STATE OF NEW HAMPSHIRE
Superior Court
Grafton, ss.
Case No. 215-2022-CV-00167

Steven Rand el al.

Petitioners,

v.

The State of New Hampshire,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Now come the Plaintiffs and submit this Memorandum of Law in support of their Motion for Preliminary Injunction.

PRELIMINARY STATEMENT

In 1997, the New Hampshire Supreme Court rejected the state education taxing scheme determining that "[t]here is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty." *Claremont Sch. Dist. v. Governor* (*Claremont II*), 142 N.H. 462, 471 (1997). Ever since then, the State has tried numerous mechanisms to avoid implementing an equitable tax system that would have the effect of imposing a fairer tax burden on wealthier towns, requiring the courts to intervene and protect the constitutional rights of New Hampshire citizens. Now, the State is primed to once again impose a tax using the same mechanisms previously held unconstitutional that will result in some taxpayers paying up to seven times as much for education funding as their wealthier counterparts. And, absent court intervention,

Plaintiffs and similarly situated taxpayers will have no recourse once the tax is levied due to the State's invocation of sovereign immunity. By this motion, Plaintiffs turn to the courts to defend their constitutional rights while a remedy is still available.

The New Hampshire Constitution requires that the State of New Hampshire "provide a constitutionally adequate education to every educable child in the public schools in New Hampshire" and to do so using taxes that are "administered in a manner that is equal in valuation and uniform in rate throughout the State." *Claremont II*, 142 N.H. at 469–71. "In mandating that knowledge and learning be 'generally diffused' and that the 'opportunities and advantages of education' be spread through the various parts of the State," the framers intended that "residents of one municipality should not be compelled to bear greater burdens than are borne by others." *Id.* at 471. Indeed, "[c]ompelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to education is unreasonable" as there is no question that "[c]hildren who live in poor and rich districts have the same right to a constitutionally adequate education." *Id.* at 472. As the Court held in *Claremont II*, "[p]roviding an adequate education is … a duty of State government expressly created by the State's highest governing document, the State Constitution," so "[t]hat the State, through a complex statutory framework, has shifted most of the responsibility for supporting public schools to local school districts does not diminish the State purpose of the school tax … the taxing district is the State." *Id.* at 469–70.

Despite this express language in *Claremont II*, the State has repeatedly sought new mechanisms to alleviate the tax burden on wealthier towns. And, each time, the courts have held these mechanisms unconstitutional. In *Opinion of the Justices*, the court advised the State senate that the proposed state education taxing scheme in response to Claremont II was unconstitutional as it provided abatements for towns that, given their property values, are able to raise funds in

excess of the state determined adequacy amount. In holding the scheme unconstitutional, the Court rejected the argument that the "special abatement is designed to protect towns from financially contributing to the adequate education of children in other towns or school districts." The Court found that intention to directly contradict *Claremont* and the New Hampshire Constitution's express language and held that education is a state responsibility to be funded by state taxes. *Op. of the Justices (Sch. Fin.)*, 142 N.H. 892, 901 (1998). Similarly, in *Claremont* (*Statewide Property Tax Phase-In*), the court held that a remittance scheme allowing towns a phase-in period prior to being obligated to remit excess funds generated by local education taxes was unconstitutional as it allowed property-rich towns to pay the full tax rate gradually, while taxpayers in poorer towns were expected to pay the full rate immediately. *See Claremont Sch. Dist. v. Governor* (*Statewide Property Tax Phase-In*), 144 N.H. 210 (1999). Finally, in *Londonderry*, the Superior Court held that a state education tax scheme allowing towns to retain funds generated by the state education taxing scheme in excess of their adequate education allocation was unconstitutional. *See Londonderry School District v. State*, 154 N.H. 153 (2006).

Plaintiffs seek an injunction of the Statewide Education Property Tax ("SWEPT"), the State's current education funding system, which, as implemented, uses the same unconstitutional mechanisms that the Supreme Court previously rejected. SWEPT is one of the primary education taxing schemes of the State and accounts for nearly 30% of the State's total contribution to education funding. Under the current SWEPT scheme, as implemented, the State permits towns that generate an excess revenue to either set a negative local education tax rate or retain the excess

SWEPT funds to be used for general town purposes. Both of these mechanisms have been expressly rejected by the New Hampshire Supreme Court.

With this background, Plaintiffs will meet the three-part test for a preliminary injunction. First, Plaintiffs are likely to succeed on the merits. As explained above, the New Hampshire Supreme Court has held that state education taxing schemes that allow for property-rich towns to retain funds generated in excess of their adequacy allocation or to have their taxes abated, is unconstitutional. As there is no dispute that SWEPT is a state tax and that certain towns have been permitted to retain excess funds or set negative tax rates, this issue is ripe for adjudication in Plaintiffs' favor.

