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

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen-minute oral argument requested)

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I. THE PLAINTIFFS CHALLENGE A SPENDING DECISION, NOT A TAX.

It is evident from plaintiffs' brief that they seek to broaden the reach of Part II, Article 5's restrictions to control how the legislature may spend lawfully raised state tax revenue. The trial court followed plaintiffs' lead; this Court should not.

Part II, Article 5 empowers the legislature "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the . . . state." It has nothing to do with spending. "In order for a tax to be proportional" under Part II, Article 5, "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). "Each taxpayer's property must be valued at the same percentage of its true value as all the taxable property in the taxing district and 'shall be valued within a reasonable time before the tax is assessed.'" *Id.* (quoting *Bow v. Farrand*, 77 N.H. 451, 451-52 (1915)).

The SWEPT meets the restrictions of Part II, Article 5. It requires an annual determination of a municipality's tax base based on a statewide equalized valuation. RSA 76:8, I(a). It then calculates each municipality's portion of the education tax by multiplying "the uniform education property tax rate by the municipality's tax base." RSA 76:8, I(b). The result is a statewide education property tax that is "proportionate and reasonable, equal in valuation and uniform in rate, and just." *First Berkshire Bus. Trust*

v. Comm'r, N.H. Dep't of Revenue Admin., 161 N.H. 176, 184 (2010) (internal quotations omitted).

The plaintiffs argue instead that the revenue the SWEPT raises is special, the legislature may only expend it to fund the State's constitutional obligation to provide an adequate education under the adequacy grant statute, RSA 198:41, I, and, when the State pays SWEPT revenue to a municipality for the use of its schools districts that is in excess of the municipality's adequacy grant, this expenditure somehow alters the "effective" SWEPT rate that individual municipal taxpayers pay in that municipality.[1] The plaintiffs contend that these spending features render the SWEPT unconstitutional under Part II, Article 5.[2]

This line of argument exposes the plaintiffs' challenge for what it really is: a challenge to how the legislature is choosing to spend lawfully raised state education tax revenue. While the plaintiffs may be able to mount such a spending challenge under other constitutional provisions like

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[1] The plaintiffs admit that the SWEPT does not provide tax relief to specific individual municipal taxpayers. (Pls.' Brief at 20). This admission not only dooms plaintiffs' Part II, Article 5 claim because it concedes that the SWEPT rate is proportional and uniform, it also reveals that plaintiffs can only succeed by convincing this Court to expand its prior Part II, Article 5 rulings to encompass a novel set of legal and factual circumstances that implicate the legislative prerogative to spend lawfully raised SWEPT revenue.

[2] It is difficult to square this argument with the other position the plaintiffs have taken in this case that is not on appeal and that has just been tried, *i.e.*, that the State's education funding system fails to provide municipalities sufficient funds to meet the State's constitutional adequacy obligations under Part II, Article 83. If the amount of State funding for all municipalities is already too low constitutionally, as plaintiffs allege, then the so-called "excess" SWEPT may fall within constitutional adequacy for the municipalities that receive it and may not be "excess" at all.

Part I, Article 12, Part II, Article 6, and Part II, Article 83, they cannot maintain such a claim under Part II, Article 5, except perhaps in the narrow instance where the State reimburses certain individual municipal taxpayers directly through a post-collection payment designed to lower or abate the tax rate for those specific taxpayers. *See Opinion of the Justices (School Finance)*, 142 N.H. 892, 899 (1998) ("We note 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."). Even then, however, the State's post-collection expenditure would have to be for a public purpose, not for the private benefit of certain individual municipal taxpayers, to be constitutional under Part I, Article 12 and Part II, Article 6, raising the question of whether the additional sentence of advice on this point as reflected in *Opinion of the Justices (School Finance)*, 142 N.H. at 899, is analytically correct.

