THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0138

Steven Rand, et al.

v.

State of New Hampshire

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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   a. Whether RSA 76:3 and RSA 76:8 impose an education tax that conforms with Part II, Article 5 of the State Constitution. (Add. 58-78)

   b. Whether RSA 76:8, II spends lawfully raised tax revenue in conformance with Part I, Article 12 and Part II, Article 6 of the State Constitution. (Add. 69-70)

   c. Whether RSA 76:3 and RSA 76:8 constitutionally classify the property subject to the SWEPT as property in municipalities thereby exempting the property in unincorporated places for just reasons. (Add. 73-75)

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   a. If this Court's education funding precedents do subject education taxes like the SWEPT to different constitutional requirements than regular taxes, and if those different requirements render the SWEPT unconstitutional, whether those education funding precedents should be overruled to the limited extent necessary to permit education taxes like the SWEPT to be treated like regular taxes. (This question

[1] Record citations are as follows: "Add." refer the Addendum to this brief. "App.I," "App.II," and "App.III" refer to Appendix Volumes I, II, and III.

need not be preserved because it asks this Court to overrule existing precedent, a function only it can perform).

III. Whether the trial court's mandatory injunction order goes beyond its constitutional, legal, and equitable authority to enter. (App.I 116-18, 151-52; AppIII. 4-5, 11-19).

CONSTITUTIONAL AND STATUTORY PROVISIONS

New Hampshire Constitution
Part I, Bill of Rights

Part I, Article 12

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.

Part II, Form of Government

Part II, Article 5

And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and

consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

Part II, Article 6

The public charges of government, or any part thereof, may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES
Chapter 31
Powers and Duties of Towns

RSA 31: Public Corporations.

Every town is a body corporate and politic, and by its corporate name may sue and be sued, prosecute and defend, in any court or elsewhere.

RSA 31:3 In General.

Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same; may recognize unions of employees and make and enter into collective bargaining contracts with such unions; and may make any contracts which may be necessary and convenient for the transaction of the public business of the town.

RSA 31:4 Appropriations

Towns may vote, at any annual meeting, to raise such sums of money as the voters judge necessary for the purpose of reducing an accumulated general fund deficit.

Chapter 53

Unincorporated Places

RSA 53:1 Powers.

I. All places, not incorporated as towns, which shall be required to pay any public tax are invested with the powers of towns relating to the choice of moderator, clerk, supervisors of the check list, and selectmen; and all provisions of law applicable to towns and town officers are extended to such places and their officers so far as they relate to meetings for the choice of such officers and to their election, and so far as they relate to the election of county, state and national officers.

II. No unorganized town or unincorporated place, including any such town or place which was previously organized and the organization of which has since been abandoned, shall hereafter become incorporated so as to become vested with the powers of towns, except for the purposes of election of local officers or state, national or county officers, unless such incorporation shall be granted by the general court.

RSA 53:2 Appointment; Tenure.

The commissioners of any county in which there may be any unincorporated place may, upon petition of 5 or more reputable persons resident in such place, appoint such persons as they may deem proper as police officers, for the purposes and with the powers herein set forth. Such police officers shall hold their offices during the pleasure of the county commissioners by whom they have been appointed, not exceeding a term of 3 years.

RSA 53:6 Compensation; Discharge.

The compensation of such police officers shall be provided by the persons petitioning for their appointment. Their duties shall cease upon notice to

that effect, filed by the county commissioners in like manner as the record of appointment, and upon due notice thereof to such officers.

TITLE V
TAXATION
Chapter 76
Apportionment, Assessment and Abatement of Taxes

RSA 76:3 Education Tax.

Beginning July 1, 2005, and every fiscal year thereafter, the commissioner of the department of revenue administration shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F. The education property tax rate shall be effective for the following fiscal year. The rate shall be set to the nearest 1/2 cent necessary to generate the revenue required in this section.

RSA 76:8 Commissioner’s Warrant.

I. (a) The commissioner shall annually determine a municipality's tax base for the education tax by subtracting from the total equalized valuation of all property, as determined under RSA 21-J:3, XIII for the preceding year, property that was then taxable under RSA 82 and RSA 83-F. In determining the tax base, the value of any utility property that is included in the total equalized valuation upon which the statewide education property tax is computed, and is also taxable under RSA 83-F for that year, shall also be subtracted from the tax base, provided the sum value of the utility property represents at least 5 percent of the total equalized value of all property, except property taxable under RSA 82 or RSA 83-F in the preceding year.
(b) The commissioner shall calculate the portion of the education tax to be raised by each municipality by multiplying the uniform education property tax rate by the municipality's tax base.

II. The commissioner shall issue a warrant under the commissioner's hand and official seal for the amount computed in paragraph I to the selectmen or assessors of each municipality by December 15 directing them to assess such sum and pay it to the municipality for the use of the school district or

districts. Such sums shall be assessed at such times as may be prescribed for other taxes assessed by such selectmen or assessors of the municipality.

II-a. At the time the warrant is issued pursuant to paragraph II, the commissioner shall report to the governor, the speaker of the house of representatives, the president of the senate, and the commissioner of education, a statement of the education tax warrants to be issued for the tax year commencing April 1 of the succeeding year.

III. Municipalities are authorized to assess local property taxes necessary to fund school district appropriations not funded by the education tax, by distributions from the education trust fund under RSA 198:39, or by other revenue sources.

TITLE V

TAXATION

Chapter 81

Taxes In Unincorporated Towns and Unorganized Places

RSA 81:1 Duties of County Commissioners.

The commissioners of every county in which there is located an unincorporated town or unorganized place shall, for those unincorporated towns and unorganized places:

I. Annually as of April 1 assess the real and personal estate in each town or place to the owner or claimant thereof for all the taxes apportioned to such town or place.

II. List all property taxes by them assessed under their hands, with a warrant under their hands and seals. The list shall be directed to the tax collector appointed by the commissioners requiring him to collect such sums and at such times as may be therein prescribed. The provisions of RSA 41:6 relative to surety bonds and RSA 41:33 to 45 relative to

collectors of taxes shall also apply to county tax collectors appointed by the commissioners for unincorporated towns and unorganized places.

III. Employ the necessary appraisal staff and indirect administrative and support personnel as they deem necessary.

RSA 81:2 Apportionment, Assessment and Abatement of Taxes.

Apportionment, assessment and abatement of taxes shall be in accordance with RSA 76. Collection of taxes shall be in accordance with RSA 80.

TITLE XV
EDUCATION

Chapter 194
School Districts

General Powers and Duties

RSA 194:1 What Constitutes a District.

Each town shall constitute a single district for school purposes; provided that districts organized under special acts of the legislature may retain their present organization, and the word "town," wherever used in the statutes in connection with the government, administration, support, or improvement of the public schools, shall mean district. The special state prison school district, as established by RSA 194:60, shall constitute a single district for school purposes, and shall be subject to the provisions of RSA 194:60. Notwithstanding any other provision of law to the contrary, in the case of unincorporated towns or unorganized places in a county, the county shall constitute the district.

Chapter 198
School Money

Miscellaneous Provisions

RSA 198:16 Unincorporated Towns and Unorganized Places.

I. By August 1, 1989, the department of education shall certify to county commissioners of each county responsible for unincorporated towns, unorganized places, and towns where by act of the legislature the school districts have been abolished, the amount of money deemed necessary to be raised by taxation to pay the costs of education for school children from such towns and places.

II. The certified amount shall be assessed under RSA 81 on the taxpayers of each unincorporated town, unorganized place, and town where by act of the legislature the school district has been abolished on a pro rata basis based upon the actual number of school children who reside in each town or place.

III. The county commissioners shall, following receipt of the taxes collected under this section, pay them to the county treasurer. From time to time, as deemed advisable by the department of education, it shall submit to the county commissioners bills for payment for the costs of education of the children from such unincorporated towns, unorganized places, and towns where by act of the legislature the school districts have been abolished and the education of the children made the responsibility of the state.

IV. The unexpended proceeds of any balance in the fund created under RSA 198:16 prior to October 1, 1989, shall be transferred to the county treasurers of counties with unincorporated towns, unorganized places, and towns where by act of the legislature the school districts have been abolished on a pro rata basis according to the number of school children who reside in each county. The pro rata distribution shall be based on the number of school children who resided in each unincorporated town and unorganized place, or town where by act of the legislature the school districts have been abolished at the close of the 1988-89 school year. The distribution shall be made prior to December 1, 1989.

Adequate Education; Education Trust Fund

RSA 198:38 Definitions.

In this subdivision: . . .

VI-a. "Municipality" means a city, town, or unincorporated place.

VIII. "School district" means school district as defined in RSA 194:1 and shall include cooperative school districts as defined in RSA 195:1, I.

RSA 198:41 Determination of Education Grants.

I. Except for municipalities where all school districts therein provide education to all of their pupils by paying tuition to other institutions, the department of education shall determine the total education grant for the municipality as follows:
(a) Add the per pupil cost of providing the opportunity for an adequate education for which each pupil is eligible pursuant to RSA 198:40-a, I-III, and from such amount;
(b) Subtract the amount of the education tax warrant to be issued by the commissioner of revenue administration for such municipality reported pursuant to RSA 76:8 for the next tax year; and
(c) Add the municipality's extraordinary need grant pursuant to RSA 198:40-f.

II. For fiscal year 2024 and fiscal year 2025, the department of education shall distribute a hold harmless grant equal to any amount in which a municipality's adequacy grant is less than 104 percent of the fiscal year 2024 preliminary estimate for the adequacy grant as of November 15, 2022. No municipality with a current adequacy grant amount that exceeds the fiscal year 2024 preliminary estimate shall receive a hold harmless grant. No hold harmless grant shall be distributed to any municipality in which the municipality's education property tax warrant pursuant to RSA 76:8 exceeds the total cost of an adequate education.

III. Beginning in fiscal year 2026, the hold harmless grant calculated under paragraph II shall decrease as a percent of the amount awarded under the following schedule:
(1) 80 percent of the calculated fiscal year 2025 hold harmless grant shall be awarded for fiscal year 2026 and fiscal year 2027.
(2) 60 percent of the calculated fiscal year 2025 hold harmless grant shall

be awarded for fiscal year 2028 and fiscal year 2029.
(3) 40 percent of the calculated fiscal year 2025 hold harmless grant shall be awarded for fiscal year 2030 and fiscal year 2031.
(4) 20 percent of the calculated fiscal year 2025 hold harmless grant shall be awarded for fiscal year 2032 and fiscal year 2033.
(5) No hold harmless grant shall be awarded for fiscal year 2034 and each year thereafter.

IV. The department shall use the best available data and methods to estimate ADMR and education grants by November 15 of the year preceding the school year for which aid is determined.

V. The department shall produce a revised estimate of grants using actual determination year data for the purpose of settling municipal tax rates. A municipality's grant estimate shall not be less than 95 percent of the estimate reported pursuant to paragraph IV. The commissioner of the department of education shall provide the estimate for the current fiscal year to the commissioner of the department of revenue administration no later than October 1 of each year.

VI. When final determination year data is available, but not later than April 1, the department shall make a final determination of grant amounts. A municipality's grant estimate shall not be less than 95 percent of the estimate reported pursuant to paragraph IV. The department shall adjust the April grant disbursement required pursuant to RSA 198:42 so that the total amount disbursed for the fiscal year shall match the final grant determination.

VII. Reports of grant determinations for municipalities required pursuant to paragraphs IV- VI shall be available to the public by the date specified in paragraphs IV- VI, and the department shall make available a report for multi-town school districts and municipalities with multiple school districts. The department of education shall provide the department of revenue administration the information needed to set tax rates.

STATEMENT OF THE CASE

Plaintiffs, Steven Rand, Randvest, Inc., Dr. Robert Gabrielli, the Gabrielli Family Ltd. Partnership, Jessica Wheeler Russell, and Adam Russell, sued the State of New Hampshire (the "State") alleging that its education funding system violates Part II, Article 83 of the State Constitution and that the Statewide Education Property Tax ("SWEPT") violates Part II, Article 5 of the State Constitution. App.I 3-30.

The Coalition Communities intervened solely as to plaintiffs' SWEPT claim. Add. 58, n.2.

Plaintiffs moved for partial summary judgment on their SWEPT claim. App.I 53-75. They argued that the SWEPT was unconstitutional under Part II, Article 5 because: (1) it results in certain communities receiving so-called "excess SWEPT"; and (2) the Department of Revenue Administration ("DRA") sets a negative local education tax rate for a small number of unincorporated places to offset their SWEPT rate. App.I 53-54.

