THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2015-0032

Appeal of Farmington School District; Appeal of Demetria McKaig

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Rule 10 Appeal from Administrative Agency

BRIEF FOR THE *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT OF DEMETRIA MCKAIG

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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QUESTION PRESENTED

In examining whether the Farmington School Board's decision to not renew Demetria McKaig's employment was clearly erroneous, was McKaig, who successfully participated in a lawsuit that prevented Student A's privacy rights from being imminently violated by Principal Matt Jozokos, a whistleblower whose actions were protected under New Hampshire law, *see* Chapter 275-E?

TEXT OF RELEVANT AUTHORITY

RSA 275-E:2; Protection of Employees Reporting Violations:

I. No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location, or privileges of employment because:

(a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States; or ….

(c) The employee, in good faith, participates, verbally or in writing, in an investigation, hearing, or inquiry conducted by any governmental entity, including a court action, which concerns allegations that the employer has violated any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States….

RSA 132:34; Waiver of Notice:

I. No notice shall be required under RSA 132:33 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that a medical emergency exists and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any superior court judge shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. Any guardian ad litem appointed under this subdivision shall maintain the confidentiality of the proceedings. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings under this section shall be held in closed court, shall be confidential and shall ensure the anonymity of the minor. All court proceedings under this section shall be sealed. The minor shall have the right to file her petition in the court using a pseudonym or using solely her initials. All documents related to this petition shall be confidential and shall not be

available to the public. These proceedings shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 2 court business days from the time the petition is filed, except that the 2 court business day limitation may be extended at the request of the minor. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions. If the court fails to rule within the 2 court business day period and an extension was not requested, then the petition shall be deemed to have been granted, and the notice requirement shall be waived.

(c) An expedited confidential appeal shall be available, as the supreme court provides by rule, to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 2 court business days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

(d) The supreme court shall make rules to ensure that procedures followed in the appeals process are handled in an expeditious manner and protect the confidentiality of the parties involved in the appeal to satisfy the requirements of the federal courts.

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union of New Hampshire ("ACLU") 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 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 rights of whistleblowers to expose violations of civil liberties without fear of retaliation. Indeed, the ACLU's legal work is, in part, reliant upon citizens contacting our organization's attorneys and disclosing violations of civil rights and civil liberties—disclosures which are protected under the attorney-client privilege and will often, by necessity, contain sensitive information. The ACLU has also long been committed to preserving a woman's constitutional right to privacy, which includes the right to decide to end a pregnancy. The national ACLU, for example, has participated in every major reproductive rights case decided by the United States Supreme Court over the past fifty years, beginning with *Poe v. Ullman*, 367 U.S. 497 (1961), and extending through *Roe v. Wade*, 410 U.S. 113 (1973), *Bellotti v. Baird*, 443 U.S. 622 (1979), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and their progeny.

This case raises the important question of whether a local school district should be given the virtually unlimited authority to retaliate against an employee who, because of the imminent actions of the school district that will violate the law, is compelled to seek independent counsel and petition a court as a whistleblower to prevent this illegal behavior. Here, if this Court reverses the State Board of Education's nonrenewal decision, not only will school districts be given *carte blanche* authority to retaliate against employees in such situations but—perhaps even worse—school district employees will be deterred from both seeking independent legal advice and seeking redress in courts to address an employer's imminent violation of civil rights. The interest of the

ACLU in ensuring that all citizens—including school district employees—have free and fair access to independent counsel and the courts in order to vindicate civil liberties protected by law led to its involvement in this case.

STATEMENT OF THE CASE

The ACLU incorporates by reference the Counter-statement of the Case submitted in the brief of Demetria McKaig.

SUMMARY OF ARGUMENT

This case concerns the Farmington School District's blatant retaliation against Demetria McKaig after she courageously sought independent legal counsel and petitioned the Strafford County Superior Court to protect Student A's right to privacy that was going to be imminently violated by Principal Matt Jozokos. The Farmington School Board's decision to not renew McKaig's employment because of her petitioning activity was clearly erroneous because McKaig is the textbook definition of a whistleblower whose actions were fully protected under New Hampshire law. *See* Chapter 275-E.

