THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

No. 217-2025-CV-480

Andrew Foley, et al.

v.

State of New Hampshire, et al.

MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO MOTION FOR PRELIMINARY INJUNCTION

Introduction

RSA 21-M:11-a establishes an administrative process and fund through which claims related to alleged past abuse perpetrated by Youth Development Center ("YDC") staff against former YDC residents may be settled. The process is an alternative to litigation that, like every other administrative process, has an administrative structure and contains administrative procedures. A person wishing to access the process files a claim. The Administrator administers claims. The Attorney General administers the fund. The Administrator ultimately issues a decision on filed claims that may include a monetary award. Any monetary award is constrained by the amount of money appropriated to the fund. RSA 21-M:11-a, XII(c). The Administrator's decision functions as an offer to settle the claim. Under the former version of RSA 21-M:11-a, if the Claimant accepted the Administrator's decision that decision would become final and binding on the Claimant and the State. If the Claimant rejected the decision, the Claimant could continue to pursue any and all other legal means of redress for his claim. Most Claimants have filed civil actions that can proceed if a Claimant is not satisfied with the operation of the settlement fund process.

The Legislature recently amended RSA 21-M:11-a. The plaintiffs challenge two of these amendments as violating the contract clause protections of the State and Federal Constitutions. The first amendment they challenge is the Legislature's decision to move the administrative claims process entirely within the executive branch of government. This amendment makes the Administrator an executive branch appointee, instead of a judicial branch appointee, and specifies that the Administrator serves at the pleasure of the Governor. The appointment of the Administrator through the Governor and Council process is the same process required for the appointment of judges. Though RSA 21-M:11-a, I(a) still requires the Administrator to be "an independent, neutral attorney," and though agency hearings officers operate within similar executive branch accountability structures, the plaintiffs contend that these amendments result in an Administrator who can never be independent and neutral. That argument is meritless.

The second amendment the plaintiffs challenge is the Legislature's decision to require the State, through the Attorney General, to accept the Administrator's decision before it becomes final and binding. The prior law did not contain such a provision and therefore did not give the people of this State, through a government representative, a voice in deciding whether to accept or reject a state settlement or an opportunity to evaluate the settlement's propriety and fairness, including to the other Claimants in the process. The new amendment gives the people that voice and ensures that their interest in maintaining the fund for all Claimants is represented. Neither the Administrator, as an independent neutral, nor a Claimant can represent those important State interests.

The plaintiffs' challenges should therefore be rejected for at least six reasons. First, the challenged amendments operate prospectively to alter the administrative structure and process; they do not operate to impair past, completed settlements or any other vested right. Second, the

plaintiffs have no vested, contractual right in the oversight structure of the administrative claims process. Third, RSA 21-M:11-a, I(a) continues to require the Administrator to act as an independent neutral. Fourth, the plaintiffs have no vested, contractual right in the procedures of the claims process. Fifth, even if the plaintiffs have a vested right that the amendments impair, that impairment is not substantial. Sixth, even if a substantial impairment exists, important public purposes justify the statutory amendments including ensuring that the fund remains fairly and prudently managed.

The plaintiffs' breach of contract claim is also meritless. No actual contract exists between the parties. The law the plaintiffs cite in support of their contracts clause analysis recognizes an implied-in-law contract under certain narrow circumstances. Sovereign immunity bars the enforcement of implied-in-law contracts against the State. Consequently, the plaintiffs can only succeed on a contract theory if they can meet the relevant constitutional test, which they cannot.

The plaintiffs' equal protection claim also fails. The claims process treats all similarly situated Claimants the same. The challenged amendments do not affect any substantive right to recovery that existed at the time of the plaintiffs' injuries. The claims process is voluntary. The plaintiffs never waive their right to pursue litigation against their abusers individually and do not waive any right to pursue litigation against the State until they finally settle their claims through the process. The plaintiffs' equal protection claim is therefore not subject to heightened scrutiny. It would still fail, however, even if intermediate scrutiny applied.

The plaintiffs' request for a preliminary injunction is therefore without merit. The plaintiffs are not likely to succeed on the merits, cannot show immediate irreparable harm, and cannot show that the balance of the equities or the public interest favor enjoining democratically

enacted structural and procedural amendments to the administrative claims process that are designed to create enhanced accountability over the process itself and are designed to provide enhanced fiscal responsibility over the corpus of the fund so as many Claimants as possible may benefit from it.

Background

In 2022, the General Court enacted RSA 21-M:11-a, the Youth Development Center Claims Administration and Settlement Fund. The statute established a process by which persons claiming sexual or physical abuse at the YDC and other similar facilities could seek to resolve their claims through a "trauma-informed, victim centered alternative to litigation for the efficient and fair resolution of those claims." 2021 HB 1677. The statute provides for an Administrator to oversee the claims process, who is "an independent, neutral attorney admitted to the practice of law in New Hampshire." RSA 21-M:11-a, I(a) (2022).

The statute has always contemplated that the executive branch and legislative branch would play a significant role in overseeing and administering the claims process. From the outset, the Attorney General has been responsible for administering the YDC settlement fund established through RSA 21-M:11-a and for using those funds "for the purpose of administering claims of former YDC residents . . . ." RSA 21-M:11-a, II (2022). The statute expressly authorizes the Attorney General, in consultation with the Administrator, to "discontinue[]" the fund. RSA 21-M:11-a, II. The statute further contemplates that the process may be altered as "otherwise provided by law." RSA 21-M:11-a, II (2022). The claims fund terminates on June 30, 2032, "unless the fund is earlier terminated by the attorney general, in consultation with the administrator, or as otherwise provided by law." 2021 HB 1677.

