THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket #2015--0366

New Hampshire Right to Life and Jackie Pelletier

v.

New Hampshire Director of Charitable Trusts Office, et als

REPLY BRIEF OF NEW HAMPSHIRE RIGHT TO LIFE AND JACKIE PELLETIER

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Oral Argument Requested to be Argued by Michael J. Tierney, Esq.

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I. The Common Interest Privilege Does Not Exempt From Disclosure Documents or Communications the State Had or Shared With Third Parties

The State now argues, for the first time on appeal, that documents withheld under the work product privilege need not be disclosed because "the State had 'common interests in developing legal theories' with the various reproductive health clinics, as well as with other state's Attorney General's Offices in anticipation of the federal litigation." State's Brief, p. 13. This argument was not raised before the Superior Court and therefore should be considered waived. *Sullivan v. Town of Hampton Bd. of Selectmen*, 153 N.H. 690, 695 (2006) ("It is well established that we will not consider issues raised on appeal that were not presented in the trial court.") Even if the State had raised the argument below, the facts of this case do not support a finding of a common interest with the abortion clinics[1] nor other state Attorney General's Offices.

a. Abortion Clinics Were Not Parties in a Pending Action With the State

In New Hampshire,[2] the common interest privilege only protects communications between "the client's lawyer or representative of the lawyer to a lawyer or representative of a lawyer representing ***another party in a pending action*** and concerning a matter of common interest therein." N.H. R. Evid. 502(b)(3). The State asserts the documents and communications with the abortion clinics were all relevant to the pending case of *Sister Mary Rose Reddy, et al. v.*

[1] The State has withheld emails its attorneys had with Jennifer Frizzell, the Vice President of Planned Parenthood as well as with Dalia Vidunas of the Concord Feminist Health Clinic. Appx. 475 (Docs W 1475-1476). In addition to work product privilege, the State alleged an attorney client privilege with Ms. Frizzell and Ms. Vidunas. Nevertheless, the state acknowledges in its Brief that PPNNE was not its client. State's Brief, p. 9. It should go without saying that Concord Feminist Health Center was also not the State's client and the State erred in claiming an attorney client privilege for its communications with either PPNNE or the Concord Feminist Health Clinic.

[2] In its Brief, the State ignores the New Hampshire Rules of Evidence and instead cites two out of state case not determinative of the application of the privilege in New Hampshire. See *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982). Nevertheless, in neither case cited by the State did the Court find that the common interest criteria had been met. In both cases, the documents a third party shared with a government entity were held not to be protected by work product privilege.

Joseph Foster, et al., Case No. 14-CV-00299 (D.N.H.). State's Brief, p. 7. Nevertheless, none of the abortion clinics, such as Planned Parenthood, are even parties in that federal case. The State acknowledges in its Brief that Planned Parenthood was not a party to the federal litigation. Appx. 9. Therefore, even if the State had raised the issue below, it would not have been able to meet its burden of showing its communications were with another party in a pending action.

b. Abortion Clinics Do Not Share Common Interests With the State of New Hampshire

As the party resisting disclosure, the State has the burden of showing the privilege applies. The State does not identify what "matters of common interest" it purports to share with abortion clinics who are not parties to the federal case. While it is undisputed that the State has provided millions of dollars of grants to Planned Parenthood over the years and Planned Parenthood has made hundreds of thousands of dollars in campaign contributions to certain State officials, see Appx. 49, this common financial interest is not relevant to the federal case upon which the State now asserts a common interest. The federal case concerns whether the State violated the First Amendment's free speech guarantees by restricting the speech of some but not all speakers on public sidewalks. Presumably, the State should have a common interest with the members of the public who want their free speech rights on public sidewalks protected and not private businesses looking to silence that speech. The State has not met its burden of showing the withheld documents concerned "matters of common interest" with the abortion clinics.

c. Other State Attorney General Offices Were Not "Another Party in Pending Litigation" With the State of New Hampshire

Similarly, the State is unable to identify any pending litigation where the other states with whom it shared documents were also parties.

d. Other State Attorney General Offices Do Not Share Common Interests With the State of New Hampshire

