MEMORANDUM

TO: **Constituents of Executive Council District 4**
FROM: **Executive Councilor John Stephen**
DATE: **February 2026**
RE: **Analysis of the Nomination of Hon. Daniel E. Will to the New Hampshire Supreme Court — A Comprehensive Review of the Nominee's Judicial Record, Hearing Testimony, and Constitutional Philosophy**

I. INTRODUCTION AND SCOPE OF REVIEW

This memorandum sets forth the comprehensive analysis underlying my decision to vote in favor of confirming Judge Daniel E. Will to serve as a Justice on the New Hampshire Supreme Court. It is written for the benefit of the constituents of District 4, many of whom have communicated serious and well-founded concerns about this nomination, and who deserve a full and transparent accounting of the evidence I considered and the reasoning that led to my conclusion.

The gravity of this decision cannot be overstated. A Justice of the New Hampshire Supreme Court may remain seated until age 70. The Court is the final arbiter of our state constitution — a document that, as the Court itself has described, "is the fundamental charter of our state" and "protects the people from government excesses and potential abuses of power." State v. Ball, 124 N.H. 226, 231 (1983). There are only five seats on our Supreme Court. Each appointment shapes the trajectory of constitutional law in New Hampshire for a generation. The Executive Council's power of advice and consent under Part II, Article 46 of the New Hampshire Constitution is, accordingly, among the most consequential powers entrusted to this body.

The central concern raised by constituents — and the one that required the most rigorous analysis — involves Judge Will's service as New Hampshire's first Solicitor General, and specifically the legal arguments he advanced on behalf of Governor Sununu in the case of *Binford v. Sununu*, No. 217-2020-CV-00152 (Merrimack Cnty. Super. Ct. 2020), during the COVID-19 pandemic. Those arguments included invocations of "considerable deference" to executive authority and characterizations of constitutional challenges as "irresponsible" and "objectively baseless."

Many constituents have expressed that they believe these arguments reflect a philosophy incompatible with the protection of individual liberties that our Constitution demands.

I share those concerns about the *Binford* arguments. I do not share the conclusion that they are dispositive. The question before this Council is not whether we would have made the same arguments as Solicitor General Will in March 2020. The question is whether Judge Will, as a Justice on our Supreme Court, will faithfully interpret and apply the New Hampshire Constitution. To answer that question, I have undertaken a review of the following materials:

- The complete *Binford v. Sununu* litigation record, including the plaintiff's emergency complaint, the State's Motion to Dismiss, the State's 25-page Objection brief, and the court's 22-page order;
- The Superior Court hearing transcript from the *Binford* proceeding (approximately March 20, 2020);
- Judge Will's judicial opinions in twelve cases spanning criminal, civil, and constitutional law, including *State v. Fries*, *State v. Bullard*, *State v. Gable*, *State v. Liberty*, *Barrington v. Page*, *Person v. City of Manchester Police Department*, *Hillsborough v. Vallerand*, *CKS Hardware v. Fuller Contracting*, *LaRaia v. Rynearson*, *Soley Family Trust v. Ferland*, *Rye Harbor Lobster, LLC v. Pease Development Authority, and Field v. City of Manchester*;
- The Defendants' Opening Brief and Reply Brief in *Contoocook Valley School District v. State of New Hampshire*, No. 2019-0500 (N.H. 2020), both authored by Solicitor General Will;
- Judge Will's law review article, "Dear Diary — Can You Be Used Against Me?: The Fifth Amendment and Diaries," 35 B.C. L. Rev. 965 (1994);
- The complete transcript of the February 6, 2026 Executive Council hearing on Judge Will's nomination to the Supreme Court;
- The transcript of the May 6, 2021 Executive Council hearing on Judge Will's nomination to the Superior Court;
- Applicable New Hampshire Supreme Court precedent, including *State v. Ball*, 124 N.H. 226 (1983); *State v. Koppel*, 127 N.H. 286 (1985); *State v. Broadus*, 167 N.H. 307 (2015); *State v. Francisco Perez*, 173 N.H. 251 (2020); *Woolf v. Fuller*, 87 N.H. 64 (1934); and *State v. Drew*, 89 N.H. 54 (1937);
- Applicable United States Supreme Court precedent, including *South Bay United Pentecostal Church v. Newsom*, 590 U.S. 721 (2020) and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020);
- HB 440, the Civil Liberties Defense Act, and its legislative history;
- A lengthy interview prior to the public hearing where I questioned Judge Will at length about applicable state and federal Constitution principles; and,
- The hundreds of constituent communications received by my office regarding this nomination.

For the reasons set forth in detail below, the totality of the evidence demonstrates that Judge Will is a textualist who has consistently applied the New Hampshire Constitution as an independent, primary document; who has ruled against the government when constitutional protections so require; who has demonstrated intellectual honesty about the evolution of the law; and who, I honestly believe, will bring to the Supreme Court the fidelity to constitutional text that our state demands of its Justices.

II. THE BINFORD LITIGATION: A FULL ACCOUNTING

A. Factual Background

On March 13, 2020, Governor Christopher Sununu declared a state of emergency in response to the COVID-19 pandemic. On March 17, 2020, David Binford, Holly Beene, and Eric Couture, represented by attorney Dan Hynes, filed an emergency complaint challenging Emergency Order #2, which restricted public gatherings of more than fifty persons. At the time of filing, New Hampshire had seventeen confirmed COVID-19 cases and zero deaths. The plaintiffs raised claims under multiple provisions of the New Hampshire Constitution, including the right of assembly (Part I, Article 32), freedom of religion (Part I, Article 5), the prohibition on martial law (Part I, Article 34), and the protection of habeas corpus (Part II, Article 91).

Judge Kissinger denied the plaintiffs' request for immediate injunctive relief on March 18, 2020. The case proceeded to briefing and hearing.

B. The State's Legal Arguments

On March 19, 2020, Solicitor General Will filed the State's Motion to Dismiss and a 25-page accompanying legal brief. The brief advanced six principal arguments on behalf of the Governor:

1. Statutory Authority. The Governor possessed authority under RSA 4:45 (emergency powers) and RSA 4:47 (specific emergency management powers) to issue the emergency order. Will argued that RSA 141-C (communicable disease statute) was inapplicable. State's Obj. to Pls.' Emergency Mot. at 5–7.

2. "Considerable Deference" Standard. Will argued that the executive's decision to exercise emergency powers "is entitled to considerable deference." *Id.* at 8 (citing *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) and *Moorhead v. Farrelly*, 723 F. Supp. 1109 (D.V.I. 1989)). This was the standard under which the State asked the court to evaluate the emergency order.