The plaintiffs nonetheless employ characterization and conflation to try to create a Part II, Article 5 claim where no such claim exists. They allege generally that the "current funding system," a concept broader than the tax itself, "allows across-the-board preferential treatment to all property owners in property-wealthy towns." (Pls.' Brief at 20). But this argument ignores the fact that property owners in towns with high levels of free-and-reduced lunch students receive targeted extraordinary need grants in addition to the basic adequacy payment as part of their adequate education grant. RSA 198:40-f; RSA 198:41, I(c). This additional targeted aid could similarly be characterized as "preferential treatment" to all property owners in towns with higher levels of free-and-reduced lunch students. It is not,

however, this Court's role to evaluate the wisdom of the legislature's chosen economic spending policies, or to referee whether or to what extent those competing spending policies result in better treatment for one municipality over another.

The plaintiffs contend that they put in front of the superior court data "showing how the retention of excess SWEPT operates to lower the effective SWEPT rate in the excess SWEPT communities" in columns B and F of Table 1. But Bruce K. Kneuer, a supervisor in the Municipal and Property Division of the New Hampshire Department of Revenue Administration, specifically disputed the figures in columns B and F of Table 1 as not being "the product of an appropriate tax rate-setting methodology" below. (Addendum at 30, ¶10). And, in any event, a legislative appropriation directed to a municipality that requires the municipality to spend that money only on its school district cannot, as a matter of law, credibly be characterized as reducing or lessening the tax rate actually paid by the individual municipal taxpayer.

In the end, the plaintiffs try to turn a spending case into a tax case by conflating the individual municipal taxpayer with the municipality itself and presuming that the SWEPT revenue paid to the municipality for the exclusive use of its school districts will lessen or alter the tax burden of the individual municipal taxpayer. This same argument, however, can be made with respect to extraordinary need grants, RSA 198:40-f, or any other type of restricted or unrestricted revenue the State may provide to municipalities. Part II, Article 5 is concerned with the imposition of taxes and the actual tax rate a person pays; it does not restrict the ability of the

legislature to spend lawfully raised tax revenue by appropriating it to another public entity for a legitimate public purpose in differing amounts.

The plaintiffs' resort to the legislative history is also unavailing. RSA 76:8, II unambiguously appropriates the SWEPT to the municipality when it directs the selectmen or assessors of each to "pay it to the municipality for the use of the school district or districts." The adequate education grant formula relies on this appropriation occurring for it to function. *See* RSA 198:41, I(a)-(b) (requiring the Department of Education to "[s]ubtract the amount of the education tax warrant to be issued by the commissioner of [the DRA] for such municipality pursuant to RSA 76:8" from the per pupil cost calculated under RSA 198:40-a, I-III). The legislative history cannot change that the specific governmental action the plaintiffs claim is unconstitutional in this case is the legislature's decision regarding how to appropriate lawfully raised SWEPT revenue to the municipalities. Part II, Article 5 is not implicated in such a claim, and the trial court erred in concluding otherwise.

II. THE PLAINTIFFS HAVE NOT SHOWN THAT THE SWEPT IS LEGALLY IMPOSED ON UNINCORPORATED PLACES.

The plaintiffs have also failed to show that the legislature intended to impose the SWEPT on unincorporated places. RSA 76:3 and RSA 76:8 unambiguously impose the SWEPT on the persons and property in municipalities. The term "municipalities" is not ambiguous, and it unambiguously excludes from its reach "unincorporated places."

The fact that RSA 76:8, I(a) utilizes the equalization contained in RSA 21-J:3, XIII does not change this. RSA 21-J:3, XIII does not purport to impose a tax on any persons or property; instead, it imposes a duty on the DRA Commissioner to equalize the valuation of property across the State. RSA 76:8, I(a)'s use of the equalization contained in RSA 21-J:3, XIII to determine a "municipality's tax base" does not show that RSA 76:3 and RSA 76:8 impose the SWEPT on all the property referenced in RSA 21-J:3, XIII.