Second, a failure to issue immediate relief will cause irreparable harm as Plaintiffs and similarly situated taxpayers will have no remedy at law due to the State's invocation of the sovereign immunity doctrine. Thus, even if Plaintiffs ultimately succeed on the merits, absent an injunction they will not be able to recoup their losses.

Finally, the balance of equities weighs heavily in favor of injunctive relief. An injunction would cause no harm to the State as it cannot use tax funds levied by an unconstitutional tax to fulfill its State obligations. However, absent an injunction, Plaintiffs will not be able to seek recourse via a later action at law if they ultimately succeed on the merits. Given the State's repeated attempts to circumvent taxpayers' constitutional rights to pay taxes that are disproportionate and not uniform in rate, an injunction is also in the interest of the public at large.

Since *Claremont II*, there is every indication that State has had no intention to comply with the Supreme Court's mandate. As evidenced by the current SWEPT scheme, absent court intervention the State intends to once again ignore the rulings of the New Hampshire Courts. "T[he] judiciary has a responsibility to ensure that constitutional rights not be hollowed out and,

in the absence of action by other branches, a judicial remedy is not only appropriate but essential." *Londonderry*, 154 N.H. at 163. This court should not allow the State to continue acting in direct contradiction of established law.

BACKGROUND

Plaintiffs Steven Rand, Randvest, Inc., Dr. Robert Gabrielli, the Gabrielli Family Ltd. Partnership, Jessica Wheeler Russell, Adam Russell, James Lewis, and John Lunn (collectively, the "Plaintiffs") filed the First Amended Complaint in the above-captioned matter on August 22, 2022 (the "Complaint") alleging, among other claims, that Defendant the State of New Hampshire's (the "State") education property tax system is unconstitutional because the property taxes upon which the State relies to fund a constitutionally adequate public education are administered in a manner that is not uniform in rate in violation of Part II, Article 5 of the New Hampshire Constitution (the "Constitution").

On September 7, 2022, the State filed its Answer to First Amended Complaint ("the Answer"). In its Answer, the State admits that "since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid by the State have been permitted to retain the excess amounts raised by the SWEPT." Answer ¶ 7-8. The State further admits that "a small number of towns have set negative local education tax rates." Answer ¶ 10.

I. THE STATE'S FUNDING OBLIGATION

The State's duty to provide a public education to the children of New Hampshire has been part of the Constitution since 1784. *See* N.H. Const. part II, art. 83. Thirty years ago, the State argued that this merely required the State to provide a public educational school system, and did not require the State to provide any substantive level of education. *Claremont School Dist. v. Governor* (*Claremont I*), 138 138 N.H. 183, 192 (1993). The New Hampshire Supreme Court (the "Court") rejected this argument and declared that it was the State's constitutional obligation "to

provide a constitutionally adequate education to every educable child in the public schools in New Hampshire" and "to guarantee adequate funding." *Id.* at 184.

In 1997, the Court determined that, because funding an adequate education is a State duty, any taxes levied by local school districts to fund an adequate education must "be administered in a manner that is equal in valuation and uniform in rate throughout the State." *See* N.H. Const. part II, art. 5. Specifically, in finding the State's school funding scheme unconstitutional, the Court held that "[a]lthough the taxes levied by local school districts are local in the sense that they are levied upon property within the district, the taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution." *Claremont II*, 142 N.H. at 465, 469. "Consequently, '[t]here is abundant justification in fact for taking this property out of the class taxed locally, and taxing it at the average rate throughout the state.'" *Id.* (quoting *Op. of the Justices*, 84 N.H. 559, 566 (1930)); *see also* N.H. Const. part II, art. 5.

In its ruling, the Court observed that "[t]here is nothing fair or just about taxing a home or other real estate in one town at four times the rate that a similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty." *Claremont II*, 142 N.H. at 471. Beyond addressing the fairness and uniformity of taxes, the Court also observed that "[i]n mandating that the 'opportunities and advantages of education' be spread throughout the various parts of the State, the framers of the New Hampshire Constitution could not have intended the current funding system with its wide disparities. This is likely the very reason that the people assigned the duty to support the schools to the State and not to the towns." *Id.* at 470 (quoting N.H. Const. pt II, art. 83).

Accordingly, the Court held that "[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." *Id.* at 471.

