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.

MOTION EXCLUDE TESTIMONY OF DYLAN GEE, PH.D

The defendants, by and through counsel, submit the following motion to exclude the testimony of Dylan Gee, Ph.D, during the August 20, 2025 preliminary injunction hearing:

Introduction

1. The defendants have explained in detail why the plaintiffs' claims fail as a matter of law. Rather than engage with these arguments head on, the plaintiffs seek to obscure the weakness of their legal position through the testimony of numerous witnesses. One of those witnesses is Dylan Gee, Ph.D, a professor of psychology at Yale, who previously served as a witness in David Meehan's civil trial. Through an affidavit attached to the plaintiffs' reply, Dr. Gee opines on how she believes the statutory amendments at issue in this case will affect claimants.

2. Dr. Gee's opinions are not admissible for at least five reasons. First, they are not admissible to prove any of the plaintiffs' claims, because those claims present pure questions of law. The effects of the statutory amendments on the plaintiffs are irrelevant to the legal analysis before the Court. Second, Dr. Gee cannot testify as to the wisdom of the challenged amendments, as that is a question of public policy reserved for the Legislature. Third, Dr. Gee's

opinions are based on incorrect conclusions of law. Fourth, Dr. Gee's testimony would be inadmissible under Rule 403 even if it had some minimal probative value. And fifth, Dr. Gee's opinions do not satisfy the requirements of RSA 516:29-a. The Court should exclude Dr. Gee's testimony in its entirety.

Discussion

A. Dr. Gee's testimony is not admissible under Rules 401 and 402.

3. Relevance is the threshold prerequisite for evidence to be admissible. N.H. R. Evid. 401, 402.

4. Dr. Gee's testimony is not relevant to prove any of the plaintiffs' claims. The plaintiffs advance claims under the contract clauses and equal protection provisions of the State and Federal Constitutions. They also contend that the defendants have breached an enforceable public contract that exists between them and the State by operation of RSA 21-M:11-a.

5. "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." *Am. Fed'n of Teachers-N.H. v. State*, 167 N.H. 294, 301 (2015) (citation and quotation marks omitted). "This inquiry, in turn, has 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).

6. When, as here, a plaintiff contends that a statute creates an enforceable contract or vested rights, courts apply the "unmistakability doctrine." *Id.* This requires a court to engage in statutory interpretation to determine whether "the challenged legislative enactment evinces the clear intent of the state to be bound to particular contractual obligations." *Id.* Likewise, when determining whether a statutory amendment substantially impairs a vested right under existing

law, a court must first interpret the amendment's language and then compare the amendment, as interpreted, against the vested contractual right in question. *See, e.g.*, *State Employees' Ass'n of N.H. v. State*, 161 N.H. 730, 738–40 (2011) (conducting this analysis); *see also City of Mancheseter v. Bellenoit*, 2024 N.H. 28, ¶¶ 46–49 (MacDonald, C.J., dissenting) (reaching this question and conducting comparative analysis). In other words, all three of the components present legal questions of pure statutory interpretation.

7. It is well settled that "[t]he interpretation of a statute presents a question of law." *In the Matter of Landgraf*, 176 N.H. 724, 727 (2024). "A witness, expert or otherwise, may not testify to conclusions of law." *Dartmouth Coll. v. N. Branch Constr., Inc.*, No. 2009-CV-00152, 2014 N.H. Super. LEXIS 4, at *16 (Mar. 24, 2014) (citing *Saltzman v. Saltzman*, 124 N.H. 515, 524 (1984)); *see also Julmist v. Prime Ins. Co.*, 92 F.4th 1008, 1022 (11th Cir. 2024) ("We have repeatedly said, in a number of contexts, that we do not need, want, or accept expert testimony on questions of law.").

8. Dr. Gee's testimony—regarding the "effects" the newly enacted law will have on claimants—is irrelevant to the above legal analysis and therefore inadmissible to prove the plaintiffs' contract clause claims.

9. Indeed, the plaintiffs' belief that they need to offer Dr. Gee's testimony to prove their contract clause claim demonstrates that the claim fails. Again, a statute only satisfies the unmistakability doctrine if its language "evinces the clear intent of the state to be bound to particular contractual obligations." *Am. Fed'n of Teachers-N.H.*, 167 N.H. at 301. Ambiguous statutory language is, by definition, insufficiently clear to satisfy the unmistakability doctrine. *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."); *see also United States v. Winstar Corp.*, 518 U.S. 839, 878 (1996) (observing that an "ambiguous term or grant of contract" will not "be construed as a conveyance or surrender of sovereign power"). If the plaintiffs believe that extrinsic evidence in the form of expert testimony about the "effects" of the statutory amendments on the claimants is needed to establish the existence of an enforceable contract or vested right, they have necessarily failed to meet their burden under the unmistakability doctrine.

