

STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2024-0138

Steven Rand, et al.

Plaintiffs,

v.

The State of New Hampshire,

Defendant.

MOTION TO RECUSE CHIEF JUSTICE GORDON J. MACDONALD
WITH INCORPORATED POINTS AND AUTHORITIES AND AFFIDAVIT

Now come the plaintiffs/appellees (hereinafter, “plaintiffs”), through counsel, and respectfully move for the recusal of Chief Justice Gordon J. MacDonald from all proceedings associated with this matter pursuant to New Hampshire Supreme Court Rules 21-A and 38, Canon 2, Rule 2.11.

In support of this motion, the plaintiffs state as follows.

1. Intervenor in this matter (hereinafter, the “*Rand* case”) represented by attorney John Mark Turner filed its notice of appeal on March 5, 2024 from an adverse ruling that was issued on February 20, 2024 by the Rockingham County Superior Court (Ruoff, J.). The ruling that is the subject of the instant appeal concerns the unconstitutionality of the statewide education property tax (“SWEPT”) RSA 76:3. Rule 21-A requires recusal motions to be filed within 20 days of the filing of a notice of appeal by an adverse party. This motion is thus timely. Plaintiffs’ counsel became aware of the facts upon which this

motion is based in 2021 and earlier, but the instant appeal was not filed until March 5, 2024.

2. The remainder of the *Rand* case, which is currently not before the Court but that is pending, concerns the sufficiency of the payments made by the State to fulfill its duty to fund a constitutionally adequate education pursuant to the *Claremont* and *Londonderry* lines of cases. See RSA 198:40-a, II. The failure of the State to properly fund a constitutionally adequate education, the plaintiffs allege, shifts the State’s burden to the plaintiffs, all of whom own residential or commercial property in New Hampshire and pay local and state education property taxes.

Facts

3. The instant matter overlaps with the case of *Contoocook Valley School District v. State*, 174 N.H. 154 (2021) (“*ConVal*”). The State filed its notice of appeal from an adverse final judgment in the *ConVal* matter on February 28, 2024. The *Rand* and *ConVal* cases significantly overlap in that plaintiffs in both cases challenge the sufficiency of the payments made for adequacy by the State pursuant to RSA 198:40-a. The *ConVal* case has limited its cost sufficiency challenge to “Base Adequacy,” RSA 198:40-a, II(A), while the *Rand* plaintiffs also challenge the sufficiency of the costs assigned to those categories of extra cost increments relevant to educating children who live in poverty, are learning English, or qualify for special education and related services. These matters are referred to as “Differentiated Aid.” RSA 198:40-a, II (B), (C), and (D).

4. At the outset of its litigation, the *ConVal* lawsuit included a tax claim focused on the SWEPT that was very similar to the *Rand* plaintiffs’ tax claims, but the *ConVal* plaintiffs discontinued their pursuit of the SWEPT claim sometime before their trial on the merits that occurred in April and May of 2023.

5. At all relevant times, the New Hampshire Department of Justice under the supervision of the Attorney General defended the State in both the *Rand* and *ConVal* cases.

6. Chief Justice Gordon J. MacDonald was the New Hampshire Attorney General until he left that position to become Chief Justice on or about March 4, 2021. Justice

MacDonald became New Hampshire Attorney General on or about April 13, 2017. The below-signed counsel and affiant, Andru Volinsky, was an Executive Councilor and voted in favor of Justice MacDonald's appointment as attorney general.

7. As Attorney General, the Chief Justice, directly or indirectly, assigned attorneys employed by the New Hampshire Department of Justice to defend the *ConVal* case and to develop the defense strategy in the matter. He then, directly or indirectly, approved the defense strategy deployed by the State in the *ConVal* case. The Chief Justice was also the Attorney General when the State gathered its factual evidence to support its defense in the *ConVal* case.

