THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0563

C.M. a/p/n/f of M.M. and J.M.

v.

State of New Hampshire, Department of Health and Human Services, Division of Children, Youth and Families, Court Appointed Special Advocates of New Hampshire, Inc.

Appeal Pursuant to a Petition for Original Jurisdiction Under Supreme Court Rule 11 From the Merrimack County Superior Court

BRIEF OF APPELLEE C.M. A/P/N/F OF M.M. AND J.M.

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Oral Argument Requested. Attorney Harris will argue.

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STATEMENT OF THE CASE

On November 25, 2014, JM and MM, then respectively five and seven years of age, witnessed their biological mother beat their three-year-old sister into unconsciousness. They then watched as their sister lay lifeless on the floor. Hours later, someone called for an ambulance. Their sister, B, was declared dead. JM's and MM's biological mother was convicted of murdering her young daughter and is serving her sentence in the State Prison.

Over their short lifetimes before their sister's murder, JM's and MM's biological mother and her boyfriend had also repeatedly abused and neglected JM, MM and their older brother A. In the absence of B's death, this sad fact would likely have been ignored. B's death, however, focused attention on how the abuse and neglect could have been prevented and B's brutal death averted. The investigation that followed showed that a multitude of individuals had, as required by law, reported the perceived abuse and neglect to the New Hampshire's Division of Children Youth and Families ("DCYF"). As recounted in the Complaint, DCYF, by its multiple failures to follow its own guidelines, did not adequately follow up on these reports and therefore did not intervene to protect the children as was its duty. The result of DCYF's errors and omissions was that JM and MM suffered needless physical and psychological harm, the effects of which will continue to haunt them throughout their lives.

The State sought to dismiss this case. It argued to the Trial Court, and continues to assert in this appeal, that the legislature meant for its waiver of sovereign immunity in RSA 541-B:14, IV to be constricted by an

unyielding three-year limitations period.[1] As applied in this case, the State's claim is that the two boys, or someone on their behalf, should have filed this lawsuit, if at all, within three years of their having suffered the harm alleged.

The boys' biological father, CM, filed a Complaint on their behalf on October 10, 2019. The State argues that JM and MM were obliged to have filed their lawsuit by no later than November 25, 2017, when they were respectively ages eight and ten years old, or find a responsible adult to do so for them. Not surprisingly, the State does not explain how the two young boys could reasonably have been expected to meet this burden, especially in the circumstances here where the conduct of the adults responsible for their care necessitated DCYF's involvement.

As this Court previously ruled in a slightly different context involving the so-called "discovery rule," and as the Trial Court explained in denying the State's motion to dismiss, adopting the State's interpretation of the applicable statutes would negate the legislature's purpose in enacting its waiver of sovereign immunity. Such a ruling would also, in the words of the Trial Court, "be a miscarriage of justice." The Court should affirm the Trial Court's ruling.

STATEMENT OF FACTS[2]

MM was born in 2007 and his brother, JM, was born in 2009. Appellant's Appendix, hereinafter "App.," at 4-5. They are the children of

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[1] In the Trial Court, the State also argued that JM and MM had no viable cause of action against the State because the State had no duty to protect them from the harm alleged. The State does not include that argument in its Petition and appears to have abandoned it.

[2] Because discovery has not yet begun, the facts recounted here are all derived from the Complaint and will be further developed if the case is returned to the Trial Court.

CM and the boys' biological mother. *Id.* at 4. At the time of their births, the boys' biological mother had a son, A, who was born in 2005. *Id*. at *5*. After JM and MM were born, their mother had two more children, their now deceased sister, B, and another sister, Q, who were born in 2011 and 2013, respectively. *Id.* CM and the boys' biological mother were divorced in the autumn of 2010. *Id.*

On or about October 10, 2010, CM filed a report with the Manchester Police Department, expressing his concern that the boys' mother was physically abusing A, who was four years old. *Id.* DCYF was notified of this allegation. *Id.* On September 14, 2011, a school guidance counselor made a report to DCYF of physical abuse of A by the boys' mother. *Id.* at 6. An assessment was opened in response to this report. *Id.* The contact notes for this assessment state that there were six prior assessments stemming from reports of alleged physical abuse, sexual abuse and/or neglect, all of which had been closed as "Unfounded." *Id*. In the closing letter for this assessment, dated October 31, 2011, the case worker stated that while the assessment was being closed as unfounded, DCYF nonetheless made various recommendations to the boys' biological mother including that she refrain from the use of physical discipline. *Id.* at 7.

