THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Case No. 217-2025-CV-00480

Andrew Foley, et al.

v.

State of New Hampshire, et al.

PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO DISMISS

The Court should deny Defendants' threadbare Motion to Dismiss ("Motion") because Plaintiffs' Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief ("Complaint") more than sufficiently pleads Plaintiffs' three causes of action and Plaintiffs' basis for class action treatment. Defendants' Motion merely retreads arguments previously raised in Defendants' objections to Plaintiffs' Motion for Preliminary Injunction (Index #8) ("Injunction Motion") and Plaintiffs' Motion to Maintain Case as a Class Action (Index #25) ("Class Motion") while failing to account for the higher standard required for dismissal of claims as a matter of law.

As this Court knows, Plaintiffs' Complaint seeks to hold the State to the contractual obligations it created for the child abuse victims of the State-run Youth Development Center. Following years of litigation and negotiation, the State induced the "vast majority" of those victims out of the superior court and into the claims process established by the Settlement Fund Act. Only after all claimants had accepted that deal did the State unilaterally change the terms to substantially advantage itself over the victims. While the State has broad authority to alter policy from one legislature to the next, it cannot abrogate its own contractual obligations after inducing reliance on its trustworthiness. When the State attempts to so act, the courts must compel it to "keep its word." *Opinion of the Justices (Furlough)*, 135 N.H. 625, 636 (1992) (internal quotation omitted).

ARGUMENT

I. Motion to Dismiss Standard.

New Hampshire is a notice pleading jurisdiction and, as such, the Court must employ a liberal approach to the technical requirements of pleadings. *Toy v. City of Rochester*, 172 N.H. 443, 448 (2019); *see also Berlinguette v. Stanton*, 120 N.H. 760, 762 (1980) ("[E]mphasis will be placed on the simple merits of the controversy rather than the form of the pleadings in which they may be presented."). A complaint "need not do more than state the general character of the action and put both court and counsel on notice of the nature of the controversy." *Toy*, 172 N.H. at 448 (quoting *Pike Indus. v. Hiltz Constr.*, 143 N.H. 1, 4 (1998)).

In considering Defendants' present Motion, the Court must assume the allegations in Plaintiffs' pleadings to be true and construe all reasonable inferences in the light most favorable to Plaintiffs. *Sanguedolce v. Wolfe*, 164 N.H. 644, 645 (2013). The Court's only task at this stage is to test the facts alleged in the complaint against the applicable law and determine if the allegations constitute a legal basis for relief. *Id*. Dismissal is proper only where the allegations in the plaintiffs' pleadings are not reasonably susceptible of any construction that would permit recovery. *Id*. Defendants' arguments do not come close to meeting this standard.

II. Defendants' Incorporated Preliminary Injunction Arguments Should be Summarily Rejected.

Defendants' Motion provides meager argument in support of dismissal of Plaintiffs' claims for breach of contract (Count I), unconstitutional impairment of contracts (Count II), and infringement of the constitutional guarantee of equal protection under the law (Count III). Instead of providing argument linked to the standard on a motion to dismiss, Defendants incorporate by reference their previously filed Objection to Plaintiffs' Motion for Preliminary Injunction (Index

#12) ("Injunction Objection"), asserting that the same arguments are also dispositive of Plaintiffs' causes of action as a matter of law. *See* Defs' Mot. ¶¶ 5-8.

As a threshold matter, the Court should reject these arguments because Defendants do not bother to explain how their previously raised arguments establish grounds for dismissal as a matter of law under the significantly more restrictive standard for dismissing claims on the face of the pleadings without factual development. As Defendants readily pointed out in their Injunction Objection, *Plaintiffs* bear the burden of establishing both the legal and factual grounds for a preliminary injunction, including a likelihood of success on the merits of their claims. With the present Motion, however, it is *Defendants* who must satisfy the burden of establishing that the Complaint does not plead plausible claims as a matter of law.