8. On April 15, 2019, the State moved to dismiss the amended *ConVal* complaint. The Chief Justice was the State's attorney general at the time. The State's memorandum of law in support of its motion to dismiss construes the *ConVal* tax claim and makes arguments to dismiss it. Motion to Dismiss at 28, *ConVal*, No. 213-2019-cv-00069 (Superior Court, Rockingham, Apr. 15, 2019). The *ConVal* tax claim was very similar to the tax claims made by the *Rand* plaintiffs in the instant matter.

9. The Court decided the first appeal in the *ConVal* case on March 23, 2021. Even though the Chief Justice had moved from his position as Attorney General to his position as Chief Justice almost three weeks before the decision was issued, the Chief Justice was listed as counsel for the State in the released opinion.

10. The Chief Justice's first nomination to the Supreme Court was rejected by the Executive Council on a 3-2 vote in July 2019 when his nomination was put forward by Governor Chris Sununu. Attorney Volinsky was an executive councilor at the time and voted against the nomination as did Councilors Michael Cryans and Deborah Pignatelli. Governor Sununu characterized the proceedings that led to rejection of the Chief Justice's nomination as "political" and as "Washington, D.C. circus theatrics." Jennifer Braceras, *Partisan Politics Blocks a Qualified Judicial Appointment in N.H.*, BOSTON GLOBE (July 22, 2019, 5:00AM), <https://www.bostonglobe.com/opinion/2019/07/22/partisan-politics-blocks-qualified-judicial-appointment/U03AKvAYkcbjkYBD3nuPiO/story.html>.

Reflecting the political animus of the Governor's administration, Councilor Volinsky

personally was singled out for his vote in a number of venues, including a lengthy Op Ed that appeared in the Boston Globe. *Id.* The writer, a fellow of the Independent Women’s Forum, characterized Councilor Volinsky as one of “New Hampshire[’s] activists [who] may have won a political scalp. Sadly, it is the New Hampshire judiciary and the citizens of the Granite State who lose.” *Id.* The Op Ed did not name the other two councilors who also voted against the nomination. The Independent Women’s Forum that advocated for Governor Sununu’s nomination of the Chief Justice is described in a New York Times editorial as “a right-wing public policy group that provides pseudofeminist support for extreme positions that are in fact dangerous to women.” Editorial Board, *Dangerous Gun Myths*, N.Y. TIMES (Feb. 2, 2013), <https://www.nytimes.com/2013/02/03/opinion/sunday/dangerous-gun-myths.html>.

11. Among the important issues on which the Independent Women’s Forum advocates is education funding, preferring to divert public education funding to private schools, including religious schools, and decrying public schools as poorly-run “government schools.” *See* Education Freedom Center, Independent Women’s Forum, <https://www.iwf.org/efc> (last visited Mar. 17, 2024); *see also* Divisive Ideology, Independent Women’s Forum, <https://www.iwf.org/issues/divisive-ideology> (last visited Mar. 17, 2024) (alleging children are “drilled on [critical race theory] and gender ideology” in schools).

12. Councilor Volinsky was not responsible for any “theatrics” during the Chief Justice’s failed nomination. Instead, he opposed the nomination because the Chief Justice lacked judicial experience, had never completed a jury trial, had a long and documented history of association with a certain approach to reproductive rights and to education vouchers that divert public education funds to private religious schools. Councilor Volinsky also opposed the Chief Justice’s nomination because he was an officer of the extremely conservative public advocacy group, the Josiah Bartlett Center. Councilor Volinsky stated his grounds for opposing the 2019 nomination in his own Op Ed that was published in the Globe shortly after the IWF column. Andru Volinsky, *Sununu’s Pick for N.H. Chief Justice Was Wrong for the Job*, BOSTON GLOBE (July 26,

2019, 12:00AM), <https://www.bostonglobe.com/opinion/letters/2019/07/25/sununu-pick-for-chief-justice-was-wrong-for-job/Gv0Sa0IFzNsemloCKFX0IK/story.html>. The Josiah Bartlett Center, like the IWF, advocates for the diversion of public education funds to private schools, including religious schools. See The Josiah Bartlett Center for Public Policy, <https://jbartlett.org> (last visited Mar. 9, 2024). The Josiah Bartlett Center’s current board president also chairs the New Hampshire State Board of Education, having been appointed by Governor Chris Sununu in 2017. The Governor’s father, former Governor John Sununu, is a permanent *emeritus* member of the Center’s board. *Id.*