The continued operation of the claims process is also contingent on legislative appropriations. To that end, the statute makes clear that "all payments authorized by the administrator are contingent upon the making of sufficient appropriations to the fund or sufficient expenditure authorizations." RSA 21-M:11-a, XII(c). The Administrator therefore has "the responsibility to monitor the balance of the fund and ensure that there are sufficient funds available to pay all claims due either as a lump sum or periodic payments. RSA 21-M:11-a, XII(a). The Administrator is further prohibited from "authoriz[ing] more than $75,000,000 in claims to be paid out from the fund in any given fiscal year" without approval of the Joint Legislative Fiscal Committee and the Governor and Executive Council. *Id.* If the Administrator "determines that a shortfall in the YDC fund is likely to occur," he must, in consultation with the Attorney General, "request an appropriation of additional funds from the legislature." RSA 21-M:11-a, XIII.

As part of his authority to administer the fund, the Attorney General is authorized to "enter into memoranda of understanding with the judicial branch or any state agency as necessary to compensate them for services performed in furtherance [of the statute]." *Id.* The statute provides that the Administrator will "receive compensation at no more than the rate of salary of an active superior court justice," and that "[t]he salary, benefits, and expenses of the administrator, and any necessary support staff, shall be paid from the fund." RSA 21-M:11-a, III. The statute requires that the Attorney General either agree with claimants' counsel on who should be appointed Administrator or submit his own names for consideration. RSA 21-M:11-a, III (2022); RSA 21-M:11-a, III (2025). These features have existed in the statute since its inception.

Additionally, the statute has always contemplated that the Attorney General would play a direct role in determining the value of claims. The Attorney General, with the input of claimants' counsel, was required to create the forms and guidelines that would govern the claims administration process, including the matrix governing the value of claims. RSA 21-M:11-a, IV(a). The Attorney General presented those guidelines to the Joint Legislative Fiscal Committee for approval. *Id.* The guidelines are binding on the Attorney General and the Administrator once approved by the fiscal committee. RSA 21-M:11-a, IV(b). The Administrator cannot revise the claims process or guidelines without first seeking input from the Attorney General and claimants' counsel and obtaining approval from the fiscal committee. *Id.* "The goal of the guidelines shall be to ensure the fair and uniform valuation of claims so that the claims of similarly situated claimants are valued similarly." *Id.*

The Attorney General has also always played a direct role in the claims administration process itself. For instance, the Attorney General has always been able to resolve claims directly with Claimants and have that resolution approved by the Administrator. RSA 21-M:11-a, III. The Attorney General has always been able to take a position on the value of a Claimant's claim—and, in the original version of the statute, was required to do so. RSA 21-M:11-a, VIII(c) (2022). The Administrator has always been able to assume that a Claimant agreed with the Attorney General's position unless the Claimant indicated otherwise. RSA 21-M:11-a, VIII(d) (2022). And the Attorney General has always been able to ask the Administrator to reconsider a decision on a claim "on the grounds that it contains mathematical mistakes, miscalculations, or a scrivener's error." RSA 21-M:11-a, IX(e).

The statute has also always required that the Administrator work with the Attorney General to issue reports related to the claims process. RSA 21-M:11-a, XV. The Administrator

must submit these reports "to the speaker of the house of representatives, the president of the senate, the joint fiscal committee and the governor[.]" *Id.* The reports must contain "information as to the number and nature of claims made and settled, the amounts requested and paid in settlement to date, the claim amounts pending, an estimate of likely amounts which will be approved and paid, the administrative costs which have been paid, and an estimate of future administrative costs to be paid." *Id.*

RSA 21-M:11-a has been amended several times since it was first enacted. Originally, claimants waived their rights to pursue their claims in court by agreeing to submit their claims to the Administrator. *See* RSA 21-M:11-a, VII(c) (2022) ("A former YDC resident who elects not to participate in the claims process retains the right to pursue a claim in a judicial or other forum."); RSA 21-M:11-a, VII(d) ("By filing a claim, the claimant agrees that he or she will participate in the claims process, and, if the claimant requests that the administrator decide the claim, agrees to accept the determination of the administrator as final and binding, even if the claimant does not receive any payment from the fund."). These provisions were amended in 2023 at claimants' counsel's urging so that a Claimant no longer gives up any rights "unless and until the claimant accepts the administrator's decision on the claim." RSA 21-M:11-a, VII(c) (2023); *see also* RSA 21-M:11-a, VII(d) ("[I]f the claimant accepts the administrator's determination on the claim, such acceptance shall be the final and binding settlement of all claims . . . .").

Amendments to the statute in 2024 also significantly expanded the scope of recovery. In its original form, the statute limited recovery to claims involving sexual abuse and claims involving physical abuse. RSA 21-M:11-a, I(c) (2022). Under that version of the statute, "claims involving both sexual abuse and physical abuse only" were capped at $1.5 million per Claimant and "claims involving physical abuse only" were capped at $150,000 per Claimant. RSA 21-

M:11-a, V (2022). The 2024 amendments expanded the definition of sexual abuse, RSA 21-M:11-a, I(j) (2024), and replaced the definition of "physical abuse" with "other abuse," which included several categories of conduct that were not recoverable under the original version of the statute, RSA 21-M:11-a, I(i) (2024). The overall cap for "egregious sexual abuse" was increased to $2.5 million per Claimant and the cap for "other abuse" was increased to $250,000 per Claimant, RSA 21-M:11-a, V (2024). The claims procedure was also amended in an effort to speed up the resolution of claims. *See* RSA 21-M:11-a, VIII. The deadline to file claims was also extended from December 31, 2024, to June 30, 2025. RSA 21-M:11-a, II.