To be sure, some of Defendants' likelihood of success arguments revolve in large measure around questions of law. Nevertheless, many of the questions presented to the Court are mixed questions of fact and law that cannot be resolved without resort to the factual record. For example, with respect to contract formation, Defendants argue that because there is no express contract, Plaintiffs' contractual claims may only proceed under an "implied-in-law" theory of contract formation, which, they argue, is barred by sovereign immunity. *See* Defs.' Mot. ¶ 8. Plaintiffs have previously rebutted that argument by pointing to the express language in the Settlement Fund Act, which establishes all the elements for an *express written contract*—i.e., offer, acceptance, meeting of the minds, and consideration, all spelled out in the statute itself. *See, e.g.*, Pls.' Injunction Mot. ¶¶ 13-20; Pls.' Reply to Injunction Mot. at 9-10.

But Plaintiffs have also gone far beyond the statutory language by developing a factual record that clearly "evince[s] a legislative intent" to contract with the YDC abuse victims, *Opinion of the Justices (Furlough)*, 135 N.H. 625, 630 (1992), including evidence showing the "extensive

negotiations" between counsel for Defendants and counsel for the abuse victims. That evidence illustrates that the Settlement Fund Act was the product of a bargained-for settlement process that resulted in a meeting of minds and ample consideration flowing to the State of New Hampshire. Likewise, questions regarding the materiality of the breach, and the substantiality of the impairment of Plaintiffs' contracts with the State, are informed by the factual record developed in support of Plaintiffs' preliminary injunction motion. With that factual record now established through admitted exhibits and live testimony, the Court should not rule on Defendants' Motion in a vacuum, denying or ignoring the existence of these relevant facts.

In any event, to the extent the Court declines to summarily reject Defendants' incorporated Injunction Objection arguments, the Court should correspondingly incorporate Plaintiffs' response to Defendants' Injunction Objection, which was filed on August 6, 2025 (Index #22) ("Injunction Reply"). In that reply, Plaintiffs responded to each of Defendants' merits arguments, providing both legal and factual grounds showing that Plaintiffs are likely to succeed on the merits at a final hearing or trial on each of the three causes of action. *See* Injunction Reply at 9-31. For the same reasons, Plaintiffs' three counts should easily survive Defendants' request for dismissal.

III. Defendants Additional Arguments are Likewise Meritless.

Defendants' Motion asserts three additional arguments in support of "partial" dismissal of Plaintiffs' claims: (1) that because the State is not a "person" for purposes of 42 U.S.C. § 1983, Plaintiffs cannot prevail on their federal constitutional claims; (2) that Plaintiffs cannot, as a matter of law, obtain injunctive relief against the State as an abstract body politic; and (3) that the class claims should be dismissed because Plaintiffs have not alleged sufficient facts to show that common questions of law or fact predominate over individualized issues. *See* Defs.' Mot. ¶¶ 9-13.

The assertion of these additional grounds is hollow and does not serve to simplify the matters pending before this Court.

While it may be true that the State of New Hampshire is not a "person" for purposes of an action for *damages* under 42 U.S.C. § 1983, Defendants fail to acknowledge that Plaintiffs are only seeking *equitable relief*, not damages, and their claims are primarily directed at *State officials* acting in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983[.]"). The requested injunctions seek to bar the Governor and Attorney General from enforcing the two challenged statutory amendments. Moreover, § 1983 is not necessary for actions under the New Hampshire Constitution and Defendants do not, and cannot, point to any case law barring Plaintiffs from asserting constitutional claims against the State under the State Constitution. Moreover, the primary thrust behind counts II and III are the State Constitution's guarantees under Part I, Article 23 (impairment of contracts) and Part I, Articles 2 and 12 (equal protection). That the State's conduct also violates federal constitutional principles is instructive and supportive of the primary State law claims. *See, e.g.*, *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.*, 159 N.H. 627, 641 (2010) (recognizing that "article I, section 10 [of the United States Constitution] and part I, article 23 [of the State Constitution] . . . offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract").

Similarly immaterial is Defendants' argument that Plaintiffs cannot obtain injunctive relief against the State as a body politic. While Plaintiffs believe the State as a body politic is an appropriate defendant in this case—inasmuch as the other two individual defendants are purportedly acting on behalf of "the State"—the requests for injunctive relief are specifically

targeted to the two State officials acting in their official capacities: the Governor and the Attorney General. Defendants' motion to dismiss on this ground serves no constructive purpose.

