

STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2024-0138

*Steven Rand, et al,*

Plaintiffs,

v.

*The State of New Hampshire,*

Defendant.

**PLAINTIFFS’ OBJECTION TO COALITION COMMUNITIES’  
MOTION TO STAY PENDING APPEAL**

Now come the Plaintiffs/Appellees (“Plaintiffs”), through counsel, and object to the Coalition Communities’ (the “Coalition”)<sup>1</sup> Motion to Stay Pending Appeal (the “Stay Motion”) stating as follows:

**Preliminary Statement**

1. In 1997, the New Hampshire Supreme Court rejected the state education taxing scheme as unconstitutional, determining that “[t]here is nothing fair or just about

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<sup>1</sup> The Coalition represents twenty-six municipalities out of the 234 in New Hampshire. None of the ten highest-populated cities or towns in the state are part of the Coalition. See New Hampshire Department of Business and Economic Affairs, *Municipalities, Cities, and Regions*, [https://www.nheconomy.com/office-of-planning-and-development/what-we-do/state-data-center-\(census-data\)/municipalities,-counties-and-regions](https://www.nheconomy.com/office-of-planning-and-development/what-we-do/state-data-center-(census-data)/municipalities,-counties-and-regions). On December 5, 2022, the trial court granted the Coalition’s motion to intervene solely as to the “manner in which the SWEPT is collected and distributed.” Dkt. No. 48 (the “Intervene Order”).

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). Today, the State administers the Statewide Education Property Tax (“SWEPT”) to raise funds sufficient to cover the cost of a constitutionally adequate education. RSA 76:3. In November 2023, the trial court ordered that property-rich communities are not allowed to retain SWEPT funds in excess of the cost of an adequate education, nor was the State permitted to set negative local education tax rates. Dkt. No. 86 (the “SWEPT Order”) at 20-21 (Exhibit A to Stay Motion). This is because the effect of those practices is that certain taxpayers are paying a lower effective tax rate towards statewide adequacy, in violation of the Constitution. *Id.* The Coalition objects to the implementation of this order.

2. This is the Coalition’s second attempt to stay this case since intervening over one year ago. As the trial court aptly noted, the Coalition should have been preparing for the potential fiscal impact of the SWEPT Order during this time instead of willfully ignoring it and focusing on contesting Plaintiffs’ constitutional rights. *See* Dkt. No. 96, (“Trial Court Stay Order”) at 6 (Exhibit H to Stay Motion). The Coalition’s argument fails yet again for multiple reasons.

3. First, the Coalition does not have a likelihood of success on the merits on appeal. The SWEPT Order was a proper interpretation of the New Hampshire Constitution, consistent with its plain language and established case law. *See Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 471 (1997) (“*Claremont II*”). Second, the Coalition suffers no harm if the trial court’s SWEPT Order goes into effect pending appeal. On the other hand, Plaintiffs will continue to suffer irreparable harm if the SWEPT Order is stayed, because it would likely result in another year that they are forced to pay state education taxes at a higher effective rate than taxpayers in property-wealthy towns, a manifest violation of the Constitution and this Court’s prior decisions. Third, staying the order goes against the greater public interest.

4. The Coalition also does not have standing to contest the SWEPT Order because the basis for which it was originally granted standing is now moot and it has no cognizable injury.

5. Additionally, there is a fundamental disconnect between the (hypothetical) harm alleged by the Coalition and the relief sought. If this Court granted the Stay Motion and the Coalition ultimately lost on the merits of the case, the Coalition would be forced to pay back the excess SWEPT funds that the municipalities over spent during the 2024–2025 fiscal year. A stay would not prevent a potential budget shortfall to pay for the non-educational projects the Coalition communities mentioned as priorities to be paid for with SWEPT funds. By filing the Stay Motion, the Coalition is not looking for a true stay, but rather to obtain another year of the advantage that results from unconstitutionally non-uniform taxes.