3. Time, Place, and Manner Analysis. In the alternative, Will argued that Emergency Order #2 was a content-neutral time, place, and manner restriction that was narrowly tailored and left open alternative channels of expression. *Id.* at 10–14 (citing *State v. Comely*, 130 N.H. 688 (1988)).

4. Religious Liberty. Will argued that the emergency order was a neutral law of general applicability, and therefore did not violate the free exercise of religion. *Id.* at 14–16 (citing *Knights of Columbus v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001)).

5. Characterization of the Challenge. The brief described the plaintiffs' position as "irresponsible, unsubstantiated, and … objectively baseless." *Id.* at 1. Will further stated that plaintiffs offered "no argument as to why risking the life, health, and safety of every individual in the State so they can attend an in-person gathering of more than 50 people within the next 21 days offsets or otherwise overrides the significant public interest in combatting the unmitigated spread of COVID-19." *Id.* at 20.

6. Public Interest. Will argued that the public interest "decidedly" favored the Governor's position. *Id.* at 19.

At the hearing, Will argued orally that the framework was straightforward: "The governor can take action if there's an emergency, if the action he takes is authorized by statute, and if the action he takes is consistent with constitutional mandates." He described the constitutional challenge as "bordering on the frivolous."

C. The Oral Argument: What Will Actually Said About Suspending Civil Liberties

The oral argument transcript from the *Binford* hearing provides the most direct basis for constituent concern — and also the most direct basis for context. In advocating for the *Smith v. Avino* deference standard, Will quoted the Eleventh Circuit's holding to the court. It is important to understand that Will was citing and advocating the holding of a federal appellate court, not stating his personal constitutional philosophy. Nonetheless, the language he chose to present — and present approvingly — warrants full disclosure. Will told the court:

> "[T]he court, the 11th Circuit, Your Honor, it talked about how there are times when civil liberties need to be temporarily suspended, for, essentially, Your Honor, for the greater good. And specifically the court said that governing authorities must be granted the proper deference and the wide latitude necessary for dealing with the emergency. And it went on to say that in an emergency fundamental rights, such as free speech and travel may be suspended or limited temporarily. And as a standard of review of an executive order of that nature, Your Honor, the court said if the governor acted in good faith and if there is a factual basis for the governor's decision that the restrictions were necessary, the court would not stand in the way."

Will acknowledged that this was an extraordinary standard, stating: "[A]t first blush [that] may sound like an awfully deferential standard — an extremely deferential standard where you're talking about civil rights and civil liberties." He then cited the *Moorehead* decisions from the District of the Virgin Islands for the proposition that "the

court must be cognizant of its limited scope of review and must be cautious not to substitute its judgment for that of the executive" and that "absent any showing that the curfew has in fact been used as a tool for harsh and erratic discriminatory enforcement, the court is obligated to defer to the judgment of the governor."

Will argued in the alternative that even under a less deferential standard, the emergency order survived as a content-neutral, reasonable time, place, and manner restriction that was narrowly tailored to serve a significant government interest and left open alternative channels of expression, including virtual worship. He also emphasized that the emergency powers were constitutionally constrained: "We're not in a limbo here, we're not in some sort of unknown suspension of any civil rights or civil liberties. It is 21 days" — referring to the automatic expiration provision of RSA 4:45 — and that "the legislature may terminate a state of emergency" at any time by concurrent resolution. He further stated: "Not only must the governor's conduct be authorized by statute, it must also comport with the Constitution."

The oral argument transcript thus presents a more complete — and, for some constituents, more troubling — picture than the written brief alone. While the brief cited *Smith v. Avino* for the proposition of "considerable deference," Will's oral argument approvingly quoted the Eleventh Circuit's language that fundamental rights "may be suspended or limited temporarily" during emergencies — language that goes directly to the heart of constituent concern.

At the same time, the transcript also shows that Will was citing existing federal appellate precedent, not articulating a personal theory; that he framed the deference standard as one option in a two-part argument; that he presented the alternative time, place, and manner framework; and that he repeatedly stated the governor's actions "must also comport with the constitution." The full record is more nuanced than either side's characterization.

D. The Court's Ruling

On March 25, 2020, Judge Kissinger issued a 22-page order granting the motion to dismiss and denying the preliminary injunction. The court found "overwhelming factual and legal support" for the Governor's actions and stated that it "cannot imagine a more critical and important public objective than protecting the citizens of the state and this country from becoming sick and dying from this pandemic." The court adopted the *Avino* two-prong test (good faith plus factual basis) advocated by the State.

E. The Legitimate Basis for Constituent Concern

The concerns raised by constituents about the *Binford* litigation are not merely legitimate — they are well-founded and reflect a proper understanding of what is at stake

when the government restricts fundamental rights. Three aspects of the State's advocacy warrant particular attention:

First, the invocation of "considerable deference" to executive emergency action. The deference standard articulated in *Smith v. Avino* effectively elevated executive judgment over individual constitutional rights, asking courts to defer unless the government acted in bad faith or without factual basis. This standard was subsequently repudiated by the United States Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), which held that emergency restrictions on religious exercise must satisfy the same constitutional scrutiny as any other government action. The deference standard, in retrospect, was the wrong standard to advocate.

Second, the characterization of the constitutional challenge as "irresponsible" and "objectively baseless." Whatever the state of the pandemic in March 2020, citizens who challenge government restrictions on assembly and worship are exercising their constitutional rights. The rhetoric of the State's brief went beyond vigorous advocacy to dismissiveness of the very notion that constitutional protections applied during the emergency.

Third, the reliance on federal precedent to the exclusion of New Hampshire constitutional law. The State's brief cited *Smith v. Avino* (11th Circuit), *Moorhead v. Farrelly* (D.V.I.), and *Knights of Columbus v. Town of Lexington* (1st Circuit). It did not cite the foundational New Hampshire Supreme Court precedent establishing the independence and primacy of the state Constitution. As will be discussed below, this stands in notable contrast to Judge Will's approach as a judge, where he has consistently addressed state constitutional claims first.

Citizens are right to find this troubling. The New Hampshire Constitution enshrines rights that belong to the people. Part I, Article 3 provides that certain natural rights may be surrendered to government only in exchange for "equivalent" protection, and "without such an equivalent, the surrender is void." N.H. Const. pt. I, art. 3. Part I, Article 29 provides that "[t]he power of suspending the laws, or the execution of them, ought never to be exercised but by the Legislature, or by authority derived therefrom." N.H. Const. pt. I, art. 29. These provisions do not yield simply because the executive declares an emergency.