The plaintiffs also point to the definition of "municipality" in RSA 198:38, VI-a. But that statutory definition is limited "to this subdivision," meaning RSA 198:38-:45-a. That statutory definition does not extend to RSA chapter 76. And the legislature could have sensibly chosen to limit that statutory definition to the adequacy grant statutes to ensure an adequate education grant is provided to an unincorporated place when it happens to find itself with a student.

The plaintiffs nonetheless argue that this statutory definition should inform the statutory interpretation analysis because "[a]dequate education is exactly what the SWEPT statute is raising funds for." (Pls.' Brief at 30.)

That statement, however, is not legally accurate or faithful to the plain language of the statutes or the applicable law.

Following this Court's decision in *Londonderry v. State*, 154 N.H. 153 (2006), the legislature went back and more specifically defined the substantive educational program it was agreeing to pay for in RSA 193-E:2-a. Through RSA 193-E:2-a, and the Department of Education minimum standard regulations specifically applicable to the eleven learning areas referenced therein, RSA 193-E:2-a, IV(a), the legislature has not agreed to pay for everything needed to operate a school or a school district; it has agreed to pay for a specific educational program comprised of instruction, materials, and assessment in eleven specific learning areas, leaving other items referenced in other statutes like buildings and transportation to be covered by municipalities. *See Londonderry*, 154 N.H. at 162 ("Any definition of constitutional adequacy crafted by the political branches must be sufficiently clear to permit common understanding and allow for an objective determination of costs. Whatever the State identifies as comprising constitutional adequacy it must pay for. None of that financial obligation can be shifted to local school districts, regardless of their relative wealth or need.").

In this way, the State and the municipalities equitably share the costs of the public school system, consistent with this Court's education funding jurisprudence, and in a manner that comports with Part II, Article 83. *See Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 475-76 (1997) (recognizing that "local governments may be required, in part, to support public schools") (internal quotations omitted).

SWEPT revenue is not appropriated to a municipality for the sole purpose of funding the substantive educational program the State has agreed to pay for under RSA 193-E:2-a. SWEPT revenue is paid more broadly "to the municipality for the use of its school district or districts." RSA 76:8, II. While most of the SWEPT revenue may be counted toward satisfaction of the State's agreement to pay for the substantive educational program it has defined as providing a constitutionally adequate education, RSA 198:41, I, what is left over is not earmarked to satisfy only the State's constitutional adequacy obligation. Consequently, it is inaccurate and an oversimplification to say that "[a]dequate education is exactly what the SWEPT statute is raising funds for."

Also, the fact that this Court's caselaw may use the word "municipality" to include "unincorporated places" at times has no bearing on what the word "municipality" means in a particular statute. The plaintiffs' argument to this effect, (Pls.' Brief at 30), is not persuasive.

The plaintiffs also assert that "it is clear from other sections in the statutory scheme that 'municipality' encompasses unincorporated places," but never identifies what the statutory scheme is. (Pls.' Brief at 31.) The relevant statutory scheme is RSA chapter 76. It references the term "unincorporated places" once, in the apportionment section of the statute, as a general directive to the DRA that applies to all public taxes: "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 76:1. RSA 76:3 then imposes an education tax only on the persons and property in RSA 76:8, and RSA 76:8 references only "municipalities." Presumably if the

legislature intended to refer to towns, cities, and unincorporated places collectively as municipalities throughout the statute, RSA 76:1 would use the term "municipalities" only. Moreover, it would be strange to read RSA 76:8, III as bestowing upon unincorporated places the power unilaterally to assess a local education tax when a different statute expressly applicable to unincorporated places, RSA 28:7-d [Education Money; Unincorporated Towns and Unorganized Places], empowers only the county commissioners to do this. Thus, contrary to plaintiffs' argument, the statutory scheme does not support reading the term "municipalities" in RSA 76:8 to include unincorporated places.