II. STATE'S RESPONSE TO CLAREMONT II

In response to *Claremont II*, the New Hampshire Legislature proposed House Bill 1280 and requested that the Court issue an advisory opinion as to the constitutionality of the bill. The bill created an "abatement" scheme which authorized a reduction in taxes based on the amount of education tax revenues generated in excess of the town's threshold for adequate education, i.e., the statewide per pupil cost of an adequate education times the average daily membership in residence for the town. *Op. of the Justices (Sch. Fin.)*, 142 N.H. at 899. The Court considered and rejected the bill proponents' intent that the bill is "designed to protect towns from financially contributing to the adequate education of children in other towns or school districts." *Id.* at 902.

In *Opinion of the Justices*, the Court advised that providing an abatement would create a non-uniform tax rate. Specifically, the Court determined that:

> [a]s a result of the special abatement, the *effective tax rate* is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined 'adequate education' for its children . . . [m]eanwhile, in any town where the property value is insufficient to support the revenue required to educate local children adequately at the uniform State education tax rate, the effective tax rate remains equal to the uniform State education tax rate.
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> *Id.* at 899-900 (emphasis supplied).

Further, the Court held that "[a]batements and exemptions necessarily result in a disproportionate tax burden on the remaining property in the taxing district." *Id.* at 900. The Court found unpersuasive the State's arguments that the abatement helps avoid "social discord . . . because other tax resolutions could be divisive." *Id.* at 901. The Court expressly rejected the argument that "the special abatement is designed to protect towns from financially contributing to

the adequate education of children in other towns or school districts." *Id.* The Court specifically remarked that "difficult decisions which may cause social unrest cannot be a factor in the court's constitutional review of the bill." *Id.* Quoting *Claremont II* the court noted that:

> Because the diffusion of knowledge and learning is regarded by the State Constitution as 'essential to the preservation of a free government,', N.H. CONST.pt. II, art. 83, it is only just that those who enjoy such government should equally assist in contributing to its preservation. The residents of one municipality should not be compelled to bear greater burdens than are borne by others.
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> *Id.* at 901.

The Court further advised that "[t]his obligation cannot be avoided or lessened by the mere circumstances of a town having few children or a town having a wealth of property value, including wealth generated by the presence of heavy industry." *Id.* Thus, the Court advised that the application of a special abatement "violates both the plain wording of Part II, Article 5 and the express language of *Claremont II*." *Id.* at 902.Less than two years after the Court's decision in *Claremont II*, plaintiffs in *Claremont (Statewide Property Tax Phase-In)*, "property poor" school districts, school children, and taxpayers, sought declaratory judgment over another non-uniform education funding scheme. 144 N.H. 210 (1999). The legislation at issue required municipalities "in which the education property tax exceeds the amount necessary to fund an adequate education" to remit the excess amount to the Department of Revenue Administration. *Id.* at 213. However, the legislation allowed a phase-in of the remit requirement; meaning that, for the first five years, the towns with excess education tax revenues did not need to remit the full amount. *Id.* The Court found "[t]he practical effect of this phase-in is that in fifty 'property rich' towns across the State, the full rate of $6.60 per thousand is imposed gradually over five years, while taxpayers in the remaining towns pay the full rate immediately." *Id.*

The Court considered whether the phase-in was a tax exemption, but determined it was unsupported by just reasons consistent with the constitution. "[I]t is neither reasonable nor fair to

award automatic tax exemptions to a majority of taxpayers in affected 'property rich' communities who do not need them in order to assist those who would surely qualify." *Id.* at 216. The Court rejected the State's argument that "because the phase-in provision is temporary, it fundamentally differs from the special abatement that this court concluded would be unconstitutional." *Id.* at 219.

After five years, the State once again tried to adopt further legislation that would allow districts to retain excess funds raised by statewide education taxes. In *Londonderry School District SAU #12 v. State*, the superior court struck down as unconstitutional another non-uniform tax mechanism that allowed the surplus of state education tax to be kept locally. No. 05-E-0406, 2006 N.H. Super. LEXIS 4, at *35 (Mar. 8, 2006). The bill at issue permitted property-rich communities to retain all the revenue they raised through the proposed statewide education tax which allegedly would exceed the communities' cost of an adequate education.[1] *Id.*

The court found the scheme comparable to that in *Opinion of the Justices (School Financing)* and *Claremont (Statewide Property Tax Phase-In)* because they all resulted in property-rich municipalities avoiding payment of the amount of the statewide education property tax that exceeded the amount necessary to provide an adequate education. *Londonderry*, 2006 N.H. Super. LEXIS 4 at *41. Therefore, the court held the bill "create[d] a non-uniform tax rate and the Court finds that no constitutional justification can be articulated to permit the retention of those excess funds by the 'property-rich' municipalities. Consequently, [the bill] violates Part II, Article 5 of the New Hampshire Constitution." *Id.*

[1] However, this policy to retain the full excess amount did not apply where the tax revenue to be raised by the municipality for fiscal year 2006 exceeded the amount taxpayers spent in fiscal year 2003 through the combined payments of state and local educational property taxes. *Id.* at *36.