The State and intervenor objected and cross-moved for partial summary judgment. App.I 76-119. The State argued that the SWEPT is not structured like previous education taxes that this Court has found unconstitutional because it requires the DRA to set a statewide tax rate that is proportionate and reasonable, equal in valuation and uniform in rate, and just. App.I 104-12. Regarding plaintiffs' "excess SWEPT" assertion, the State argued that the plaintiffs were really challenging the legislature's decision regarding how to appropriate SWEPT revenue after it has been paid. *Id.* The State explained that the legislature's power to spend lawfully raised tax revenue is plenary and controlled by Part I, Article 12 and Part II, Article 6 of the State Constitution, not by Part II, Article 5. *Id.*

The State also argued that the SWEPT constitutionally classifies the property subject to it as the property in municipalities and thus does not tax the property in unincorporated places for just reasons. App.I 112-16. Thus, the DRA's practice of setting a negative local education tax rate for certain unincorporated places does not render the SWEPT unconstitutional under Part II, Article 5. *Id.*

The State also argued that, if the court disagreed with its positions and found the SWEPT unconstitutional under Part II, Article 5, the court should enter a non-disruptive remedy to give the other co-equal branches of state government sufficient time to resolve the deficiency. App.I 116-18.

The trial court granted the plaintiffs' motion and denied the State's and intervenor's cross-motions. Add. 58-78. It declared the State's administration of the SWEPT unconstitutional and entered a mandatory injunction enjoining "the State" from "permitting communities to retain excess SWEPT funds," requiring communities that generate so-called "excess SWEPT" to remit those funds to the DRA, and requiring those remitted funds to be "used for the exclusive purpose of satisfying the State's adequacy obligations." Add. 78.

The intervenor moved to reconsider and stay the trial court's order. App.III 11-39. The State moved to stay the order. *Id.* at 3-6. The trial court denied these motions. Add. 79-87. This appeal followed.

STATEMENT OF FACTS

A. The Statewide Education Property Tax

RSA 76:3 imposes an "education tax" known as the Statewide Education Property Tax or the SWEPT as follows: "Beginning July 1, 2005, and every fiscal year thereafter, the commissioner of the [DRA] shall set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." RSA 76:3. This amount was lowered to $263,000,000 for Fiscal Year 2023 only. 2021 N.H. Laws ch. 91:332.

RSA 76:8, I describes how the SWEPT rate is calculated. The DRA determines a municipality's tax base for the SWEPT, then multiplies the equalized tax rate set under RSA 76:3 by that tax base to determine the total amount of revenue generated in each municipality. RSA 76:8, I(a)-(b). In tax year 2022, the uniform rate for all municipalities was $1.23/1000; in tax year 2023, the unform rate was $1.440/1000. App.II 8-527.

RSA 76:8, II describes how the SWEPT is assessed and how SWEPT revenue is appropriated after it is paid. The DRA Commissioner "issue[s] a warrant under [her] hand and official seal for the amount computed in [RSA 76:8, I] to the selectmen or assessors of each municipality … directing them to assess such sum" on individual municipal taxpayers. RSA 76:8, II then appropriates the State revenues generated to the municipality solely for the use of the municipality's school district or districts.

B. Adequate Education Grants

The revenue RSA 76:8, II appropriates to a municipality plays a role in determining that municipality's education grant under RSA 198:41. Education grants under RSA 198:41 help the State meet its constitutional obligation to fund an adequate education. Under RSA 198:41, I, the Department of Education ("DOE") determines a municipality's total education grant by: (a) "Add[ing] the per pupil cost of providing the opportunity for an adequate education for which each pupil is eligible pursuant to RSA 198:40-a, I-III, and from such amount: (b) Subtract[ing] the amount of the education tax warrant to be issued by the [DRA] commissioner … for such municipality reported pursuant to RSA 76:8 for the next tax year; and (c) Add[ing] the municipality's extraordinary need grant pursuant to RSA 198:40-f."

When the difference between the amount calculated under RSA 198:41, I(a) and RSA 198:41, I(b) results in a negative figure, the plaintiffs refer to that negative figure as "excess SWEPT" because it represents revenue that RSA 76:8, II appropriates to the municipality but that exceeds the amount strictly needed to fund the municipality's education grant under RSA 198:41, I(a).

C. Unincorporated Places

Unincorporated places are places in New Hampshire that "are not incorporated as towns." RSA 53:1, I. Such places cannot "become incorporated so as to become vested with the powers of towns, except for the purposes of election of local officers or state, national or county

officers, unless such incorporation shall be granted by the general court." RSA 53:1, II.

By contrast, a "town is a body corporate and politic, and by its corporate name may sue and be sued, prosecute and defend, in any court or elsewhere." RSA 31:1. Towns "may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey same," RSA 31:3; unincorporated places lack this power. Towns may also "make any contracts which may be necessary and convenient for the transaction of the public business of the town," *id.*; unincorporated places lack this power. Towns may also "at any legal meeting grant and vote such sums of money as they judge necessary for any purpose for which a municipality may act if such appropriation is not prohibited by the laws or by the constitution of this state," RSA 31:4; unincorporated places lack this power.

When a public tax is imposed on unincorporated places, unincorporated places become vested with the powers of towns for the limited purpose of operating elections and voting for representatives. N.H. Const. Pt. I, Art. 28; RSA 53:1, I. The county commissioners assess and collect public taxes imposed on unincorporated places in accordance with RSA 76 and RSA 80. RSA 81:1; RSA 81:2. The county constitutes the school district for unincorporated places. RSA 194:1.

The DRA sets a negative local education tax rate for certain unincorporated places when those unincorporated places will generate SWEPT revenues that exceed their local educational needs. App.I 197-98, ¶21.

The following is a list of unincorporated places in New Hampshire: Atkinson and Gilmanton Academy Grant; Bean's Grant; Bean's Purchase; Cambridge; Chandler's Purchase; Crawford's Purchase; Cutt's Grant; Dix's Grant; Dixville; Erving's Location; Green's Grant; Hadley's Purchase; Hale's Location; Kilkenny; Livermore; Low and Burbank's Grant; Martin's Location; Millsfield; Odell; Pinkham's Grant; Sargent's Purchase; Second College Grant; Success; Thompson and Meserve's Purchase; and Wentworth Location. App.I 158-59, ¶21.

According to 2020 census data, the following unincorporated places had no population: Atkinson and Gilmanton Academy Grant, Bean's Grant, Bean's Purchase, Chandler's Purchase, Crawford's Purchase, Cutt's Grant, Dix's Grant, Erving's Location, Green's Grant, Hadley's Purchase, Kilkenny, Low and Burbank's Grant, Pinkham's Grant, and Sargent's Purchase. App.I 159-63, ¶¶22-24, 26-29, 31-33, 35, 37, 41-42.

According to 2020 census data, the following unincorporated places had single digit population: Dixville (4); Livermore (2); Martin's Location (2); Odell (1); Second College Grant (1); Success (4); Thompson and Meserve's Purchase (1). App.I 160, 162-64, ¶¶30, 36, 38, 40, 43-45.

According to 2020 census data, the following unincorporated places had a total population above single digits: Cambridge (16); Hale's Location (132); Millsfield (25); and Wentworth's Location (28). App.I 159, 161-62, 164, ¶¶25, 34, 39, 46.

Hale's Location is the only unincorporated place in Carroll County. *See* App.I 154-64, ¶¶21-46. Livermore is the only unincorporated place in Grafton County. *Id.* All other unincorporated places are in Coos County. *Id.*

D. DRA's Treatment of Unincorporated Places

The DRA has historically treated unincorporated places as quasi-municipalities under RSA 76:3 and RSA 76:8. The DRA has also set a negative local education tax rate in some of those places to avoid the accrual of SWEPT revenues which, in its view, would be stranded in the local budget if appropriated to the unincorporated place. *See* App.I 197-98, ¶21.

The State maintains that RSA 76:3 and RSA 76:8 do not impose the SWEPT on property in unincorporated places as a matter of law. The State also does not believe that SWEPT revenue appropriated to an unincorporated place "for the use of its school district," RSA 76:8, II, would be stranded in the local budget because the county "constitute[s]" the school "district" for the unincorporated places, RSA 194:1.

SUMMARY OF THE ARGUMENT

RSA 76:3 and RSA 76:8 imposes an education tax known as the SWEPT. The SWEPT rate is proportional and reasonable, equal in valuation and uniform in rate across the State, and just. RSA 76:8, I. The SWEPT therefore complies with Part II, Article 5 of the State Constitution.

The trial court nonetheless found that the State's administration of the SWEPT violated Part II, Article 5 because: (1) the State "allows" municipalities to retain so-called "excess SWEPT"; and (2) the DRA sets a negative local education tax rate to offset the SWEPT in certain unincorporated places. This decision is incorrect.

What the plaintiffs and the trial court call "excess SWEPT" is nothing more than lawfully raised tax revenue. How RSA 76:8, II appropriates lawfully raised tax revenue does not implicate Part II, Article 5. RSA 76:8, II appropriates SWEPT funds to the municipalities that raise them and requires those funds to be spent for a public purpose—the use of the municipality's school districts—consistent with Part I, Article 12 and Part II, Article 6 of the State Constitution. RSA 76:8 does not use SWEPT revenue to reduce or abate any individual municipal taxpayer's SWEPT rate, nor does RSA 76:8 provide a rebate to an individual municipal taxpayer that functionally reduces the taxpayer's SWEPT rate. Part II, Article 5 does not apply to how the legislature chooses to appropriate lawfully raised SWEPT revenue, and there is no such thing as "excess SWEPT."

RSA 76:3 and RSA 76:8 also constitutionally classify the property subject to the SWEPT as the property in municipalities and thereby excludes the property in unincorporated places for just reasons, consistent

with Part II, Article 6 of the State Constitution. Setting a negative local education tax rate for certain unincorporated places therefore does not render the SWEPT unconstitutional. The trial court's decision should therefore be reversed and its injunction vacated.

The trial court read this Court's education funding precedents expansively and extended them beyond the specific legal and factual scenario each presented to find the administration of the SWEPT unconstitutional. It erroneously expanded Part II, Article 5's restrictions on how the legislature may impose taxes to include restrictions on how the legislature may spend tax revenue. This Court should correct the error and make clear to lower courts that its education funding precedents do not subject state education taxes to different constitutional requirements than other state taxes. If this Court's precedents do subject state education taxes to different constitutional requirements than other state taxes, and if those different requirements render the SWEPT unconstitutional, then those precedents should be overruled to the extent necessary to permit state education taxes to be subject to the same constitutional standards as other state taxes.

Finally, the trial court's injunction is beyond its constitutional, statutory, and equitable authority to enter. The State advocated for the correct remedy if a constitutional violation existed: a declaration and stay to allow the other branches of government a reasonable time to fix the deficiency. The State also advocated for another remedy respectful of the roles of the other branches of government: order that so-called "excess SWEPT" be held in escrow for the State's benefit until the legislature directs where that money should go and how it should be used.

The trial court rejected these remedies in favor of an extraordinarily disruptive remedy that goes well beyond an exercise of the judicial function and does significant violence to the separation of powers. Thus, even if the SWEPT's administration is unconstitutional in some respect, the trial court's injunction should be vacated and the resulting declaration stayed to allow the legislative and/or executive branches a reasonable time to fix the defect consistent with this Court's precedent.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFFS AND DENYING PARTIAL SUMMARY JUDGMENT FOR THE STATE.

The trial court found the SWEPT unconstitutional as administered by the State under Part II, Article 5. The trial court's decision is erroneous, fails to apply accurately this Court's precedents, and should be reversed and vacated.

"In reviewing a trial court's rulings on cross-motions for summary judgment," this Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party." *Arell v. Palmer*, 173 N.H. 641, 644 (2020). Only if the record discloses "no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law," will this Court "affirm the grant of summary judgment. *Id.*

A. The SWEPT Is Constitutional Under Part II, Article 5 Because It Is Proportional And Reasonable, Equal In Valuation And Uniform In Rate, And Just.

Part II, Article 5 "provides that the legislature has the power 'to impose and levy proportional and reasonable assessments, rates, and taxes, upon all of the inhabitants of, and residents within, said state.'" *Starr v. Governor*, 148 N.H. 72, 74 (2002). "This article requires that all taxation be proportionate and reasonable[,] equal in valuation and uniform in rate, and just." *Id.* (cleaned up). "Taxes must be in 'due proportion, so that each individual's share, and no more, shall fall upon him.'" *Id.* (quoting *Rollins v. Dover*, 93 N.H. 448, 449 (1945)). "In order for a tax to be proportional,

all property in the taxing district must be valued alike and taxed at the same rate." *Sirrell v. State*, 146 N.H. 364, 370 (2001).

"Establishing the rules by which each individual's just and equal proportion of a tax shall be determined is a task of much difficulty, and a very considerable latitude must be left to the legislature on the subject." *Id.* at 369 (internal quotations omitted). In reviewing the SWEPT, this Court determines only whether the it presents "a 'clear conflict with the Constitution,'" and "do[es] not concern . . . [itself] with whether the tax is 'wise, reasonable, or expedient.'" *Id.* (quoting *Petition of Boston & Maine Corp.*, 109 N.H. 324, 325-26 (1969)). This Court's "task is neither to establish educational policy nor to determine the appropriate mechanism for its funding." *Id.* A "statewide property tax law, like any legislative act, is presumed constitutional and will not be declared invalid except upon unescapable grounds." *Id.* at 369-70 (internal quotations omitted).