McKaig's status as a whistleblower is made clear by the undisputed facts of this case. The Farmington School District admits that, had McKaig not acted on Student A's behalf and petitioned the Strafford County Superior Court with the assistance of counsel, Principal Jozokos would have, within 24 hours, breached Student A's confidentiality by notifying her parents of her pregnancy. Principal Jozokos's superiors backed his decision, making McKaig's actions in seeking judicial relief a necessity to prevent irreparable harm to Student A's statutory and constitutional right to privacy. *See, e.g.*, RSA 132:34(II) (noting that judicial bypass process to obtain an abortion exists where "pregnant minor elects not to allow the notification of her parent or guardian or conservator"); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). McKaig's petitioning activity was also successful. The Strafford County Superior Court (i) enjoined Principal Jozokos and the District from notifying Student A's parents of her pregnancy and (ii) ordered Principal Jozokos "to remind the members of the administrative team of the confidentiality requirements of RSA 132:34." Finally, the District also admits that the Farmington School Board's decision to not renew McKaig's employment was based not on her job performance, but on McKaig's decision to take legal action to protect Student A. This is, by all accounts, a unique employment case where the District repeatedly acknowledges its retaliatory motive. These basic facts should end this

Court's inquiry, as McKaig's actions in petitioning the Strafford County Superior Court were not just "in good faith," but were ultimately vindicated by the Court and proved necessary to prevent the Principal from imminently violating the law. *See* RSA 275-E:2(I)(a) (protecting employee from retaliation where the employee "in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law").

The District should have met McKaig's courageous whistleblowing actions in protecting Student A's right to privacy with praise. Instead, the District met McKaig's actions with contempt and retaliation. McKaig's actions were not "insubordinate." Rather, her actions were critical to forcing the District to comply with RSA 132:34. And even if McKaig's actions could be remotely viewed as "insubordination," this is precisely the type of "insubordination" that is protected under New Hampshire's whistleblowers' protection statute. If the protections that have been created in New Hampshire for whistleblowers are to remain meaningful, a school district cannot—as the District claims here—be excused from retaliating against protected behavior by simply labeling it "insubordination." Put another way, if there was any case where the actions of a school district were "clearly erroneous," it is this case where the employee sought independent counsel and successfully engaged in petitioning activity that was necessary to vindicate a student's legal right to confidentiality that was going to be imminently infringed upon. If this Court reverses the State Board of Education's nonrenewal decision, not only will school districts be given *carte blanche* authority to retaliate against employees in such situations but—perhaps even worse—school district employees will be deterred from both seeking independent legal advice and seeking redress in courts to address an employer's imminent violation of civil rights.

Unless this Court affirms protection to school employees' right to seek the advice of independent counsel and ask the courts to address imminent violations of the law, in many cases school district officials will ultimately control whether certain suits ever reach the courts. This

will be so even where the claims brought by the employee present real violations of the law impacting the civil liberties of teachers and students. These are the very kinds of cases (i) where employees should be encouraged to consult with independent counsel—consultations which are protected under the attorney-client privilege and may, by necessity, require the disclosure of sensitive information—and (ii) that the New Hampshire courts should hear with the assistance of able counsel. This is why lawyers and the courts exist. It is also important to note that a decision by this Court affirming the State Board of Education's nonrenewal ruling in favor of McKaig would not undermine local control of school personnel decisions, Chapter 189, or the "clearly erroneous" standard of review. Rather, a decision in McKaig's favor would necessarily be factually narrow and limited to a situation where a school district employer discharges an employee because that employee sought independent legal counsel and petitioned a court in good faith to prevent the district from imminently violating the law. Though factually narrow, a decision in McKaig's favor would nonetheless affirm the protections New Hampshire law provides to all whistleblowers, including those who work for public school districts.

Accordingly, because the Superintendent's recommendation to not renew McKaig's employment was unlawful given McKaig's status as a whistleblower, the Farmington School Board's decision accepting this nonrenewal recommendation was clearly in error. Thus, this Court should affirm the State Board of Education's decision concerning McKaig's nonrenewal.

ARGUMENT

I. The Farmington School Board's Nonrenewal Decision Was Clearly Erroneous Because Demetria McKaig, By Successfully Engaging in Petitioning Activity in Order to Protect the Privacy Rights of "Student A" Against the Imminent Unlawful Conduct of Principal Matt Jozokos, Was a Whistleblower Under New Hampshire Law.

