THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

OCTOBER SESSION

Case No: 2022-0348

RYAN HARDY & MATTHEW O'CONNOR

v.

CHESTER ARMS, LLC, & A.

REPLY BRIEF FOR THE PETITIONERS

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TEXT OF RELEVANT AUTHORITIES & STATUTES

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New Hampshire R.S.A. 135-C:27:

A person shall be eligible for involuntary emergency admission if he is in such mental condition as a result of mental illness to pose a likelihood of danger to himself or others.

I. As used in this section "danger to himself" is established by demonstrating that:

(a) Within 40 days of the completion of the petition, the person has inflicted serious bodily injury on himself or has attempted suicide or serious self-injury and there is a likelihood the act or attempted act will recur if admission is not ordered;

(b) Within 40 days of the completion of the petition, the person has threatened to inflict serious bodily injury on himself and there is likelihood that an act or attempt of serious self-injury will occur if admission is not ordered; or

(c) The person's behavior demonstrates that he so lacks the capacity to care for his own welfare that there is a likelihood of death, serious bodily injury, or serious debilitation if admission is not ordered.

(d) The person meets all of the following criteria:

(1) The person has been determined to be severely mentally disabled in accordance with rules authorized by RSA 135-C:61 for a period of at least one year;

(2) The person has had at least one involuntary admission, within the last 2 years, pursuant to RSA 135-C:34-54;

(3) The person has no guardian of the person appointed pursuant to RSA 464-A;

(4) The person is not subject to a conditional discharge granted pursuant to RSA 135-C:49, II;

(5) The person has refused the treatment determined necessary by a mental health program approved by the

department; and
(6) A psychiatrist at a mental health program approved by the department has determined, based upon the person's clinical history, that there is a substantial probability that the person's refusal to accept necessary treatment will lead to death, serious bodily injury, or serious debilitation if admission is not ordered.
II. As used in this section "danger to others" is established by demonstrating that within 40 days of the completion of the petition, the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another…… 14

New Hampshire R.S.A. 135-C:28:

I. The involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner. The commissioner shall maintain a list of physicians, PAs, and APRNs, as defined in RSA 135-C:2, II-a, who are approved by either a designated receiving facility or a community mental health program approved by the commissioner. The admission may be ordered upon the certificate of an approved physician, approved PA, or approved APRN, as defined in RSA 135-C:2, II-a, provided that within 3 days of the completion of the petition the physician, PA, or APRN has conducted, or has caused to be conducted, a physical examination if indicated and circumstances permit, and a mental examination.

The physician, PA, or APRN must find that the person to be admitted meets the criteria of RSA 135-C:27. The certificate shall state the time and, in detail, the nature of the examinations conducted. The certificate shall also state a specific act or actions the physician, PA, or APRN has actually observed or which have been reported to him or her by the petitioner or a reliable witness who shall be identified in the certificate, and which in the physician's, PA's, or APRN's or designee's opinion

satisfy the criteria set forth in RSA 135-C:27. The physician, PA, or APRN shall inform the person of the designated receiving facility in the mental health services system that he or she will be transported to upon the facility location being identified. The admission shall be made to the facility which can best provide the degree of security and treatment required by the person and shall be consistent with the placement principles set forth in RSA 135-C:15.

As used in RSA 135-C:27-33, "petitioner" means any individual, including a physician, PA, or APRN completing a certificate, who has requested that a physician, PA, or APRN conduct or who has conducted an examination for purposes of involuntary emergency admission. Every certificate shall be accompanied by a written petition signed by a petitioner.

II. Upon request for involuntary emergency admission by a petitioner, if the person sought to be admitted refuses to consent to a mental examination, a petitioner or a law enforcement officer may sign a complaint which shall be sworn to before a justice of the peace. The complaint shall be submitted to the justice of the peace with the petition. The petition shall state in detail the acts or actions of the person sought to be admitted which the petitioner has personally observed or which have been personally reported to the petitioner and in his or her opinion require a compulsory mental examination. If the justice of the peace finds that a compulsory mental examination is necessary, the justice may order the examination.

III. When a peace officer observes a person engaging in behavior which gives the peace officer reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that unless the person is placed in protective custody the person poses an immediate danger of bodily injury to himself or others, the police officer may place the person in protective custody.

Any person taken into protective custody under this

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paragraph shall be transported directly to an emergency room of a licensed general hospital or to another site designated by the community mental health program serving the area, for the purpose of determining if an involuntary emergency admission shall be ordered in accordance with RSA 135-C:28, I. The period of protective custody shall end when a physician, PA, or APRN makes a determination as to whether involuntary emergency admission shall be ordered or at the end of 6 hours, whichever event occurs first……. 14

New Hampshire R.S.A. 541-B:19:

I. Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to…

(b) Any claim based upon an act or omission of a state officer, employee, or official when such officer, employee, or official is exercising due care in the execution of any statute or any rule of a state agency. …… 10

27 C.F.R. § 478.11

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) Is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

18 U.S.C. § 922(g)(4):

(g) It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
(5) who, being an alien--
(A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
(6) who has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;
(8) who is subject to a court order that--
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging

in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (CXD includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce……. 15

18 U.S.C. § 922(t)(6)

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm…….. 10, 11, 13, 15, 16

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OTHER AUTHORITIES

ARGUMENT

I. THE SUPERIOR COURT WRONGLY GRANTED SUMMARY JUDGMENT WHERE THE DEPARTMENT OF SAFETY DID NOT ACT WITH REASONABLE CARE TO SUPPORT THE IMMUNITY UNDER R.S.A. 541-B:19.