On December 13, 2011, a neighbor reported concerns that JM, MM and A, then aged two, four and six, respectively, were being physically abused and neglected by their mother. *Id.* at 8. Among other things, the neighbor reported that approximately 10-14 days earlier MM had been taken by ambulance due to injuries that the neighbor believed had been inflicted by his mother. *Id*. DCYF opened an assessment in response to this report and an "Additional Information" report was added to the assessment in response to a report by the school guidance counselor on

December 8, 2011, that A had reported that his mother had pulled down his pants and hit him with a hanger. *Id.* at 9. During a home visit as part of the assessment, the boys' mother refused to permit the caseworker to interview the children privately. *Id.*

On March 13, 2012, another Additional Information Report was added to this assessment when the school guidance counselor reported that A had recounted being hit by his mother with a belt. *Id*. When a new allegation of abuse or neglect is made during an open Assessment, DCYF policy 1212 II(B)(4) requires that a new 24-Hour Safety Assessment be completed within 24 hours of the addition of the new allegation into the open assessment. *Id.* According to policy 1212, the purpose is to "define how Child Protective Service Workers and supervisors will respond to information received regarding a new allegation of child abuse or neglect during an assessment and when to consult Central Intake for review and potentially a new assessment." *Id.* at 9-10. In the introduction to policy 1212, DCYF states that "[t]hrough consistent practice in screening allegations and initiating new assessments when necessary, DCYF can determine if there is immediate danger to the child[ren]/youth, identify what the family needs to assure continued safety and promote the well-being of the child[ren]/youth and family, and connect them with resources to promote their well-being." *Id.* at 10.

Just as there is, on information and belief, no Safety Assessment in the DCYF file for the assessment itself, there is no new Safety Assessment in the DCYF file following the addition of the Additional Information Report, in violation of DCYF Policy 1212. *Id.* The closing letter for this assessment, which was determined to be unfounded, recommended, among

other things, that the boys' biological mother utilize non-physical forms of discipline. *Id.*

On October 29, 2013, yet another assessment was opened based on a report from the school nurse regarding "suspicious bruises" on A, followed by another call from the school on November 12, 2013 with concern about the children's wellbeing. *Id.* Nevertheless, this assessment was eventually closed as "unfounded" on January 23, 2014, the same day as the completion of the risk assessment, and long after the sixty (60) day timeframe within which to conclude an assessment required by DCYF policy. *Id.* at 10-11.

On January 9, 2014, DCYF opened an assessment following a report by the children's therapist that she was concerned about MM and JM, then respectively aged six and four years old, after MM told her that his older brother A, then eight years old, had touched his private parts. *Id.* at 11. During a home visit that was conducted as part of this assessment, the mother refused to permit the caseworker to ask the boys about past sexual abuse. *Id.* Although the caseworker asked if she could come back another time because she did not have an opportunity to fully interact with the children, the caseworker never performed a follow-up home visit regarding this assessment. *Id*. This assessment was closed as unfounded on March 12, 2014, with the recommendation that the mother supervise the children at all times due to the injuries they were receiving. *Id.* at 13.

On January 14, 2014, DCYF received a report from the school nurse that one of the children had bruises and a swollen area on the side of his head. *Id.* at 11. The nurse was also concerned that he had been told not to talk to her. *Id.*

On January 17, 2014, a neighbor called the police to report that MM, who had bruises on his face, was standing outside his home and had told her that his parents were in the home and would not open the door. *Id.*

On February 11, 2014, an assessment was opened following a report of neglect and physical abuse of A, who had been seen at school with bruises all over his face and jaw. *Id.* at 12. When questioned by school staff, the boys' mother claimed that she had taken A to the emergency room, but the hospital had no record of having seen A. *Id.* The caseworker created a written safety plan that included taking A to the hospital to see if he had a concussion. *Id.* The mother did not permit the caseworker to speak to the children alone. *Id.* This complaint was closed as unfounded on March 12, 2014, with the recommendation that the mother supervise the children at all times due to the injuries they were receiving. *Id.* at 13.