The Farmington School Board's decision to accept the Superintendent's recommendation to not renew Demetria McKaig's employment was clearly erroneous because McKaig is the textbook definition of a whistleblower whose actions were fully protected under New Hampshire law. *See* RSA 275-E:2(I)(a), (c). Here, McKaig courageously sought independent legal counsel and petitioned the Strafford County Superior Court to protect Student A's right to privacy that was going to be imminently violated by Principal Matt Jozokos. Rather than praising these whistleblowing actions that prevented a violation of the law, the Superintendent retaliated against McKaig by not renewing her employment. The actions of the Superintendent and the Farmington School Board were not only wrong, but they violated New Hampshire's whistleblowers' protection statute.

The goal of New Hampshire's whistleblowers' protection statute, *see* Chapter 275-E, "is to ensure that employees are made whole and restored to the position they would have been in absent the employer's unlawful acts," which includes back pay. *See In re Hardy*, 154 N.H. 805, 816 (2007) (internal quotations omitted). This statute also recognizes a "public policy favoring the good faith reporting of reasonably perceived illegal actions of employers by employees without retaliation, even if it is ultimately determined that the employer engaged in no illegal activity." *See Karch v. BayBank FSB*, 147 N.H. 525, 537 (2002); *see also Appeal of Osram Sylvania*, 142 N.H. 612, 617-18 (1998) (same). To establish a prima facie case under this statute, an employee must establish that: (1) she engaged in an act protected by the whistleblowers' protection statute; (2) she suffered an employment action proscribed by the whistleblowers' protection statute; and

(3) there was a causal connection between the protected act and the proscribed employment action. *See In re Seacoast Fire Equip. Co.*, 146 N.H. 605, 608 (2001). If the prima facie case is established, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Finally, the employee is "given a chance to demonstrate that the employer's proffered reason was actually a pretext." *Id.* Each of these elements is satisfied here.

A. McKaig Engaged In Petitioning Activity Protected by New Hampshire's Whistleblowers' Protection Statute.

Under the first element, it cannot be seriously disputed that McKaig engaged in an act protected by the whistleblowers' protection statute. Under RSA 275-E:2, an employer may not retaliate against an employee who "in good faith, reports or causes to be reported … what the employee has reasonable cause to believe is a violation of any law …." RSA 275-E:2(I)(a). This statute also protects an employee's right to participate "in an investigation, hearing, or inquiry conducted by any governmental entity, including a court action, which concerns allegations that the employer has violated any law …." RSA 275-E:2(I)(c). Here, McKaig's actions were protected because, (i) she "in good faith, report[ed] or cause[d] to be reported" to the Strafford County Superior Court "what [she had] reasonable cause to believe is a violation of" RSA 132:34, and (ii) she participated in a "court action" concerning allegations that Principal Jozokos was going to violate RSA 132:34.

1. McKaig's Actions In Petitioning the Superior Court Were In Good Faith and Concerned A Reasonable Belief That Principal Jozokos Was Going to Imminently Violate State Law.

As a factual matter, McKaig had a "good faith" reasonable belief that, had she not immediately petitioned the Strafford County Superior Court on Tuesday, December 4, 2012, Principal Jozokos would have notified Student A's parents of her pregnancy within 24 hours. *See*

Osram Sylvania, 142 N.H. at 617 ("[W]e define 'good faith' as 'absence of malice' and 'honesty of intention'"; also noting that employee must have "reasonable cause to believe" that violation of law will or has occurred). Indeed, McKaig's belief that such a disclosure was imminent went well beyond the standard of "good faith." Her belief was indisputably accurate. The Farmington School District readily admits that Principal Jozokos was going to inform Student A's parents of her pregnancy the next day on Wednesday, December 5, 2012 if Student A did not do so herself. *See* Jan. 15, 2015 Appendix of the Farmington School District ("Farmington App.") at 66-67 (Principal Jozokos's Dec. 11, 2012 Answer before Strafford County Superior Court admitting that (i) "he advised [McKaig] that he would disclose the student's pregnancy to her mother on Wednesday, December 5th" and (ii), as of Tuesday, December 4, "he was moving forward with the original plan to notify the student's mother"); *see also* Farmington Br. at 18 (noting that Principal Jozokos "remained firm in his decision, even after being contacted by [the ACLU] regarding the matter" on December 4).

