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

Steven Rand et al.

Plaintiffs,

v.

The State of New Hampshire,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SWEPT

NOW COME THE PLAINTIFFS AND SUBMIT THIS MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT.

A NOTE ON TIMING AND THE NATURE OF THIS MOTION

This case presents three primary issues: (1) whether the current version of the Statewide Education Property Tax ("SWEPT") is unconstitutional to the extent excess SWEPT revenues are retained and/or Defendant the State of New Hampshire (the "State") offsets SWEPT by setting a negative tax rate ("SWEPT issue"); (2) whether the State can show its determined adequacy amount is sufficient to meet its constitutional obligation under Part II, Article 83 ("adequacy issue"); and (3) assuming the State cannot establish the sufficiency of its adequacy amount, whether the shortfall in adequacy funding requires local communities to pay for the shortfall with local education taxes that vary widely in rate rendering the use of local education taxes—when used to pay for state adequacy—unreasonable and disproportionate in violation of Part II, Article 5 ("disproportionate tax issue"). There is no dispute that local education taxes

vary in rate.[1] 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") believe the SWEPT issue is resolvable as a matter of law and resolution of this issue at this stage is appropriate.

First and foremost, Plaintiffs are respectful of the Court's ruling that denied preliminary injunctive relief. That order of December 5, 2022, found that Plaintiffs have standing to challenge the Department of Revenue Administration's (the "DRA's") administration of SWEPT, but concluded the practical implications of finding SWEPT unconstitutional in the middle of tax season was too great to grant relief. *See* Order on Motion for Preliminary Injunctive Relief, Motion to Intervene, and Motion for Temporary Restraining Order (the "Order") at 11. This is not an effort to circumvent that ruling or to seek its reconsideration. The Order did not address the merits of the Plaintiffs' assertion that the SWEPT is unconstitutionally administered. *Id.* at 11-12. There is no "law of the case" on this point.[2]

Instead, this partial summary judgment motion is an effort to obtain a ruling from this Court before the next property tax year begins. New Hampshire has a "property tax year" that begins on April 1st. R.S.A. 76:2. The next round of semi-annual tax bills are generally not

[1] There is also no dispute that the local education taxes raised are used to provide educational services to students. Given that the local education tax rates are indisputable and that all districts spend more than the adequacy amount provided by the State, there is no issue of material fact as to this issue. Accordingly, to the extent Plaintiffs demonstrate that the State determined adequacy amount is insufficient, there can be no legitimate dispute that the resulting tax rates used to supplement adequacy funding violate Part II, Article 5.

[2] *Saunders v. Town of Kingston*, 160 N.H. 560, 566 (2010) ("Under the law of the case doctrine, '[o]nly such issues as have actually been decided, either explicitly, or by necessary inference from the disposition, constitute the law of the case . . . .'") (quoting *Taylor v. Nutting*, 133 N.H. 451, 456 (1990) (quotation and brackets omitted)).

mailed to taxpayers until late May or early June. In addition, the New Hampshire Legislature will be in session in April. All of these factors militate in favor of all parties benefitting from a ruling that comes in time for the beginning of the next property tax year.

Plaintiffs have also chosen to isolate the challenge to the constitutionality of SWEPT in this motion for partial summary judgment to facilitate the participation of the intervening Coalition Communities.

Second, resolution of the SWEPT issue at this juncture would narrow the triable issues. As to the adequacy issue, Plaintiffs believe there are components of that issue that can be resolved as a matter of law. Plaintiffs intend to file a motion for summary judgment on the adequacy issue early in the new year. Plaintiffs respectfully request the Court not wait for the broader summary judgment motion, as this pleading can and should be addressed on its own merits.

PRELIMINARY STATEMENT

As this Court noted at the preliminary injunction hearing, there is no issue of material fact regarding the SWEPT issue—the taxes are what they are. The only issue is whether permitting certain localities to retain SWEPT funds generated in excess of adequacy and/or offsetting SWEPT by setting a negative tax rate violates the proportional and reasonable clause as a matter of law. It does.

In 1997, the New Hampshire Supreme Court (the "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 schemes

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 once again using the same schemes previously held unconstitutional, and those schemes will result in some taxpayers paying up to seven times as much for education funding as their wealthier counterparts.

The New Hampshire Constitution requires that the State "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." *Id.* at 469. "That 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 schemes to alleviate the tax burden on wealthier towns. And, each time, the courts have held these schemes 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." *Op. of the Justices (Sch. Fin.)*, 142 N.H. 892, 901 (1998). 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. *Id*. 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. *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. *Londonderry School District v. State*, 154 N.H. 153 (2006).

Under the current SWEPT scheme, as implemented, the State permits towns that generate excess revenue to retain the excess SWEPT funds to be used to depress local tax rates, and also instructs other localities to offset SWEPT with a negative local education tax rate. Both of these mechanisms have been expressly rejected by the Court. As there is no dispute that SWEPT is a state tax and that certain towns have been permitted to retain excess funds or have negative tax rates, this issue is ripe for adjudication in Plaintiffs' favor.

Since *Claremont II*, there is every indication that the State has no intention to comply with the Supreme Court's mandate. As evidenced by the current SWEPT scheme, absent court intervention, the State intends to continue to 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 filed the First Amended Complaint in the above-captioned matter on August 22, 2022 (the "Complaint") alleging, among other claims, that the State's 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").

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 N.H. 183, 192 (1993). 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.* at 470 (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:

> In 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 multiplied by 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:

> 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 . . . [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.

Id. at 899–900 (emphases added).

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 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.