III. THE ADVOCACY-VERSUS-JUDGING DISTINCTION

The critical analytical question is whether the arguments Solicitor General Will made as an advocate for his client are predictive of how Judge Will decides cases from the bench. Established principles of legal ethics and judicial selection counsel that, standing alone, they generally are not.

A. The Ethical Framework

The New Hampshire Rules of Professional Conduct expressly provide that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." N.H. R. Prof. Conduct 1.2(b). This principle reflects a foundational commitment of the adversary system: effective representation requires that attorneys advance the best available legal arguments on behalf of their clients, regardless of personal agreement.

Judge Will addressed this directly at his 2021 Superior Court confirmation hearing: "I have a client and I have a zealous and an ethical obligation to zealously represent my client." He reiterated this at the February 6, 2026 hearing, explaining his role as Solicitor General: "So the Governor was my client, and I was tasked with defending the challenge to Governor [Sununu's] emergency order."

The analogy to public defense is instructive. A public defender who secures an acquittal for a person accused of a violent crime has not endorsed violence; the defender has fulfilled a constitutional obligation. So too with the Solicitor General: Will's defense of the emergency orders reflects the position of his client, not necessarily his own constitutional philosophy.

B. The Limitation of This Principle

I acknowledge that this principle has limits. The Solicitor General is not a hired gun — the position carries public trust. And in the *Binford* case, Solicitor General Will had a choice of legal frameworks: he could have defended the emergency order solely under strict scrutiny (arguing it survived the highest level of constitutional review) or he could have — as he did — also advocated for a more deferential standard. The choice to advance the *Avino* deference framework was a strategic decision, and one that reasonably raises questions about the nominee's instincts regarding executive power.

It is for precisely this reason that my analysis does not rest on the advocacy-versus-judging distinction alone. Rather, I have examined the full body of evidence — including, most importantly, Judge Will's actual judicial record — to determine whether the *Binford* advocacy is predictive of his approach from the bench.

C. The Chilling Effect on the Legal Profession

My analysis also must be guided by the moving testimony of former Supreme Court Chief Justice Bob Lynn, now a State Representative, who spoke at the February 6, 2026 hearing about the broader consequences of this nomination fight for the legal profession and the rule of law.

Chief Justice Lynn, who spent close to 27 years on the bench and also serves on the Governor's Judicial Selection Commission, testified that the Commission was unanimous in its recommendation of Judge Will's qualifications. But his most significant

remarks concerned what he called the "unfair suggestions from some quarters that Judge Will's work while solicitor general … in defending the governor's emergency orders during the pandemic somehow should disqualify him from the bench."

Chief Justice Lynn stated:

> "If we want to preserve the rule of law and the fairness of our system of justice, we cannot subscribe to the view that lawyers should be punished in their careers for their legitimate legal advocacy and support of causes that may be unpopular at the moment. If that becomes the case, finding lawyers to represent those accused of crimes — including particularly my children or your child — will become untenable. Because those accused of crime are rarely popular, and few lawyers will be willing to risk their future prospects for advancement by taking that chance."

He then posed the question directly to the Council: "Is that really the kind of system we want to live in? I hope not."

This testimony carries particular weight. Chief Justice Lynn is not a political figure advancing a partisan argument. He is a former Chief Justice of the very court to which Judge Will has been nominated, warning this Council that disqualifying lawyers from the bench based on their advocacy as counsel would fundamentally undermine the adversary system. If young lawyers come to believe that zealous representation of an unpopular client — or a client whose cause later falls out of favor — will be held against them for the rest of their careers, the consequences for the administration of justice in New Hampshire would be severe. The right to counsel, the willingness of talented lawyers to take on difficult cases, and the pipeline of experienced advocates willing to serve as judges all depend on the principle that advocacy is not endorsement.

IV. JUDGE WILL'S JUDICIAL RECORD: EVIDENCE OF CONSTITUTIONAL FIDELITY

The most reliable predictor of how a nominee will serve on the Supreme Court is not what arguments they made as an advocate, but what decisions they rendered as a judge, therefore my decision must be guided by the following: Judge Will's four-and-a-half-year record on the Superior Court provides substantial and consistent evidence of his commitment to constitutional text, individual rights, and the rule of law. I have reviewed twelve of his judicial opinions in detail. The seven most significant are discussed below.

A. *State v. Fries*, No. 216-2023-CR-01649 (Hillsborough Cnty. Super. Ct. N. Dist., Mar. 7, 2025)

This case provides the strongest evidence in the record that Judge Will enforces constitutional limits on government power even when the consequences are uncomfortable.

The Facts. At approximately 2:00 a.m. on July 23, 2023, Manchester Police Department Officers Benway and Hascall, on a "hot-spot" patrol, observed a BMW with a missing front license plate traveling at what they visually estimated to be a high rate of speed. The officers did not deploy radar to objectively verify the speed. They initiated a traffic stop. The BMW turned onto several streets before stopping in front of McGarvey's bar on Church Street.

Officer Benway approached the driver's side while Officer Hascall approached the passenger side, where the defendant David Fries sat. Officer Benway testified that he could not readily see into the vehicle due to tinted glass, but the driver lowered both driver-side windows at his request. Officer Benway explained the reason for the stop but neither officer questioned the driver or the defendant about the missing plate or the rate of speed. Instead, within approximately thirty seconds, Officer Benway invoked generalized "officer safety concerns" and ordered the driver out of the vehicle.

On the passenger side, Officer Hascall observed a hard-edged container with a plastic bag containing a white substance poking out. He also observed the defendant positioning his cell phone over an open container between his legs. When Officer Benway ordered the defendant out of the vehicle and the defendant hesitated, Officer Hascall physically pulled the defendant from the car. Officers then searched the container, which contained drugs and related paraphernalia.

The Ruling. Judge Will granted the defendant's motion to suppress all evidence. His eight-page order is a model of careful constitutional analysis:

State constitutional primacy. Judge Will began with the New Hampshire Constitution, applying Part I, Article 19 as "more protective of defendants' constitutional rights relative to motor vehicle stops" than the federal constitution. *State v. Koppel*, 127 N.H. 286, 291 (1985). He cited federal law "only to aid" the state constitutional analysis. *State v. Francisco Perez*, 173 N.H. 251, 256 (2020). This is the *Ball* framework in action — the same framework conspicuously absent from Will's *Binford* briefing.

Constitutional rights override officer safety. Judge Will held that "officer safety concerns do not override a defendant's constitutional protections," citing *State v. Broadus*, 167 N.H. 307, 313 (2015) ("Although we appreciate that officer safety is of paramount concern, the goal of ensuring officer safety does not vitiate the requirement that an officer have an objective basis to believe that a subject is armed and presently dangerous before initiating a frisk.").

