

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

2003 TERM  
SEPTEMBER SESSION

Docket No. 2003-0482

IN RE: PETITION OF NEW HAMPSHIRE BAR ASSOCIATION

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BRIEF ON BEHALF OF THE STATE OF NEW HAMPSHIRE

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Petition for Declaratory Relief

STATE OF NEW HAMPSHIRE

Peter W. Heed  
Attorney General

Suzanne M. Gorman  
Senior Assistant Attorney General  
Amy B. Mills  
Assistant Attorney General  
Civil Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3650

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QUESTIONS PRESENTED

- I. WHETHER THE ENACTMENT OF LAWS 2003, CH. 250, CONSTITUTES A VALID EXERCISE OF THE LEGISLATIVE AUTHORITY OF THE GENERAL COURT WHICH DOES NOT PREVENT THE JUDICIARY FROM PERFORMING AN ESSENTIAL JUDICIAL FUNCTION
  
- II. WHETHER THE LIMITATIONS ON LOBBYING IN RSA 311:7-h, III VIOLATE THE FREE SPEECH RIGHTS OF THE BAR ASSOCIATION
  
- III. WHETHER THE REFERENDUM PROVISION IN RSA 311:7-g, III IMPERMISSIBLY INTERFERES WITH A PRIVATE CONTRACT IN VIOLATION OF THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

## STATUTORY PROVISIONS

### 311:7-g State Bar Association Membership; Vote Required.

I. The supreme court, pursuant to its power to regulate the practice of law under this chapter and its continuing supervisory authority over attorneys practicing before courts of this state, may assess fees for the purpose of regulating the practice of law and for maintaining a professional conduct committee.

II. The supreme court may require all person engaged in the practice of law in this state to be members of the New Hampshire Bar Association; provided that the members of the Bar Association have approved the requirement pursuant to paragraph III.

III. The board of governors of the New Hampshire Bar Association shall place on the ballot with the election of officers of the association, the following question: "Shall membership in the New Hampshire Bar Association be required for all attorneys licensed to practice in this state?" An affirmative vote of a majority of those voting on the question, shall allow for the requirement by the supreme court under paragraph II. Approval by the membership under this paragraph shall be valid for a 5-year period beginning on the date of the affirmative vote.

### 311:7-h Bar Association Legislative Activities.

I. The New Hampshire Bar Association, if membership is mandatory for attorneys under RSA 311:7-g, shall be prohibited from using any part of dues paid by its members for the purpose of lobbying or influencing the general court on any matter, except as provided in paragraph III.

II. If membership in the New Hampshire Bar Association is mandatory for attorneys under RSA 311:7-g, no person shall be permitted to engage in legislative activities on behalf of the New Hampshire Bar Association for the purpose of lobbying or influencing the general court on any matter, except as provided in paragraph III.

III. The Bar Association may use a part of dues paid by its members, and may engage a person to lobby or influence the legislature on its behalf provided the Association:

(a) Limits its activities before the general court to those matters which are directly related to the regulation of the legal profession and improving the quality of legal services available to the people of the state. The scope of such permissible activities shall be narrowly defined; and

(b) Has determined that substantial unanimity exists within the bar as a whole in agreement with the position taken on a matter.

IV. Nothing in the section shall prevent officers and members of the Bar Association from appearing before the general court to express their views as individuals, as members of voluntary association, or as representatives of clients.

V. Any member of the New Hampshire Bar Association, if membership is mandatory for attorneys under RSA 311:7-g, may refuse to pay that portion of the Bar Association dues that are used for lobbying or influencing the legislature or other political matters.

311:7-i Severability. If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, such invalidity shall not effect other provisions or applications hereof which can be given effect without the invalid provisions or application, and to this end the provisions of this subdivision are severable.

## STATEMENT OF THE CASE

The New Hampshire Bar Association filed a petition for declaratory relief in the New Hampshire Supreme Court challenging the constitutionality of New Hampshire Laws, 2003, Ch. 250. *See* Petition for Declaratory Relief on Behalf of the New Hampshire Bar Association.

The Supreme Court accepted the case and issued a briefing schedule. *See* N.H. Sup. Ct. Order dated August 18, 2003.

Since the Petitioner filed this action in the Supreme Court, there is no record from a lower court. The parties have had no opportunity to conduct discovery or an evidentiary hearing on any of the issues presented. The only record consists of the legislative record.

## STATEMENT OF THE FACTS

All facts set forth in this Statement of Facts are obtained from the legislative record with respect to House Bill 175 or its predecessor, House Bill 465.

In the 2003 legislative session, the New Hampshire General Court enacted House Bill 175, Laws 2003, ch. 250. The text of the statute is set forth above at page 2.

In its final report on House Bill 175, the Judiciary Committee reported that this bill is essentially the same bill that passed both houses in the prior session but was vetoed by the Governor. *See* H.R. Judiciary Comm. Rpt. on HB 175, 2003 Sess., (March 18, 2003) (Statement of Intent), Appendix to State's Brief [hereinafter App.] at 42. The bill in the 2001 session was House Bill 465.

In its initial report on House Bill 465, in which the Judiciary Committee voted to retain the bill, the Committee noted as follows:

There is strong opposition to the unified bar by a substantial number of people in the legal community. It is viewed by some as a political arm of the court. It does provide various legal services for the underprivileged. The funds to provide these services are extracted from the membership without choice. These issues and the will of the bar should be further addressed.

H.R. Judiciary Comm. Rpt. on HB 465, 2001 Sess., (March 28, 2001) (attachment to statement of intent), App. at 38-39.

In its final report on House Bill 465, in its statement of intent, the Judiciary Committee found:

[The New Hampshire Bar Association] uses mandatory dues to provide services to its members and to the public and to engage in lobbying the legislature. Because the association is not a voluntary association, there are constitutional limits on its political activities. Some attorneys testified that they disagree with positions taken by the association and object to their dues being used to support those political positions.

There was also testimony that the association often oversteps the constitutional limits placed on mandatory bar associations.”