By all accounts, McKaig's immediate action was both justified and required. On Friday, November 30, 2012 and Monday, December 3, 2012, McKaig voiced her concerns to Principal Jozokos that any disclosure to Student A's parents of Student A's pregnancy would violate the student's right to confidentiality. Principal Jozokos rebuffed these concerns. Confronted with Principal Jozokos's imminent (and arbitrary) December 5 deadline, McKaig contacted the ACLU for guidance. On Tuesday, December 4, 2012, the ACLU contacted Principal Jozokos by telephone and (i) further voiced concerns to Principal Jozokos that disclosure to Student A's parents would violate RSA 132:34 and (ii) gave Principal Jozokos an opportunity to correct his decision. Once again, Principal Jozokos refused to reverse course. Within hours he was going to make the disclosure. In short, McKaig, both directly and indirectly, voiced her concerns to her immediate supervisor and was ignored, thus compelling her to immediately go to a higher

authority—the Strafford County Superior Court. *See Appeal of Fred Fuller Oil Co. (New Hampshire DOL)*, 144 N.H. 607, 610 (2000) ("[T]he Act contemplates a series of events: notice to the employer of a violation; followed by an opportunity for the employer to remedy the violation; and, ultimately, if necessary, report of the violation to a higher authority."); *Appeal of Bio Energy Corp*., 135 N.H. 517, 519 (1992) ("By its very terms, [RSA 275-E:2] covers reports made either to employers or to third parties.").

The District's argument that its policies required McKaig to go through an internal "dispute resolution" process and report her concerns to Principal Jozokos's supervisors is particularly remarkable given the facts of this case and the exigency created by the Principal. *See* Farmington Br. at 19-20. The District readily admits that it steadfastly backed Principal Jozokos's decision to disclose the pregnancy to Student A's parents on December 5 and would not have deviated from his chosen course of action. *See* Farmington App. at 66-67 (in Principal Jozokos's Dec. 11, 2012 Answer before Strafford County Superior Court, admitting that Assistant Superintendent, the Assistant Principal, the school nurse, and the Superintendent of Schools agreed that Student A's parents should be notified). Given the Principal's imminent December 5 deadline, there was simply no time for McKaig to go further "up the chain," and, as the District must concede, doing so would have both been futile and allowed the Principal to irreparably harm Student A's privacy rights within hours. Going to court was the only "dispute resolution" avenue available to McKaig that would have preserved the status quo so the legal rights of Student A could be fully examined by a neutral arbiter unencumbered by Principal Jozokos's arbitrary and unnecessary deadline. This is why the New Hampshire courts exist. *See Osram Sylvania*, 142 N.H. at 617 (OSHA complaint constituted report made "in good faith" where employee believed that "the company just didn't seem like they were going to do anything").

Moreover, the District's insubordination policy—Policy 4244—does not require McKaig to have voiced her concerns directly to the District's Superintendent. District Policy 4244 states, for example, that "the employee should discuss the issue with the Building Administrator"—here, Principal Jozokos. McKaig complied with this rule. *See* Farmington App. at 44 (District Policy 4244). In sum, as the State Board of Education correctly concluded, "Ms. McKaig's actions as a whole demonstrated a desire to *avoid* conflict while insuring the privacy and safety of her student under extremely difficult and time-sensitive circumstances." *See* Farmington App. at 6 (Sept. 10, 2014 Decision of State Board of Education) (emphasis in original); *see also* Farmington App. at 13 (May 20, 2014 Decision of State Board of Education Hearing Officer) (same).