Specific and articulable facts required. Judge Will distinguished cases where officers had information specific to vehicle occupants — *State v. Robbins*, 170 N.H. 292, 297–98 (2017) (known gang members, one with prior resisting arrest charge); *State v. Graca*, 142 N.H. 670, 674 (1998) (unexpected person in vehicle, occupant with recent armed robbery arrest) — from the facts before him, where "[n]either Officer Benway or

Hascall acted in whole or in part on any information specific to the driver or the defendant, nor did they observe any contemporaneous conduct that would have justified asking them out of the car."

Evidence tested against the record. In a particularly notable passage, Judge Will used body-worn camera footage to contradict the officers' hearing testimony. Officer Benway testified that the driver "did not make eye contact." The BWC footage showed the driver "peering up toward Officer Benway through the open window." Similarly, Officer Benway's police report — "prepared much closer in time to the actual stop" — "chronicles no unusual delay in the stop" despite the officer's contrary testimony. This demonstrates a judge willing to test the government's representations against objective evidence.

Fruit of the poisonous tree. Because the officers' observations of drugs and the defendant's conduct all occurred after the impermissible expansion of the stop, Judge Will held that the State could not establish any warrantless seizure exception — not exigent circumstances, not plain view, not inevitable discovery, not purging of the taint. *See State v. Martin*, 145 N.H. 362, 364 (2000). The drug evidence was suppressed in its entirety.

Significance. This case is the most direct rebuttal to concerns about Judge Will's *Binford* advocacy. A drug defendant sat before Judge Will with drugs in plain view. The police had found the drugs. The defendant was guilty by any common-sense measure. But Judge Will said: the Constitution still matters. The police did not follow the constitutional requirements. The evidence is suppressed. This is not a judge who defers to the government. This is a judge who follows the Constitution and the law wherever it leads, regardless of the consequences.

B. *Barrington v. Page* (Strafford Cnty. Super. Ct., Jan. 19, 2022)

In this junkyard ordinance enforcement action, Judge Will denied the Town of Barrington's request for a preliminary mandatory injunction and, critically, denied the Town's request for an administrative inspection warrant under RSA 595-B. On the merits, Judge Will found that the defendant had demonstrated compliance with the ordinance at the time of the hearing — he had removed over 200 tires, paid to dispose of non-antique vehicles, and enclosed his remaining antique vehicles behind a six-foot fence. On a significant statutory interpretation issue, Judge Will parsed the text of RSA 236:123 to hold that the antique motor vehicle restoration exception (RSA 236:111-a, III(b)) requires compliance with the statute's fencing requirement but not the separate "locked gate" requirement, which applies to commercial junk yards. He called the Town's contrary reading "an unreasonable construction of the exception's statutory scheme."

On the inspection warrant, Judge Will held that "[p]robable cause must support governmental efforts to search private property" under both the Fourth Amendment and Part I, Article 22 of the New Hampshire Constitution. He noted that the defendant's evidence of compliance undermined any showing of probable cause.

Significance. This ruling demonstrates that Judge Will does not defer to government claims of enforcement necessity. When the Town asked for authority to search a citizen's property without adequate constitutional basis, Judge Will said no.

C. *Person v. City of Manchester Police Department* (Hillsborough Cnty. Super. Ct. N. Dist., Dec. 4, 2024)

The Facts. Eugene Person was driving through a Manchester intersection with a green light when a police cruiser driven by Officer Lally entered the intersection against a red light and struck his vehicle. The City sought summary judgment based on official immunity.

The Ruling. Judge Will denied summary judgment, applying the three-part official immunity test from *Farrelly v. City of Concord*, 168 N.H. 430 (2015). The parties presented "two starkly different versions" of events. The plaintiff's version: Officer Lally was "sitting in the right-turn lane looking at his phone," then "just stepped on it" into the intersection without activating emergency lights until mid-intersection. Judge Will held that "the non-moving plaintiff's narrative … could support a plaintiff-favorable inference that Officer Lally consciously assumed a foreseeable risk of a vehicle collision when he chose to enter an intersection — while distracted by his phone — without having the right of way."

Significance. Judge Will did not shield a government actor from accountability under the official immunity standard. He held the police officer to the same legal standard that would apply to any other citizen, and he allowed the citizen's case to proceed to a jury.

D. *Hillsborough v. Vallerand* (Hillsborough Cnty. Super. Ct. N. Dist., Dec. 10, 2025)

In this junkyard enforcement case, Judge Will granted a permanent injunction for the Town but imposed significant limitations on the government's requested relief. He denied the Town's request for a three-year property inspection license as excessive. He also conducted a careful textualist analysis of the term "inoperative," rejecting the Town's contention that "uninspected" means "inoperative." He cited the Oxford English Dictionary's definition of "inoperative" ("[n]ot operative; not working or taking effect in action") and noted that the Legislature's recent elimination of the vehicle inspection requirement (Laws 2025, 141:253, effective January 31, 2026) was itself evidence that inspection status does not correlate with operability.

Significance. Even when ruling in favor of a municipality, Judge Will constrained the government's power to what the law actually authorized — no more. He applied the plain text of the statute rather than deferring to the government's preferred interpretation.

E. *State v. Liberty*
(Strafford Cnty. Super. Ct., June 10, 2024)

The defendant was convicted of forgery for writing another person's name on an auto bill of sale. The State sought $4,250 in restitution for the buyer's repair costs, arguing that the defendant's misrepresentations about the vehicle's condition caused the harm. Judge Will denied restitution, holding that it must "tie to harm flowing from the specific convicted crime, not broader conduct" (citing *Pinault*). The forgery (signing another's name) did not directly cause the buyer's repair costs; those costs flowed from misrepresentations that "form no part of the criminal conduct that supported the charge and conviction." While acknowledging the buyer might have civil remedies, Judge Will refused to extend criminal restitution beyond what the law authorized.

Significance. This ruling demonstrates the same principle at work across different areas of law: the government must operate within the precise terms of the law. Judge Will held the State to the text of the restitution statute, not the State's preferred reading of it.

F. *State v. Bullard*, No. 216-2024-CR-01594
(Hillsborough Cnty. Super. Ct. N. Dist., Oct. 1, 2025)

In this child sexual abuse images prosecution, Judge Will denied the defendant's motion to suppress evidence recovered pursuant to a search warrant. On the particularity issue, Will found the warrant's scope — "all devices capable of storing electronic data" — was reasonable because downloaded files can be transferred to any storage device, and the warrant included a limiting "global modifier" restricting the search to evidence of the specific offense. On the alleged material omissions from the affidavit, Judge Will found that including the omitted information about software reliability would only have *strengthened* probable cause, quoting *United States v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012): "It would be wildly illogical to suppress the fruits of a search on the ground that the warrant application omitted statements that, if included, would have increased the affidavit's persuasive force."

