

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

217-2020-CV-00026
and all consolidated YDC and YDSU CASES

**STATE DEFENDANTS' REPLY TO PLAINTIFFS' OBJECTION TO
STATE DEFENDANTS' SECOND MASTER MOTION
TO DISMISS THE MASTER COMPLAINT**

NOW COME the State Defendants, by and through their undersigned counsel, and submit this Reply to Plaintiffs' Objection (the "Objection") to State Defendants' Second Master Motion to Dismiss the Master Complaint (together with its supporting memorandum of law, the "Second Motion").¹

INTRODUCTION

Plaintiffs' Objection misconstrues, mischaracterizes, or ignores both the actual positions taken by State Defendants² and the legal authorities cited by the parties. State Defendants will

¹ Plaintiffs' Objection is cited as "Obj."; exhibits to the Objection are cited as "Obj. Ex."; the memorandum of law in support of State Defendants' Second Motion is cited as "2d Mem."; the memorandum of law in support of State Defendants' First Motion is cited as "1st Mem."; Plaintiffs' Master Complaint is cited as "MC."

² Among the more significant misstatements or mischaracterizations of State Defendants' positions are claims that:

- State Defendants "seek[] the wholesale dismissal of all (or nearly all) of the hundreds of Plaintiffs' claims" (Obj. 2, 53);
- State Defendants seek "a blanket order barring application of the discovery rule" (Obj. 20);
- State Defendants' argument constitutes an "admission" that "there is little doubt Plaintiffs were

solely address the legal issues in this Reply. But State Defendants could not have been clearer that the First Motion and Second Motion seek only to have the Court establish the legal framework that will then be applied consistently and uniformly across these hundreds of consolidated cases to the individual Short-Form Complaints at the appropriate time.³ It was for this reason that this Court set the current briefing schedule in this case.

Consistent with this purpose, neither the First Motion nor the Second Motion seeks in its prayer for relief the dismissal of a single Plaintiff's case. Rather, the State Defendants have set forth in good faith their view of the legal landscape in which these cases must operate, with supporting citations to existing and controlling precedent. In doing so, State Defendants have recognized that many individuals have credibly alleged that they have suffered, and State Defendants' legal defenses are not intended to make light of that suffering. The legislature, recognizing that many former YDC/YDSU residents may well have meritorious claims, but that some number of them might not be able to meet the applicable legal requirements to successfully sue in court, has created a victim-centered, trauma-informed claims process, along with a one-hundred-million-dollar settlement fund, open to all former YDC/YDSU residents. Any former resident of YDC/YDSU may also seek relief against the individual perpetrator(s). State Defendants have not admitted liability as to any aspect of the Master Complaint or as to any Plaintiff's claims. State Defendants believe there are viable legal defenses to these consolidated actions. That does not mean that the State is trying to prevent anyone from seeking just

actually harmed while in their care and custody" (Obj. 32); and

- If the Court grants the Second Motion "some Plaintiffs in these consolidated cases might be barred from seeking compensation" (Obj. 35).

³ Therefore, it is not "appropriate" to consider any Short-Form Complaints at this time. Obj. 3. Plaintiffs agree that the First and Second Motions "are aimed only at the common factual allegations and legal claims set forth in the Master Complaint" so "the Court's review must of course be focused squarely on that pleading." Obj. 3.

compensation for meritorious claims where legally available under the laws of New Hampshire.

Nevertheless, for the reasons below and in the Second Motion, the Court should grant the Second Motion.

LEGAL STANDARD

When ruling on a motion to dismiss, the court “must *rigorously scrutinize* the complaint to determine whether, *on its face*, it asserts a cause of action.” *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44-45 (1987) (first emphasis added). In so doing, “the court need not ‘assume the truth of statements . . . that are merely conclusions of law.’” *Puiia v. Miner*, No. 219-2017-CV-00433, 2018 WL 9441038, at *1 (N.H. Super. Ct. Mar. 28, 2018) (quoting *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611 (2010)). “Nor must the court accept any ‘invective . . . bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like’ that may be included in the complaint.” *Fowler v. O’Hara*, No. 218-2015-CV-1109, 2015 WL 13404064, at *1 (N.H. Super Ct. Feb. 9, 2015) (Schulman, J.) (quoting *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)); accord *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). “[W]here a writ merely states a legal conclusion, but does not allege specific facts to support that legal conclusion, the writ may be dismissed.” *Kennedy v. Titcomb*, 131 N.H. 399, 402 (1989).

ARGUMENT

I. SOVEREIGN IMMUNITY IS A CONSTITUTIONAL AND STATUTORY DOCTRINE AND CONTROLLING PRECEDENT ESTABLISHES ITS CONSTITUTIONALITY.

As an initial matter, the doctrine of sovereign immunity cannot be declared unconstitutional in whole or in part because it is a right secured to the people by the State Constitution. Part I, Article 7 of the New Hampshire Constitution specifically grants to the

people the right to govern as a “free, sovereign, and independent State” and extends to them “every power, jurisdiction, and right, pertaining thereto.” N.H. Const. Pt. I, Art. 7. The right of the sovereign not to be sued in its own courts without its consent has been a longstanding, inherent feature of state sovereignty since the establishment of the New Hampshire constitution and the ratification of the federal constitution. *See, e.g., Franchise Tax Bd. Of Cal. v. Hyatt*, ___ U.S. ___, 139 S. Ct. 1485, 1493 (2019) (an integral component of States’ sovereignty at the time the United States Constitution was ratified was “their immunity from private suits”); *Alden v. Maine*, 527 U.S. 706, 733 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.”); *Wooster v. Plymouth*, 62 N.H. 193, 204 (1882) (“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; . . .”); Federalist No. 81 (Alexander Hamilton 1788) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.”).

“Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.” *Alden*, 527 U.S. at 715-16. As the New Hampshire Supreme Court has explained, “New Hampshire is no less a sovereign than the United States.” *Wooster*, 62 N.H. at 205. “It is *not constitutionally bound* to give to its school-teachers, to those who support its paupers, lend it money, sell it real or personal property, or make and repair its roads and buildings, to travellers injured by defects in its highways, or to any class of

contractors, creditors, or claimants, a right of action, civil or criminal, against itself.” *Id.* (emphasis added). “If it makes a gift of such a right, it may prescribe the remedy.” *Id.* The doctrine has been “deeply entrenched in this jurisdiction,” *Conrad v. N.H. Dep’t of Safety*, 167 N.H. 59, 78 (2014), since its founding, so much so that “[t]he suability of a State without its consent was a thing unknown to the law” that “ha[d] been so often laid down and acknowledged by courts and jurists that it [wa]s hardly necessary to be formally asserted.” *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). Thus, while the doctrine of sovereign immunity is not expressly identified by name in the New Hampshire Constitution, *Sousa v. State*, 115 N.H. 340, 342 (1975), it is a right of the people conferred by Part I, Article 7 and is of constitutional dimension. Sovereign Immunity, therefore, cannot be unconstitutional under Part I, Article 14, on state equal protection grounds, or on any other state constitutional grounds.⁴

The Legislature has also enshrined the doctrine of sovereign immunity in RSA chapter 99-D in response to outmoded judicial efforts to abolish it by treating sovereign immunity as solely a common law doctrine within the power of the judiciary to control. These judicial efforts ultimately did not prevail and remain to this day only in dissenting or concurring opinions. Binding New Hampshire Supreme Court precedent still holds that the even-handed application of absolute sovereign immunity to all persons on the same terms does not violate Part I, Article 14 of the equal protection provisions of the New Hampshire Constitution. *Sousa*, 115 N.H. at 342-44. In so holding, the New Hampshire Supreme Court concluded that sovereign immunity did not violate plaintiffs’ rights to equal protection “as all those who are similarly situated [*i.e.*, all those persons injured by the State] are similarly treated.” *Sousa*, 115 N.H. at 344. And it held

⁴ Plaintiffs make no developed argument regarding the Federal Constitution (*see* Obj. 12 n.2). In any event, because the State Constitution is at least as protective as the Federal Constitution, that sovereign immunity does not run afoul of the State Constitution means that sovereign immunity also survives any challenge under the Federal Constitution.

that “conformably to the laws” as used in Part I, Article 14 means that the remedies to which people have a right are limited to those remedies available under the “statutory and common law applicable at the time the injury is sustained.” *Id.* at 343. Because absolute sovereign immunity was the law of the state, Part I, Article 14 was not offended. *Id.*

Today, of course, absolute sovereign immunity does not exist. The legislature has substantially waived sovereign immunity for the benefit of injured persons. RSA chapter 541-B represents the most significant waiver of that immunity. It supplies a limited damages remedy against the State that is uniformly applicable to all persons injured by the State. It contains a three-year limitation period with a discovery rule and a specific damages cap. The justices of the New Hampshire Supreme Court advised the legislature in 1985 that RSA chapter 541-B was constitutional in these and other respects. *Opinion of the Justices*, 126 N.H. 554, 560 (1985). It has undergone some amendment over the years, but in structure and form remains largely the same.