H.R. Judiciary Comm. Rpt. on HB 465, 2001 Sess., (December 12, 2001) (Statement of Intent), App. at 40.

The Minority Report on House Bill 175 went further. The minority committee members found that the amended bill is preferable to the present situation [of a mandatory bar] but would have preferred to end compulsory membership on any basis. The minority found:

The State has a legitimate interest in seeing to the regulation of admission to the practice of law and to the discipline of attorneys, but these functions can be handled by the supreme court outside the structures of the bar association. In every other aspect, the New Hampshire Bar Association is a club, or fraternal or benevolent organization not unlike the Elks, Rotary or VFW, and there is no more justification for any element of compulsion in joining the Bar Association than there is in any other organization.”

H.R. Judiciary Comm. Rpt. on HB 175, 2003 Sess., (March 18, 2003) (Minority Report), App. at 44.

The Bar Association testified in opposition to House Bill 175. *See* H.R. Judiciary Comm., 2003 Sess., Minutes of Public Hrg. on HB 175 (January 22, 2003); S. Judiciary Comm., 2003 Sess., Tr. of Public Hrg. on HB 175 (May 20, 2003).

In June 2003, the Bar Association submitted a proposed amendment to House Bill 175. The proposed amended version required a vote by the membership regarding unification, with the results submitted to the Supreme Court for appropriate action, contained limits on lobbying activities to those related to “administration of justice, composition and operation of the courts and the practice of law and legal profession,” and provided that any

member may refuse to pay that portion of the dues that are used for political purposes. *See* Letter from John MacIntosh, Esq. to Representative John Pratt with attached Draft Floor Amendment to HB 175. The Bar Association indicated that if this proposed amendment was adopted, the Association would not sue to challenge House Bill 175. *Id.*

In the prior session, the Bar Association had also testified in opposition to House Bill 465. *See* H.R. Judiciary Comm., 2001 Sess., Minutes of Public Hrg. on HB 465 (February 14, 2001).

The publication of the Bar Association regarding member services does not contain a procedure for reduction or abatement of dues for members opposed to the use of their dues for political advocacy or a procedure for determining substantial unanimity of the bar on positions taken by the Bar Association. *See* Guide to Member Resources & Bar Services, contained in Legislative History File on H.B. 175, 2003 Session. The publication of the Bar Association regarding its legislative program does not contain a procedure for reduction or abatement of dues for members opposed to the use of their dues for political advocacy or a procedure for determining substantial unanimity of the bar on positions taken by the Bar Association. *See* “How the Bar Makes Decisions About Engaging in Legislative Activity” contained in Legislative History File, H.B. 175, 2003 Session. According to this document, “The Board’s procedure adopted to comply with U.S. Supreme Ct. decision in Keller et al. v. State Bar of California, et al. is included in a separate document.” *Id.* No such additional document is included with the publication.

Other facts may be relevant to a full and fair adjudication of the issues before the Court. While not an exhaustive list, given the opportunity to conduct discovery and an evidentiary hearing, the State believes further factual development would show, among other

things, the nature of the activities and programs conducted by the Bar Association and the participation by the members and the sources of revenue and funding for these activities, the manner in which the Bar Association expends funds provided to it through compulsory dues of the members, including funds allocated to the legislative lobbying, social service programming, and development of continuing education programs, the nature and extent of the Bar's investigation and prosecution of unauthorized practice of law and the resources dedicated to this function, the role of the Bar Association in the traditional regulatory functions conducted by the Supreme Court and the amount of funds allocated to this purpose, and a host of other activities in which the New Hampshire Bar Association may participate.

Factual development would also show the nature of the Bar Association's participation in the legislature and how and whether it exceeds the parameters articulated in *Chapman* and *Keller*, the procedures followed by the Bar Association to determine the position of members of the bar regarding matters about which the Bar Association conducts lobbying activities in the legislature, any procedures adopted by the Bar Association to comply with its obligations under *Keller* and the manner in which these procedures are published to the bar membership.

## SUMMARY OF THE ARGUMENT

The enactment of Laws 2003, Chapter 250, constitutes a valid exercise of the legislative authority of the General Court. The statute does not impermissibly encroach on an essential function of the Judicial Branch. Regulation of the practice of law in New Hampshire is an area of shared responsibility between the legislative and judicial branches. Simply permitting the members of the bar to vote on whether membership in the New Hampshire Bar Association should be mandatory does not unconstitutionally interfere with any authority of the Judicial Branch to regulate the practice of law or to administer the courts.

Even assuming that the regulation of the practice of law is, at least in part, an essential judicial function, RSA 311:7-g, II will not prevent the Court from exercising this function. RSA 311:7-g specifically confirms the authority of the Supreme Court to regulate the practice of law, and enables the Supreme Court to continue to regulate the admission, licensure and conduct of attorneys independent of the Bar Association.

The statute does not violate free speech rights of the Bar Association. The free speech rights of the Bar Association, if any, are not identical to the rights of voluntary organizations or individuals. It is well established that restrictions may be imposed on legislative lobbying activities of mandatory organizations. This legislation merely codifies existing case law, which balances the rights and obligations of a mandatory bar with the rights of its members.

The referendum provision in RSA 311:7-g does not impermissibly interfere with a private contract in violation of the Contract Clause. When the Legislature granted the

Association its charter in 1873, the Legislature reserved the right to amend the charter. In addition, where court rule and case law require attorneys practicing in New Hampshire to be members of the Association, there is no mutual assent, and no contract with respect to membership in the Association. Thus, there can be no Contract Clause violation.

## STANDARD OF REVIEW

“[C]ourts will never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond all reasonable doubt.” *Petition of Boston & Maine Corporation*, 109 N.H. 324, 325 (1969). Rather, a legislative act is presumed constitutional and the Court will not declare it invalid “except on unescapable grounds.” *Niemiec v. King*, 109 N.H. 586, 587 (1969).