6. Therefore, Plaintiffs urge this Court to deny the Stay Motion and allow the SWEPT Order to be implemented beginning on April 1, 2024, the start of the next property tax year. *See* RSA 76:2.<sup>2</sup>

### **Procedural History**

7. On August 23, 2022, Plaintiffs filed their First Amended Complaint seeking a “permanent injunction that requires New Hampshire to discontinue its unconstitutional public education funding scheme[.]” Dkt. No. 17. Plaintiffs allege two causes of action: first, because the State is not providing enough aid to fund a constitutionally-mandated “adequate” education, local municipalities are forced to impose a local education tax levied at widely varying rates, causing disproportionate tax rates on property owners; and second,

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<sup>2</sup> The Coalition argues that the SWEPT order may be automatically stayed by the filing of its Notice of Appeal. Stay Motion at 8–9. To the extent that there is any ambiguity over whether the trial court intended for its final order to remain in effect while an appeal is pending, *Gray v. Kelly*, 161 N.H. 160, 167 (2010), this was answered by the trial court’s refusal to stay the SWEPT Order on February 20, 2024. Trial Court Stay Order at 7–8. In fact, the trial court reiterated that the injunction was to take effect beginning with the budget cycle in late-2023, *id.* at 1, and remarked that the Coalition should have been considering the impact of the SWEPT order on “*this* budget year,” *id.* at 6 (emphasis added). This signals a clear intent by the trial court to implement its final order in “*this*” budget year, namely the one “culminating in budget votes in March or April 2024,” while an appeal is pending. *Id.* at 1.

that the effective SWEPT rate is not uniform among all taxpayers in the state because the State allows property-rich towns to retain excess SWEPT and sets a negative local education tax rate to offset most or all the revenues produced by the SWEPT in other localities. SWEPT Order at 10.

8. On November 4, 2022, the Coalition filed a motion to intervene in this action. Dkt. No. 36. The trial court allowed the Coalition to intervene as to Plaintiffs' challenge to the practice of allowing municipalities to retain excess SWEPT funds or impose negative local education tax rates. Dkt. No. 48 ("Intervene Order") at 13-14. The trial court also declined to rule on the merits of a preliminary injunction on the issue, noting that issuing an injunction in the middle of the tax cycle would force towns and cities to send out costly replacement or supplemental tax bills. *Id.* at 9.

9. On November 20, 2023, the trial court granted Plaintiffs' Partial Motion for Summary Judgment and denied the State and Coalition's cross-motions. The order declared that the State is violating Part II, Article 5, of the New Hampshire Constitution "by administering SWEPT in a manner which allowed communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates." SWEPT Order at 21. In doing so, the trial court carefully reviewed several decades of Supreme Court jurisprudence establishing that taxes imposed to meet the State's duty to provide an adequate education must be uniform in rate. *Id.* at 2-9. The court held that "allowing some communities to retain excess SWEPT funds impermissibly results in a disproportionate tax rate, in violation of Part II, Article 5." *Id.* at 15-16. It also held that setting negative local education tax rates which offset SWEPT "to any degree" ran afoul of the same provision. *Id.* at 18. The order enjoins the State from permitting "communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates." *Id.* at 20. The injunction begins "with the budget cycle commencing in late-2023" and culminates "in budget votes in March or April 2024." *Id.* at 20. The trial court declined to implement the SWEPT Order when it was granted, in the middle of a tax cycle, due to the impact "any immediate remedy [targeting the] current budget cycle" would have on the Coalition

communities. *Id.* Given this timeline, the order will only affect payments after April 2024, permitting the communities to adjust their budgets accordingly. The next property tax year begins on April 1, 2024. *See* RSA 76:2.

10. On December 20, 2023, the Coalition filed a motion to stay and reconsider the injunction in the trial court. Dkt. No. 93 (Exhibit C to Stay Motion).