RSA chapter 541-B is a considered legislative policy designed to strike “a balance between granting relief to injured claimants and protecting the solvency of the State.” *Sousa*, 115 N.H. at 345. It implicates “[e]xtremely broad considerations of public policy and government administration.” *Id.* For example, “[i]f the State incurred significant liability, the payment of these costs could impair the financial ability of the State to render government services.” *Opinion of the Justices*, 126 N.H. at 560. Also, “exposure to liability for the State’s tortious performance of functions that it alone can perform, such as law enforcement [or the services DCYF performs], in a sense, would penalize the State for undertaking these obligations.” *Id.* “Unlike an individual or private entity, which can select its activities to minimize its liability exposure, the State may not eschew certain functions, even if the attendant

liability exposure is onerous.” *Id.* Sovereign immunity and RSA chapter 541-B work in tandem to strike an appropriate balance between these (and other) important government interests and the rights of persons injured by state agencies to seek a monetary recovery against the State.

Against this backdrop, the plaintiffs contend that sovereign immunity is unconstitutional under Part I, Articles 2, 8, 12, and 14 of the New Hampshire Constitution. This theory cannot prevail because sovereign immunity is a right of the people conferred upon them by Part I, Article 7 of the New Hampshire Constitution. All of these constitutional provisions must be interpreted “as a whole, . . . and as if enacted at one time” and must be construed “so as to avoid conflict with one another.” *Carrigan*, 174 N.H. at 372-73.

A. Part I, Article 8 of the New Hampshire Constitution Does Not Unsettle Sovereign Immunity.

The plaintiffs contend that the existence of sovereign immunity violates Part I, Article 8 of the New Hampshire Constitution. It does not. The 2018 amendment to Part I, Article 8 describes the public’s “right to an orderly, lawful, and accountable government” and, in that regard, provides “any individual taxpayer eligible to vote in the State” with standing “to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.” N.H. Const. Pt. I, Art. 8. This amendment “was intended to return taxpayer standing in New Hampshire to its status prior to” certain New Hampshire Supreme Court decisions. *Carrigan v. N.H. Dep’t of Health & Human Servs.*, 174 N.H. 362, 368 (2021).

Part I, Article 8 does not address sovereign immunity and the taxpayer standing it confers undermines the plaintiffs’ position in this case. Specifically, Part I, Article 8 empowers a citizen to bring a claim against a government official to prohibit him or her from taking a specific governmental action to spend money where sovereign immunity, N.H. Const. Pt. I, Art. 7; RSA

chapter 99-D, would prohibit the money's use or recovery and legislative authorization to spend the money does not otherwise exist. *See Carrigan*, 174 N.H. at 371 (collecting pre-*Baer* decisions wherein taxpayer standing was conferred to challenge the decision of a municipality to enter into a particular contract, to build a baseball park on a common area with city funds, to expend money to purchase a truck and police cruiser). Sovereign immunity is the constitutional and statutory law of the State and ensuring it is properly enforced secures the public's right to an orderly, lawful, and accountable government. Since the amendment to Part I, Article 8, the New Hampshire Supreme Court has addressed sovereign immunity and has continued to opine that state agencies are "cloaked with the State's sovereign immunity" and are "immune from suit in New Hampshire courts unless there is an applicable statute waiving immunity." *Avery v. Comm'r, N.H. Dep't of Corr.*, 173 N.H. 726, 730-31 (2020) (quotation marks omitted). In short, Part I, Article 8 did not change or alter sovereign immunity in any way.

B. New Hampshire Supreme Court Precedent Establishes That Sovereign Immunity Is Constitutional Under Part I, Articles 2, 12, and 14 of the New Hampshire Constitution.

The New Hampshire Supreme Court's binding, precedential decision in *Sousa* holds that the even-handed application of absolute sovereign immunity to all persons on the same terms does not violate Part I, Article 14 or the equal protection provisions of the New Hampshire Constitution. *Sousa*, 115 N.H. at 342-44. In so holding, this Court concluded that sovereign immunity did not violate plaintiffs' rights to equal protection "as all those who are similarly situated [*i.e.*, all those persons injured by the State] are similarly treated." *Id.* at 344. And it held that "conformably to the laws" as used in Part I, Article 14 means that the remedies to which people have a right are limited to those remedies available under the "statutory and common law applicable at the time the injury is sustained." *Id.* at 343.

Contrary to Plaintiffs arguments, Plaintiffs agree with State Defendants that RSA 541-B is the statutory scheme that “inform[s] the sovereign immunity analysis” here. Obj. 52. RSA chapter 541-B supplies a limited waiver of sovereign immunity for a damages remedy against the State. Like absolute sovereign immunity, the provisions of RSA chapter 541-B are uniformly applicable to all persons injured by the State. Thus, RSA Chapter 541-B, on its face, does not treat similarly situated persons differently, *Sousa*, 115 N.H. at 344, and therefore poses no equal protection problem. *Id.*; see *In re Sandra*, 150 N.H. 634, 638 (2004) (“Whether applying a strict scrutiny, intermediate, or rational basis standard of review, we, as well as the federal courts, determine whether differences between the classes justify disparate treatment under the law.”).

Part I, Article 14 also poses no constitutional obstacle. As a limited waiver of sovereign immunity, RSA Chapter 541-B creates a private remedy against the State where one otherwise never existed. Every person has access to that statutory remedy under the same circumstances: they must file their 541-B claim in the proper forum, RSA 541-B:9, within the proper time period, RSA 541-B:14, IV, and may not recover more than the statutory damages caps in place, RSA 541-B:14, I. Under Part I, Article 14, the plaintiff’s right to a remedy exists “conformably to” RSA Chapter 541-B and the law of sovereign immunity. Accordingly, RSA Chapter 541-B is not unconstitutional under Part I, Article 14, consistent with New Hampshire Supreme Court’s holding, analysis, and reasoning in *Sousa*, 115 N.H. at 343, and other cases from the New Hampshire Supreme Court uniformly holding that Part I, Article 14 “only requires a remedy that conforms to the statutory and common law rights applicable at the time of the injury.” *Ocasion v. Federal Express Corp.*, 162 N.H. 436, 448 (2011); see also *Univ. of Texas Med. Branch at Galveston v. Greenhouse*, 889 S.W.2d 427, 431 (Tex. Ct. App. 1994) (holding that the open courts

provision of the Texas Constitution did not apply to waiver of sovereign immunity statute because the “suit is a statutory cause of action that exists solely by virtue of the Act”).

Moreover, the purpose of Part I, Article 14 is “to make civil remedies available and to guard against arbitrary and discriminatory infringements upon access to courts.” *Huckins v. McSweeney*, 166 N.H. 176, 180 (2014). “The right to a remedy is not a fundamental right, but is relative and does not prohibit all impairments of the right of access.” *Petition of Goffstown Educ. Support Staff*, 150 N.H. 795, 803 (2004). Notably, it does not “guarantee that all injured persons will receive full compensation for their injuries.” *Ocasion*, 162 N.H. at 448.

Thus, where other persons or entities responsible for an injury exist and could be sued, no right to a remedy violation exists under Part I, Article 14. *Huckins*, 166 N.H. at 180-81. The New Hampshire Supreme Court’s decision in *Huckins* is illustrative. In that case, the plaintiff argued that RSA 507-B:2 and RSA 507-B:5, two statutes limiting the liability of municipalities from suit, violated his right to a remedy because, although he could maintain an action against the direct tortfeasor, he asserted pursuing only the direct tortfeasor was “constitutionally inadequate” and presented “a hollow recovery.” 166 N.H. at 180. The New Hampshire Supreme Court rejected the argument, holding that the plaintiff had not been deprived of his right to a remedy under the New Hampshire Constitution because the plaintiff “has legal recourse to recover damages for his injuries from the party allegedly responsible for them.” *Id.* at 181.

In this case, the plaintiffs allege that specific persons engaged in unauthorized acts of harm against them. Neither sovereign immunity nor RSA Chapter 541-B infringe upon the right of the plaintiffs to bring statutory or common law claims directly against any or all of these alleged tortfeasors. Thus, for this reason too, neither sovereign immunity nor RSA Chapter 541-B violate or conflict with Part I, Article 14 in this case.

Nonetheless, even if the plaintiffs could meet their initial burden of showing that sovereign immunity or RSA Chapter 541-B infringed their right to a remedy in this case in a manner implicating Part I, Article 14, sovereign immunity as modified by RSA Chapter 541-B passes constitutional muster. Laws infringing the right to a remedy under Part I, Article 14 implicate “an important substantive right” and are subject to “intermediate scrutiny.” *Lennartz v. Oak Point Associates, P.A.*, 167 N.H. 459, 462-63 (2015). Under intermediate scrutiny, once the plaintiff shows that a law infringes his right to a remedy—a burden the plaintiffs have failed to meet in their objection—the State must show that the challenged legislation is “substantially related to an important governmental objective.” *Id.* at 463.