The Legislature further amended RSA 21-M:11-a in 2025, and two of those amendments are at issue in this case. First, the Legislature amended RSA 21-M:11-a, III to provide that the Administrator is an executive branch employee appointed by the Governor with the advice of the Executive Council who serves at the pleasure of the Governor. Second, the Legislature amended RSA 21-M:11-a, IX(e) to provide:

> Upon expiration of the reconsideration period, the AG designee and the claimant shall have 30 days to accept or decline the administrator's decision regarding the claim. If the AG designee and claimant do not both affirmatively accept the administrator's decision within 30 days after the expiration of the reconsideration period, then the claim shall be deemed withdrawn, and the claimant shall retain the right to pursue their claim in a judicial or other forum.

The plaintiffs move for a preliminary injunction that enjoins the defendants from enforcing these amendments. Pls.' Mot. Prelim. Inj. At 18 (Prayer A). For the reasons set forth below, the plaintiffs' motion should be denied.

Standard of Review

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final

determination of the case on the merits." *Id.* "[A] party seeking an injunction must show that it would likely succeed on the merits." *Id.* "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." *Id.* Additionally, courts assessing whether to issue a preliminary injunction must "consider the circumstances of the case of the case and balance the harm to each party if relief were granted." *Kukene v. Genualdo*, 146 N.H. 1, 4 (2000). Courts also consider whether an injunction is in the public interest. *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 13–14 (1987). The party seeking a preliminary injunction bears the burden of demonstrating that relief is appropriate. *Mottolo*, 155 N.H. at 63.

Argument

The plaintiffs assert claims for breach of contract and for violations of the contracts clauses and equal protection provisions of the State and Federal Constitutions. As set forth below, the plaintiffs have not satisfied any of the preliminary injunction factors on any of these claims.[1]

I. The plaintiffs are not likely to succeed on their contract clause claims.

The New Hampshire Supreme Court has read the proscription on retrospective laws in Part I, Article 23 to "duplicate[] the protections found in the contract clause of the United States Constitution." *Prof'l Fire Fighters of N.H. v. State*, 167 N.H. 188, 194 (2014) (citation and quotation marks omitted). "When evaluating a contract clause claim, a court must first determine whether a change in state law has resulted in a substantial impairment of a contractual relationship." *City of Manchester v. Bellenoit*, 2024 N.H. 28, ¶ 12. "This inquiry, in turn, has

[1] In addition to the reasons discussed herein, the plaintiffs are not likely to succeed on their federal constitutional claims to the extent they are asserted against the State of New Hampshire because a State is not a person for the purposes of 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* (citation and quotation marks omitted). "To survive a contract clause challenge, a legislative enactment that constitutes a substantial impairment of a contractual relationship must have a significant and legitimate public purpose." *Id.* (citation and quotation marks omitted).

A. RSA 21-M:11-a does not create an enforceable public contract.

The plaintiffs contend that RSA 21-M:11-a creates an enforceable public contract. "A party alleging that contractual rights arose from a statutory enactment faces a heavy burden." *Prof'l Fire Fighters of N.H.*, 167 N.H. at 193 (citation and quotation marks omitted). "[N]ormally state statutory enactments do not of their own force create a contract with those whom the statute benefits." *Id.* at 194 (citation and quotation marks omitted). "'[T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state.'" *Id.* (quoting *Nat'l R. Passenger Corp. v. A. T. & S. F. R. Co.*, 470 U.S. 451, 466 (1985)). "'Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the law is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.'" *Id.* (citing *Nat'l R. Passenger Corp.*, 470 U.S. at 466).

The New Hampshire Supreme Court has therefore adopted the "unmistakability doctrine" within the context of a contracts clause challenge for determining whether a legislative enactment creates an enforceable contract. *City of Manchester*, 2024 N.H. 28, ¶ 13. "This doctrine mandates that [courts] determine whether the challenged legislative enactment evinces a clear intent of the state to be bound to particularly contractual obligations." *Id.* (citation and quotation marks omitted). "[A]bsent some clear indication that the legislature intends to bind

itself contractually, the presumption is that a law is not intended to create a private contractual relationship or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* (citation and quotation marks omitted).

"When reviewing a particular enactment, [a court must] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id.* ¶ 14 (citation and quotation marks omitted). A court must "begin by examining the [statute's] language itself and closely analyze the provisions of the [statute] at issue." *Id.* (citation omitted).

The amendments the plaintiffs challenge do not operate retrospectively to alter or void any final binding settlement already reached through the claims process. The Legislature has contemplated that a settlement under the claims process only becomes enforceable once it is final. *See* RSA 21-M:11-a, XII(d). At that point, if the State defaults on paying the settlement amount in full or in part, a Claimant has an express right to enforce the settlement "in any superior court." *Id.* This is in keeping with the well-established rule that final settlement agreements operate as enforceable contracts for which specific performance is an available remedy. *See, e.g.*, *Poland v. Twomey*, 156 N.H. 412, 415–16 (2007).

