 (2005) (finding that "[c]o-offending violence increased throughout adolescence").

⁴² Zimring, *supra* note 12, at 280.

necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer-pressure,” a social skill that is not fully developed in adolescents.⁴³

In short, as this Court has observed, “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Because juveniles’ developmental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures, they “have a greater claim than adults to be forgiven” for the criminal acts that result from such pressures. *Roper*, 543 U.S. at 570.

C. Juveniles Have A Greater Capacity For Change And Reform

Finally, as this Court has recognized, “the character of a juvenile is not as well formed as that of an adult,” and “[t]he personality traits of juveniles are more transitory, less fixed.” *Roper*, 543 U.S. at 570. Accordingly, “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character.’” *Graham*, 130 S. Ct. at 2026. A defining aspect of adolescence is that character is not yet fully formed, and adolescents’ signature qualities—including their susceptibility to peer influence and weaknesses in self-regulation—reflect their incomplete identity or “sense of self.” Thus, what may be perceived as fixed personality traits in juveniles may in fact result from malleable factors such as present maturity level or social

⁴³ *Id.* at 280-281.

context, rather than engrained or enduring aspects of personality or worldview. Research has shown that personality traits change significantly during the developmental transition from adolescence to adulthood,⁴⁴ and the process of identity-formation typically remains incomplete until at least the early twenties.⁴⁵ Juveniles are simply more likely than adults to change.

This Court recognized in *Roper* that because “juveniles still struggle to define their identity, ... it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” 543 U.S. at 570. And it reaffirmed in *Graham* that “from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” 130 S. Ct. at 2026-2027.

In fact, juveniles do typically outgrow their antisocial behavior as the “impetuousness and recklessness” of youth subside in adulthood. *Roper*, 543 U.S. at 570. Adolescent criminal conduct frequently results from

⁴⁴ See Brent Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course*, 132 Psychol. Bull. 1, 14-15 (2006).

⁴⁵ E.g., Alan Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982) (“The most extensive advances in identity formation occur during the time spent in college.”); Laurence Steinberg & Robert Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial*, *supra* note 12, at 9, 27 (“[M]ost identity development takes place during the late teens and early twenties.”); Scott & Steinberg, *supra* note 32, at 52 (“[C]oherent integration of ... [identity] does not occur until late adolescence or early adulthood. ... [T]he final stages of this process often occur during the college years.”).

experimentation with risky behavior and not from deep-seated moral deficiency reflective of “bad” character.⁴⁶ For most juveniles, therefore, antisocial behavior will “cease with maturity as individual identity becomes settled.” *Id.* at 570. Only a small proportion of adolescents who experiment with illegal activities will develop an entrenched pattern of criminal behavior that persists into adulthood; “the vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature.”⁴⁷

As this Court has previously observed, moreover, even experts have no reliable way to predict whether a particular juvenile offender will continue to commit crimes as an adult. *See Roper*, 543 U.S. at 573. The positive predictive power of juvenile psychopathy assessments, for instance, remains poor. One study found that only 16% of young adolescents who scored in the top quintile on a juvenile psychopathy measure would eventually be assessed as psychopathic at age 24.⁴⁸ The authors concluded that “most individuals identified as psychopaths at age 13 will not receive such a diagnosis” as adults.⁴⁹ A recent study of 75 male juvenile offenders found that assessments of psychopathic characteris-

⁴⁶ Moffitt, *supra* note 5, at 686, 690; *see also* Arnett, *supra* note 4, at 344, 366-367.

⁴⁷ Steinberg & Scott, *supra* note 14, at 1014-1015; *see also* Moffitt, *supra* note 5, at 685-686; Monahan et al., *supra* note 7, at 1654, 1655.

⁴⁸ Donald Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160 (2007).

⁴⁹ *Id.* at 162.

tics did not predict general or violent reconvictions over a 10-year follow-up period.⁵⁰ And another recent study showed no correlation between a youthful homicide offense and the basic psychological measures of persistent antisocial personality such as “cruelty to people and callous-unemotional behavior.”⁵¹

To be sure, research has identified certain childhood risk factors, or “predictors,” that show a statistically significant association with adult criminality. But such studies do not suggest that anyone could reliably determine, *ex ante*, whether particular juvenile offenders will reoffend. To the contrary, the same research makes clear that such predictions cannot be made with any accuracy. Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults. For example, a major longitudinal study of Pittsburgh inner-city boys successfully identified, *ex post*, childhood risk factors, including various forms of antisocial behavior and crime, that were correlated with future homicide convictions. But it also found that, even among the subgroup of boys with the greatest number of risk factors, only a small minority were eventually convicted of homicide: Using the authors’ model to attempt to identify juveniles who would be future homicide offenders yielded a very high false positive rate of 87%.⁵²

⁵⁰ See John Edens & Melissa Cahill, *Psychopathy in Adolescence and Criminal Recidivism in Young Adulthood*, 14 Assessment 57, 60 (2007).

⁵¹ Loeber & Farrington, *supra* note 31, at 158.

⁵² *Id.* at 75.

In fact, researchers have consistently concluded that the behavior of juveniles who will and will not continue as criminal offenders through adulthood is “often indistinguishable during adolescence.”⁵³ In first distinguishing between adolescence-limited and persistent offenders, researchers recognized that they could not “effectively assign individual delinquent adolescents to meaningful subtypes on the basis of ... their antisocial behavior during adolescence.”⁵⁴ And those who have dedicated their careers to identifying risk factors associated with persistent criminality continue to acknowledge that “[t]he results show very imperfect predictions of which offense trajectory individuals will follow over time,” and to warn against the “danger that policy makers will start to use less than good predictions as a rationale for harsh punishments and severe legal sanctions.”⁵⁵

⁵³ Monahan et al., *supra* note 7, at 1655; *see also, e.g.*, John Edens et al., *Assessment of “Juvenile Psychopathy” and Its Association with Violence*, 19 Behav. Sci. & L. 53, 59 (2001) (collecting evidence that psychopathy assessments may “tap construct-irrelevant variance associated with relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features”); Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) (“Assessing adolescents ... presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers.”); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2004) (noting discontinuity and disappearance of mental disorders identified in adolescence).

⁵⁴ Moffitt, *supra* note 5, at 678.

⁵⁵ Loeber et al., *supra* note 7, at 333.

Moreover, it is just as difficult to predict future criminality among adolescents convicted of the most serious crimes.⁵⁶ A recent, major effort to identify risk factors for recidivism among serious adolescent offenders confirmed the “good news ... that even within a sample ... limited to those convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small,” while acknowledging the “bad news” that the ability to predict future criminality remains “exceedingly limited.”⁵⁷ Most strikingly, when the homicide study discussed above limited its effort to predict future homicide offenses to boys who had already committed an act of violence, it “did not significantly improve predictive accuracy.”⁵⁸ In fact, the false-positive rate *increased* from 87% to 89%.⁵⁹

In sum, juveniles are still developing their character and identity, and it is quite likely that a juvenile of-

⁵⁶ See *id.* (distinguishing, throughout, between serious and less serious forms of violence and theft).

⁵⁷ Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 Dev. & Psychopathology 453, 468-470 (2010); see also Monahan et al., *supra* note 7 (finding that only 6% of serious juvenile offenders persisted in high levels of antisocial behavior into adulthood).

⁵⁸ Loeber & Farrington, *supra* note 31, at 88.

⁵⁹ *Id.* at 89; see also Alex Piquero et al., *Violence in Criminal Careers: A Review of the Literature from a Developmental Life-Course Perspective*, Aggression & Violent Behav. (forthcoming 2012) (concluding that “most youths who become violent do so in adolescence and their violent involvement is limited to the late teen/early 20s” and that “attempt[ing] to correctly predict the violent recidivist is virtually impossible”).

fender will desist from crime in adulthood. *See Roper*, 543 U.S. at 570. Juvenile crime is likely to be the product of the “signature qualities of youth,” *id.*; there is no reliable way to determine that a juvenile’s offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.

D. Juveniles’ Psychosocial Immaturity Is Consistent With Recent Research Regarding Adolescent Brain Development

Neuroscientists continue to accumulate evidence that the adolescent brain is not yet fully developed in critical respects. By now, “[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence,” and “[a]lthough most of this work has appeared just in the last 10 years, there is already strong consensus among developmental neuroscientists about the nature” of these changes.⁶⁰ While research continues into the precise meaning and effect of the changes in the brain during adolescence, they are consistent with and suggest the possible physiological basis for adolescents’ observed psychosocial immaturity.

The most noteworthy features of adolescent brain development relate to changes occurring within the brain’s frontal lobes—in particular the prefrontal cortex—and in the connections between the prefrontal

⁶⁰ Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 *Am. Psychologist* 739, 742 (2009).

cortex and other brain structures. These areas and interconnections are critical to “executive” functions such as planning, motivation, judgment, and decision-making, including the evaluation of future consequences, the weighing of risk and reward, the perception and control of emotions, and the processing and inhibition of impulses.⁶¹ Four related changes in these brain systems during adolescence merit special attention.

First, early adolescence (especially the period immediately after puberty) coincides with major changes in the “incentive processing system” of the brain involving neurotransmitters like dopamine.⁶² “[R]eward-related regions of the brain and their neurocircuitry undergo particularly marked developmental changes

⁶¹ *E.g.*, Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23, 24, 141 (2001); B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 *Biological Psychol.* 241, 244-246 (2000); Elizabeth Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 *Nature Neurosci.* 859, 860 (1999); Antonio Damasio & Steven Anderson, *The Frontal Lobes*, in *Clinical Neuropsychology* 404, 434-435 (Kenneth Heilman & Edward Valenstein eds., 4th ed. 2003) (one “hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests” of the individual).

⁶² *E.g.*, Chein et al., *supra* note 35, at F2; Linda Spear, *The Behavioral Neuroscience of Adolescence* 149-150 (2009); Dustin Wahlstrom et al., *Developmental Changes In Dopamine Neurotransmission in Adolescence: Behavioral Implications and Issues in Assessment*, 72 *Brain & Cognition* 146, 150-151 (2010); Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 *Pharmacology Biochem. & Behav.* 199, 206-208 (2009); Albert & Steinberg, *supra* note 11, at 217.

during adolescence.”⁶³ These pubertal changes are seen in other species, and “have been linked to changes in reward-directed activity” among adolescents, especially the willingness to engage in risky and socially motivated behaviors.⁶⁴ The observed spike in risk-taking, reward-seeking, and peer-influenced behaviors among adolescents correlates with this normal aspect of adolescent brain development.

Second, during childhood and early adolescence the brain undergoes substantial synaptic “pruning”—the paring away of unused synapses—leading to more efficient neural connections.⁶⁵ During adolescence, this pruning is more characteristic of the prefrontal cortex than other brain regions, consistent with the observation that adolescence is a time of marked improvement in executive functions.⁶⁶

⁶³ Tamara Doremus-Fitzwater et al., *Motivational Systems in Adolescence: Possible Implications for Age Differences in Substance Abuse and Other Risk-Taking Behaviors*, 72 *Brain & Cognition* 114, 116 (2010); Steinberg, *supra* note 60, at 743.

⁶⁴ Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *Brain & Cognition* 160, 161 (2010); Spear, *supra* note 62, at 18-19; Linda Van Leijenhorst et al., *What Motivates the Adolescent? Brain Regions Mediating Reward Sensitivity Across Adolescence*, 20 *Cerebral Cortex* 61, 67 (2010).

⁶⁵ Casey et al., *supra* note 61, at 242-243; Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 *Proc. Nat'l Acad. Sci.* 8174, 8175 (2004); Spear, *supra* note 62, at 81-90; Peter Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* 41, 46-47, 52-58, 67 (2002).