Sovereign immunity as modified by RSA Chapter 541-B is substantially related to numerous important government objectives that the New Hampshire Supreme Court has expressly acknowledged. Sovereign immunity as modified by RSA Chapter 541-B advances the State’s important governmental interest in striking an appropriate “balance between granting relief to injured claimants and protecting the solvency of the State.” *Sousa*, 115 N.H. at 345. As the New Hampshire Supreme Court has expressly recognized, “[i]f the State incurred significant liability, the payment of these costs could impair the financial ability of the State to render government services.” *Opinion of the Justices*, 126 N.H. at 560. Also, “exposure to liability for the State’s tortious performance of functions that it alone can perform, such as law enforcement [or the services DCYF performs], in a sense, would penalize the State for undertaking these obligations.” *Id.* “Unlike an individual or private entity, which can select its activities to minimize its liability exposure, the State may not eschew certain functions, even if the attendant liability exposure is onerous.” *Id.*

The New Hampshire Supreme Court’s decision in *Lennartz* is illustrative. There, an employee in a state university laboratory who was injured by a defective ventilation system brought a negligence claim against the contractors who constructed the ventilation system nearly nine years after the system was installed, and three years after the employee suffered injuries. *Id.* at 461. Following a motion for summary judgment, the trial court dismissed the plaintiff’s claims under the statute of repose set forth in RSA 508:4-b, I, which requires all tort actions “arising out of any deficiency in the creation of an improvement to real property . . . [to] be brought within 8 years from the date of substantial completion of the improvement . . . ,” regardless of when the injury occurred. *Id.* at 462 (quoting RSA 508:4-b, I). On appeal, the plaintiff argued that application of RSA 508:4-b, I “violates principles of equal protection [including under Part I, Article 14] because it barred her accrued cause of action without application of the discovery rule contained within the limitations period found in RSA 508:4, I.” *Id.* The New Hampshire Supreme Court disagreed.

Applying middle-tier scrutiny, the New Hampshire Supreme Court explained that the purpose of RSA 508:4-b, I was to “relieve the building industry from potentially infinite liability under the discovery rule.” *Id.* at 463. The New Hampshire Supreme Court found this was an “important government objective” that was substantially related to the 8-year statute of repose. *Id.*; see also *Winnisquam Reg. School Dist. v. Levine*, 152 N.H. 537 (2005) (reaching the same conclusion under prior standard for middle tier scrutiny).

The same rationale and result applies with equal force in this case. Sovereign immunity as modified by RSA Chapter 541-B advances the State’s important government interest in relieving the public treasury and ultimately the taxpayers of this State from potentially infinite liability, while providing individual citizens with some meaningful recourse against the State for injuries

caused by it. It protects the public treasury from insolvency, and it guards against impairing the State in its ability to provide services the people have deemed necessary under the police power—services that no rational private actor would ever provide because the liability risks associated with them are too great.

Contrary to the plaintiffs’ assertions, the State does not need to tender evidence to establish these important governmental objectives. Obj. 54 (quoting *Gardner v. City of Concord*, 137 N.H. 253, 259 (1993)); *see also* Obj. 56.⁵ Rather, the relevant constitutional provisions, statutes, legislative history, and related New Hampshire Supreme Court jurisprudence may reveal these important governmental objectives. *See, e.g., Lennartz*, (plaintiff conceded the purpose of RSA 508:4-b, I was to prevent potentially infinite liability in the building industry because the New Hampshire Supreme Court previously found that to be the purpose of RSA 508:4-b, I, after reviewing the statute and its legislative history in *Winnisquam Reg. Sch. Dist. v. Levine*, 152 N.H. 537, 540 (2005), and finding that purpose to be an important governmental objective); *Petition of Concord Teachers*, 158 N.H. 529, 539 (2009) (looking to the State Constitution and New Hampshire Supreme Court jurisprudence to find an important governmental objective in providing eligible public employees with retirement benefits); *Cnty. Res. for Justice, Inc. v. City of Manchester*, 157 N.H. 152, 154 (2008) (explaining that “the government may not rely upon

⁵ State Defendants need not submit affidavits to support a motion to dismiss on sovereign immunity grounds as Plaintiffs assert. The language Plaintiffs quote is a reference to the language now contained in Superior Court Rule 11(b):

The court will not hear any motion grounded upon facts, unless such facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties, their attorneys, or non-attorney representatives; and the same rule will be applied as to all facts relied on in opposing any motion.

See Gardner, 137 N.H. at 259 (citing then-Super. Ct. R. 57).

justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations”).

In this case, Part I, Article 7 of the New Hampshire Constitution, RSA chapter 99-D, the New Hampshire Supreme Court’s controlling jurisprudence including *Sousa*, and the legislative history of RSA Chapter 541-B, which includes *Opinion of the Justices*, 126 N.H. at 560, all establish and support the above-referenced important governmental objectives further by sovereign immunity as modified by RSA Chapter 541-B.

Plaintiffs’ reliance (Obj. 13-15) on *City of Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109 (1990), to establish a contrary proposition is unavailing. As an initial matter, *City of Dover* concerns *municipal* immunity, not *sovereign* immunity, and the New Hampshire Supreme Court has “always considered State sovereign immunity a doctrine separate and apart from municipal immunity.” *LaRoche v. Doe*, 134 N.H. 562, 567 (1991); *see also* 2d Mem. 30 n.12. Second, *City of Dover* concerned then-RSA 507-B:2, I, which “provide[d] municipalities with complete immunity from tort liability from negligence incident to ownership or maintenance of highways, streets, and sidewalks.” 133 N.H. at 119. The court’s disapproval of this provision is not instructive in the context of sovereign immunity, particularly because RSA 541-B:19 *does not contain* a similar provision. In fact, as the court detailed in *City of Dover*, the New Hampshire Supreme Court had advised the legislature in *Opinion of the Justices* that a “nearly identical” provision in the proposed RSA 541-B:19 (which the legislature did not enact in the final bill) would be problematic. 133 N.H. at 115. Because the legislature already chose not to enact the language in the statute pertaining to the State’s sovereign immunity, the court’s discussion in *City of Dover* disapproving of similar language regarding municipal immunity does not apply here.

Plaintiffs further mischaracterize *City of Dover* (Obj. 15-16). In essence, the Plaintiffs conflate the court’s dicta describing the problems with a municipality’s complete tort immunity regarding highways, streets, and sidewalks includes the complete denial of a legal remedy “in circumstances of ordinary negligence [and] even when a municipality creates or is aware of a problem which could result in serious injury and then acts irresponsibly in failing to correct the problem.” 133 N.H. at 119. Through this dicta, which concerned absolute municipal immunity and not the State’s sovereign immunity, the New Hampshire Supreme Court assuredly did *not* “h[o]ld that the constitutional guarantee of a remedy under Part I, Article 14 cannot be impaired where a government actor creates or is aware of a problem which could result in serious injury and then acts irresponsibly in failing to correct the problem.” Obj. 15 (quotation marks omitted). Not only is this language *not a holding*, but even if it were, for it to apply against the State Defendants here, Plaintiffs would have to transmute the unsubstantiated allegations in the Master Complaint into uncontroverted facts that “State Defendants created and were aware of a problem that could result in injury to . . . Plaintiffs” and then failed to correct the problem. Obj. 16.

Accordingly, sovereign immunity itself, and particularly as modified by RSA Chapter 541-B, is constitutional. As set forth in their Second Motion, State Defendants are entitled to sovereign immunity on various aspects of Plaintiffs’ claims for reasons that are apparent as a matter of law or are “apparent from the record” (here, the allegations set forth in the Master Complaint). The plaintiffs’ assertions to the contrary is without merit and should be rejected.

C. Implied Waiver of Sovereign Immunity Is Not at Issue Here.

The State and its agencies are “immune from suit in New Hampshire courts ‘unless there is an applicable statute waiving immunity.’” *XTL-NH*, 170 N.H. at 656 (quoting *Chase Home for Children v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 730 (2011)). “A statute

can waive immunity either expressly or by *reasonable* implication,” but “[s]uch waivers . . . are *strictly construed*” and “must evidence a *clear intent* to grant a right to sue the State.” *Chase Home*, 162 N.H. at 730 (quotation marks omitted) (emphases added). Furthermore, “[a]ny statutory waiver is limited to that which is articulated by the legislature; thus, New Hampshire courts lack subject matter jurisdiction over an action against the State unless the legislature has prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.” *XTL-NH*, 170 N.H. at 656 (quotation marks omitted). Plaintiffs refer to various provisions of RSA 169 and its predecessor statutes (Obj. 65-71) to try to avoid RSA 541-B, the very statute in which the Legislature has articulated the “*comprehensive and exclusive procedure* for persons seeking money damages from the State and/or its employees.” *Laramie*, 160 N.H. at 437 (emphasis added). That is the very relief Plaintiffs seek. The Court should disregard Plaintiffs’ attempt to avoid RSA 541-B for several reasons.