The Plaintiffs rely on and incorporate their Brief, at pages 18-51, in response to the Department of Safety's (NHDOS) Brief. However, NHDOS included an argument that NHDOS is entitled to immunity under 18 U.S.C. § 922(t)(6), which must be addressed.

In the Department of Safety's Brief before this Honorable Court, the Defendant asserts that it is immune from suit for failing to submit information to the NICS database because of the federal statute, 18 U.S.C. § 922(t)(6). NHDOS Brief at 28. While NHDOS presented this argument, and the Plaintiffs argued NHDOS was not entitled to immunity through pleadings before the Superior Court, the Superior Court did not address this argument and whether NHDOS is entitled to immunity under 18 U.S.C. § 922(t)(6) is not an issue before this Court.

a. Introduction

For the sake of arguendo, the State is not entitled to immunity for two reasons. First, the State is not a "local government" that is designed to be protected by the statute. Second, Gun Line employees responsible for providing information to the NICS database did not add any information that was then erroneously used to prevent Ian MacPherson from purchasing a firearm. The suggestion that NHDOS is entitled to immunity pursuant to 18 U.S.C. § 922(t)(6) is inaccurate; NHDOS is not entitled to this immunity.

The State accurately quoted the pertinent sections of the federal statute, but it failed to include the interpretive judicial intent and effect of the law. *See*, Sanders, *et al* v. United States of America, 937 F.3d 316, 333-334 (4th Cir. 2019). The Fourth Circuit has clearly held that the referenced immunity provision contained within 18 U.S.C. § 922(t)(6) is limited to a local government or to an employee of a local government who is responsible for providing information to the NICS database and where information is added to the federal database, which is then relied upon to wrongfully withhold the sale of a firearm. *Id*. at 335. The referenced statute does not contemplate immunity where a state government does not provide information to the federal database. *Id*. A local government cannot be legally liable where it supplied information to the NICS database which is the basis for an action at law. *Id*.

b. The State Is Not a "Local Government" and Is Not Immune Under 18 U.S.C. § 922(t)(6).

As the Supreme Court of Idaho recently found, the Brady Act does not grant immunity to the State and its agencies. *See*, Von Lossberg v. State, 170 Idaho 75, 506 P.3d 251, 257 (2022). The Idaho Supreme Court noted that 18 U.S.C. § 922(t)(6) only lists a "local government" as being immune, and not the "state government" or a "federal government." *Id*. at 256. Importantly, the Court found that "[i]n drafting the Brady Act, Congress was certainly aware of the general governmental distinctions used to categorize the types of government employees entitled to immunity, but it only granted immunity to one of those types of government entities: local government. Neither state nor federal governments were included." *Id*. at 257. The State is not immune.

c. The State Is Not Immune Because the Employees Responsible for Providing Information to NICS Did Not Provide Any Information.

An employee of a state government or federal government is entitled to the immunity if they were responsible for providing information to NICS, and, in relying on that information, either failed to prevent the sale of a firearm or prevented a sale to a person who may lawfully receive or possess a firearm. There is no information that NHDOS supplied information to the NICS database, which was the basis of an action at law. In fact, the Department **did not add any information** to the federal database.

The Plaintiffs have pointed out that the State received reliable information from a New Hampshire police department, and the Department of Safety had access to additional information from the Merrimack, New Hampshire Police Department that Mr. MacPherson had, in fact, been involuntarily committed to the New Hampshire State Hospital. Apx. I at 1119-21;[1] Plaintiffs' Brief at 36. The Merrimack Police Department was part of that involuntary commitment process such that they delivered Mr. MacPherson to a mental health provider who found, under the appropriate New Hampshire statute, that Mr. MacPherson was suffering a psychosis and was a danger to himself and others. Apx. I at 1121. Members of the Merrimack Police Department were witnesses which they documented in a police report that was available to the Department of Safety. *Id*. The Department of Safety never inquired of the Merrimack Police Department nor requested any information from the Merrimack Police Department as to

[1]All cites to Apx. I herein refer to Appendix I filed with the Plaintiffs' Brief on October 7, 2022.

whether Mr. MacPherson had ever been involuntarily committed to a mental facility, as known to that police department. Apx. I at 1079; Plaintiffs' Brief at 25.