On the evening of February 11, 2014, the caseworker received a telephone call from the hospital reporting that A was covered with bruises all over his legs as well as over his entire back and had a cut over his eye requiring stiches. *Id.* at 12. The physician's assistant at the hospital related her concerns that the explanation provided for A's injuries—that he had fallen backward on ice, then forward on stairs and then was hit in the face with ice balls—sounded rehearsed. *Id.* The Nashua Police Department ("NPD") was called. *Id.*

On March 10, 2014, an assessment was opened based on a report that JM, then aged four, was found outside alone in sub-freezing weather wearing flip-flops. *Id.* at 13. According to the police, this was the second time JM had been found outside alone by the police. *Id.* The first time was on February 20, 2014. *Id.* The safety plan for this assessment stated that it

would be reviewed on March 27, 2014. *Id.* However, the assessment was closed as unfounded on March 19, 2014. *Id.*

On April 1, 2014, another assessment was opened, following a report of neglect and physical abuse of A, MM, JM, B and Q. *Id.* A was taken to the emergency room where he was noted to have extensive bruising on his arms, legs, left ear, left lower face, chest and back. *Id.* at 14. NPD filed an *ex parte* motion to remove the children from their home, which was granted, and all five children were placed in emergency foster care. *Id.* The New Hampshire Integrated Assessment 24-Hour Safety Assessment of April 3, 2014, concluded that the children were unsafe in their home. *Id.*

On May 5, 2014, the boys' mother and her boyfriend were arrested and were charged with allegedly assaulting A. *Id.* While the children were living at the foster home, the social worker interviewed the children, who all described verbal and physical abuse and neglect at the hands of their mother and/or her boyfriend. *Id.* On April 11, 2014, a CASA-NH guardian ad litem was appointed for each of the children. *Id.*

During May, 2014, multiple hearings took place. *Id.* Among the issues raised by the mother's attorney was DCYF's failure to timely respond to discovery requests. *Id.* Ultimately, the court found that DCYF had failed to meet its burden of proof regarding its petition for abuse and neglect, and the petition was dismissed. *Id.* at 15. By June 16, 2014, all five children were again living with their mother. *Id.* Because the court had dismissed the petition, DCYF closed the assessment as "unfounded" although the risk assessment was completed with a finding that the risk is "very high," and that NPD continued to have concerns about the children living with the mother and her boyfriend in light of the unexplained injuries

and the criminal charges still pending against them for assaulting the children. *Id.*

On June 25, 2014, NPD Detective Nicole Brooks visited the home to perform a mandatory welfare check. *Id.* Although the mother refused to allow Detective Brooks into the home, Detective Brooks saw bruising on A's legs. *Id.* On June 29, 2014, another welfare check was performed during which the children were hesitant to speak to the police officers. *Id.*

On July 1, 2014, Detective Brooks performed a further welfare check and observed that B had a large bruise on her cheek and another bruise on her forehead and that A and M had welts on their legs. *Id.*

On August 29, 2014, B was taken to the emergency room where she was diagnosed with a spiral fracture of the left tibia. The boys' mother was noted to have provided two different explanations for how B hurt her leg. *Id.* at 15-16.

On September 2, 2014, an assessment was opened alleging the neglect, medical neglect, and physical abuse of all five children by the mother and an unknown perpetrator. *Id.* at 16. The school principal reported seeing multiple bruises on the left side of A's face and eye and on both arms. *Id.* He also reported seeing injuries on B's face and noted that her entire leg was wrapped in an Ace bandage that appeared homemade. *Id.* During interviews by the NPD and a DCYF caseworker, MM and A were reluctant to talk. *Id.* A reported that he was told by their mother that B had hurt her leg due to a fall in the shower. *Id.* During a home visit on September 2, 2014, the mother claimed that JM had broken B's leg. *Id.*

The 24-Hour Safety Assessment conducted by DCYF on September 2, 2014 noted that "There are criminal court orders that [the mother] allow welfare checks on the children. Mother refused to allow

CPSW or the police to access the home." *Id.* at 17. It ended by concluding that "Legal action must be taken to place the child/youth outside the home. Note: child/youth is considered unsafe in the home; it is contrary to the child/youth's welfare to remain in the home." *Id.* The 24 Hour Safety Response Decision was nevertheless "Conditionally Safe." *Id.* DCYF Policy 1201 provides that:

> All children in the household must be met or observed by the CPSW to help assess the validity of the referral and to make a determination about whether they are in imminent danger. Ideally, the child needs to be interviewed in an (neutral) uninfluenced, non-threatening, private, quiet place that is free from interruptions. Prior parental notification is not advisable or required under certain circumstances such as: A. Child sexual and/or severe physical abuse has occurred in the home and the alleged perpetrator is a member of the household, a relative, or friend of the family (RSA 169-C: 38, IV) ... C. There are concerns that the parents have failed to protect the victim. D. Notifying the parent places the child at further risk.