The plaintiffs do not, however, have any vested, enforceable right in the structure of the claims process or the procedures governing that process. These changes are quintessentially procedural, in that they "prescribe[] the methods of enforcing [the plaintiffs'] rights or obtaining redress," but do not define or regulate the rights themselves. *In re M.M.*, 174 N.H. 281, 289 (2021). Statutes affecting "procedural or remedial rights are presumed to apply retrospectively to cases that, on the effective date of the statute, have not gone beyond the procedural state to

which the statute pertains." *Id.* "Such application does not offend the constitutional prohibition on retrospective laws." *Id.*

The fact that the Legislature clearly contemplated that continued operation of the claims process would be contingent and that the claims process could be altered, amended, or terminated makes evident that the plaintiffs lack any vested right in the structure or procedures of the process. A statute does not create vested, enforceable contract rights when performance under the statute is contingent on some future event.[2] Likewise, an enforceable contract does not exist if performance is optional or one party can unilaterally alter or terminate the agreement.[3]

The Legislature knows how to create vested, enforceable contractual rights when it wants to do so. *See, e.g.*, RSA 167:64, I(a)(2)(E) ("Hospitals entitled to payments under [the statute] have a vested contractual right to receive these payments in fiscal years 2018 through 2024 as limited by paragraph IV."). It did not do so here. Rather, the Legislature expressly contemplated in RSA 21-M:11-a that "all payments authorized by the administrator are contingent upon the making of sufficient appropriations to the fund or sufficient expenditure authorizations." RSA

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[2] *See, e.g.*, *In the Matter of Goodlander & Tamposi*, 161 N.H. 490, 495 (2011) ("A perfected vested right can be no other than such as is not doubtful, or depending on *any contingency*, but absolute, fixed and certain." (citation omitted; emphasis added)); *Farnum's Petition*, 51 N.H. 376, 382 (1871) ("The rule is, that a constitutional act of the legislature, which is equivalent to a contract, and is perfected, *requiring nothing further to be done in order to its entire completion and perfection*, is a contract executed, and whatever rights are thereby created, a subsequent legislature cannot impair." (citations omitted; emphasis added)).

[3] *See, e.g.*, *Tremblay v. Bald*, 2024 N.H. 6, ¶ 14 ("'Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise.'" (quoting Restatement (Second) of Contracts § 77 cmt. (a), at 195 (1981)); *Eshagh v. Terminix Int'l Co., Ltd. P'ship*, 588 F. App'x 703, 704 (9th Cir. 2014) (citation omitted); *see also A.L. Prime Energy Consultant, Inc. v. Mass. Bay Transp. Auth.*, 479 Mass. 419, 429 (2018) ("A public entity's power to unilaterally to walk away from a contract, without restrictions, therefore would render the contract illusory."); *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010) (observing that an arbitration clause is illusory if "one party can avoid its promise to arbitrate by amending the provision or terminating it altogether"); *Cheek v. United Healthcare of the Mid- Atl., Inc.*, 835 A.2d 656, 662–64 (Md. 2003) (reaching the same conclusion and collecting cases that also reached that conclusion).

21-M:11-a, XII(c). The Legislature likewise contemplated that it could alter or eliminate the claims process "as otherwise provided by law." RSA 21-M:11-a, II (2022). The statute also expressly authorizes the Attorney General, after consultation with the Administrator, to discontinue the claims fund altogether. *Id.* These features, which are embodied in the statutory text, provide a clear indication that the Legislature always intended the operation of the claims process to be contingent and subject to amendment or termination, and not to create a vested, enforceable contractual right in the existence of that process or how it operates. *See Studier v. Mich. Pub. Sch. Emples. Ret. Bd.*, 698 N.W.2d 350, 364 (Mich. 2005) (holding that a statute did not create an enforceable contract when, among other things, the legislature did not "covenant that it would not amend the statute or remove or diminish the obligation [thereunder]").

The Legislature's post-enactment amendments to RSA 21-M:11-a also confirm that the statute was never intended to operate as a contract. The Legislature has specifically amended RSA 21-M:11-a to: condition a Claimant's waiver of rights on acceptance of the Administrator's award rather than upon submission of a claim; extend the claims filing window; expand the scope of conduct eligible for the fund; significantly increase the caps on awards; and alter the claims process to streamline proceedings. Notably, the plaintiffs and their counsel have never suggested that any of *these* amendments are unconstitutional. "[W]here a former statute is clarified by amendment, the amendment is strong evidence of the legislative intent concerning the original enactment." *Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755, 763 (2014). Here, the subsequent amendments to RSA 21-M:11-a are strong evidence that the Legislature never intended the statute to trap the terms of the statute in amber such that they could not be altered or amended by subsequently legislatures. *See Studier*, 698 N.W. at 366 (observing that "further evidence that the Legislature did not intend to contract away its legislative powers"

could be bound in the fact that "subsequently legislatures ha[d] exercised their powers to amend the statute many times throughout the years").

The plaintiffs' reliance on RSA 21-M:11-a, VII(d) is misplaced. That provision, at most, contemplates that the Legislature has offered the claims process to Claimants as a form of nonbinding arbitration. It is by no means clear that an agreement to enter nonbinding arbitration can operate as a binding contract at all. Some courts view nonbinding arbitration agreements as "agreements to agree" that are not enforceable contracts. *See, e.g.*, *Medallion Ne. Ohio, Inc. v. SCO Medallion Healthy Homes, Ltd.*, 2006-Ohio-6965, ¶ 17 (Ohio Ct. App. 2006); *Shields v. State*, 27 S.W.3d 267, 275 (Tex. App. 2000); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001) ("Whether an agreement to enter into a non-binding arbitration process is enforceable under the FAA is a matter not well-settled in the federal courts . . . ."). The plaintiffs have not explained why this reasoning does not extend to RSA 21-M:11-a.

In any event, the language in RSA 21-M:11-a, VII(d), even when viewed in isolation, does not unmistakably create any enforceable contractual rights. The U.S. Supreme Court has recognized that the Federal Arbitration Act—the federal analogue to RSA ch. 542:1, *see, e.g.*, *Grand Summit Hotel Condo Unit Owners' Ass'n v. L.B.O. Holding, Inc.*, 171 N.H. 343, 346 (2018)—"make[s] arbitration agreements as enforceable as other contracts, but not more so." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). The only "offer" even arguably contained in RSA 21-M:11-a, VII(d) is to make available a process through which Claimants' claims might be settled. That process is voluntary, a Claimant does not give up any right to pursue litigation by filing a claim, and the Administrator's decision is not binding. In other words, the Legislature has created a process by which Claimants might, but are not required to, settle their claims at some point in the future. This type of "agreement to agree" is not enforceable. *See, e.g.*,

Rosenfield v. U.S. Trust Co., 290 Mass. 210, 217 (1935) ("An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto.").

