THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2024-0138

Steven Rand, et al.,

v.

State of New Hampshire

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

BRIEF OF PLAINTIFFS

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New Hampshire Constitution

Part I [Art.] 37. [Separation of Powers.] In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.

Part II [Art.] 5. [Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations.] 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 [Art.] 6. [Valuation and Taxation.] 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.

Part II [Art.] 83. [Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc.] Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil

and criminal proceedings in respect to all the wrongs herein declared against.

Statutory Provisions

RSA 21-J:3 Duties of Commissioner. –
In addition to the powers, duties, and functions otherwise vested by law, including RSA 21-G, in the commissioner of the department of revenue administration, the commissioner shall:
…
XIII. Equalize annually by May 1 the valuation of the property as assessed in the several towns, cities, and unincorporated places in the state including the value of property exempt pursuant to RSA 72:37, RSA 72:37-b, RSA 72:39-a, RSA 72:62, RSA 72:66, RSA 72:70, RSA 72:85, and RSA 72:87, property which is subject to tax relief under RSA 79-E:4, and property which is subject to tax relief under RSA 79-E:4-a or RSA 79-E:4-b, by adding to or deducting from the aggregate valuation of the property in towns, cities, and unincorporated places such sums as will bring such valuations to the true and market value of the property, and by making such adjustments in the value of other property from which the towns, cities, and unincorporated places receive taxes or payments in lieu of taxes, including renewable generation facility property subject to a payment in lieu of taxes agreement under RSA 72:74 and combined heat and power agricultural facility property subject to a payment in lieu of taxes agreement under RSA 72:74-a, as may be equitable and just, so that any public taxes that may be apportioned among them shall be equal and just. In carrying out the duty to equalize the valuation of property, the commissioner shall follow the procedures set forth in RSA 21-J:9-a.

RSA 21-J:35 Setting of Tax Rates by Commissioner. –
I. The commissioner of revenue administration shall compute and establish the tax rate of each town, city, or unincorporated place. Any assessments report issued by the commissioner pursuant to RSA 21-J:11-a shall not delay or otherwise affect the setting of the tax rate for that municipality.

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.

RSA 198:38 Definitions. –
In this subdivision:
…
VI-a. "Municipality" means a city, town, or unincorporated place.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The plaintiffs are satisfied with the Statements of Case and Facts provided in the State and Coalition Communities' briefs.

SUMMARY OF ARGUMENT

The plaintiffs, who pay property taxes on their homes and businesses in Plymouth, Penacook, Concord, Hopkinton, and Newport, challenge the administration of the statewide education property tax (SWEPT) as unconstitutional. Specifically, the State 1) permitting certain localities to retain SWEPT funds generated in excess of adequacy, and 2) setting negative local tax rates to offset the SWEPT in other localities violates Part 2, Article 5 of the New Hampshire Constitution. These practices allow property owners in those places to effectively pay less than the full SWEPT rate, while property owners like the plaintiffs continue to pay the full rate. This renders the SWEPT not uniform and, therefore, unconstitutional.

The SWEPT, which the Legislature enacted to help meet the State's duty to provide an adequate education to all public school children in New Hampshire, is a state tax. The State delegates its collection to local officials, however, and this structure has led to the belief that the proceeds of the SWEPT are local revenue that should be retained locally, to be spent how local authorities see fit. This Court has repeatedly rejected attempts by the Legislature to carve out special treatment for some towns. In this case, the trial court struck down the latest version of this effort, carefully following the principles laid out by this Court in three prior decisions. *See Claremont Sch. Dist. v. Governor* (*Claremont II*), 142 N.H. 462 (1997); *Opinion of the Justices (School. Financing)*, 142 N.H. 892 (1998); *Claremont Sch. Dist. v. Governor* (*Statewide Property Tax Phase-In*), 144 N.H. 210 (1999).

The trial court also properly rejected the latest argument for this disparate treatment: that the Legislature's favoritism toward property-wealthy towns somehow amounts to a "spending decision." This argument has no basis in the statute or its legislative history and is illogical and nonsensical. Finally, the trial court rejected the State's argument that properties in unincorporated places are not subject to the SWEPT as this makes no sense under the statutory scheme and goes against the State's own longstanding practice.

Plaintiffs ask that this Court uphold the trial court's rulings on both issues, reminding the Legislature and the Coalition Communities yet again that everyone in the State, wherever they live, has a constitutional duty to pay uniform taxes to educate all of our children.

ARGUMENT

I. IN STRIKING DOWN YET ANOTHER ATTEMPT BY THE STATE TO UNFAIRLY FAVOR PROPERTY OWNERS IN PROPERTY-WEALTHY TOWNS, THE TRIAL COURT FOLLOWED THIS COURT'S CLEAR AND REPEATED HOLDINGS.

This is the fourth time that this Court has been asked to rule on the efforts of a small number of property-wealthy communities to avoid full and equal participation in the state education property tax. Two key aspects of the Statewide Education Property Tax (SWEPT) should inform any analysis of the tax scheme. First, the Legislature chose to have it collected by local officials, along with the traditional municipal, county, and local education property taxes. This operational structure has fed a persistent resistance in certain communities to remitting to the State the state tax revenue that exceeds the State's adequacy obligation in those towns. Second, the SWEPT is a not a generic tax raising general revenue for the

State, but rather was created specifically to raise funds to meet the State's obligation to fund an adequate education.