The plaintiffs' argument that the SWEPT would not be a state tax if the property in unincorporated places was excluded from it is also faulty. (Pls.' Brief at 31.) This line of reasoning implies that there can be no exclusions or exemptions from a state property tax otherwise the resulting tax is not a state tax because it fails to reach and apply to all property within the state. If this proposition were to hold true, the State could never impose a truly statewide property tax because vast amounts of property in the State are exempt from taxation including some unincorporated places that fall entirely within the White Mountain National Forest, are owned by the federal government, and are exempt from state taxes as a result, *see* RSA 123:1-:2. Regardless, this Court's case law does not endorse such an extreme view. It recognizes that exclusions or exemptions from a statewide education tax are permissible if supported by just reasons, and many just reasons exist for excluding unincorporated places from the SWEPT.

The plaintiffs also argue that word "municipalities" in RSA 76:8 must include unincorporated places because the DRA has interpreted the

SWEPT statutes that way for years. (Pls.' Brief at 32-34.) "Although 'it is well established . . . that an interpretation of statute by the agency charged with its administration is entitled to deference,' that deference is not absolute." *Doe v. Comm'r, N.H. Dept. of Health & Human Servs.*, 174 N.H. 239, 254 (2021). This Court "will not defer to an agency's statutory interpretation when, . . . , it clearly conflicts with the statutory language . . . ." *Id.*

As this case reveals, trying to shoehorn unincorporated places into the SWEPT statutes creates textual and practical problems. Unincorporated places are not municipalities because they are not incorporated. They do not have selectmen or their own assessors. *See* RSA 76:8, II. Thus, they do not have the power to assess local taxes on their own, *see* RSA 53:1, II; RSA 81, and extending the SWEPT to unincorporated places would give them that unilateral power through RSA 76:8, III, even though a different statute expressly applicable to unincorporated places, RSA 28:7-d [Education Money; Unincorporated Towns and Unorganized Places], empowers only the county commissioners to assess local education taxes in those places.

Consequently, even though the DRA has interpreted the SWEPT statutes to include unincorporated places in the past, that interpretation does not overcome the unambiguous language of the SWEPT statutes themselves.

The plaintiffs' contention that all property owners pay the SWEPT is simply incorrect. (Pls.' Brief at 34.) Many exemptions to property taxes exist. RSA 72:23. Low and moderate income homeowners may also be

eligible to have all or a portion of their state education property taxes rebated. RSA 198:57.

There is also no merit to the argument that the legislative history must reveal the reasons for selecting a certain class of property for taxation, and there is equally no merit to the argument that the type of intermediate scrutiny applied in *Hardy v. Chester Arms, LLC*, 2024 N.H. 5, applies in this case. *See Eby v. State*, 166 N.H. 321, 331 (2014) (holding that legislative justifications needs not be articulated and rational basis test applies).

All of the plaintiffs' arguments seek to bring unincorporated places into the SWEPT by implication. That approach, however, is inconsistent with the law. *See N. New Eng. Tel. Operations, LLC v. Town of Acworth*, 173 N.H. 660, 681 (2020) ("It is well settled that the authority to tax "must be found within the letter of the law and is not to be extended by implication.").

CONCLUSION

The plaintiffs' Part II, Article 5 claim regarding so-called "excess" SWEPT boils down to a policy plea that "[t]he State should operate the SWEPT as it did before 2011 and collect excess SWEPT." (Pls.' Brief at 37.) That policy argument is not appropriately made to a court. It should be made to the legislature. The plaintiffs' Part II, Article 5 claim regarding unincorporated places is incorrect as a matter of statutory construction.

Finally, the judicial branch does not have the power to rewrite statutes, appropriate and dictate the expenditure of state money, or enact litigants' preferred policy outcomes. The Bill of Rights of the State

Constitution purposefully separates these legislative and executive powers from the judicial power to safeguard individual liberty. N.H. Const. Pt. I, Art. 37. The trial court's remedy significantly transgressed these constitutionally separated boundaries and is not legally or equitably justifiable; this Court should correct that error.