Significance. This case is the necessary counterweight to Fries. Judge Will does not reflexively rule against the government. Where the warrant met constitutional requirements for particularity, he upheld the search. This demonstrates a judge who follows the law in both directions — enforcing constitutional protections when the government falls short, but sustaining government action when the Constitution is satisfied.

G. *Rye Harbor Lobster, LLC v. Pease Development Authority*, No. 217-2025-CV-00039

(Hillsborough Cnty. Super. Ct. N. Dist., Dec. 12, 2025)

This 34-page order is Judge Will's most comprehensive judicial opinion in the record and demonstrates his constitutional methodology across a wide range of legal issues. The plaintiffs, operators of a lobster business at Rye Harbor, brought eleven counts against the Pease Development Authority and its officials, alleging retaliatory enforcement motivated by a competing business interest.

The order is notable for the following analytical features:

***State v. Ball* framework.** In Footnote 7 of the order, Judge Will stated that the Court "addresses the plaintiffs' arguments under the State Constitution first, relying upon federal law only to aid in its analysis. *Ball*, 124 N.H. at 231–33." This is the same *Ball* framework that Judge Will applied in Fries — and the same framework that was absent from his *Binford* advocacy. Its presence here, in a civil case, confirms that state constitutional primacy is not situational for Judge Will; it is his standard methodology.

Textualist statutory construction. In analyzing the RSA 356 antitrust claim, Judge Will conducted a detailed textual analysis of the statute's definitions. He noted that RSA 356:11 defines "person" broadly to include government entities for purposes of who may *sue*, but does not include government entities in the definition of who may be *sued*. He held that this silence could not constitute a waiver of sovereign immunity, citing the Supreme Court's instruction that statutory waivers of sovereign immunity must be construed strictly. *Chase Home for Children v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 730 (2011) ("Any waiver of sovereign immunity must evidence a clear intent to grant a right to sue the State."). He further cited *Santos v. Metro. Prop. & Cas. Ins. Co.*, 171 N.H. 682, 689 (2019) and *In re Town of Seabrook*, 163 N.H. 635, 653 (2012) for the principles that the Court "accord[s] statutory language its plain and ordinary meaning" and "will not add words the legislature did not see fit to include."

Judicial restraint on constitutional expansion. On the Part I, Article 8 claim, Judge Will acknowledged that the text of Article 8 was capable of being read more broadly than existing precedent allowed, but declined to expand the provision from the trial bench. He wrote: "The divination of a constitutional expansion of this magnitude lies squarely within the province of the New Hampshire Supreme Court." This is judicial restraint in practice — a trial judge respecting the boundaries of his role in the constitutional system.

Significance. The Rye Harbor order demonstrates the full range of Judge Will's analytical approach: state constitutional primacy, textualist statutory construction, strict application of sovereign immunity, and judicial restraint on questions of constitutional expansion. Taken together with Fries, Barrington, and Person, it paints a comprehensive

picture of a judge who applies consistent principles across criminal, civil, and constitutional law.

H. Summary of Judicial Record

The following table summarizes Judge Will's rulings across the seven cases reviewed in detail:

Case	Ruling	For/Against Government
State v. Fries	Suppression GRANTED	Against the State
Barrington v. Page	Preliminary injunction DENIED	Against the Town
Person v. Manchester PD	Summary judgment DENIED	Against the City/MPD
Hillsborough v. Vallerand	Injunction GRANTED (with limits)	For the Town (limited)
State v. Liberty	Restitution DENIED	Against the State
State v. Bullard	Suppression DENIED	For the State
Rye Harbor Lobster v. PDA	Motions to dismiss GRANTED	For the government defendants

This record demonstrates a judge who rules for and against the government based on the law, not on institutional sympathies. In four of the seven cases, Judge Will ruled against the government; in three, he ruled for it. The pattern is consistent with a jurist who follows the text wherever it leads.

V. STATE CONSTITUTIONAL INDEPENDENCE: THE BALL FRAMEWORK

One of the most important questions for any nominee to the New Hampshire Supreme Court is whether they will treat the New Hampshire Constitution as an independent document or merely as a shadow of the federal Constitution. The seminal case on this question is *State v. Ball*, 124 N.H. 226 (1983), in which the Supreme Court held that "[w]hen this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." *Id.* at 231–33.

Judge Will's judicial record and hearing testimony both demonstrate a strong commitment to the Ball framework:

- In *State v. Fries*, Judge Will addressed the state constitutional claim first, applying Part I, Article 19 as "more protective" than the federal constitution and citing federal law "only to aid" the analysis.
- In *Rye Harbor Lobster*, Judge Will stated in Footnote 7 that the Court "addresses the plaintiffs' arguments under the State Constitution first, relying upon federal law only to aid in its analysis. Ball, 124 N.H. at 231–33."

- In *Rye Harbor*, on the equal protection claims, Judge Will stated in Footnote 7 that the Court "addresses the plaintiffs' arguments under the State Constitution first, relying upon federal law only to aid in its analysis."
- At the February 6, 2026 hearing, Judge Will stated: "The *Ball* opinion to me was really important because it goes all the way back to 1983 and it announces that [our] Constitution is vital. It's here. And it's primary in our state."
- When asked how he approaches conflicts between state law and evolving federal jurisprudence, Judge Will stated: "If it's a question of constitutional law, [we] resort first to the state Constitution."
- On the New Hampshire Constitution generally, Judge Will stated: "It's an independent document. As the Supreme Court said, it's the charter of our state. And it is vital and it's extremely meaningful. And in many ways, it offers greater protections, and different protections."

This commitment to state constitutional independence is directly relevant to the *Binford* concern. In our constitutional system, it is the New Hampshire Supreme Court — not the United States Supreme Court — that determines the scope of rights under the New Hampshire Constitution. A Justice who treats the state Constitution as primary is a Justice who can provide protections beyond what the federal Constitution offers, particularly in areas where the New Hampshire Constitution's text is broader or different. Judge Will's judicial record demonstrates that he applies this principle consistently.

VI. FEBRUARY 6, 2026 HEARING TESTIMONY

Judge Will's testimony before this Council on February 6, 2026 provided extensive further evidence of his judicial philosophy and constitutional commitments. I questioned the nominee at length and have reviewed the full transcript. The following statements are particularly significant.

A. Textualism as Guiding Principle

Judge Will described his judicial philosophy as "based on strict adherence to the language of texts," meaning "focusing on the plain meaning of the words the legislature or the framers used, and applying that plain meaning to the facts of the particular case." He stated:

> "I come to decisions not based on my own views or personal positions, but on what governing law requires."