The State asserts that it had "common interests in developing legal theories . . . with other state's Attorney General's Offices" State's Brief, p. 13, but does not identify any matters in which other States had common interest with the State of New Hampshire. Furthermore, the State neither identifies the other states it corresponded with nor the dates of those communications to show that these were "all with an eye toward preparing its case for federal court." State's Brief, p. 13. The State represented to the Superior Court that the communications with other states number over 250 pages in length and include "attachments containing draft amicus briefs." Appx. 471 (Documents (w) 36-294). The fact that no amicus brief was filed indicates a likely determination that there was no mutuality of interests between the states.[3] Regardless, the burden is on the State to show that commonality of interest. When "a public entity seeks to avoid disclosure of material under the Right to Know Law, that entity bears a heavy burden to shift the balance toward non-disclosure." *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7, 11-12 (2011). The State has not met its burden in this case.

e. The Signed Affidavit of Meagan Gallagher Was Not a Draft Document

In its Brief, the State argues that the signed Affidavit of Planned Parenthood C.E.O Meagan Gallagher was "drafted by both the counsel for the State and PPNNE together . . . [and] is also a draft document" that shows the thought processes of the State's counsel. State's Brief, p. 9-10. These factual assertions are contrary to the documents and the facts as found by the Superior Court. First, the affidavit was sent to the State in final form by Planned Parenthood. See Appx. 84. Although it appears that the State had asked for an affidavit from Planned Parenthood, there

[3] There was a brief temporal window between when the federal case was filed on July 7, 2014 and the federal case was stayed on July 23, 2014. The State represented to the Superior Court that the communications with other states number over 250 pages in length and include "attachments containing draft amicus briefs." Appx. 471 (Documents (w) 36-294). Therefore, it would appear that at least some of these communications may have taken place not with an eye toward New Hampshire's own case as the State Brief now alleges but rather toward Massachusetts's case of *McCullen v. Coakley* for which the states of New York and Michigan had filed amicus briefs in support of the state of Massachusetts in late 2013 and early 2014. New Hampshire was not a party nor amicus in the *McCullen* case.

is no evidence the State's attorneys drafted it. See Appx. 84. Second, the Superior Court described the affidavit as containing "some purely factual information, but it also contains policy statements and opinions of the affiant" C.E.O. Meagan Gallagher. Add. 9. The Superior Court held that the affidavit contained the opinions of Ms. Gallagher, a third party, not the mental processes of the State's attorneys. The State in its Brief does not deny that it is withholding purely factual information but rather argues that "even disclosing 'purely factual information' would jeopardize the State's litigation strategy." State's Brief, p. 11.[4] The work product privilege does not exempt disclosure under RSA 91-A the "purely factual information" contained in the affidavit. The work product privilege also does not exempt from disclosure C.E.O. Gallagher's "policy statements and opinions" contained in the affidavit. Finally, even if Planned Parenthood could assert the work product privilege on behalf of documents it created, it waived any work product privilege when it shared its CEO's affidavit with attorneys for the State. Appx. 84. The State was not representing Planned Parenthood in the federal litigation and PPNNE was not even a party in the federal litigation. Pursuant to RSA 91-A, the Superior Court should have ordered disclosure of the Gallagher Affidavit at (w) 305-306. See Appx. 472.

II. Negligible Privacy Interest of Videos of a Public Sidewalk is Insufficient Overcome Even the Smallest Public Interest in Disclosure

In its Brief, the State argues that it withheld disclosure of a video of a public sidewalk on the basis of "the confidential nature of the identity of PPNNE patients and clients." State's Brief, p. 14. There is no privacy interest in what can be seen from a public sidewalk.

On the other hand, the public has an interest in disclosure of these videos. These videos were discussed during legislative hearings on the repeal of the abortion clinic buffer zone and were the State's evidence in a federal case of why it felt it was necessary to restrict citizen's free speech

[4] The "purely factual information" that the State is seeking to withhold from the public has already been selectively disclosed to Planned Parenthood, thereby waiving any exemption that may have otherwise existed.

rights on public sidewalks outside abortion clinics. Appx. 196. The buffer zone statute's stated purpose was to remedy alleged problems at "recent demonstrations outside of reproductive health clinics." 2014 N.H. Laws 81:1(I)(e-g). When weighing the small or non-existent privacy interest in videos of a public sidewalk against the great public interest in disclosure, it is clear that the public interest in disclosure outweighs any privacy interest.