In a facial constitutional challenge, the burden is extraordinarily high. The Bar Association must establish that “**no** set of circumstances exists under which the Act would be valid.” *Pharmaceutical Research and Mfrs. v. Concannon*, 249 F.3d 66, 77 (1st Cir. 2001), *cert. granted*, 2002 WL 1393606 (June 28, 2002), (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added). Where Petitioner has failed to meet this heavy burden, its Petition should be denied.

The Petitioner requests the Court to exercise its original jurisdiction to adjudicate this matter without a factual record. This case presents no extreme circumstances that would require a need for expeditious resolution, since Laws, 2003, Ch. 250 will have no practical effect until the next election cycle of the Bar Association. *Cf. Petition of Mone*, 143 N.H. 128, 132 (1998) (Court exercised supervisory power to adjudicate the case without a record where extreme circumstances exist, namely the impending termination of the petitioners). As such, in the event the Court determines there are relevant facts not evident in the record, and the Court intends to consider any such facts in adjudicating the Petitioner’s request for declaratory relief, it would be appropriate for the Court to remand the case for discovery and

trial in the Superior Court or in the alternative appoint a Special Master to oversee discovery and a hearing on the merits.

## ARGUMENT

### I. THE ENACTMENT OF LAWS 2003, CH. 250, RSA 311:7-g-i CONSTITUTES A VALID EXERCISE OF THE LEGISLATIVE AUTHORITY OF THE GENERAL COURT

#### A. In Enacting Laws, 2003, Ch. 250 the Legislature Exercised its Constitutional Authority to Enact Wholesome and Reasonable Laws.

The supreme legislative power within the State is vested in the legislature. N.H. Const., Part 2, Art. 2; *see also* N.H. Const., Part 2, Art. 5. Included in this power is the taxing and spending authority and the police power. *E.g., Soucy v. State*, 127 N.H. 451, 454 (1985); *Hampton v. Marvin*, 105 N.H. 34, 36 (1963). The breadth of this authority is well established. The police power, for example, has been described to include “such varied interests as public health, safety, morals, comfort, the protection of prosperity, and the general welfare.” *Girard v. Town of Allenstown*, 121 N.H. 268, 270-71 (1981); *see generally American Automobile Assoc. v. State*, 136 N.H. 579, 584-85 (1992) (distinguishing between taxes and licensing fees).

The legislative action at issue here was well within the scope of these broad legislative powers. It is a measured, narrowly drawn statute designed to address a perceived need for remedial or pre-emptive regulatory action to protect the rights and interests of attorneys and the public, while not interfering with the legitimate function of the judiciary to regulate attorneys. *See* App. at 40 (Statement of Intent); *see also infra* at pp. 25-28. In any event, the power of the legislature to enact “wholesome and reasonable” laws vests it with

the right of determining conclusively the wisdom and reasonableness of its enactments, provided they are not contrary to the Constitution. *E.g.*, *State v. Jackson*, 71 N.H. 552, 554 (1902); *see* N.H. Const., Part 2, Art. 5. As such, the wisdom of the legislature's action in enacting this statute is not an issue before this Court. *See, e.g.*, *Niemiec v. King*, 109 N.H. at 325 (courts not concerned with whether a statute is wise, reasonable or expedient). Rather, the sole function of the Court is to determine whether this statute, whatever its relative merits, is, beyond all reasonable doubt, contrary to the Constitution. Where Petitioner has not met this heavy burden, the Petition in this case should be denied.

B. The Enactment of RSA 311:7-g, II Does Not Impermissibly Encroach on an Essential Function of Judicial Branch.

1. Regulation of the practice of law in New Hampshire is an area of shared responsibility between the legislative and judicial branches.

The Petitioner does not contend in this case that the regulation of the bar association or even the practice of law is *solely* a judicial branch function. The Petitioner does not, for example, suggest that RSA 311 is unconstitutional in its entirety.<sup>1</sup>

In fact, the regulation of the bar association and the practice of law in New Hampshire has historically been shared between the legislative and judicial branches of government. *See, e.g.*, RSA 311. At least as early as the 1700's the legislature acted to regulate attorneys, prescribing an oath of office, which exists even today. *See* RSA 311:6; *see also* Laws, Vol. 5 at p. 731 (First Const. Period 1784-92). In 1873 the legislature incorporated a voluntary organization of attorneys as the Bar Association of the State of New Hampshire. *See* Laws,

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<sup>1</sup> Petitioner, in fact, proposed its own amendment to RSA 311 to require a vote of members of the bar regarding unification and a restrictions on lobbying by the Association.

1873, ch. 115. In 1967 the legislature amended this special legislation to change the name of the association to its present name, the New Hampshire Bar Association. Laws, 1967, ch. 521. In 1968, the Supreme Court ordered that membership in this association be mandatory for all attorneys licensed in the State. *See In re Unification of the New Hampshire Bar*, 109 N.H. 260 (1968).

This Court has recognized this overlapping authority, holding that “[a]dmission to the practice of law and regulation of the conduct of attorneys in this State has been dealt with as an area of shared responsibility between the legislative and judicial branches of government.” *Rousseau v. Eshleman*, 128 N.H. 564, 567 (1986)<sup>2</sup>; *see also Averill v. Cox*, 145 N.H. 328, 332-33 (2000). In concluding that the regulation of the practice of law is a shared responsibility, the Court has cited to the various legislative enactments regarding the practice of law, including specifically RSA 311, as well as Part II, Article 73-a of the New Hampshire Constitution, which pertains to the Court’s authority to make rules regarding practice and procedure in the courtroom.