RSA 76:3 and RSA 76:8 impose an education tax that is proportional and reasonable, equal in valuation and uniform in rate, and just. It requires the DRA to "set the education tax rate at a level sufficient to generate revenue of $363,000,000 when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." RSA 76:8, I(a) requires the DRA annually to determine a municipality's tax base "by subtracting from the total equalized valuation of all property, as determined under RSA 21-J:3, XIII for the preceding year, property that was then taxable under RSA 82 [Taxation of Railroads] and RSA 83-F [Utility Property Tax]." RSA 76:8, I(b) then requires the DRA to "calculate the portion of the education tax to be raised by each municipality" by multiplying the "uniform education property tax rate" by

the "municipality's tax base." Thus, in tax year 2022, the uniform rate for all municipalities was $1.23/1000; in tax year 2023, the unform rate was $1.440/1000. App.II 8-527.

Accordingly, the SWEPT statutes impose an education tax on individual municipal taxpayers that is proportionate and reasonable, equal in valuation and uniform in rate, and just.

1. The SWEPT Is Distinguishable From Other Education Taxes This Court Has Found To Violate Part II, Article 5.

The SWEPT is materially distinguishable from other education taxes this Court has found to violate Part II, Article 5, because those other taxes reduced the tax rate for some individual taxpayers, but not for others.

In *Claremont School District v. Governor*, 142 N.H. 462, 466 (1997) ("*Claremont II*"), this Court held that a property tax levied to help fund the State's education obligations is, by virtue of the State's duty to provide a constitutionally adequate public education, a State tax that must be imposed at a uniform statewide rate. Because under that tax scheme the property tax was being computed and assessed proportionately and uniformly *only* within each municipality, the resulting payment rates were non-uniform among municipalities and, therefore, disproportionate across the State. Accordingly, this Court held that education property tax scheme unconstitutional under Part II, Article 5.

The SWEPT is distinguishable from the *Claremont II* property tax scheme because the SWEPT statutes establish a uniform statewide property tax rate based on an equalized valuation, RSA 76:8, I, thereby resulting in a uniform, proportional, and reasonable statewide tax.

A year later, in *Opinion of the Justices (School Finance)*, 142 N.H. 892 (1998), the Senate asked this Court whether a proposed state education property tax violated Part II, Article 5. Under the proposed tax, the tax rate would be determined "by calculating the total statewide cost for educating all New Hampshire students and dividing this sum by the total statewide equalized property value." *Id.* 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 for the town." *Id.* Thus, "[b]y the terms of the bill, the commissioner of revenue administration [wa]s directed to calculate each town's tax by multiplying the State education tax rate by the total equalized value of property within it, *less* any special abatement." *Id.* (emphasis in original).

This Court advised the Senate that this proposed tax violated Part II, Article 5 because the "special abatement" is "applie[d] before any taxpayer within a given town receives a tax bill." *Id.* The special abatement thus reduced the individual taxpayer's rate in certain communities thereby rendering the tax non-uniform and disproportionate across the State. *Id.* This Court further advised that "even if the bill provided for the actual collection of revenue raised through the uniform State education tax, and thereafter reimbursed certain qualifying taxpayers pursuant to the special abatement, our conclusions herein would remain unchanged." *Id.*

The SWEPT is materially distinguishable from the tax in *Opinion of the Justices* because the SWEPT statutes do not provide a "special abatement" to individual taxpayers, nor does the SWEPT reimburse collected tax money to individual municipal taxpayers. Instead, the

SWEPT statutes impose a proportional tax at a uniform rate on individual municipal taxpayers. They then appropriate the revenue paid to the municipality for the exclusive use of the municipality's school district. The SWEPT statutes do not return any portion of the revenue they generate to the individual municipal taxpayer. No individual municipal taxpayer therefore receives a "special abatement" or a post-payment reimbursement that reduces his or her SWEPT rate.

In *Claremont School District v. Governor*, 144 N.H. 210 (1999) ("*Claremont III*"), this Court held that a statewide education property tax that phased-in the tax for taxpayers in certain communities over a period of five years while taxpayers in other communities would have to pay the full tax rate immediately violated Part II, Article 5 because it resulted in similarly situated taxpayers paying "varying property tax rates." *Id.* at 216-17.

The SWEPT statutes do not vary the statewide tax rate that individual municipal property taxpayers pay through a phase-in. They impose a statewide uniform rate on all individual municipal taxpayers. The SWEPT is therefore proportional and reasonable, equal in valuation and uniform in rate, and just, in conformance with Part II, Article 5.

2. The Revenue The SWEPT Generates In Excess Of A Municipality's Adequate Education Grant Does Not Function As An Abatement Or Rebate For An Individual Municipal Taxpayer.

In ruling against the State, the superior court endorsed the plaintiffs' theory that the revenue the SWEPT generates in excess of a municipality's adequate education grant, as determined under RSA 198:41, is equivalent to

an abatement or rebate provided directly to an individual municipal taxpayer. That ruling is incorrect.

Part II, Article 5's restrictions apply to the structure of taxes, not to how tax revenue is spent. Part II, Article 5 tests whether the tax the individual municipal taxpayer is paying is proportional and reasonable, equal in valuation and uniform in rate, and just. Abatements, phase-ins, or refunds or rebates provided directly to a taxpayer solely to lower for him the uniform tax rate that every other taxpayer is required to pay may be scrutinized under Part II, Article 5. However, once a tax that is proportional and reasonable, equal in valuation and uniform in rate, and just, is paid by individual taxpayers and appropriated to a government entity for a legitimate public purpose, Part II, Article 5's restrictions no longer apply. Part II, Article 5 does not govern how the legislature may appropriate lawfully raised tax revenue nor does it test the validity of a tax by trying to ascertain the level of indirect benefit an individual taxpayer may receive from such appropriations.

B. RSA 76:8, II Appropriates Lawfully Raised Tax Revenue In Conformance With Part I, Article 12 And Part II, Article 6 Of The State Constitution.

An education tax "seldom bears a direct relationship to the benefits received by each taxpayer and this is particularly true in the case of corporations, nonresidents and childless taxpayers." *Duncan v. Jaffrey*, 98 N.H. 305, 307 (1953). "'Taxes must be proportionally assessed on persons and property; but there is no constitutional provision that money raised by taxation must be appropriated in such a manner that the several taxpayers, or districts of taxpayers, will be directly benefited in proportion to the

amount of their taxes.'" *Id.* at 307-08 (quoting *Sch. Dist. No. 1 in Walpole v. Prentiss*, 66 N.H. 145, 146 (1889)). "'Such a provision, if it existed, could not be executed.'" *Id.* at 308 (quoting *Sch. Dist. No. 1*, 66 N.H. at 146).

An education tax may be constitutional although it fails directly to benefit a particular taxpayer or benefits certain taxpayers more than others. *Duncan*, 98 N.H. at 308. As this Court explained in *Duncan*, "it is almost unanimously held that it is no defense to the collection of a tax for a special purpose that a person liable for the tax is not benefited by the expenditure of the proceeds of the tax or not as much benefited as others." *Id.* (internal quotations omitted). Similarly, a tax is not invalid because some taxpayers benefit more from the expenditure of its proceeds than others.

The rule in this State is therefore expressed as follows: "Neither the plaintiffs nor any taxpayer can complain that the distribution of a valid tax after its collection must be allocated to a specific purpose so long as it is devoted to a public use." *Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n*, 105 N.H. 17, 21 (1963). This public-use restriction is imposed on the legislative spending power by Part I, Article 12 and Part II, Article 6 of the State Constitution, which "have always been understood to deny power to the legislature to authorize the assignment of public funds to other than public purposes." *Opinion of the Justices*, 85 N.H. 562, 563 (1931). Thus, "'[s]o long as the use is a proper one, allocation to a particular use of a part or all of a general or special tax is in the legislative discretion.'" *Manchester Fed. Sav. & Loan Ass'n*, 105 N.H. at 21-22 (quoting *Opinion of the Justices*, 88 N.H. 500, 510 (1937)); *cf. Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.)*, 145 N.H. 474, 478 (2000) ("[W]e have never ruled that constitutional adequacy requires a uniform expenditure per

pupil throughout the State … . The constitution mandates statewide adequacy – not statewide equality.").

The SWEPT statutes raise and appropriate SWEPT revenue in a constitutional manner. RSA 76:3 and RSA 76:8, I impose a proportional, reasonable, and uniform property tax on individual municipal taxpayers. The municipalities collect the tax for the State, and RSA 76:8, II appropriates the amount collected to each municipality "for use of the school district or districts" in that municipality. The distribution of funds for public education is a recognized public purpose, *see, e.g.*, N.H. Const. Pt. II, Art. 83; *Opinion of the Justices*, 99 N.H. 536, 538 (1955) ("The furtherance of education is universally regarded as a public purpose … ."), and this expenditure of revenue does not need to be equal or uniform across the State.

The SWEPT therefore complies with Part II, Article 5, and the appropriation of SWEPT revenue complies with Part I, Article 12 and Part II, Article 6. The SWEPT statutes are therefore not unconstitutional because of how they appropriate SWEPT revenues, let alone inescapably in conflict with the State Constitution. The superior court's analysis, if endorsed, would expand Part II, Article 5's tax restrictions into the realm of legislative spending, a result this Court has never endorsed and should not endorse in this case.

Accordingly, the superior court's finding that the SWEPT is unconstitutional as administered because it permits certain municipalities to receive so-called "excess SWEPT" should be reversed.

C. RSA 76:3 And RSA 76:8 Constitutionally Classify The Property Subject To The SWEPT As Property In Municipalities Thereby Excluding The Property In Unincorporated Places For Just Reasons.

The superior court also erred in concluding that the DRA's practice of setting negative local education tax rates in a small number of unincorporated places renders the SWEPT's administration unconstitutional because RSA 76:3 and RSA 76:8 classify the property subject to the SWEPT as the property in municipalities, and unincorporated places are not municipalities.

"Part II, Article 6 . . . provides that '[t]he public charges of government, or any part thereof, may be raised by taxation, upon polls, estates, or other classes of property.'" *N. Country Envt'l Servs. v. State*, 157 N.H. 15, 19 (2008) (ellipsis omitted). Under it, "the legislature has the broad authority to classify types of property for taxation so long as the classification is sufficiently inclusive to constitute a distinctive class." *Id.* (citation and quotation marks omitted). "The legislative power to classify property includes the power to exempt property from taxation." *Id.* (citation and quotation marks omitted). "This power is not unlimited, however, and the court will invalidate a classification if it is unreasonable or if its purpose is to discriminate." *Id.* (citation and quotation marks omitted).

"Strictly speaking, 'the rule of equality and proportionality does not apply to the selection of the subjects of taxation, provided just reasons exist for the selection made.'" *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 686 (1997) (quoting *Opinion of the Justices*, 94 N.H. 506, 508 (1947)). "'A reasonable classification which is sufficiently inclusive to constitute a distinctive class will be upheld.'" *Id.* at 687 (quoting *Opinion of the*

Justices, 114 N.H. 174, 177 (1974)). A court's "review of legislative taxation classifications" is limited to determining "whether there are 'just reasons' for the classification." *Id.* (quoting *Opinion of the Justices*, 115 N.H. 306, 308 (1975)). "In this context, '[a] just reason is the equivalent of a reasonable or rational basis.'" *Id.* (quoting *Cagan's, Inc. v. Dep't of Rev. Admin.*, 126 N.H. 239, 246 (1985)).

"[T]he New Hampshire Constitution requires only that 'just reasons exist' in selecting a certain class of property for taxation." *Eby v. State*, 166 N.H. 321, 331 (2014) (quoting *N. Country Envtl. Servs.*, 157 N.H. at 19)). "Under our rational basis test, the 'legitimate governmental interests' served by the statute need not be the Legislature's actual interests in adopting it nor need they be based upon articulated facts." *Id.* "Accordingly, the Legislature need not declare its reasons for passing the tax; it is sufficient that there are just reasons for the classification." *Id.*

Determining what property RSA 76:3 and RSA 76:8 reach requires this Court to interpret those statutes. This review is *de novo*. *Carr v. Town of New London*, 170 N.H. 10, 13 (2017). This Court first "examine[s] the language of the statute and ascribe[s] the plain and ordinary meanings to the words used." *Id.* The Court interprets the statutes "in the context of the overall statutory scheme and not in isolation." *Id.* at 13-14. The Court's "goal is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* Moreover, "an ambiguous tax statute will be construed against the taxing authority rather than the taxpayer." *State v. Priceline.com, Inc.*, 172 N.H. 28, 34 (2019) (internal quotations omitted).

1. RSA 76:3 and RSA 76:8 Impose an Education Tax Only on The Property in Municipalities and Should be Construed as Such.

RSA 76:3 imposes an education tax "on all persons and property *taxable pursuant to RSA 76:8*, except property subject to tax under RSA 82 and RSA 83-F." (emphasis added). RSA 76:8 references only municipalities; it makes no reference to unincorporated places. *See* RSA 76:8, I(a) ("The commissioner shall annually determine a municipality's tax base for the education tax . . . ."); RSA 76:8, II ("The commissioner shall issue a warrant … to the selectmen or assessors of each municipality by December 15 directing them to assess such sum and pay it to the municipality for the use of the school district or districts. Such sums shall be assessed at such times as may be prescribed for other taxes assessed by such selectmen or assessors of the municipality."); RSA 76:8, III ("Municipalities are authorized to assess local property taxes necessary to fund school district appropriations not funded by the education tax, by distributions from the education trust fund under RSA 198:39, or by other revenue sources.").