First, Plaintiffs have already agreed that RSA 541-B applies here (*see* Part I.B, *supra*, Obj. 52). The New Hampshire Supreme Court has agreed, analyzing claims similar to Plaintiffs’ claims here (e.g., alleged breach of fiduciary duty, negligence, and vicarious liability involving alleged sexual abuse of a child “under the care of” the New Hampshire Division for Children, Youth and Families) under RSA 541-B. *Petition of N.H. Div. for Children, Youth & Families*, 173 N.H. 613, 614-15 (2020) [hereinafter “*Petition of DCYF*”].

Second, the caselaw Plaintiffs cite is inapposite. The Legislature amended RSA 541-B to provide an avenue for suit in court effective July 3, 1985. Before that date, and after July 1, 1977, claims against the State could only be addressed via a Board of Claims, not in a court of law. And before July 1, 1977, the State had absolute immunity from suit absent a specific waiver. *See generally* 2d Mem. 31-33. Plaintiffs’ citations to *Chasse v. Banas*, 119 N.H. 93

(1979), *State v. Brosseau*, 124 N.H. 184 (1983), and *Public Service Co. of N.H. v. State*, 102 N.H. 54 (1959), are inapposite because these cases all concerned the pre-1985 regime in which the State had not yet established the procedures by which a plaintiff could sue the State. The implied waivers found in *Chasse* and *Brosseau* (neither of which concerned the Child Welfare Acts, their “predecessor” statutes, or any other statute at issue in this litigation) thus provide no guidance here.⁶ And *Public Service Co.*, which concerned a time when the State was generally immune from suit, not only did not find any implied waiver of immunity but also reiterated that “[a]ny modification of the doctrine of state immunity” is a question “for the Legislature to determine rather than being within the province of the court.” 102 N.H. at 58 (quotation marks omitted). That remains the law today.

Plaintiffs do cite two recent cases but misapply them. Plaintiffs characterize *Chase Home* as finding “an implied statutory waiver.” Obj. 65. This is incorrect. Indeed, the New Hampshire Supreme Court held that the statute at issue in that case was “an *express and detailed* waiver of sovereign immunity directly applicable” to the breach-of-contract suit at bar. 162 N.H. at 731 (emphasis added). And *Kenison v. Dubois*, 152 N.H. 448 (2005), is not a sovereign immunity case at all; rather, it considered the immunity of a nonprofit snowmobile club under recreational-use statutes granting immunity in certain situations. Plaintiffs’ final argument appears to be that any remedial statute must be construed liberally, arguing that any remedial statute must be construed to waive sovereign immunity. That, certainly, is not the law of New Hampshire. See, e.g., *Chase Home*, 162 N.H. at 730 (statutory waivers of immunity, whether

⁶ For example, *Chasse*, upon which *Brosseau* relies, only reinforces the decision’s inapplicability here. In *Chasse*, the “most appropriate remedy” for alleged violation of the right at issue was “an action for damages.” 119 N.H. at 96. At that time, there was no mechanism for such a damages suit. But Plaintiffs here *do* have access to such a mechanism: RSA 541-B.

express or implied, “are strictly construed” and “must evidence a clear intent to grant a right to sue the State”) (quotation marks omitted).

Plaintiffs close out this line of argument with another mischaracterization of the relevant law by claiming that it is simply “absurd” for the State to have responsibility under the Child Welfare Acts “without providing those children with a remedy to enforce their rights.” Obj. 70. But Plaintiffs do have a remedy at law, provided they (like any other plaintiff wishing to bring tort claims for damages against the State) comply with the “comprehensive and exclusive procedure” detailed in RSA 541-B. *Laramie*, 160 N.H. at 437. Plaintiffs also may sue the actual perpetrators of their alleged abuse. And, again, the Legislature has created a claims process and one-hundred-million-dollar settlement fund open to individuals like Plaintiffs.

II. ASPECTS OF STATE DEFENDANTS’ SOVEREIGN IMMUNITY BAR MANY OF PLAINTIFFS’ CLAIMS.

Sovereign immunity remains the law of New Hampshire. *See* Part I, *supra*. Several different aspects of the State’s sovereign immunity apply to bar various causes of action alleged in the Master Complaint, as set forth in the Second Motion and below.

A. Discretionary Function Immunity Bars Counts IV and VI of Plaintiffs’ Claims.

As State Defendants set out in their Second Motion, the doctrine of discretionary function immunity, set forth in RSA 541-B:19, I(c), bars at least Counts IV and VI. 2d Mem. 40-44, 46-48. Plaintiffs attempt to argue that the 2018 amendment to the New Hampshire Constitution’s taxpayer-standing provision—which is wholly inapposite here for reasons articulated above—somehow renders this doctrine “anachronistic” and “outdated.” Obj. 55.⁷ Plaintiffs’ argument

⁷ Plaintiffs also dismiss State Defendants’ discussion of multiple cases in the Federal Tort Claims Act context (which are persuasive in the RSA 541-B:19 context, as the FTCA has nearly identical wording, *see* 2d Mem. 43 n.19) by asserting without any support that these cases “are not representative of the law in New Hampshire.” Obj. 56.

misses the mark.

Count IV alleges negligence in State Defendants' decisions regarding training and supervision; hiring; and employee discipline. Count VI alleges a negligent failure to adopt and implement rules. As case after case makes clear, these are all core governmental activities protected by discretionary function immunity. *See* 2d Mem. 40-44, 46-48. The U.S. District Court for the District of New Hampshire, for example, held that a school district's "decisions on the appropriate training and supervision of high school teachers and administrators" was "shielded" by discretionary function immunity. *Brodeur v. Claremont Sch. Dist.*, 626 F. Supp. 2d 195, 219-20 (D.N.H. 2009) (analyzing *Hacking v. Town of Belmont*, 143 N.H. 546 (1999)).⁸ These authorities go essentially unaddressed in the Plaintiffs' Objection.

Plaintiffs do discuss one Superior Court order, *Plaintiff v. Spaulding Youth Center*, No. 2016-2015-CV-520 (N.H. Super. Ct. Mar. 31, 2016) (Obj. Ex. H) as supporting the proposition that hiring, training and supervision are not covered discretionary functions. Obj. 56-58. But that court's analysis concerned allegations regarding the training, screening, and supervision of "one *particular* set of foster parents" and the placement with them of "a *particular* child[]" and "not that DCYF's policies generally were inadequate." Obj. Ex. H, at 8 (emphasis added). In other words, the court distinguished between the decision to *create* certain policies (which fell within discretionary function immunity) and the *implementation* of policies in a particular case (which did not fall within discretionary function immunity in that case). Accordingly, the *Spaulding Youth Center* decision supports the existence of immunity as to Count VI here: the court held that "[b]ecause the decision of whether to enact regulations and policies is subject to discretionary function immunity, DCYF is immune from suit based on" the complaint's

⁸ Plaintiffs' assertion that State Defendants "fail to discuss *Hacking*" (Obj. 56) is puzzling, given the lengthy discussion of *Hacking* and cases interpreting and applying it. *See* 2d Mem. 42-44.

allegations that “DCYF failed to enact certain standards, policies, and procedures.” Obj. Ex. H, at 6. So too here. Discretionary function immunity bars Plaintiffs’ claims that State Defendants are liable for their alleged failures to enact sufficient policies and procedures to safeguard the children in their care.

To avoid this result, Plaintiffs attempt to rewrite their claims along the lines of those that the *Spaulding Youth Center* court held to be outside the scope of discretionary function immunity. Plaintiffs argue that discretionary function immunity does not apply to their claims because they concern the mere “implementation of . . . rules, standards, and procedures” and “fail[ure] to follow an established plan, standard, or orders,” which, they claim, are not discretionary functions. Obj. 59. But this is not what the Master Complaint alleges. Count IV alleges among other things a failure “to take reasonable measures to properly hire, train, supervise, and retain their workers.” MC ¶ 90. Count VI alleges a “failure to promulgate, adopt, and enforce reasonable rules or policies and procedures” such that “reasonable rules or policies and procedures” were not “in place, and reasonably enforced.” MC ¶ 115.⁹ As a fair reading makes plain, the Master Complaint alleges that *there were no reasonable measures, policies, and procedures in place to be enforced*—it does not allege that appropriate policies were in place but were not implemented properly in particular instances.¹⁰ Plaintiffs do not appear to contest that

⁹ To the extent the Master Complaint refers to various statutes, *e.g.*, MC ¶¶ 89, 113, these provisions do not create duties running to Plaintiffs. *See, e.g.*, 1st Mem. 22 & nn.13-14.