Id. There is no evidence in the DCYF case file that DCYF, its agents or employees availed themselves of this policy. *Id.*

On September 3, 2014, the children's pediatrician contacted DCYF to report that he was concerned about the children's safety and that he believed the children should be removed from the home. *Id.* One of the employees at the pediatrician's office reported that when the children had been there on September 3, several other parents who were in the waiting room expressed concern for their wellbeing. *Id.* at 18.

On September 9, 2014, A was brought to the emergency room by NPD due to extensive facial bruising and bruising on his left foot and forearm. *Id.* That same day, a Safety Review was conducted. *Id.* at 19. It noted that the hospital staff had expressed concerns about A's injuries and

the mother's care of the children. *Id.* It concluded that legal action had to be taken to place the children outside the home, and stated that "DCYF is filing neglect petitions regarding [redacted] and [redacted] and requesting in home services to assist mother to develop parenting and supervision skills and to assist her with managing [redacted] behaviors appropriately." *Id.* The Safety Review was approved on September 12, 2014. *Id.* On information and belief, the petitions for neglect were never filed, despite emails on September 10 between NPD and various individuals at DCYF stating that DCYF was planning to file petitions to either remove the children or to put in-home services in place, and stating that approval to file had been received. *Id.* On information and belief, a safety review was scheduled to be performed on September 23, 2014. *Id.*

On September 16, 2014, the caseworker informed Detective Brooks of the NPD that DCYF would not be filing any petitions to remove the children or to provide in-home services because the DCYF supervisors and attorneys had decided there was not enough evidence to support going forward with these petitions. *Id.* at 20.

On September 24, 2014, the caseworker and several members of NPD attempted to perform a welfare check, during which the mother yelled and cursed at the officers when they attempted to ask questions of A. *Id.* It was subsequently decided that the caseworker would perform the welfare checks without the police in attendance in the hope that she would be more cooperative. *Id.* The caseworker agreed to keep Detective Brooks updated. *Id.*

On November 20, 2014, Detective Brooks noted that she had been trying to contact DCYF for the previous six weeks regarding the status of home visits but had not yet received a response. *Id.* On November 21,

2014, a DCYF supervisor finally responded to Sergeant Baxter of NPD that the caseworker was planning to do a home visit during the first week of December, 2014. *Id.* at 20-21. No information was provided to NPD regarding whether any home visits had been conducted between September 24 and November 21 and, if so, what had occurred during those visits, when in fact no home visits had been conducted during that time period. *Id.* at 21.

On November 25, 2014, the boys' mother murdered B by brutally beating and otherwise physically abusing her for a number of days. *Id.* Following B's murder, both MM and JM stated in their Victim Impact Statements that they witnessed her murder: Six-year-old JM recounted hearing B's screams, seeing their mother banging B's head on the floor and seeing her body afterwards; nine-year-old MM told about seeing B's body after her murder and referenced the frequent beatings he and his siblings had endured. *Id.* The boys' mother was found guilty of second degree murder on August 29, 2016. *Id.*

Because of JM's and MM's inability to file a lawsuit themselves, on October 10, 2019, CM filed the lawsuit on their behalf.

SUMMARY OF ARGUMENT

The Trial Court ruled that RSA 541-B:14, IV, incorporates the same savings provisions that apply to civil claims generally, including the provision that tolls minors' claims until they reach the age of majority. The State, however, contends that the Court should read RSA 541-B:14 so that it forever bars minors and those who are mentally incompetent from pursuing claims against it unless they can find a way to file those claims within three years of the harm alleged.

The State's position is especially troubling in a case like this where the underlying claims are tied to the fact that the minors are involved with the child welfare system. It is apparent that the purpose behind the State's waiver of its sovereign immunity—a waiver that incorporates the same three-year limitations period that applies in most other civil litigation—was to put the State on the same footing as private litigants.