⁶⁶ *E.g.*, Nitin Gogtay & Paul Thompson, *Mapping Gray Matter Development*, 72 *Brain & Cognition* 6, 7 (2010); Neir Eshel et

Third, the adolescent brain undergoes substantial myelination, the process through which neural pathways are insulated with a white fatty tissue called myelin. That insulation “speeds ... neural signal transmission,” making “communication between different parts of the brain faster and more reliable.”⁶⁷ “[M]yelination is ongoing well into late adolescence and early adulthood.”⁶⁸ And this “improved connectivity within the prefrontal cortex is important for higher order functions subserved by multiple prefrontal areas, including many aspects of executive function, such as response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information.”⁶⁹

Fourth, “well into late adolescence” there is “an increase in connections not only among cortical areas but between cortical and subcortical regions” that are “especially important for emotion regulation.”⁷⁰ As the

al., *Neural Substrates of Choice Selection in Adults and Adolescents*, 45 *Neuropsychologia* 1270, 1270-1271 (2007); Spear, *supra* note 62, at 87-90.

⁶⁷ Goldberg, *supra* note 61, at 144.

⁶⁸ Steinberg, *supra* note 60, at 743; see Rhoshel Lenroot et al., *Sexual Dimorphism of Brain Developmental Trajectories During Childhood and Adolescence*, 36 *Neuroimage* 1065, 1065 (2007).

⁶⁹ Steinberg, *supra* note 60, at 743; see Casey et al., *supra* note 61, at 245-246; Elizabeth Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 *J. Neurosci.* 8819, 8828 (2001).

⁷⁰ Steinberg, *supra* note 60, at 743; Spear, *supra* note 62, at 119-120, 125-126; Thomas Eluvathingal et al., *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in*

brain matures, that self-regulation is “facilitated by the increased connectivity between regions important in the processing of emotional and social information and regions important in cognitive control processes.”⁷¹ This developmental pattern is consistent with adults’ superior ability to make mature judgments about risk and reward, and to exercise cognitive control over their emotional impulses, especially in circumstances that adolescents would react to as socially charged.⁷²

In short, the brain systems that govern many aspects of social and emotional maturity, such as impulse control, risk avoidance, planning ahead, and coordination of emotion and cognition, continue to mature throughout adolescence.⁷³ Importantly, these changes occur at different times, with the rapid, pubertal changes in the brain’s incentive and social processing systems outpacing the slower, steadier, and later-occurring changes in areas related to executive function

Normally Developing Children and Adolescents, 17 Cerebral Cortex 2760, 2763-2764 (2007).

⁷¹ Steinberg, *supra* note 60, at 743; Leah Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain & Cognition 124, 128-129 (2010) (noting importance of white-matter development and the “functional network [in] mediat[ing] the ability to exert control in the face of emotion”).

⁷² Chein et al., *supra* note 35, at F7-F8; Steinberg, *supra* note 64, at 162; Spear, *supra* note 62, at 121-126.

⁷³ See, e.g., Eshel et al., *supra* note 66, at 1270-1271; Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 Law & Hum. Behav. 78, 79-80 (2008); Steinberg et al., *supra* note 10, at 1765.

and self-control.⁷⁴ Indeed, studies have shown that the prefrontal cortex is among the last areas in the brain to mature fully.⁷⁵ These findings suggest a

basic framework, articulated in slightly different versions by many writers ... posit[ing] that middle adolescence is a time of heightened vulnerability to risky and reckless behavior because of the temporal disjunction between the rapid rise in dopaminergic activity around the time of puberty, which leads to an increase in reward-seeking, and the slower and more gradual maturation of the prefrontal cortex and its connections to other brain regions, which leads to improvements in cognitive control and in the coordination of affect and cognition. As dopaminergic activity declines from its early adolescent peak, and as self-regulatory systems become increasingly mature, risk-taking begins to decline.⁷⁶

“From this perspective, middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.”⁷⁷

⁷⁴ Steinberg, *supra* note 64, at 161.

⁷⁵ Gogtay & Thompson, *supra* note 66, at 7; Casey et al., *supra* note 61, at 243; Spear, *supra* note 62, at 87-88.

⁷⁶ Steinberg, *supra* note 64, at 161; *see* Somerville et al., *supra* note 71, at 126-127.

⁷⁷ Steinberg, *supra* note 64, at 162.

Although the precise relationships between particular aspects of brain development and adolescent behavior continue to be studied, these findings regarding the neuroscience of adolescent development reinforce and expand upon the well-established behavioral findings discussed in *Roper* and *Graham*. They demonstrate that, even in late adolescence, important aspects of brain maturation remain incomplete. And those normal patterns of adolescent physiological development are correlated with the poor judgment and particular vulnerability to negative social influences that characterize adolescence and then subside in young adulthood. Unlike adults, juveniles may thus be expected to change as they age and their brains mature, evincing both fewer impulses toward reckless and criminal behavior and an increased ability to restrain such impulses.

II. SENTENCING JUVENILES TO LIFELONG IMPRISONMENT WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT

In *Graham*, this Court determined that a sentence of life without parole for juvenile offenders convicted of non-homicide offenses was constitutionally disproportionate punishment for two related reasons—both of which are equally powerful as applied to juveniles convicted of homicide.

First, juveniles’ immaturity, vulnerability, and changeability—while in no way excusing their crimes—substantially lessen their culpability and undermine any justification for definitively ending their free lives. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569-570. The Court thus reaffirmed in *Graham* that “from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult.” 130 S. Ct. at

2026-2027. At the same time, the Court recognized that “[l]ife without parole is an especially harsh punishment for a juvenile,” because “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Id.* at 2028. “A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” *Id.* In fact, a juvenile sentenced to life in custody not only serves a greater percentage of his life in prison, but suffers a unique deprivation: He will never experience adulthood—or the ability “to attain a mature understanding of his own humanity,” *Roper*, 543 U.S. at 574—as a free person.

Sentences that foreclose any possibility of eventual release are thus particularly draconian for juveniles. Although adolescents can be expected to mature and reform as they age, such a sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.” *Graham*, 130 S. Ct. at 2027. Juvenile crimes are committed “while [the offender is] a child in the eyes of the law,” *id.* at 2033, meaning that most juvenile offenders are sentenced to life imprisonment without ever having been initiated into such elementary aspects of adult society as voting, driving, marriage, parenthood, profession—even high-school graduation. For adolescent offenders, a sentence of “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” *Id.* at 2032. Given juveniles’ reduced culpability and increased likelihood of reform, such a severe sanction—foreclosing any willingness even to consider release in the future—is mani-

festly disproportionate to the penological justifications for imposing it.

Neither this Court's precedent nor the research into adolescent development provides any reason why this analysis should be different in the case of juvenile homicide offenders. This Court first recognized the reduced culpability of adolescent offenders in the context of prohibiting the death penalty for juvenile homicide offenses, finding that even for older adolescents, and "even [for] a heinous crime," the immaturity, vulnerability, and changeability of juvenile offenders made it "less supportable to conclude that ... [a] crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. To be sure, more serious crimes call for more serious punishments. But there is no reason why the reduction in culpability associated with adolescence should vary according to the severity of the offense. Indeed, the best available research indicates that even serious juvenile offenders are far more likely than not to desist from criminality as they mature, and that it is equally true of the most serious offenders that "expert psychologists [cannot] differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.⁷⁸

Accordingly, the penological justifications for a sentence of life imprisonment without parole are weakened for juveniles who commit homicide, just as they are for other juvenile offenders. The retributive purpose of such a punishment is attenuated because "cul-

⁷⁸ See *supra* p. 24 & nn. 56-59.

pability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” *Roper*, 543 U.S. at 571. Likewise, the same characteristics of juveniles that render them less culpable—their impulsivity, rash decision-making, biased attention to anticipated immediate rewards rather than longer-term costs, and lesser ability to consider and evaluate the future consequences of their actions—substantially weaken the deterrence justification for such punishment. *Id.*⁷⁹ Life without parole will unquestionably incapacitate a juvenile offender, but the Court rightly noted in *Graham* that justifying “life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible,” when “[t]he characteristics of juveniles make that judgment questionable.” 130 S. Ct. 2029. And it is particularly inappropriate to “forswear[] altogether the rehabilitative ideal,” *id.* at 2030, with respect to offenders who are far more likely than any others to reform as both their character and their physical brain structure mature into adulthood.

⁷⁹ Indeed, empirical studies evaluating the deterrent effect of laws mandating that juvenile offenders be transferred to the adult criminal justice system for certain crimes have concluded that the threat of adult criminal sanctions had no measurable effect on juvenile crime. *E.g.*, Simon Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 Law & Soc’y Rev. 521, 526-532 (1988) (comparing juvenile arrest statistics before and after enactment of New York’s transfer legislation and finding little measurable impact on serious juvenile crime); Eric Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96, 100-102 (1994) (same for Idaho).

In short, this Court has recognized what research confirms: Adolescence is transitory, and juveniles change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration. And, even in the case of the most serious offenses, there is no reliable way to distinguish the juvenile offender who might become a hardened criminal from the far more common offender whose crime is a product of the transient influences of adolescence itself. Sentencing a juvenile to life imprisonment "without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes," *Graham*, 130 S. Ct. at 2033, disregards entirely the signature characteristics of youth. And sentencing such an immature and less culpable juvenile to spend his entire adult life in prison, notwithstanding the likelihood that "[m]aturity can lead to ... remorse, renewal, and rehabilitation," *id.* at 2032, is grossly disproportionate punishment.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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JANUARY 2012

**State v. Bergeron, No. 211-2019-cr-00163 (Belknap Cty.
Super. Ct. June 12, 2020) (granting assented-to motion
to file amicus brief) (with case summary)**

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

Granted



Honorable James D. O'Neill, III

June 12, 2020

v.

RICHARD E. BERGERON, III

Clerk's Notice of Decision
Document Sent to Parties
on 06/15/2020

No. 211-2019-CR-163

**ASSENTED-TO MOTION TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO
STATE'S MOTION FOR A COURT ORDER PROHIBITING PRE-TRIAL PUBLICITY
BY FRIDAY, JUNE 19, 2020.**

NOW COMES the American Civil Liberties Union of New Hampshire Foundation (“ACLU-NH”), and moves for leave to file a Brief of *Amicus Curiae* and a Brief of *Amicus Curiae* in Opposition to the State’s Motion for a Court Order Prohibiting Pre-Trial Publicity. ACLU-NH is a multi-issue civil rights and civil liberties organization advocating for protections included in the state and federal constitutions, and routinely files *amici* briefs in the courts of this state. ACLU-NH intended to file its amicus by June 12, but requires a short extension until June 19 to file that brief. As trial is scheduled for October, neither party will be prejudiced. Counsel for the State and Mr. Bergeron assent to the relief requested in this motion.

WHEREFORE, ACLU-NH respectfully requests that this Honorable Court:

- A. Permit ACLU-NH to file an *amicus* brief in this matter on or before June 19, 2020; and
- B. Grant such other relief as is just and proper.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF
NEW HAMPSHIRE FOUNDATION,

By its attorneys,

Date: June 11, 2020

/s/ Henry Klementowicz
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Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record pursuant to the court's e-filing system. A copy was sent to Mr. Bergeron by email per agreement between Mr. Bergeron and *Amicus*.