In the original *In re Unification of the New Hampshire Bar* case, the Supreme Court recognized that in many states, bar unification is a matter of legislative action or a combination of legislative and judicial branch action. *See* 109 N.H. at 263. In New Hampshire, the Court noted, the legislature had not taken conclusive action on proposed

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<sup>2</sup> In *Rousseau*, the Court held that the professional conduct committee of the Supreme Court is a “regulatory board or officer acting under statutory authority of this state or of the United States” within the meaning of the Consumer Protection Act, and the Court therefore interpreted the statute to exempt attorneys under RSA 358-A:3, I. The Court noted the practical problems that may attend application of the Consumer Protection Act in an area of shared constitutional responsibility, and therefore declined, absent clearly expressed legislative intent, to so interpret the statute. The dissenters disagreed that the professional conduct committee of the Court falls within the meaning of the statute, and therefore found no blanket exemption for attorneys. The dissenters would instead distinguish between the commercial and non-commercial aspects of the practice of law.

legislation regarding bar unification. *See* 109 N.H. at 263. Thus, there being no legislative expression of policy to the contrary, the Court opined that it could step into the void to act where the legislature had not done so. *Id.* The Court further pointed out that the legislature had specifically granted authority to the Court over admission of attorneys and the power to supervise, control and discipline those admitted to practice. *See id.*; *see also* RSA 311:2, RSA 311:8. In addition, the Court noted that the constitutional and statutory authority granted to the Court to make reasonable rules for the admission and removal of members of the bar is inherent in the courts. *See* 109 N.H. at 263 (establishment of courts presumes the authority to create a bar to practice in them).

However, nowhere in *In re Unification of the New Hampshire Bar* did the Court rule that the issue of bar association membership or even regulation of the practice of law are matters *solely* within the province of the judiciary. Rather, a careful reading of the discussion of the Court's authority in *In re Unification of the New Hampshire Bar* reveals its focus on justification for the Court's authority to act to integrate the bar "without any specific statutory authorization or direction to do so." 109 N.H. 264. The Court did not address what its authority or course of action might be if the legislature had affirmatively acted on the issue. Thus, the *Unification of the Bar* case law described at some length in the Petitioner's brief, is not determinative of the issues presented in this case.<sup>3</sup>

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<sup>3</sup> While not relied upon by the Petitioner, there is one case subsequent to the *Unification* cases in which the Supreme Court has stated that "the obligations and responsibilities of the bar are matters of judicial concern alone." *See Smith v. State*, 118 N.H. 764, 770 (1978). Interestingly in *Smith* the Court cited no New Hampshire authority for this proposition. *See id.* In any event, the statement in this case appears to be unique in its breadth. Moreover, the function at issue in *Smith*, the authority to determine reasonable compensation for court appointed counsel, was directly associated with the function of the judiciary to administer the court system, in contrast to the statute at issue here.

Where two branches of government share overlapping authority, the Court has described a means of determining the jurisdiction of the respective branches. While the discussion pertained to the executive and legislative branches, it is instructive here. Both branches of government possess a zone of constitutionally exclusive powers in which either may act even against the express will of the other. In the middle area, either branch can act absent the initiative of the other. *See Opinion of the Justices*, 118 N.H. 582, 588 (1978) (quoting *Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952)). However, where legislative activity demonstrates a legislative intent to the contrary, the exercise of authority in the void by the other branch is not entitled to the same deference it might otherwise be accorded. *See id.*; *see also Briere v. Briere*, 107 N.H. 432, 434 (1966) and *Dean v. Smith*, 106 N.H. 314, 317 (1965) cited in *In re Unification of the New Hampshire Bar*, 109 N.H. at 263.

The State does not assert in this case that the Court exceeded the scope of its authority in initially determining to act in this shared area in the absence of any action to the contrary by the legislature. However, the legislature having now acted, as is its constitutional prerogative, whether or not the Court agrees with the action is not the pertinent question. The only issue before the Court is whether the legislature exceeded the scope of its constitutional authority by impermissibly encroaching on an essential judicial function.

2. Permitting the members of the bar to vote on whether membership in the New Hampshire Bar Association should be mandatory does not unconstitutionally interfere with the authority of the Judicial Branch to regulate the practice of law.

Contrary to the Petitioner's assertion, the legislature has not usurped an essential judicial power by allowing attorneys in New Hampshire to vote on bar association membership on a periodic basis. Even assuming that regulation of the practice of law is, at least in part, an essential judicial function, RSA 311:7-g, II will not prevent the Court from exercising this function. Indeed, by its very terms, RSA 311:7-g specifically confirms the authority of the Supreme Court "to regulate the practice of law under [RSA 311] and its continuing supervisory authority over attorneys practicing before the courts of this state," and to "assess fees for the purpose of regulating the practice of law and for maintaining a professional conduct committee." RSA 311:7-g, I. Granting attorneys some voice in determining whether to require membership in a professional organization is not synonymous with regulating the practice of law.

The Supreme Court currently regulates virtually every aspect of licensure of attorneys under its own authority and independent of the Bar Association and presumably will continue to do so regardless of how members of the bar vote under RSA 311:7-g, III. For example, nothing in the new statute purports to restrict the Court's authority to continue to prescribe ethical standards for attorneys, *see* N.H. Rules of Prof. Conduct, or to enforce compliance with those ethical standards, *see* N.H. Sup. Ct. Rule 37, 37A. Nothing in the legislation prevents the Court from setting the minimum educational and character and fitness requirements for individuals seeking licensure. *See* N.H. Sup. Ct. Rule 42. Nor does the legislation in any way prohibit the Supreme Court from requiring attorneys to meet minimum annual continuing legal education requirements, *see* N.H. Sup. Ct. Rule 53, or to set fees to carry out any of its regulatory functions, *see* RSA 311:7-g, I. The legislation also does not prevent the Court from requiring attorneys to continue to pay into a public

protection fund as a component of their licensing fees. *See In re Proposed Public Protection Fund*, 142 N.H. 588 (1988). In short, nothing in RSA 311:7-g interferes with the authority articulated by this Court in *Petition of Tocci*, whether statutory or constitutional, to “regulate the bar to ensure that the bar is, in fact, qualified and ethical.” *See Petition of Tocci*, 137 N.H. 131, 135 (1993); *see also In re Proposed Public Protection Fund*, 142 N.H. at 590 (task of supervising and disciplining attorneys falls squarely on the shoulders of the Court).