11. On February 20, 2024, the trial court declined to stay or reconsider the case. Trial Court Stay Order at 7-8. In particular, the trial court found that the plaintiffs “will derive a significant benefit from injunctive relief that cures the above-described constitutional violations.” *Id.* at 6. As to the Coalition’s arguments regarding the harm it would incur, the court stated that the Coalition has had notice for well over a year and should have been inspired to “plan for the fiscal impacts of the SWEPT Order during the pendency of this action.” *Id.* The court also rejected the Coalition’s argument that holding excess SWEPT funds in escrow would be overly complicated, as “the DRA is well-versed in determining tax revenues to be collected from individual communities, and . . . can readily devise a system for recording the amount of excess SWEPT revenues” generated by individual communities. *Id.* at 7.

12. The Coalition now seeks to have this Court stay the SWEPT Order as it pertains to excess SWEPT revenue. It does not appeal the SWEPT Order regarding negative local education rates. Stay Motion at 3 n.4. Therefore, to the extent this Court grants the Stay Motion, the SWEPT Order should only be stayed as to the excess SWEPT revenue. The portion of the SWEPT Order addressing the negative local education tax rate should not be stayed.

### **Standard of Review**

13. The party seeking a stay bears the burden to show that (1) it will succeed on the merits, (2) it will be irreparably injured absent a stay, (3) a stay would not irreparably injure other interested parties in the proceeding, and (4) the public interest favors a stay. *Sierra Club v. Wagner*, No. CIV. 07-CV-257-SM, 2008 WL 3823700, at \*1 (D.N.H. Aug. 15, 2008). “Granting a motion to stay—like granting injunctive relief—is an

‘extraordinary remedy’ and it is the movant's obligation to justify the court's use of such a measure.” *White v. Gordon*, No. 15-CV-523-JL, 2016 WL 8674632, at \*2 (D.N.H. Jan. 29, 2016), *report and recommendation adopted*, No. 15-CV-523-JL, 2016 WL 2637812 (D.N.H. May 9, 2016).

### Argument

#### **I. THE COALITION IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL.**

14. The Coalition contends that there is a “substantial likelihood” of reversal of the trial court’s decision. Specifically, it argues that the SWEPT Order is an improper infringement on the Legislature’s spending power. It does not.

15. First, the SWEPT Order is supported by several decades of New Hampshire jurisprudence. Over two decades ago, this Court held that “[t]o the extent . . . the property tax is used . . . 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” in line with the Constitution.” *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 471 (1997). Since then, this Court has addressed multiple school funding tax schemes that would result in a tax rate that was not uniform either facially or as administered, including guidance addressing the exact issue here. *See Op. of the Justices (Sch. Fin.)*, 142 N.H. 892, 901 (1998) (assessing a state education taxation scheme that provided special abatements for property-rich municipalities that were able raise funds in excess of the state-determined adequacy amount and holding it unconstitutional); *see also Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In)*, 144 N.H. 210 (1999) (holding that a remittance scheme allowing municipalities a “phase-in” period prior to being obligated to remit excess funds generated by local education taxes was unconstitutional, as the result permitted certain taxpayers to benefit from a lower effective tax rate during the phase-in). The court directly relied on this guidance in its determination that retaining excess SWEPT was akin to an unconstitutional rebate. *See Op. of the Justices*, 142 N.H. at 899 (warning that any abatement, whether it be in the initial assessment or as a post-assessment rebate,

would violate the requirement that property taxes used to fund an adequate education must be “equal in valuation and uniform in rate”).