¹⁰ Even if the Court finds that Plaintiffs’ allegations do concern implementation of existing policy, that would not necessarily mean that discretionary function immunity is not available to State Defendants. *See* 2d Mem. 48 n.22. Contrary to Plaintiffs’ insinuation, *Gardner v. City of Concord* does not hold that “discretionary function immunity is unavailable” if employees do not properly implement policy. Obj. 59. As *Gardner* makes clear, in that situation, “a municipality *could* be subject to tort liability” but that is not a foregone conclusion because the court “refuse[d] to adopt a rule that automatically would make a municipality liable for torts that result from the action of those who carry out a plan.” 137 N.H. at 258 (emphasis added).

discretionary function immunity applies to State Defendants' decision whether or not to enact policies and procedures governing their operations.

B. Due Care Immunity Also Bars Counts IV and VI of Plaintiffs' Claims.

The State's due care immunity, contained in RSA 541-B:19, I(b), provides another reason why at least some of Plaintiffs' claims are barred.¹¹ Plaintiffs attempt (Obj. 60-63) to rebut the court's application of New Hampshire Supreme Court precedent in the *Hardy* Summary Judgment Order and *Hardy* Reconsideration Order (2d Mem. Exs. B and A, respectively) to the immunity context. That attempt is not persuasive. *See* 2d Mem. 44-45. Plaintiffs claim that "there is no reason for this Court to depart from the accepted understanding of what is required by 'due care'—acting with reasonable prudence under the circumstances." Obj. 61. That is exactly the standard that *Hardy* applies. Due care, according to the *Hardy* court, "is what reasonable prudence would require under similar circumstances." 2d Mem. 44 (quoting the *Hardy* Reconsideration Order). The *Hardy* decision then applied New Hampshire Supreme Court precedent making clear that "'reasonably' and its cognates have a particular meaning in the immunity context" so "[f]or immunity purposes, the failure to act 'reasonably' must connote more than mere negligent actions." *Farrelly v. City of Concord*, 168 N.H. 430, 444-45 (2015). Plaintiffs contend that *Farrelly* is inapposite because it concerned intentional torts and not claims based in negligence. Obj. 61. But *Farrelly* itself made clear that "negligence . . . remains a critical part of the analysis for [the claims at issue] notwithstanding that they are intentional torts." 168 N.H. at 445-46. The decision's discussion of the meaning of reasonableness in the immunity context should not be cabined in the way Plaintiffs assert.

In the immunity context, if State employees act less than wantonly or recklessly, due care

¹¹ At least Counts IV and VI, but possibly more, depending on how the Court construes the Master Complaint. *See* 2d Mem. 45 n.21.

immunity applies. This is so because the State has not waived its sovereign immunity when its employees are acting in a non-negligent manner. Due care immunity protects the State when its employees are doing what “reasonable prudence” requires. In order for the concept of due care immunity to have any meaning, then, being not-reasonably-prudent (such that due care immunity will not apply) must mean more than simply being negligent. Being not-reasonably-prudent, therefore, means acting recklessly or wantonly. *See* 2d Mem. 44 & n.20. This is not “the application of a more lenient standard.” Obj. 62. It is the recognition as a matter of statutory construction that “the meaning of ‘reasonably’ is not immutable; it takes on varying meanings depending on the context in which it is used.” *Farrelly*, 168 N.H. at 445.

Plaintiffs argue that “[i]n most cases . . . the earliest the State could” avail itself of the “exit ramp” of due care immunity “would be at summary judgment.” Obj. 62. Immunity, however, “ordinarily should be decided by the court long before trial” and “if at all possible” should be resolved in time to “avoid[] . . . disruptive discovery.” *Conrad v. N.H. Dep’t of Safety*, 167 N.H. 59, 70 (2014) (quotation marks omitted). As one Superior Court justice put it, “the better practice for trial courts is to resolve issues at the earliest possible stage of the litigation.” *Ludtke v. N.H. Ins. Dep’t*, No. 217-2011-CV-368, 2014 WL 8332494, at *3 (N.H. Super. Ct. May 21, 2014). That stage is now; State Defendants respectfully submit that the Court need not wait to determine whether due care immunity applies, because the Master Complaint *nowhere* uses the words “wanton” or “reckless” but alleges only mere negligence.¹²

¹² Plaintiffs’ citation (Obj. 63) to *Migdal v. Stamp*, 132 N.H. 171 (1989) is inapposite. That decision concerned the specific context of the “fireman’s rule” that a first responder cannot recover “in tort for injuries caused by negligent conduct that creates the very occasion for the officer’s engagement.” *Id.* at 174. To the extent the Court finds *Migdal* applicable here, due care immunity may still apply at a later stage of the litigation (as Plaintiffs concede, *see* Obj. 62).

C. Count III (Aiding and Abetting) Must Also Be Dismissed.

As set forth in State Defendants' First and Second Motions, this Court should dismiss Plaintiffs' claims for aiding and abetting breaches of fiduciary duty and nondelegable duty because a) the New Hampshire Supreme Court has never recognized this cause of action; and b) Plaintiffs' theory that the State aided and abetted itself would not be cognizable in any event. 1st Mem. 17-18; 2d Mem. 39. No policy reason justifies inventing the cause of action for this case. Plaintiffs would not be denied a remedy absent this cause of action because the alleged conduct underlying this count also underlies Count I, which State Defendants seek only to properly limit, not dismiss.

Accordingly, the Court can—and should—dismiss the theoretical aiding and abetting claim (which does not exist in New Hampshire) without determining whether it would be barred by the State's sovereign immunity for "intentional tort[s]" under RSA 541-B:19, I(d).¹³ Plaintiffs' allegations are so broad that, if the Court were to determine that Count III does plead a valid cause of action, application of RSA 541-B:19, I(d) immunity may well require further development. But the fact that in certain circumstances the State is immune from intentional tort claims (which this claim would be, if recognized in New Hampshire) and that such a hypothetical cause of action may be barred or otherwise limited by other sovereign immunity and limitations grounds, further demonstrates that this case is an inappropriate vehicle for recognizing this cause of action in the first instance. The Court should simply dismiss it.

¹³ Plaintiffs erroneously contend that State Defendants are somehow conceding that the Master Complaint's allegations concern acts "within the scope of their employees' official duties." Obj. 64. State Defendants concede no such thing. No employee's job description ever contained a requirement or the responsibility to abuse residents. These allegations describe a breach of the State's trust as well.

III. MANY OF PLAINTIFFS' CLAIMS SUFFER FROM STATUTES OF LIMITATIONS PROBLEMS.

Separate and apart from the sovereign immunity issues addressed above, the allegations in Master Complaint raise globally applicable issues relating to statutes of limitations. As set forth below and in the Second Motion, State Defendants respectfully request this Court define the applicable limitations periods by which individual Plaintiffs' Short-Form Complaints will be evaluated.

A. The Three-Year Limitations Period in RSA 541-B Applies Here.

Plaintiffs continue to erroneously assert that State Defendants' discussion of statutes of limitations issues is an attempt to "deprive Plaintiffs of a day in court before this Court has even seen their individualized factual allegations." Obj. 19. Not so. As the Second Motion makes perfectly clear, State Defendants raise these issues to request that this Court "[d]etermine the applicable limitations provisions . . . and Order that in the absence of sufficient factual pleading in the Short-Form Complaints to overcome the applicable limitations period through operation of the discovery rule where available, those claims are subject to dismissal." 2d Mem. 51-52. State Defendants seek only that the Court set forth the rules and principles that will—at a later date—be consistently applied across the hundreds of individual cases in this consolidated litigation.

As set forth above, Plaintiffs agree that RSA 541-B applies to their claims. *See* Part I.B, *supra*.¹⁴ Part of that "comprehensive and exclusive procedure for persons seeking money damages from the State and/or its employees," *Laramie*, 160 N.H. at 437, is RSA 541-B:14, IV, which mandates that claims "*shall* be brought within 3 years of the date of the alleged" harm.

¹⁴ Plaintiffs also ignore State Defendants' discussion of other historical statutes of limitations that may apply. *See* 2d. Mem. 33-38. Plaintiffs may not raise new argument in a sur-reply. *See, e.g., Panas v. Harakis*, 129 N.H. 591, 617-18 (1987).

(emphasis added).¹⁵ The real dispute is not whether the three-year statute of limitations applies, but whether other considerations, if any, may nonetheless save Plaintiffs' claims.¹⁶ For the reasons below and in the Second Motion, State Defendants submit that none do.¹⁷

B. The Discovery Rule Has Not Been Satisfied Considering Only the Master Complaint.

Plaintiffs' discussion of the discovery rule (RSA 508:4, I) attempts to have it both ways. First, Plaintiffs assert that they "are entitled to the benefit of the discovery rule on all claims." Obj. 19 (emphasis and capitals omitted). Then, Plaintiffs claim that "the Court need not feel pressured to resolve these issues in one fell swoop through a ruling on the Master Complaint." Obj. 21 n.4. And once again, Plaintiffs mischaracterize State Defendants' clearly stated argument by asserting that State Defendants seek "a blanket order barring application of the discovery rule . . . in these cases." Obj. 20. State Defendants unequivocally argued throughout the Second Motion that the allegations in the Master Complaint, standing alone, do not satisfy the discovery rule across the board for each and every Plaintiff without considering the allegations in the Short-Form Complaints at the appropriate later stage. For example:

¹⁵ Plaintiffs themselves elsewhere cite caselaw for the proposition that "use of the word 'shall' . . . connotes 'a command which requires mandatory enforcement.'" Obj. 67-68 (quoting *In re N.T.*, No. 2021-0437, 2022 WL 2821640, at *3 (N.H. July 20, 2022)).