In the original *Unification* case, the Supreme Court suggested that, a determination of whether the administration of justice would best be served by compulsory membership of all attorneys in a single association, is a component of the inherent power of the Court to regulate the practice of law and supervise those engaged therein in New Hampshire. *See* 109 N.H. at 264. However, as set forth above, the Court, in part, was explaining its authority to act in the absence of legislative directive. In addition, whatever the factual circumstances of the bar in 1968 that may have prompted the Court to determine that unification of the bar was integral to its authority to carry out its regulatory function, the extensive Supreme Court rules and procedures regarding regulation of virtually all aspects of admission to the bar and the practice of the profession demonstrate that the Supreme Court can and routinely does exercise its authority to regulate the bar entirely independent of the Bar Association. Furthermore, RSA 311:7-g makes clear that the Court may assess fees in order to carry out its regulatory functions. Thus, the legislature has alleviated any concern that the Court will somehow lack the financial or administrative resources to carry out its regulatory functions in the absence of a unified Bar.

The enactment of RSA 311:7-g will also not so fundamentally undermine the policy considerations articulated by the Court in its determination to order bar unification that the

Court's authority over attorneys and their behavior would be somehow unconstitutionally impaired. *See, e.g., Niemiec v. King*, 109 N.H. at 325 (courts not concerned with whether a statute is wise, reasonable or expedient; only question is whether statute is repugnant to Constitution). For example, in *In re Unification*, the Court found that unification would permit the imposition of ethical standards on all attorneys admitted to the practice and provide an effective means of enforcement. 109 N.H. at 265. However, promulgation and enforcement of the rules of ethics are conducted by the Supreme Court through its professional conduct committee, not the Bar Association. In fact, attorneys pay dues separately to support this function, and may continue to do so under RSA 311:7-g.

The Court further found that unification would insure the finances, personnel and interest in the membership to provide more and better continuing legal education. *See* 109 N.H. at 265. The State is aware of the quality of continuing legal education programming conducted by the Bar. However, nothing in RSA 311:7-g prevents the Bar Association from continuing to sell legal education services to bar members as it does now. As a practical matter, perhaps unlike in 1968, today there is a myriad of legal education providers available, both public and private, and a multitude of choices for the practitioner to employ in complying with the continuing legal education requirement, often at less cost than programs presented by the Bar Association. Aside from the practical skills course for new admittees, attendance at which is mandatory by Supreme Court Rule 42(7), no lawyer need ever attend a continuing legal education program presented by the Bar Association in order to meet their CLE obligation. Technology has also radically altered the manner in which lawyers become knowledgeable about changes and developments in the law, rendering some publications previously critical to an informed bar virtually obsolete.

One factor cited by the Supreme Court in acting to unify the Bar in the absence of legislative enactment was the Court's view that a unified bar would provide the finances and personnel to ferret out the unauthorized practice of law. *See* 109 N.H. at 265. As a practical matter, unauthorized practice claims are generally referred to the Attorney General. *See* RSA 311:7-a. More importantly, RSA 311:7-b specifically authorizes the attorney general to conduct investigations, subpoena witnesses, and take other actions to enforce the laws with respect to the unauthorized practice of law. Nothing in RSA 311:7-g purports to interfere with the authority of the attorney general in this regard. Again, the legislation does not impermissibly interfere with an essential judicial function.

The Petitioner does not argue that raising awareness and funds to support social programming initiatives or law related education initiatives are essential judicial functions. Indeed, to the extent these are public functions, they are best described as core legislative branch functions more appropriately addressed through the tax and spend power. *See generally American Auto Assoc. v. State*, 136 N.H. at 584-85 (explaining distinction between taxes and licensing fees). In any event, these initiatives can continue either through a voluntary Bar Association as originally created by the legislature, or through the more recently created Bar Foundation, a truly voluntary charitable organization of the bench and bar.

Petitioner argues in its brief that, because a vote of the association membership against unification would, de facto, deunify the bar, RSA 311:7-g, II violates Part I, Article 37 and Part II, Articles 72-a and 73-a of the New Hampshire Constitution. This claim is not supportable.

As set forth in detail above, creation and regulation of the bar association is historically an area of shared responsibility between the branches of government. Moreover, the separation of powers doctrine does not require complete independence of each branch of government. “It is clear that N.H. Const. pt. 1, art. 37 provides that the three branches of government ought to be kept as ‘separate from, and independent of, each other, as the nature of a free government will admit.’ It has long been recognized in this State, however, that the three branches of government cannot be completely separate and there must be some overlapping.” *Monier v. Gallen*, 120 N.H. 333, 339 (1980). The separation of powers doctrine is violated only when one branch usurps an essential power of another. *Petition of Judicial Conduct Committee*, 145 N.H. 108, 109 (2000).

There is no unconstitutional usurpation by the legislature of any essential power of the judiciary in this instance. First, in the event the bar membership votes to remain unified, there is no conflict at all. Petitioner’s challenge to the potential results of the vote is therefore not even ripe for review. Second, even if the bar votes against mandatory membership, as set forth above, the legislation will not interfere with the authority of the Court to regulate the conduct of attorneys in virtually all essential aspects of the practice of the profession.

RSA 311:7-g, II also does not interfere with the Court’s authority to exercise its judicial power to make rules governing the administration of the courts and the practice and procedure to be followed in the courts as set forth in Part 2, Articles 72-a and 73-a. In fact, this Court has already recognized that Article 73-a is but one component of the shared responsibility for the regulation of the profession, not the source of plenary regulatory authority. *See Rousseau v. Eshleman*, 128 N.H. at 567 (citing Article 73-a). Moreover,

unlike recent cases involving court procedure or personnel, nothing in RSA 311:7-g purports to regulate the conduct of anyone, attorneys or otherwise, within the courts. *Cf. Petition of Mone*, 143 N.H. 128, 135 (1998).

Attorneys perform a multitude of roles and services independent of their role as “officers of the court.” While all attorneys are so licensed, many attorneys will never have occasion to appear in a courtroom. Thus, an assertion that any shared regulation of attorneys will necessarily unconstitutionally interfere with the Court’s authority to administer the courts and to regulate behavior in the courts ignores a significant element of the profession.

In sum, Petitioner has not shown that the limited and measured action taken by the legislature to permit attorneys to vote on the mandatory nature of bar membership unconstitutionally encroaches on an essential judicial branch function.

