

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0500

Contoocook Valley School District, Winchester School District, Mascenic  
School District, Monadnock School District, Myron Steere, III, Richard  
Cahoon,  
Richard Dunning

v.

The State of New Hampshire New Hampshire Department of Education,  
Christopher T. Sununu, Frank Edelblut

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Brief of Amici Curiae Berlin School District, Derry School District,  
Hopkinton School District, Mascoma Valley Regional School District,  
Pittsfield School District, Newport School District, Merrimack Valley  
Regional School District, Haverhill School District, Winnisquam Regional  
School District, White Mountains Regional School District, Claremont  
School District, Concord School District, Warren School District, Piermont  
School District, Bath School District, Manchester School District,  
Governor Wentworth Regional School District, Keene School District,  
Chesterfield School District, Harrisville School District, Marlborough  
School District, Marlow School District, Nelson School District,  
Westmoreland School District, and Nashua School District and the New  
Hampshire School Boards Association

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## **STATEMENT OF AMICI CURIAE'S INTEREST**

The Petitioner school districts have made a forceful showing that New Hampshire's school funding system still falls far short of compliance with the mandates of Part II, Article 83, and Part II, Article 5, of the New Hampshire Constitution and this Court's holdings in the *Claremont* and *Londonderry* cases. While all four Petitioner school districts are located in the largely rural southwest corner of New Hampshire, the flaws in the current system cause great harm to public school districts, students, teachers, and property taxpayers throughout the State. The twenty-five amici school districts — Berlin, Derry, Hopkinton, Mascoma Valley Regional, Pittsfield, Newport, Merrimack Valley Regional, Haverhill, Winnisquam Regional, White Mountains Regional, Claremont, Concord, Warren, Piermont, Bath, Manchester, Governor Wentworth Regional, Keene School District, Chesterfield School District, Harrisville School District, Marlborough School District, Marlow School District, Nelson School District, Westmoreland School District, and Nashua School District — represent a range of large, mid-size, and small school districts in cities and towns in every region of New Hampshire. Together, these districts educate more than 30% of public school students in the state (51,373 out of a total of 168,730). They, and a majority of school districts in New Hampshire, suffer from the failure of the State to fulfill its constitutional obligations.

The New Hampshire School Boards Association is a voluntary, non-profit, association whose membership is comprised of approximately 160 of the 176 locally elected New Hampshire school boards, many of which must

impose burdensome local property taxes because the State has not come close to meeting its obligation to fund public education.

## **SUMMARY OF ARGUMENT**

This brief will present an overview of the current school funding system and explain why the Superior Court's conclusion that the current funding formula is unconstitutional fully comports with this Court's prior rulings. The State's defense of the current formula is contradicted by the State's own definition of constitutional adequacy and by common sense. Further, the Superior Court erred in not ruling directly on the irrefutable evidence that the property tax disparities inherent in the current school funding system flatly contravene Part II, Article 5 of the New Hampshire Constitution, which requires that taxes levied to meet the State's educational duty must be uniform in rate across the state.

In the past ten years, the State's inaction has aggravated this problem, forcing local school districts with greatly disparate property tax bases to rely even more on nominally "local" school taxes. A significant portion of these "local" school taxes are actually state taxes that are required to make up the gap between the State's woefully insufficient adequacy formula and the true cost of meeting the State's broad and detailed definition of constitutional adequacy. Consequently, the same grossly disproportionate school tax rates that this Court declared to be unconstitutional more than two decades ago persist throughout the state.

Because this Court has already spoken clearly and directly about these flaws and injustices in its prior school funding decisions, amici ask that this Court affirm those rulings and direct the State to finally fulfill its constitutional duty without further delay, bringing a rapid end to the irresponsibility and evasion of the past two decades.