As the Trial Court stated: "To interpret the law as the State is asking the Court to, would lead to an absurd, unfair, and unjust result." Appellant Brief at 35 (Trial Court Ord. at 8). This Court should interpret RSA 541-B:14, IV consistent with the Statute's purpose, which is to require that the government stand accountable for its conduct similar to the accountability imposed upon a private enterprise for an abrogation of the standard of care.[3] In cases like this one, that means that the three-year limitations period contained in RSA 541-B:14, IV must include the savings provisions contained in RSA chapter 508. This Court has already read RSA 508:4 into RSA 541-B:14, IV. *Petition of N.H. Div. for Children, Youth & Families*, 173 N.H. 613, 617 (2020) ("*Petition of DCYF*"). Absent the similar incorporation of the saving provisions reflected in RSA 508:8, children and those who are mentally incapacitated will lose their ability to hold the State accountable for harm done to them by reason of their lack of capacity to sue.

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[3] Of course, unlike private actors who can be held liable to the full extent of the harm done by their negligence, the State is protected by limitations on the damages it can be made to pay. RSA 541-B:14, I.

ARGUMENT

The State urges this Court to begin and end its interpretation of RSA 541-B:14 with the Statute's plain language. Because RSA 541-B:14 specifies that the State has waived its sovereign immunity to claims filed within three years, the State argues that any claim filed against it after three years is barred by its sovereign immunity. To rule otherwise, contends the State, would be to "consider what the legislature might have said or add language that the legislature did not see fit to include." Appellant's Brief at 15 (quotations omitted). As this Court has already recognized in *Petition of DCYF*, the State's blinkered statutory analysis misses the point of RSA 541-B and would produce an incongruous result—a result that the Trial Court noted would be "absurd, unfair and unjust." App. at 110.

Statutory interpretation seeks not just to understand the words on a page, but to discern the policy the legislature sought to advance by its entire statutory scheme. *State v. Carpentino*, 166 N.H. 9, 13 (2014). "[S]tatutes are not construed by taking out a phrase for literal interpretation without reference to the legislative intent of the statute as a whole. If a literal construction of a statute does violence of the apparent policy of the legislature it will be rejected." *State ex rel. Fortin v. Harris*, 109 N.H. 394, 395 (1969) (quoting *Newell v. Moreau*, 94 N.H. 439, 446 (1947)). Accordingly, a "plain language" statutory construction must give way to a more nuanced interpretation if the "plain language" of the statute suggests a result "inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute." RSA 21:1.

This Court considered the State's "plain language" argument regarding the interpretation of RSA 541-B:14 in *Petition of DCYF* and rejected that analysis. *Petition of DCYF*, 173 N.H. at 616. In *Petition of*

DCYF, the State argued that the plaintiff was foreclosed from her lawsuit by the State's sovereign immunity because she had suffered the harm alleged more than three years before. *Id.* at 614. The plain language of RSA 541-B:14, the State claims, only waives the State's sovereign immunity to lawsuits filed within three years of the harm alleged. *Id.* at 615. Accordingly, the State contended that because the plaintiff in *Petition of DCYF* had not discovered her claim until after three years from the time she suffered the harm alleged, she was barred by the State's sovereign immunity from suing it. *Id.*

In overruling the State's argument, this Court determined that the legislature intended to incorporate the savings provisions contained in RSA chapter 508 to the three-year limitations period in RSA chapter 541-B:14 which waives the State's sovereign immunity. *Id* at 618. Incorporating the savings provisions contained in RSA chapter 508 to the to the three-year limitations period contained in RSA chapter 541-B was, this Court concluded, commensurate with the "legislative intent to permit injured parties to sue state agencies for injuries proximately caused by the State's wrongful conduct or omission." *Id.* In *Petition of DCYF*, this meant incorporating the "knew or should have known" principle contained in RSA 508:4, in deciding whether the plaintiff's claim against the State was time-barred. *Id.* (citing *Slovenski v. State*, 132 N.H. 18, 20-21 (1989)).