16. The SWEPT Order does not set policy, fiscal or otherwise, for the State. Instead, the order enjoins the State from administering SWEPT in an unconstitutional manner. Ensuring legislation is administered in a constitutional manner is the responsibility of the court. *Baines v. New Hampshire Senate President*, 152 N.H. 124, 129 (2005). (“Reviewing whether . . . disputed legislation violates [the New Hampshire Constitution] does not demonstrate lack of respect due the legislative branch of government. Rather, it fulfills the constitutional responsibility of the judicial branch.”) Accordingly, judicial intervention is warranted to protect constitutional rights. *State v. Solomon*, 157 N.H. 47, 52 (2008); *see also Petition of Smart*, No. 2022-0198, 2023 WL 2668478, at \*2 (N.H. Mar. 29, 2023) (quoting *Richard v. Speaker of House of Representatives*, 175 N.H. 262, 268 (2022)) (“[w]hen the question presented is whether or not a violation of a mandatory constitutional provision has occurred, it is not only appropriate to provide judicial intervention, we are mandated to do no less.”).

17. It does not conflict with the Legislature’s spending power, as the Coalition asserts. Stay Motion at 4 (asserting “the Legislature’s spending power under Part 1, Art. 12 and Part II, Art. 6 is plenary.”). The Legislature’s spending power does not and cannot prevent or impede the judiciary’s duty to assess the constitutionality of the Legislature’s actions.

## **II. THE BALANCE OF HARMS WEIGHS AGAINST ISSUING A STAY.**

18. The trial court found that Plaintiffs “will derive significant benefit from injunctive relief that cures the [State’s]. . . constitutional violations.” Trial Court Stay Order at 6.<sup>3</sup> A stay in this case, on the other hand, would cause Plaintiffs irreparable harm.

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<sup>3</sup> For example, the Coalition claims that Plaintiffs will not benefit from the SWEPT Order because it “seemingly require [sic] sequestration of the remitted SWEPT revenues in an escrow account.” Stay Motion at 1. The Coalition is wrong. The Court did not order the funds to be placed in an escrow account and, in fact, “decline[d] to direct that the State place such revenue in a particular fund.” SWEPT Order at 21.

Plaintiffs have now paid two cycles of unconstitutional taxes since the filing of their injunction because of the Coalition's efforts to stay this case in order to preserve their unfair and unconstitutional advantage. *See Planned Parenthood of N. New England v. City of Manchester, NH*, No. CIV. 01-64-M, 2001 WL 531537, at \*6 (D.N.H. Apr. 27, 2001) (noting that the deprivation of constitutional rights is an irreparable harm). Three of the Plaintiffs in the current action are also over seventy years old. A further stay may be tantamount to a denial of relief during their lifetimes. The Coalition dismisses the real harm that the stay will cause Plaintiffs and invites this Court to do the same. The Court should decline the invitation.

19. Unlike Plaintiffs, the Coalition will not face irreparable harm if this Court denies a stay. The Coalition asserts, as it did below, that a stay is necessary because the SWEPT Order will cause them to lose millions of dollars of revenue, to devastating effect. Stay Motion at 7. After careful consideration, the trial court correctly ruled that the Coalition would not be harmed absent a stay. It noted that "the equitable scales have shifted" due to the "significant benefit" plaintiffs will receive from the injunctive relief provided in the SWEPT Order. Trial Court Stay Order at 5–6. In weighing the benefit to plaintiffs against the Coalition's concerns, the trial court noted that the Coalition had been involved in the litigation for "well over a year," which should have led it "to plan for the fiscal impacts of the SWEPT Order during the pendency of this action." *Id.* at 6. The trial court was correct for several reasons.