RSA chapter 76 does not define the term "municipality." This Court therefore looks to the term's common and approved usage and reference dictionary definitions for guidance. Black's Law Dictionary defines "municipality" as a "municipal corporation" or "[t]he governing body of a municipal corporation." *Black's Law Dictionary* at 1113 (9th Ed. West 2009). It also defines a "municipal corporation" as "[a] city, town, or other local political entity formed by charter from the state and having autonomous authority to administer the state's local affairs; esp., a public

corporation created for political purposes and endowed with political powers to be exercised for the public good in the administration of local civil government." *Id.* Webster's Deluxe Unabridged Dictionary defines "municipality" to mean "a city, town, etc. having its own incorporated government." Webster's Deluxe Unabridged Dictionary at 1182 (2d Ed. Simon & Schuster 1979).

Under New Hampshire law, an "unincorporated place" is, by definition, not a municipality because it lacks the singular, necessary feature to make it a municipality: it is not incorporated. RSA 53:1, I makes clear that unincorporated places are "[a]ll places, not incorporated as towns." RSA 53:1, II further makes clear that no unincorporated place "shall hereafter become incorporated so as to become vested with the powers of towns, except for the purposes of election of local officers or state, national or county officers, unless such incorporation shall be granted by the general court."

Also, RSA chapter 81 is a separate statutory regime governing tax administration for unincorporated places. It does not *impose* any taxes on unincorporated places, but indicates that apportionment, assessment and abatement of taxes shall follow the procedures in RSA chapter 76. RSA 81:2. Conversely, RSA 76:3 specifically *imposes* an education tax only "on all persons and property taxable pursuant to RSA 76:8," and RSA 76:8 references only "municipalities." Consequently, no education tax is actually imposed on the persons or property in unincorporated places.

Including "unincorporated places" in the term "municipality" in RSA 76:8 would also create anomalous results. An "unincorporated place" does not have "selectmen" or "assessors"; the county performs that function

for them, RSA 81:1. RSA 76:8, III also grants "[m]unicipalities" the authority to "assess local property taxes necessary to fund school district appropriations," but unincorporated places lack that power, RSA 53:1, II, and other statutes exist to help facilitate their payment of education costs. *See* RSA 198:16; RSA 198:38, VI-a (defining a "municipality" "[i]n this subdivision" to include an "unincorporated place" for purposes of adequate education grants).

Consequently, RSA 76:3 and 76:8 unambiguously impose an education tax only on the persons or property in "municipalities" and not on the persons or property in unincorporated places.

However, even if RSA 76:3 and RSA 76:8 were ambiguous in this regard, the ambiguity would be construed in favor of the taxpayers in unincorporated places to find that the tax is not imposed on them. *Priceline.com, Inc.*, 172 N.H. at 34; *Carr*, 170 N.H. at 14; *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 143 (1998) ("Because the power to tax arises solely by statute, the right to tax must be found within the letter of the law and is not to be extended by implication.").

2. Just Reasons Exist for Exempting The Property in Unincorporated Places From The SWEPT.

Unincorporated places contain *de minimis* to zero population. They lack the authority to have a local government capable of raising money through taxation to provide for the public safety, health, and welfare. *See Hillsborough v. Deering*, 4 N.H. 86, 92 (1827) (explaining that unincorporated places "have no authority to raise one dollar by a tax upon themselves for any purpose whatever"). They therefore cannot raise money for the construction, repair, or maintenance of roads. *Id.* They may only

have police for their public protection if the county commissioners, "upon the petition of 5 or more reputable persons resident in such place," decide to "appoint such persons as they deem proper as police officers," for a term not to exceed three years. RSA 53:2. The compensation for such police officers "shall be provided by the persons petitioning for their appointment." RSA 53:6. Unincorporated places do not have their own school district; the county fulfills that function for them. RSA 194:1. Unincorporated places lack the authority to sue and be sued, RSA 31:1; RSA 53:1, II, and, therefore, lack the ability to defend their interests in litigation like this. Unincorporated places also lack the power to alienate property and enter into contracts. RSA 31:3; RSA 53:1, II

By contrast, municipalities do not merely contain, but affirmatively support the vast majority of the State's population. By virtue of their incorporation, they have a local government capable of establishing school districts and raising money through taxation to provide for the public safety, health, and welfare. *See generally* RSA chapter 31. They can raise money for the construction, repair, and maintenance of roads, for a police department, for a fire department, and for emergency vehicles like ambulances. RSA 31:4. They may incur indebtedness and undertake emergency borrowing. RSA 31:10-14. They may take and hold trusts, RSA 31:19, or create them, RSA 31:20. They may make bylaws. RSA 31:39. They possess the authority to sue and be sued and therefore can act to assert or defend their own interests in litigation. RSA 31:1. And they can alienate property and enter contracts to fund important public works. RSA 31:3.

Consequently, the property in unincorporated places is subject to materially different benefits and burdens than the property in

municipalities. Property owners in unincorporated places may need to expend their own money to construct, repair, and maintain roads, to raise and maintain a police force, and to make other expenditures for their safety, health, and welfare. They lack the population and local governmental authority to spread these costs in a manner that makes them more affordable. Unincorporated places rarely have school age children and, when they do, their county, which serves as their school district, RSA 194:1, may be eligible for adequate education grants, *see* RSA 198:38 (defining the term "municipality" as used only in "this subdivision [i.e., RSA 198:38-:45-a] to include "unincorporated places"); RSA 198:41 (determination of grant); RSA 198:42 (distribution of adequate education grant is to the "municipality's school district). Unincorporated places also have their own statutory mechanism in place to raise funds to pay for any school age children they may have. RSA 198:16.

By excluding the property of unincorporated places from the SWEPT, the legislature could have rationally and justly concluded that allowing property owners in unincorporated places to retain that money would further the public welfare by helping ensure that those taxpayers are better able to afford the basic items and services they need that a local municipal government would ordinarily provide for them. The inherent differences between unincorporated places and municipalities therefore justly and rationally support exempting the property in unincorporated places from the SWEPT. *Eby*, 166 N.H. at 331; *Smith*, 141 N.H. at 687 (explaining that a tax exemption is just so long as the distinction between taxable and nontaxable property is "a reasonable one").

Nonetheless, the superior court determined that, because the public education system benefits the entire state including the property owners of uninhabited locations, no just reasons exist for exempting the property in unincorporated places from the SWEPT. Under this extraordinarily broad reasoning, no exemptions from the SWEPT would ever be supported by just reasons, and the superior court intimated as much in its order. Add. 75, n.5. The superior court relied principally on *Claremont II* and *Opinion of the Justices (School Financing)* to reach this conclusion, but those cases do not support that extraordinary result.

Claremont II relied on settled tax precedent and did not suggest that its holding created new or special constitutionally-based rules for education taxes. This Court did not hold in *Claremont II* that the legislature could not exempt property from an education tax for just reasons.

Opinion of the Justices (School Financing) also does not support the superior court's conclusion. In that opinion, this Court simply applied *Claremont II*'s core holding and advised that a special abatement applied before tax bills were sent rendered the proposed tax disproportionate and unreasonable because it would result in similarly situated taxpayers paying different tax rates across the State depending in what municipality they lived. In its advice, this Court reaffirmed *Claremont II*. This Court also rejected arguments made by supporters of the tax regime that the special abatement would "prevent social discord" and would "protect towns from financially contributing to the adequate education of children in other towns or school districts," *id.* at 901, because those arguments were not grounded in good cause or just reasons; they were grounded in the simple desire by individual taxpayers to avoid paying the tax and therefore "achieve

disproportionality for disproportionality's sake," *id.* This Court did not advise that tax exemptions from an education tax could not exist for good cause or just reasons; rather, it implied just the opposite.

Then, in *Claremont III*, this Court made clear that exemptions from an education tax were permissible provided the exemption is just and not made solely to prefer some taxpayers over others. 144 N.H. at 213-14. In that decision, this Court agreed that just reasons existed to provide tax relief to at-risk taxpayers in so-called "property rich" communities. *Id.* at 216. This Court, however, viewed the phase-in exemption as overbroad: "Although we do not quarrel with the legislature's articulated goal of tax relief to the at-risk taxpayer, it 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.* This Court explained: "The classification created by the phase-in encompasses taxpayers who do not merit special tax treatment in accordance with the just reasons offered by the legislature." *Id.* Thus, the phase-in "cast too wide a net at the problem it intended to solve" resulting in a mismatch between it and the justification supporting it. *Id.* at 216-17.

The takeaway from the above three cases is that exemptions from a state education tax are permitted and are not *per se* unjust simply because the public education system benefits the entire State. There are many just reasons for exempting the property in unincorporated places from the SWEPT. Those reasons are appropriately grounded in the inherent differences between unincorporated places and municipalities and the materially different burdens and benefits that affect the persons and property in those places; those reasons are not grounded in a general desire

or preference of certain individuals not to pay the tax; they are grounded in the public welfare, and the classification is precisely tailored to fit those just reasons. The superior court's contrary decision is incorrect and should be reversed.

3. The Constitutional Avoidance Canon Does Not Apply.

The superior court also erred in refusing to give the term "municipality" or "municipalities" in RSA 76:8 its ordinary meaning. The term "municipality" in RSA 76:8 is not defined. Dictionary definitions associated with the term all define a municipality as an incorporated public entity. In New Hampshire, unincorporated places are not incorporated, are distinguished from municipalities on that basis, and, consequently, lack nearly all of the powers and authority that municipalities possess. When the legislature wants to affect unincorporated places, it does so expressly. *See, e.g.*, RSA 72-B:11 (specifying that the excavation tax collected in "the incorporated towns and cities" shall be paid "into their respective treasuries for the general use of the city or town" and in "any unincorporated place shall be collected by the county commissioners . . . and paid by them to the county treasurer"); RSA 73:16-a ("A failure of a city, town or unincorporated place to comply with any provision of this section shall bar the assessment of any tax upon any such property to the owner of the land."); RSA 76:1 ("An apportionment of public taxes according to the equalized valuation of the towns, cities and unincorporated places shall be made annually by the commissioner of revenue administration."); RSA 78-A:26, III-IV (specifying that "the unincorporated towns, unorganized places, towns and cities" shall receive distributions from the "meals and

rooms municipal revenue fund"); RSA 79:1, I (defining "assessing official" to mean those "charged by law with the duty of assessing taxes in the city, town, or unincorporated place"); RSA 79-A:7, I ("Notwithstanding the provisions of RSA 75:1, the tax shall be at the rate of 10 percent of the full and true value determined without regard to the current use value of the land which is subject to a non-qualifying use or any equalized value factor used by the municipality or the county in the case of unincorporated towns or unorganized places in which the land is located."); RSA 198:38 (defining the term "municipality" as used in "this subdivision [RSA 198:38-:45-a]" to include "unincorporated places"); *see also* RSA 21:47-:48 (specifying what the terms "legislative body" and "governing body" mean "[w]hen used to refer to a municipality" and "when used to refer to unincorporated towns or unorganized places").

The superior court eschewed a plain meaning analysis to avoid a conflict with constitutional rights, Add. 74, but the constitutional avoidance canon does not apply for two reasons. First, the constitutional avoidance canon only applies when a statute is ambiguous, which means the statute may be *construed* in more than one reasonable way. *See Polonsky v. Town of Bedford*, 171 N.H. 89, 96 (2018) ("In light of the plain meaning of the statutes, the canon of constitutional doubt, upon which the trial court relied, does not apply."). RSA 76:3 and RSA 76:8 are not ambiguous. They impose an education tax only upon the property in municipalities. The term municipality, in its ordinary sense, includes only incorporated public entities and does not include, as a matter of law, unincorporated places, RSA 53:1. The constitutional avoidance canon therefore does not apply.

Second, there is no constitutional problem to avoid in the first place. The inherent differences between unincorporated places and municipalities supply just reasons for excluding the property in unincorporated places from the SWEPT. No case from this Court holds that exclusions or exemptions from an education tax are *per se* unconstitutional, nor do those cases suggest that the inherent differences between the kinds and uses of property, public entities, or taxpayers cannot supply just reasons to support excluding them from an education tax. As explained above, there are real world, functional differences between unincorporated places and municipalities that result in the property in those places being subject to materially different benefits and burdens. Just reasons grounded in the public welfare therefore exist for the exclusion. Consequently, there is no constitutional problem to avoid that would justify applying the constitutional avoidance canon.

II. THIS COURT'S EDUCATION FUNDING PRECEDENTS DO NOT SUBJECT EDUCATION TAXES LIKE THE SWEPT TO DIFFERENT CONSTITUTIONAL REQUIREMENTS THAN OTHER TAXES.

The trial court ruled that this Court's decision in *Claremont II*, 142 N.H. 462 (1997), made the SWEPT a "unique" form of property tax that may only be used to generate revenue to meet the State's constitutional education obligations under Part II, Article 83. This Court should clarify that education taxes like the SWEPT are not subject to different constitutional requirements than other state taxes.