## II. THE LIMITATIONS ON LOBBYING IN RSA 311:7-h, III DO NOT VIOLATE THE FREE SPEECH RIGHTS OF THE BAR ASSOCIATION

Petitioner challenges RSA 311:7-h, III as violative of “relevant provisions of the state and federal constitutions.” *See* Pet. Brief at p. 11. Petitioner’s explanation of this claim and its citation to the First Amendment and Part I, Article 22 of the New Hampshire Constitution is cursory at best. Where an issue is not adequately briefed, the Court may deem the claim waived. *See In re Samantha L.*, 145 N.H. 408, 411 (2000) (issues that are briefed with only a passing reference are not preserved).

In any event, nothing in RSA 311:7-h, III violates “free speech” rights of the Bar Association. Petitioner asserts that the associations and organizations “posses the ‘free speech’ rights of individuals, [ ] which may not be infringed by the legislature.” Pet. Brief at p. 12. In support of this broad proposition, Petitioner cites *Federal Election Comm’n v.*

*Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). However, Petitioner overlooks a significant distinction between the Bar Association and the Massachusetts Citizens for Life – only one is a *voluntary political association*.

To the extent the Bar Association has any free speech rights at all, they are not identical to the rights of voluntary political organizations and individuals. Attorneys have not voluntarily joined forces to promote a political agenda; nor may they simply stop contributing to the Bar Association. *Cf. FEC v. Mass. Citizens for Life*, 479 U.S. at 260-61 (noting that individuals contribute to a political organization, in part, as a more effective means of advocacy; individuals desiring more direct control can earmark the funds or simply stop contributing).

In the other case cited by the Petitioner, *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980) a utility company with a monopoly challenged a prohibition on its distributing political advocacy literature with its bills. The Court struck down the prohibition, finding that the customers were not a captive audience as they could discard the materials. *Id.* at 542.

Here, the Bar Association is not a private person. *Cf. Consolidated Edison*, 447 U.S. at 540. In addition, not only does the Bar Association use its members' contributions to fund what may be essentially political activities, but the Association purports to represent the position of the members. The scenario presented here is more akin to the utility company in the *Consolidated Edison* distributing advocacy materials that not only are disseminated with the customers' money, but that claim to articulate the *position* of the customers. Again, nothing in *Consolidated Edison* demonstrates the impropriety of the legislature's regulatory action in RSA 311:7-h, III.

Petitioner further asserts that “no legitimate cause exists to authorize a legislative enactment seeking to silence a group of citizens with respect to matters pending before the general court.” Petitioner’s Brief at 12. First, the Bar Association is not simply a “group of citizens”; membership is mandatory. Second, if the legislature may not act to “silence” the Bar, neither can the Court. The propriety of State action does not hinge on the branch of government that imposes it. Thus, under Petitioner’s broad claim, even the restrictions imposed in *Petition of Chapman* are unconstitutional.

In any event, it is well established that restrictions may be imposed on legislative lobbying activities of mandatory organizations. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990). The legislation in question does not “silence” the Bar Association. It merely codifies existing case law, which balances the rights and obligations of a mandatory bar with the rights of its members. RSA 311:7-h, III protects the First Amendment rights of bar association members while not preventing the Bar Association from advocating on matters integrally related to its purpose.

Contrary to Petitioner’s assertion, legitimate cause exists to restrict the lobbying efforts of the Bar Association. Given the circumstances facing the legislature at the time of the enactment of RSA 311:7-h, it was not required to ignore its responsibility to protect and further the rights of its citizens, including members of the Bar Association.

Despite the admonitions of this Court in *Petition of Chapman*, 128 N.H. 24 (1986), the New Hampshire Bar Association has, in the years since *Chapman*, advanced positions in the legislature where substantial unanimity does not exist or is not known to exist within the bar as a whole, and sometimes on issues which are inherently political in nature. *See id.* at 32. For example, the Association lobbied in opposition to a proposed constitutional

amendment addressing the balance of authority between the legislative and judicial branches of government. Yet, this proposed constitutional amendment evoked widely differing and strongly held viewpoints among members of the bench and bar. *See* 43 N.H.B.J. 38-47 (June 2002); *see also* H.R. Judiciary Comm., Minutes of Public Hrg. on CACR 5 (January 31, 2001); H.R. Judiciary Comm., Minutes of Public Hrg. on CACR 4 (January 31, 2001). Similarly, it is undisputed that the Association actively opposed the legislation in question here, legislation which clearly “affect[s] members’ economic self-interest”, with no knowledge of substantial unanimity of the bar. *See Petition of Chapman*, 128 N.H. at 32; *see also* H.R. Judiciary Comm., Minutes of Public Hrg. on HB 175 (January 22, 2003) (testimony of Bar Association in opposition to HB 175); S. Judiciary Comm. Tr. of Public Hrg. on HB 175 (May 20, 2003) (same); H.R. Judiciary Comm., Minutes of Public Hrg. on HB 465 (February 14, 2001) (testimony of Bar Association in opposition to HB 465); H.R. Judiciary Comm., Minutes of Public Hrg. on HB 465 (February 14, 2001) (testimony of attorneys in support of House Bill 456); Letter of Donald Kries, Esq. to Chair, House Judiciary Committee (written testimony in support of House Bill 456).

Indeed, the legislative history of House Bill 465, the precursor to House Bill 175, which was passed in the prior legislative session but vetoed by the Governor, specifically references the legislature’s concern that attorneys “disagree with positions taken by the association and object to their dues being used to support those political positions,” and that “the association often oversteps the constitutional limits placed on mandatory bar associations.” *See* H.R. Rep., Judiciary Comm., 2001 Sess. (Dec. 12, 2001) (statement of intent), App. at 40.