After reviewing this Court's prior rulings invalidating similar schemes, the trial court struck down the unconstitutional preference the Legislature has granted to taxpayers in property-wealthy communities. The trial court also rejected the argument that this preferential tax treatment was a "spending" decision and not simply a repetition of the previous schemes already struck down by this Court. The trial court appropriately rejected this new contention, which has no basis in the statute, the overall funding framework, legislative history, or logic.

A. THE STATE'S CONSTITUTIONAL FUNDING OBLIGATION: LEVYING STATE TAXES AT UNIFORM RATES TO MEET THE STATE'S EDUCATIONAL DUTY.

The State's duty to provide a public education to the children of New Hampshire has been part of the Constitution since 1784. *See* N.H. Const. part II, art. 83. In *Claremont School Dist. v. Governor* (*Claremont I*), 138 N.H. 183, 192 (1993), this Court held that it was the State's obligation "to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire" and "to guarantee adequate funding." *Id.* at 184.

In 1997, this Court determined that, because funding an adequate education is a State duty, any taxes levied by local school districts to fund an adequate education must "be administered in a manner that is equal in valuation and uniform in rate throughout the State." *Claremont v. Governor (Claremont II)*, 142 N.H. 462, 471 (1997); *see* N.H. Const. part II, art. 5. Specifically, in finding the State's school funding scheme unconstitutional, the Court held that "[a]lthough the taxes levied by local school districts are local in the sense that they are levied upon property within the district, the

taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution." *Claremont II*, 142 N.H. at 469. "Consequently, '[t]here is abundant justification in fact for taking this property out of the class taxed locally, and taxing it at the average rate throughout the state.'" *Id.* at 470 (quoting *Op. of the Justices*, 84 N.H. 559, 566 (1930)); *see also* N.H. Const. part II, art. 5.

In its ruling, the Court observed that "[t]here is nothing fair or just about taxing a home or other real estate in one town at four times the rate that a similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty." *Claremont II*, 142 N.H. at 471. In addressing the requirement of fair and uniform tax rates to meet the State's constitutional education obligation, the Court observed that: "In mandating that the 'opportunities and advantages of education' be spread throughout the various parts of the State, the framers of the New Hampshire Constitution could not have intended the current funding system with its wide disparities." *Id*. at 470 (quoting N.H. Const. pt II, art. 83). "This is likely the very reason that the people assigned the duty to support the schools to the State and not to the towns." *Id.* Accordingly, the Court held that "[t]o the extent that 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.* at 471.[1]

[1] The State is not required by the Constitution to employ a statewide property tax to meet its constitutional duty. It could raise funds by other means. But if the Legislature continues to use a property tax to raise these funds, it must be administered in a way that is uniform in rate across the state.

B. THE TRIAL COURT PROPERLY FOCUSED ON THE "EFFECTIVE TAX RATE" IN DETERMINING THAT ALLOWING TOWNS TO RETAIN THE EXCESS SWEPT VIOLATES PART 2, ARTICLE 5 OF THE NEW HAMPSHIRE CONSTITUTION.

Since *Claremont II*, the State and a group of property-wealthy communities have repeatedly attempted to evade the uniform tax mandate. This effort began less than six months after the *Claremont II* decision when the New Hampshire Legislature proposed House Bill 1280 and requested that the Court issue an advisory opinion as to the constitutionality of the bill. This Court responded in *Opinion of the Justices (School. Financing)*, 142 N.H. 892 (1998). The bill created an "abatement" scheme which authorized a blanket reduction in taxes based on the amount of education tax revenues generated in excess of the town's threshold for adequate education, *i.e*., the statewide per pupil cost of an adequate education multiplied by the average daily membership in residence for the town. *Id.* at 899. The excess state revenue generated under the proposed statewide property tax at issue in that case is identical to the excess SWEPT at issue in this case that the property-wealthy towns seek to retain for their own local purposes. In rejecting this type of scheme, the Court stated that it was "not persuaded that the special abatement provision is supported by good cause or just reasons consistent with the constitution." *Id.* at 900-901.

In its opinion, the Court advised that providing an abatement would create a non-uniform tax rate. Specifically, the Court determined 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 . . . 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 tax rate*** remains equal to the uniform State education tax rate.

Id. at 899–900 (emphases added).

Further, the Court held that "[a]batements and exemptions necessarily result in a disproportionate tax burden on the remaining property in the taxing district." *Id.* at 900. The Court found unpersuasive the State's arguments that the proposed special abatement would help avoid "social discord . . . because other tax resolutions could be divisive." *Id.* at 901. The Court noted that "difficult decisions which may cause social unrest cannot be a factor in the court's constitutional review of the bill." *Id.* Quoting *Claremont II*, the Court reiterated 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. The residents of one municipality should not be compelled to bear greater burdens than are borne by others.

Id. at 901 (quoting *Claremont II*, 142 N.H. at 470).

The Court expressly rejected the destructive "donor town/receiver town" dichotomy that remains at the heart of the property-wealthy towns' long-standing quest for favored treatment:

> Proponents of the bill also 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.

Opinion of the Justices, 142 N.H. at 901.

The Court further advised that "[t]his obligation cannot be avoided or lessened by the mere circumstances of a town having few children or a town having a wealth of property value, including wealth generated by the presence of heavy industry." *Id.* Thus, the Court held that the application of a special abatement "violates both the plain wording of Part II, Article 5 and the express language of *Claremont II*." *Id.* at 902.