This Court's education funding decisions from *Claremont Sch. Dist. v. Governor*, 138 N.H. 183 (1993) ("*Claremont I*"), to *Londonderry v. State*, 154 N.H. 153 (2006), have required the legislative and executive branches

to define an adequate education, cost the educational program defined, fund that educational program with constitutional taxes, and deliver that educational program with accountability. These cases do not purport to distort or alter existing areas of constitutional law. *Claremont II*, *Opinion of the Justices (School Finance)*, and *Claremont III* all applied pre-existing Part II, Article 5 tax precedent and did not purport to create special constitutional principles applicable only to the education taxes.

The superior court's decision is not faithful to those precedents and, instead, expands them by imposing new constitutional restrictions on how the legislature may spend lawfully raised education tax dollars. The superior court's decision would require the legislature to spread those education tax dollars out equally or in some other manner deemed more equitable to the judiciary among all municipalities. This Court, however, has "never ruled that constitutional adequacy requires a uniform expenditure per pupil throughout the State." *Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.)*, 145 N.H. 474, 478 (2000). It has also "never directed or required the selection of a particular funding mechanism." *Id.*

Even though the judiciary's "task is neither to establish educational policy nor to determine the appropriate mechanism for its funding," *Sirrell*, 146 N.H. at 369, the superior court has done just that. It has read this Court's precedents to make education taxes like the SWEPT unique and to require the revenue they raise to be spent in a manner it believes to be more equitable. The superior court even believes it has the authority to rewrite the statutory regime to accomplish these goals and order a state agency to execute them. Such a result violates separation of powers by usurping the

lawmaking and appropriation authority of the legislature as well as the execution and spending authority of the executive. N.H. Const. Pt. I, Art. 37; N.H. Const. Pt. II, Arts. 5, 41, 56. To avoid this result in the future, this Court should make clear that its education funding precedents do not subject education taxes like the SWEPT to different constitutional requirements than other taxes.

A. If This Court's Precedents Subject Education Taxes To Different Constitutional Requirements Than Other Taxes, Those Precedents Should Be Overruled To The Limited Extent Necessary To Permit Education Taxes To Be Treated Like Other State Taxes.

If this Court's education funding precedents do subject education taxes like the SWEPT to different constitutional requirements than other state taxes, and if those different requirements render the SWEPT unconstitutional, then those precedents should be overruled to the limited extent necessary to permit education taxes like the SWEPT to be treated like other taxes. The State Constitution does not contain special restrictions on the legislative taxing power for education taxes. This Court does not make or set education funding policy, and its jurisprudence should not distort the ordinary constitutional rules that apply to the legislative taxing power.

Stare decisis would also be weak under this circumstance. No case from this Court sets forth a clear rule specifying that education taxes are to be treated differently under the State Constitution than other state taxes. If such a rule exists, it has not been repeatedly and consistently applied, accepted, or relied upon, and certainly has not been explained or considered with particular care. *See Brannigan v. Usitalo*, 134 N.H. 50, 53 (1991)

("Although not binding on a constitutional question, the doctrine of *stare decisis* is compelling when the earlier case: (1) was joined by a strong majority of the court; (2) has been 'repeatedly and consistently . . . accepted and applied' by the court that decided it; and (3) was 'considered with special care.'"). Accordingly, if this Court's education funding precedents somehow subject education taxes to special constitutional requirements, this Court should overrule or otherwise clarify those precedents to ensure education taxes are subject to the same constitutional standards under Part II, Article 5 as other state taxes.

III. THE TRIAL COURT'S INJUNCTION GOES BEYOND ITS CONSTITIUTIONAL, LEGAL, AND EQUITABLE AUTHORITY TO ENTER.

The State argued below that, if the trial court found the SWEPT unconstitutional, it should declare as much and stay its order consistent with this Court's education funding precedents. *See Claremont II*, 142 N.H. at 476-77 ("We are mindful of the fact that our decision holding the present system of financing public education unconstitutional raises issues concerning the interim viability of the existing tax system. Because the legislature must be given a reasonable time to effect an orderly transition to a new system, the present funding mechanism may remain in effect through the 1998 tax year."); *cf. Londonderry*, 154 N.H. at 163 (staying portion of the case to permit the legislature to further define with specificity the components of a constitutionally adequate education).

Alternatively, the State argued that the trial court could direct municipalities to hold so-called "excess SWEPT" revenues in escrow for

the State's benefit until the legislature decides what to do with those funds. The plaintiffs did not provide a clear remedy for the trial court to impose.

Instead of adhering to precedent and limiting itself to a remedy proportionate to the harms to be addressed, respectful of the roles of the other branches of government, and respectful of the significant role municipalities have in administering the SWEPT, the trial court fashioned a new statutory spending regime and ordered a State agency to execute and enforce it. This order usurps the core lawmaking and appropriation powers of the legislature and the core power of the governor to execute the laws. It therefore violates the separation of powers. N.H. Const. Pt. I, Art. 37. There is also no statutory authority for it. No statute allows the DRA to transfer and dispose of so-called "excess SWEPT" revenues. No statute requires municipalities to remit so-called "excess SWEPT" to the DRA. No statute authorizes the DRA to offset so-called "excess SWEPT" with other state grants or aid money that a municipality may receive. The injunction is also inequitable for these reasons and the reasons the intervenor has expressed.

This Court should vacate the trial court's remedy even if it agrees that the SWEPT is being unconstitutionally administered. The correct remedy is a declaration of unconstitutionality and a stay to give the legislature and/or executive reasonable time to fix the deficiency. The State presented an alternative remedy appropriately respectful of the roles of all of the branches of state government. The trial court erred in summarily rejecting them and its affirmative injunction should be vacated.

CONCLUSION

The SWEPT is constitutional under Part II, Article 5. It is proportional and reasonable, equal in valuation and uniform in rate, and just. It excludes the property in unincorporated places from its provisions for just reasons. This Court should therefore reverse the trial court's decision and vacate its injunction.

If this Court finds the SWEPT unconstitutional under Part II, Article 5 because RSA 76:8, II spends SWEPT revenue by providing it to municipalities for the use of their school districts, this Court should affirm the declaration and stay it to give the legislative and executive branches a reasonable time to resolve the deficiency.

If this Court finds the DRA's practice of functionally excluding the property in a small number of unincorporated places from the SWEPT unconstitutional, this Court should affirm the declaration and enjoin that practice. The SWEPT revenue will then be directed to the unincorporated places "for the use of" their "school district," RSA 76:8, II, which is their county, RSA 194:1. The county can then determine how it may use that revenue.

Under no circumstances should this Court affirm the injunctive remedy the trial court imposed. That remedy is inconsistent with this Court's precedents and substantially violates the separation of powers.

ORAL ARGUMENT REQUEST & CERTIFICATION

The State respectfully requests a 15-minute oral argument in this case to be provided by Solicitor General Anthony J. Galdieri.

A copy of the superior court orders appealed from are appended to the addendum to this brief.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Date: August 14, 2024

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,045 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 14, 2024

/s/ Anthony J. Galdieri
Anthony J. Galdieri

CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that a copy of the State's brief shall be served on, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 14, 2024

/s/ Anthony J. Galdieri
Anthony J. Galdieri

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

No. 215-2022-CV-00167

ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT[1]

In this case, the plaintiffs challenge the manner in which the State carries out certain education-related obligations imposed by the State Constitution. See Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 156–57 (2021) ("ConVal"); see also Doc. 17 (Pls.' Am. Compl.). The parties now cross-move for partial summary judgment regarding the plaintiffs' claim that the State administers the Statewide Education Property Tax ("SWEPT") in an unconstitutional fashion. See Doc. 49 (Pls.' Mot. Summ. J. – SWEPT); Doc. 56 (State's Obj. & Cross-Mot. – SWEPT); Doc. 53 (Coalition's[2] Obj. & Cross-Mot.); see also Doc. 17. The Court held a hearing on the motions on July 12, 2023. For the reasons that follow, the plaintiffs' motion is **GRANTED**, and the cross-motions filed by the State and the Coalition are **DENIED**.

[1] The Court intentionally delayed issuing this Order so that it could be issued contemporaneously with the order in Contoocook Valley School District, et al. v. State of New Hampshire, docket no. 213-2019-CV-00069. The Court did this to afford the parties an opportunity to assess how or if that order impacts the procedure in this case. The SWEPT issue in that case was withdrawn by the plaintiff. To the extent the delay has frustrated any of the parties, the Court apologizes but remains convinced it was in the best interest of justice to do so.

[2] The Coalition represents a group of New Hampshire cities and towns that oppose the plaintiffs' challenge to the SWEPT. See Doc. 48 (Dec. 5, 2022 Order). On December 5, 2022, the Court allowed the Coalition to intervene solely as to this aspect of the case. See id.

Standard of Review

"In considering . . . cross-motions for summary judgment, [courts] consider the evidence in the light most favorable to each party in its capacity as the non-moving party." ConVal, 174 N.H. at 162–63. Summary judgment shall be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. As the parties acknowledged during the July 12, 2023 hearing, the facts underlying the plaintiffs' Part II, Article 5 challenge to the SWEPT are undisputed. Rather, the relevant dispute centers on the proper interpretation of our State's education funding jurisprudence, and how the law applies to the existing education funding and tax scheme.

Education Funding Jurisprudence

"Under our education funding jurisprudence, Part II, Article 83 of the State Constitution 'imposes a duty on the State to provide a constitutionally adequate education . . . in the public schools in New Hampshire and to guarantee adequate funding.'" ConVal, 174 N.H. at 156 (quoting Claremont Sch. Dist. v. Governor, 138 N.H. 183, 184 (1993) ("Claremont I")). "To comply with that duty the State must 'define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.'" Id. at 156–57 (quoting Londonderry Sch. Dist. v. State, 154 N.H. 153, 155–56 (2006) ("Londonderry I"). Under Part II, Article 5 of the State Constitution, "constitutional taxes" must "be proportionate and reasonable—that is, equal in valuation and uniform in rate." Claremont Sch. Dist. v. Governor, 142 N.H. 462, 468 (1997) ("Claremont II") (citations and quotations omitted)).

Over time, the legislature has crafted several tax schemes aimed at complying with the above-described constitutional obligations. As of December 17, 1997, properties located within a particular school district were taxed at whatever rate was necessary to "meet the obligations of the school budget" within that district. See Claremont II, 142 N.H. at 467 (explaining Department of Revenue Administration ("DRA") set unique tax rates for properties in each school district). In Claremont II, a group of school districts, students, taxpayers, and parents successfully challenged this tax scheme. See id. at 465. The Claremont II plaintiffs argued (as relevant here) "that the school tax is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education" and thus "is a State tax that should be imposed at a uniform rate throughout the State." Id. at 467. The State countered that setting district-specific tax rates was constitutionally appropriate, characterizing the school tax as "a local tax determined by budgeting decisions made by the district's legislative body and spent only in the district . . . ." Id. at 467–68 (noting State's argument that this practice allowed each school district "to decide how to organize and operate their schools"). The Claremont II court concluded that because "the purpose of the school tax" was "overwhelmingly a State purpose"—i.e., fulfilling the State's duty "to provide a constitutionally adequate education . . . and to guarantee adequate funding"—it constituted a State tax. Id. at 469.

Having resolved that issue, the Claremont II court next analyzed whether the tax scheme was "proportional and reasonable throughout the State in accordance with" Part II, Article 5. Id. at 470; see also id. at 468 ("Part II, article 5 of the State Constitution provides that the legislature may 'impose and levy proportional and reasonable

assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state.'"). Citing evidence that the equalized tax rate for the 1994–95 school year was approximately four times higher in Pittsfield than in Moultonborough, the court concluded that the tax was disproportionate and unreasonable. Id. at 470–71. In reaching this conclusion, the court emphasized 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." Claremont II, 142 N.H. at 470–71. Given these conclusions, the court explained that "[t]o the extent . . . 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.

In response to Claremont II, the legislature solicited an advisory opinion from the Supreme Court regarding the legality of an alternative tax scheme. See Opinion of the Justices (School Financing), 142 N.H. at 892–97. As relevant here, the proposed scheme "purport[ed] to establish a uniform State education tax rate based upon the equalized value of all taxable real property in the State." Id. at 899. However, the scheme included "a 'special abatement' for 'the amount of 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 for the town." Id. (cleaned up). Under the proposed scheme, the DRA would "calculate each town's tax by multiplying the State education tax rate by the total equalized value of the property within it, less any special abatement." Id. (cleaned up). "Thus, the special abatement

applie[d] before any taxpayer within a given town receive[d] a tax bill." Id. (expressing Supreme Court's view that substantive legal issues would "remain unchanged" if proposed scheme provided for actual collection of revenue raised through uniform State education tax, and thereafter reimbursed taxpayers pursuant to the special abatement).

Ultimately, the Supreme Court concluded that the proposed scheme would not pass constitutional muster. See id. at 902. The court explained 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 rate remains equal to the uniform State education tax rate. Those towns receive a grant from the State to meet the otherwise unfunded cost 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.