He identified the analytical approach of Justice Scalia as aspirational, while noting he does not share Scalia's writing style. He cited Scalia and Garner's Reading Law as a primary reference for statutory construction. When asked about his guiding principle, he stated: "That's the first place that I would start in any given case. And that's where I'd like to end if I can. That's my goal. My goal is just to use the text."

B. *Stare Decisis* and Correctability of Error

On the question of precedent, Judge Will provided statements that are directly relevant to the concern about COVID-era jurisprudence:

> "I think as a general rule, that precedent should not be overruled lightly or easily. It should be a rigorous analysis. But I also think that *stare decisis* can't be a straitjacket into which precedent that is just plainly wrong, legally wrong, is nonetheless maintained simply because of the concept of *stare decisis*."

> "I just think that a judge should never suspend his — and a Supreme Court judge should [never] suspend his or her critical view of precedents."

When I read him Justice Scalia's statement that "[t]he court should not confuse the doctrine of *stare decisis* with the duty to follow the Constitution," Judge Will responded:

> "I do agree. I don't think that *stare decisis* can be used or should be used to justify maintaining judicial decisions that need to be corrected."

He further stated that a precedent "could be a 20-year precedent, could be a 100-year precedent — if it is an incorrectly decided case, I think that the court has an obligation" to review it. This matters directly for the *Binford* concern: to the extent any pandemic-era precedent was wrongly decided, a Justice Will would retain the analytical independence to say so and to correct it.

C. The Constitution Cannot Be Suspended

When asked directly about the Binford case, Judge Will stated unequivocally:

> "The Constitution can never be suspended. No governor can suspend the Constitution. In that *Binford* case, what I argued was that the governor's actions under the emergency powers statute had complied both with the statute and the Constitution."

He further testified that he argued the emergency order survived "strict scrutiny" — "narrowly tailored to meet a compelling governmental interest." While the *Binford* record shows that the "considerable deference" standard was the primary framework the State advanced, Judge Will's clear and unequivocal statement of the constitutional principle — that the Constitution is never suspended — is significant as a statement of the principle that would govern his decision-making as a Justice.

D. *Brooklyn Diocese* and the Evolution of the Law

Judge Will provided a candid chronology of the evolution of COVID jurisprudence. He testified that the *Binford* litigation predated much of the COVID-specific case law. He described the May 2020 order in *South Bay United Pentecostal Church v. Newsom*, 590 U.S. 721 (2020), in which the United States Supreme Court

"expressed a standard that was very deferential to the executive in times of public health crisis." He then described the November 2020 decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), in which the Court "pulled back on deference to an executive" and "signaled that an executive act, be it in an emergency or not, has to just survive the constitutional scrutiny that applies."

He summarized: "[T]he governor's actions, any governor's actions, even in an emergency, must survive the standard constitutional analysis that applies." He did not defend the earlier deferential standard as the correct state of the law going forward. This acknowledgment demonstrates intellectual honesty and an understanding that the law has moved decisively in the direction of requiring standard constitutional scrutiny during emergencies.

E. *Doe v. Manchester School District* and Fundamental Rights

This exchange is among the most significant in the entire hearing for constituents concerned about parental rights and the protection of fundamental liberties. I questioned Judge Will at length about *Doe v. Manchester School District*, a recent New Hampshire Supreme Court decision that has generated substantial public concern. To appreciate the full significance of Judge Will's answers, they must be read in the context of testimony he had already given earlier in the same hearing.

The Framework Will Had Already Established. Earlier in the hearing, in response to questioning about the levels of constitutional review, Judge Will gave a detailed explanation of the scrutiny framework:

> "[T]hey range from something we call rational basis, which [is] very low scrutiny, to intermediate scrutiny, to strict scrutiny, strict being the highest level of scrutiny. So it's the courts take the hardest look at what the government did through strict scrutiny, the test being that the governmental action that is being challenged, in a strict scrutiny context, it must narrowly serve a compelling governmental interest."

He further stated that strict scrutiny "is the highest level of constitutional review there is. It is the hardest burden for the government to meet." And he confirmed that going forward, "the governor's actions, any governor's actions, even in an emergency, must survive the standard constitutional analysis that applies" — meaning the government must establish that restrictions on fundamental rights are "narrowly tailored to serve a compelling governmental interest." This is strict scrutiny. Judge Will stated this principle clearly, unequivocally, and without reservation.

The Facts of the Case. In *Doe*, a mother discovered that her child was going by a different name at school. She contacted the school and requested that her child be called by the child's given name. The school principal responded that under the district's policy, staff were required to use the child's preferred name and could not disclose to a parent

the choice the child had made. The New Hampshire Supreme Court has repeatedly held that "the rights of parents to raise children is a fundamental liberty interest deserving the highest level of protection." *Horsley v. Trame*, 120 N.H. 290 (1980). Despite this, the majority in *Doe* applied rational basis review — the most deferential standard — rather than strict scrutiny. The dissent argued that strict scrutiny was required because a fundamental right was at stake.

The Exchange. I asked Judge Will directly: "What is your thoughts on the application of the strict scrutiny versus rational basis to the fundamental right of a parent to know what is going on with their child in the school?" Judge Will initially declined to state whether he agreed with the majority or dissent, explaining that he had read the opinion but had not "done the work of going through the cases that each the dissent and the majority cite." He added: "I can certainly understand, as a parent, having some concern about the policy at the school district."

I pressed the question in a different form, presenting a hypothetical stripped of the specific case: "A mother walks into her child's public school. She asks the teacher, is my child going by a different name? Is my child presenting as a different gender? The school, following policy, refuses to give her an answer. Does that implicate the mother's fundamental rights?"

Judge Will's response was unequivocal: "I believe that it would."

I then asked whether invoking fundamental rights triggers strict scrutiny under the New Hampshire and federal Constitutions. Judge Will declined to answer that specific follow-up, stating: "You're asking me to essentially tell you what my opinion of the *Doe v. Manchester* [decision is]." He explained that he could not answer hypotheticals that might project what he would do on any given case.

Significance. Read in isolation, Judge Will's refusal to connect the final dot — fundamental rights to strict scrutiny — might appear evasive. But read in the context of the full hearing, the picture is very different. Earlier in the same proceeding, Judge Will had already stated the governing principle in plain terms: strict scrutiny is the standard that applies when the government restricts fundamental rights. He called it "the highest level of constitutional review there is" and "the hardest burden for the government to meet." He did not hedge that statement. He did not qualify it. He stated it as settled law.