All of this aside, NHDOS did not submit any information to NICS which, in turn, is the basis of the Plaintiffs' causes of action against NHDOS. Had NHDOS added information to the NICS database, and if the supplied information was wrong or inappropriate to submit, then in that setting, NHDOS may have the protection of the 18 U.S.C. § 922(t)(6) immunity. *See*, 18 U.S.C. § 922(t)(6)(B). The Plaintiffs' claims have alleged wrongdoing because NHDOS did not enter any such data – but they should have done so. No immunity is available to NHDOS because there are no such allegations that NHDOS provided some erroneous information to the federal database. The State failed to enter information into the federal database even though NHDOS had information that it should have entered into the database.

The Department of Safety received significant information from law enforcement officials about Ian MacPherson's mental state, including his delusions, which was contemplated by the actual contacts that the Merrimack Police Department had with Ian MacPherson. Plaintiffs' Brief at 25; Apx. I at 1057; 1089; 1095. Had this information been inaccurate and entered into NICS, then NHDOS (and the employees) may have been protected under 18 U.S.C. § 922(t)(6). There is no basis for NHDOS to gain immunity since NHDOS did not provide this information. *See*, Sanders, *supra*, at 333-34.

The Department of Safety breached its duty of care owed to the public and to Officers Hardy and O'Connor as it did absolutely nothing to

investigate whether Ian MacPherson was a mental defective or whether he had been involuntarily committed to a mental institution. These issues had to be addressed by the Gun Line employees, as they could have reasonably researched the issues. In reality, there were communications with the Merrimack Police, but the Gun Line employees failed to ask the Merrimack Police officers if they were aware of, or had access to, information as to whether Ian MacPherson was adjudicated as a mental defective or involuntarily committed. Apx. I at 1099-1101; Plaintiffs' Brief at 27.

Gun Line was familiar with the federal standards as this was Gun Line's primary focus of its day-to-day activities for the benefit of gun dealers and the public. We now know that the Merrimack Police officers were involved with an involuntary commitment of Ian MacPherson, and we know that Mr. MacPherson was adjudicated as a mental defective where he was found to be a danger to himself and to others in New Hampshire and Illinois. *See*, Plaintiffs' Brief at 35-36.

The Plaintiffs also respectfully disagree with the Department of Safety's suggestions that Mr. MacPherson was not adjudicated as a mental defective by a court or an authorized physician under New Hampshire law. Mr. MacPherson was involuntarily committed to the New Hampshire State Hospital for mental health reasons because he was a threat to himself and to his father. R.S.A. 135-C:27-28; Plaintiffs' Brief at p. 36. The Merrimack District Court, on more than one occasion, required that Mr. MacPherson undergo mental health assessments in order to determine if he should be involuntarily committed to a mental hospital and, in order to require the mental health assessments, the district court determined that Mr.

MacPherson was a "mental defective" as these terms are described in the federal law. *See*, 18 U.S.C. § 922(g)(4).

Adjudicated as a mental defective is broader than the disqualifier which applies to a person who has been involuntarily committed. Apx. I at 1085-87. "ATF interprets **'adjudicated as a mental defective' to include anyone adjudicated to be a 'danger to him or herself,' 'a danger to others;' or lacking 'the mental capacity to contract or manage their own affairs.' For purposes of federal law, 'danger' means any danger, not simply 'imminent' or 'substantial' danger as is often required to sustain an involuntary commitment under state law**. **Thus, for example, adjudication that a person was mentally ill and a danger to himself or others would result in a federal firearms disability, whether the court-ordered treatment was on an inpatient or outpatient basis**. **This is because the adjudication itself (a finding of danger due to mental illness) is sufficient to trigger disability**. ". . . **[W]hether a person has been adjudicated a mental defective or committed to a mental institution, the firearms disability is permanent**." Apx. I at 1087. (Emphasis supplied.) *See also*, 27 C.F.R. § 478.11. Along with the findings in New Hampshire, the Illinois hospitalization was an adjudication that MacPherson was a mental defective which barred the firearm transfer; the Superior Court wrongly considered the effect of this evidence.

The immunity set out within 18 U.S.C. § 922(t)(6) provides no protection to NHDOS as NHDOS did not enter any of the information into NICS. There has been no suggestion that the State entered wrongful information or somehow that the introduction of information into the database served as the underpinnings for a cause of action. 18 U.S.C. § 922

(t)(6) also does not consider a State government to have immunity, only local government. The argument that the State is entitled to this immunity is entirely without support.

CONCLUSION

The Department of Safety should not be granted immunity as summary judgment was not appropriate. With regard to immunity under 18 U.S.C. § 922(t)(6), the issue should be remanded to the Superior Court.

Respectfully submitted,

Ryan Hardy & Matthew O'Connor
By and Through Their Attorneys,

Dated: December 19, 2022

By: */s/Mark D. Morrissette*

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CERTIFICATE OF SERVICE

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

/s/Mark D. Morrissette
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CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Reply Brief do not exceed the maximum of 3,000 words.

/s/ Mark D. Morrissette
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