Recognizing that tax abatements and exemptions "necessarily result in a disproportionate tax burden," the Supreme Court explained that such an outcome is permissible under Part II, Article 5 only when abatements are "supported by good cause and exemptions by just reasons." Id. at 900. The court concluded that the above-described special abatement would not meet that standard:

> Proponents . . . assert that the special abatement is designed to protect towns from financially contributing to the adequate education of children in other towns or school districts. Essentially, the proponents seek to measure proportionality and fairness on a municipality-by-municipality or district-by-district basis, rather than statewide. But, to the extent that a property tax is

> used to raise revenue to satisfy the State's obligation to provide an adequate education, it must be proportional across the State . . . .

Id. at 901 (also explaining that possibility of "social unrest cannot be a factor in . . . constitutional review" of proposed tax scheme). In addition, the court again emphasized the statewide benefits arising out of public education:

> Because the diffusion of knowledge and learning is regarded by the State Constitution as essential to the preservation of a free government, it is only just that those who enjoy such government should equally assist in contributing to its preservation . . . . This obligation cannot be avoided or lessened by the mere circumstance of a town having few children or a town having a wealth of property value, including wealth generated by the presence of heavy industry.
>
> It should not be forgotten that New Hampshire is not a random collection of isolated cities and towns . . . . The benefits of adequately educated children are shared statewide . . . .

Id. at 901–02 (cleaned up). In light of the foregoing, the court concluded that because property owners who did not benefit from the special abatement would bear "an increased tax burden," and "such disproportionality [wa]s not supported by good cause or a just reason," the proposed education funding scheme would violate "both the plain wording of Part II, Article 5 and the express language of Claremont II." Id. at 902.

After receiving the Supreme Court's guidance, "the legislature passed an act in April 1999 'establishing a uniform education property tax'" and omitting any special abatement. See Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 212 (1999) ("Claremont III") (citation omitted). Pursuant to the act, "[i]n each municipality in which the education property tax exceed[ed] the amount necessary to fund an adequate education, the excess" was to be "remitted" to the DRA. Id. at 213 (citation omitted). Notably, however, the act included a "phase-in" provision which provided that in certain property-rich towns, the full tax rate would be "imposed

gradually over five years, while taxpayers in the remaining towns [would] pay the full rate immediately." Id.

In Claremont III, the plaintiffs challenged (among other things) the constitutionality of the phase-in provision. See id. at 212. Although the State "acknowledged . . . that facially the phase-in perpetuate[d] a disproportionality for five years," the State nevertheless argued that the phase-in could "be viewed as a partial abatement" or a "partial exemption" of the tax liability in property-rich towns. See id. at 213. The Supreme Court summarily dismissed the State's abatement argument, explaining the phase-in did not constitute a permissible abatement because it did "not limit relief to persons aggrieved by the assessment of a tax." Id. (citation omitted). Further, the court concluded that the phase-in was not a valid tax exemption because it did not serve the general welfare. See id. at 212–14. In reaching this conclusion, the court reasoned that although the phase-in was intended to "ameliorate the possibility of foreclosures, bankruptcies, or similar adverse economic consequences that could occur" in the property-rich communities, "[t]he classification created by the phase-in encompasse[d] taxpayers who d[id] not merit special tax treatment in accordance with the just reasons offered by the legislature . . . ." Id. at 213–16.

Before considering whether the phase-in provision could be severed from the act (and ultimately concluding that it could not), the Supreme Court took the opportunity to emphasize and clarify important aspects of our State's taxation jurisprudence:

> [W]e give heed to the words of Chief Justice Doe written more than one hundred years ago: "A state law selecting a person or class or municipal collection of persons for favors and privileges withheld from others in the same situation . . . is at war with a principle which this court is not authorized to surrender." . . . In the field of taxation, the principle of uniformity and equality of rights is of paramount importance and has been embodied in the

> "proportional and reasonable" language of Part II, Article 5 of our State Constitution since June 2, 1784.
>
> In this case, the classification at issue imposes a State tax on property at different rates for five years based solely on the location of the property. We can find no case where different rates of taxation exist in a State tax from one municipality to another. We can conceive of none that would pass muster under the words of Chief Justice Doe or the provisions of Part II, Article 5 . . . . our language on taxes requiring uniformity and equality is not something invented in the Claremont cases, but is the far-reaching language of constitutional mandate which has guided every tax decision of this court for over two hundred years.

Id. at 217 (citations omitted) (quoting State v. Griffin, 86 N.H. 609, 614 (1894)).

In response to Claremont III, the legislature "reenacted the statewide property tax without the phase-in . . . ." Sirrell v. State, 146 N.H. 364, 367 (2001). Under that tax scheme, communities which raised funds "beyond that necessary to fund an adequate education for their students" were "required to pay the excess . . . to the education trust fund for distribution to communities unable to raise sufficient funds to meet their cost of adequacy." See id. By 2006, however, the legislature had again modified the education tax scheme. See Londonderry Sch. Dist. SAU #12 v. State, No. 226-2005-EQ-00406, 2006 WL 563120 (N.H. Super. Mar. 8, 2006) (Groff, J.) ("Londonderry") at *6–7 (describing changes to tax scheme arising out of House Bill 616). As relevant here, the legislature eliminated the requirement that excess education funds be remitted to the State, instead permitting property-rich communities to "retain all the revenue they raise[d]" under the education tax scheme "in excess of what [wa]s needed to support the cost of an adequate education." Id. at *13. In Londonderry, a group of school districts, School Administrative Units and towns argued that this change "violate[d] Part II, Article 5" because it resulted "in some 'property poor' communities bearing a disproportional share of educational expenses through local taxes." Id.

Citing the jurisprudence discussed above, Judge Groff agreed with the plaintiffs:

> Under HB 616, the real effect of having the "property-rich" municipalities retain excess [education tax] proceeds is to permit these municipalities to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children. At the same time, "property-poor" municipalities will be required to use the full amount of the statewide enhanced education tax assessment revenues collected to support the cost of an adequate education. Therefore, HB 616 creates 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.

Id. at *15 (noting "special abatement" and phase-in provisions of prior proposed legislation were deemed unconstitutional because they permitted municipalities to avoid payment of statewide education property tax which exceeded the amount necessary to provide an "adequate education" within relevant school district).

On appeal, the Supreme Court concluded that it could not analyze whether the State was funding public education in a constitutional manner until the legislature appropriately defined the scope of a constitutionally adequate education. See Londonderry I, 154 N.H. at 162. In response, the legislature enacted sweeping changes to the public education laws, including the funding scheme. See Londonderry Sch. Dist. SAU #12 v. State, 157 N.H. 734, 735 (2008) ("Londonderry II"). As a result, the Supreme Court determined that the remaining challenges to House Bill 616 had become moot. See id. at 736. Thus, the Supreme Court has not definitively determined whether allowing a municipality to retain excess education funds—that is, funds generated under a statewide education tax scheme which exceed the cost of providing the opportunity for a constitutionally adequate education to the public school students living in that municipality's school district—runs afoul of Part II, Article 5.

Existing Education Funding and Tax Scheme

Today, RSA 198:40-a, II, sets forth the annual per-pupil cost of providing the opportunity for a constitutionally adequate education (hereinafter "adequacy aid"). The State raises adequacy aid funds via the SWEPT. See ConVal, 174 N.H. at 159. Specifically, RSA 76:3 requires that the DRA "set the education tax rate at a level sufficient to generate" a statutorily-defined total "when imposed on all persons and property taxable pursuant to RSA 76:8, except property subject to tax under RSA 82 and RSA 83-F." Funds raised via this tax are "collected and distributed at a local level and . . . used to meet the cost of an adequate education." See Doc. 18 (State's Am. Answer 1st Am. Compl.) ¶ 19.

"The State admits that since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid [to that community] by the State have been permitted to retain the excess . . . ." Id. ¶ 22; see also Laws 2011, 258:7 (eff. July 1, 2011) (eliminating requirement that excess SWEPT funds be paid to DRA "for deposit in the education trust fund"). The State further acknowledges that for certain areas in New Hampshire, the DRA has "set negative local education tax rates" which mathematically offset most if not all of the applicable equalized SWEPT rate. See Doc. 18 ¶ 35; Doc. 59 (Aff. Bruce Kneuer) ¶ 18 ("A negative Local Education Rate may occur . . . when a municipal entity . . . has minimal or no public education responsibilities within its boundaries . . . ."). For example, for the 2020–21 school year, the DRA set a local education tax rate for Hale's Location of negative $1.84 / $1000, whereas the equalized SWEPT rate for that same area was $1.85 / $1000. See Doc. 18 ¶ 36.

Analysis

The plaintiffs argue that because the State allows communities to retain excess SWEPT funds or offsets the equalized SWEPT rate via negative local education rates, the SWEPT is not being administered in a manner that is "uniform in rate," as required by Part II, Article 5. See Doc. 50 (Pls.' Mem Law) at 3, 14. The parties now cross-move for summary judgment with respect to this issue. Compare Doc. 49 with Docs. 53 and 56. Before turning to the merits of the parties' arguments, the Court must address two preliminary matters. First, in support of their cross-motions for summary judgment, the State and the Coalition maintain that the SWEPT should be presumed constitutional, and that the plaintiffs bear the burden of establishing a "clear and substantial conflict" between the SWEPT and the State Constitution. See Doc. 53 at 3 (citing ConVal, 174 N.H. at 161, for proposition that Court may only declare SWEPT unconstitutional "upon 'inescapable grounds'"); accord Doc. 57 (State's Mem. Law) at 6. For the reasons outlined below, the Court concludes that if the State and the Coalition have appropriately framed the relevant standards, the plaintiffs have overcome the presumption of constitutionality and met their burden of showing a clear and substantial conflict. Accordingly, the Court will assume, without deciding, that those standards apply here. Cf. Canty v. Hopkins, 146 N.H. 151, 156 (2001) (declining to reach arguments that would not alter court's conclusion).

Second, in support of their motion for partial summary judgment, the plaintiffs have submitted data tables generated by Douglass Hall. See Doc. 51 (Pls.' State. Mat. Facts) Ex. A (Aff. Douglass Hall) ("Hall Aff."). These tables indicate which New Hampshire communities generated "SWEPT in Excess of Adequacy" in certain tax

years, and they also reflect Hall's calculations as to what the SWEPT rate would have been had such communities only collected the funds necessary to cover their own adequacy aid needs. See id. ¶¶ 4–9. The tables contain similar information concerning communities for which the DRA has set negative local tax rates. See id. ¶¶ 10–13.

The Coalition suggests Hall's work deserves little weight. Doc. 53 at 14 n.3 (noting Hall's affiliation with N.H. School Funding Fairness Project, and that Hall did not "explain why he selected" data points reflected in tables). Notably, however, the Coalition concedes that Hall's tables were "created from State data," and the Coalition does not suggest that Hall misreported the data, or that the data is otherwise unreliable. See id. Nor does the Coalition assign error to Hall's calculations. See id. As there is no dispute regarding the validity of the data underlying his work, the Court concludes that it is appropriate to substantively consider Hall's calculations, as reported in the tables, in ruling on the parties' cross-motions for summary judgment.

The Court now turns to the substance of the parties' cross-motions. As the parties raise somewhat distinct arguments concerning "excess" SWEPT communities and "negative tax rate" communities, the Court will address each category, in turn.

I. Excess SWEPT Communities

Relying on the caselaw discussed above, the plaintiffs argue that allowing municipalities to retain "excess" SWEPT funds beyond those needed to meet local adequacy aid requirements is the functional equivalent of the special abatement and phase-in schemes which the Supreme Court previously deemed unconstitutional. See Doc. 50 at 14. In particular, the plaintiffs argue that property-poor communities which do not generate excess SWEPT funds are effectively paying a higher SWEPT rate than

those which do generate and are allowed to retain excess funds. See id. at 15. As a result, the plaintiffs argue that the SWEPT is being administered in a manner which is not "uniform in rate," as required under Part II, Article 5. See id. at 15–18. In response, the State and the Coalition argue that the legislature's decision to permit retention of excess SWEPT funds constitutes a spending decision and not a tax, rendering the prior school funding cases distinguishable. See Doc. 57 at 1–2; Doc. 53 at 2. The State and the Coalition thus assert that the plaintiffs' Part II, Article 5 challenge to the SWEPT must fail. See Doc. 57 at 2; Doc. 53 at 2.

Upon review, the Court agrees with the plaintiffs' characterization of this issue. The plaintiffs do not challenge the amount of money the State spends on education in one community versus another. Rather, as in Claremont II, the plaintiffs in this case emphasize that the SWEPT "is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education." See Claremont II, 142 N.H. at 467; see also Doc. 61 (Pls.' Reply – SWEPT) at 1–2 (noting in a footnote that SWEPT "is not a generic tax for education" but "a specific state tax to pay for the State's constitutional duty to fund adequacy"). The plaintiffs thus contend that by allowing property-rich communities to retain excess SWEPT funds, the State is administering the SWEPT in a manner which effectively reduces the SWEPT rate paid by those communities. In other words, although the SWEPT rate is uniform on its face, the plaintiffs argue that any scheme which diverts SWEPT funds to purposes other than adequacy aid lowers the effective SWEPT rate paid by certain communities, thus running afoul of Part II, Article 5.