What Judge Will would not do — and what judicial ethics properly prevented him from doing — was apply that principle to the specific *Doe v. Manchester* decision, a case decided by the very court to which he has been nominated, and one that could return to the court in some form. That is not evasion; it is the discipline of a judge who understands the boundaries of what a nominee can say. The Canons of Judicial Conduct prohibit judges and judicial candidates from making "pledges, promises, or commitments

that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Canon 4, Rule 4.1(A)(13).

But consider what Judge Will did say, taken together:

- Fundamental rights trigger strict scrutiny — "the highest level of constitutional review there is."
- A school's refusal to disclose to a parent whether her child is going by a different name or presenting as a different gender "would" implicate the mother's fundamental rights.

The syllogism completes itself. A judge who has stated that fundamental rights trigger strict scrutiny, and who has found that parental rights in this context are fundamental, has told the public everything that judicial ethics permit him to say. The conclusion follows necessarily from the premises he stated on the record.

For constituents concerned about parental rights, this is the most direct and consequential evidence in the hearing record. Judge Will recognizes parental rights as fundamental. He has stated that fundamental rights receive the highest level of constitutional protection. He understands, as a parent himself, the gravity of a school concealing information from a mother about her own child. And his judicial record — particularly the rigorous constitutional analysis in *Fries*, where he enforced Part I, Article 19 against the government even when the result was uncomfortable — demonstrates that he applies these principles when it matters, not merely when it is convenient.

F. Agency Deference and *Loper Bright*

When asked about the appropriate level of deference to administrative agencies, Judge Will discussed the New Hampshire Supreme Court's decision in *Appeal of Town of Seabrook*, 163 N.H. 635 (2012). He stated that the Seabrook case's framework "doesn't relieve the court from conducting its own statutory analysis" and that "whatever deference is owed to an agency … it's not binding on the court at all."

He further stated: "In New Hampshire, I don't think we defer to agencies the same way that the federal government was [under] *Chevron* and the *Chevron* doctrine." This position is consistent with the textualist approach of treating courts, not agencies, as the final interpreters of statutory meaning.

VII. THE LEGISLATIVE RESPONSE: HB 440 AND THE CIVIL LIBERTIES DEFENSE ACT

The New Hampshire Legislature has not been silent on the issues raised by the COVID-19 emergency. In 2022, the Legislature enacted HB 440, the Civil Liberties Defense Act, which provides in relevant part that "civil liberties shall on no account be suspended." This statute represents the considered judgment of the people's

representatives that the legal framework applied during the pandemic was insufficient to protect individual rights.

This legislative enactment is significant for several reasons. First, it establishes a statutory safeguard that will bind any future Justice confronted with emergency powers questions. Judge Will, as a textualist, testified at his hearing that he would be bound by the plain text of legislative enactments. The Civil Liberties Defense Act provides unambiguous text: civil liberties shall on no account be suspended.

Second, the statute reflects the same concern that constituents have raised: that the legal framework invoked during the pandemic — including the deference standard from *Smith v. Avino* — was inadequate. The Legislature has corrected the legal landscape going forward. A Justice who applies the law as written will be bound by that correction.

Third, Judge Will himself acknowledged at the February 6, 2026 hearing that any future emergency actions would need to comply with the applicable statutory and constitutional framework — a framework that now includes HB 440.

VIII. PROFESSIONAL QUALIFICATIONS AND ENDORSEMENTS

Judge Will's professional qualifications are extensive and, I believe, uncontested. They merit recounting in full.

A. Education and Early Career

Judge Will graduated from the University of Pennsylvania with a degree in political science (with honors) and from Boston College Law School (with high honors), where he served as Editor-in-Chief of the Boston College Law Review. He clerked for Judge Morton Brody on the United States District Court for the District of Maine and for Judge Norman Stahl on the United States Court of Appeals for the First Circuit — two of the most demanding and prestigious clerkships available to a young attorney in the First Circuit.

B. Professional Career

Judge Will practiced commercial litigation for twenty-two years at Divine Millimet, one of New Hampshire's oldest and most respected law firms, where he served on the firm's management committee. He was appointed as New Hampshire's first Solicitor General in 2018 by Attorney General Gordon MacDonald. He served as President of the New Hampshire Bar Association — a position reflecting the esteem of the organized bar.

C. Endorsements

At both his 2021 and 2026 hearings, Judge Will received strong endorsements from across the legal community:

- Attorney General John Formella: “Dan might be the best candidate I’ve seen for the particular position.”
- Retired Chief Justice, State Representative Bob Lynn, who has known Will for more than sixteen years.
- Retired Supreme Court Justice Carolyn Conboy: “There is not one iota of arrogance.”
- United States District Court Judge Joseph LaPlante: “I can tell you there's no member of our bench or bar in our state who excels beyond him.”
- Alex Walker, attorney: “He is without question one of the finest lawyers of his generation.”
- Hillsborough County Attorney John Coughlin: "If he didn't know something, he acknowledged it and would research it and welcome the parties' input… Judge Will is an outstanding choice for the New Hampshire Supreme Court."

These endorsements come from across the ideological and professional spectrum — from prosecutors to defense attorneys, from state judges to federal judges, from former opponents to former colleagues. The breadth and depth of professional support is exceptional and warrants significant weight.

IX. THE 1994 LAW REVIEW ARTICLE: EVIDENCE OF LONGSTANDING CONSTITUTIONAL PHILOSOPHY

In assessing whether a judicial nominee’s stated philosophy is genuine or adopted for the occasion, there is no better evidence than what the nominee wrote before any professional obligation could have shaped his views. In 1994, as a law student at Boston College, Daniel Will published a Note in the *Boston College Law Review* entitled “Dear Diary — Can You Be Used Against Me?: The Fifth Amendment and Diaries.” 35 B.C. L. Rev. 965 (1994). This article, written more than thirty years ago, reveals the same analytical commitments that define Judge Will’s judicial philosophy today.

A. The Article’s Thesis

The article examined whether the Fifth Amendment’s privilege against self-incrimination protects the contents of personal diaries from compelled government production. Two competing frameworks existed in the case law. Under *Boyd v. United States*, 116 U.S. 616 (1886), courts had extended Fifth Amendment protection based on the *contents* of a document — if a document was sufficiently private or intimate, its contents were protected regardless of how the government sought to obtain it. Under the later *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984), the relevant question was not what a document contained but whether the *act of producing* it constituted compelled testimonial communication.