/s/ Henry Klementowicz
Henry Klementowicz

Date: June 11, 2020

Belknap

Case Summary

Case No. 211-2019-CR-00163

State v. Richard E Bergeron

§
§

Location: Belknap
Filed on: 03/18/2019

Case Information

Offense	Statute	Degree	Offense Date	Filed Date	Case Type: Criminal Case Status: 03/30/2022 Closed 03/18/2019 Pending
Jurisdiction: Gilford					
1. Sale of a Controlled/Narcotic Drug Arrest Control #: 007025J181602978001 ChargeID: 1602978C	318-B:26 I (a)	SPEC	12/06/2018	03/18/2019	
Jurisdiction: Belmont					
2. Sale of a Controlled/Narcotic Drug Arrest Control #: 007025J181602979002 ChargeID: 1602979C	318-B:26 I (a)	SPEC	12/13/2018	03/18/2019	
3. Sale of a Controlled/Narcotic Drug Arrest Control #: 007025J181602980003 ChargeID: 1602980C	318-B:26 I (a)	SPEC	12/20/2018	03/18/2019	
4. Sale of a Controlled/Narcotic Drug Arrest Control #: 007025J181602981004 ChargeID: 1602981C	318-B:26 I (a)	SPEC	12/31/2018	03/18/2019	
5. Sale of a Controlled/Narcotic Drug Arrest Control #: 007025J191602995005 ChargeID: 1602995C	318-B:26 I (a)	SPEC	01/03/2019	03/18/2019	
6. Sale of a Controlled/Narcotic Drug Arrest Control #: 007025J191602996006 ChargeID: 1602996C	318-B:26 I (a)	SPEC	01/30/2019	03/18/2019	

Assignment Information

Current Case Assignment

Case Number 211-2019-CR-00163

Court Belknap

Date Assigned 03/19/2019

Party Information

Belknap

Case Summary

Defendant **Bergeron, Richard E**
DOB: 10/01/1977
SID: NH








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Events and Orders of the Court

02/28/2019	 Bail Order Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 3
02/28/2019	 Notice to Defendants Eligible for Bail	Index # 4
02/28/2019	 Pre Trial Release Questionnaire Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 5
03/18/2019	 Complaint Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 1
03/18/2019	 Affidavit <i>re: Probable Cause</i>	Index # 2
03/20/2019	 Appearance Party: Defendant Bergeron, Richard E	Index # 6
03/20/2019	 Other <i>Defendant's Pre-Arrest Supplemental Brief and Legal Memorandum</i> Party: Defendant Bergeron, Richard E Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 7


Case Summary

Case No. 211-2019-CR-00163


2. Sale of a Controlled/Narcotic Drug (318B261a)
3. Sale of a Controlled/Narcotic Drug (318B261a)
4. Sale of a Controlled/Narcotic Drug (318B261a)
5. Sale of a Controlled/Narcotic Drug (318B261a)
6. Sale of a Controlled/Narcotic Drug (318B261a)


03/20/2019  Affidavit Index # 8
Defendant's Affidavit is support of Pre-Arrestment Supplemental Brief
Party: Defendant Bergeron, Richard E


03/21/2019 **Arraignment/Bail Hearing** (1:30 PM) (Judicial Officer: O'Neill, James D, III)
Charges: 1, 2, 3, 4, 5, 6

03/21/2019  Other Index # 9
Waiver of Right to Counsel
Party: Defendant Bergeron, Richard E
Charges:

1. Sale of a Controlled/Narcotic Drug (318B261a)
2. Sale of a Controlled/Narcotic Drug (318B261a)
3. Sale of a Controlled/Narcotic Drug (318B261a)
4. Sale of a Controlled/Narcotic Drug (318B261a)
5. Sale of a Controlled/Narcotic Drug (318B261a)
6. Sale of a Controlled/Narcotic Drug (318B261a)

03/21/2019  Proposed Order Index # 10
Party: Defendant Bergeron, Richard E

03/21/2019  Waiver of Extradition Index # 11
Party: Defendant Bergeron, Richard E

03/21/2019  Bail Order (Judicial Officer: O'Neill, James D, III) Index # 12
Charges:

1. Sale of a Controlled/Narcotic Drug (318B261a)
2. Sale of a Controlled/Narcotic Drug (318B261a)
3. Sale of a Controlled/Narcotic Drug (318B261a)
4. Sale of a Controlled/Narcotic Drug (318B261a)
5. Sale of a Controlled/Narcotic Drug (318B261a)
6. Sale of a Controlled/Narcotic Drug (318B261a)

03/21/2019 **Plea** (Judicial Officer: O'Neill, James D, III)
Bergeron, Richard E

1. Sale of a Controlled/Narcotic Drug
Not Guilty
ChargeID: 1602978C Sequence:
Bergeron, Richard E
2. Sale of a Controlled/Narcotic Drug
Not Guilty
ChargeID: 1602979C Sequence:
Bergeron, Richard E
3. Sale of a Controlled/Narcotic Drug
Not Guilty
ChargeID: 1602980C Sequence:
Bergeron, Richard E
4. Sale of a Controlled/Narcotic Drug
Not Guilty
ChargeID: 1602981C Sequence:
Bergeron, Richard E
5. Sale of a Controlled/Narcotic Drug
Not Guilty
ChargeID: 1602995C Sequence:
Bergeron, Richard E
6. Sale of a Controlled/Narcotic Drug

Belknap
Case Summary

Case No. 211-2019-CR-00163












Not Guilty
ChargeID: 1602996C Sequence:

03/25/2019	 Motion to Dismiss Party: Defendant Bergeron, Richard E	Index # 13
03/25/2019	 Affidavit Party: Defendant Bergeron, Richard E	Index # 14
03/26/2019	 Obj-Motion to Dismiss Party: Attorney Livernois, Andrew ESQ	Index # 15
03/27/2019	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Standby Counsel to be appointed</i>	Index # 16
03/29/2019	 Ntc of Eligibility and Appt of Counsel <i>Standby counsel for defendant</i> Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 17
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04/04/2019	 Objection <i>Supplemental Objection</i> Party: Attorney Livernois, Andrew ESQ	Index # 19
04/05/2019	 Appearance <i>Standby counsel</i> Party: Attorney Smith, Caroline L. ESQ	Index # 20
04/05/2019	 Obj-Notice of Chemical Analysis Party: Attorney Smith, Caroline L. ESQ	Index # 21
04/08/2019	 Other <i>Supplemental Brief in Support of Motion to Dismiss</i> Party: Defendant Bergeron, Richard E	Index # 22
04/08/2019	 Affidavit Party: Defendant Bergeron, Richard E	Index # 23
04/08/2019	 Motion <i>to Determine Duties of Standby Counsel</i> Party: Attorney Smith, Caroline L. ESQ	Index # 24
04/08/2019	 Other <i>Waiver of Right to Counsel</i>	Index # 27
04/10/2019	 Hearing-Motion to Dismiss (8:30 AM) (Judicial Officer: O'Neill, James D, III) <i>Hearing Held</i> Charges: 1, 2, 3, 4, 5, 6 —	

Belknap

Case Summary

Case No. 211-2019-CR-00163

05/16/2019	 Indictment Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 25
05/20/2019	 Arraignment and Scheduling Order	Index # 26
06/03/2019	Denied (Judicial Officer: O'Neill, James D, III) <i>See Order #28</i>	
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06/03/2019	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Motion to Dismiss DENIED, Motion to Determine Duties of Standby Counsel GRANTED</i>	Index # 28
06/19/2019	 Other <i>misc.</i>	Index # 29
07/18/2019	 Motion to Recuse or Disqualify <i>*Recuse Andrew Livernois</i> Party: Defendant Bergeron, Richard E	Index # 30
08/01/2019	 Obj-Motion to Recuse or Disqualify Party: Attorney Livernois, Andrew ESQ	Index # 31
08/12/2019	 Response to Objection <i>to Motion to Recuse</i> Party: Defendant Bergeron, Richard E	Index # 32
08/30/2019	Dispositional Conference (8:30 AM) <i>Hearing Held</i> Charges: 1, 2, 3, 4, 5, 6	
08/30/2019	Hearing on Pending Motions (8:30 AM) <i>Taken Under Advisement</i> Charges: 1, 2, 3, 4, 5, 6	
08/30/2019	 Other <i>Waiver of Right to Counsel</i> Party: Defendant Bergeron, Richard E	Index # 33
08/30/2019	 Dispositional Conference Order (Judicial Officer: O'Neill, James D, III) Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 34
09/05/2019	 Affidavit <i>in Support of Motion to Recuse</i> Party: Defendant Bergeron, Richard E	Index # 35
09/16/2019	 Motion to Suppress	Index # 36

Belknap
Case Summary

Case No. 211-2019-CR-00163

Statements

Party: Defendant Bergeron, Richard E

09/30/2019	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Motion to Recuse DENIED</i>	Index # 37
09/30/2019	Denied (Judicial Officer: O'Neill, James D, III)	
10/01/2019	 Witness List Party: Attorney Livernois, Andrew ESQ	Index # 38
10/02/2019	 Response Party: Attorney Livernois, Andrew ESQ	Index # 39
10/02/2019	 Moot (Judicial Officer: O'Neill, James D, III)	
10/07/2019	 Motion to Compel Party: Defendant Bergeron, Richard E	Index # 40
11/06/2019	 Obj-Motion to Compel Party: Attorney Livernois, Andrew ESQ; Prosecutor Belknap County Attorney	Index # 41
11/07/2019	Final Pretrial (8:30 AM) <i>Hearing Held</i> Charges: 1, 2, 3, 4, 5, 6	
11/07/2019	Hearing-Motion to Compel (8:30 AM) <i>Taken Under Advisement</i> Charges: 1, 2, 3, 4, 5, 6	
11/07/2019	 Other (Judicial Officer: O'Neill, James D, III) <i>Waiver of Right to Counsel</i> Party: Defendant Bergeron, Richard E Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a) 6. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 42
11/07/2019	 Final Pre-Trial Order (Judicial Officer: O'Neill, James D, III) <i>Trial - 4 Days Env. #864842</i>	Index # 43
11/08/2019	 Motion to Continue Trial <i>Env. #889627</i> Party: Prosecutor Belknap County Attorney	Index # 44
11/14/2019	 Response Party: Defendant Bergeron, Richard E	Index # 45
11/14/2019	 Objection to Motion to Continue Party: Defendant Bergeron, Richard E	Index # 46
11/14/2019	 Motion in Limine <i>State's First Motion in Limine</i> Party: Prosecutor Belknap County Attorney	Index # 47

Belknap
Case Summary

Case No. 211-2019-CR-00163

11/14/2019	 Motion in Limine <i>State's Second Motion in Limine</i> Party: Prosecutor Belknap County Attorney	Index # 48
11/14/2019	 Motion in Limine <i>State's Third Motion in Limine</i> Party: Prosecutor Belknap County Attorney	Index # 49
11/14/2019	 Motion in Limine <i>State's Fourth Motion in Limine</i> Party: Prosecutor Belknap County Attorney	Index # 50
11/20/2019	Hearing-Motion to Continue (8:30 AM) <i>Taken Under Advisement</i> Charges: 1, 2, 3, 4, 5, 6	
11/20/2019	 Objection <i>to State's Motions in Limine</i>	Index # 51
11/20/2019	Granted (Judicial Officer: O'Neill, James D, III)	
11/20/2019	 Other (Judicial Officer: O'Neill, James D, III) <i>Waiver of Right to Counsel</i>	Index # 52
11/20/2019	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Order re: Motion to Continue Env. #889627</i>	Index # 53
11/25/2019	CANCELED Jury Selection (9:00 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Continued</i>	
12/10/2019	 Assented to Motion to Continue <i>Assented to Motion to Continue</i> Party: Defendant Bergeron, Richard E	Index # 54
12/10/2019	Granted (Judicial Officer: O'Neill, James D, III) <i>env 918715</i>	
12/16/2019	 CANCELED Hearing-Motion in Limine (8:30 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Continued</i>	
01/03/2020	 Hearing-Motion in Limine (8:30 AM) <i>Taken Under Advisement</i> Charges: 1, 2, 3, 4, 5, 6	
01/03/2020	 Other <i>Waiver of Right to Counsel</i>	Index # 55
01/03/2020	 Court Order (Judicial Officer: O'Neill, James D, III) <i>re: Motion to Compel DENIED Env. #950684</i>	Index # 56
01/08/2020	 Court Order (Judicial Officer: O'Neill, James D, III) <i>re: Motions in Limine Env. #957308</i>	Index # 57
01/13/2020	 Motion to Reconsider Party: Defendant Bergeron, Richard E	Index # 58
01/24/2020	 Assented to Motion to Continue	Index # 59