10. Dr. Gee's testimony is also not admissible to prove the plaintiffs' equal protection claims. In determining whether the challenged amendments treat similarly situated persons differently, the Court must again engage in statutory construction. *See, e.g.*, *State v. Lilley*, 171 N.H. 766, 775–76 (2019) (interpreting ordinance to determine whether it discriminated on basis of gender). Likewise, whether the amendments impinge "statutory or common law rights applicable at the time of injury," *Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 448–49 (2011), is a legal question, not one that is determined based on expert opinions. Dr. Gee's opinions have no bearing on the resolution of these questions.

11. The same is true with respect to the plaintiffs' standalone breach of contract claim. Whether RSA 21-M:11-a creates a contract is a legal question resolved through statutory construction, as previously discussed. In any event, it is a matter of black-letter law that sovereign immunity bars claims arising out of alleged implied-in-law contracts with the State. *XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 170 N.H. 653, 657–58 (2018). Dr. Gee's testimony is therefore not relevant to this claim either.

12. The plaintiffs cannot elicit testimony from Dr. Gee as to her views on the wisdom of the challenged amendments, whether they are good public policy, or how they may affect the claimants. Dr. Gee devotes the bulk of her affidavit to explaining why, in her view, the

amendments would undermine the purposes the claims process is designed to serve and cause claimants to drop out of the process. *See* Gee Aff. ¶¶ 11–22. These, quintessentially, are "public policy arguments . . . made in the wrong forum." *Doe v. Comm'r, N.H. Dep't of Health and Human Servs.*, 174 N.H. 239, 260 (2021) (citations omitted). "Because [the judiciary's] function is not to make laws, but to interpret them, any public policy arguments relevant to the wisdom of the statutory scheme and its consequences should be addressed to the General Court." *Id.* (citation and quotation marks omitted). Put differently, "courts are not concerned with whether a statute is wise, reasonable, or expedient." *Petition of Boston & Maine Corp.*, 109 N.H. 324, 325 (1969). "As is always the case with legislative enactments, the wisdom of the measure proposed is for the legislature, and not within the prerogative of [courts] to determine." *Opinion of the Justices*, 111 N.H. 136, 143 (1971).

13. Dr. Gee's testimony is also inadmissible because all of her opinions are premised on incorrect statements of law. In support of her opinions, Dr. Gee asserts that, under the challenged amendments, the same institution that the plaintiffs claim is responsible for their abuse—the State—will also now determine whether claimants receive compensation under the claims fund. *See, e,g.*, Gee. Aff. ¶¶ 12, 17. As a legal and factual matter, this statement is incorrect.

14. The State of New Hampshire refers to the people of the State who created the State as a body politic, N.H. Const. pt. 2, art. 1, and retained in themselves the State's sovereign power, N.H. Const. pt. 1, art. 7. As used in this sense, "the State" has always retained the power to determine whether claimants receive compensation under the claims fund (or indeed whether the claims fund even exists) because the fund is a creature of statute enacted in the name of the people.

15. The State consists of three branches of government. *See* N.H. Const. pt. 2, art. 2 [Legislature, How Constituted]; art. 41 [Governor, Supreme Executive Magistrate]; art. 72-a [Supreme and Superior Courts]. One of those branches is the judicial branch, which, among other things, placed many claimants at YDC and other facilities through the juvenile justice system. A Claims Administrator employed by the judicial branch is just as much an agent of "the State as a political institution," Gee Aff. ¶ 12, as is an employee of the executive branch.

16. In the underlying litigation, however, the plaintiffs do not allege that the entire State, as a body politic, abused them. They bring claims against a single executive branch agency—DHHS—concerning how it operated the YDC and other facilities decades ago. Individual criminal actors who are alleged to have perpetrated the abuse in question have been or are being prosecuted by executive branch officials. DHHS is not led today by the same people who operated it decades ago.

17. Dr. Gee thus imputes to government actors today responsibility for the plaintiffs' alleged past injuries. This is manifestly wrong as a matter of law and fact. Indeed, this type of rhetoric saps Dr. Gee's testimony of any credibility and impartiality. Her assertion in this regard is a political one that holds no evidentiary value in a court of law.