III. THE CURRENT FUNDING SYSTEM

The State's education funding system has multiple components, including a Statewide Education Property Tax (the current version coined as "SWEPT"),[2] which is collected and distributed locally by each town to raise funds needed to meet the State's cost of funding an adequate education.[3] RSA 76:8. Although assessed, collected, and distributed locally, the SWEPT is a state tax.[4]

The SWEPT was introduced in 1999 as a response to Claremont II and set at a rate of $6.60. To determine the tax rate, the New Hampshire Legislature (the "Legislature") sets the amount of total statewide cost for educating all New Hampshire students and divides that total number by the total statewide equalized property value. *See* RSA 76:8 (the statewide education property tax is computed based on total equalized valuation). From 2005 to 2021, the Legislature set the total to be raised by the SWEPT at $363 million annually. *Id.* This amount is not adjusted for inflation. For the 2022-2023 state fiscal year only, the Legislature lowered the amount of the money to be collected by the SWEPT from $363 million to $263 million. That amount is expected be raised back to $363 million for the 2023-2024 fiscal year.[5]

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[2] The earliest version of SWEPT was introduced as the Education Property Tax in 1999 as a response to Claremont II. As a result of the courts' orders detailed above, the taxing scheme has been amended multiple times since 1999, with each variation receiving a different acronym (e.g., SEET). For the avoidance of confusion, Plaintiffs will refer to the state's education taxing system as SWEPT.

[3] "The State admits that the Statewide Education Property Tax (SWEPT) is collected and distributed at a local level and raises funds used to meet the cost of an adequate education." Defendant's Answer to First Amended Complaint ¶ 19 ("Answer). As a note, Plaintiffs do not consider the State's admissions to be concessions, but rather facts the state's lawyers were ethically bound to admit.

[4] *See* Answer ¶ 28 (admitting Plaintiffs' assertion that "[t]he Statewide Education Property Tax (SWEPT) is a state tax, although the State leaves it to local municipalities to assess, collect, and distribute the funds."

[5] "The State admits that the total amount raised by the SWEPT is slated to return to $363 million during the fiscal year starting July 1, 2023." Answer ¶ 20.

By statute, the Legislature has directed the Commissioner of the Department of Revenue Administration (the "DRA Commissioner") to set the SWEPT rates by December of each year. RSA 76:8. In practice, the DRA Commissioner sets the SWEPT rates and begins issuing warrants starting in late September through November, and towns collect the SWEPT taxes beginning in December.[6]

Under the $263 million allocation, the SWEPT comprises about 23.6% of the State's contribution to adequate education. In previous years, where SWEPT was set to $363 million, the SWEPT comprised 35.9% of the state's contribution to adequate education in 2021.

Revenue generated by SWEPT is used to fund the adequacy aid provided to students. For most towns, the modest amount raised by the SWEPT does not meet the State's adequacy funding level. In these property-poor and middle-wealth communities, the State supplements the SWEPT funds to bring the total amount of state support to approximately $3,708, the state-determined adequacy cost per student, (or an average of $4,597 per student when factoring in differentiated aid).[7] In property-wealthy towns, however, the SWEPT raises more funds per pupil than the State's low standard for what it asserts is the cost of a State-funded adequate education.[8]

Previously, the State required these towns to remit the excess revenue ("surplus") generated to the State's Education Trust Fund. However, since 2011, the State has permitted these towns to

[6] NH Department of Revenue Administration, Municipal Matters: Technical Assistance for Tax Collectors 51 (2019), https://www.revenue.nh.gov/mun-prop/municipal/documents/tax-collector-municipal-matters-manual.pdf.

[7] Differentiated aid is additional aid provided to students who meet certain eligibilities including, for example, free and reduced-price lunch, special education, or students who are not English native speakers. Complaint ¶ 13.