Belknap

Case Summary

Case No. 211-2019-CR-00163


Party: Defendant Bergeron, Richard E

01/24/2020	 Waiver of Speedy Trial Party: Defendant Bergeron, Richard E	Index # 60
01/27/2020	 CANCELED Final Pretrial (8:30 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Continued</i>	
01/27/2020	 Notice of No Objection	Index # 61
01/27/2020	Granted (Judicial Officer: O'Neill, James D, III) <i>Env. #999635</i>	
01/31/2020	Denied (Judicial Officer: O'Neill, James D, III)	
01/31/2020	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Motion to Reconsider DENIED Env. #10000526</i>	Index # 62
02/03/2020	 CANCELED Jury Selection (9:00 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Continued</i>	
05/19/2020	 Telephonic Hearing (10:00 AM) Charges: 1, 2, 3, 4, 5, 6	
05/19/2020	 Other <i>Case Status Rescheduling Report, env 1154352</i>	Index # 63
05/22/2020	 Motion <i>Motion for Court Order Prohibiting Pre-Trial Publicity</i> Party: Prosecutor Belknap County Attorney	Index # 64
05/22/2020	 Other <i>Exhibit A to State's Motion for a Court Order Prohibiting Pre-Trial Publicity</i> Party: Prosecutor Belknap County Attorney	Index # 65
05/22/2020	 Other <i>Exhibit B to State's Motion for a Court Order Prohibiting Pre-Trial Publicity</i> Party: Prosecutor Belknap County Attorney	Index # 66
05/27/2020	 Objection Party: Defendant Bergeron, Richard E	Index # 67
05/27/2020	 Affidavit Party: Defendant Bergeron, Richard E	Index # 68
05/28/2020	 CANCELED Final Pretrial (8:30 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Other</i>	
06/08/2020	 CANCELED Jury Selection (9:00 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Other</i>	
06/09/2020	 Appearance <i>Appearance of Henry Klementowicz</i> —	Index # 69

Belknap

Case Summary

Case No. 211-2019-CR-00163


06/09/2020  Other
Notice of Intent to File Amicus Index # 70

06/09/2020  Appearance
Appearance of Gilles Bissonnette, Esq. on Behalf of Amicus Curiae ACLU of New Hampshire Index # 71

06/11/2020  Assented to Motion
Assented to Motion to file Amicus Brief by June 19 Index # 72


06/12/2020 Granted (Judicial Officer: O'Neill, James D, III)
env 1188660

06/19/2020  Other
Brief of Amicus Curiae ACLU of New Hampshire in Opposition to State's Motion for Court Order Prohibiting Pre-Trial Publicity
Index # 73


07/03/2020  Motion
Partially Assented-to Motion to Participate in Oral Argument Index # 74

07/15/2020  Appearance
Party: Attorney Heater, Tara J. ESQ Index # 75


07/15/2020  Withdrawal
Party: Attorney Livernois, Andrew ESQ Index # 76

07/15/2020  Notice - Withdrawal of Pleading
Motion for Court Order Prohibiting Pre-Trial Publicity
Party: Prosecutor Belknap County Attorney Index # 77

07/15/2020 Granted - No Objection (Judicial Officer: O'Neill, James D, III)
Env #1232551


07/20/2020  Motion
for Court-Ordered Sanctions...: DENIED (see Order - Index #85)
Party: Defendant Bergeron, Richard E Index # 78

07/20/2020  Affidavit
Party: Defendant Bergeron, Richard E Index # 79

07/21/2020  CANCELED Motion Hearing (8:00 AM)
Charges: 1, 2, 3, 4, 5, 6
Withdrawn

07/27/2020  Objection
Motion for Sanctions Index # 80

07/29/2020  Response
Party: Defendant Bergeron, Richard E Index # 81

08/14/2020  Motion in Limine
Voir Dire Questions: HELD IN ABEYANCE (see Order - Index #85)
Party: Prosecutor Belknap County Attorney Index # 82

08/19/2020  Other
Notice of Cancelled Hearings, env 1282400 Index # 83

Belknap
Case Summary

Case No. 211-2019-CR-00163

08/24/2020	 Objection <i>Env #1292797</i> Party: Defendant Bergeron, Richard E	Index # 84
09/09/2020	 Hearing on Pending Motions (8:00 AM) <i>Taken Under Advisement</i> Charges: 1, 2, 3, 4, 5, 6	
09/24/2020	 CANCELED Final Pretrial (8:30 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Other</i>	
10/05/2020	 CANCELED Jury Selection (9:00 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Other</i>	
10/23/2020	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Env 1385505 [motion #78 is DENIED; motion #82 is HELD IN ABEYANCE]</i>	Index # 85
02/01/2021	 Motion <i>Amended Motion for Court Ordered Sanctions: DENIED (see Order - Index #91)</i> Party: Defendant Bergeron, Richard E	Index # 86
02/01/2021	 Affidavit Party: Prosecutor Belknap County Attorney	Index # 87
02/05/2021	 Motion to Amend <i>Amended Motion for Court Ordered Sanctions (emailed to Atty. Heater)</i> Party: Defendant Bergeron, Richard E	Index # 88
02/09/2021	 Objection <i>to Amended Motion for Sanctions</i> Party: Prosecutor Belknap County Attorney	Index # 89
02/11/2021	 Response Party: Defendant Bergeron, Richard E	Index # 90
03/05/2021	 Motion Hearing (8:00 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6	
03/11/2021	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Env 1618359</i>	Index # 91
04/07/2021	 Motion <i>To rescuse</i> Party: Defendant Bergeron, Richard E	Index # 92
05/12/2021	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Motion to Recuse DENIED, Env #1733160</i>	Index # 93
05/21/2021	 Motion to Reconsider Party: Defendant Bergeron, Richard E	Index # 94
05/21/2021	 Affidavit Party: Defendant Bergeron, Richard E —	Index # 95

Belknap
Case Summary

Case No. 211-2019-CR-00163

06/07/2021	 Court Order (Judicial Officer: O'Neill, James D, III) <i>Env #1771770</i>	Index # 96
06/17/2021	 Motion to Dismiss	Index # 97
06/22/2021	 Objection Party: Prosecutor Grafton County Attorney's Office	Index # 98
06/24/2021	 Motion <i>to Amend Objection</i> Party: Prosecutor Grafton County Attorney's Office	Index # 99
06/25/2021	 Response Party: Defendant Bergeron, Richard E	Index # 100
08/03/2021	 CANCELED Hearing-Motion to Dismiss (8:30 AM) (Judicial Officer: O'Neill, James D, III) Charges: 1, 2, 3, 4, 5, 6 <i>Hearing Not Needed</i>	
08/05/2021	 Court Order (Judicial Officer: O'Neill, James D, III) <i>MTD Denied, Env #1874041</i>	Index # 101
08/11/2021	 Motion to Reconsider Party: Defendant Bergeron, Richard E	Index # 102
08/31/2021	 Court Order (Judicial Officer: O'Neill, James D, III) <i>MRE Denied, Env #1916021</i>	Index # 103
09/08/2021	 Motion <i>To recuse</i>	Index # 104
09/20/2021	 Court Order (Judicial Officer: O'Neill, James D, III) <i>MTR Denied - Env #1948612</i>	Index # 105
11/16/2021	 Motion <i>To Schedule Trial</i>	Index # 106
11/18/2021	 Notice of No Objection <i>Partial Non-Objection to Motion to Schedule Trial</i> Party: Prosecutor Belknap County Attorney	Index # 107
11/19/2021	 Granted in Part (Judicial Officer: O'Neill, James D, III) <i>Env #2052106</i>	
03/30/2022	 Notice of Nolle Prosequi <i>1602978C, 1602979C, 1602980C, 1602981C, 1602995C, 1602996C</i> Party: Prosecutor Grafton County Attorney's Office	Index # 108
03/30/2022	 Return <i>Env # 2271253</i> Charges: 1. Sale of a Controlled/Narcotic Drug (318B261a) 2. Sale of a Controlled/Narcotic Drug (318B261a) 3. Sale of a Controlled/Narcotic Drug (318B261a) 4. Sale of a Controlled/Narcotic Drug (318B261a) 5. Sale of a Controlled/Narcotic Drug (318B261a)	Index # 109

Belknap


Case Summary

Case No. 211-2019-CR-00163

6. Sale of a Controlled/Narcotic Drug (318B26Ia)

03/30/2022 **Disposition**


1. Sale of a Controlled/Narcotic Drug
Nolle Prossed
ChargeID: 1602978C
Sequence:
2. Sale of a Controlled/Narcotic Drug
Nolle Prossed
ChargeID: 1602979C
Sequence:
3. Sale of a Controlled/Narcotic Drug
Nolle Prossed
ChargeID: 1602980C
Sequence:
4. Sale of a Controlled/Narcotic Drug
Nolle Prossed
ChargeID: 1602981C
Sequence:
5. Sale of a Controlled/Narcotic Drug
Nolle Prossed
ChargeID: 1602995C
Sequence:
6. Sale of a Controlled/Narcotic Drug
Nolle Prossed
ChargeID: 1602996C
Sequence:

04/19/2022 

CANCELED Final Pretrial (8:00 AM)

Charges: 1, 2, 3, 4, 5, 6

Case Closed

05/09/2022 

CANCELED Jury Selection (9:00 AM)

Charges: 1, 2, 3, 4, 5, 6

Case Closed

Case summary in Estate of Hagen Esty-Lennon v. State of New Hampshire, No. 217-2015-cv-00376 (Merrimack Cty. Superior Court Apr. 4, 2015) (granting assented-to motion to file a memorandum of law as amicus curiae)

MERRIMACK, SS.

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

No. 217-2015-CV-00376

ESTATE OF HAGEN ESTY-LENNON

v.

STATE OF NEW HAMPSHIRE

**AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE'S PARTIALLY
ASSENTED-TO MOTION TO FILE A MEMORANDUM OF LAW AS *AMICUS*
*CURIAE***

2015 SEP 1 AM 11:02

SUPERIOR COURT

029170

The American Civil Liberties Union of New Hampshire ("ACLU-NH") hereby submits its Partially Assented-to Motion to File a Memorandum of Law as *Amicus Curiae* in support of the disclosure to the *Valley News*, the Union Leader Corporation, and Hearst Properties, Inc. (including WMUR-TV) of the four (4) videos depicting the events surrounding the fatal police shooting of Hagen Esty-Lennon pursuant to Chapter 91-A. In support, the ACLU-NH states as follows:

1. The American Civil Liberties Union of New Hampshire is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 500,000 members (including over 3,500 New Hampshire members). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under federal and state law, including the right to freedom of information pursuant to Part 1, Article 8 of the New Hampshire Constitution and New Hampshire's open records law (Chapter 91-A).

2. The ACLU-NH has a long track record of working specifically on open records issues, both in and out of the courts. The ACLU-NH frequently utilizes the provisions of Chapter 91-A to investigate civil liberties issues and has several public records requests pending.