## **ARGUMENT**

### **I. The Superior Court’s determination that the current funding formula is irrational and unconstitutional is congruent with this Court’s decisions and supported by both compelling facts and common sense.**

#### A. Understanding the State’s current funding formula

##### *1. The components of the adequacy formula*

RSA 198:40-a, which was the focus of the trial court’s opinion, embodies the core of the State’s effort to meet its educational duty under Part II, Article 83 of the New Hampshire Constitution and sets the base amount per student of “the cost of the opportunity for an adequate education.” This amount is to be adjusted each biennium to reflect changes in the federal Consumer Price Index. RSA 198:40-d. During the 2018-2019 school year, at the time when the trial court was considering this case, the “base adequacy” amount was set at \$3,606 per student. For the 2019-2020 and 2020-2021 school years, this amount increased to \$3,709 per student.

RSA 198:40-a authorizes additional “differentiated aid” for certain categories of students. In the 2018-2019 school year, these amounts were \$1,818 for pupils eligible for free or reduced-price meals (an indicator/measure of family poverty), \$711 for English language learners, and \$1,956 for pupils receiving special education services. *See* RSA 198:40-a, II (b)-(d). This section also provides an additional \$711 for third grade students not already included in one of the first three categories who score below the proficient level on an assessment test. *See* RSA 198:40-a, II (e).

Using this formula and student enrollment figures, the New Hampshire Department of Education (NHDOE) calculates the total “adequacy grant” for each school district, which includes the base adequacy amount and the differentiated aid. The average adequacy grant in 2018-2019 was \$4,502 per pupil.<sup>1</sup>

In addition to the adequacy grants, since FY 2012 the State has provided “stabilization aid,” which replaced targeted grants enacted in 2009. Those grants were intended to help school districts with low property wealth and higher percentages of needy students. The Legislature has not increased the stabilization grants since FY 2012 and in FY 2017, 2018, and 2019 they were cut by 4% each year. In the biennial budget for FY 2020 and 2021, these grants were restored to their 2012 level.<sup>2</sup>

## *2. Contrasting the adequacy formula with actual expenses*

Taking into account all of the funds provided by the base adequacy grants, differentiated aid, and stabilization grants, the average state funding per pupil in the 2018-2019 school year was \$5,513.<sup>3</sup> According to the

<sup>1</sup> See “State Adequate Education Aid FY 2019” spreadsheet posted by the NH Department of Education (NHDOE) website. This figure was calculated by dividing the “Total Calculated Cost of an Adequate Education” in P7 (\$747,686,405.52) by the “17-18 Membership ADM” in F7 (\$166,095.91). This spreadsheet is available on the NHDOE website at <https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-education-statistics/state-adequate-education-aid>.

<sup>2</sup> Laws 2019, 346:238. For FY 2021 only, the Legislature also authorized a temporary increase in “differentiated aid” for pupils eligible for free and reduced meals, and a one year “fiscal disparity aid” program that will provide additional funding for school districts with below average “equalized value per student” (property wealth per student). Laws 2019, 346:234. This is repealed as of July 1, 2021. Laws 2019, 346:236, 440.

<sup>3</sup> Using the NHDOE spreadsheet referenced in footnote 1 above, this is calculated by adding the cash grants to towns (W7) plus SWEPT (Q7) and dividing by the pupil count (F7).

NHDOE, however, the average expenditure per pupil in New Hampshire’s K-12 public schools was \$19,720 in the 2018-2019 school year.<sup>4</sup> Excluding transportation, capital expenditures, interest on bonds, and facility construction and acquisition, the average per pupil cost was \$16,346.<sup>5</sup> By either of these measures, the State is funding less than one-third of the actual per pupil cost of K-12 public education in New Hampshire. NHDOE’s own reports show that the State pays 28.3% of the cost through its “Equitable Education Aid” (adequacy funding) and 2.9% from “Other State Sources,” for a total of 31.2%.<sup>6</sup> The “Equitable Education Aid” figure includes the funds raised by the Statewide Education Property Tax (SWEPT). Although the SWEPT is nominally a “state” tax, there is no real functional or operational involvement by any state agency except rate-setting by the Commissioner of Revenue. *See* RSA 76:3. Local officials assess and collect the SWEPT, along with municipal, county, and local school taxes. RSA 76:5. No SWEPT funds are ever sent to the State, deposited into a State account, or disbursed by the State government. Since 2011, towns have been allowed to retain any amount they raise through the

<sup>4</sup> *See* “State Average Cost per Pupil and Total Expenditures 2018-2019” on the NHDOE website: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/cost-state-average18-19.pdf>. A copy is also included in the Appendix to this brief at p. 28.