The trial court's decision below should be reversed and vacated.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Date: October 23, 2024

/s/ Anthony J. Galdieri

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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 3,000 words or less, excluding the cover, tables, the signature block, and attached certificates. Counsel relied upon the word count of the computer program used to prepare this brief.

October 23, 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.

October 23, 2024

/s/ Anthony J. Galdieri
Anthony J. Galdieri

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THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

SURREPLY TO PLAINTIFFS' REPLY TO THE STATE'S OBJECTION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The defendant, the State of New Hampshire, by and through counsel, submits this surreply in support of its objection to the plaintiffs' motion for preliminary injunction. In support thereof, the defendant states as follows:

In their reply, the plaintiffs have substantially changed or clarified the nature of the preliminary injunctive relief they seek. Instead of seeking to enjoin the DRA Commissioner from "approving any final school district tax rate for the coming year pursuant to RSA 21-J:35, or other authority, at a tax rate less than $00.00 per $1000" and ordering her from refraining to "issu[e] a warrant . . . to the selectmen or assessors of each municipality directing them to assess and pay to the municipality any sum for the use of the school district or districts, as required by RSA 76:8, II," (*see* Pls.' Amended Proposed Order filed in support of their Mot. for Prelim. Inj.), they now seem to request in their reply an order enjoining the DRA Commissioner from permitting any revenue the SWEPT generates above the amount of a municipality's total education grant from being returned to the municipality (*see* Pls.' Reply at 2.)

While this proposed solution may sound simple on paper, the adverse impacts it would have on the State and on the municipalities affected by the injunction are both significant and

uncertain. Any injunction would require the Department of Revenue Administration ("DRA") to stop the rate-setting process until the Department of Education could determine whether it needed recalculate the total education grants for any municipalities. Supplemental Affidavit of Bruce K. Kneuer ¶ 4. This, at a minimum, would delay the DRA in setting final rates, which in turn would delay municipalities in issuing their own tax warrants, sending tax bills, and collecting revenues. *Id.*

Once rate-setting was able to resume, the DRA would have to determine in which municipalities for which final rates had not yet been set the SWEPT would have generated revenues in excess of total education grants those municipalities would have received. *Id.* ¶ 5. The DRA would then have to eliminate any excess revenues generated by the SWEPT from the formula used to set the rate in that municipality. *Id.* This would result in the DRA setting a higher local education tax rate in that municipality to offset the amount of revenues eliminated as a result of the injunction. *Id.*

Moreover, as of the date of this filing, the DRA has already set final rates in sic of the municipalities identified as "Excess SWEPT Communities" by the plaintiffs in Table 1 attached to their reply. *Id.* ¶ 6. If any injunction the Court issued only extended to municipalities for which final rates would not have been set, then this would not remedy the constitutional violation the plaintiffs allege with respect to the SWEPT because some municipalities would still be able to retain excess revenues generated through the SWEPT. If, in contrast, the Court issued an injunction that was backward facing, then the potential impact would be uncertain. Many municipalities issue their warrants and send tax bills to taxpayers promptly upon receiving final rates from the DRA. *Id.* ¶ 8. Any injunction that required the DRA to re-set the tax rates in a municipality that had already issued its warrant and sent tax bills would likely require the

municipality to issue a second tax bill, communicate to taxpayers which bill they were required to pay, and determine how to credit or refund any taxes that were paid by each taxpayer on the original bill. *Id.* ¶ 7. This would lead to taxpayer confusion and create significant logistical challenges for the municipality in question. *Id.* It would also materially delay rate-setting, which would affect the municipality's ability to raise revenues for all local purposes, including obligations required by law that those municipalities have to their respective school districts and their respective counties. *Id.* If a tax rate were not set by year's end, this could also have consequences on, among other things, the deductions some individual taxpayers could claim on their federal income tax for the current year. *Id.* ¶ 8.