As set forth above, the plaintiffs' contention finds substantial support in our State's education funding jurisprudence. Indeed, the Claremont II court expressly noted 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." 142 N.H. at 470 (emphasis added). The court's broader discussion of the administration of such a tax, rather than just the facial tax rate, aligns with the plaintiffs' position. See id. Similarly, in Opinion of the Justices (School Financing), the Supreme Court concluded that the proposed "special abatement" impermissibly resulted in a lower "effective" education tax rate for certain communities. See 142 N.H. at 902. While recognizing that the proposed tax would be uniform on its face, the Supreme Court concluded that the proposed tax would violate Part II, Article 5 because "[a]pplication of the special abatement [would] guarantee[] that property owners paying the full rate [bore] an increased tax burden . . . ." Id. at 901–02 (explaining that "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"); see also id. at 899 (noting court's conclusions "would remain unchanged" if proposed scheme had provided for actual collection of revenue, then reimbursed taxpayers pursuant to special abatement).

Relying on this reasoning, Judge Groff determined in Londonderry that the retention of surplus education tax funds violated Part II, Article 5 because it allowed property-rich municipalities "to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children." 2006 WL 563120, at *15. While Judge Groff's holding on this issue and

other aspects of the jurisprudence discussed above do not constitute binding precedent, the Court is persuaded by the reasoning set forth therein. As Judge Groff noted, where education taxes like the SWEPT are intended to fulfill the State's constitutional obligation to fund adequacy aid, the effective rate of such a tax is only uniform if all proceeds of the tax are directed to that purpose. See id.

In this case, the existing education funding and tax scheme permits communities to retain surplus SWEPT funds which exceed local adequacy aid needs. As a result, such funds are not remitted to the State for use in meeting the adequacy aid needs of other communities where SWEPT revenues fall short of adequacy. While communities which retain excess SWEPT funds must use those funds for education, the excess funds are not used to satisfy the State's adequacy aid obligations.[3] By contrast, communities which do not generate such an excess must use all collected SWEPT revenue to satisfy the State's adequacy aid obligations. In short, communities which do not generate excess SWEPT funds use all revenues generated under the facial SWEPT rate for adequacy aid purposes, and excess SWEPT communities do not.

Given the unique nature of the SWEPT—a State tax meant to generate the funding necessary to meet the State's constitutional adequacy aid obligations, see Claremont II, 142 N.H. at 467—there can be no meaningful dispute that allowing communities to retain excess SWEPT funds lowers the effective SWEPT rate paid by those communities. See Hall. Aff. Table 1. Accordingly, the Court concludes that allowing some communities to retain excess SWEPT funds impermissibly results in a

[3] In the event the amount of adequacy aid is increased in the future, such a change would not undermine the conclusion that a community's retention of SWEPT funds generated in excess of adequacy aid effectively reduces the SWEPT rate for that community, in violation of Part II, Article 5.

disproportionate tax rate, in violation of Part II, Article 5. See Claremont II, 142 N.H. at 467; see also Opinion of the Justices (School Financing), 142 N.H. at 902; Londonderry, 2006 WL 563120, at *15. In light of the foregoing, the plaintiffs have overcome any applicable presumption of constitutionality regarding the retention of excess SWEPT funds, and have further established a "clear and substantial conflict" between this aspect of the SWEPT, as administered, and Part II, Article 5 of the State Constitution. See Doc. 53 at 3; Doc. 57 at 6. The plaintiffs' motion for summary judgment is thus **GRANTED** with respect to this issue, and the corresponding aspects of the competing motions filed by the State and the Coalition are **DENIED**.

II. Negative Tax Rate Communities

The plaintiffs similarly argue that by setting negative local education tax rates in communities with little to no education expenses, the State is impermissibly reducing the effective SWEPT rate for those communities. See Doc. 50 at 16 (arguing this scheme is "virtually identical" to the special abatement scheme deemed unconstitutional in Opinion of the Justices, 142 N.H. at 899); see also Hall Aff. Table 3. In response, the State contends that the communities at issue, which are generally "unincorporated places," are not and need not be part of the SWEPT tax base. See Doc. 57 at 14–18.[4] In other words, the State does not deny that negative local education tax rates effectively reduce or eliminate SWEPT liability, but argues this outcome is contemplated by the relevant statutory scheme and is constitutionally permissible. See id.

Upon review, the Court again agrees with the plaintiffs. As the Supreme Court has repeatedly emphasized, the public education system benefits the entire State, not

[4] The Coalition does not directly address the negative local education tax rate issue in their filings. See Docs. 53; 63 (Coalition's Reply).

merely those communities in which publicly-educated children reside. See Claremont II, 142 N.H. at 470 ("[B]ecause the diffusion of knowledge and learning is regarded by the State Constitution as 'essential to the preservation of a free government' . . . it is only just that those who enjoy such government should equally assist in contributing to its preservation."); Opinion of the Justices (School Financing), 142 N.H. at 901–02 ("The benefits of adequately educated children are shared statewide . . . ."). Of particular relevance here, even property owners in uninhabited locations benefit from the preservation of our State's government, without which their property interests would be put in jeopardy. See Claremont II, 142 N.H. at 470. Accordingly, the fact that few if any publicly-educable children reside within some unincorporated places does not constitute a "just reason[]" for reducing or eliminating SWEPT liability in those locations. See Opinion of the Justices (School Financing), 142 N.H. at 900 (explaining Part II, Article 5 requires that tax exemptions be "supported by . . . just reasons").

In light of this conclusion, the Court is not persuaded by the State's proffered interpretation of the term "municipalities," as used in RSA 76:3 and 76:8. See Doc. 57 at 14–15 (arguing "municipalities," as used in relevant statutes, does not include unincorporated places). It is well settled that New Hampshire courts "must construe a statute to avoid a conflict with constitutional rights whenever reasonably possible." Bellevue Properties, Inc. v. 13 Green St. Properties, LLC, 174 N.H. 513, 517 (2021) (citation and quotations omitted). For the reasons outlined above, if the legislature intended to exempt unincorporated places from contributing to the State's education funding obligations, such an exemption would not be supported by the requisite "just reasons." See Opinion of the Justices (School Financing), 142 N.H. at 900.

Accordingly, the Court cannot construe the term "municipalities" as excluding unincorporated places in this context. See Bellevue Props., 174 N.H. at 517.[5]

For the reasons outlined above, the Court concludes that the setting of negative local education tax rates which offset the SWEPT to any degree runs afoul of Part II, Article 5. Accordingly, the plaintiffs have overcome any applicable presumption of constitutionality regarding the offsetting of SWEPT rates via negative local tax rates, and have further established a "clear and substantial conflict" between this aspect of the SWEPT, as administered, and Part II, Article 5 of the State Constitution. See Doc. 53 at 3; Doc. 57 at 6. The plaintiffs' motion for summary judgment is thus **GRANTED** with respect to this issue, and the corresponding aspects of the competing motions filed by the State and the Coalition are **DENIED**.

III. Remedy

Having found that the plaintiffs are entitled to judgment as a matter of law regarding their Part II, Article 5 challenge to the administration of the SWEPT, the Court must now determine the appropriate remedy. As noted in the Court's December 5, 2022 Order on the plaintiffs' motion for preliminary injunctive relief, "[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Doc. 48 at 8 (quoting N.H. Dept. Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007)). Moreover, "the granting of an injunction 'is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity.'" Id. (citing UniFirst Corp. v. City of

[5] Although the State's Reply identifies other property types which are not subject to the SWEPT under the existing scheme, see Doc. 64 at 3, the State does not cite (and the Court is not aware of) any legal basis for rejecting a valid Part II, Article 5 challenge because the relevant tax may also run afoul of the constitution in other respects.

Nashua, 130 N.H. 11, 14 (1987) for proposition that courts may consider public interest in evaluating requests for injunctive relief).

Given the lengthy history of constitutional violations arising out of the State's various education tax schemes, the plaintiffs urge the Court to act swiftly in curing the above-described constitutional infirmities. See Doc. 50 at 18–19 (quoting Claremont III, 143 N.H. at 158, for proposition that "[a]bsent extraordinary circumstances, delay in achieving a constitutional system is inexcusable"); see also Doc. 61 at 12–14 (noting plaintiffs first sought preliminary injunctive relief in October 2022). For its part, the State urges the Court not to "impose any remedy that disrupts the current municipal budget cycle," arguing that if any remedy is warranted, "it would be far less disruptive for the remedy to become effective with the next budget cycle, which will commence in late-2023 and culminate in budget votes in March or April 2024." Doc. 57 at 20. In addition, the State maintains that because the legislature repealed any statutory authority for remitting excess SWEPT revenues to the education trust fund, the Court should order those funds held in escrow pending further legislative action. See id.[6]

The parties' arguments implicate important considerations regarding the roles of the respective branches of State government. See Londonderry I, 154 N.H. at 163. The Supreme Court's respect of those roles has led it to "demure[]" each time the court "has been requested to define the substantive content of a constitutionally adequate public education . . . ." Id. However, as the Londonderry I court recognized, "the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and,

[6] The Coalition's filings do not directly address the issue of an appropriate remedy. See Docs. 53; 63.

in the absence of action by other branches, a judicial remedy is not only appropriate but essential." Id. (citing Petition of Below, 151 N.H. 135 (2004)).

In light of the substantial guidance that can be gleaned from the jurisprudence discussed above, the plaintiffs are understandably frustrated by the manner in which the State is currently administering the SWEPT. However, any immediate remedy which impacts the current budget cycle will necessarily have a far greater impact on the Coalition's members and other similarly-situated communities than on the State. See Doc. 60 (Aff. Lindsey Stepp) ¶ 20 (explaining prospective remedy would allow affected communities to consider this change "when building their next budgets"). While those communities also could have benefitted from the guidance discussed above, the Court recognizes that it may have been impractical or imprudent for communities to collect a surplus of tax revenue before the Court ruled on the merits of the relevant constitutional issues. On the other hand, the Court is mindful that communities which do not generate excess SWEPT funds or offset the SWEPT with negative local tax rates continue to shoulder an unfair burden as it relates to the State's adequacy aid obligations.

Having considered all of the relevant facts and circumstances, the Court concludes that the following remedy strikes the appropriate equitable balance:

Beginning with the upcoming budget cycle (i.e., the budget cycle the State characterizes as commencing "in late-2023" and culminating in "budget votes in March or April 2024," Doc. 57 at 20), the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated by a community which exceed the amount of adequacy aid to which that community is statutorily entitled must be remitted to the

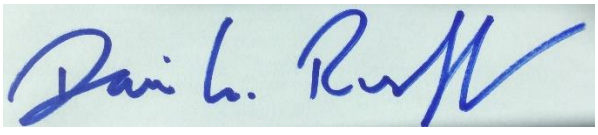
DRA. While the Court declines to direct that the State place such revenue in a particular fund, the Court reiterates that such funds must be used for the exclusive purpose of satisfying the State's adequacy aid obligations.

Conclusion

Consistent with the foregoing, the Court concludes that by administering the SWEPT in a manner which allows communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates, the State has violated Part II, Article 5 of the State Constitution. Accordingly, the plaintiffs' motion for partial summary judgment as to this issue (Doc. 49) is **GRANTED**, and the cross-motions filed by the State (Doc. 56) and the Coalition (Doc. 53) are **DENIED**. Beginning with the budget cycle commencing in late-2023 and culminating in budget votes in March or April 2024, the State is enjoined from permitting communities to retain excess SWEPT funds or offset the equalized SWEPT rate via negative local tax rates. Further, any SWEPT funds generated in excess of the adequacy aid to which any community is statutorily entitled must be remitted to the DRA, and thereafter used for the exclusive purpose of satisfying the State's constitutional adequacy aid obligations.

Lastly, given the timing of this Order and the fact that the Court is contemporaneously releasing an order in Contoocook Valley School District, et al. v State of New Hampshire, finding the current base adequacy amount unconstitutional, the deadline to file a Motion to Reconsider is extended to 30 days.

SO ORDERED.



Date: November 20, 2023

Hon. David W. Ruoff
Rockingham County Superior Court

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Steven Rand, et al.

v.

The State of New Hampshire

No. 215-2022-CV-00167

ORDER ON PENDING MOTIONS CONCERNING SWEPT CLAIMS

In this case, the plaintiffs challenge the manner in which the State carries out education-related obligations imposed by the State Constitution. See Doc. 17 (Pls.' Am. Compl.). On November 20, 2023, the Court granted the plaintiffs' motion for partial summary judgment, concluding that certain practices concerning the Statewide Education Property Tax ("SWEPT") are unconstitutional, and enjoining the State from continuing those practices "[b]eginning with the budget cycle commencing in late-2023 and culminating in budget votes in March or April 2024[.]" See Doc. 86 (the "SWEPT Order"). The State now moves for a stay of the SWEPT Order pending appeal. See Doc. 91. To expedite the appellate process, the State also seeks a ruling that the SWEPT Order constitutes a final decision on the merits. See Doc. 92 (the "Rule 46(c) Request"); see also Super. Ct. R. 46(c). The Coalition, an intervenor representing certain New Hampshire cities and towns, joins in the State's motions, see Doc. 93, and moves for partial reconsideration of the SWEPT Order, see Doc. 94. The plaintiffs object to reconsideration and the requested stay, but assent to the Rule 46(c) Request. See Doc. 95. After review, the Court finds and rules as follows.