20. First, revenue from SWEPT is intended to pay the cost of an adequate education (as determined by the state). SWEPT Order at 10. Indeed, the SWEPT is described as the "Education Tax." RSA 76:3. It is not meant for education purposes in general, as the Coalition claims its members use it. Stay Motion at 1. Further, the Coalition's evidence in support of the stay undermines its contention that the SWEPT Order would deprive it of revenues used to pay for the education of its students. The four affidavits that it offers in support of the Stay Motion are from town administrators, and no educational institution or educator has offered an affidavit stating that a school district or

SAU would be harmed by the SWEPT Order. *See generally* Exhibit C, Stay Motion. Indeed, the affidavits make clear that the Coalition improperly uses excess SWEPT funds for non-educational purposes. *See id.*, Aff. of Mark Decoteau at 2–3 (noting that the town cannot absorb additional revenue loss after large budgetary expenses including a new wastewater treatment facility, drinking water regulations, and updating solid waste facilities); Aff. of Karen Sanborn at 3 (stating the town’s desire to expand access to community services for its aging population); Aff. of Charles Smith at 2–3 (stating that a “critical priority” of the town includes expanded access to sewer lines and “[i]f the town is required to make up the difference for the excess SWEPT funds, it will be unable to put town funds towards this critical need”); Aff. of Matthew Scruton at 1–3 (stating that the town has several “critical projects” that would be negatively impacted by the loss of excess SWEPT revenues, including improving roads, cleaning a local creek, and repairing and replacing failing infrastructure). The potential lack of SWEPT revenue to fund non-educational projects is not harm sufficient to justify a stay because the Intervenors are not suffering harm as a result of loss of funding that is limited to educational purpose.

21. Second, the Coalition’s harm presupposes that they are entitled to receive revenue that, as the Coalition argues, is distributed to them as part of the State’s discretionary spending authority. The Coalition cannot be harmed by the failure to receive revenue that the State has not yet remitted. Moreover, the Coalition cannot claim that it has an expectation to receive a specific amount of SWEPT revenue in the discretion of the Legislature. The State can alter the specific amount of excess SWEPT revenue at any time. For example, the Legislature lowered the amount of money to be collected by SWEPT from \$363 million annually to \$263 million for the 2022–23 fiscal year. *See* Dkt. No. 22 at 10. There is nothing that binds the State to remitting the excess SWEPT revenue to the Coalition each year or to set a SWEPT rate that creates excess revenue. Thus, the Coalition cannot claim harm based on the expectation of revenue that is not guaranteed year-over-year.

22. Third, there is no harm because the local tax rate is not set until later in the fiscal year, in response to how much money is budgeted by the community and total SWEPT collected. To the extent that Coalition municipalities have budgetary necessities, they can appropriately plan and raise their tax rates. If the SWEPT Order is ultimately reversed, the Coalition can use the excess SWEPT revenue to off-set any local taxes during the following fiscal year. Therefore, while the Coalition would suffer zero net harm should it win on the merits, Plaintiffs would have paid an unconstitutional tax for another cycle with no restitution should they prevail.

23. Fourth, to the extent the Coalition claims harm, placing the funds at issue in escrow pending appeal is a reasonable solution for all parties. As the trial court correctly found, at this stage of the litigation any harm to the Coalition is caused by the Coalition's failure to plan. Trial Court Stay Order at 6. Choosing not to plan for an adverse decision and further choosing to ignore a court order and budget in the same manner is not the proper cause of an emergency. The trial court specifically chose to implement the SWEPT Order for this tax cycle because the Property Tax Year begins on April 1 and this would provide the Coalition with sufficient time to budget accordingly, minimizing any potential harm for the Coalition. RSA 76:2; SWEPT Order at 19-20 (holding that the order would only take effect following budget votes in "March or April 2024"). Indeed, while the Coalition's town administrators assert that "the injunction left [Waterville Valley] *almost no time* to account for an 8.3% drop in revenue," *id.*, the Coalition communities have had more than sufficient time to prepare their budgets while anticipating the injunction. The trial court gave the Coalition over six months to prepare for the loss of SWEPT revenue by declining to issue an injunction during the 2023–2024 cycle, due in large part to the impact any immediate remedy would have on the Coalition. SWEPT Order at 19–20. And the court refused to issue a preliminary injunction the previous tax season for a similar reason. The Coalition cannot now claim harm when they knew of this decision prior to debating and implementing the 2024 budget.