The State is not able to speak to the full extent of how the sudden, unanticipated loss of revenues would affect the many municipalities who have premised their local budgets on being able to use revenues generated by the SWEPT that would be eliminated through the injunction the plaintiffs seek or on the individual taxpayers in those municipalities. These interests are significant and sufficient to make the municipalities themselves necessary parties to this litigation. *See Porter v. Coco*, 154 N.H. 353, 357 (2006) ("The necessary parties to any proceeding, . . . are those . . . who have an interest in the subject-matter of the suit and whose rights may be concluded by the judgment." (internal quotations omitted)).

The Court must consider these interests by balancing them against the harm to the plaintiffs, which is non-existent. The money the plaintiffs seek to freeze and keep from these municipalities will not go to the plaintiffs. This money also will not go into any state fund because the legislature has not directed it to go into any state fund. In fact, in 2011, the legislature specifically repealed the statutes directing the excess revenues the SWEPT generates from being remitted to the education trust fund. *See* RSA 198:46, I–II (2009), *repealed by* 2011

Laws 258:9 (providing that "[a] municipality in which education property tax revenue collected exceeds the amount necessary to fund the cost of an adequate education in a fiscal year, as determined in RSA 198:40-a, shall collect and remit such excess to the department of revenue administration before March 15 of the tax year in which the excess occurs" and that "[t]he commissioner of the department of revenue administration shall collect from the municipality the excess tax and pay the excess tax over to the state treasurer for deposit in the education trust fund established by RSA 198:39"). An injunction that functionally rewrites state law is not an appropriate remedy for a purported constitutional violation. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases."); *State v. Lukas*, 164 N.H. 693, 694 (2013) ("We will not rewrite the statute; that is the province of the legislature."); *State v. Johnson*, 134 N.H. 570, 578 (1991) ("Courts have no right to redraft legislation to make it conform to an intention not fairly expressed therein.").

Consequently, under current law, the municipalities collect the SWEPT for the State and hold it so the State can determine the adequate education grant amount for the municipality. The State funds the adequate education grant utilizing revenues from the SWEPT and any additional revenues from the education trust fund that may need to be provided. The State then releases those revenues to the municipalities for them to be utilized to support their school districts. Under this arrangement, if the plaintiffs obtain their proposed injunction, the excess revenues the SWEPT generates would have to be held in constructive trust by the municipality, for the benefit of State, and could not be used by the municipality for any purpose. This result would freeze these funds in place and prevent the municipalities from using them as revenue for the year,

which would in inflict the harms described above on municipalities and local taxpayers without providing any benefit to the plaintiffs at all.

The plaintiffs' requested injunction would inflict these harms on municipalities and local taxpayers while ameliorating no harm to plaintiffs. Moreover, if the injunction issued, the harms could not be easily undone if a preliminary injunction is later determined to be unwarranted without placing significant financial and administrative burden on those municipalities and, ultimately, on the taxpayers within those municipalities. Thus, even as narrowed in the reply, the preliminary injunction the plaintiffs seek is not needed to prevent any irreparable harm to themselves and is manifestly inequitable and not in the public interest.

The plaintiffs claim irreparable harm in their motion for preliminary injunction, in part, on the ground that they could not recover the monetary amounts they will personally pay under the SWEPT. When the State raised the availability of the abatement process under RSA 76:16 as a remedy for that, the plaintiffs changed their theory in reply, asserting that the abatement process is not the proper place to raise their constitutional challenge to the SWEPT. Pls.' Reply at 9-10. The desire to obtain a declaration about a specific feature of how revenues generated by the SWEPT are distributed, however, does not demonstrate irreparable harm, particularly where the accompanying injunctive relief requested would result in no tangible benefit to the plaintiffs nor would it ameliorate any harm the plaintiffs face. If the plaintiffs are concerned about recouping funds, they have a statutory remedy available. If all they want is a determination as to the facial validity of the SWEPT, they have a remedy through a declaratory judgment. That they may not be able to seek both forms of relief through a single action does not constitute irreparable harm sufficient to warrant a preliminary injunction.