¹⁶ Plaintiffs attempt to reject the legal analysis presented in the Second Motion by asserting that these arguments have failed "to gain traction with a single New Hampshire judge or justice." Obj. 19. But Plaintiffs admit that the trial court's decision in *C.M. v. N.H. DHHS et al.*, No. 217-2019-CV-677 (N.H. Super. Ct. Aug. 27, 2021) (Obj. Ex. B) "has been fully briefed" on appeal to the New Hampshire Supreme Court. Obj. 18. The opinion in *A.A. et al. v. N.H. DHHS et al.*, No. 217-2019-CV-676 (N.H. Super. Ct. Feb. 28, 2022) (Obj. Ex. C) restates the *C.M.* analysis, which has not been approved by the Supreme Court. The opinion in *C.W. v. N.H. DHHS et al.*, No. 217-2019-CV-680 (N.H. Super. Ct. Apr. 5, 2022) (Obj. Ex. D) is not persuasive because it does not contain any evaluation of State Defendants' argument here; rather, the court simplistically equated RSA 508:4, I and RSA 508:4-g without any analysis. *See* Obj. Ex. D at 2-3.

¹⁷ Plaintiffs also ignore State Defendants' discussion of class-action tolling, so may not rely on that doctrine, which has not been adopted in New Hampshire and which nonetheless would not alter the three-year limitations period. *See* 2d Mem. 13 n.6.

- “[T]he allegations made so far in the Master Complaint appear to negate rather than invoke the discovery rule.” 2d Mem. 5;
- “At least in the Master Complaint, the discovery rule has not been sufficiently invoked to extend [the applicable limitations] period.” 2d Mem. 11;
- “As an initial matter, the Court should rule that the discovery rule has not been satisfied in the Master Complaint because these allegations are not well pled.” 2d Mem. 14;
- “Even if Plaintiffs’ conclusory allegations are tested under the discovery rule, the rule applied to those allegations does not save the claims in the absence of other facts pled in the Short-Form Complaints that satisfy the discovery rule.” 2d Mem. 15-16;
- “[T]he discovery rule has not been satisfied by the allegations in the Master Complaint. And these same principles should be applied at the point the Court tests the allegations in the Short-Form Complaints to make individualized decisions on the question of limitations.” 2d Mem. 17;
- “Plaintiffs have not yet pled facts sufficient to satisfy the discovery rule.” 2d Mem. 18; and
- “This Court should rule preliminarily that the three-year statute of limitations in RSA 541-B:14, IV or other applicable limitations periods will control in the absence of other facts pled in the Short-Form Complaints that satisfy the discovery rule.” 2d Mem. 24.

In any event, the Master Complaint, without more, cannot and does not satisfy the discovery rule.

Plaintiffs make no effort to rebut State Defendants’ explication of the discovery rule’s general requirements, which State Defendants will not repeat here. *See* 2d Mem. 15-16. The upshot is that the discovery rule is analyzed using an “objective standard of reasonableness” that focuses on “whether a reasonable plaintiff . . . could have discovered or known about his injury,” *D’Amico v. Kindred Healthcare, Inc.*, No. 2014-CV-00201, 2014 WL 12802982, at *4 (N.H. Super. Ct. Nov. 20, 2014), and the “possibility” of a “causal connection” to State Defendants. *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 713 (2010).

As to the first prong of the analysis, the Master Complaint’s allegations demonstrate that a reasonable plaintiff would likely have discovered or known about his or her injury. Plaintiffs do not substantively address this point in their Opposition, at least as to any form of alleged

injury other than sexual abuse. As to sexual abuse, all Plaintiffs offer is the assertion that their Exhibit G, an *amicus curiae* brief from a Pennsylvania case, collects a body of scholarship ostensibly “establishing that childhood victims of sexual abuse often do not recognize that they have been sexually abused until much later in life.” Obj. 24. But Plaintiffs ignore that the Master Complaint *does not allege* that Plaintiffs did not know they had been sexually abused (as in a repressed-memory case). *See* 2d Mem. 18-19. This alleged scholarship does not apply to, and cannot now amend, the Master Complaint’s allegations.

This is but one of the reasons the 2021 Order dismissing Mr. Meehan’s class-action complaint (Obj. Ex. E) is not helpful or persuasive here. Plaintiffs recognize that the decision “may not have binding effect as to the claims of all other Plaintiffs in the consolidated cases.” Obj. 22. But without engaging with State Defendants’ explanation of why that decision has no bearing on the Master Complaint and is otherwise of questionable value, Plaintiffs simply assert that it is nonetheless “highly relevant and persuasive.” Obj. 22. It is not, as State Defendants explained in the Second Motion. *See* 2d Mem. 22-24.

Plaintiffs also cite (Obj. 23) an order from *Willott v. N.H. DHHS, et al.*, No. 216-2018-CV-605 (N.H. Super. Ct. July 14, 2021) (Obj. Ex. F). But *Willott’s* discussion of the discovery rule is distinguishable because the plaintiff there “was not the direct victim of DCYF’s negligent acts.” Obj. Ex. F at 13. Nor does *Willott* help Plaintiffs with regard to the second prong of the analysis—whether a reasonable plaintiff would have discovered or known of the possibility of a causal connection to State Defendants. In *Willott*, the court credited plaintiff’s assertion that he became aware of the State’s “potential involvement” when he read a newspaper article. Ex. F at 13. But Plaintiffs argue the contrary (Obj. 25-32)—generously construed, Plaintiffs argue that repeated public reporting, as alleged in the Master Complaint (*see* 2d Mem. 19-22), would *not*

have put a reasonable plaintiff on notice of the mere possibility of a connection to the State. This is so, claim Plaintiffs, because of other reporting in which State employees “deni[ed] . . . culpability.” Obj. 25. The discovery rule does *not* require a defendant to *admit liability* in order for a reasonable plaintiff to be aware of the mere possibility that the defendant might be connected to the alleged harm.¹⁸ Plaintiffs’ argument here is contrary to law and without merit.

C. The Minor Limitations Provision (RSA 508:8) Does Not Alter This Analysis.

Plaintiffs’ primary basis for arguing that the minor limitations provision does apply to claims against the State is the Superior Court’s decision in *C.M.* (Obj. Ex. B). *C.M.* has been appealed, and is awaiting decision by the New Hampshire Supreme Court, but that should not prevent this Court from engaging in its own analysis of the issue. *See* Obj. 18, 35. Plaintiffs claim that this Court may simply disregard State Defendants’ arguments because the opinion on appeal “is undoubtedly correct” and it is a foregone conclusion that “the Supreme Court will . . . affirm” the ruling. Obj. 34-35. State Defendants respectfully suggest that this Court may and should engage in its own independent analysis.¹⁹

¹⁸ State Defendants have not admitted that “there is little doubt Plaintiffs were actually harmed while in their care and custody.” Obj. 32. State Defendants do acknowledge (2d Mem. 2-3) that many individuals have raised credible allegations and that at least some Plaintiffs here may be able to meet the requirements for pressing suits at law. And State Defendants do not seek to diminish these individuals’ experiences. But State Defendants have not and cannot, at this stage of this litigation, make any such admissions. Furthermore, and contrary to Plaintiffs’ contentions, State Defendants’ “primary argument” that the discovery rule has not been satisfied has nothing to do with any “financial burden.” Obj. 32. Rather, the discovery rule has not yet been satisfied based on an application of the relevant law to the facts as currently pled in the Master Complaint.

¹⁹ Plaintiffs may be “confident” of an affirmance (Obj. 35), but the New Hampshire Supreme Court has (in a decision following *Petition of DCYF*) affirmed by an evenly divided court a Superior Court decision concluding that “[t]he legislature’s choice to insert an explicit limitations period into RSA chapter 541-B demonstrates, at a minimum, that it did not clearly intend for RSA chapter 508’s catch-all statutes of limitations and tolling provisions to govern suits against the State. Absent such a clear intent, the Court is obligated to assume RSA 541-B:[14], IV’s three-year limitations period establishes a term and condition to which the Plaintiff was obligated to strictly adhere.” *Frederick v. State*, No. 217-2018-CV-00255, 2019 WL 3764049, at *2 (N.H. Super. Ct. Feb. 20, 2019), *affirmed by an equally divided court sub nom.*

State Defendants' straightforward application of the New Hampshire Supreme Court's caselaw (*see* 2d Mem. 25-26) is hardly a "misleading technical argument." Obj. 34.²⁰ Succinctly, the New Hampshire Supreme Court has already determined, that the "two-year tolling provision in RSA 508:8" is a different amount of time than the "three-year time limit[]" in RSA 508:4, I. *Petition of DCYF*, 173 N.H. at 617-18. As discussed below, the amended RSA 508:4-g contains no limit, so it is clearly not a three-year period. Because the three-year period for claims against the State contained in RSA 541-B:14, IV is a narrower and more specific statute than the general catch-all statute (RSA 508:8) and because the period of time in RSA 508:8 -- two years after a minor reaches the age of majority -- is not equal to the time period in RSA 541-B:14, IV -- three years from the date of the injury -- RSA 541-B:14, IV controls here and the minor limitations provision does not apply. *See Steir v. Girl Scouts of U.S.A.*, 150 N.H. 212, 215 (2003).

