THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2024-0138

Steven RAND et al.,

Plaintiffs-Appellees,

v.

STATE OF NEW HAMPSHIRE et al.

Defendant-Appellant and
Intervenor-Appellant

Rule 7 Mandatory Appeal from Rockingham County Superior Court

COALITION COMMUNITIES' (APPELLANT'S) REPLY BRIEF

John-Mark Turner (#15610)
Abbygale Martinen (#272938)
Avery Topel (#276209)
Sheehan, Phinney, Bass & Green, PA
1000 Elm Street
Manchester, NH 03101
603.627.8143
jturner@sheehan.com

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

Cases

Statutes

Constitutional Provisions

ARGUMENT

I. Plaintiffs' "Effective" Rate Theory Should Be Rejected Because It Is Based On How Tax Revenues Are Spent Rather than What Rate Taxpayers Pay.

Plaintiffs argue that taxpayers in towns that retain excess SWEPT revenue pay a lower effective tax rate than taxpayers in towns that do not. See Pl.'s Br. at 14-21. They contend that Douglas Hall's affidavit shows that individuals in different communities pay different effective tax rates. See Pl.'s Br. at 20-21; see also Affidavit of Douglas Hall [Appx. III at 116-29]. This is incorrect. Mr. Hall does not testify anywhere in his affidavit that individuals in different communities actually pay tax at different rates. See Affidavit of Douglas Hall [Appx. III at 116-29].

Instead, the plaintiffs rely on data in the affidavit labeled "Effective Equalized SWEPT Rate for Adequacy." See Pl.'s Br. at 20-21; Affidavit of Douglas Hall at Table 1 [Appx. III at 120]. This data simply shows what the SWEPT rate would be in a community if the law was different and only required the Town to raise enough revenue to meet its own adequacy needs. However, these hypothetical SWEPT rates are not the same as "effective" tax rates. An individual's "effective" tax rate is what the individual actually pays after accounting for reimbursements or credits, such as a tax abatement. See Opinion of the Justices (Sch. Financing Special Abatement), 142 N.H. 892 (1998). The data in Hall's affidavit tells us nothing about effective tax rates—what individuals actually pay. As things stand, it is undisputed that all taxpayers pay a uniform SWEPT rate. In 2023, for example, all municipalities assessed property taxes at a SWEPT rate of $1.440/1000. See Kneuer Affidavit ¶ ¶ 13, 15 & Ex. B [Appx. Vol. II at 4-5; 268-527]. The taxpayers in "excess" towns pay tax at that rate; just like Plaintiffs.

Plaintiffs argue that this Court's previous rulings "look beyond the facially uniform SWEPT rate to examine the reduced effective tax rate that is created when the excess SWEPT payments are not sent to the state, but instead are delivered to town coffers." Pl. Br. at 20. But this Court has never held that the "effective" tax rate for purposes of Part II Art. 5 is reduced or raised because the tax revenue generated by the SWEPT was directed to a particular purpose or to one entity rather than another.

Instead, this Court's school tax cases, like all Part II, Art. 5 cases, have focused on how a law impacts the rate individual taxpayers are required to pay. The Special Abatement case, Opinion of the Justices (Sch. Financing Special Abatement), 142 N.H. at 899-900, considered a special abatement that would lower the tax rate actually paid by taxpayers in some municipalities, but not others. The proposed law required the DRA Commissioner 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." The result was that the taxpayers in towns with a special abatement were assessed and paid a lower rate than taxpayers in other towns. See id. at 900 ("Application of the special abatement guarantees that property owners paying the full rate bear an increased tax burden compared with property owners who are not assessed the full rate."). Claremont III, the Phase-in case, is the same. See 144 N.H. 210, 217 (1999) ("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.").

The plain language of the Constitution is consistent with the Court's focus in tax cases on what rates individuals pay, rather than on what revenues municipalities or the State receive. Part II, Article 5 permits the Legislature to "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said

state." N.H. Const. Part II, Art. 5 (emphases added). By its plain language, the Constitution is concerned with uniformity among "inhabitants" and "residents" of the state (that is, individual taxpayers) when taxes are imposed and levied. Nothing in the plain language of Part II Art. 5 contains a limitation like the one proposed by Plaintiffs: that the Legislature's taxing power depends on how tax revenue is spent after a uniform tax is imposed and levied.

Because Plaintiff's "effective" tax rate argument – that a tax rate is determined by what proportion is spent on one legislative purpose or another - is not supported by this Court's previous decisions or the plain language of Part II, Art. 5, the Court should reject it.