9-4-15
Printed
[Signature]

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The ACLU-NH has also testified before the New Hampshire legislature on open records issues, including most recently against 2014 House Bill 646—a bill which would have crippled Chapter 91-A by causing requesters to pay, in advance, for estimated labor costs before the government entity even begins collecting responsive documents. The ACLU-NH has also litigated public records cases, including cases that have grappled with the balance between government transparency and privacy. For example, the ACLU-NH litigated *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003), where the New Hampshire Supreme Court weighed the public interest in disclosure and individuals' privacy interests under Chapter 91-A, and held that the Manchester police department was required to disclose to the ACLU-NH photographs taken by the department pursuant to its policy of taking photographs of people who were stopped by the police, but not arrested.

3. The ACLU-NH is committed to protecting both the right to government transparency and the right to privacy. As its work in *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003) demonstrates, the ACLU-NH has striven to appropriately balance these rights when they conflict. This too is a case where these competing rights conflict. As the debate over whether the police should use body cameras has grown more robust in New Hampshire and throughout the country, the ACLU-NH has strongly encouraged the use of body cameras as a tool to ensure police accountability. But the ACLU-NH has also provided guidance to local law enforcement agencies as to how these cameras can be used in ways that protect citizens' privacy. For example, in May 2015, the national ACLU was the first organization to publish model legislation designed to assist police departments in how to use body cameras in ways that protect the public's right to know, while also protecting the public's right to privacy. This model legislation suggests that body camera footage should be subject to

state open records laws when it depicts the following: (i) any use of force; (ii) events leading up to and including an arrest for a felony-level offense; (iii) events that constitute a felony-level offense; and/or (iv) an encounter about which a complaint has been registered by a subject of the video footage. *See* National ACLU, A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement, at 5 (May 2015), *available at* https://www.aclu.org/files/field_document/aclu_police_body_cameras_model_legislation_may_2015.pdf. As this national ACLU model legislation recognizes, the public interest in law enforcement accountability and transparency is particularly compelling in the context of incidents like officer-involved shootings.

4. Because this case presents important questions about police accountability and public access to information about the operation of police officers, as well as the appropriate balance between accountability and privacy, proper resolution of this matter is of significant concern to the ACLU-NH and its members. The ACLU-NH believes that its experience in the legal issues surrounding the disclosure of information on governments, and police in particular, as well as in the repercussions for decisions on governance of police and police-community relations, will make its brief of service to the Court. *See* N.H. Sup. Ct. R. 30(2) (“The motion shall concisely state the nature of the movant’s interest, the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.”).

5. Accordingly, the ACLU-NH wishes to file a Memorandum of Law in this case. The ACLU-NH is conditionally filing its Memorandum of Law with this Motion.

6. Counsel for the *Valley News* (William L. Chapman, Esq.) and counsel for the Union Leader Corporation and Hearst Properties, Inc. (Gregory V. Sullivan, Esq.) assent to the

relief sought in this Motion. Counsel for the Attorney General's Office (Susan Morrell, Esq. and Elizabeth Mullholland, Esq.) takes no position on the relief requested in this Motion. Counsel for the Haverhill Police Department (Charlie P. Bauer, Esq.) and the Estate of Hagen Esty-Lennon (Peter McGrath, Esq.) do not oppose the relief sought in this Motion. Counsel for Hagen Esty-Lennon's children (Diane Puckhaber, Esq.) does not assent to the relief requested in this Motion.

WHEREFORE, the American Civil Liberties Union of New Hampshire requests that this Honorable Court grant it leave to file an *Amicus Curiae* brief in this case.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire
Foundation,



Gilles R. Bissonnette, NH Bar # 265393
American Civil Liberties Union of New Hampshire
18 Low Avenue
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Dated: September 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to the following on this

1st day of September 2015:

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Gilles Bissonnette, Esq.

Merrimack

Case Summary

Case No. 217-2015-CV-00376

Estate of Hagen Esty-Lennon v State of New Hampshire

§
§
§

Location: Merrimack

Judicial Officer: Fauver, Peter H

Filed on: 08/05/2015

Case Information

Case Type: Complaint for Injunction

Case Status: 12/10/2015 Closed

09/24/2015 Appealed to Supreme Court

08/05/2015 Pending

Assignment Information

Current Case Assignment

Case Number 217-2015-CV-00376

Court Merrimack

Date Assigned 08/05/2015

Judicial Officer Fauver, Peter H

Party Information

Plaintiff Estate of Hagen Esty-Lennon
Male

McGrath, Peter G ESQ

Retained

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603-224-7111(W)

000-000-0000(H)

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Intervenor American Civil Liberties Union of New Hampshire Foundation

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p/n/f of the Esty-Lennon Children

Puckhaber, Diane M. ESQ

Retained

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Bauer, Charles P. ESQ

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Haverhill Police Officers

Bauer, Charles P. ESQ

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Merrimack

Case Summary

Case No. 217-2015-CV-00376

Hearst Properties, Inc.
Pending Motion to Intervene

New Hampshire Center for Public Interest Journalism

NH1 News Network

Town of Haverhill

Union Leader Corporation
Pending Motion to Intervene

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Chapman, William L. ESQ
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Events and Orders of the Court

08/05/2015	Complaint for Injunction <i>Emergency Petition for Preliminary and Temporary Injunctive Relief</i> Party: Attorney McGrath, Peter G ESQ	Index # 1
08/05/2015	Service State of New Hampshire Unserved	
08/05/2015	Summons on Complaint	Index # 2
08/06/2015	Temporary Hearing (8:30 AM) (Judicial Officer: McNamara, Richard B)	
08/06/2015	Appearance <i>Counsel for: Valley News</i> Party: Attorney Chapman, William L. ESQ	Index # 3
08/06/2015	Motion to Intervene <i>Valley News. Attached Exhibit 1.</i> Party: Attorney Chapman, William L. ESQ	Index # 4
08/06/2015	Limited Appearance or Withdrawal <i>Counsel for: Lisa Esty-Lennon p/n/f of the Esty-Lennon Children</i>	Index # 5
08/06/2015	Motion to Intervene <i>Lisa Esty-Lennon, p/n/f of Bohden and Hadley Esty-Lennon</i> Party: Attorney Puckhaber, Diane M. ESQ	Index # 6
08/06/2015	Response <i>Response to Emergency Petition for Preliminary and Temporary Injunctive Relief Filed by the Estate of Hagen Esty-Lennon</i> Party: Attorney Puckhaber, Diane M. ESQ	Index # 7

Merrimack

Case Summary

Case No. 217-2015-CV-00376

08/06/2015 Appearance Index # 8
Counsel for: Town of Haverhill/Haverhill Police Department/ Haverhill Police Officers
Party: Attorney Bauer, Charles P. ESQ

08/06/2015
Other
Assented-To Motion for Appearance and Participation on Behalf of Town of Haverhill/Haverhill Police Department/Haverhill Police Officers
Party: Attorney Bauer, Charles P. ESQ
Index # 9

08/06/2015 Appearance Index # 10
As Counsel for: State of New Hampshire
Party: Attorney Mulholland, Elizabeth V. ESQ

08/06/2015 Correspondence Index # 11
Re: disc
Party: Attorney Mulholland, Elizabeth V. ESQ

08/07/2015
Court Order (Judicial Officer: Fauver, Peter H)
See Order. ...the Petitioner's motion for a preliminary injunction enjoining the release of the videos is GRANTED, to remain in effect pending further order of the Court.
Index # 12

08/17/2015 Motion Index # 13
Motion for Post-Decision Relief - Valley News
Party: Attorney Chapman, William L. ESQ

08/18/2015 Motion to Intervene
Motion of Union Leader Corporation and Hearst Properties, Inc. to Intervene and to Oppose the Plaintiff's Petition
Party: Attorney Sullivan, Gregory V. ESQ
Index # 14

08/21/2015 Response to Motion Index # 15
State's Response to Valley News' Motion for Post-Decision Relief
Party: Attorney Mulholland, Elizabeth V. ESQ

08/24/2015 Motion to Substitute Index # 16
Assented-To Motion to Substitute Party-Valley News to Newspapers of New Hampshire, Inc.
Party: Attorney Chapman, William L. ESQ

08/26/2015 Response
Position Statement on Behalf of Town of Haverhill, Haverhill Police Department, and Haverhill Police Officers
Party: Attorney Bauer, Charles P. ESQ
Index # 17

08/26/2015 Response to Motion Index # 18
Response to Valley News' Motion for Post-Decision Relief
Party: Attorney Puckhaber, Diane M. ESQ

08/28/2015
Response to Motion
Town of Haverhill, Haverhill Police Department, and Haverhill Police Officers' Response to Valley New's Motion for Post-Decision Relief
Party: Attorney Bauer, Charles P. ESQ
Index # 19

08/31/2015 Memorandum of Law Index # 20
Lisa Esty-Lennon- Intervener's Memorandum of Law
Party: Attorney Puckhaber, Diane M. ESQ

09/01/2015
Motion
American Civil Liberties Union of New Hampshire's Partially Assented-To Motion to File a Memorandum of Law as Amicus Curiae
Party: Attorney Bissonnette, Gilles R. ESQ
Index # 21

09/01/2015
Memorandum of Law

Merrimack

Case Summary

Case No. 217-2015-CV-00376

Amicus Curiae American Civil Liberties Union of New Hampshire's Memorandum of Law in Support of Disclosure to the Valley News, The Union Leader Corporation, and Hearst Properties, Inc.

Party: Attorney Bissonnette, Gilles R. ESQ

Index # 22

09/01/2015	Memorandum of Law <i>Plaintiff's Memorandum of Law</i> Party: Attorney McGrath, Peter G ESQ	Index # 23
09/01/2015	Appearance <i>as Counsel for: New Hampshire Center for Public Interest Journalism d/b/a IndepthNH.org</i> Party: Attorney Gagliuso, Richard C. ESQ	Index # 24
09/01/2015	Motion to Intervene <i>Motion of IndepthNH.org to Intervene in Opposition to Plaintiff's Petition for Injunctive Relief</i> Party: Attorney Gagliuso, Richard C. ESQ	Index # 25
09/01/2015	Memorandum of Law <i>Memorandum in Support of Releasing All Videos Relating to Police Shooting</i> Party: Intervenor NH1 News Network	Index # 26
09/01/2015	Memorandum of Law <i>Newspapers of New Hampshire, Inc.'s Memorandum of Law</i> Party: Attorney Chapman, William L. ESQ	Index # 27
09/01/2015	Memorandum of Law <i>State's Memorandum of Law in Support of Redacted Release of Certain Body Camera Video Footage</i> Party: Attorney Mulholland, Elizabeth V. ESQ	Index # 28
09/04/2015	Granted (Judicial Officer: Fauver, Peter H)	
09/04/2015	Granted (Judicial Officer: Fauver, Peter H)	
09/04/2015	Granted in Part (Judicial Officer: Fauver, Peter H) "A is granted. So ordered."	
09/04/2015	Court Order (Judicial Officer: Fauver, Peter H)	Index # 29
09/04/2015	Order Made (Judicial Officer: Fauver, Peter H) See #29	
09/08/2015	Motion for Clarification <i>Newspapers of New Hampshire, Inc.'s Motion for Clarification</i> Party: Attorney Chapman, William L. ESQ	Index # 30
09/10/2015	Other <i>Plaintiff's Clarification Regarding Memorandum of Law</i> Party: Attorney McGrath, Peter G ESQ	Index # 31
09/10/2015	Motion to Reconsider <i>Motion for Reconsideration</i> Party: Attorney Puckhaber, Diane M. ESQ	Index # 32
09/10/2015	Motion to Stay <i>Partially Assented to Motion for Stay of Orders Pending Order on Reconsideration and/or Appeal</i> Party: Attorney Puckhaber, Diane M. ESQ	Index # 33
09/11/2015	Motion to Reconsider <i>Motion of Union Leader Corporation and Heart Properties, Inc. for Reconsideration</i> Party: Attorney Sullivan, Gregory V. ESQ	Index # 34
09/11/2015	Sealed Document <i>Redacted video</i>	Index # 35
09/14/2015	Motion to Reconsider <i>Motion of IndepthNH.org for Reconsideration of September 4, 2015 Order</i> Party: Attorney Gagliuso, Richard C. ESQ	Index # 36
09/14/2015	Obj-Motion to Stay <i>Newspapers of New Hampshire, Inc.'s Objection to Motion for Stay of Orders</i> Party: Attorney Chapman, William L. ESQ	Index # 37
09/14/2015	Obj-Motion to Reconsider	Index # 38

Merrimack

Case Summary

Case No. 217-2015-CV-00376

Newspapers of New Hampshire, Inc.'s Objection to Motion for Reconsideration

Party: Attorney Chapman, William L. ESQ

09/16/2015 Court Order (Judicial Officer: Fauver, Peter H)

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09/16/2015 **Granted in Part** (Judicial Officer: Fauver, Peter H)

09/21/2015 Obj-Motion to Stay

Objection to Motion of Lisa Esty-Lennon for Stay of Orders Pending Order on Reconsideration and/or Appeal

Party: Attorney Gagliuso, Richard C. ESQ

Index # 40

09/21/2015

Obj-Motion to Stay

Oppositioin of Union Leader Corporation and Hearst Properties, Inc. to the Motion of Lisa Esty-Lennon for Stay of Orders Pending Order on Reconsideration and/or Appeal

Party: Attorney Sullivan, Gregory V. ESQ

Index # 41

09/21/2015

Court Order (Judicial Officer: Fauver, Peter H)

...see order...Motion for Reconsideration and Motion for Stay denied....Attorney General shall release the videos and audio on Sept. 25, 2015 with the redaction set forth herein.....