As a legal matter, McKaig also had a "good faith" reasonable belief that Principal Jozokos's imminent disclosure of Student A's pregnancy to Student A's parents would have violated RSA 132:34 and the student's constitutional rights. *See Appeal of Smithfield Dodge, Inc. (New Hampshire DOL)*, 145 N.H. 23, 26 (2000) ("section two does not require an actual violation of a law or rule but only that an employee reasonably believe that such a violation has occurred"). RSA 132:34 creates a judicial process for a minor to obtain an abortion ***without parental notification***. As RSA 132:34(II) explains, the judicial bypass process exists where the "***pregnant minor elects not to allow the notification of her parent or guardian or conservator***." (emphasis added). This procedure "shall be held in closed court, shall be confidential and shall ensure the anonymity of the minor." *See* RSA 132:34(II)(b). The election to allow notification or to not allow notification lies exclusively with the minor. Consistent with federal constitutional requirements, this process is designed to protect the minor's safety and privacy with respect to ***both*** her pregnancy status and desire to terminate the pregnancy because, if the minor's pregnancy status is revealed, a parent or guardian may circumvent the minor's desire to exercise her right to have an abortion. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 647 (1979) ("[M]any parents hold

strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most."). As accurately summarized in McKaig's Request for a Temporary Restraining Order filed in Strafford County Superior Court, RSA 132:34 "recognizes the unfortunate reality that some minors feel they cannot confide openly and candidly with their parents, especially about a sensitive problem like an unwanted and unplanned pregnancy." *See* Farmington App. at 61 (McKaig TRO Request). Thus, as explained in the TRO Request, Principal Jozokos's "insistence on notifying [Student A's] parents that she is pregnant is inconsistent with, and in violation of, RSA [132]:34." *Id.* In approving the Superintendent's nonrenewal decision, the Farmington School Board dismissed McKaig's interpretation of RSA 132:34 on the grounds that "parental notification and 'Judicial Bypass' are not mutually exclusive." The Board went so far as to "reject[] the argument that notifying a parent would be a violation of RSA 132." *See* Farmington App. at 53 (Aug. 2013 Farmington School Board Decision). However, as explained in more detail below, the Farmington School Board's position is fundamentally incorrect as a matter of law. *See, e.g., Zbaraz v. Hartigan*, 763 F.2d 1532, 1542 (7th Cir. 1985) ("[C]onfidentiality during and after [the judicial bypass] proceeding is essential to ensure that a minor will not be deterred from exercising her right to a hearing because of fear that her parents may be notified.") (citations omitted), *aff'd by an equally divided Court*, 484 U.S. 171 (1987).

But even if the Farmington School Board's view of the law is correct (which it is not) and even if the Strafford County Superior Court had sided in the School Board's favor against McKaig (which it did not), McKaig's petitioning actions would still be protected because her interpretation of RSA 132:34 and view that Principal Jozokos was going to imminently violate this statute were

obviously in good faith and reasonable. *See Appeal of New Hampshire Dep't of Empl. Sec.*, 140 N.H. 703, 709 (1996) ("The act protects employees from retaliation for reporting alleged violations of law, not just for the violations themselves."); *see also Appeal of Smithfield Dodge*, 145 N.H. at 26.

2. McKaig's Belief That Principal Jozokos Was Going to Imminently Violate State Law Was Legally Correct As Confirmed by the Superior Court.

To obtain whistleblower status, McKaig's belief that Principal Jozokos was going to imminently violate the law need only have been "reasonable" and "in good faith"—a standard which is easily satisfied here for the reasons stated above. But in this case, though not required to obtain whistleblower status, McKaig's belief was also legally correct.

On December 11, 2012—one day after Student A obtained a "judicial bypass" order—McKaig's view was affirmed by the Strafford County Superior Court, which enjoined Principal Jozokos from notifying Student A's parents of her pregnancy. The order, which was assented to by Principal Jozokos's counsel, was unequivocal and stated the following: "After hearing, the Court enjoins [Principal Jozokos] from making the disclosure to the parents, and orders him *to remind the members of the administrative team of the confidentiality requirements of RSA 132:34*." *See* Farmington App. at 70 (emphasis added). The Court did not believe the issue was moot after the judicial bypass order was issued and plainly thought that—whether agreed upon or not—Student A still needed judicial relief. Here, the Superior Court would not have issued this order affirming McKaig's view if it did not believe that the order was both necessary and consistent with New Hampshire law. If the District disagreed with McKaig's position before the Superior Court or with the Superior Court's order issuing the very injunction she sought, it could have contested either or both. The District did neither.