[8] *See* Answer ¶ 21 ("The State admits that it provided school districts with adequacy aid in an amount of $4,597.82 per pupil during the 2020-2021 school year and that in some communities the amount raised by the SWEPT exceeds the total amount of adequacy aid provided to those communities.").

either set a negative local education tax rate or retain excess SWEPT funds to be used for general town purposes. Answer ¶¶ 22,[9] 35.[10]

In 2021[11], upon information and belief, twenty-one towns who were permitted to retain excess the SWEPT funds opted to set a negative SWEPT tax rate. Answer ¶ 35 ("The State admits that a small number of towns have set negative local education tax rates."). For example, in Hale's Location, the DRA Commissioner set a SWEPT tax rate of $1.85 in 2021 to raise $147,484. Complaint at app. tbl. C.[12] The DRA Commissioner also set a local school tax rate of negative $1.84, thus reducing the amount to be raised to virtually zero. As a result, the SWEPT tax liability was completely offset and Hale's Location taxpayers paid no SWEPT tax for schools.

In 2021, upon information and belief, approximately thirty-four towns were permitted to retain excess SWEPT. It is likely there will be communities in which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid to those communities in the upcoming fiscal year. Answer ¶ 33.[13]

Plaintiffs reside in towns that do not generate excess SWEPT or issue negative local education tax rates.

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[9] *See* <u>*also*</u> Answer ¶ 22 ("The State admits that since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid by the State have been permitted to remain the excess amounts raised by the SWEPT.").

[10] "The State admits that a small number of towns have set negative local education tax rates." Answer ¶ 35.

[11] Plaintiffs cite to 2021 numbers as these were the last set of numbers made publicly available.

[12] *See* Answer ¶ 37 ("The State admits that the values contained in the second and third columns of Table C, contained in the appendix to the First Amended Complaint, are accurate equalized tax rates for the 2020-2021 school year").

[13] Answer ¶ 33 ("The State admits this paragraph only insofar as it alleges that it is likely that during the fiscal year starting July 1, 2023, there will be communities in which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid to those communities.").

ARGUMENT

1. A PRELIMINARY INJUNCTION IS WARRANTED UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE

It is within a court's "sound discretion" to grant a preliminary injunction "upon a consideration of all the circumstances." *Gauthier v. Robinson*, 122 N.H. 365, 368 (1982). In determining whether an injunction is warranted, courts consider the following elements: (1) whether the movant is likely to succeed on the merits; (2) whether the movant is in danger of an immediate, irreparable harm that cannot be adequately remedied by law; and (3) whether the balance of equities weighs in favor of the movant. *N.H. Dep't of Env't Servs. v. Mottollo*, 155 N.H. 57, 63 (2007); *UniFirst Corp. v. Nashua*, 130 N.H. 11, 14-15 (1987).

Here, Plaintiffs satisfy each of these elements. First, Plaintiffs are likely to prevail on the merits because the New Hampshire Supreme Court has repeatedly struck down similar tax avoidance schemes. Second, Plaintiffs will suffer irreparable harm absent an injunction as sovereign immunity will prohibit Plaintiffs from recovering damages for unconstitutional taxes paid from the State (i.e., sovereign immunity bars recovery of damages by the Plaintiffs and similarly situated taxpayers in an action at law). Third, the balance of equities weigh in the Plaintiffs' favor because Plaintiffs seek an injunction to protect the constitutional rights of the public at large and the State will not suffer harm if an injunction is granted because it cannot fund state services through the imposition of an unconstitutional tax.

2. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A party seeking injunctive relief must show that it would likely succeed on the merits. *Kukene v. Genualdo*, 145 N.H. 1, 4 (2000). New Hampshire courts have often determined the likelihood of success on the merits by a balance of the probabilities. *Thompson v. N.H. Bd. of Med.*, 143 N.H. 107, 109 (1998); *see UniFirst*, 130 N.H. at 14–15. To succeed on the merits,

Plaintiffs will have to demonstrate that SWEPT is (i) a state tax and (ii) is administered in a way that is not uniform in rate as required by Part II, Article 5 of the Constitution.

There is no dispute that SWEPT is a state tax. Answer ¶ 28 (admitting that "The Statewide Education Property Tax (SWEPT) is a state tax, although the State leaves it to local municipalities to assess, collect, and distribute the funds."). Accordingly, the only issue Plaintiffs will have to demonstrate is that SWEPT is administered in a way that is not uniform in rate.

The SWEPT tax as currently administered is not uniform in rate as the State allows towns with surplus SWEPT funds to either (i) set a negative local education tax rate to offset the State's official equalized SWEPT tax rate[14] or (ii) retain the excess.[15] Both of these mechanisms have been previously deemed unconstitutional by New Hampshire courts.