In light of this Court's strong and clear statements about looking beyond town boundaries in determining the constitutionality of the statewide property tax, it is remarkable and telling that the Coalition Communities concede in their brief that the statutory change in 2011 that ended the remittance by the property-wealthy towns of the excess SWEPT to the State came about because resentment from the "donor" communities:

> The Legislature changed the law in 2011, because of problems attendant to the donor-receiver model, such as the undesirable "battles between 'winning' and 'losing' communities. [Appx. Vol. I at 241]. The Constitution gives the Legislature task of establishing educational policy and determining "the appropriate mechanism for its funding." *See Sirrell*, 146 N.H. at 369. That means the Legislature has the freedom to decide that its chosen way to find an adequate education should be modified when negative consequences appear.

Coalition Brief, at 23. This argument flies in the face of this Court's jurisprudence about the obligation of all New Hampshire taxpayers to contribute at equal rates to the adequate education of all our children, regardless of whether they live in the same town or at opposite ends of the state. This Court should once again reject this narrow and parochial approach to funding an adequate education for the State's children.

Less than two years after the Court's decision in *Claremont II* and a year after this Court spoke in *Opinion of the Justices, supra*, the plaintiffs

in that case, "property poor" school districts, school children, and taxpayers, were compelled to seek a declaratory judgment about yet another education funding scheme favoring the property-wealthy towns, which this time had already been enacted by the Legislature. *Claremont v. State* (*Statewide Property Tax Phase-In*), 144 N.H. 210 (1999). The legislation at issue required municipalities "in which the education property tax exceeds the amount necessary to fund an adequate education" to remit the excess amount to the Department of Revenue Administration (DRA). *Id.* at 213. However, it allowed a phase-in of the remit requirement; meaning that, for the first five years, the towns with excess education tax revenues did not need to remit the full amount. *Id.* The Court found "[t]he practical effect of this phase-in is that in fifty 'property rich' towns across the State, the full rate of $6.60 per thousand is imposed gradually over five years, while taxpayers in the remaining towns pay the full rate immediately." *Id.*

The Court considered whether the phase-in was a tax exemption, but determined it was unsupported by just reasons consistent with the constitution. "[I]t 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.* at 216. The Court rejected the State's argument that "because the phase-in provision is temporary, it fundamentally differs from the special abatement that this court concluded would be unconstitutional." *Id.* at 219. Likewise, in the instant case, it is not reasonable or fair to lower the effective tax rate for all taxpayers in the property-wealthy towns regardless of any showing of individual hardship or special circumstances.

Five years after the *Statewide Property Tax Phase-In* decision, the State once again tried to adopt further legislation that would allow districts

to retain excess funds raised by statewide education taxes. In *Londonderry School District SAU #12 v. State*, No. 05-E-0406, 2006 N.H. Super. LEXIS 4, at *35 (Mar. 8, 2006), the superior court struck down as unconstitutional another non-uniform tax mechanism that allowed the surplus of state education tax to be kept locally. The bill at issue permitted property-wealthy communities to retain all the revenue they raised through the proposed statewide education tax which allegedly would exceed the communities' cost of an adequate education. *Id.*

The superior court found the scheme comparable to that in *Opinion of the Justices* (*School Financing*) and *Claremont* (*Statewide Property Tax Phase-In*), because they all resulted in property-wealthy municipalities avoiding payment of the amount of the statewide education property tax that exceeded the amount necessary to provide an adequate education. *Londonderry*, 2006 N.H. Super. LEXIS 4, at *41. Therefore, the court ruled that the bill "create[d] 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. Consequently, [the bill] violates Part II, Article 5 of the New Hampshire Constitution." *Id.* at *41-42.

In its decision striking down the retention of excess SWEPT in property-wealthy towns, the trial court in the instant case relied on the consistent rulings from this Court in *Claremont II*, *Opinion of the Justices*, and the *Claremont Phase-In* decisions, as well as the "persuasive" superior court decision in the *Londonderry* case. As the trial court noted, under the current system, towns whose property tax base was insufficient to pay for the full cost of adequacy would receive a grant to meet the remaining cost, but "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." Add. 62[2] (quoting *Opinion of the Justices*, 142 N.H. at 899-900).

In their briefs, the State and the Coalition Communities argue that because the SWEPT tax rate appears to be uniform — before the excess SWEPT is retained — the current system complies with the constitutional mandate for uniform tax rates. *See State's Brief*, at 33; *Coalition's Brief*, at 22-24. However, this Count anticipated and rejected such a rationalization in *Claremont II* and again in the *Opinion of the Justices*. As noted above, in *Claremont II* this Court said that if 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.

The trial court in this case correctly relied on this analysis in its order. *See* Add. 71. Looking to the holding in *Opinion of the Justices*, the trial court noted that, as here, the special abatement at issue in that case would appear at first glance to be uniform on its face, but would in fact be unequal because application of the special abatement would result in taxpayers in less wealthy towns paying the full rate while the effective rate would be lowered for taxpayers in the wealthy towns. Add. 71; *see Opinion of the Justices*, 142 N.H. at 901-902.

As the trial court also noted, this conclusion would not change if the scheme had provided for collection of the revenue before the special abatement was applied. Add. 71 (citing *Opinion of the Justices*, 142 N.H. at 899). Thus, the allegedly uniform rates cited by the State and the Coalition

[2] "Add." refers to the Addendum to the State's Brief. "App. I," "App. II," and "App. III" refer to the Appendix Volumes I, II, and III respectively.

Communities are illusory and deceptive. The trial court followed this Court's consistent approach of examining whether the tax is being administered in a way that maintains actual uniformity for taxpayers throughout the state or results in perpetuating lower effective rates in the property-wealthy communities. Its conclusion, being challenged in this appeal by the State and the Coalition Communities, mirrors the rulings of this Court in the line of cases that have repeatedly dealt with this issue. *See* Add. 72-73.