The plaintiffs also seem to suggest that the abatement process does not provide them with an adequate remedy at law because they cannot obtain a declaration through it. It bears emphasis that the plaintiffs cannot obtain a declaration on a motion for preliminary injunction either. A declaration is a form of final merits relief. Consequently, this argument is irrelevant in this context. An adequate remedy at law is sufficient to defeat a request for preliminary injunction if it alleviates any immediate irreparable harm the plaintiffs contend that they face. The plaintiffs have identified no immediate irreparable harm that a preliminary injunction freezing excess SWEPT revenues in place will remediate.

Finally, the plaintiffs argue in their reply that they have taxpayer standing under Part I, Article 8 because they do challenge a specific spending decision: the ability of municipalities to retain revenues generated by the SWEPT in excess of the amounts those municipalities receive in adequacy grants. While this shift in focus may well bolster the plaintiffs' claim to taxpayer standing, it undermines their request for a preliminary injunction in at least two material respects. First, it confirms that the plaintiffs really challenge how tax revenues are distributed once generated, not how the SWEPT is levied in the first place, which places their claim beyond the scope of Part II, Article 5 for the reasons stated in the State's underlying objection. Second, even if the plaintiffs have taxpayer standing to challenge how revenues generated by the SWEPT are distributed, the only relief they can obtain under the plain language of Part I, Article 8 is a declaration, not a preliminary or permanent injunction, as also discussed in the State's objection. The plaintiffs' arguments for why they have taxpayer standing therefore do not get them any closer to obtaining the extraordinary relief they seek.

For all of the above reasons, and those stated in the State's underlying objection, the plaintiffs' request for a preliminary injunction should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorney,

JOHN M. FORMELLA
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Date: November 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, a copy of the foregoing was served via the court's electronic filing system to all counsel of record.

/s/ *Samuel R.V. Garland*
Samuel R.V. Garland

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

SUPPLEMENTAL AFFIDAVIT OF BRUCE K. KNEUER

I, Bruce K. Kneuer, being over the age of 18, swear as follows:

1. I previously supplied an affidavit in this case in relation to the State of New Hampshire's objection to the plaintiffs' motion for a preliminary injunction.

2. I am aware that the plaintiffs have filed a reply to the State's objection, which I understand to modify or clarify the preliminary injunction the plaintiffs seek in this case. I understand that the plaintiffs now seek to enjoin the State from allowing municipalities to retain or use Statewide Education Property Tax ("SWEPT") revenues where those revenues are in excess of what those municipalities receive in total Education Grants under RSA 198:41 and :42 ("Excess SWEPT").

3. Such an injunction would have a number of potential ramifications on DRA's rate-setting process.

4. First, the DRA is unable to set tax rates in a municipality until it receives a final determination from the Department of Education as to the total amount that municipality will receive in total Education Grants pursuant to RSA 198:41. Accordingly, if the injunction the plaintiffs seek issued in this case, then the rate-setting process would

have to be put on hold until the Department of Education determined whether the injunction required it to recalculate total Education Grants for any municipalities. This would delay the DRA in setting preliminary or final rates for any municipalities in which rates have not yet been set, which, in turn, would delay municipalities in issuing their own tax warrants, sending tax bills, and collecting taxes.

5. Second, even if the Department of Education determined that the injunction the plaintiffs seek did not require it to recalculate the Education Grant Amounts to which each municipality was entitled, the DRA would still have to identify whether Excess SWEPT would result for any municipality in which rates had not been set at the time the injunction issued. For any municipality in which Excess SWEPT resulted, because there is no mechanism for the Department to recover those funds from municipalities once assessed and collected, any Excess SWEPT would have to be removed from the rate-setting formula described in paragraph 16 of my original affidavit when rates were set in that municipality. This would result in the DRA setting a higher Local Education Rate in that municipality to offset the amount of the revenues eliminated as a result of the injunction. This exercise would also be in contravention of RSA 76:8 and the Commissioner's Warrants which have already set the SWEPT Amount.