### **III. THE PUBLIC INTEREST LIES IN DENYING THE STAY MOTION.**

24. The Stay Motion should not be granted as the timely implementation of the SWEPT Order will protect the constitutional rights of the broader public.

25. The Coalition only represents a small subset of all state municipalities. None of the top ten most populated municipalities are part of the Coalition, nor have any other municipalities objected to the SWEPT Order. To hold the general public hostage for another tax cycle while further litigating the privilege accorded a select few communities is directly opposite the public interest as it undermines trust in our state's revenue raising instrumentalities and in our judiciary. This issue has been litigated for more than four years, both in this action and in the *ConVal* case. *Contoocook Valley School District, et al. v. The State of New Hampshire, et al.*, Dkt. No. 213-2019-cv-00069 (2019). The public has a substantial interest in a prompt resolution. Accordingly, this factor weighs in favor of denying the Stay Motion.

### **IV. THE COALITION HAS NO STANDING TO STAY THE SWEPT ORDER.**

26. Finally, the Court should decline to grant the Stay Motion because the Coalition does not have standing to move for a stay when the State has chosen not to do so. To have standing, a party must allege that it "suffered a legal injury against which the law was designed to protect." *Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 535, 643 A.2d 956, 958 (1994) (affirming that a plaintiff did not have standing on appeal because plaintiff could not claim a legal injury under the provisions of the statute at issue). The Coalition cannot establish that it suffered a legal, cognizable injury sufficient to give it standing because it cannot show that it will be injured by the State's decision to comply with the SWEPT Order.

27. The Coalition's status as an intervenor does not automatically grant it standing on appeal. The trial court initially granted the Coalition standing based on the premise that any decision would impact a community's established budget. Intervene Order at 9–10, 13 (noting that the Coalition had a right to intervene because at the time of the motion, the members were in the middle of the tax cycle and would have to send out

supplemental or replacement tax bills). That reasoning no longer applies. The Coalition is asserting an injury based on budgets that are only now being established, and the Department of Revenue Administration will take months to establish tax rates after reviewing local budgets. This is a different procedural posture. All the Intervenors can allege is a hypothetical, abstract injury that is insufficient to maintain the Coalition's standing. *See Libertarian Party of New Hampshire v. Sec'y of State*, 158 N.H. 194, 196 (2008) (holding that where the trial court allowed a party to intervene as to the constitutionality of a statute, but the only issue on appeal was the remedy crafted by the trial court, the party no longer had standing).

28. The Coalition is a subset of towns and cities across New Hampshire. As local municipalities, the excess SWEPT funds that they receive are not theirs, but instead are the State's funds, to which they are not independently entitled. To date, the State has not moved to stay the SWEPT Order. To the extent it declines to do so, the Coalition cannot assert that it is injured. *See Libertarian Party of New Hampshire v. Sec'y of State*, 158 N.H. 194, 196 (2008) (holding that intervenors did not suffer a legal harm where "the relief [it] sought is for the benefit of another party who has chosen not to request it.").

29. The Coalition's Stay Motion should be denied. The Coalition will not suffer irreparable harm if the stay is not granted, while Plaintiffs will suffer continued deprivation of their constitutional rights. Additionally, because the Coalition does not have a likelihood of success on appeal, nor does it have standing to make this appeal in the first place, Plaintiffs request that the Court:

- a. Deny the Coalition's Stay Motion; or
- b. Exercise its equitable powers to protect the constitutional rights at stake while the Coalition's appeal is pending, for example, by holding the excess SWEPT funds in escrow while the appeal is pending; and
- c. Grant such other relief as may be just.

Dated: Concord, New Hampshire  
March 18, 2024

Respectfully submitted,

/s/ Natalie Laflamme

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*\*pro hac vice forthcoming*

**CERTIFICATE OF SERVICE**

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

/s/ Natalie Laflamme  
Natalie Laflamme