C. THE CURRENT FUNDING SYSTEM DOES NOT PROVIDE TAX RELIEF TO INDIVIDUAL TAXPAYERS BUT ONCE AGAIN ALLOWS ACROSS-THE BOARD PREFERENTIAL TREATMENT TO ALL PROPERTY OWNERS IN PROPERTY-WEALTHY TOWNS.

The State and the Coalition Communities briefly argue that there is no individual abatement or special tax relief in the current system that justifies judicial scrutiny under Part II, Article 5. *See State's Brief*, at 33-34; *Coalition's Brief*, at 25-26. This argument once again ignores the heart of this Court's prior rulings, which 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. In rejecting this argument, the trial court held that "there can be no meaningful dispute that allowing communities to retain excess SWEPT funds lowers the effective SWEPT rate paid by those communities." Add. 72. In reaching this conclusion, the trial court reviewed data showing how the retention of the excess SWEPT operates to lower the effective SWEPT rate in the excess SWEPT communities. *See* Add. 68-69; App. III, 118, 120 (Table 1). Column B of Table 1 shows the nominal equalized SWEPT rate, and Column F shows the effective rate after the

impact of the retained excess SWEPT funds is taken into account. App. III 120. For example, the rate went from $1.40 to $0.44 in Moultonborough; $1.52 to $1.26 in Portsmouth; $1.45 to $0.71 in Rye; and $1.38 to $0.63 in Waterville Valley. At the bottom of the table are the rates for Plymouth, Newport, and Hopkinton, the towns where the several plaintiffs in this case reside. With no excess SWEPT to be retained by these towns, their effective tax rate is the same as the initial nominal rate. *Id*.

Neither the State nor the Coalition Communities offered any evidence to counter this data. The trial court was correct in relying on it and then applying this Court's repeated holdings on the importance of effective tax rates to strike down the current practice of allowing property-wealthy communities to keep excess SWEPT.

D. The Argument That Preferential Tax Treatment For Property-Wealthy Towns Is A "Spending Decision," Has No Basis In The Statute, Legislative History, Logic, or the Actual Facts of this Case.

After years of unsuccessfully attempting to justify different iterations of the same unconstitutional policy, the State and the Coalition Communities have now advanced a new argument to protect this inequitable practice: that it amounts to a "spending decision" and not another unlawful attempt to divert state tax revenue intended to pay for an adequate education across the state. This argument has no support, however, in either the language or the legislative history of HB 337, enacted as Chapter 258 of 2011 Session Laws, in which this change was included. *See* 2011 N.H. Laws 258. Nor does it fit with the purpose, structure, or logic of the state's system for funding an adequate education.

1. **There is no support in the language of HB 337 for the notion that the Legislature "appropriated" excess SWEPT for education beyond adequacy in property-wealthy towns.**

HB 337 made a number of changes to the adequacy formula, including consolidating and reducing the aid provided on behalf of students in poverty who are eligible for the federal free and reduced price meal program. App. I, 202-204. It repealed "fiscal capacity disparity aid," which had provided additional funding to property-poor districts, and created a new fund, called "stabilization grants," to hold districts harmless from the loss of funding due the other changes. *Id.* at 202, 205. The title of the bill, "AN ACT amending the calculation and distribution of adequate education, grants, repealing fiscal capacity disparity aid, and providing stabilization grants to certain municipalities[,]" did not mention the change the bill made regarding excess SWEPT revenue. *Id.* at 203.

Those changes came at the end of the bill and were all related to the process by which excess SWEPT payments had been remitted to the State Department of Revenue for deposit into the Education Trust Fund, the repository of state funds used to fund the State's adequacy grants. *See* App. I, 205-206. Nothing in the bill authorized or appropriated new adequacy grants, made up of the excess SWEPT, exclusively for the small number of property-wealthy communities *who had already received full adequacy funding through SWEPT.* Nothing in the bill supports the notion that the Legislature decided to spend some of the State's adequacy funding (which is what the excess SWEPT is) for some kind of extra education beyond adequacy, but only in property-wealthy towns.

2. The legislative history of HB 337 shows without doubt that the purpose of the repeal was to "end donor towns."

The House and Senate committee reports and summaries of the bill that were prepared as it moved through the legislative process repeatedly explain the purpose of the repeal of the remittance requirement simply and bluntly: Get rid of donor towns:

- "Fourth and finally this bill eliminates donor towns." App. I, 208.

- "WHY THIS STATUTORY AMENDMENT?
  - 3. Eliminates Donor Towns.

  Period."
  App. I, 234. [Emphasis in original]

- "This legislation eliminates donor towns and fiscal disparity aid, two of the most divisive elements of the school funding formula . . ." App. I, 241.

- "Eliminates donor towns by allowing excess property tax revenues raised in a town to be used by the town." App. I, 242. [Emphasis in original]

The Coalition Communities' brief, in its discussion of the legislative history of HB 337, acknowledges the true purpose of this provision of the bill: "[T]he Legislature's overriding purpose in making this change was to bolster local control and 'eliminate donor towns.'" *Coalition Brief*, at 18. The Coalition's brief further described the justification for this bill with arguments that this Court has repeatedly and emphatically rejected: "The testimony, in favor of the similar SB 183, made the same points – the legislation would (1) 'stop the perpetuation of battles between "winning" and "losing" communities,' and (2) 'tie[] our education dollars directly to the children they were meant to support.'" *Coalition's Brief*, at 18. This argument repeated the old contention that social discord would justify

abandonment of constitutional principles. It also reveals that the property wealthy towns have still not accepted the fundamental nature of SWEPT funds — that they are state taxes meant to fulfill the State's duty to provide an adequate education of all students across the state.