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 DRA. *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.[3] *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 that 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.*

III. THE CURRENT FUNDING SYSTEM

The State's education funding system has three main components: (i) the current version of SWEPT;[4] (ii) state adequacy grants; and (iii) local property taxes. SWEPT is collected and distributed locally by each locality to raise funds needed to meet the State's cost of funding an adequate education.[5] Although assessed, collected, and distributed locally, SWEPT is a state tax.[6]

[3] 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.

[4] 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.

[5] "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 ("Answer") ¶ 19. 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.

[6] *See* Answer ¶ 28 (admitting Plaintiff's 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.").

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 money to be collected by the SWEPT from $363 million to $263 million. That amount is expected to be raised back to $363 million for the 2023–2024 fiscal year.[7]

The property tax year is determined by statute and runs from April 1 through March 31. R.S.A. 76:2. Property taxes are levied based on the inventory taken on April 1. *Id.* SWEPT is generally collected in two tax payments.[8] The first payment, made during the summer, is based on the prior year's tax rate. RSA 76:15-a, II. The second tax payment, made in December, reflects the actual tax rates set by DRA for the current year. *Id.* To set the rate, the Commissioner of the DRA (the "DRA Commissioner") first determines a localities' tax base for education. RSA 76:8, I(a). The DRA Commissioner then multiplies the statutory equalized tax rate by that tax base to determine the total amount of revenue generated by SWEPT. RSA 76:8, I(a); *see also* State's Objection to Plaintiffs' Motion for Preliminary Injunction ("Obj."), at 3–4. The DRA

[7] "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.

[8] A small number of localities collect quarterly as opposed to semi-annually. *See* RSA 76:15-aa.

Commissioner sets the SWEPT rates and begins issuing warrants starting in late September through November, and towns collect the SWEPT taxes beginning in December.[9] Obj. at 21.

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

Revenue generated by the 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).[10] 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.[11]

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

[9] 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.

[10] 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 native English speakers. Complaint ¶ 13.

[11] *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.").

retain excess SWEPT funds to be used for general town purposes, or has set a negative local education tax rate. Answer ¶¶ 22,[12] 35.[13]

In 2021[14], the DRA set negative local education tax rates for twenty-one towns to offset SWEPT rates. 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, App. Table C.[15] 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, the DRA also permitted approximately thirty-four towns to count excess SWEPT revenues as local revenues and allowed these communities to lower local tax rates based on these revenues. 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.[16]

[12] *See also* 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.").

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

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

[15] *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.").

[16] 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.").

After the DRA Commissioner determines the total amount of SWEPT generated and any additional adequacy grants, the DRA Commissioner finally determines the local education tax rate necessary to generate the funds a locality still needs to meet its state-approved school budget.

Plaintiffs reside in towns that do not generate excess SWEPT or issue negative local education tax rates, resulting in Plaintiffs paying higher effective tax rates than taxpayers in excess or negative districts. *See* Statement of Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment ("SOF"), Ex. A Table 1.

ARGUMENT

1. SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS IS WARRANTED, AS THE NEW HAMPSHIRE SUPREME COURT HAS REPEATEDLY RULED THAT RETAINING EXCESS OR SETTING NEGATIVE LOCAL EDUCATION TAX RATES IS UNCONSTITUTIONAL

The New Hampshire Supreme Court has repeatedly ruled that any abatement scheme that results in certain localities' taxpayers paying a lower effective tax rate for the cost of an adequate education is unconstitutional. Here, there is no dispute that Plaintiffs are paying a higher effective tax rate than taxpayers in excess or negative tax rate localities.

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."). Therefore, it is subject to the reasonable and proportional clause. *Claremont II*, 142 N.H. at 471. Accordingly, the only issue is whether 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) apply a negative local education tax rate to offset the State's

official equalized SWEPT tax rate[17] or (ii) retain the excess.[18] Both of these schemes have been previously deemed unconstitutional by New Hampshire courts, as they result in certain taxpayers paying a lower effective tax rate. Here, there is no dispute that Plaintiffs are paying a higher effective tax rate than taxpayers in excess or negative tax rate localities. SOF, Ex. A Table 1.

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.[19] The Court determined that the abatement scheme violated Part II, Article 5. The proposed bill sought to "determine the 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 that the abatement rendered the tax system unconstitutional, finding that:

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

[18] 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.").

[19] The State senate also requested an opinion as to whether "enactment of HB 1280-LOCAL as amended, [would] 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.

> 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 (emphases added).

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 Court further noted 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.

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 Court. 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 localities, 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.*

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.[20]

The State permitting towns to retain excess SWEPT funds is identical to the scheme held unconstitutional by the 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 Court, and as a result Plaintiffs are paying a higher effective tax rate, this Court should grant Plaintiffs' summary judgment motion.

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 . . . [t]he controlling legal principles are plain. . . [t]he 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

[20] 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.

471). These words issued by the Court nearly twenty-five years ago unfortunately still ring true today. As the Court forewarned in *Londonderry*, "[d]eference, [. . .] has its limits."[21] And that limit has been reached. It is time for the judiciary to fulfill its "responsibility to ensure that constitutional rights not be hollowed out . . . ." *Londonderry*, 154 N.H. at 163. This court must put an end to this cycle.

For the foregoing reasons, Plaintiff asks that the Court grant this motion for summary judgment and find the SWEPT, as administered, violates Pt. 2, Art. 5 of the New Hampshire Constitution.

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Respectfully submitted,

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[21] *Id.* at 163.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this motion was electronically filed in the court's electronic filing system and thereby served on counsel for the State, Samuel Garland, Anthony Galdieri, and on John-Mark Turner, counsel for the Intervenor, this 21st day of December, 2022.

/s/ Natalie Laflamme

Natalie Laflamme