Other factors support the limited restrictions set forth in RSA 311:7-h, III. Subsequent to *Chapman*, in 1990 the United States Supreme Court articulated some parameters for permissible lobbying activities by a unified bar and procedures which should be observed in the event compulsory dues are expended for lobbying purposes. *See Keller v. State Bar of California*, 496 U.S. 1, 16 (1990) (an integrated bar should include an adequate explanation for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending). The apparent failure of the New Hampshire Bar Association to inform its members of their right to withhold funds used for lobbying or to seek abatements, and the absence of any published *Keller* procedure, again, supports the legislature's election to pursue legislation in this area. *See* RSA 311:7-h, V.

Similarly, in *Keller*, the Supreme Court justified the compelled association and integration of a state bar by the state's interest in regulating the legal profession and improving the quality of legal services, provided, however, that a mandatory bar may constitutionally fund only those activities which are germane to those goals with the mandatory dues of all members. *See Keller*, 496 U.S. at 13-14.<sup>4</sup> The *Keller* Court recognized the inherent difficulty in using a nebulous standard such as the improvement of the administration of justice to determine activities germane to the purposes of the Bar Association. *See* 496 U.S. at 14-16. *Cf. Petition of Chapman*, 128 N.H. at 32 (Association should limit its activities before the general court to matters related directly to efficient administration of judicial system, composition and operation of courts, and education, ethics,

competence, integrity and regulation of legal profession); N.H. Bar Assn. Const., art. 1 (Association shall confine its activities before general court to matters related directly to administration of justice, composition and operation of courts, practice of law and legal profession). Within this broad spectrum, the Court recognized that there are certain activities for which the use of mandatory dues would clearly be permissible, namely, “regulating the legal profession and improving the quality of legal services.” However, it would not be permissible to fund activities of an ideological nature. *See Keller*, 496 U.S. at 13-14. Here, the legislature adopted restrictions that mirror these clear parameters. By its terms, RSA 311:7-h, III authorizes the Bar Association, if unified under RSA 311, to lobby only on matters directly related to the regulation of the legal profession and improving the quality of legal services available to New Hampshire residents where the Bar has determined where substantial unanimity exists. *See* RSA 311:7-h, III(a); *see also Keller v. State Bar of California*, 496 U.S. at 13-14. The legislature can hardly be faulted for following existing Supreme Court case law in enacting statutes to further the rights and interests of its citizens.

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<sup>4</sup> The State Bar at issue in *Keller* served a more traditional regulatory function than the Bar Association here. There, the Bar made recommendations as to admission to practice, the discipline of attorneys, codes of conduct, and the like.

III. THE REFERENDUM PROVISION IN RSA 311:7-g, III DOES NOT IMPERMISSIBLY INTERFERE WITH A PRIVATE CONTRACT IN VIOLATION OF THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

Petitioner's claim that RSA 311:7-g, III violates the Contract Clause of the United States Constitution is without factual or legal support. RSA 311:7-g, III, requires the Bar Association board of governors to poll its members as to whether membership in the Association shall be mandatory. This provision does not violate the Contract Clause.

As a preliminary matter, the Bar Association neither identifies an alleged contractual relationship nor a contractual obligation that allegedly has been impaired. Nonetheless, by relying on *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), the Association appears to assert that its corporate charter is a contract, and that mandatory membership in the Association amounts to an obligation of that contract.<sup>5</sup> Thus, the Association apparently contends that RSA 311:7-g, III is an unconstitutional attempt to impair its corporate charter.

The United States Constitution provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .” U.S. Const. art. I, § 10. As explained by the New Hampshire Supreme Court, “[b]oth the State Constitution and the Federal Constitution prohibit the legislature from impairing the integrity of contracts.” *Smith Ins. Inc. v. Grievance Comm.*, 120 N.H. 856, 862 (1980) (citing U.S. Const. art. I, § 10, cl. 1; N.H. Const. pt. 1, art. 23). “The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference,” *Garrison v. Mayor of*

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<sup>5</sup> In *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), the Court concluded that a charter, granted to Dartmouth College by the crown for incorporation of a religious and literary institution, constituted a contract under which the College obtained property and pursued corporate ends. “Frequently, a corporate charter is described as a contract of a threefold nature, that is, a contract between

*New York*, 88 U.S. 196, 203 (1874), and the primary focus of the Contract Clause “was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy.” *Keystone Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 503 (1987). Thus, while the Legislature cannot generally by statutory fiat abridge existing contractual relationships, *see Smith*, 120 N.H. at 862, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally. *Keystone Coal*, 480 U.S. at 502; *Page v. Symonds*, 63 N.H. 17, 21 (1883). *See generally* 16B Am. Jur. 2d, *Constitutional Law* §§ 708-744 (discussing the obligation of contracts with respect to the Contract Clause).

A Contract Clause analysis “has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.” *Opinion of the Justices*, 135 N.H. 625, 630-31 (1992) (quotation and citation omitted); *see also Lower Village Hydroelectric Assocs., L.P. v. City of Claremont*, 147 N.H. 73, 77 (2001). A court must find a precise obligation that has been impaired to find an impairment of the contract, *Keystone Coal*, 480 U.S. at 504, *Keefe v. Clark*, 322 U.S. 393, 396 (1944); thus “[t]here can be no contract clause violation unless it is first shown that a contract has been

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the state and the corporation, a contract between the corporation and its stockholders, and a contract between the stockholders inter se.” 18 Am. Jur. 2d *Corporations*, § 76 (1985).

substantially altered.”<sup>6</sup> *Opinion of the Justices*, 135 N.H. at 630-31.

Here, there is neither a contract nor a substantial impairment. In 1873, the New Hampshire Bar Association was incorporated by legislative act “for the purpose of maintaining the honor and dignity of the profession of the law, and cultivating social relations among its members, and increasing its usefulness in promoting the due administration of justice.” Laws, 1873, ch. 115. Further, the Legislature authorized the Association to adopt a constitution and bylaws. *Id.* § 3. In granting the charter, however, the Legislature expressly reserved the right to “at any time alter, amend, or repeal” the act.<sup>7</sup> *Id.* § 6.