Nowhere to be seen in the legislative history of HB 337 is any mention by any legislator of any intent to appropriate extra education funding only for these property-wealthy towns. Under the reasoning of the State and the Coalition Communities, however, the Legislature made an affirmative decision to spend *extra state adequacy funds on educational programs beyond adequacy, but only in property-wealthy towns*. Such a "policy" or spending decision would have been inconceivable and illogical, and there is no evidence for it.

Lacking any real response to the reality of this Court's repeated holdings striking down similar schemes that unfairly and unconstitutionally favored property-wealthy towns, the State and the Coalition Communities invented the new "spending decision" argument. While they cite numerous prior decisions about the Legislature's prerogative to make spending decisions, they have no evidence to support the notion that this latest legislative defiance of the Court's prior rulings was actually a spending decision in any meaningful sense. It was but another attempt to avoid sending excess SWEPT funds to the State for adequacy payments for students across the state. As the Coalition's brief reveals, the purpose of the repeal 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.

The State and the Coalition Communities say in their briefs that under the current scheme, the excess SWEPT is being spent on "education"

in the property-wealthy communities. In so stating they are taking advantage of a statutory anomaly that resulted from the repeal of the remittance requirement and the process through which it was implemented. RSA 76:8, II directs that the proceeds of the SWEPT be paid "to the municipality for the use of the school district or districts." But it is incontrovertible that it is not being used to provide an adequate education in those towns because they have already received their full allotment of adequacy funds through the SWEPT. Thus, this practice contradicts and undermines the purpose of the SWEPT. The underlying statute RSA 76:3, first enacted in 1999, authorized the SWEPT and prescribed how it would be collected and distributed for the purpose of meeting the State's adequacy obligation. The provision that was repealed required that excess SWEPT payments be sent to the State's Education Trust Fund. *See* App. I, 206. The repeal of that section did not change the purpose of the SWEPT; it simply acquiesced to the resistance of the property-wealthy towns to the principle that the revenue from this state tax for education was intended to meet the State's adequacy obligation across the state and not simply for the benefit of the towns where the tax was collected.

3. Affidavits from four Coalition towns demonstrate that these towns did not consider the excess SWEPT as an appropriation for local education beyond adequacy in their towns, but as a fungible financial windfall.

The affidavits from municipal officials in Coalition Communities that were submitted to the trial court as part of the Coalition's effort to delay implementation of the trial court's summary judgment ruling of November 20, 2023, belie the Coalition's argument that the diversion of the excess SWEPT was a spending decision undertaken solely to provide extra

"education" funds to the property-wealthy towns. The affidavits came from town administrators in Waterville Valley (App. III 21-25); Hebron (*Id*. 27-30.); Moultonborough (*Id.* 32-24); and Rye (*Id.* 36-39), four towns in the Coalition who benefit from the reduction in their effective SWEPT rate. *See* App. III, 120.

These affidavits demonstrate that these towns treat the excess SWEPT as a fungible financial windfall that they can use as they want in their own towns, even though these funds were raised to pay for an adequate education for public school children across the state. This is apparent from the description in each of the affidavits about the potential impact of the loss of these funds if these towns were again required to remit excess SWEPT funds. For example, the first concern in Waterville Valley is the impact on the town's plans to build a new wastewater treatment plant, while the second concern is the impact on the town's ability to maintain its supply of drinking water, and the third concern is the town's desire to redesign and reorganize its solid waste transfer station. App. III, 22-23. Also mentioned are the need for a new fire truck and road repaving and maintenance. *Id*. at 24. Large specific dollar amounts are cited for each of these potential non-educational impacts from the loss of the excess SWEPT. Only in the last paragraph of the town administrator's affidavit is there a brief discussion of the potential impact on the school budget. *Id*. at 24-25.

In short, this affidavit reveals that Waterville Valley does not treat the excess SWEPT as an extra appropriation of funds for education beyond adequacy, as the Coalition and the State now struggle to categorize it. Neither the Coalition nor the State offered any evidence that the extra funds were spent on education. The affidavits reveal that the Coalition towns did not feel bound by any such expectation. Instead, the towns used these state

funds, meant for education adequacy, as an extra unrestricted windfall to be spent solely as they saw fit and only for their own municipal benefit. *See also, id*. at 36-38.

The "spending decision" argument was offered as the latest justification for a revival of a practice that has been repeatedly struck down by this Court. That argument has no basis in the language of HB 337 or its legislative history. It strains credulity to suggest that the Legislature would appropriate state adequacy funds only for property wealthy towns that had already received their full adequacy grants. And the legislative history makes plain that the motivation for the change was a continuing refusal to accept that extra state funds raised locally should be sent to the State to meet the State's constitutional responsibility. Finally, the statements of the Coalition town officials demonstrate that the excess SWEPT funds were treated as general financial windfall and not as additional support for education. For all these reasons, this Court should reject this argument and uphold the trial court's decision.

II. THE TRIAL COURT CORRECTLY RULED THAT THE STATE' S PRACTICE OF SETTING NEGATIVE TAX RATES TO OFFSET SWEPT IN UNINCORPORATED PLACES VIOLATES PART II, ARTICLE 5.