The Court has previously held and advised that abatements for state education taxes are unconstitutional. In *Claremont II*, the Court held that the varying property tax rates used to fund an adequate education were unreasonable and disproportionate in violation of Part II Article 5. *Claremont II*, 142 N.H. at 471. In response to the decision, the state senate requested an advisory opinion of the court as to whether a proposed amendment to the funding bill that included a property tax abatement scheme would violate *Claremont II*'s mandate.[16] The court determined that the abatement scheme violated Part II Article 5. The proposed bill sought to "determine the

[14] Answer ¶ 35 ("The State admits that a small number of towns have set negative local education tax rates.")

[15] Answer ¶ 33 ("The State admits only that since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid by the State have been permitted to retain the excess amounts raised by the SWEPT.")

[16] The state senate also requested an opinion as to whether "enactment of HB 1280-LOCAL as amended, violate the express language of this court in Claremont II, that to the extent that the property tax is used to fund the provision of an adequate education, to be constitutional, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the state?" *Op. of the Justices*, 142 N.H. at 896.

tax rate by calculating the total statewide cost for educating all New Hampshire students and dividing this sum by the total statewide equalized property value." *Op. of the Justices*, 142 N.H. at 899. However, the bill also authorized a "special abatement for the amount of the state education tax apportioned to each town . . . in excess of the product of the statewide per pupil cost of an adequate education . . . times the average daily membership in residence of the town." The court advised the senate the abatement rendered the tax system unconstitutional, finding that:

> As a result of the special abatement, the effective tax rate is reduced below the uniform State education tax rate in any town that can raise more revenue than it needs to provide the legislatively defined "adequate education" for its children. For example, in those towns where there are no children, the special abatement reduces the effective tax rate to zero. Meanwhile, in any town where the property value is insufficient to support the revenue required to educate local children adequately at the uniform State education tax rate, the effective tax rate remains equal to the uniform State education tax rate. Those towns receive a grant from the State to meet the otherwise unfunded costs of an adequate education. Although such towns would be fully funded, the owners of property therein would pay taxes at a higher rate than those in towns with a surplus of revenue, which would receive the special abatement.

Id. at 899–900.

The court explicitly rejected arguments by proponents of the bill that the "special abatement is designed to protect towns from financially contributing to the adequate education of children in other towns or school districts." *Id.* at 901. As the court made clear, the obligation to contribute to statewide education funding "cannot be avoided or lessened by the mere circumstances of a town having few children or a town having a wealth of property value, including wealth generated by the presence of heavy industry." *Id.* at 901 (citing *Barksdale v. Town of Epsom*, 136 N.H. 511, 514 (1992) and *Union Transit Co. v. Kentucky*, 199 U.S. 194, 203 (1905)).

The State permitting towns to apply a negative tax rate to offset excess SWEPT is virtually identical to the abatement scheme in *Opinion of the Justices* deemed unconstitutional by the New

Hampshire Supreme Court.[17] Accordingly, SWEPT as currently administered is unconstitutional to the extent towns are permitted to apply a negative local education tax rate. Particularly important here, is that local school districts, like all municipalities, do not set their local tax rates. Municipal rates are set by the DRA Commissioner. *See* R.S.A. 21-J:35 ("The commissioner of revenue administration shall compute and establish the tax rate of each town, city, or unincorporated place."). Thus, it is clear that the setting of a negative school district rate is a State action, not a local municipal action.

Similarly, courts have previously rejected state education taxing schemes that permitted communities to retain revenue in excess of what is needed to support the community's cost of an adequate education. *See Claremont* (*Statewide Prop. Tax Phase-In*), 144 N.H. 210 (1999); *Londonderry*, 2006 N.H. Super. LEXIS 4 at*41. For example, as a result of the advisory opinion, the legislature passed a revised bill that required municipalities in which the SWEPT revenue would exceed the adequacy amount to remit the excess to the DRA. However, the remittance obligation would be generally phased in over five years. As a result, "[t]he practical effect of this phase-in is that fifty 'property rich' towns across the State" would not pay the full education tax rate for the first five years, "while taxpayers in the remaining towns pay the full rate immediately." *Claremont* (*Statewide Prop. Tax Phase-In*), 144 N.H. at 213 (citing *Claremont II*, 142 N.H. at 467). The State argued "that because the phase-in is temporary, it is fundamentally" different than the abatement scheme rejected by the court in *Opinion of the Justices*. *Id.* at 219. The Court once again rejected this argument holding that the phase-in resulted in an unconstitutional abatement. *Id.*

[17] Notably, the court advised that regardless of whether the abatement is applied prior to the taxpayer receiving a tax bill or via reimbursement after taxes were collected, the court's conclusion would remain the same. *Op. of the Justices*, 142 N.H. at 899. Accordingly, the fact that the towns set the negative tax rate (as opposed to the State applying the abatement prior to issuing the warrant) has no bearing here.