The State seeks to overcome the weight of the foregoing argument by claiming that the "time limitations provided for in RSA 508:8 and RSA 541-B:14 are different." Appellant's Brief at 17. This contention is pivotal to DCYF's dismissal motion because RSA 508:8 provides that "[a]n infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed." RSA 508:8. Accordingly, if RSA 508:8

applies, then the Plaintiffs' case was timely filed because MM and JM are still minors, meaning they still have the balance of their minority plus two years within which to file an action. If DCYF could establish that a different statute of limitations applied in cases like the one filed against it here, then it could avoid the application of RSA 508:8 because RSA 508:1 provides that the provisions of chapter 508 do not apply to cases "in which a different time is limited by statute." RSA 508:1.

As support for its argument, DCYF points to *Steir v. Girl Scout of U.S.A.*, 150 N.H. 212, 215 (2003). Appellant's Brief at 11. In *Steir*, the Court held that the tolling provisions contained in RSA chapter 508 did not apply to discrimination cases because the statute of limitations in discrimination cases is 180 days. As this Court has already determined in *Petition of DCYF*, "[u]nlike in *Steir* where the statutes at issue implicated two distinct limitations periods, the statutes at issue in this case both involve three-year time limits and RSA 541:B-14, IV does not include a specific discovery rule. *See* RSA 508:4, I; RSA 541-B:14, IV." *Petition of DCYF*, 173 N.H. at 617-18. The Court further explained that:

> RSA chapter 508's purpose is to function as a "catch-all" for tolling provisions when another statute has no comparable provision, and RSA chapter 541-B has no such provision; specifically, no discovery rule. The purpose of the discovery rule is to provide injured parties an avenue of relief when they did not and reasonably could not know of the harm or its causal link to a wrongful act or omission by another party.

Id. at 618 (citation omitted).

Here, unlike *Steir*, the case is not one for unlawful discrimination, but it is a "personal action" seeking recourse against DCYF for its negligent breach of duty. The three-year statute of limitations governing "personal actions" is the same three-year limitations period contained in the State's

waiver of its sovereign immunity. Accordingly, the tolling provisions contained in RSA chapter 508, applicable to personal actions generally, also apply to actions against the State.

The only difference between this case and *Petition of DCYF* is that *Petition of DCYF* involved RSA chapter 508's "discovery rule" (*i.e.,* RSA 508:4), and this case involves RSA chapter 508's tolling of the claims of minors and those who are mentally incapacitated (*i.e.,* RSA 508:8). The Court should consider the difference to be one without a distinction.

Both RSA 508:4 and RSA 508:8 are found amongst RSA chapter 508's provisions. The legislature was undoubtedly aware of the three-year limitations period applicable generally to personal actions when it imposed a three-year limitations period as part of its waiver of the State's sovereign immunity in chapter 541-B. Likewise, it understood that the three-year limitations period was not applied blindly and inflexibly, but instead recognized that it would make no sense to have the Statute run on a claim that was unknown to the litigant (RSA 508:4), or to expire because the claimant was a child or incapacitated person who had no ability to commence the action within the limitations period (508:8). Indeed, the legislature both tolled the limitations period until an individual turns eighteen, and provided a two-year grace period upon an individual's reaching the age of majority so that the minor would have time after reaching the age of majority to preserve his or her rights.

Based on a review of this legislative scheme, a few things are apparent. First, in picking a three-year limitations period within which claims could be filed against the State, the legislature sought parity between actions filed against public and private defendants. Second, as this Court recognized in *Petition of DCYF*, the legislature, as a matter of fairness,

wanted to provide potential recourse to individuals harmed by State action or inaction. Third, by allowing that recourse, the legislature recognized that it was imposing accountability on State actors—accountability that would eventually inhere to the public's benefit.

With these tenets in mind, it would make no sense for the legislature to have intended that those aged fifteen and younger at the time the State harmed them would be stripped of recourse by the passage of time. Such an outcome would be at least as repugnant as an individual's forfeiture of a claim because they could not reasonably have known that the harm they suffered was causally related to the State's abrogation of its duty. The unfairness of the State's interpretation of RSA 541-B is especially pronounced in this case where the minor plaintiffs and the mandatory reporters who alerted DCYF to the abuse and neglect were depending on the State to intervene and protect the minor plaintiffs. Barring those claims is also unjust in that it allows DCYF to escape the scrutiny and accountability that lawsuits often provide. Having escaped accountability in this case, the strong likelihood is that the fact pattern recounted in this case will repeat itself.