Finally, Plaintiffs erroneously claim that, unless this Court treats these Plaintiffs differently than other plaintiffs by choosing not to apply limitations periods applicable to claims against the State, "some Plaintiffs in these consolidated cases might be barred from seeking compensation." Obj. 35. This is correct insofar as, with regard to particular individuals, it is a normal consequence of having statutes of limitations at all. But it is manifestly incorrect as a factual matter about these particular Plaintiffs. As earlier noted, Plaintiffs whose claims may be barred by normal operation of law may still seek compensation through the victim-centered,

Frederick v. N.H. Dep't of Health & Human Servs., No. 2019-0156, 2021 WL 944216 (N.H. Mar. 12, 2021).

²⁰ Nor is it "absurd" (Obj. 33) for the State Defendants to observe that the Master Complaint—which nowhere refers to RSA 508:8, tolling, disability, and the like—does not clearly invoke the minor limitations provision. 2d Mem. 25.

trauma-informed claims process and its accompanying one-hundred-million-dollar settlement fund established by the Legislature separate and apart from the litigation process.

D. The Recently Amended Sexual Assault Limitations Period (RSA 508:4-g) Does Not Alter This Analysis.

As explained in the Second Motion, RSA 508:4-g, which provides a special limitations period for “any offense under RSA 632-A [sexual assault] or an offense under RSA 639:2 [incest],” does not alter the statutory limitations scheme that the legislature enacted in RSA 541-B for claims against the State. *See* 2d Mem. 26-30. Regardless of which version of the statute applied to Plaintiffs’ claims, RSA 541-B is a narrower, more specific statute which controls for the same reasons as stated above with respect to the minor limitations provision.²¹

As State Defendants demonstrated, the New Hampshire Legislature could have amended RSA 541-B to incorporate the limitations language from RSA 508:4-g in the same way as it expressly incorporated that language into RSA 507-B, the statute governing bodily injury actions against government units other than the State and its agencies. *See* 2d Mem. 29-30. But the Legislature chose not to do so. This Court may not infer from the Legislature’s silence that it intended RSA 508:4-g to replace or extend the express statutory limitations period in RSA 541-B:14 for claims against the State.

Even though RSA 507-B:7, II contains a tolling provision for sexual assaults, and RSA 541-B:14 does not, Plaintiffs argue unpersuasively that RSA 508:4-g actually applies to both statutes. Obj. 43. This argument does not withstand scrutiny. RSA 541-B and RSA 507-B are different statutes that serve different purposes for different entities. *See Sousa*, 115 N.H. at 342

²¹ Plaintiffs extensively quote from *A.A.* (Obj. 37-39), which relied upon that jurist’s earlier opinion in *C.M.* (*see* Obj. Ex. C, at 4), which has been appealed to the New Hampshire Supreme Court and is not binding on this Court. *See* Part III.C, *supra*. The *C.W.* opinion is not persuasive because it does not contain any consideration or analysis of State Defendants’ argument here; rather, the court equated RSA 508:4, I and RSA 508:4-g without any analysis. *See* Obj. Ex. D at 2-3.

(“The tort immunity of the State and that of cities and towns have had a different history in this State.”). RSA 541-B is a waiver of State sovereign immunity that should be narrowly construed in favor of the State. State sovereign immunity is of constitutional dimension, N.H. Const. Pt. I, Art. 7, is enshrined in statute, RSA chapter 99-D, and is the common law of the State, *XTL-NH, Inc. v. N.H. State Liquor Commission*, 115 N.H. 653, 656 (2018). RSA 507-B functions as a limitation of liability for municipal entities because the New Hampshire Supreme Court abolished common law municipal immunity many years ago. *Merrill v. Manchester*, 114 N.H. 722 (1974). RSA 507-B is therefore in derogation of the common law of New Hampshire and its provisions must be strictly construed against a municipal entity. *Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 266 (2005). Consequently, it cannot be presumed that any change to RSA 507-B effectuates a change to or alteration of RSA 541-B. *See Sousa*, 115 N.H. at 343 (“Hence the abolition of the tort immunity of cities and towns in *Merrill v. Manchester*, 114 N.H. 722, 332 A.2d 378 (1974), which do not have immunity from suit without consent, does not mandate that recovery for torts be allowed against the State.”).

Plaintiffs’ contention that the State’s waiver of immunity sweeps so broadly that it “was already clear” that the sexual assault tolling language from RSA 508:4-g applied to claims against the State (Obj. 43) is similarly unfounded, and they cite no authority for it. Finally, Plaintiffs conclude that if the Legislature intended to draw a distinction between the application of RSA 508:4-g to suits against the State versus suits against other government entities, “it would have said so expressly in the statute.” But the Legislature did exactly that by amending RSA 507-B:7, II to expressly incorporate the language of RSA 508:4-g, while at the same time leaving RSA 541-B:14 alone. It is irrelevant that this distinction is not also spelled out in RSA 508:4-g itself.

In addition, Plaintiffs have not rebutted State Defendants’ argument that RSA 508:4-g does not apply to claims against the State because the statute refers to criminal sexual assault and incest for which the State could not be held criminally liable. *See* 2d Mem. 28. All Plaintiffs provide is their own *ipse dixit* that the statute applies to anyone “that might have been at least partially responsible for the harm caused by sexual assault.” Obj. 40. It is Plaintiffs’ proposition, not State Defendants’ argument, that lacks support. Plaintiffs cite to *State v. Zeta Chi Fraternity*, 142 N.H. 16 (1997) for the proposition that organizations can commit crimes in New Hampshire under certain circumstances. *See* Obj. 41. Though that may be true, Plaintiffs cite no cases in which an entity other than a human being has been held criminally liable for committing rape or incest.²²

Moreover, there is no basis to infer that the legislature intended to waive sovereign immunity with respect to any civil sexual assault claim against the State accruing at any time in history, as Plaintiffs contend. *See* Obj. 36-37. Plaintiffs claim that the 2020 amendment to RSA 508:4-g, which provides that a person alleging sexual assault “may commence a personal action at any time,” permits any survivor of sexual assault to bring a claim against the State, no matter how long ago the misconduct allegedly occurred. Obj. 36-37. Such construction abrogates RSA 541-B entirely with respect to sexual assault claims, and therefore does “violence to the apparent

²² Plaintiffs’ unfounded assertion that RSA 508:4-g’s inapplicability here somehow means that “claims against the State must be excluded from the claims process” (which was established to, among other things, provide relief for claimants who are unable to bring claims in a court of law) is meritless. Obj. 41. The statute establishing the claims fund defines “claim” to include “a request for compensation related to one or more incidents of sexual abuse and/or physical abuse perpetrated upon a former YDC resident by or at the behest of a member of the YDC staff.” RSA 21-M:11-a, I(c). The statute’s definitions of “physical abuse” and “sexual abuse” define those terms as “an incident of conduct that would constitute an offense under” specified criminal statutes. RSA 21-M:11-a, I(h-i). A plain reading of the statute makes clear that requests for compensation for certain criminal conduct committed by individual State employees may be made to the State through the claims process. Moreover, this language is consistent with State Defendants’ position that individuals, not entities, commit sexual assault.

policy of the Legislature in limiting the application of sovereign immunity.” *Petition of DCYF*, 173 N.H. at 618 (quotation marks omitted). It is also incorrect as a matter of statutory construction.

Whether an amendment to a statute of limitations applies retrospectively is, in the first instance, a matter of statutory construction. *See, e.g., Eldridge v. Eldridge*, 136 N.H. 611, 613 (1993) (“Before deciding the constitutional issue, we must first determine whether [the law] was intended to be applied retrospectively to cases such as this one.”). “As a general rule, statutes are to be applied prospectively.” *Id.* Moreover, “[w]here a law affects substantive rights and liabilities, it is presumed to apply only to future causes of action unless there is some evidence of legislative intent that the statute be applied retrospectively.” *Norton v. Patten*, 125 N.H. 413, 417 (1984). “When a statutory change . . . solely affects procedures or remedies, rather than substantive rights, the normal presumption against retrospective application is reversed.” *Id.* (citations omitted); *see also State v. Johnson*, 134 N.H. 570, 572-73 (1991).