Similarly, in *Londonderry*, the court held that the state's education tax scheme SEET (the predecessor to SWEPT) was unconstitutional because it "clearly results in many 'property-rich' municipalities retaining SEET proceeds in excess of the cost of an adequate education." *Londonderry*, 2006 N.H. Super. LEXIS 4 at *40–41. Drawing from the language in *Opinion of the Justices* and *Claremont (Statewide Property Tax Phase-In)*, the court determined that allowing "property-rich" municipalities to retain the excess resulted in a non-uniform tax rate in violation of Part II, Article 5 of the New Hampshire Constitution.[18]

The State permitting towns to retain excess SWEPT funds is identical to the scheme held unconstitutional by the New Hampshire Supreme Court in *Claremont (Statewide Property Tax Phase-In)* and the Superior Court in *Londonderry*. As the court made clear in Claremont II, "there is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty. Compelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to fund education is unreasonable." *Claremont II*, 142 N.H. at 471. Yet the SWEPT tax as administered does exactly that. Accordingly, as both these mechanisms have already been held unconstitutional by the New Hampshire Supreme Court, an injunction is warranted as Plaintiffs are likely to succeed on the merits.

[18] On appeal, the Supreme Court stayed the issue pending an order for the State to revise legislation to address its failure to define an adequate education. *Londonderry*, 154 N.H. at 162. As a response, the State superseded the education and tax scheme at issue in *Londonderry* and the Supreme Court determined that challenges to the previous statute were now mooted. *Londonderry Sch. Dist. v. State*, 157 N.H. 734 (2008). Following *Londonderry*, communities were not permitted to withhold excess funds until 2011. *See* Answer ¶ 22.

3. PLAINTIFFS WILL BE ABLE TO SHOW IRREPARABLE HARM BECAUSE THERE IS NO ADEQUATE REMEDY AT LAW

Under New Hampshire law, a preliminary injunction is warranted if there is immediate danger of irreparable harm to the party seeking injunctive relief and there is no adequate remedy at law. *Unifirst*, 130 N.H. at 14; *Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316, 444 (1982); *N.H. Dep't of Env't Servs. v. Mottolo*, 155 N.H. 57, 63 (2007).

An injury is "irreparable" if it cannot adequately be compensated for, either by a later-issued permanent injunction after a full adjudication on the merits, or by a later-issued damages remedy. *Nw. Bypass Grp. v. U.S. Army Corps. of Eng'rs*, 470 F.Supp.2d 30, 64 (D.N.H. 2007). If a trial on the merits can be conducted before the injury would occur, interlocutory relief is not necessary. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005) (citing Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11A Federal Practice & Procedure § 2948.1, at 149 (2d ed. 1995)). Whether an adequate remedy exists "necessarily depends upon the factual circumstances in each case." *Exeter Realty Corp. v. Buck*, 104 N.H. 199, 200 (1962); *see also Varney v. Fletcher*, 106 N.H. 464, 467-68 (1965) ("The granting of an injunction . . . is a matter within the sound discretion of the Court upon a consideration of all the circumstances of each case."). Here, an injunction is warranted because sovereign immunity will prevent Plaintiffs from being adequately compensated after a full adjudication on the merits or by a later-issued damages remedy. Indeed, a damage award is not available to the Plaintiffs because sovereign immunity protects the State from just such an award. *Contoocock Valley Sch. Dist. v. State*, No. 213-2019-CV-00069, 2019 N.H. Super. LEXIS 24, at *25 (Apr. 5, 2019).

Under the doctrine of sovereign immunity, the State cannot be sued absent an applicable statute or other consent waiving the State's sovereign immunity. *In re Estate of Raduazo*, 148 N.H. 687, 692 (2002). Sovereign immunity also "bars a retrospective award for constitutional

wrongdoing in the absence of such a decree when the award is indistinguishable from an award of damages paid from state funds." *Contoocock Valley*, 2019 N.H. Super. LEXIS 24 at *25. Because of sovereign immunity, if Plaintiffs ultimately prevail on the merits, taxpayers will be unable to recoup the taxes paid pursuant to the unconstitutional tax scheme. Accordingly, absent an injunction, taxpayers will have no remedy at law.[19]

4. THE BALANCE OF THE EQUITIES WEIGH HEAVILY IN PLAINTIFFS' FAVOR

The Court should grant Plaintiffs' preliminary injunction because an injunction is in the public's best interest.

New Hampshire courts agree that "injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted." *Kukene*, 145 N.H. at 4. When performing this balancing of equities, courts should grant an injunction "when it is apparent . . . that it will subserve the ends of justice." *Eaton v. Eaton*, 64 N.H. 493, 498 (1888) (quoting *Willard v. Tayloe*, 75 U.S. 557, 567 (1870)).