RSA 21-M:11-a, VII(d) also fails to evince the type of consideration that would give rise to an enforceable contract. A Claimant does not waive any rights by filing a claim and retains the ability to leave the claims process and pursue civil litigation. Further, until the statute was amended in 2025, the Administrator's decision was binding only on the State, but not on the Claimant until he or she accepted the decision. "Where the practical effect of an arbitration agreement binds only one of the parties to arbitration, it lacks mutuality of promise, and is devoid of consideration." *Williams v. Kemper Corp.*, 608 F. Supp. 3d 708, 714 (S.D. Ill. 2022); *see also United States ex rel. Birckhead Elec., Inc. v. James W. Ancel, Inc.*, No. WDQ-13-2498, 2014 U.S. Dist. LEXIS 78891, at *5 (D. Md. June 5, 2014) ("An arbitration provision that binds only one party lacks mutual consideration, and thus, is unenforceable.").

Reading RSA 21-M:11-a, VII(d) to create enforceable contractual rights of the kind the plaintiffs advance here would also violate the basic rules of statutory construction. When construing a statute, a court must "give effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Rand v. State*, 2025 N.H. 27, ¶ 7. A court must "construe all parts of a statute together to effectuate its overall purpose." *Id.* A court thus will not "construe statutes in isolation" and instead must "attempt to construe them in harmony with the overall statutory scheme." *Id.* The plaintiffs' arguments with respect to RSA 21-M:11-a, VII(d) read *into* that provision conditions and obligations that the Legislature did not include, while simultaneously reading *out* of remainder of RSA 21-M:11-a the clear indicia that the Legislature always contemplated that the claims process could be changed or even terminated. The basic rules of

statutory construction do not permit a court to selectively read language into a subsection of a statute and then wield that subsection in isolation to effectively nullify other portions of the statutory scheme.

Yet, even if the plaintiffs' reading of the statute were possible (and it is not), this would still be insufficient to satisfy their burden. The unmistakability doctrine requires the Legislature to "evince[] a *clear* intent . . . to be bound to particularly contractual obligations." *City of Manchester*, 2024 N.H. 28, ¶ 13 (emphasis added). Ambiguous statutory language necessarily fails to establish an unmistakable contract. *See Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emples. Ret. Sys.*, 758 F.3d 23, 31 (1st Cir. 2014) ("Either characterization of [the statute] is possible. In the context of the unmistakability doctrine, this ambiguity dooms Plaintiffs' argument."). For this additional reason, the plaintiffs are not likely to succeed on their breach of contract claim.

The plaintiffs' reading of RSA 21-M:11-a, VII(d) also asks this Court to encroach upon inherent legislative powers in a manner the unmistakability doctrine is designed to protect against. In first recognizing that doctrine, Chief Justice Marshall observed that because "the whole community is interested in retaining [the legislative power] undiminished; that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." *Providence Bank v. Billings*, 29 U.S. 514, 561 (1830). Our Supreme Court has thus emphasized that "to construe laws as contracts when the law is not clearly and unequivocally expressed would be to *limit drastically* the essential powers of the legislative body." *Prof'l Fire Fighters of N.H.*, 167 N.H. at 193 (citation omitted; emphasis added).

The Legislature has made clear that the process available under RSA 21-M:11-a can be altered or even terminated. It has further made clear that a settlement under the statute only becomes enforceable once it is final. The Legislature has amended the statutory process several times since its inception without any complaint from the plaintiffs. Under the unmistakability doctrine, the plaintiffs cannot now seek a judicial veto of duly enacted statutory amendments simply because they disagree with those amendments as a matter of policy.

To the extent the plaintiffs separately premise their contract clause claim on a purported vested right in how the Administrator is appointed or removed or whether the Attorney General can accept or reject awards, that argument also fails. The appointment and removal of the Administrator is, at most, a question of procedure. *See Opinion of the Justices (Prior Sexual Assault Evidence)*, 141 N.H. 562, 572 (1997) ("Procedural laws are those laws which have for their purpose to prescribe the machinery and methods to be employed in enforcing [substantive rights]." (citation and quotation marks omitted)). The Attorney General's ability to accept or reject an award likewise affects only the procedure by which a Claimant can reach a settlement under the statute. "[R]etrospective statutes affecting remedies or procedural matters do not violate part I, article 23." *State v. Burr*, 142 N.H. 89, 94 (1997). "[N]o party has a vested right to any particular remedy," *Norton v. Patten*, 125 N.H. 413, 416 (1984) (citation and quotation marks omitted), and "[a] vested right cannot be contingent on a mere expectation of a future benefit," *Gilman v. County of Cheshire*, 126 N.H. 445, 448 (1985) (citation and quotation marks omitted). The plaintiffs have never been guaranteed that they will receive *any* award under the claims process, much less one they would be inclined to accept.

B. The plaintiffs have not demonstrated a substantial impairment of any right.

The plaintiffs have also failed to demonstrate that any impairment to a purported right under the statute would be substantial. The plaintiffs suggest that the Administrator cannot be impartial as an executive branch employee who serves at the pleasure of the Governor. This argument is meritless.

"Administrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result." *McKay v. N.H. Compensation Appeals Bd.*, 143 N.H. 722, 729 (1999) (*Broderick*, J.) (cleaned up). "The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." *Id.* The guidelines remain binding on the Administrator. RSA 21-M:11-a, IV(b). The Administrator still cannot change those guidelines without approval of the fiscal committee. RSA 21-M:11-a, IV(b). The Administrator must still give "due consideration to the guidelines" when determining any award. RSA 21-M:11-a, III (2025). The Governor has no authority to review the Administrator's awards, *id.*, and those awards remain unappealable, RSA 21-M:11-a, IX(b). Claimants' counsel retain the same say in who serves as Administrators as they did before the amendments. RSA 21-M:11-a, III (2025). The Administrator still must be "an independent, neutral attorney admitted to the practice of law in New Hampshire." RSA 21-M:11, I(a). The appointment and confirmation process is the same one that judges are subject to. RSA 21-M:11-a, III (2025). The plaintiffs fail to explain why, under these circumstances, the Administrator cannot be fair and impartial.

The plaintiffs have likewise failed to demonstrate that a substantial impairment flows from the amendment to RSA 21-M:11-a, IX(e) authorizing the Attorney General to accept or reject award amounts. The claims process has always been voluntary. The plaintiffs have never been guaranteed any award through the process, much less an award in a particular amount.

Since 2023, Claimants have been able to proceed through the process without relinquishing any right to pursue litigation and have been free to reject any amount the Administrator awards. The Attorney General has always been able to take a position on the amount a Claimant should be awarded and has always been able to settle a claim with a Claimant directly. The Administrator has always been able to agree with the Attorney General on the value of a claim. The Administrator has also always had the authority to award a Claimant no money at all or an amount significantly less than what the Claimant requests. Under these circumstances, any suggestion that the Attorney General's ability to accept or reject awards substantially impairs a Claimant's ability to receive an award is unavailing.

C. The challenged amendments serve a significant and legitimate public purpose.

The plaintiffs' contract claim also fails because the amendments at issue serve "a significant and legitimate public purpose." *City of Manchester*, 2024 N.H. 28, ¶ 12. To date, the Legislature has appropriated nearly $200 million to the claims fund. *See* 2021 HB 1677 (appropriating $100,000,000 to the fund); 2023 SB 591 (appropriating $60,000,000 to the fund); 2025 HB 2 (appropriating $20,000,000 to the fund). Prior to the amendments at issue in this case, the responsibility for determining how to expend those funds largely fell on a judicial branch employee who reported to and was overseen by the Supreme Court. RSA 21-M:11-a, III (2022). The 2025 amendments shift this responsibility to the executive branch. RSA 21-M:11-a, III, IX(e) (2025).

Under Part II, Article 56, "the *Governor*," not the judicial branch, is "responsible for governmental expenditures[.]" *N.H. Health Care Ass'n v. Governor*, 161 N.H. 38, 387 (2011) (emphasis added). "The purpose of Part II, Article 56 is to grant the Governor the power to ensure that no payments be made from the public treasury except for public purpose and in

accordance with the law." *Id.* (cleaned up). Part II, Article 56 contains an "implied obligation not to [spend state funds] recklessly." *Id.* at 389. "The executive branch is the organ of government charged with the responsibility of, and is normally the only branch capable of, having detailed and contemporaneous knowledge of spending decisions." *Id.* (citation and quotation marks omitted).

The amendments to RSA 21-M:11-a at issue in this case bring the responsibility for determining how to expend hundreds of millions of dollars in public funds within the organ of government responsible for governmental expenditures. This is a significant and legitimate public purpose. Indeed, courts have recognized "'a state's interest in preserving the separation of powers within its own government as a *compelling* interest.'" *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1348 (11th Cir. 2019) (quoting *Republican Party of Minn. v. White*, 416 F.3d 738, 773 (8th Cir. 2005)) (emphasis added).

The amendments also serve the significant and legitimate public purpose of giving the people of the State of New Hampshire, through their government representatives, a voice in deciding whether to accept or reject a particular settlement and a role in ensuring the proper maintenance of the fund. Under the former law, any decision was binding on the State if a Claimant accepted it. The Administrator does not owe a duty to the State in the process nor is the Administrator required to manage the fund with an eye toward ensuring all Claimants have an opportunity to benefit from it. The new amendment therefore gives the people of the State an important check in an administrative process that must make awards of limited taxpayer dollars, thereby serving a significant and legitimate public purpose. *See Bailey v. Dep't of Elem. & Secondary Educ.*, 451 F.3d 514, 519 (8th Cir. 2006) (courts "generally regard the expenditure of public funds to be a matter of public concern"); *United States v. Suarez*, 880 F.2d 626, 630 (2d

Cir. 1989) ("[T]here is an obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount is large."); *Cecort Realty Dev., Inc. v. Llompart-Zeno*, 100 F. Supp. 3d 145, 163 (D.P.R. 2015) ("the prudent management of public funds is steeped in interests of the public order").

"Once a significant and legitimate public purpose is identified, the next inquiry is whether the adjustment of rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislations adoption." *Deere & Co. v. State*, 168 N.H. 460, 472 (2015) (citations omitted). This inquiry is also satisfied here.

The claims process prescribed in RSA 21-M:11-a has not substantively changed in the wake of the 2025 amendments. Claimants still file their claims in the same way. Those claims are still processed in the same way. The victim-centered, trauma-informed process in which the Administrator receives information from a Claimant has not changed. The procedural amendments made in 2024 to speed up the process have not changed. The increased statutory caps added in 2024 remain part of the statute. The Administrator's qualifications have not changed. The requirement that the Administrator follow the guidelines has not changed.