The State also seeks to avoid application of RSA 508:8, by claiming that the Statute establishes "a special limitations period for minors giving them two years after reaching the age of majority to file an accrued personal injury action." Appellant's Brief at 18. Having characterized the tolling provisions pertinent to minors as "a special limitations period," the State then asserts that RSA 508:1 negates the application of the 508:8 tolling provision because RSA 508:1 provides that RSA chapter 508 does not apply to cases "in which a different time is limited by statute." *Id.* at 16.

The State's argument depends upon its contention that RSA 508:8 furnishes a separate statute of limitations. This, however, misconstrues the purpose and effect of RSA 508:8. Rather than establish a separate statute of limitations for minors and those who are incapacitated, RSA 508:8 creates a tolling provision that stops the running of the three-year statute of limitations against minors and those incapacitated—both categories of individuals who during the term of their incapacity cannot access the courts.

Although RSA 508:8 may toll the three-year statute of limitations applicable to personal actions, it does not alter the underlying limitations period. *See Stewart v. Robinson*, 115 F. Supp. 188, 196 (D.N.H. 2000) (Incapacitated individual has three years to bring an action after suffering harm, or two years from the removal of the incapacity, whichever is longer.). The two-year period is therefore not a separate limitations period, but is the legislature's determination of how much time it takes for one who was formerly incapacitated to arrange their affairs such that they can effectuate their right to pursue a remedy for their injuries. The tolling provided for by RSA 508:8 is functionally similar to the operation of 508:4—both assure that the statute of limitations will not run before a litigant recognizes and is able to pursue a claim for alleged harm.

The State's argument regarding RSA 508:8 providing a separate limitations period is also illogical. Appellant's Brief at 18-19. Looking at the impact of the tolling provisions on the period within which a litigant must file suit and then decreeing that applying the tolling provisions creates a different statute of limitations such that the tolling provision cannot be applied embraces a circularity of argument that misses the point of the analysis and does nothing to rebut the New Hampshire Supreme Court's

incorporation of the tolling provisions of RSA chapter 508 when applying the general limitations period found in RSA 541:B-14.

Finally, the State points to *Opinion of the Justices*, 126 N.H. 554 (1985), in support of its position. In particular, the State notes the Court's "robust advanced review" of RSA 541:B-14, and its conclusion that the Statute was constitutional, assuming the legislature meant to incorporate the discovery rule as part of the Statute's application. According to the State, this Court, having referenced the discovery rule, but not the balance of the savings provisions contained in RSA chapter 508, meant to exclude those other savings provisions from its analysis of the constitutionality of the limitation on recovery incorporated as part of RSA 541:B:14. The State's constricted view of the Court's analysis in *Opinion of the Justices* is in error.

In evaluating the constitutionality of RSA 541:B-14 in light of the equal protection clause, the Court held that New Hampshire's Constitution assures that "the right to recover for personal injuries is . . . an important substantive right." *Carson v. Maurer*, 120 N.H. 925, 931-32 (1980). The Court has also recognized that "[t]he continued existence of any application of the doctrine of sovereign immunity depends upon whether the restrictions it places on an injured person's right to recovery be not so serious that [they] outweigh the benefits sought to be conferred upon the general public." *Opinion of the Justices*, 126 N.H. at 559 (quoting *State v. Brosseau*, 124 N.H. 184, 197 (1983)). Accordingly, the Court identified the policy considerations supporting and opposing sovereign immunity. *Id.* at 560.

Factors favoring waiver include that: (1) the State is able to insure against loss due to its negligence such that the burden of injury would not

fall solely on the injured party; (2) holding the State accountable "would encourage responsible government;" and (3) fairness dictates that if the State causes harm it should be required to make amends. *Id.* at 560-61. On the other hand, lawsuits consume resources and could negatively impact governmental decision making. In *Opinion of the Justices*, the Court concluded that, at a minimum, given these competing concerns, immunity should continue to be extended where the State was engaged in: (1) the exercise of legislative or judicial function; or, (2) the exercise of an executive or planning function involving the formulation of policy decisions characterized by a high degree of official judgment or discretion. *Id.* at 561.