II. The SWEPT Is Spent on Education, Which Is a Permissible Public Purpose.

The Plaintiffs argue that the SWEPT revenue generated over adequacy is not really spent on education and is instead "a fungible financial windfall" to communities that generate SWEPT above adequacy. See Pl. Br. at 24-27. Plaintiffs contend that the Legislature's real aim when it changed the law in 2011 "was simply to keep excess SWEPT revenue in their individual towns so it could be used for what they wanted, and not be spent on students in other towns." Pl. Br. at 24. Plaintiffs argue that the law was an act of "legislative defiance of the Court's prior rulings." Id.

Plaintiff's argument should be rejected. First, the law's plain language shows what the Legislature intended. See Petition of Carrier, 165 N.H. 719, 721 (2013) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include."). Repealing the requirement that excess SWEPT revenue be paid to the State's Education Trust Fund, the Legislature required that the revenue be paid instead "for the use of the school district or districts." RSA 76: 8, II. Plaintiffs do not

dispute that spending on education is a public purpose but argue instead the tax revenue is not really going to education. That claim is belied by the record.

The affidavits from all municipal officials testify to what would happen if a portion of the funds raised by the SWEPT must be remitted to the State, contrary to current law. They testify that the towns would then be placed in the position of either (a) keeping their school funding at the same level (by raising taxes or cutting municipal spending on non-education purposes), or (b) reducing funding to their schools. See DeCoteau Aff. ¶13; Scruton Aff. ¶11 [Appx. Vol III at 23, 38]. There is no evidence in the record that the towns do not actually pay SWEPT revenue to local schools. Instead, the evidence shows the opposite. See Sanborn Aff. ¶3; Smith Aff. ¶3 [Appx. Vol. III at 27, 32] ("Until the Court's order, the Town had retained any excess SWEPT revenue (revenue over the state-mandated adequacy amount) and put it towards local education funding." (emphasis added)).

Second, even if Plaintiffs were right that the Legislature was simply trying to divert SWEPT dollars that used to go to fund adequacy so that municipalities could spend the revenues on what they wanted and not education, that does not violate the Constitution. Plaintiffs assume without any supporting authority that once the SWEPT was enacted in 1999, its revenue could only ever be spent on adequacy. They do not even address this Court's holdings that taxpayers cannot object to a tax on the basis of how the revenues are spent, so long as the spending is for a public purpose. See Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n, 105 N.H. 17, 21 (1963) (holding that no "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 purpose"). The Legislature has the discretion to decide the "particular use" of revenues from "part or all of a

general or special tax" Id. Thus, it would be constitutional for the Legislature to direct all SWEPT revenue, not just excess, to be used for an entirely different public purpose than adequacy or even education. Of course, the State would run into trouble under the Claremont cases and Part II, Art. 83, if it could no longer fund adequacy, but the Legislature has the discretion to fulfill adequacy obligations with funding other than the SWEPT if it chooses, as it has here.

In summary, Plaintiffs are challenging the Legislature's decision to spend "excess" SWEPT revenue on one public purpose, education funding in local towns, rather than another public purpose, funding adequacy. Even if Plaintiffs are allowed to make this argument (without pleading a Part I, Art. 12 or Part II, Art. 6 claim), it fails because the Constitution does not give the judiciary the authority to tell the Legislature which public purpose a particular tax's revenues must be spent on.

III. The Right to an Adequate Education Under Part II, Article 83 Does Not Impact the Analysis Under Part II, Article 5.

The League of Women Voters (" the League"), amicus curiae, argues that taxes intended to fund education should be treated differently under Part II, Article 5 than other statewide taxes. See Br. of League of Women Voters at 6-7. They essentially argue that, because education is a fundamental right under Part II, Article 83, the Court should apply Part II, Article 5's restriction on disproportionate taxation more broadly when the tax is intended to fund education. Id. at 6-15. There are two problems with this argument. First, permitting communities to retain excess SWEPT revenue does not infringe on the right to education under Part II, Article 83. And second, this Court has made no special exceptions to Part II, Article 5's plain language when reviewing educational taxes.