The Superior Court's order confirms that McKaig's actions were protected by New Hampshire's whistleblowers' protection statute. The District cannot escape this conclusion by arguing that McKaig acted inconsistent with Farmington School District Policy 5140, which states that the School Board "acknowledges and upholds the rights of parents to determine for their children the moral and ethical course of conduct appropriate consistent with the parents' beliefs." Farmington App. at 45 (District Policy 5140); *see also* Farmington Br. at 25-26. Even if this case appears to present "an exceptionally difficult and unique situation involving the balance between the student's rights to privacy and safety and a parent's rights to be informed and make decisions for their minor children," *see* Farmington App. at 8 (Sept. 10, 2014 Decision of State Board of Education), the choice of how to balance these competing interests was ***not*** the Principal's to make. The New Hampshire legislature, through RSA 132:34 and consistent with the constitutional principles explained below, had already decided this question in favor of protecting the minor's right to privacy concerning her pregnancy status. The Farmington School Board has every right to disagree with this state law. But the Farmington School Board and the District's administration do not have the right to violate it. This Court should also not overlook the irony of the District's argument that its nonrenewal decision was justified because McKaig violated Student A's right to confidentiality. After all, had McKaig not immediately acted, ***it was Principal Jozokos*** who was going to imminently violate Student A's right to confidentiality enshrined in RSA 132:34.[1]

[1] To the extent Principal Jozokos's actions can be construed as issuing a "directive" to McKaig to do nothing and acquiesce in his violation of New Hampshire law, McKaig's act in petitioning the Strafford County Superior Court would also have been protected under Section 3 of the whistleblowers' protection statute. *See* RSA 275-E:3 (protecting an employee who refuses to execute a "directive" from an employer which violates "any law or rule adopted by the state of [New Hampshire]"); *see also* Farmington App. at 53 (Aug. 2013 Farmington School Board Decision stating that Principal Jozokos's decision was a "directive").

3. McKaig's Interpretation of the Law was Correct under Federal Constitutional Principles.

Interpreting RSA 132:34 as protecting the confidentiality of a minor's pregnancy status is also correct as a matter of constitutional law. As courts have long recognized, for both adult and minor women, there are few matters more deeply private than one's pregnancy status and desire to obtain an abortion. *See, e.g., Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 552 (9th Cir. 2004) (recognizing that the "potential for harm" in any "non-consensual disclosure [of a woman's pregnancy status and intent to obtain an abortion] is obviously tremendous"); *Margaret S. v. Edwards*, 488 F. Supp. 181, 204 (E.D. La. 1980) (holding that an abortion law failed to protect minors' confidentiality, and explaining that "[o]ne of the most personal matters that can be disclosed is the fact that a woman is seeking an abortion"). Owing to both the deeply sensitive nature of such information and the serious risk of harm many teens would face if their pregnancy status and desire to obtain an abortion were disclosed against their wishes, courts have long recognized the importance of protecting minors against unwanted disclosure of that information. *See, e.g., Bellotti*, 443 U.S. at 642; *Gruenke v. Seip*, 225 F.3d 290, 302-03 (3d Cir. 2000) (holding that a minor's constitutional right to privacy is violated by a school official's unwanted disclosure of her pregnancy status); *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1141 (7th Cir. 1983); *Margaret S.*, 488 F. Supp. at 204.

In particular, because "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976), the Supreme Court has long held that "[t]he constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors ...." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *accord Bellotti*, 443 U.S. at 642. Indeed, decisions relating to pregnancy "differ[] in important ways from

other decisions that may be made during minority." *Bellotti*, 443 U.S. at 642. The need to preserve the minor's right to decide whether to obtain an abortion and the "unique nature of the [pregnancy] decision, especially when made by a minor, requires a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti*, 443 U.S. at 622. After all, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible," *id.* at 634, and there is real danger that parents may obstruct the minor's choice in such a significant matter, or subject the minor to physical or emotional abuse. *Id.* at 647 ("[T]here are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.").