13. In November of 2016, after winning election to the Executive Council, but before being sworn in, Attorney Volinsky raised the question of how the Court wished to handle judicial recusals when Attorney Volinsky appears before justices that were the subject of confirmation hearings in which he participated as a Councilor. Attorney Volinsky inquired of Eileen Fox, then Supreme Court Clerk, and Howard Zibel, then counsel to the Supreme Court, and was advised that the Court preferred recusals not be automatic but that confirmations that involved some level of controversy would be appropriate for recusal. Ms. Fox orally conveyed this information to Attorney Volinsky in a telephone call that occurred on November 21, 2016 and in a subsequent letter. Unfortunately, Attorney Volinsky no longer has access to the letter, but the original was given to Governor Sununu when he met with the new Executive Councilors at their initial organization meeting in late 2016 or early 2017.

14. As described above, the 2019 confirmation proceedings of the Chief Justice involved some “level of controversy.”

15. Finally, it is important to note that Attorney Volinsky has been legal counsel to one or more litigants challenging how New Hampshire funds its schools since 1990 and has a wealth of knowledge and experience in this form of litigation.

The Law

16. In *State v. Bader*, 148 N.H. 265, 268 (2002), the Court outlined the standard for recusal as an objective one designed to avoid instances in which “the judge's impartiality might reasonably be questioned and to avoid even the appearance of

impropriety.” (citing *Blaisdell v. City of Rochester*, 135 N.H. 589, 593 (1992)) In *Bader*, the Court cited “Sup.Ct. R. 38, Canon 3C(1) (amended 2001, current version at Canon 3E(1)).” *Id.*

17. The current version of the standard for recusal is contained in Supreme Court Rule 38, Canon 2 which provides: “A judge shall perform the duties of judicial office impartially, competently, and diligently.” Rule 2.11 of Canon 2 further explicates the standard:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . .

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association [and]

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy

Supreme Court Rule 38, Canon 2, Rule 2.11. The rule makes clear that the overall situation is controlling, more than the specific circumstances provided in the rule subparts. *See* Supreme Court Rule 38, Canon 2, Rule 2.1, cmt 1 (“Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.”).

Argument

18. The Chief Justice must recuse himself from all proceedings in the *Rand* appeal to avoid the appearance of partiality or personal animus. First, as described above, there was a level of controversy in the confirmation process—during which politically charged public statements were made about Attorney Volinsky that would lead

to an objective concern about impartiality. Second, the Chief Justice was an officer of an organization strongly opposed to school funding adequacy and dedicated to the diversion of public education funds to private schools. Either of these concerns alone raises the appearance of partiality. Together, the specter is even more pronounced.

19. The recusal is also required to address the Chief Justice's involvement as counsel for the State in the *ConVal* case because that case involves significant overlapping issues with the *Rand* matter and facts relevant to the overlapping issues in the *Rand* matter were developed during the *ConVal* litigation when the Chief Justice was Attorney General.

20. Finally, although the *Rand* matter was not filed until after the Chief Justice was confirmed to the Court, the Chief Justice had substantial relations with the attorneys who are members of the New Hampshire Department of Justice and who are litigating the *Rand* case.

WHEREFORE, for the foregoing reasons, the *Rand* plaintiffs respectfully request the Chief Justice recuse himself from all aspects of the appellate proceedings related to this matter and for such other relief as is just and proper.

Dated: Concord, New Hampshire
March 18, 2024

Respectfully submitted,

/s/ Andru Volinsky

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**pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion has been served via the court's electronic filing system to all parties of record on this 18th day of March, 2024.

/s/ Andru Volinsky
Andru Volinsky, NH Bar. No. 2634

FACTUAL AVERMENT

I swear under the pains and penalties of perjury that the facts asserted in paragraphs 3-20, *supra*, are true and accurate to the best of my knowledge and belief.

/s/ Andru Volinsky
Andru Volinsky, NH Bar. No. 2634