Absent an injunction, Plaintiffs and similarly situated taxpayers across the state will pay unconstitutional taxes and have no adequate remedy at law if the Court later determines the SWEPT tax is unconstitutional. Injunctions serve the public interest where an injunction would safeguard constitutional rights. *See UniFirst*, 130 N.H. at 14–15 (finding that granting an injunction was in the public interest to protect due process rights); *Deere & Co. v. State*, No. 216-

[19] Plaintiffs are unaware of any waiver of sovereign immunity by the State that would compensate Plaintiffs for their payment of an unconstitutional tax. The State has asserted sovereign immunity in their Answer. See Answer at 20 (Second Affirmative Defense). Moreover, the State's limited waiver of sovereign immunity approved by the Legislature in RSA Ch. 541-B does not apply. *See* RSA 541-B:1, II-a. ("'Claim'' means any request for monetary relief for either: (a) Bodily injury, personal injury, death or property damages caused by the failure of the state or state officers, trustees, officials, employees, or members of the general court to follow the appropriate standard of care when that duty was owed to the person making the claim, including any right of action for money damages which either expressly or by implication arises from any law, unless another remedy for such claim is expressly provided by law….").

2013-cv-00554, 2013 N.H. Super. LEXIS 32, at *35 (Sept. 19, 2013) ("Here, the plaintiffs are asserting a constitutional right . . . . Therefore, like *UniFirst*, it is proper for the Court find that the public's interest is served by allowing a status quo preliminary injunction . . . ."); *see also Claremont I*, 138 N.H. at 191–92 ("Having identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement.").

Moreover, the New Hampshire Supreme Court has repeatedly determined that issues regarding education and specifically taxes used to fund education are rights enforceable by plaintiffs on behalf of the public at large. *See Claremont I*, 138 N.H. 183 (1993); *Claremont II*, 142 N.H. 462 (1997); *Londonderry*, 154 N.H. 153 (2006). The State, absent oversight from the Court and the public, intends to enforce a tax scheme virtually identical to the previous schemes the New Hampshire Supreme Court has ruled are unconstitutional. *See Claremont II*, 142 N.H. 462 (1997); *Op. of the Justices*, 142 N.H. 892 (1998); *Londonderry*, 154 N.H. 153 (2006). Accordingly, a preliminary injunction enjoining the State from repeating its constitutional violations is within the public interest.

Lastly, as explained above, if this Court does not grant an injunction and plaintiffs ultimately prevail at trial, sovereign immunity will prevent taxpayers from obtaining any recovery. Where sovereign immunity would prevent later recovery an injunction is warranted. In *Plymouth Village Water & Sewer District v. Scott*, the court granted a preliminary injunction, stating that "[b]ecause New Hampshire is protected by sovereign immunity, if injunctive relief is not granted, Plaintiffs will never be able to recoup the expenses they incur if they succeed at trial." *Plymouth Vill. Water & Sewer Dist. v. Scott*, No. 217-2019-cv-00650, 2019 N.H. Super. LEXIS 18, at *32–33 (Nov. 26, 2019). While taxpayers would be irreparably harmed absent an injunction, the State would suffer no harm. The money collected by the towns in December will be used to cover the

adequate education allocation for the 2023-2024 school year which begins next September, after this case is tried. Accordingly, there will be time for the State to issue warrants and levy taxes if it ultimately prevails.[20]

CONCLUSION

"Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable. The legality of the education funding system in this State has been questioned for at least the past twenty-seven years . . . The controlling legal principles are plain. . . The command of Part II, Article 5 is that taxes be proportional and reasonable, thereby forbidding varying property tax rates across the State to support the public duty to provide education." *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 158 (1998) (citing *Claremont II*, 142 N.H. at 471). These words issued by the New Hampshire Supreme Court nearly twenty-five years ago unfortunately still ring true today. This court must put an end to this cycle.

For the foregoing reasons, Plaintiffs ask that the Court grant this motion for preliminary injunction.

Dated: October 5, 2022

Respectfully submitted,

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[20] Plaintiffs also believe that the issue of whether the SWEPT tax is unconstitutional is ripe for summary judgment and can be resolved well in advance of trial, further limiting any potential harm to the State.

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**pro hac vice pending*

Certificate of Service

I hereby certify that a copy of this Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction has been served upon the State of New Hampshire this 5th day of October, 2022, by way of the court's electronic filing system.

/s/*Natalie Laflamme*
Natalie J. Laflamme