Thus, while the Supreme Court, in adjudicating cases where parental notification was imposed upon minors seeking abortions, has held that the state may impose parental notification requirements, such notification laws must contain effective and confidential bypass procedures in order to pass constitutional muster *because the pregnant minor enjoys a right of privacy*. *See, e.g.*, *Hodgson*, 497 U.S. at 434 (citations omitted); *Bellotti*, 443 U.S. at 633 n.12. While it is accepted that the state must balance its interest in protecting minors with their parents' familial rights, there are limitations placed upon the state's ability to infringe upon a minor's rights. Where the state takes action that infringes upon a minor's constitutional right—such as the enactment of a parental notification requirement prior to abortion—the state must ensure that it simultaneously creates an adequate, confidential, and judicial bypass mechanism before a neutral decision-maker that affords the minor an opportunity to bypass notification. *See Hodgson*, 497 U.S. at 436-37 (summary of decisions through 1990). Otherwise, the statute will be deemed unconstitutional. *See Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976). This is precisely what the New Hampshire legislature did in creating RSA 132:34—namely, create a mechanism that *confidentially* affords the minor an opportunity to bypass notification and ensure that *both* her

pregnancy and her termination decision can remain ***confidential*** to ensure that the minor's privacy rights are not interfered with by parents and third parties.

This promise of confidentiality and privacy does (and must) protect a student's pregnancy status. This is not just embedded within RSA 132:34, but also in the plethora of federal cases establishing that minors have a constitutionally-protected right to confidentiality in seeking a judicial bypass from a parental involvement requirement, *see Bellotti*, 443 U.S. at 643; *Zbaraz*, 763 F.2d at 1542, and a constitutionally-protected right to privacy against unwanted disclosure of their pregnancy status, *see Gruenke*, 225 F.3d at 302-03. Therefore, it follows that school officials to whom a student has confided her pregnancy may not disclose such fact to the student's parents over the student's objection. To do so would compromise the student's ability to have an abortion without parental intervention. As *Bellotti* explained, "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents." 443 U.S. at 647.

B. The District Acknowledges That It Engaged In Naked Retaliation.

The remaining whistleblower criteria are easily satisfied. At the outset, it is obvious that McKaig suffered an employment action proscribed by the whistleblowers' protection statute. The Superintendent did not renew McKaig's employment, which constitutes a "discharge" or other "discriminat[ion] against any employee regarding … terms, conditions, location, or privileges of employment." *See* RSA 275-E:2(I); *see also Bellerose v. SAU #39*, No. 13-cv-404-PB, 2014 DNH 265, 2014 U.S. Dist. LEXIS 177718, at *19 (D.N.H. Dec. 29, 2014) (contract nonrenewal "is an employment action covered by the statute").

It is also undisputed that there was a causal connection between the protected act—McKaig's petitioning activity vindicating her student's legal right to privacy—and the adverse employment action. In fact, this is a unique employment case where the District admits that it

engaged in naked retaliation. The District repeatedly acknowledges that the Superintendent's nonrenewal decision was based not on McKaig's job performance, but on McKaig's decision to go to Court to protect her student's right to privacy. *See* Farmington Br. at 2, 12, 20, 22 (noting that nonrenewal decision was because McKaig "had been insubordinate by bringing a lawsuit against her supervisory principal"; arguing that McKaig was not renewed because "of her involvement in a lawsuit against her supervisory principal over a decision he made that was within his authority to make and consistent with District policy" and because she "openly participated in a court action to stop him from making the [disclosure]"; arguing that McKaig "crossed [the] line" in "actively challenging a decision of a supervisor in a court"); Farmington App. at 50 (Superintendent's May 24, 2013 statement of reasons listing as grounds for nonrenewal the fact that, "[r]ather than follow the chain of supervisory authority within the school district in order to address a student matter, you chose to bring suit in Superior Court against your supervisory principal"); *id.* at 52 (Aug. 2013 Farmington School Board Decision noting that it "cannot condone … the decision of Ms. McKaig, after getting [the ACLU] involved, and after knowing of [the principal's] decision to stand firm, [to choose] to become a litigant against Mr. Jozokos in his capacity as principal"). The District is not offering a legitimate, nondiscriminatory reason for the adverse employment action beyond McKaig's protected petitioning activities. Thus, this is not a pretext case.[2]

The District should have met McKaig's courageous whistleblowing actions in protecting Student A's right to privacy with praise. Instead, the District met McKaig's actions with contempt and retaliation. McKaig's actions were not "insubordinate." Rather, they were critical to ensuring