Will argued unequivocally for the *Fisher/Doe* framework. His core reasoning was textualist: the Fifth Amendment protects against “compelled self-incrimination,” not

privacy generally. Courts should not "cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy." 35 B.C. L. Rev. at 988. The contents-based approach from *Boyd*, Will argued, had no textual foundation in the Fifth Amendment and had produced "case-by-case, ad hoc determinations" that left litigants and courts "unsure as to what may or may not be demanded." Id. at 982. By contrast, the act-of-production framework provided "clear guidelines" rooted in the constitutional text. Id. at 997.

B. Themes Consistent with Judge Will's Judicial Philosophy

The article reveals four analytical commitments that are directly visible in Judge Will's judicial record three decades later:

1. Textualism. Will's central argument was that the constitutional text controls. The Fifth Amendment says "compelled self-incrimination" — not "privacy." Courts that read privacy protections into the Fifth Amendment were departing from the text in the same way that, Will would later argue as Solicitor General in *Contoocook Valley School District v. State*, courts that read specific funding mandates into Part II, Article 83's duty to "cherish the interest of literature and the sciences" were departing from that text. And it is the same textualist approach Judge Will applies from the bench — as demonstrated by his plain-language analysis of "inoperative" in *Hillsborough v. Vallerand* and his statutory construction in *Rye Harbor Lobster*.

2. Skepticism of Judicially Created Rights. Will rejected the argument that the Supreme Court's penumbral privacy right from *Griswold v. Connecticut*, 381 U.S. 479 (1965), should be extended to protect document contents under the Fifth Amendment, warning that such an extension "would invite attempts to assert a right to privacy against government actions of all types." 35 B.C. L. Rev. at 989. This skepticism of judicially created rights beyond the constitutional text is the same principle Judge Will demonstrated in *Rye Harbor Lobster*, where he declined to expand Part I, Article 8 beyond existing precedent, writing that "[t]he divination of a constitutional expansion of this magnitude lies squarely within the province of the New Hampshire Supreme Court."

3. Preference for Clear Standards Over Ad Hoc Judging. Will argued that the contents-based approach produced unpredictable, case-by-case adjudication, while the act-of-production framework provided clear, administrable rules. This preference for predictability and rule-based analysis over discretionary balancing is evident throughout Judge Will's judicial opinions, which are characterized by structured, methodical application of established legal tests rather than broad equitable discretion.

4. Respect for the Legislative Role. In a notable passage, Will cited an article by then-Professor Samuel A. Alito, Jr. (later Justice Alito) for the proposition that "the most reliable protection may come not from the Court, but from Congress." 35 B.C. L. Rev. at 999 (citing Samuel A. Alito, Jr., *Documents and the Privilege Against Self-*

Incrimination, 48 U. Pitt. L. Rev. 27 (1986)). The principle that policy protection should come from the legislature rather than from judicial invention is the same principle Will articulated in his *ConVal* briefs, where he argued against the judiciary "running the State's education systems," and the same principle he demonstrated on the bench in *Rye Harbor Lobster* by declining to create constitutional rights not yet recognized by the Supreme Court.

C. Significance for This Nomination

The 1994 law review article is significant because it was written before any client, employer, or professional obligation could have influenced Will's views. He was a law student, writing for a scholarly audience, advancing his own intellectual convictions. The fact that the same four principles — textualism, skepticism of judicially created rights, preference for clear standards, and respect for the legislative role — appear in his law review article, his appellate advocacy, his judicial opinions, and his hearing testimony, over a span of more than thirty years, provides strong evidence that these principles are genuine convictions and not positions of convenience.

This matters directly for the *Binford* question. If Judge Will's textualism were situational — applied when convenient and abandoned when not — we would expect to see inconsistency across time and context. Instead, the record shows remarkable consistency. The 25-year-old law student who argued that courts should not "cut the Fifth Amendment completely loose from the moorings of its language" is the same judge who, in *State v. Fries*, applied Part I, Article 19 according to its text and suppressed drug evidence because the police failed to meet the constitutional standard. The through-line is clear: Judge Will believes the Constitution means what it says.

X. CONCLUSION

The question before this Council is not whether we agree with every legal argument Daniel Will made as an advocate. It is whether, based on the totality of the evidence, he will faithfully interpret and apply the New Hampshire and United States Constitutions as a Justice on our Supreme Court.

The evidence compels an affirmative answer.

Judge Will's judicial opinions demonstrate consistent fidelity to constitutional text. In *State v. Fries*, he suppressed drug evidence because police officers violated Part I, Article 19 — applying the state constitution as more protective than the federal constitution and holding that "officer safety concerns do not override a defendant's constitutional protections." In *Barrington v. Page*, he denied a government inspection warrant because probable cause was lacking under Part I, Article 22. In *Person v. City of Manchester*, he denied a police officer summary judgment and allowed a citizen's case to proceed. In *Hillsborough v. Vallerand*, he constrained government enforcement authority

to what the statute actually authorized. In *State v. Liberty*, he denied restitution that exceeded the scope of the criminal conviction. In *Rye Harbor Lobster*, he applied the *Ball* framework for state constitutional independence and declined to expand constitutional provisions beyond existing precedent from the trial bench.

His hearing testimony reinforces what the judicial record demonstrates. He has described textualism as his guiding principle. He has affirmed the primacy of the New Hampshire Constitution as an independent document. He has stated unequivocally that the Constitution cannot be suspended. He has agreed that *stare decisis* cannot be a straitjacket that enshrines incorrect precedent. He has acknowledged that the *Brooklyn Diocese* decision changed the legal landscape on emergency deference. And he has indicated that he would not defer to administrative agencies in the manner of the now-overruled *Chevron* doctrine.

The concerns about *Binford* are legitimate, and I do not dismiss them. But the *Binford* arguments were made by an advocate on behalf of a client, in the earliest and most uncertain days of a pandemic, before the United States Supreme Court itself had clarified the applicable standards. The more probative evidence — the decisions Judge Will has made when the choice was his alone — tells a consistent story of a judge who takes the New Hampshire Constitution seriously, who enforces its protections against government overreach, and who follows the text wherever it leads.

The Legislature has acted to ensure that civil liberties "shall on no account be suspended." A Justice who applies the law as written will be bound by that enactment. Judge Will's record demonstrates that he applies the law as written.

Based on this comprehensive review, I am satisfied that Judge Daniel E. Will possesses the judicial philosophy, constitutional commitment, intellectual rigor, and professional qualifications to serve with distinction on the New Hampshire Supreme Court. His record demonstrates that he will defer to the text of the Constitution first; that he will apply the New Hampshire Constitution as the independent, primary document it is; that he will enforce constitutional limits on government power; and that he will not hesitate to correct precedent that is plainly wrong.

I vote to confirm.

Respectfully submitted,

JOHN STEPHEN
Executive Councilor, District 4
State of New Hampshire