For more than a decade, the Commissioner of the NH Department of Revenue Administration (DRA) has set "negative tax rates" in a small number of unincorporated places to offset the SWEPT rates that the DRA had set for these places. For example, in 2021, the DRA set a SWEPT rate of $1.82 in Hale's Location, but then set a local school tax rate of –$1.82, thus reducing the amount of the SWEPT rate to zero. *See* App. III, 118-19,

122 (Table 3).[3] As a result, the SWEPT liability was completely offset and property owners in Hale's Location, and other unincorporated localities in the state, paid no SWEPT to support the State's constitutionally mandated obligation to provide an adequate education to all public school students in the state, while the plaintiffs, like all other property owners in their communities, continued to pay the full SWEPT rate. The trial court correctly held that this practice of setting "negative tax rates" in unincorporated places is unconstitutional. Add. 75.

A. THE SWEPT STATUTE APPLIES, AND INDEED HAS ALWAYS BEEN APPLIED BY THE STATE, TO PROPERTY IN UNINCORPORATED LOCALITIES.

The State argues that unincorporated places are not subject to the SWEPT because they are not "municipalities" within the meaning of the SWEPT statute. When interpreting a statute, courts "first examine the language of the statute and ascribe the plain and ordinary meanings to the words used." *Carr v. Town of New London*, 170 N.H. 10, 13 (2017). Courts "interpret statutes in the context of the overall statutory scheme and not in isolation." *Id.* at 13-14. The "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.* at 14.

The SWEPT statute, titled "Education Tax," provides: "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." RSA 76:3. In turn, RSA 76:8, titled "Commissioner's Warrant," provides: "The

[3] Table 3 lists negative tax rates for 21 other unincorporated places. App. III, 122.

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." RSA 76:8, I (a). It additionally states that "[t]he 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." RSA 76:8, I (b).

Explicitly referenced in the SWEPT statute, but not acknowledged in the State's argument, is RSA 21-J:3, XIII. RSA Chapter 21-J pertains to the Department of Revenue Administration and section J:3 in particular sets forth the duties of the Commissioner. The DRA Commissioner shall: "Equalize annually by May 1 the valuation of the property as assessed in the several towns, cities, and unincorporated places in the state." RSA 21-J:3, XIII. In other words, the SWEPT statute uses as part of its calculation the total equalized valuation of property that, pursuant to the DRA statute, explicitly includes unincorporated places.

The DRA statute contains other indications that the term "municipality" is meant to include towns, cities, and unincorporated places. *See* RSA 21-J:35, I ("The commissioner of revenue administration shall compute and establish the tax rate of each town, city, or unincorporated place. Any assessments report issued by the commissioner pursuant to RSA 21-J:11-a shall not delay or otherwise affect the setting of the tax rate for that municipality.").[4]

[4] The NH Department of Revenue Administration publishes a glossary of common terms, in which it defines "Municipality" as "City, town or unincorporated place," and cites to statute and rules in support of this definition. https://www.revenue.nh.gov/sites/g/files/ehbemt736/files/inline-

The State recognizes that some statutes explicitly include unincorporated places in the definition of municipality. It points to RSA chapter 198, entitled "School Money." There, the definition for "Municipality" is "a city, town, or unincorporated place." RSA 198:38, VI-a. The State notes that the section begins with "In this subdivision," and implies that definition of "municipality" applies only to that section and is not applicable to the SWEPT. Because a word is defined in one place, however, does not mean it cannot have the same meaning elsewhere. That would be absurd. *See Doe v. Attorney General*, 175 N.H. 349, 352 (2022) ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result."). The fact that RSA chapter 198 defines "municipality" this way does the opposite of what the State suggests. That chapter pertains to school money, and that particular section pertains to adequate education. Adequate education is exactly what the SWEPT statute is raising funds for. It would make sense for the same definition to apply to the entire statutory scheme. *See Carr*, 170 N.H. at 14.

This Court's caselaw also interchangeably uses "municipality" to include unincorporated places. *See, e.g., Sirrell v. State*, 146 N.H. 364, 397 (2001) ("There are 259 cities, towns and municipalities (municipalities) in New Hampshire, of which twenty-six are 'unincorporated areas.'"); *Appeal of Coos County Comm'rs*, 166 N.H. 379, 386 (2014) (referring to agreement between a company and unincorporated places as an example of an agreement between "municipalities and renewable generation facilities made pursuant to RSA 72:74"); *Prolerized New Eng. Co. v. City of Manchester*, 166 N.H. 617, 623-624 (2014) ("RSA chapter 322 delegates to

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documents/sonh/municipal-property/municipal-glossary-of-terms.pdf (Last accessed Sept. 29, 2024).

local authorities the general regulation of junk and scrap metal dealers. The legislature granted authority to '[t]he governing body of any town, city, or unincorporated place' to license, 'in [its] discretion,' junk and scrap metal dealers within the municipality.").

Because it is clear from other sections in the statutory scheme that "municipality" encompasses unincorporated places in the state, and there are examples of that usage in New Hampshire caselaw, this Court need not examine dictionary definitions, as the State's brief suggests. *Cf. In re State (Taylor),* 153 N.H. 700, 703 (2006) ("We did not consider the dictionary definitions of 'income' in any of these cases and focused instead on whether the legislature intended to include the item in question within the statutory definition of 'gross income' Similarly, we have no reason to turn to dictionary definitions in this case."); *Graves v. Estabrook,* 149 N.H. 202, 206 (2003) ("The defendant's argument, limiting the analysis to a dictionary definition, amounts to a dry classification that puts the emphasis at the wrong place." (citation and brackets omitted)); *see also Farrelly v. City of Concord,* 168 N.H. 430, 444–45 (2015) (declining to adopt Black's Law Dictionary when context clues revealed the dictionary was not in accord with the legislature's use of the word).