III. The Controversial Nature of State Funding of Abortion Clinics Buttresses the Necessity of Public Disclosure, Not Secrecy

There is great public interest in how state taxpayer dollars are spent. See *Brock v. Pierce County*, 476 U.S. 253, 262 (1986); *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1192 (11th Cir. 2007); *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"). NHRTL has requested, pursuant to RSA 91-A, documents from the State regarding the budgets, funding and regulation of the taxpayer funded abortion clinics. In its Brief, the State argues, without any support, that "the fact that much of what these reproductive health clinics do is highly controversial . . . buttresses the argument that the privacy interests of the employees [and budgets of how the clinics will spend taxpayer dollars] must be protected." State's Brief, p. 17. The controversial nature of state taxpayer funding of abortion clinics does not buttress the alleged privacy interest but rather the public interest in disclosure. In fact, the controversial nature of Planned Parenthood selling baby parts was cited as one reason why the New Hampshire Executive Council recently denied additional funding to Planned Parenthood. The State should not be subsidizing organizations that profiteer in these controversial activities.

In addition, the State erroneously argues "the financial documents provide very little, if any, information about how state grant money was spent, and thus, show only the conduct of the clinics themselves, not any government conduct." State's Brief, p. 20. This is not true. Budgets

of taxpayer funded clinics show how the taxpayer funds will be spent and provide insight as to whether the taxpayer should continue to subsidize these operations. In this case, the redacted budget forms show how the $74,500 in State grant funds was to be spent for each grant year. Appx. 611-612. Other redacted budget and financial statements show that 87.5% of Program Director Brigit Ordway's salary and 87.47% of Assistant Program Director Donna Denny's salary is being paid for by state funds even though the redacted portion of financial statements shows that $306,880.25 of its $496,256.26 total income, or 62%, is related to abortions.[5] See Appx. at 607, 601. The public has an interest in knowing whether publicly subsidized entities are properly spending taxpayer dollars.

Finally, the State suggests that the public interest in disclosure "must reveal some information about the State's activities . . . [not] in exposing potential government corruption . . . [in] the Office of the Governor, to whom this Right-to-Know request was not directed upon." State's Brief, p. 18. The Governor and the Office of the Governor are part of the State of New Hampshire and disclosure of financial transactions between Health and Human Services, the AGO, the Board of Pharmacy or the Governor's Office are all relevant to the public interest. If the Office of the Governor was a separate entity from the State, as suggested by the State in its Brief, then the State could not allege attorney client privilege for communications between Governor's Counsel, Attorney Hodder, and the Attorney General, Joseph Foster, as it has asserted. See Appx. 471-475, (w 17, 1389-1397, 1399-1401, 1406-1415, 1416, 1418, 1420).

IV. The State's "Table of Contents" Did Not Provide Sufficient Specificity to Allow NHRTL to Contest Withholdings

The State acknowledges in its Brief that it had the obligation to provide NHRTL with "'a relatively detailed justification, specifically identifying the reasons why a particular exemption is

[5] The first line shows medical abortions are $49,208.77 while surgical abortions are $257,671.48. Appx. 601.

relevant and correlating those claims with the particular part of a withheld document to which they apply.'" State's Brief, p. 25 quoting *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 549 (1997). The State then argues that "it is clear that the table of contents provided by the State was sufficient and enabled the Appellants to contest or object to the redactions or the withholdings." State's Brief, p. 26. The State's "Table of Contents," Appx. 471-475, does not contain a detailed justification nor allow one to contest the withholdings.

First, the Table of Contents, submitted by the state on April 17, 2015, did not provide any opportunity to contest or object as it was not provided until several months after the January 13, 2015 merits hearing and the February 2, 2015 deadline for submission of briefing on the applicability of the withholdings. See Appx. 466. Although NHRTL had requested the reasons for the State's withholdings early on, the State repeatedly refused to identify the documents it was withholding. See Appx. 92-94, Appx. 6, ¶¶ 36-39, Appx. 68-69. The State represented to the Court on January 30, 2015 that it was only withholding a "minimal amount of documents." Appx. 187. It was not until April 17, 2015 that the State acknowledged that it was actually withholding a massive 1,460 pages of documents. Appx. 465, ¶ 7.