The Constitution's restriction on disproportionate taxation is distinct from the constitutional right to an adequate education. Part II, Article 5

limits the taxing power to require proportionality and uniformity of individual taxpayer rates. Claremont II, 142 N.H. at 468. On the other hand, Part II, Article 83 creates a funding obligation to guarantee "a constitutionally adequate education." Id. at 469. That funding obligation requires "statewide adequacy—not statewide equality." Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.), 145 N.H. 474, 478 (2000). So long as the State satisfies its constitutional adequacy obligation through some sort of funding mechanism, Part II, Article 83 is satisfied, no matter what tax or funding sources is used.

The State meets its funding obligation under the SWEPT's present structure. If a community's SWEPT revenue is insufficient to cover the cost of an adequate education, the State issues educational grants to cover the difference. See RSA 198:4, I. Plaintiffs concede that in these communities, the State provides sufficient supplementary funding to meet the State's adequacy funding level. See Pl. Memo in Support of Summ. J. at 12 [Appx. I at 67]. There is therefore no Part II, Article 83 violation.[1] Whether a community is required to spend SWEPT revenue on its local schools or remit it to the State makes no difference to the relevant inquiry under Part II, Article 83 – has the State spent sufficient funds, from whatever source, for adequacy?

Additionally, contrary to the League's position, this Court has not changed its application of Part II, Article 5 based on whether a tax is meant to raise funds for education. Rather, as stated in Claremont III, "our language on taxes requiring uniformity and equality is not something invented in the Claremont cases, but is the far-reaching language of

[1] Plaintiffs also challenge the level of the State's payments as not sufficient to meet constitutional adequacy, but that issue is distinct from the SWEPT's constitutionality and is currently the subject of further proceedings in the Superior Court.

constitutional mandate which has guided every tax decision of this Court for ever two hundred years." Claremont III, 144 N.H. at 217. This Court has made no exceptions to the plain language of Part II, Article 5 when reviewing school taxes.

In Claremont II, the educational purpose of the tax was relevant insofar as this established that the tax was a state tax with statewide benefits, and therefore subject to Part II, Article 5. See 142 N.H. at 469-70 ("The taxes imposed by the legislature for the support of schools are, in their nature, state taxes." (cleaned up)). After establishing that the SWEPT was a state tax, the dispositive question was whether it was proportional and reasonable. Id. at 470. After noting that tax rates varied by up to 400 percent, the Court explained that it "need look no further to hold that the school tax is disproportionate in violation of our State Constitution." Id. The Court's concern was disparate impacts on individual taxpayers, not the purpose of the tax.

Again, in Claremont III, the purpose of the tax did not play into the Court's analysis. See Claremont III, 142 N.H. 210. Other than to explain that it was reviewing an education property tax program meant to satisfy the State's education obligations, the Court scarcely mentioned schooling. Id. at 212-15. Instead, the Court focused on the different rates imposed on individual taxpayer from the phase-in. Id. at 216-17. Contrary to the League's position, the Court expressly stated that the purpose of the taxing scheme would not impact its validity: "It is the essential characteristics of the bill which must determine its validity, rather than its declared purpose." Id. at 214-15. Like in Claremont II, the Claremont III Court did not subject the taxing scheme to any additional scrutiny simply because it was meant to fund education.

In sum, there is no reason for this Court to apply Part II, Article 5 more strictly when reviewing an education tax. Nothing in that Article's

plain language distinguishes between types of taxes. It applies to all statewide taxes. Nor has this Court concluded that Part II, Article 5 must be applied differently when an education tax is at issue. And even if a tax's impact on the constitutional right to education were relevant, the current SWEPT framework has no impact on that fundamental right. Therefore, the educational nature of SWEPT should not change the Court's centuries' old focus on what taxpayers actually pay.

IV. Conclusion

The Court should reverse the Superior Court and order judgment be entered in favor of the State and the Coalition on Plaintiff's claims.

Respectfully submitted,

COALITION COMMUNITIES

By its attorneys,
Sheehan Phinney Bass & Green PA

October 23, 2024

By: */s/ John-Mark Turner*

John-Mark Turner (#15610)
Abbygale Martinen (#272938)
Avery Topel (#276209)
1000 Elm Street, 17th Floor
P.O. Box 3701
Manchester, NH 03105-3701
(603) 627-8143
jturner@sheehan.com

CERTIFICATIONS

I certify that this brief was written in 13-point font using Microsoft Word and contains less than 3,000 words as calculated by Word's word count feature, exclusive of the sections excluded per Rule 16(11).

I also certify that this brief was delivered to all parties of record pursuant to this Court's electronic filing and service system.

October 23, 2024 *<u>/s/ John-Mark Turner</u>*
John-Mark Turner