RSA 21-M:11-a thus remains designed to serve the same public purpose that it did at the time of its enactment—to provide a "trauma-informed, victim centered alternative to litigation for the efficient and fair resolution of [YDC] claims." 2021 HB 1677. Any adjustment to the rights and responsibilities under the statute has not altered this purpose or how the statute is designed to achieve it. Rather, the amendments the plaintiffs challenge reflect the legislative decision to shift responsibility over the expenditure of millions of dollars in public funds to the

branch of government authorized to serve that function. This is an eminently reasonable decision.

II. The plaintiffs are not likely to succeed on their breach of contract claim.

Because no enforceable public contract exists as a matter of law for the reasons previously stated, the plaintiffs' breach of contract claim also necessarily fails. But that standalone claim is also barred by sovereign immunity. The waiver of sovereign immunity for contract claims does not extend to contracts that are implied in law. *XTL-NH, Inc. v. N.H. State Liquor Commission*, 170 N.H. 653, 659 (2018). Here, the plaintiffs do not contend that the parties entered into a formal, express contract. They instead contend that RSA 21-M:11-a created an enforceable public contract. They do not point to any statutory language that expressly creates a contract. Rather, they contend, in essence, that a contract is implied in the statutory language. Even if this were true—and it is not for the reasons stated above—this would at most mean that the plaintiffs were seeking to enforce an implied-in-law contract. Sovereign immunity bars any such claim.[4]

[4] For the purposes of this objection, the defendants take at face value the plaintiffs' assertion that their breach-of-contract and contracts clause claims turn on the theory that the Legislature created vested, enforceable contractual rights through RSA 21-M:11-a. That theory fails for all the reasons discussed herein. It bears noting, however, that the plaintiffs' preliminary injunction motion contains language that would tend to suggest that the plaintiffs are proceeding, in substance if not in form, on a promissory estoppel theory. *See, e.g.*, Pls.' Mot. ¶ 3 (alleging that hundreds of Claimants, "in reliance on the State's promises, have suspended their lawsuits in superior court"); *id.* ¶ 4 (alleging that the defendants "successfully lured the Plaintiffs' class out of court and into the Settlement Fund"); *id.* ¶ 32 ("Defendants induced claimants to enter the claims process with false promises, then pulled the rug out from under claimants without warning or opportunity for public comment."). Any such claim would be plainly barred by sovereign immunity. *XTL-NH, Inc.*, 170 N.H. at 659.

III. The plaintiffs are not likely to succeed on the merits of their equal protection claims.

The plaintiffs are also not likely to succeed on the merits of their equal protection claims.[5] The plaintiffs contend that they are entitled to intermediate scrutiny on these claims because the amendments they challenge affect their constitutional right to a recovery. They are incorrect.

The changes to RSA 21-M:11-a do not affect the plaintiffs' right to recovery at all. That right is "necessarily relative." *Sousa v. State*, 115 N.H. 340, 343 (1975). It does not confer on any plaintiff "a right to sue and hold the State liable in tort." *Id.* at 344. Nor does it "guarantee that all injured persons will receive full compensation for their injuries." *Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 448 (2011) (citation and quotation marks omitted). "It only requires a remedy that conforms to the statutory and common law rights applicable at the time of injury." *Id.* (citation omitted).

There was no statutory or common law right to a claims process like the one established through RSA 21-M:11-a at the time the plaintiffs were injured. The statute was first enacted in 2022, and there is no suggestion in the complaint that any of the named or class plaintiffs suffered injuries after that date. The statute created a brand new process that did not previously exist. That process is available only to "former YDC residents," as that phrase is defined in the statute. RSA 21-M:11-a, I(f), VII(a). No Claimant gives up any right to bring a tort action until the end of the claims process. RSA 21-M:11-a, VII(c). And even then, Claimants do not waive the right to bring tort actions against their abusers individually. RSA 21-M:11-a, VII(e). RSA 21-

[5] Because the State Constitution is at least as protective in this area as the Federal Constitution, the following analysis equally applies to the plaintiffs' federal equal protection claim. *In re Concord Teachers*, 158 N.H. 529, 540 (2009)

M:11-a thus only *expands* a Claimant's avenues for recovery. The statute does not impede any Claimant's existing right to recovery such that intermediate scrutiny would apply.

"[A]bsent a classification based upon suspect classes, affecting fundamental rights, or involving important substantive rights, the constitutional standard of review is that of rationality." *State v. Lilley*, 171 N.H. 766, 773 (2019) (citation omitted). This test "requires that legislation be rationally related to a legitimate government interest." *Id.* (citation omitted) "Under this test, the party challenging the statute or ordinance must show that whatever classification is promulgated is arbitrary or without some reasonable justification. *Id.* (citation omitted). The plaintiffs cannot satisfy this burden because, as explained above, the amendments they challenge are, at a minimum, rationally related to ensuring that the expenditure of public funds out of the claims fund is overseen by the branch of government responsible for such expenditures.

The plaintiffs' challenge would still fail, however, even if intermediate scrutiny applied. Again, "'a state's interest in preserving the separation of powers within its own government as a *compelling* interest.'" *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1348 (quoting *Republican Party of Minn.*, 416 F.3d at 773) (emphasis added). The amendments at issue here, which do not materially change how the Administrator processes a claim or the award amounts available under the statute, are substantially related to that interest. They reflect, at most, modest changes to the overall statutory scheme. Intermediate scrutiny is therefore satisfied.

IV. The plaintiffs have not demonstrated an immediate danger of irreparable harm.

The plaintiffs' request for a preliminary injunction must also be denied because the plaintiffs have not demonstrated any immediate danger of irreparable harm. The plaintiffs devote just three paragraphs of their motion to irreparable harm. *See* Pls.' Mot. ¶¶ 21–23. The bulk of

their assertions of harm consist of a single-paragraph, unelaborated list. *Id.* ¶ 22. The plaintiffs also suggest that they face retraumatization by virtue of the amendments because the Administrator may choose to depress award amounts or the Attorney General may choose to reject some awards. *Id.* ¶ 23. For several reasons, the plaintiffs have not come close to satisfying their burden under the irreparable harm prong.