18. Accordingly, Dr. Gee's assertion that the amendments challenged in this case fundamentally change the claims process by putting the party responsible for the claimant's abuse in control of whether claimants are compensated is simply wrong. For this additional reason, her testimony is inadmissible. *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 654 F. Supp. 2d 518, 522 (E.D. La. 2009) (excluding an expert opinion that was "a misstatement of Louisiana law"); *United States v. Gallion*, 257 F.R.D. 141, 149 (E.D. Ky. 2009) (excluding expert opinions in part because they were "incorrect statements of law"); *Loeffel Steel Prods. v.*

Delta Brands, Inc., 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) ("Expert opinions that are contrary to law are inadmissible."); *see also Integra Lifesciences I, Ltd. v. Merck KGaA*, 496 F.3d 1334, 1342 (Fed. Cir. 2007) ("[W]hen an expert witness' statement of the law is incorrect, that view of the law cannot be relied upon to support the verdict.").

B. Dr. Gee's testimony should be excluded under Rule 403.

19. Even if Dr. Gee's testimony was minimally relevant to some issue before the Court, it should still be excluded under Rule 403. Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

20. This case presents concrete legal questions that must be resolved through the established tools of statutory construction. Dr. Gee's testimony is wholly untethered from that analysis and is essentially a policy plea based on her view of the "effects" legislative changes will have on claimants. She makes those pleas in the wrong forum. It would be highly prejudicial to the defendants for Dr. Gee's testimony to inform how this Court assesses the actual legal questions before it.

21. For similar reasons, allowing Dr. Gee's testimony would confuse the issues and waste time. Dr. Gee's opinions are based on manifestly incorrect statements of law and fact. She seeks to impute to current government officials allegations related to how a single executive branch agency operated decades ago. This testimony would serve no purpose other than to obscure the straightforward legal issues before the Court and unnecessarily use up limited judicial resources.

C. Dr. Gee's testimony does not satisfy the requirements of RSA 516:29-a.

22. RSA 516:29-a prescribes the standards governing when a witness can offer expert testimony. Expert testimony is not permitted unless a court finds that: "(a) [s]uch testimony is based upon sufficient facts or data; (b) [s]uch testimony is the product of reliable principles and methods; and (c) [t]he witness has applied the principles and methods reliably to the facts of the case." RSA 516:29-a, I (formatting altered).

23. In making this determination, a court must consider, "if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:(1) [h]ave been or can be tested; (2) [h]ave been subjected to peer review and publication; (3) [h]ave a known or potential rate of error; and (4) [a]re generally accepted in the appropriate scientific literature." RSA 516:29-a, II (formatting altered).

24. Dr. Gee's testimony does not satisfy these requirements. As previously discussed, her opinions are based on manifestly incorrect statements of law and fact. For this reason alone, her opinions are not "based upon sufficient facts or data." RSA 516:29-a, I(a).

25. Dr. Gee has also failed to establish that she has the training or experience sufficient to offer opinions on how the plaintiffs (or anyone else) will respond to changes in the law. She does not explain why her background and credentials allow her to draw conclusions of this type. She does not identify any time that she provided this type of opinion in the past and does not identify anyone who has drawn this type of conclusion, what training or experience they had, or what principles and methods they employed to reach that opinion.

26. Moreover, Dr. Gee also reaches her conclusions—which concern the effects the amendments will have on claimants as a class—after interviewing just two claimants. Gee Aff. ¶ 6. She contends that these interviews, her review of the filings in this case, and her separate

work as an expert in David Meehan's case allow her to reach her conclusions with a reasonable degree of scientific certainty. *See id.* ¶¶ 6, 11. She identifies no reliable principles and methods that she relied on in extrapolating her conclusions out to all claimants. She does not, for instance, explain how it is empirically reliable to draw conclusions as to how thousands of people will respond to statutory changes based on the circumstances of two or three individuals. She does not explain how her conclusions hold true for all claimants even though how claimants allege they were abused varies significantly in nature and degree. Indeed, she does not even explain how she reaches the conclusions she draws with respect to the claimants she actually interviewed. Her affidavit instead consists of a series of non sequiturs devoid of any connective tissue to the requirements of RSA 516:29-a.

Conclusion

27. For the foregoing reasons, the Court should exclude Dr. Gee's testimony from the August 20 preliminary injunction hearing.

WHEREFORE, the defendants request that this Honorable Court:

A. Grant this motion;

B. Exclude Dr. Gee's testimony from the August 20 preliminary injunction hearing; and

C. Grant such further relief as the Court deems just and equitable.

Respectfully submitted,

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

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: August 15, 2025

By: /s/ *Samuel Garland*

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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.

Date: August 15, 2025

/s/ *Samuel Garland*
Samuel Garland