Background

The SWEPT Order includes a detailed summary of New Hampshire's education funding jurisprudence. See Doc. 86 at 2–9. To the extent relevant, that summary is incorporated by reference here. By way of brief background, "Part II, Article 83 of the State Constitution imposes a duty on the State to . . . define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 156–57 (2021) ("ConVal") (citations and quotations omitted). Pursuant to Part II, Article 5 of the State Constitution, "constitutional taxes" must "be proportionate and reasonable—that is, equal in valuation and uniform in rate." Claremont Sch. Dist. v. Governor, 142 N.H. 462, 468 (1997) ("Claremont II") (citations and quotations omitted)).

Over time, the legislature has crafted several tax schemes aimed at complying with the above-described constitutional obligations. See, e.g., id. In resolving questions regarding those tax schemes, the New Hampshire Supreme Court has also clarified the nature of the State's constitutional obligations. In Claremont II, for example, the court explained that because taxes intended to raise education funds serve a "State purpose"—i.e., fulfilling the State's duty "to provide a constitutionally adequate education . . . and to guarantee adequate funding"—such taxes must be "proportional and reasonable throughout the State in accordance with" Part II, Article 5. Id. at 469–70 (emphasis added). The supreme court reaffirmed this ruling in Opinion of the Justices (School Financing), concluding that a proposed "special abatement" intended to offset excess tax revenues—that is, education tax revenues generated by a given community above the amount necessary for that same community "to provide the legislatively

defined 'adequate education' for its children"—would run afoul of Part II, Article 5. 142 N.H. 892, 899–902 (1998). One year later, the Supreme Court tripled down on the requirement that education tax schemes be uniformly applied, concluding that the State could not perpetuate the unconstitutional application of such a tax via a five-year phase-in of the uniform tax rate. Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 212 (1999) ("Claremont III").

Today, RSA 198:40-a, II, sets forth the annual per-pupil cost of providing the opportunity for a constitutionally adequate education ("adequacy aid"). The State raises adequacy aid funds via the SWEPT. See ConVal, 174 N.H. at 159. Since 2011, the State has allowed communities that raise SWEPT revenues above their respective adequacy aid levels to retain the excess. See Laws 2011, 258:7 (eff. July 1, 2011) (eliminating requirement that communities pay excess SWEPT funds to Department of Revenue Administration ("DRA") for deposit in education trust fund). For certain other locations, the DRA has set negative local education tax rates to offset the applicable SWEPT rate. See Doc. 86 at 10. In December of 2022, the plaintiffs successfully moved for summary judgment with respect to their claim that both practices result in an effective SWEPT tax rate that is not uniform, in violation of Part II, Article 5. See Doc. 50 (Pls.' Mem. Law) at 3, 14; Doc. 86 (SWEPT Order) at 15–16 ("[T]here can be no meaningful dispute that allowing communities to retain excess SWEPT funds lowers the effective SWEPT rate paid by those communities"); id. at 16–18 (emphasizing that public education system benefits entire State, and concluding that "setting of negative local education tax rates which offset the SWEPT . . . runs afoul of Part II, Article 5"). As a result, the Court enjoined the State from continuing either practice. See id. at 21.

Analysis

As noted at the outset, the State and the Coalition have filed several motions concerning the SWEPT Order. See, e.g., Doc. 94. The Court will first address the Coalition's motion for partial reconsideration. See id. Notably, this motion does not challenge the substance of the legal rulings set forth in the SWEPT Order, but rather the remedy provided in response to those rulings. See id. In particular, the Coalition suggests that an immediate suspension of the practices at issue—i.e., allowing communities to retain excess SWEPT funds or to avoid such an excess via negative tax rates—will cause substantial hardship to those communities that have benefitted from these unconstitutional practices for the past twelve years. See id. at 2. In addition, the Coalition argues that it would be too disruptive to adjust local budgets in response to the SWEPT Order at the current stage of that process. See id. at 3–6 (arguing this shift will result in voter confusion and prevent communities from completing important projects). Given these concerns, the Coalition argues that the "public interest and balance of harms" weigh against injunctive relief. See id. at 7–8 (noting excess SWEPT funds would be held in escrow pending appeal, and citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 534 (1987) in support of claim that if enjoined party "would suffer injury" and injunction "does not remedy" plaintiffs' harm, "injunction should be denied").

This is not the first time the Coalition has raised these concerns. Rather, the Coalition voiced substantially similar concerns in connection with a November 28, 2022 hearing on the plaintiffs' request for preliminary injunctive relief. See Doc. 41 (Coalition's Obj. Pls.' Mot. TRO & Prelim. Injunct.). At that stage of the proceedings, the Coalition argued that the "mere" fact that the plaintiffs' "constitutional rights . . . have

been allegedly violated" did not amount to irreparable harm. See id. at 4. Moreover, in comparing the plaintiffs' claimed injuries to the potential fiscal impact on Coalition members, the Coalition took the position that the relevant harms were "obviously one-sided[.]" Id. at 6. Significantly, however, that view was premised on the Coalition's perception that preliminary injunctive relief would put "dozens of communities in 'crisis' and facing a million-dollar deficit in sixty days." Id.

In denying the plaintiffs' request for preliminary injunctive relief, the Court was persuaded by the Coalition's time-based arguments, noting:

> The Court in no way wishes to minimize the significance of the plaintiffs' claimed constitutional injuries. Nevertheless, the Court cannot ignore the substantial, immediate, and concrete harm that the Coalition members and their constituents would suffer if the Court were to grant the plaintiffs' request for preliminary injunctive relief. Because the Commissioner [of the DRA] is responsible for carrying out the State's education funding scheme, the Court cannot fault the Coalition members for relying on the Commissioner's years-long practice of allowing them to retain excess SWEPT funds or offset their respective SWEPT rates.

Doc. 48 (Dec. 5, 2022 Order) at 11; see UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (explaining that in exercising discretion concerning requests for injunctive relief, courts consider circumstances of each case and apply principles of equity).

In the Court's view, however, the equitable scales have shifted. As an initial matter, the Court remains both unpersuaded and deeply troubled by the characterization of the plaintiffs' injuries as a "mere" violation of their constitutional rights. See Doc. 41 at 4; see also Doc. 94 at 7–8 (arguing plaintiffs "will not gain any benefit from" injunction because excess SWEPT revenues will be held in escrow pending appeal). New Hampshire Supreme Court Rule 42E requires that every attorney admitted to practice law in New Hampshire "take and subscribe an oath to

support the constitutions of New Hampshire and of the United States." Further, as the Claremont III court recognized, "[t]he New Hampshire Constitution is the supreme law of this State," and "[e]very person chosen governor, councilor, senator, or representative in this State is solemnly committed by oath taken pursuant to Part II, Article 84 to 'support the constitutions' of the United States and New Hampshire." 143 N.H. at 158. Against that backdrop, the Court concludes that although the plaintiffs will not sustain an immediate fiscal benefit from the disgorged funds, they will derive significant benefit from injunctive relief that cures the above-described constitutional violations.

In weighing that benefit against the concerns raised by the Coalition, the Court notes that the Coalition has now been involved in this litigation for well over a year. In addition, having reached the merits of the plaintiffs' Part II, Article 5 SWEPT claims, the Court is persuaded that the clarity of the relevant legal landscape should have inspired Coalition members to plan for the fiscal impacts of the SWEPT Order during the pendency of this action. See, e.g., Opinion of the Justices (School Financing), 142 N.H. at 899–902 (concluding "special abatement" intended to offset excess education tax revenues would run afoul of Part II, Article 5). As the Court previously recognized, it might have been imprudent or impractical for communities to collect additional tax revenues during prior budget cycles in anticipation of the rulings set forth in the SWEPT Order. See Doc. 86 at 20. Given the substantial jurisprudence supporting the plaintiffs' claims, however, it would have been both prudent and practical for those communities to consider the fiscal impact of the plaintiffs' SWEPT claims when planning for this budget year. See Doc. 50 at 1–3 (explaining plaintiffs moved for partial summary judgment in December of 2022 so communities could plan for "next property tax year").

In the Court's view, any failure to prepare for the foreseeable suspension of unconstitutional practices does not justify the continuation of those practices. See Claremont III, 143 N.H. at 158 ("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."); see also Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1270 (11th Cir. 2012) (citing Aesop, "The Ant and the Grasshopper," Aesop's Fables Together with the Life of Aesop 115 (Rand McNally 1897) in support of proposition that if people are "wise like Aesop's ant, during the summer and autumn of their lives they store up something for the winter"). Accordingly, the Coalition's motion for partial reconsideration is **DENIED**.

In moving for a stay of the injunctive relief set forth in the SWEPT Order, the State and the Coalition raise similar arguments concerning the wisdom of directing the DRA to collect excess SWEPT funds and hold them in escrow pending appeal. See Docs. 91, 93. For the reasons outlined above, those arguments are unavailing. In addition, the State also maintains that holding excess SWEPT funds in escrow will prove overly complicated. See Doc. 91 ("The DRA will have to segregate those excess funds by local jurisdiction and . . . account for excess SWEPT that municipalities were unable to collect"). The Court is, again, unpersuaded. The DRA is well-versed in determining tax revenues to be collected from individual communities, and tracking amounts collected and owed. The Court is thus confident that the DRA can readily devise a system for recording the amount of excess SWEPT revenues generated by and collected from individual communities while this matter is pending appeal. To the

extent any communities fail to remit the requisite level of excess SWEPT revenues, the Court is similarly confident that the DRA can follow existing protocols to obtain the missing amounts or offset them through other means.[1]

Consistent with the foregoing, the motions seeking a stay of the remedy set forth in the SWEPT Order pending appeal are **DENIED**.

The final pending SWEPT motion is the State's Rule 46(c) Request. See Doc. 92; see also Super. Ct. R. 46(c). Rule 46(c)(1) provides:

> When, in a civil action that presents more than one claim for relief . . . , the court enters an order that finally resolves the case as to one or more, but fewer than all, claims . . . , the court may direct that its order . . . be treated as a final decision on the merits as to those claims . . . if the court:
>
> (A) explicitly refers to this rule;
> (B) identifies the specific order or part thereof that is to be treated as a final decision on the merits;
> (C) articulates the reasons and factors warranting such treatment; and
> (D) finds that there is an absence of any just reason for delay as to the party or claim that is to be severed from the remainder of the case.

As noted at the outset, all parties assent to the State's Rule 46(c) Request. See Docs. 93–94. Upon review, the Court agrees that the relief requested in that filing is warranted. In particular, while the SWEPT Order pertains to the manner in which the DRA collects education tax revenues from local communities, see Doc. 92 ¶ 2, the plaintiffs' remaining claims concern the sufficiency of the education funding the State provides to local communities. See id. ¶¶ 2–3. Those issues implicate distinct legal

[1] The State and the Coalition seemingly suggest that the DRA cannot compel communities to collect or remit excess SWEPT revenues. The Court views this suggestion with extreme skepticism. Though the Court has heard no evidence concerning this issue, the Court would be surprised to learn that communities collect and remit State taxes on a purely voluntary basis. Rather, common sense suggests that the DRA has mechanisms in place to enforce the tax scheme, perhaps by offsetting uncollected or improperly retained amounts via a reduction in State grants or aid. If the State wishes to further contest the DRA's authority in this context, it may file a timely motion for reconsideration, following which the Court will schedule an evidentiary hearing regarding this narrow issue.

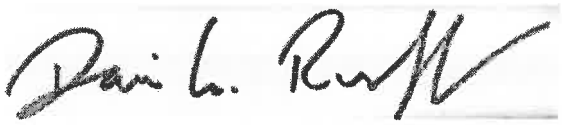
questions. Moreover, given the compelling interests involved, there is no just reason to delay appeal of the SWEPT Order. Accordingly, the State's Rule 46(c) Request is **GRANTED**. See Doc. 92. The Court thus directs that the SWEPT Order is to be treated as a final decision on the merits with respect to the plaintiffs' Part II, Article 5 challenge to the administration of the SWEPT. See Super. Ct. R. 46(c)(1).

Conclusion

Consistent with the foregoing, the Coalition's motion for partial reconsideration is **DENIED**. See Doc. 94. The State's motion for a stay of the injunctive relief set forth in the SWEPT Order, see Doc. 91, and the Coalition's joinder in that motion, see Doc. 93, are also **DENIED**. As set forth above, if the State wishes to contest the DRA's authority to enforce the relevant aspects of the tax scheme, it may file a timely motion for reconsideration, following which the Court will schedule an evidentiary hearing concerning that narrow issue. Finally, the State's Rule 46(c) Request is **GRANTED**. See Doc. 92.

SO ORDERED.

Date: February 20, 2024



Hon. David W. Ruoff
Rockingham County Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 02/20/2024