If the State's argument — that unincorporated areas are *not* within the State's definition of "municipality"— were accepted, then the SWEPT would *not* be a state tax. It would be a series of local taxes where localities contribute only to their local need — the same assumption that *Claremont II* determined was unconstitutional. *See Claremont II*, 142 N.H. at 469–71 (holding the State must provide a constitutionally adequate education using funds raised "in a manner that is equal in valuation and uniform in rate

throughout the State")(emphasis added). This reading offered by the State must be rejected.

Despite its arguments in this case, the State *itself* has always treated unincorporated areas as municipalities for SWEPT purposes. As explained above, in calculating the SWEPT, the State sets the total amount to be collected and then divides that number by the eligible total statewide equalized property value to determine the SWEPT rate. *See* RSA 76:8. The DRA Commissioner includes unincorporated areas in its calculation of SWEPT and has — every year — issued a warrant to *all* unincorporated areas with taxable property, to collect the SWEPT at the same rate as every town and city throughout the State. *See* App. II. The State fails to explain why the DRA has calculated SWEPT rates for unincorporated places year after year if those places are not subject to the tax.

"[W]hen the meaning of a statute is in doubt, the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent." *New Hampshire Retirement Sys. v. Sununu*, 126 N.H. 104, 109 (1985) (quotation omitted); *see also United States v. Rutherford*, 442 U.S. 544, 554 (1979) (stating the Court was "reluctant to disturb a longstanding administrative policy that comports with" the language, history and purpose of a statute). This Court has applied this principle in other tax cases. *See, e.g., New Hampshire Retail Grocers Ass'n v. State Tax Comm'n*, 113 N.H. 511 (1973). In that case, the parties disputed whether a tax on tobacco, which was paid by the wholesaler prior to selling to retailers, was to be included in a wholesaler's costs for the purposes of calculating a six percent markup. *Id.* at 513. The Court recognized that it was "uncontradicted" that the tax

commission had "interpreted the statute as providing that the 'total cost at the retail outlet' on which the six percent markup was to be calculated included both federal and state taxes." *Id*. at 514-15. "The fact that this administrative interpretation of the statute went unchallenged for a period of over 30 years . . . is entitled to great weight in determining the intended meaning of the statutory language." *Id*. at 515. "Furthermore, instead of interfering with the previous interpretation, the legislature . . . has repeatedly impliedly approved that interpretation by using it in estimating the revenue to be expected from various increases made in the tax rate on cigarettes." *Id.*

In the instant case, the State, through the DRA, has been calculating the SWEPT using all property (including unincorporated places), and implementing the SWEPT by issuing warrants to all localities (including unincorporated places) the same way for over a decade. That the legislature never indicated this was an incorrect interpretation is "entitled to great weight." *Id*. Additionally, the State has used this interpretation of SWEPT in its own accounting. *See* App. III, 67, 74-77 (State of New Hampshire Annual Comprehensive Financial Report (ACFR) for the Fiscal Year Ended June 30, 2023).[5] As shown in the report the State accounts for the entire amount of SWEPT in the Education Trust Fund. *See* App. III, 77. That is, the entire amount of SWEPT revenue is — according to the State's books — part of the education trust fund, regardless of whether it is the SWEPT for negative rate communities that is never actually collected. *See also id.* at 76 (listing the entire SWEPT amount, labeled as "Property Tax

[5] Available at (last accessed Sept. 29, 2024): https://www.das.nh.gov/accounting/FY%2023/FY_2023_Annual_Comprehensive_Financial_Report_ACFR.pdf

Retained Locally," as revenue in the Education Trust Fund). Any suggestion that the State does not consider taxes set in unincorporated locations to be part of the SWEPT is not believable, and this Court should reject that argument.

B. THE SWEPT APPLIES STATEWIDE AND THERE IS NO REASON TO EXCLUDE PROPERTY IN UNINCORPORATED LOCALITIES.

The plaintiffs, like all other property owners in their communities, pay the full SWEPT. Their treatment contrasts with those who own real estate in unincorporated places and pay little or no SWEPT. The State contends the disparate treatment is justified by the SWEPT statute and does not violate the constitutional requirement of uniform tax rates. One proffered justification is that there are few or no public school pupils who live in these communities, so the property owners need not pay state (or local) education property taxes. But this approach brushes aside the obligation that all taxpayers have to support public schools, regardless of whether they have children of their own in public school and regardless of whether their community is large or small or has only a small school population or none at all. "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. p. 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. "This obligation cannot be avoided or lessened by the mere circumstances of a town having few children." *Opinion of the Justices (Sch. Fin.),* 142 N.H. at 901; *see also Barksdale v. Town of Epsom*, 136 N.H. 511, 514 (1992) ("A citizen cannot claim tax aggrievement merely because he or she does not personally add to the public education expense"); *Union Refrigerator Transit Co. v.*

Kentucky, 199 U.S. 194, 203 (1905) (noting taxpayers cannot refuse to pay simply because they do not receive equal share of benefits; childless citizens must pay share of school tax).

The State offers another possible justification. It argues that because unincorporated places lack other services, owners there have other burdens and the Legislature could have accounted for that in the SWEPT statute and let them out of responsibility to pay an equal share of the tax. *See State's Brief* at 41-43. The State offers no legislative history or any other evidence that this was the intent or even a consideration. "Under [its] well-settled rules of statutory construction, however, [the court] will not speculate as to what the legislature intended." *Appeal of Belair,* 158 N.H. 273, 278 (2009). In *Dover v. Imperial Casualty & Indem. Co*., 133 N.H. 109, 117 (1990), this Court examined whether carving out an exemption for municipalities under a statute was constitutional. It explained that it had to first understand the objective of the statute. *Id.* It further noted that "[r]esearch of the legislative history [] provided [it] with little insight as to why the legislature created the exception for highways, streets and sidewalks found in RSA 507-B:2, I, and [it was] reluctant to speculate on its intent." *Id*.