[2] The Superintendent did originally attempt to create a pretextual basis for McKaig's nonrenewal in his May 24, 2013 statement of reasons. There, he claimed that McKaig "failed to fulfill the responsibilities of [her] position, including but not limited to, attending special education team meetings concerning students for whom [she was] responsible." *See* Farmington App. at 50 (Superintendent's May 24, 2013 statement of reasons). In its August 2013 decision affirming the Superintendent's decision, the Farmington School Board expressly rejected this rationale, concluding that the evidence on this point "was not sufficient grounds for non-renewal" and that this justification "was brought to Ms. McKaig's attention only after the decision to non-renew was made." *Id.* at 51, 56.

the District's compliance with RSA 132:34. And even if McKaig's actions could be remotely viewed as "insubordination," this is precisely the type of "insubordination" that is protected under New Hampshire's whistleblowers' protection statute. If the protections that have been created in New Hampshire for whistleblowers are to remain meaningful, a school district cannot—as the District claims here—be excused from retaliating against protected behavior by simply labeling it "insubordination." Put another way, if there was any case where the actions of a school district were "clearly erroneous," it is this case where the employee sought independent counsel and successfully engaged in petitioning activity that was necessary to vindicate a student's legal right to confidentiality that was going to be imminently infringed upon. If this Court reverses the State Board of Education's nonrenewal decision, not only will school districts be given *carte blanche* authority to retaliate against employees in such situations but—perhaps even worse—school district employees will be deterred from both seeking independent legal advice and seeking redress in courts to address an employer's imminent violation of civil rights.

Unless this Court affirms protection to school employees' right to seek the advice of independent counsel and ask the courts to address imminent violations of the law, in many cases school district officials will ultimately control whether certain suits ever reach the courts. This will be so even where the claims brought by the employee present real violations of the law impacting the civil liberties of teachers and students. These are the very kinds of cases (i) where employees should be encouraged to consult with independent counsel—consultations which are protected under the attorney-client privilege and may, by necessity, require the disclosure of sensitive information—and (ii) that the New Hampshire courts should hear with the assistance of able counsel. This is why lawyers and the courts exist. It is also important to note that a decision by this Court affirming the State Board of Education's nonrenewal ruling in favor of McKaig would not undermine local control of school personnel decisions, Chapter 189, or the "clearly

erroneous" standard of review. Rather, a decision in McKaig's favor would necessarily be factually narrow and limited to a situation where a school district employer discharges an employee because that employee sought independent legal counsel and petitioned a court in good faith to prevent the district from imminently violating the law. Though factually narrow, a decision in McKaig's favor would nonetheless affirm the protections New Hampshire law provides to all whistleblowers, including those who work for public school districts.

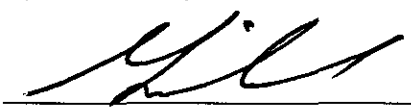
CONCLUSION

Because the Superintendent's recommendation to not renew McKaig's employment was unlawful given McKaig's status as a whistleblower, the Farmington School Board's decision accepting this nonrenewal recommendation was clearly in error. Thus, this Court should affirm the State Board of Education's decision concerning McKaig's nonrenewal.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

By Its Attorneys,



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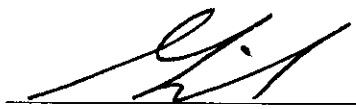
Date: August 4, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae American Civil Liberties Union of New Hampshire in Support of Demetria McKaig* was served this 4th day of August, 2015 by first class mail, postage prepaid, and by electronic mail on (i) counsel for the Farmington School District, Peter C. Phillips, Esq., Soule, Leslie, Kidder, Sayward & Loughman, PLLC, 220 Main Street, Salem, New Hampshire 03070 (phillips@soulefirm.com), (ii) counsel for Demetria McKaig, James F. Allmendinger, Esq., NEA-New Hampshire, 9 South Sprint Street, Concord, New Hampshire 03301 (jallmendinger@nhnea.org), (iii) counsel for the New Hampshire School Boards Association, Theodore E. Comstock, Esq. and Barrett M. Christina, Esq., New Hampshire School Boards Association, 25 Triangle Park Drive, Suite 101, Concord, New Hampshire 03301 (sklesq@aol.com; bchristina@nhsba.org), and (iv) counsel for *amicus curiae* Planned Parenthood of Northern New England, Inc., Joshua L. Gordon, Esq., 75 South Main Street #7, Concord, New Hampshire 03301.



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