Index # 42

09/24/2015

Notice of Appeal to Supreme Court

Lisa Esty-Lennon's with Supreme Court Emergency Motion for Stay of Order Releasing Video and Audio Recordings Pending Appeal

Party: Attorney Puckhaber, Diane M. ESQ

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**Motion for leave to file amicus brief and case docket
in Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC et al.,
No. 1:22-cv-00078 (D.N.H. May 25, 2022)
(federal district court granting partially assented-to
motion to file an amicus brief even in the absence of
district court local rules discussing amicus brief
procedures)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

SIG SAUER, INC.

Plaintiff,

v.

JEFFREY S. BAGNELL, ESQ., LLC, and
JEFFREY S. BAGNELL,

Defendants.

No.: 1:22-cv-00078-LM

**PARTIALLY ASSENTED-TO MOTION OF THE AMERICAN CIVIL
LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES
UNION OF NEW HAMPSHIRE TO FILE A BRIEF AS *AMICUS
CURIAE* IN OPPOSITION TO PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION**

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before courts throughout the country in cases involving the exercise of First Amendment rights, both as direct counsel and as *amicus curiae*. *See, e.g., Hague v Cong. of Indus. Orgs.*, 307 U.S. 496 (1939); *Bartnicki v Vopper*, 532 U.S. 514 (2001); *Snyder v Phelps*, 562 U.S. 443 (2011); *Mahanoy Area Sch. Dist. v B. L.*, 549

US ___, 141 S. Ct. 2038 (2021). The American Civil Liberties Union of New Hampshire (ACLU-NH) is the statewide affiliate of the ACLU and has more than 9,000 members and supporters across the state.

The ACLU-NH has similarly litigated numerous free speech cases both as direct counsel as *amicus curiae*. See, e.g., *Rideout v. State of New Hampshire*, 123 F. Supp. 3d 218 (D.N.H. 2015), *aff'd*, 838 F.3d 65 (1st Cir. 2016), *cert denied*, 137 S. Ct. 1435 (2017) (striking down New Hampshire law banning online “ballot selfies” on grounds that it violates the First Amendment); *Petrello v. City of Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793 (D.N.H. Sep. 7, 2017) (striking down, on First Amendment grounds, Manchester’s anti-panhandling ordinance, as well as permanently enjoining Manchester’s anti-panhandling police practices); *City of Keene v. Cleaveland*, 167 N.H. 731 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that “the First Amendment shields the respondents from tort liability for the challenged conduct”; as *amicus curiae*); *Automated Transactions, LLC v. American Bankers Association*, 172 N.H. 528 (2019) (affirming dismissal of defamation case alleging that use of the term “patent troll” was defamatory, and concluding that the usage of the term was protected opinion; as *amicus curiae*); *Frese v. N.H. Att’y Gen.*, No. 1:18-cv-01180 (filed on Dec. 18, 2018, and pending appeal at First Circuit) (challenging on vagueness grounds New Hampshire’s criminal defamation statute).

Both the ACLU and the ACLU-NH have long opposed prior restraints on speech, particularly speech on matters of public concern. The proper resolution of this case is therefore a matter of substantial interest to the ACLU, the ACLU-NH, and their members. Indeed, this case presents an issue of exceptional importance concerning the propriety of a court issuing a preliminary injunction that would restrain speech that has not been finally adjudicated to be false or misleading in any context. The ACLU and ACLU-NH believe that their experience in the legal issues surrounding free speech rights will make their brief of service to the Court.

Accordingly, the ACLU and ACLU-NH wish to file an *amicus* brief in this case. The ACLU and ACLU-NH are conditionally filing their *amicus* brief with this Motion.

Pursuant to Local Rule 7.1(c), undersigned counsel have made a good faith attempt to obtain concurrence in the relief sought. Counsel for the defendants have assented to the filing of this *amicus* brief. Counsel for the plaintiff do not oppose this motion seeking to file this *amicus* brief, but will file a short response to the motion with the Court to explain their position.

WHEREFORE, the American Civil Liberties Union and the American Civil Liberties Union of New Hampshire request that this Honorable Court grant them leave to file an *Amicus Curiae* brief in this case.

Respectfully submitted,

The American Civil Liberties Union
Foundation and the American Civil Liberties
Union of New Hampshire,

/s/ Gilles R. Bissonnette

Gilles R. Bissonnette (N.H. Bar. No.
265393)

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Date: May 23, 2022

**U.S. District Court
District of New Hampshire (Concord)
CIVIL DOCKET FOR CASE #: 1:22-cv-00078-LM**

Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC et al
Assigned to: Chief Judge Landya B. McCafferty
Cause: 15:1125 Trademark Infringement (Lanham Act)

Date Filed: 03/02/2022
Date Terminated: 07/12/2022
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

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represented by **Howard M. Cooper**
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ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Lorraine D Belostock
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Amicus

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Amicus**AMERICAN CIVIL LIBERTIES
UNION OF NEW HAMPSHIRE**

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian M. Hauss
(See above for address)
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Henry Klementowicz
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/02/2022	<u>1</u>	NEW CASE/ COMPLAINT with Jury Demand Filing fee \$ 402, receipt number ANHDC-2222156 filed by Sig Sauer, Inc.. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Summons to Jeffrey S. Bagnell, # <u>3</u> Summons to Jeffrey S. Bagnell, Esq., LLC). Complaint includes a

		claim under the NH Consumer Protection Act. A copy of the Complaint has been sent to the NH Attorney General via an automatic Notice of Electronic filing. (Zick, Colin) (Entered: 03/02/2022)
03/02/2022	2	Disclosure Statement by Sig Sauer, Inc. disclosing a parent company, no publicly traded company, and no merger agreement. (Zick, Colin) (Entered: 03/02/2022)
03/02/2022	3	MOTION for Preliminary Injunction filed by Sig Sauer, Inc.. HEARING REQUESTED. Follow up on Objection on 3/16/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). Certain exhibit(s) maintained conventionally in Clerks Office. (Attorney filers must submit conventional materials to the court within 72 hours.) (Attachments: # 1 Memorandum of Law, # 2 Proposed Order, # 3 Expert Affidavit of Robert "Buzz" Miller, # 4 Affidavit of Sean Toner, # 5 Affidavit of Stephen K. Garvey, # 6 Exhibit 1 - Screen Capture of Bagnell Firm Website, # 7 Exhibit 2 - Screen Capture of Bagnell YouTube Channel, # 8 Exhibit 3 - Screen Capture of November 11, 2021 Comments, # 9 Exhibit 4 - Screen Capture of January 5, 2022 Comments, # 10 Exhibit 5 - Screen Capture of January 7, 2022 Comments, # 11 Exhibit 6 - Screen Capture of Animation on Sigtalk.com, # 12 Exhibit 7 - Electronic Copy of Animation, # 13 Notice of Conventional Filing of Ex 7 to Garvey Affidavit)(Zick, Colin) (Entered: 03/02/2022)
03/02/2022	4	MOTION for Anthony D. Mirenda to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2222229.) filed by Sig Sauer, Inc..Follow up on Objection on 3/16/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). (Attachments: # 1 Exhibit A - Declaration of Anthony D. Mirenda) (Zick, Colin) (Entered: 03/02/2022)
03/02/2022	5	MOTION for K. Neil Austin to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2222238.) filed by Sig Sauer, Inc..Follow up on Objection on 3/16/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). (Attachments: # 1 Exhibit A - Declaration of K. Neil Austin)(Zick, Colin) (Entered: 03/02/2022)
03/02/2022	6	MOTION for Stephen K. Garvey to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2222245.) filed by Sig Sauer, Inc..Follow up on Objection on 3/16/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). (Attachments: # 1 Exhibit A - Declaration of Stephen K. Garvey) (Zick, Colin) (Entered: 03/02/2022)
03/02/2022		Case assigned to Chief Judge Landya B. McCafferty. The case designation is: 1:22-cv-78-LM. Please show this number with the judge designation on all future pleadings. (ed) (Entered: 03/02/2022)
03/02/2022		NOTICE. This case has been designated for Electronic Case Filing. All further submissions shall be filed in compliance with the Administrative Procedures for Electronic Case Filing. Pro se litigants are not required to file electronically and may continue to file documents in paper format. Persons filing electronically are strongly encouraged to complete the interactive training modules available on the courts website. To access these modules, click HERE. (ed) (Entered: 03/02/2022)
03/02/2022	7	Summonses issued electronically as to Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. NOTICE: Counsel shall print and serve the summonses and all attachments in accordance with Fed. R. Civ. P. 4. (Attachments: # 1 Notice ECF) (ed) (Entered: 03/02/2022)
03/03/2022		ENDORSED ORDER granting 4 Motion to Appear Pro Hac Vice. Text of Order: Granted. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent

		<p>order of the court. So Ordered by Magistrate Judge Andrea K. Johnstone.</p> <p>The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices. (ed) (Entered: 03/03/2022)</p>
03/03/2022		<p>ENDORSED ORDER granting <u>5</u> Motion to Appear Pro Hac Vice. Text of Order: Granted. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent order of the court. So Ordered by Magistrate Judge Andrea K. Johnstone.</p> <p>The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices. (ed) (Entered: 03/03/2022)</p>
03/03/2022		<p>ENDORSED ORDER granting <u>6</u> Motion to Appear Pro Hac Vice. Text of Order: Granted. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent order of the court. So Ordered by Magistrate Judge Andrea K. Johnstone.</p> <p>The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices. (ed) (Entered: 03/03/2022)</p>
03/03/2022		<p>ENDORSED ORDER RE: <u>3</u> MOTION for Preliminary Injunction . Text of Order: A status conference via video shall be scheduled forthwith. So Ordered by Chief Judge Landya B. McCafferty. (bt) (Entered: 03/03/2022)</p>
03/07/2022	<u>8</u>	<p>NOTICE of Attorney Appearance by Anthony Mirenda on behalf of Sig Sauer, Inc. Attorney Anthony Mirenda added to party Sig Sauer, Inc.(pty:pla).(Mirenda, Anthony) (Entered: 03/07/2022)</p>
03/07/2022	<u>9</u>	<p>NOTICE of Attorney Appearance by Kristopher Neil Austin on behalf of Sig Sauer, Inc. Attorney Kristopher Neil Austin added to party Sig Sauer, Inc.(pty:pla).(Austin, Kristopher) (Entered: 03/07/2022)</p>
03/10/2022	<u>10</u>	<p>Return of Service Executed as to Jeffrey S. Bagnell, Esq., LLC by Sig Sauer, Inc.. Served/Mailed on 3/7/2022. Answer Follow Up on 3/28/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c).(Zick, Colin) (Entered: 03/10/2022)</p>
03/21/2022	<u>11</u>	<p>NOTICE of Attorney Appearance by Joseph M. Cacace on behalf of Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC Attorney Joseph M. Cacace added to party Jeffrey S. Bagnell(pty:dft), Attorney Joseph M. Cacace added to party Jeffrey S. Bagnell, Esq., LLC(pty:dft).(Cacace, Joseph) (Entered: 03/21/2022)</p>
03/21/2022	<u>12</u>	<p>Disclosure Statement by Jeffrey S. Bagnell, Esq., LLC disclosing no parent company, no publicly traded company, and no merger agreement. (Cacace, Joseph) (Entered: 03/21/2022)</p>
03/21/2022		<p>NOTICE of Hearing. Status Conference RE: MOTION for Preliminary Injunction VIA</p>

		VIDEO set for 3/28/2022 03:30 PM before Chief Judge Landya B. McCafferty. (bt) (Entered: 03/21/2022)
03/21/2022	<u>13</u>	Assented to MOTION for Max D. Stern to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2229060.) filed by Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. (Attachments: # <u>1</u> Exhibit (Affidavit) A Declaration of Max D. Stern, Esquire)(Cacace, Joseph) (Entered: 03/21/2022)
03/21/2022	<u>14</u>	Assented to MOTION for Howard M. Cooper to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2229071.) filed by Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. (Attachments: # <u>1</u> Exhibit (Affidavit) A Declaration of Howard M. Cooper, Esq.)(Cacace, Joseph) (Entered: 03/21/2022)
03/22/2022		ENDORSED ORDER granting: <u>13</u> Motion to Appear Pro Hac Vice. Text of Order: Granted. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent order of the court. So Ordered by Magistrate Judge Andrea K. Johnstone. The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices. (bt) (Entered: 03/22/2022)
03/22/2022		ENDORSED ORDER granting: <u>14</u> Motion to Appear Pro Hac Vice. Text of Order: Granted. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent order of the court. So Ordered by Magistrate Judge Andrea K. Johnstone. The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices. (bt) (Entered: 03/22/2022)
03/23/2022	<u>15</u>	Assented to MOTION for Lorraine D. Belostock to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2230027.) filed by Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. (Attachments: # <u>1</u> Exhibit A Declaration of Belostock)(Cacace, Joseph) (Entered: 03/23/2022)
03/24/2022		ENDORSED ORDER granting: <u>15</u> Assented to MOTION for Lorraine D. Belostock to Appear Pro Hac Vice. Text of Order: Granted. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent order of the court. So Ordered by Magistrate Judge Andrea K. Johnstone. The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices. (bt) (Entered: 03/24/2022)
03/24/2022	<u>16</u>	NOTICE of Attorney Appearance by Max D. Stern on behalf of Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC Attorney Max D. Stern added to party Jeffrey S. Bagnell(pty:dft), Attorney Max D. Stern added to party Jeffrey S. Bagnell, Esq., LLC(pty:dft).(Stern, Max) (Entered: 03/24/2022)

03/24/2022	<u>17</u>	NOTICE of Attorney Appearance by Howard M. Cooper on behalf of Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC Attorney Howard M. Cooper added to party Jeffrey S. Bagnell(pty:dft), Attorney Howard M. Cooper added to party Jeffrey S. Bagnell, Esq., LLC(pty:dft).(Cooper, Howard) (Entered: 03/24/2022)
03/24/2022	<u>18</u>	NOTICE of Attorney Appearance by Lorraine D Belostock on behalf of Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC Attorney Lorraine D Belostock added to party Jeffrey S. Bagnell(pty:dft), Attorney Lorraine D Belostock added to party Jeffrey S. Bagnell, Esq., LLC(pty:dft).(Belostock, Lorraine) (Entered: 03/24/2022)
03/28/2022	<u>19</u>	STIPULATION re: Joint Stipulation Regarding Scheduling by Sig Sauer, Inc.(Mirenda, Anthony) (Entered: 03/28/2022)
03/28/2022		Minute Entry for proceedings held before Chief Judge Landya B. McCafferty. STATUS CONFERENCE held via video conference on 3/28/2022. Order to issue. (Court Reporter: Brenda Hancock) (Pltfs Atty: Anthony Mirenda; Neil Austin; Colin J. Zick) (Defts Atty: Max D. Stern & Joseph M. Cacace)(Total Hearing Time: 37 Minutes) (bt) (Entered: 03/28/2022)
03/28/2022	<u>20</u>	PROCEDURAL ORDER. So Ordered by Chief Judge Landya B. McCafferty. (bt) (Entered: 03/29/2022)
03/29/2022		NOTICE of Hearing re: <u>3</u> MOTION for Preliminary Injunction . Evidentiary Hearing set via video conference for 6/15/2022 09:00 AM before Chief Judge Landya B. McCafferty. (bt) (Entered: 03/29/2022)
03/29/2022		NOTICE of Hearing re: <u>3</u> MOTION for Preliminary Injunction . Status Conference set via video conference for 6/13/2022 10:30 AM before Chief Judge Landya B. McCafferty. (bt) (Entered: 03/29/2022)
04/12/2022	<u>21</u>	NOTICE of Attorney Appearance by Stephen K. Garvey on behalf of Sig Sauer, Inc. Attorney Stephen K. Garvey added to party Sig Sauer, Inc.(pty:pla).(Garvey, Stephen) (Entered: 04/12/2022)
04/15/2022	<u>22</u>	OBJECTION to <u>3</u> MOTION for Preliminary Injunction filed by Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. Certain exhibit(s) maintained conventionally in Clerks Office. (Attachments: # <u>1</u> Exhibit (Affidavit) Affidavit of Jeffrey S. Bagnell, # <u>2</u> Exhibit Ex 1 Bagnell Aff - SIG press release, # <u>3</u> Exhibit Ex 2 Bagnell Aff - 8-8-2017 Article, # <u>4</u> Exhibit Ex 3 Bagnell Aff - Manteca CA discharge report, # <u>5</u> Exhibit Ex 4 Bagnell Aff - Notice of Conventional Filing, # <u>6</u> Exhibit Ex 5 Bagnell Aff - Notice of Conventional Filing, # <u>7</u> Exhibit Ex 6 Bagnell Aff - Notice of Conventional Filing, # <u>8</u> Exhibit Ex 7 Bagnell Aff - Notice of Conventional Filing, # <u>9</u> Exhibit Ex 8 Bagnell Aff - Notice of Conventional Filing, # <u>10</u> Exhibit Ex 9 Bagnell Aff - 3-03-22 Press Release, # <u>11</u> Exhibit (Affidavit) Affidavit of Peter Villani, # <u>12</u> Exhibit Ex 1 Villani Aff - Perez Report, # <u>13</u> Exhibit Ex 2 Villani Aff - Jinn Report, # <u>14</u> Exhibit Ex 3 Villani Aff - Notice of Conventional Filing, # <u>15</u> Exhibit Ex 4 Villani Aff - Notice of Conventional Filing, # <u>16</u> Exhibit Ex 5 Villani Aff - Notice of Conventional Filing, # <u>17</u> Exhibit Ex 6 Villani Aff - Notice of Conventional Filing, # <u>18</u> Exhibit (Affidavit) Affidavit of Timothy Hicks, # <u>19</u> Exhibit Ex 1 Hicks Aff - 5-27-21 Guay - Sig Sauer Report, # <u>20</u> Exhibit Ex 2 Hicks Aff - 11-15-2021 Jinn Sig Sauer Report)(Cacace, Joseph) Modified on 5/9/2022 to add: OBJECTION (vln). (Entered: 04/15/2022)
04/25/2022	<u>23</u>	REPLY to OBJECTION to <u>3</u> MOTION for Preliminary Injunction / <i>Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction</i> filed by Sig Sauer, Inc.. (Attachments: # <u>1</u> Supplemental Affidavit of Robert "Buzz" Miller, # <u>2</u> Supplemental Affidavit of Sean Toner)(Austin, Kristopher) Modified on 5/9/2022 to add: REPLY to OBJECTION (vln). (Entered: 04/25/2022)

05/09/2022	24	MOTION for Leave to File Surreply Brief <i>UNOPPOSED</i> filed by Jeffrey S. Bagnell. Follow up on Objection on 5/23/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). (Cacace, Joseph) (Entered: 05/09/2022)
05/09/2022		ENDORSED ORDER granting 24 Motion for Leave to File Surreply Brief Unopposed. Text of Order: Granted. So Ordered by Chief Judge Landya B. McCafferty. (gla) (Entered: 05/09/2022)
05/11/2022	25	SURREPLY to Reply to 3 MOTION for Preliminary Injunction filed by Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. (Attachments: # 1 Exhibit 1 Toner Dep Excerpts Powers, # 2 Exhibit 2 Toner Dep Excerpts Frankenberry, # 3 Exhibit (Affidavit) Affidavit of Peter Villani) (Cacace, Joseph) (Entered: 05/11/2022)
05/23/2022	26	MOTION for Leave to File BRIEF AS AMICUS CURIAE IN OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION filed by AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE. Attorney Gilles R. Bissonnette added to party AMERICAN CIVIL LIBERTIES UNION FOUNDATION(pty:am), Attorney Gilles R. Bissonnette added to party AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE(pty:am). Follow up on Objection on 6/6/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). (Attachments: # 1 Exhibit [PROPOSED] BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION) (Bissonnette, Gilles) (Entered: 05/23/2022)
05/23/2022	27	NOTICE of Attorney Appearance by Henry Klementowicz on behalf of AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE Attorney Henry Klementowicz added to party AMERICAN CIVIL LIBERTIES UNION FOUNDATION(pty:am), Attorney Henry Klementowicz added to party AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE(pty:am). (Klementowicz, Henry) (Entered: 05/23/2022)
05/23/2022	28	MOTION Expediated Consideration <i>Requesting Oral Argument an Expedited Ruling on Personal Jurisdiction Before 6-15-22 Preliminary Injunction Hearing</i> filed by Jeffrey S. Bagnell, Jeffrey S. Bagnell, Esq., LLC. Follow up on Objection on 6/6/2022. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). (Cacace, Joseph) (Entered: 05/23/2022)
05/23/2022	29	RESPONSE to Motion re 26 MOTION for Leave to File BRIEF AS AMICUS CURIAE IN OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION filed by Sig Sauer, Inc.. (Attachments: # 1 Exhibit 1 - Proposed Order Granting Plaintiff's Motion for a Preliminary Injunction) (Austin, Kristopher) (Entered: 05/23/2022)
05/23/2022	30	Assented to MOTION for Brian Hauss to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2251979.) filed by AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE. (Bissonnette, Gilles) (Entered: 05/23/2022)
05/23/2022	31	Assented to MOTION for Laura Moraff to Appear Pro Hac Vice (Filing fee \$ 100, Receipt # ANHDC-2251980.) filed by AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE. (Bissonnette, Gilles) (Entered: 05/23/2022)
05/25/2022		ENDORSED ORDER granting 30 Motion for Brian Hauss to Appear Pro Hac Vice; granting 31 Motion for Laura Moraff to to Appear Pro Hac Vice. Text of Order:

		<p><i>Granted effective upon the filing of substitute Affidavits that include email addresses for Laura Moraff and Brian Hauss. Local counsel shall comply with all obligations required by L.R. 83.2(b) absent order of the court. So Ordered by Chief Judge Landya B. McCafferty.</i></p> <p>The clerks office will provide the admitted attorney with instructions on how to obtain access to electronic filing by separate email. The admitted attorney must have an individual upgraded PACER account, not a shared firm account, to electronically file in the District of New Hampshire. After obtaining e-filing access, the admitted attorney must file an appearance to begin receiving electronic notices.(vln) (Entered: 05/25/2022)</p>
05/25/2022	<u>32</u>	RESPONSE to Motion re <u>28</u> MOTION Expedited Consideration <i>Requesting Oral Argument an Expedited Ruling on Personal Jurisdiction Before 6-15-22 Preliminary Injunction Hearing</i> filed by Sig Sauer, Inc.. (Austin, Kristopher) (Entered: 05/25/2022)
05/25/2022		<p>ENDORSED ORDER granting <u>26</u> Motion for Leave to File BRIEF AS AMICUS CURIAE IN OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION. Text of Order: Granted. Within 48 hours counsel shall electronically refile the pleading attached to the Motion for Leave to File using the appropriate event in CMECF. So Ordered by Chief Judge Landya B. McCafferty.(vln) (Entered: 05/25/2022)</p>
05/26/2022	<u>33</u>	NOTICE of Attorney Appearance by Brian M. Hauss on behalf of AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE Attorney Brian M. Hauss added to party AMERICAN CIVIL LIBERTIES UNION FOUNDATION(pty:am), Attorney Brian M. Hauss added to party AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE(pty:am).(Hauss, Brian) (Entered: 05/26/2022)
05/26/2022	<u>34</u>	BRIEF/MEMORANDUM OF AMICI CURIAE IN OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION by AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE(Bissonnette, Gilles) (Entered: 05/26/2022)
06/01/2022	<u>35</u>	NOTICE of Attorney Appearance by Laura Moraff on behalf of AMERICAN CIVIL LIBERTIES UNION FOUNDATION Attorney Laura Moraff added to party AMERICAN CIVIL LIBERTIES UNION FOUNDATION(pty:am).(Moraff, Laura) (Entered: 06/01/2022)
06/10/2022	<u>36</u>	<p>ORDER re: <u>28</u> Motion for Expedited Consideration Requesting Oral Argument an Expedited Ruling on Personal Jurisdiction Before 6-15-22 Preliminary Injunction Hearing. The June 15, 2022, evidentiary hearing is converted to oral argument on the subject of personal jurisdiction. The Zoom status conference set for June 13, 2022, is continued. So Ordered by Chief Judge Landya B. McCafferty.(vln) (Entered: 06/10/2022)</p>
06/10/2022		NOTICE of VIDEO Hearing. Oral Argument re Personal Jurisdiction set for 6/15/2022 09:00 AM before Chief Judge Landya B. McCafferty.(vln) (Entered: 06/10/2022)
06/13/2022		RESCHEDULING NOTICE VIDEO of Hearing. Oral Argument set for 6/15/2022 01:00 PM before Chief Judge Landya B. McCafferty.(vln) (Entered: 06/13/2022)
06/15/2022		Minute Entry for proceedings held before Chief Judge Landya B. McCafferty. ORAL ARGUMENT held on 6/15/2022 re: Personal Jurisdiction. Matter taken under advisement. (Court Reporter: Liza Dubois) (Pltfs Atty: Anthony Mirenda) (Defts Atty: Joseph Cacace, Max Stern)(Total Hearing Time: 1:00) (vln) (Entered: 06/15/2022)

06/17/2022	37	<p>TRANSCRIPT of Proceedings for Oral Argument held on 6/15/2022 via video conference. Court Reporter: Liza Dubois, Telephone # 603 225-1442. Transcript is available for public inspection, but may not be copied or otherwise reproduced, at the Clerk's Office for a period of 90 days. Additionally, only attorneys of record and pro se parties with an ECF login and password who purchase a transcript from the court reporter will have access to the transcript through PACER during this 90-day period. If you would like to order a copy, please contact the court reporter at the above listed phone number.</p> <p>NOTICE: Any party who requests an original transcript has 21 days from service of this notice to determine whether it is necessary to redact any personal identifiers and, if so, to electronically file a Redaction Request.</p> <p>Redaction Request Follow Up 7/8/2022. Redacted Transcript Follow Up 7/18/2022. Release of Transcript Restriction set for 9/12/2022.(de) (Entered: 06/17/2022)</p>
07/12/2022	38	<p>///ORDER. The court finds that it lacks personal jurisdiction over the defendants and directs the clerk of court to transfer the case to the District of Connecticut. So Ordered by Chief Judge Landya B. McCafferty.(vln) (Entered: 07/12/2022)</p>
07/12/2022		Civil Case Terminated. (vln) (Entered: 07/12/2022)
07/12/2022		Interdistrict Transfer Out to District of District of Connecticut. (vln) (Entered: 07/12/2022)

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**Spofford v. NHPR, No. 218-2022-cv-00803
(Rockingham Cty. Super. Ct. Jan. 26, 2023) (granting
contested partially-assented-to motion by ACLU-NH to
file amicus brief)**

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

ERIC SPOFFORD

v.

NEW HAMPSHIRE PUBLIC RADIO, INC. ET AL.

Docket No. 218-2022-CV-00803

ORDER ON MOTION TO FILE AND MOTION TO STRIKE AMICUS BRIEF

Plaintiff Eric Spofford brought this defamation action against Defendants New Hampshire Public Radio, Inc. ("NHPR"), Lauren Chooljian, Jason Moon, Dan Barrick (collectively, the "NHPR Defendants"), Nancy Bourque, Justin Downey, and Brian Stoesz stemming from an NHPR article detailing accusations of sexual misconduct. Doc. 26 (Am. Compl.). Defendants, save Stoesz, now move to dismiss. Docs. 17 (NHPR Defs.' Mot. Dismiss); see also Docs. 55, 62 (Downey and Borque's Mots. Dismiss). Additionally, American Civil Liberties Union of New Hampshire and other advocacy groups (collectively, "Proposed *Amici*") now move to submit a brief as *amicus curiae*. Doc. 45. Spofford objects. Doc. 48; see also Doc. 53 (Proposed *Amici*'s Reply); Doc. 63 (Spofford's Surreply). Spofford moves to strike the proposed *amicus* brief. Doc. 49. Proposed *Amici* object. Doc. 54; see also Doc. 64 (Spofford's Reply). The Court held a hearing on the motions on January 13, 2022. After review, the Court finds and rules as follows.

In their motion, Proposed *Amici* argue that this case raises concerns regarding freedom of speech and freedom of the press, and that their experience as advocacy

organizations on those subjects “will make their brief of service to the Court.” Doc. 45 ¶ 6. Spofford objects, contending that the absence of any court rules governing *amicus* briefs suggests that the brief should not be accepted, particularly over the objection of a party. Doc. 48 ¶¶ 16–17. Further, Spofford argues that the brief adds no legal or factual perspective that the NHPR Defendants have not already provided, and that allowing Proposed *Amici* to merely echo existing arguments could lead to excessive briefing at every stage of trial. *Id.* ¶¶ 18–22. Spofford’s motion to strike the brief makes similar arguments as those in his objection. See Doc. 49.

Acceptance of *amicus* briefs by a Superior Court in New Hampshire is rare, but not unprecedented. See, e.g., State v. Brown, No. 216-2020-CR-00483, Hillsborough Cty. Super. Ct. North (July 25, 2022 Order, Delker, J.); Estate of Hagen Esty-Lennon v. State, No. 217-2015-CV-00376, Merrimack Cty. Super. Ct. (Sept. 4, 2015 Order, Fauver, J.). Here, the parties agree that the relevant question is not whether the Court may accept the *amicus* brief, but whether the Court should. The Superior Court Rules are silent regarding filing of *amicus* briefs, and New Hampshire case law on the subject is sparse. Thus, the Court looks to other jurisdictions for guidance.

Acceptance or rejection of *amicus* briefs falls squarely “within the sound discretion of the court.” Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970); see also Parsons v. State, Dept. of Soc. And Health Servs., 129 Wash.App. 293, 299 (2005) (“We can see no reason a trial judge should not have discretion to permit [*amicus*] participation if it may be helpful to the court.”). “In cases involving questions of important public interest leave is generally granted to file a brief as *amicus curiae*.” Kruger v. Bloomberg, 768 N.Y.S.2d 76, 81 (Sup. Ct., New York Cty., 2003). “Although

an *amicus curiae* is permitted to make useful suggestions to the court on matters of law which may escape the court's attention, an *amicus curiae* is bound by the issues presented by the parties." Thomas Tool Servs., Inc. v. Town of Croydon, 145 N.H. 218, 221 (2000) (quotation omitted). However, "an *amicus* may present different arguments than the parties relating to those issues." Lewis v. Harris, 378 N.J.Super. 168, 185 n.2 (App. Div. 2003).

Upon review, the Court finds that the proposed brief is appropriately limited in scope to the issues raised by the parties and may be helpful to the Court in ruling on the pending motions to dismiss. See Parsons, 129 Wash.App. at 299. The brief highlights Proposed *Amici*'s history of advocacy in preserving freedom of expression and the right to a free press, and limits its legal analysis to arguing why Spofford's action should be dismissed. See Doc. 45 Ex. 1 (Proposed Brief). In the Court's view, the brief does not attempt to argue issues of fact or otherwise exceed the limited issue of dismissal, instead describing the appropriate legal standard for this type of defamation action and arguing why that standard necessitates dismissal of Spofford's claims under the state and federal constitutions. See id.

In other words, the brief simply raises additional, relevant arguments related to existing issues before the Court. See Thomas Tool Servs., Inc., 145 N.H. at 221. To the extent that the brief raises new arguments regarding constitutional issues, such arguments are clearly linked to the issue of dismissal, and are thus proper. See Lewis, 378 N.J.Super. at 185 n.2. The Court also notes that issues related to freedom of speech or freedom of the press are undoubtedly of "important public interest," further suggesting leave should be granted to file the brief. See Kruger, 768 N.Y.S.2d at 81.

While Spofford understandably disagrees regarding the validity of Proposed *Amici's* arguments, he cannot argue in good faith that his claims do not raise such constitutional questions. The Court sees no prejudice to Spofford created by acceptance of the brief, as he will have a full opportunity to be heard regarding his responses to Proposed *Amici's* arguments at the upcoming hearing on the motions to dismiss, currently scheduled for January 31, 2023. Accordingly, for the reasons stated above, Proposed *Amici's* motion to file an *amicus* brief is **GRANTED**. See Doc. 45. For the same reasons, Spofford's motion to strike the propose *amicus* brief is **DENIED**. See Doc. 49.

Before concluding, the Court notes that at the January 13, 2023 hearing the Court expressed concern about the prospect of well-resourced third-party interest groups filing briefs in lawsuits involving purely private actors, such as run-of-the-mill tort or contract disputes. Such a practice could overburden the Court or prejudice certain parties without serving to benefit the public interest. Therefore, while the Court finds that an *amicus* brief is appropriate under these circumstances given the free speech issues raised in this case, this Order should not be read to suggest that *amicus* briefs should be accepted as a matter of course. The Court also emphasizes that, should this case survive dismissal, the parties should not expect additional *amicus* briefs to be accepted at later stages of litigation without further review.

SO ORDERED.

Date: January 26, 2023



Hon. Daniel I. St. Hilaire

Clerk's Notice of Decision

4 Document Sent to Parties
on 01/26/2023