In a recent constitutional case, this Court considered a plaintiff's substantive right to a remedy and applied an intermediate scrutiny analysis. *Hardy v. Chester Arms, LLC*, 2024 N.H. 5 (2024). It stated the "burden to demonstrate that the challenged legislation meets this test rests with the party seeking to uphold the statute," which, in this case, is the State. *Id*. at P31. Further, "the party may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." *Id*. That is precisely what the State is doing in the instant case. It is faced with a constitutional challenge to a statute and

offers "hypothesized" justifications that were apparently "invented post hoc in response to litigation." *Id.*

Even if this justification had been considered by the Legislature, it would not be a permissible classification. "While the legislature's discretion to classify property is broad, the constitution prohibits it from classifying taxpayers for purposes of taxation." *Opinion of Justices*, 115 N.H. 306, 308 (1975)(quotation omitted); *see Opinion of the Justices,* 84 N.H. 559, 569 (1930) ("Property can be classified for tax purposes. The taxpayers cannot."); *see also* N.H. Const. pt. II, art. 6. The State's explanation, that there are other costs to owners, is based on the taxpayers. That those taxpayers may have other expenses says nothing of the property, which is what any classification must be based on. The State offers no explanation why similar properties in unincorporated and incorporated places should be treated differently for this statewide tax.

"[T]he constitutionality of a statute is to be decided by an examination of its real purpose and its actual effect." *Opinion of the Justices,* 87 N.H. 496, 497 (1935). Of course, the actual effect of setting local negative tax rates allows some property owners to escape contributing to the State's duty to fund a constitutionally adequate education — the statute's real purpose. The plaintiffs provided an example before the trial court of a home located on a golf course in Hale's Location, which sold for $995,000 in 2022. App. I, 125-26, 137-141. It pays an effective SWEPT rate of $0.00. App. I, 125. There is no justification for completely exempting such high value properties, that are not unlike similar properties in incorporated parts of the state, from the statewide education tax.

III. THE TRIAL COURT DID NOT CREATE NEW LAW IN ITS DECISION AND DID NOT OVERSTEP IN ORDERING THE RELIEF.

The State and Coalition posit that the trial court misapprehended the law and treated the SWEPT uniquely. This is untrue. The SWEPT is unusual in some ways — by the State's own design. First, the State maintains a narrow definition of adequacy as it relates to education, and then underfunds it. This leads to a multilayered system of school funding, including SWEPT, other state adequacy aid, local taxes, other state aid, and federal aid. Second, though all parties agree it is a state tax, the State has delegated the responsibility to assess and collect it locally. It then calculates each district's adequacy cost and deals with them individually. This ties the statewide tax more to localities than it is meant to. The trial court correctly affirmed that because it is a state tax, the taxing district is the state, no matter how the State administers it. *See Claremont II*, 142 N.H. at 470. Because it is a state tax, and the taxing district is the state, it must be proportional throughout the state, per Part 2, Article 5. That constitutional provision is exactly what the trial court applied. It did not create any new rules for the SWEPT, nor treat it any differently than any other state tax.

The trial court also granted an appropriate remedy. There is no need to send the matter back and wait for the legislature to "fix" it. *See State's Brief* at 52. The fix is clear. The State should operate the SWEPT as it did before 2011 and collect excess SWEPT. The State has not provided a legitimate reason why it cannot collect a state tax. The SWEPT can readily be applied to unincorporated localities, as the DRA already does, and the state already accounts for. The rates are known and no calculations are needed; the law simply needs to be applied constitutionally. Further, there should not be any accounting difficulties as the State already keeps its

books this way. Any suggestion that there are administrative hurdles is just an excuse to uphold the unconstitutional tax scheme.

CONCLUSION

The Plaintiffs respectfully ask this Court to not once again defer to the Legislature, which has shown little or no inclination to fix school funding, but rather chooses to relitigate settled law time after time. Although the Court has acknowledged that "[t]he Separation of Powers Clause of the State Constitution, Part I, Article 37, prevents one branch government from encroaching on the power of another," it has also "emphasize[d] the final part of that provision, which speaks of 'that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.' N.H. Const. pt. I, art. 37." *Opinion of the Justices*, 143 N.H. 154, 160-61 (1998). "For this to occur our co-equal branches of government must act." *Id*. at 160.

It is not outside of the Court's authority to see that laws are applied equitably and that constitutional rights are protected. *See Londonderry v. State,* 154 N.H. 153, 163 (2006) ("[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential."). As this Court has stated: "It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it. We would shirk our duty were we to decline to act in this case merely because our task is a difficult one." *Monier v. Gallen*, 122 N.H. 474, 476 (1982).

STATEMENT ON ORAL ARGUMENT

If the Court schedules this case for oral argument, Natalie Laflamme, Esq. will argue on behalf of the plaintiffs.

Date: September 30, 2024

Respectfully submitted,

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RULE 16(11) CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limitations set out in Supreme Court Rule 16(11) and contains approximately 8,582 words, exclusive of sections excluded per Rule 16(11). Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ John E. Tobin, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, a true and correct copy of the foregoing document has been served via the Supreme Court electronic filing system on all counsel of record.

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