Statutes of limitations are deemed “remedial” for this analysis only as to those claims for which the limitations period has not already run. *See, e.g., State v. Hamel*, 138 N.H. 392, 395 (1994) (“Thus, *until a criminal statute of limitations has run*, it is a mere regulation of the remedy and we will presume that an extension of the limitations period applies retrospectively.”) (emphasis added). Once the statute of limitations has run, however, application of a new limitations period to revive the lapsed claim is deemed to affect a defendant’s substantive right to be free of liability for the claim. *Gould v. Concord Hosp.*, 126 N.H. 405, 408 (1985) (citing *Town of Rockport v. Walden*, 54 N.H. 167 (1873)); *see also Maplevale Builders, LLC & a. v. Town of Danville*, 165 N.H. 99, 108 (2013) (“The right to rely upon a statute of limitations as a

defense vests, and therefore becomes a substantive right, only after the limitations period has run.”).

Because application of the new limitations law to revive lapsed claims would affect substantive rights, the presumption is that it will apply only to claims that had not yet lapsed (including by operation of the previous versions of RSA 508:4-g, *see* 2d Mem. 26-28) and to prospective claims, unless the legislature expressed an intent for it to apply retroactively to revive barred claims. *Johnson*, 134 N.H. at 573–74. Plaintiffs do not point to anything in the statute itself or legislative history suggesting that the Legislature intended to permit sexual assault survivors to bring claims against the State for incidents occurring years, even decades, after the then-current statutes of limitations had run.²³ A more sensible reading that comports with the rules of statutory construction would be that the legislature intended to indefinitely extend the statute of limitations for claims that were still within the limitations period at the time of the amendment’s enactment and to remove barriers to bringing claims going forward.

Ultimately, however, the Court need not decide this issue here. Simply put, RSA 508:4-g does not alter the “comprehensive and exclusive” statutory scheme set forth in RSA 541-B for bringing claims against the State. *Laramie*, 160 N.H. at 437.

²³ Plaintiffs argue that applying the statute retrospectively against the State would not violate Article 23 of the New Hampshire Constitution. Obj. 44-45. “It is unnecessary for [the Court] to address” whether retrospective application of the 2020 amendment to RSA 508:4-g would violate Article 23 “because rules of statutory construction require [the 2020 amendment] to apply prospectively only.” *Johnson*, 134 N.H. at 572 (cleaned up) (quoting *LaBarre v. Daneault*, 123 N.H. 267, 271 (1983)). Even if Plaintiffs are correct, it strains credulity that the Legislature would knowingly enact a limitations law that would abrogate the limited waiver of sovereign immunity for such claims against the State “*ad infinitum*” (Obj. 37) without expressly saying so.

E. Plaintiffs’ “Additional Bases” For Equitable Tolling Are Meritless.

1. Plaintiffs’ invocation of the fraudulent concealment doctrine fails.

Assuming application of the fraudulent concealment doctrine would not be entirely duplicative of the protections the discovery rule affords, the Master Complaint does not establish that it has been satisfied for each Plaintiff’s claims. This is so for the same reasons that the Master Complaint standing alone falls short of satisfying the statutory discovery rule. *See, e.g., Eldridge v. Ocwen Loan Servicing, LLC*, No. 2016-0328, 2017 WL 5983705, at *8 (N.H. Oct. 12, 2017) (holding that “the discovery rule and fraudulent concealment rule serve a common purpose and entail a similar analysis,” so “because of the similarities,” the failure to satisfy the former is failure to satisfy the latter). Plaintiffs’ conclusory allegations that State employees attempted to cover up abuse does not establish that State Defendants took any affirmative steps to fraudulently conceal their alleged role with respect to each or any particular Plaintiff. Likewise, as with the discovery rule, Plaintiffs’ allegations in the Master Complaint suggest that a reasonable plaintiff using reasonable diligence would have been aware long ago of at least the possibility of a causal connection to the State regarding abuse at State-operated facilities. If this equitable doctrine were cognizable here, Plaintiffs would have to supply additional allegations in their Short-Form Complaints to satisfy the doctrine. *See* Part III.B, *supra*.

2. The New Hampshire Supreme Court has already rejected Plaintiffs’ “fiduciary tolling” theory.

Plaintiffs also attempt to fashion a new equitable tolling rule allegedly applicable only to claims against fiduciaries. *See* Obj. 47-51. As Plaintiffs would have it, because fiduciaries have an obligation to disclose material facts, any claims arising out of the fiduciaries’ alleged breach of duty should be tolled until the fiduciary admits liability for the allegations. If the fiduciary does not do so, Plaintiffs assert that the failure to disclose serves to toll the underlying breach of

fiduciary duty claim forever, or at least until the claimant has actual knowledge of the underlying breach. *See* Obj. 47-51. The New Hampshire Supreme Court has expressly rejected this theory: the Court has flatly held that “there is *no support* in our case law for the proposition that a limitations period is tolled in fiduciary cases until the fiduciary discloses his or her misconduct.” *Beane*, 160 N.H. at 714 (emphasis added).

Plaintiffs attempt to circumvent *Beane*, claiming that it touched on the fiduciary tolling issue only “obliquely,” and “elided past it” because “it would have made no difference” in light of the plaintiff’s knowledge of the facts supporting his malpractice claim within the limitations period. Obj. 48-49. That is not accurate. The Supreme Court squarely held that the fiduciary tolling theory that Plaintiffs propose here is not legally cognizable. 160 N.H. at 714. Moreover, the *Beane* Court implicitly rejected Plaintiffs’ theory that claims against fiduciaries are tolled until the plaintiff has “actual knowledge” of the facts supporting the claims, as opposed to notice or constructive knowledge. The *Beane* plaintiff argued that the statute of limitations did not begin to run until he learned about his accountants’ negligence in preparing his tax returns through testimony during the ensuing IRS tax court trial. The Court disagreed, concluding that, “despite the defendants’ failure to disclose their alleged errors, the record shows that . . . at the latest . . . the plaintiff was *on notice* of the causal connection between his harm and the defendants’ conduct” on the date he first received an IRS notice of deficiency, years earlier. *Id.* at 715 (emphasis added).

Lastly, Plaintiffs’ general invocation of basic black-letter fiduciary duty law does not support the creation of a new tolling rule, particularly in light of *Beane*’s express rejection of Plaintiffs’ theory. For example, Plaintiffs point to cases from Massachusetts and Connecticut for the proposition that their proposed tolling doctrine is “jurisprudentially sound and well-

established” in other jurisdictions. Obj. 49-50. But Plaintiffs’ fail to mention that all of those cases apply *statutory* tolling provisions, not equitable doctrines. Indeed, Plaintiffs’ lengthy quotation (Obj. 49) from *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159 (Mass. 1997), artfully omits, through the use of ellipses, several references to the statute at issue, M.G.L. c. 260, § 12. The fact that other states’ legislatures enacted statutes that have been applied a particular way to breach of fiduciary duty claims is not a basis for this Court to invent an equitable doctrine out of whole cloth, particularly where the New Hampshire Supreme Court has specifically rejected that doctrine.

CONCLUSION

For the reasons stated herein and in State Defendants’ Second Motion, the Court should grant the Second Motion.

* * * * *

WHEREFORE, the State Defendants respectfully request that this honorable Court:

- A. Grant the relief requested in State Defendants’ Second Motion; and
- B. Grant such further relief as the Court deems just and proper.

Respectfully Submitted,

State of New Hampshire; New Hampshire
Department of Health and Human Services;
Department of Youth Development Services;
Division of Children, Youth, and Families; Division
of Juvenile Justice Services; and Sununu Youth
Services Center, a/k/a Youth Development Center
and Youth Development Services Unit, f/k/a State
Industrial School and Adolescent Detention Center

By their attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: December 22, 2022

/s/ Brandon F. Chase
Brandon F. Chase, Bar #270844
Assistant Attorney General
Jennifer S. Ramsey, Bar #268964
Senior Assistant Attorney General
Anne M. Edwards, Bar #6826
Associate Attorney General
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650
brandon.f.chase@doj.nh.gov
jennifer.s.ramsey@doj.nh.gov
anne.m.edwards@doj.nh.gov

VERRILL DANA, LLP

/s/ John W. VanLonkhuyzen
/s/ Martin C. Topol
John W. VanLonkhuyzen (admitted *pro hac vice*)
Maine Bar No. 3487
Sara E. Hirshon (admitted *pro hac vice*)
Maine Bar No. 4776
Martin C. Topol (admitted *pro hac vice*)
Maine Bar No. 6732
Verrill Dana LLP
One Portland Square
Portland, ME 04101-4054
(207) 774-4000
jvanlonkhuyzen@verrill-law.com
shirshon@verrill-law.com
mtopol@verrill-law.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record on the date above.

/s/ Brandon F. Chase
Brandon F. Chase