With these factors in mind, the Court considered the constitutionality of RSA 541:B-14. *Id.* at 562. The Court noted that the Statute's requirement that any claim be brought "within [3] years of the date of the alleged bodily injury or property damage or wrongful death resulting from bodily injury" would have to be construed as though the discovery rule were implied. *Id.* at 566. In other words, the Court concluded that reading RSA 541:B-14 based on the "plain language" of the Statute, without incorporating the discovery rule, would be "manifestly unfair" because it would "foreclose an injured person's cause of action before he has had a reasonable chance to discover its existence." *Id.* The Court, finding no reason "under an equal protection analysis [to] deny persons injured by the State" the protection of the discovery rule found that the discovery rule would govern the accrual of causes of action under RSA 541:B-14. *Id.* It reasoned that "[s]ince the limitations period is otherwise equivalent to the period accorded personal injury actions against private tortfeasors, RSA 508:4, it raises no other constitutional issues." *Id.*

The State argues that because the Court read the discovery rule into RSA 541:B-14, and did not also specify that RSA 541:B-14 incorporated RSA 508:8, the Court therefore meant to create a rule that would bar minors from filing suit against the government before they had any right to file such a claim. Appellant's Brief at 19. The State's explanation for why it would be okay to "foreclose [a minor's] cause of action before he has had a reasonable chance to [gain standing to file]" is because "minors can and do file claims in their infancy through parents or guardians, just as CM has done in this case . . . " *Id.* at 21. Of course, here, the Plaintiff's fundamental contention is that the State failed to remove the minor plaintiffs from the abuse and neglect that shattered their young lives and resulted in the death of their sister. The State's response is to say that the minor plaintiffs should have looked to a responsible adult to protect their interests and that having failed to find one, they have forfeited their right to "a certain remedy, by having recourse to the laws for all injuries he may receive in his person, property, or character." New Hampshire CONST. pt. I, art. 14.

New Hampshire's Constitution guarantees all its citizens equal protection under the law. N.H. CONST. pt. 1, arts. 2 and 12; *see also City of Dover v. Imperial Cas. & Indemn. Co*., 133 N.H. 109, 116 (1990) (the New Hampshire constitution guards against arbitrary and discriminatory infringement on access to the courts). The government must treat those persons similarly situated similarly. *See Gazzola v. Clements*, 120 N.H. 25, 29 (1980). "The right to recover for personal injuries is … An important substantive right." *Carson*, 120 N.H. at 931-32; *see also In re Sandra H.,* 150 N.H. 634, 638-39 (2004). Accordingly, the burden is upon the State to demonstrate that any justification for curtailing minors' ability to sue before

they can legally do so is "exceedingly persuasive" and that "the challenged legislation be substantially related to an important governmental objective." *Community Resources for Justice, Inc. City of Manchester*, 154 N.H. 748, 761-62 (2007).

The acknowledged purpose of the State's waiver of its sovereign immunity was to put the State on an equal footing with private parties sued for the same or similar errors and omissions. Absent the incorporation of RSA 508:8 into the application of RSA 541:b-14, as urged by the State, there would be a class of children who will be barred from recourse because of the nature of the homes and circumstances into which they are born.

The State has attempted to justify this construction of its sovereign immunity waiver and its consequent limitation of minors' ability to access the courts on the grounds that leaving the limitations period open raises the prospect of children retaining claims against the State for upwards of 20 years before those claims are filed. Of course, private parties who incur liability preserved by RSA 508:8 claims have been able to manage such claims. In any event, the State has articulated no "exceedingly persuasive" reason that its legislative objectives cannot be achieved while still preserving minors' right to recourse. Indeed, the State's harsh reading of RSA 541:B-14 stands in stark contrast to DCYF's acknowledged purpose and the statutory scheme that reflects the legislative and constitutional priorities of the people of New Hampshire to protect those who need that protection the most. *See Doe v. Commissioner of New Hampshire Department of Health and Human Services*, 174 N.H. 239, 251 (2021) (citing *State v. Ploof*, 162 N.H. 609, 620 (2011)) (Under the doctrine of constitutional avoidance the Court will construe a statute "to avoid conflict with constitutional rights wherever reasonably possible.").

CONCLUSION

The Court should affirm the Trial Court's denial of the State's motion to dismiss.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument. Mr. Harris will argue.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11) and contains 6,700 words.

/s/ Scott H. Harris
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Respectfully submitted,

C.M. a/p/n/f of M.M. and J.M.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, I served the foregoing Brief of Appellee C.M. a/p/n/f of M.M. and J.M. on all counsel of record by filing it through this Court's e-filing system.

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