Second, the Table of Contents did not provide dates of any of the documents withheld. The dates of documents could have been relevant in determining the applicability of the claimed exemptions. For example, the State withheld 16 pages of Board of Pharmacy investigation materials even though the Board of Pharmacy investigation closed on October 26, 2012 and NHRTL's request was only for documents since July 1, 2013. See Appx. 72, 110. Therefore, the date of the documents could impact the applicability of the exemption. Furthermore, the State has withheld several communications between state officials and "former Governor's counsel Lucy Hodder." Appx. 472-475. Attorney Hodder was Planned Parenthood's attorney

prior to going to work for Governor Hassan and then left the Governor's office in January 2015. The description provided by the State does not identify when the communication was sent so it could not be determined whether Attorney Hodder was currently representing Planned Parenthood, the Governor, or had left the Governor's office. Similarly, the State had also declined to provide dates of its communications with other states that also could be relevant as to whether these communications could be withheld. See Appx. 471 ((w) 36-294).

Finally, the description provided in the State's Table of Contents are not a "'detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply'" as the State argues on page 25 of its Brief. For example, the State lumps 250 pages of "various DOJ employees" communications with "other states Attorney Generals Offices" without even identifying which other states. Appx. 471 ((w) 36-294). The State also withholds over 1,000 pages of documents alleging that they are "work product" but providing no basis to determine how many of these withheld documents could constitute mental impressions of attorneys as opposed to purely factual information. Appx. 472 (w 307-1388.) The State asserts many of these documents "are also publicly available" but does not identify which documents are being withheld as work product or why their public availability precludes disclosure under RSA 91-A. Appx. 472 (w 377-611). In its Brief, p. 12, the State asserts "Simply put, the materials gathered or correspondence generated by counsel while preparing for litigation is protected attorney work product." This broad conclusion is eerily similar to the argument put forth by the AGO but rejected by this Court in *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579, 583 (2006), where the State argued anything in the police investigative file was protected. In *Murray*, this Court recognized that "merely because a piece of paper has wended its way into an

investigative dossier created in anticipation of enforcement action, an agency ... cannot automatically disdain to disclose it." Id. at 583. Likewise, merely because a document has wended its way into a file at the AGO's office does not mean that the State can automatically disdain to disclose it.

Many of the documents withheld by the State could very well have been exempt from disclosure under RSA 91-A and/or NHRTL might not have challenged the withholding if NHRTL was given a sufficient description to analyze the validity of the State's claimed exemptions. Nevertheless, NHRTL was provided only with a statement that the State was withholding an unknown number of documents for various unknown reasons which "includes but is not limited to personal contact information and attorney work product." Appx. 24. This did not meet the statutory requirement to "deny the request with reasons." RSA 91-A:4, IV.

V. Costs Should Have Been Awarded for the State's Violation of RSA 91-A

The State argues in its Brief that costs should not have been awarded because "Although the trial court did, in fact, order some information to be disclosed, there was no ultimate finding that a violation occurred." State's Brief, p. 27. In fact, the Superior Court specifically stated "the Court has held that certain withholdings and redactions by the State do not meet the Right-to-Know Law." Add. 34. This finding and the fact that the documents were only produced after Court order is sufficient to require an award of costs.

VI. Fees Should Have Been Awarded For the State's Delayed Disclosures

It is undisputed, and the State acknowledges in its Brief, p. 23, that the State did not comply with RSA 91-A's time limitations. "The time period for responding to a Right–to–Know request is absolute." *ATV Watch v. New Hampshire Dep't of Res. & Econ. Dev.*, 155 N.H. 434, 440 (2007). It is undisputed that on September 11, 2014, NHRTL requested financial data including

reports regarding Concord Feminist but that these documents were not produced until December 4, 2014, more than a month after NHRTL filed its Complaint on October 20, 2014. The State seeks to excuse its delayed disclosure by arguing "documents had not yet been processed by the DCT Office and it was unknown that they were even in the State's possession at the time." State's Brief, p. 23. The State's recitation of the facts is contradicted by the State's own documents. The Concord Feminist financial records are clearly marked as having been received by DCT on August 18, 2014. Appx. 133. The State knew or should have known that the records should have been produced when requested on September 11, 2014[6] and the Superior Court erred in failing to find this twelve week delayed disclosure a knowing violation.

Respectfully submitted,

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Dated: November 16, 2015

Certificate of Service

I hereby certify that two (2) copies of this brief have been forwarded by First Class mail to Megan A. Yaple, Esq. and Lynmarie C. Cusack, Esq., Civil Bureau, New Hampshire Office of Attorney General, 33 Capitol Street, Concord, NH 03301-6397.

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[6] NHRTL did not show up unannounced on September 11, 2014 but had requested on September 4, 2014 that the DCT identify a time when the documents could be compiled for Mr. Wuelper's review. See Appx. 80.