6. Third, as of the date of this affidavit, the DRA has set final rates for 6 of the municipalities identified as "Excess SWEPT Communities" by the plaintiffs in Table 1 attached to their reply dated October 31, 2022. I have not independently determined which, if any, of the communities listed will in fact have Excess SWEPT. If the injunction did not apply to any final rates that were set before the injunction issued, then this would still result in some municipalities—those in which the rates were set before the

injunction—retaining Excess SWEPT. If the injunction were backward facing and applied to municipalities in which final rates had already been set, then the impact of the injunction would be hard to predict. For municipalities that had not yet issued their own warrants and sent out their tax bills to taxpayers, it might be possible to re-set the tax rates in the manner described in the preceding paragraph. This would still result in the Local Education Rates increasing in those municipalities and would delay the rate-setting process. To date the Division has set 79 preliminary municipal tax rates of which 41 have been finalized.

7. If, however, a municipality had already issued its own warrant and sent out tax bills, then it is unclear how that process could realistically be unwound. Taxpayers would receive two tax bills—one in which excess revenues generated by the SWEPT were factored into the rate-setting formula and one in which those revenues were excluded from the calculation. Municipalities would have to communicate to taxpayers which bill they were required to pay and would have to determine how to credit or refund any taxes that were improperly paid by each taxpayer on the first tax bill. This would likely lead to significant taxpayer confusion and create substantial logistical challenges for the municipality. It would also materially delay the rate-setting process in the manner described above, and in turn the municipality's ability to generate revenues for all local purposes, including obligations required by law that those municipalities have to their respective school districts and their respective counties.

8. The full extent of the impact that any of the above scenarios would have on the municipalities affected by the injunction the plaintiffs seek is not known to me. I understand, though, that once municipalities receive final rates from the DRA, many

promptly issue tax warrants and start sending tax bills. I further understand that municipalities desire to have final rates set as quickly as possible, as any delay in the rate-setting process generates a corresponding delay in municipalities' ability to generate needed tax revenues. I also understand that if municipalities are unable to send their tax bills by the end of the calendar year, then this can have consequences on, among other things, the deductions some individual taxpayers can claim on their federal income tax returns for the current year.

9. I have also reviewed the Affidavit of Douglas Hall and tables contained in Exhibit A to that affidavit, which are attached to the plaintiffs' reply. I have no reason to dispute, as a factual matter, the numerical values contained in columns A, B, C, and D of Table 1; columns C and D of Table 2; columns A, B, C, D, E, F, G, and I of Table 3; and columns D and I of Table 4. I also do not have reason to dispute, as a factual matter, that the values contained in columns E and F of Table 1, column E of Table 2, and column H of Table 3 have been accurately calculated as described in the body of Mr. Hall's affidavit. However, I have not independently confirmed Mr. Hall's computations or the accuracy of his reporting of the Department of Education's figures.

10. I do, however, dispute that the values contained in columns B and F of Table 1 reflect tax rates that the DRA sets as part of its rate-setting process, that the DRA conducts the calculations reflected in columns B and F of Table 1 as part of its rate-setting process, or that the values contained in columns B and F of Table 1 are the product of an appropriate tax rate-setting methodology.

I DECLARE under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 3rd day of November 2022.

Dated: November 3, 2022

Bruce K. Kneuer
Bruce K. Kneuer

THE STATE OF NEW HAMPSHIRE
MERRIMACK COUNTY

Before me, personally appeared Bruce K. Kneuer, and acknowledged the foregoing to be true an accurate to the best of his knowledge or belief.

Dated: November 3, 2022

Notary Public/~~Justice of the Peace~~
MY COMMISSION EXPIRES 1/23/2024