While the *Trustees of Dartmouth College* case demonstrates that corporate charters may give rise to contractual rights, any contractual right inherent in the Bar Association’s charter is subject to the State’s reserved power to alter, amend, or repeal--as provided for in the 1873 act incorporating the Association. *Ashuelot R. Co. v. Elliot*, 58 N.H. 451, 454 (1878) (holding statute of incorporation is a legislative grant subject to any reserved legislative power of amendment and repeal). “What the

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<sup>6</sup> Even if a contract is found to be substantially impaired, “it is to be accepted as commonplace that the Contract Clause does not operate to obliterate the police power of the States.” *Opinion of the Justices*, 135 N.H. at 634 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978)). “Thus, a balancing of the police power and the rights protected by the contract clauses must be performed, and a bill or law which substantially impairs a contractual obligation may pass constitutional muster only if it is ‘reasonable and necessary to serve an important public purpose.’” *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)). Accordingly, even if this Court were to find that RSA 311:7-g, III substantially impairs a contractual obligation of the Bar Association’s charter, such impairment is justified as an exercise of the State’s broad police power serving the public welfare. *See Smith*, 120 N.H. at 862; *Page*, 63 N.H. at 20.

<sup>7</sup> This type of legislative reservation is a legitimate limitation on the grant of a corporate charter. *See Missouri P. R. Co. v. Kansas*, 216 U.S. 262, 276 (1910).

state has granted it may not take away, but the exercise of powers reserved to it under the grant cannot infringe either the contract or due process clauses of the Constitution.” *Kirk v. Maumee Valley Electric Co.*, 279 U.S. 797, 802 (1929); *see also Sears v. City of Akron*, 246 U.S. 242, 249 (1918) (holding subsequent act amending corporate charter did not violate Contract Clause where charter was subject to state’s reserved power to amend or repeal); *Missouri P. R. Co. v. Kansas.*, 216 U.S. 262, 274-75 (1910) (holding that charter held subject to the power of the state to repeal, alter, or amend constitutes only a repealable contract).

The Legislature created the Bar Association subject to the legislative right to alter, amend, or repeal the charter. The Legislature’s current exercise of that right, RSA 311:7-g, III, provides members with an opportunity, through a vote, to choose whether they want to be a member of the Association. RSA 311:7-g, III does nothing to the Association with respect to any corporate purpose; for example it does not adjust a pre-existing debtor-creditor relationship, or shift control over corporate assets to state government. As the Legislature could arguably, in a full exercise of its reserved power, repeal the charter of the Association, RSA 311:7-g, III clearly does not impair any contractual obligation in violation of the Contract Clause.

Further, there can be no violation of the Contract Clause where no contractual obligation exists with respect to Bar Association membership. Contracts, which are protected by the constitutional prohibition against the violation of the obligation of a contract, “are voluntary--that is, based on the assent of the parties, expressly or impliedly given.” *Anders v. Nicholson*, 150 So. 639, 642 (Fla. 1933); *see also Jones v. Cheney*, 489 S.W.2d 785, 788 (Ark. 1973) (“The classes of contracts entered into voluntarily that are based on the assent of the parties expressly or impliedly given as opposed to those that are

compulsory, are protected by the Constitutional provisions against impairing the obligation of a contract.”). As explained by the United States Supreme Court, “[t]he term ‘contract’ is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.” *State of Louisiana v. City of New Orleans*, 109 U.S. 285, 288 (1883); *see also Freeland v. Williams*, 131 U.S. 405, 414 (1889) (“Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition [of the federal Constitution].”); *Garrison*, 88 U.S. at 203 (finding it difficult to perceive how “a transaction wanting the assent of the parties” could be a contract within the meaning of the federal contract clause); *Allen v. Cuomo*, 100 F.3d 253, 262-63 (2<sup>nd</sup> Cir. 1996) (ruling inmates failed to establish existence of contractual relationship between inmates and correctional department regarding payment of wages where inmates were required to work by virtue of incarceration).

Membership in the New Hampshire Bar Association is currently mandatory for every attorney licensed to practice in the State. Sup. Ct. R. 42A; *In Re Unification of the New Hampshire Bar*, 109 N.H. 260 (1968); *In Re Unified New Hampshire Bar*, 112 N.H. 205 (1972). Non-payment of Association dues results in an order from the Supreme Court suspending the person from practicing law. Sup. Ct. R. 42A. There is no opportunity for assent on the part of the attorneys to this compulsory membership term. Therefore, there is no contractual obligation with respect to membership within the meaning of the Contract Clause, and--as there is no contract--the voting requirement of RSA 311:7-g, III does not

constitute a violation of the Contract Clause. If anything, the statute furthers a contractual relationship by bringing an element of voluntariness to the equation.

### CONCLUSION

For the foregoing reasons, the State of New Hampshire respectfully requests that this Honorable Court deny the Petition of the New Hampshire Bar Association. In the alternative, the State respectfully requests the Court to remand this case to the trial court or assign it to a special master for further factual development through discovery and evidentiary hearing.

### ORAL ARGUMENT

The State of New Hampshire requests to be heard orally. Senior Assistant Attorney General Suzanne M. Gorman will present oral argument. (15 minutes)

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE  
By its attorneys,

Peter W. Heed  
Attorney General

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Suzanne M. Gorman  
Senior Assistant Attorney General  
Amy B. Mills  
Assistant Attorney General  
Civil Bureau  
33 Capitol Street  
Concord, NH 03301-6397  
(603) 271-3650

October 17, 2003

Certificate of Service

I certify that two copies of the foregoing were hand delivered or mailed this 17<sup>th</sup> day of October, 2003 by first-class mail, postage prepaid, to Frederick K. Upton, Esq. at Upton & Hatfield, LLP, 10 Centre Street, Concord, NH 03301, Richard J. Lehmann, Senate Legal Counsel, at New Hampshire Senate, Statehouse, 107 North Main Street, Concord, NH 03301, Betsy B. Miller, House Legal Counsel, at New Hampshire House of Representatives, Statehouse, 107 North Main Street, Concord, NH 03301 and Christopher Reid, Governor's Counsel, at Office of the Governor, Statehouse, 107 North Main Street, Concord, NH 03301.

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Suzanne M. Gorman