The plaintiffs' assertions of irreparable harm are wholly conclusory. The plaintiffs make no effort to explain why any of those assertions constitute irreparable harm as a legal matter, and they provide no elaboration (let alone evidentiary support) for the assertions themselves. "To establish a likelihood of irreparable harm, conclusory or speculative allegations are not enough." *Titaness Light Shop, Ltd. Liab. Co. v. Sunlight Supply, Inc.*, 585 F. App'x 390, 391 (9th Cir. 2014); *see also Eyewonder, Inc. v. Abraham*, 293 F. App'x 818, 820 (2d Cir. 2008) ("Mere unsupported, conclusory statements that plaintiffs are 'likely to suffer irreparable harm' . . . are insufficient to meet this standard." (citation and quotation marks omitted)). Because the plaintiffs offer nothing but conclusory assertions here, they have failed to meet their burden.

The plaintiffs also appear to contend that the breach of contract and constitutional violations they allege automatically result in irreparable harm. Because the plaintiffs have not shown that they have any likelihood of success on the merits of those claims, they have correspondingly failed to show that they are likely to suffer irreparable harm. But even setting that aside, authority does not support the notion that a breach of contract automatically works irreparable harm on the non-breaching party. *See, e.g.*, *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp*., 356 F.3d 1256, 1263 (10th Cir. 2004) (observing that, even when the breach of a contract provision could satisfy irreparable harm "courts do not automatically, nor as a matter of course, reach this conclusion," and instead "examine whether the harms alleged by

the party seeking the preliminary injunction are in fact irreparable, and sometimes conclude in the negative"). Likewise, "an injunction will not be issued if there is any other procedure, including . . . completion of suits in other forums, which may be expected to prevent or correct the threatened harm." 4 Gordon J. MacDonald, New Hampshire Practice: Wiebusch on New Hampshire Civil Practice and Procedure § 19.08. The claims process remains voluntary, and Claimants do not waive any ability to pursue claims for monetary damages unless or until they receive a final award from the Administrator. Put differently, the plaintiffs can always pursue claims in court regardless of whether they receive an award through the claims process. They therefore have an alternative remedy available to them, and their assertion of irreparable harm fails.

The plaintiffs' remaining assertions of irreparable harm all boil down to their perception that the amendments at issue render the claims process unfair. As previously discussed, however, these assertions fail to overcome the strong presumption that executive officials serving in an adjudicatory capacity will be fair and impartial. *McKay*, 143 N.H. at 729 (*Broderick*, J.). The plaintiffs offer no support for the notion that an Administrator, who is subject to the same qualification requirements and must follow the same procedure that existed before the 2025 amendments, will be unable to operate independently as an executive branch official. Nor do they explain how the bilateral ability to accept or reject a claim award—which is a typical feature of nonbinding arbitration—somehow renders an arbitration process unfair. They instead support their position with speculation and innuendo. "Speculative injury does not constitute a showing of irreparable harm." *Public Service Co. v. West Newbury*, 835 F.2d 380, 383 (1st Cir. 1987); *see also Priv. Truck Council of Am., Inc. v. State*, 128 N.H. 466, 477 (1986).

V. The balance of harms and the public interest weigh against preliminary injunctive relief.

The balance of harms and public interest also weigh against issuing a preliminary injunction. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *N.M. Dep't of Game & Fish v. United States DOI*, 854 F.3d 1236, 1254 (10th Cir. 2017) (quoting *Maryland v. King*, 567 U.S. 1301 (Roberts, C.J, in chambers)). Similarly, "'the public interest lies in a correct application' of the law and 'upon the will of the people [of a State] being effected in accordance with [that State's] law.'" *Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) (quoting *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006)). "Thus, the public interest necessarily weighs against enjoining a duly enacted statute," and this is particularly true when, as here, a plaintiff has not shown a likelihood of success on the merits. *Id.*

The public also has an interest in the expenditure of public funds and in the separation of powers. Courts "generally regard the expenditure of public funds to be a matter of public concern." *Bailey*, 451 F.3d at 519 (citations omitted). There is also a "substantial public interest" in "honoring the separation of powers." *Sec'y of Lab. v. Indus. Turnaround Corp.*, 138 F.4th 1339 (D.C. Cir. 2025) (citation and quotation marks). The amendments challenged here serve both interests by placing responsibility for the expenditure of millions of dollars of public funds within the branch of government that the State Constitution makes responsible for expenditures.

The plaintiffs do not address the public interest at all in their motion. Their argument with respect to the equities is a nothing more than a tautological string of assertions that the changes to the claims process are unfair. *See* Pls.' Mot. ¶¶ 31–32. The defendants have already addressed these arguments above and will not reiterate their position here. Suffice it to say that the

plaintiffs' failure to establish a likelihood of success on the merits and irreparable harm is also fatal to their equities arguments.

Conclusion

The plaintiffs have not met their burden under any of the preliminary injunction factors. Their motion for a preliminary injunction should be denied. Because this case involves pure questions of law, the Court should structure this case to allow the parties to file cross-motions for summary judgments so that the legal issues presented can be efficiently and definitively resolved.

Respectfully submitted,

Governor Kelly Ayotte; Attorney General John Formella; State of New Hampshire

By their attorney,

JOHN M. FORMELLA
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Date: July 23, 2025

By: /s/ *Samuel Garland*

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CERTIFICATE OF SERVICE

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

Date: July 23, 2025

/s/ *Samuel Garland*
Samuel Garland