Defendants additionally argue that Plaintiffs have not suffered any harm warranting injunctive relief because, even absent a fair and impartial Settlement Fund, Plaintiffs can still pursue a remedy in court. That may be true theoretically, but that supposition does not mitigate the significant irreparable harm that Plaintiffs, and the class they represent, will surely suffer if Defendants are permitted to enforce the challenged amendments. As the Court heard at the two preliminary injunction hearings, Plaintiffs and the class could be set back by many years in their quest for justice, not to mention the emotional and psychological trauma they are suffering and will continue to suffer by virtue of the State's betrayal and the further delay caused by the State's underhanded maneuvering. As Dr. Dylan Gee testified, the combination of the betrayal, the added trauma, and the further delay will likely cause many claimants to give up on any hope for justice.

Finally, Defendants' argument to dismiss the class claims is procedurally misplaced. The parties are separately briefing Plaintiffs' Class Motion and Defendants have already filed an objection to that motion. This Court should reject this aspect of Defendants' present Motion for all the reasons provided in Plaintiffs' Class Motion, particularly the arguments regarding predominance. *See* Class Mot. ¶¶ 26-45.

Additionally, the Court should reject Defendants' further (and repeated) attempts to mischaracterize Plaintiffs' claims. For example, as they argued in opposition to Plaintiffs' request for a preliminary injunction, Defendants again assert that the class will not suffer harm because no Settlement Fund claimant is "guaranteed" any award from the Administrator and the Attorney General's new ability to reject a Settlement Fund award is no different from his ability to reject settlement proposals in any other civil case. This straw man argument simply avoids honestly

confronting the claims asserted. Through this lawsuit, Plaintiffs (and the proposed class) are not seeking any specific monetary awards; they are only seeking specific performance of their contract with the State, which promised a fair and impartial settlement and arbitration *process* under the terms that existed at the time that each member of the class filed their respective claims (i.e., all before July 1, 2025). The fact that the Attorney General has discretion to reject settlement proposals outside of the Settlement Fund process only illustrates one aspect of the deal that was struck at that time—the State agreed to surrender the Attorney General's settlement authority to the Settlement Fund Administrator, who would determine fair and appropriate settlements in accordance with the Settlement Fund Act and the implementing procedures and guidelines.

Defendants also speculate that there are claimants who would "otherwise reject an award made by the Administrator." Defs.' Obj. ¶ 13. But obviously most, if not all, claimants in the proposed class are open to settling their claims within the parameters of the Settlement Fund guidelines and caps. If that were not so, they would never have filed a claim or would have withdrawn before now. If they were not open to settlement, it would not make any sense for them to remain in the Settlement Fund with their underlying lawsuits remaining stayed. That does not mean every claimant will accept their Settlement Fund offer, but history has shown that, until the challenged amendments became effective on July 1, 2025, the overwhelming majority did.

Similarly flawed is Defendants' circular argument that claimants who would resolve their claims by agreement with the Attorney General are not harmed by the amendments. *See id*. There is no way to know, today, which remaining claimants (if any) might settle directly with the Attorney General instead of submitting their claims to the Administrator. It very well may be the case that, following the amendments, more claimants will choose to settle directly with the Attorney General because they see no utility in submitting to the arbitration process before an

Administrator who is controlled by the Governor and whose decisions can be vetoed by the Attorney General in any event. Claimants may reasonably conclude that the Attorney General's offer is the best offer they can hope to get and going through the charade of a resolution proceeding is not worth additional delay, inconvenience, and suffering. But that would only prove the irreparable harm—the amendments effectively destroyed the impartial arbitration process, which the State offered to claimants to induce them to enter the Settlement Fund and stay their lawsuits.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

Dated: September 2, 2025

Respectfully submitted,

PLAINTIFFS ANDREW FOLEY, RONALD "CHUCK" MILES, and JANE DOE #231 (on behalf of themselves and all those similarly situated)

By their attorneys,

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CERTIFICATE OF SERVICE

I certify that on September 2, 2025, I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's e-filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case.

/s/ W. Daniel Deane
W. Daniel Deane, Esq.