<sup>5</sup> *Id.*

<sup>6</sup> *See* “State Summary [of] Revenues and Expenditures of School Districts 2018-2019,” dated December 18, 2019, on the NHDOE website: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/state-summary18-19.pdf>. A copy is also included in the Appendix to this brief at p. 30. Even with the modest new funding included in the current two-year state budget, most of which will last for only one year, the State’s share will still only be about 31%. *See* a summary prepared by NHDOE of State Adequacy funding from FY 2014 through the current biennium FY 2020 and FY 2021 in the Appendix to this brief.

SWEPT that exceeds the State’s base adequacy grant. Considering that SWEPT is actually billed, collected, and kept locally, the State’s actual contribution is closer to 20% of the cost of public education.

The following chart shows how the current adequacy formula set out in RSA 198:40-a is applied to the twenty-five amici school districts. It shows the amounts of the base adequacy grants, the additional “differentiated aid,” and the total adequacy grant for FY 2019/20 and compares this total with the actual per pupil spending in these districts for FY 2018/19 (the most recent available data):<sup>7</sup>

<sup>7</sup> This is based on the FY 2020 version of the spreadsheet described in footnote 1, above. This spreadsheet is also available on the NHDOE website at <https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-education-statistics/state-adequate-education-aid>. Columns 2-7 are taken from this spreadsheet, *ad\_ed\_aid\_fy2020\_rev.xlsx*. The seventh column is calculated by dividing the sixth column by the second column. The eighth column is taken from same NHDOE report noted in footnote 15. Note that the Adequacy per Pupil is for 2019/20 school year while Spending per Pupil is from 2018/19 school year, one year earlier.

## How the State Calculates the Cost of an "Adequate" Education

Town	Each pupil	Supplements				Cost of "adequate education"	Adequacy per pupil	Actual Spending per pupil
		Low income	Special education	English learners	Below proficient			
	\$3,709	\$1,854	\$1,995	\$726	\$726			
Bath	134	40	22	0	0	\$616,794	\$4,603	\$15,975
Berlin	1,064	628	249	3	15	\$5,621,184	\$5,283	\$16,779
Chesterfield	425	83	58	4	9	\$1,857,953	\$4,372	\$17,680
Concord	1,678	923	305	17	14	\$8,562,842	\$5,103	\$16,755
Concord	4,210	1,646	696	362	44	\$20,350,964	\$4,834	\$15,658
Derry	4,749	1,148	1,013	63	77	\$21,864,992	\$4,604	\$15,336
Harrisville	82	19	10	0	1	\$360,680	\$4,399	\$21,689
Haverhill	581	235	113	3	8	\$2,823,193	\$4,859	\$18,166
Hopkinton	968	82	174	1	16	\$4,102,529	\$4,238	\$17,175
Keene	2,504	985	542	40	23	\$12,239,555	\$4,888	\$15,655
Manchester	12,957	7,806	2,522	1,992	136	\$69,106,135	\$5,333	\$12,389
Marlborough	242	103	39	0	1	\$1,164,947	\$4,814	\$19,461
Marlow	67	23	14	1	0	\$320,771	\$4,788	\$19,999
Nashua	10,941	4,690	1,932	1,232	123	\$54,111,701	\$4,946	\$13,261
Nelson	64	17	5	0	0	\$279,209	\$4,363	\$16,924
Newport	808	478	205	16	15	\$4,313,644	\$5,339	\$15,960
Piermont	82	12	10	0	4	\$347,840	\$4,242	\$18,950
Pittsfield	563	307	138	3	5	\$2,936,990	\$5,217	\$16,442
Warren	107	43	19	0	1	\$517,177	\$4,833	\$19,109
Westmoreland	207	26	33	2	2	\$885,198	\$4,276	\$16,796
Governor Wentworth								
Brookfield	83	25	3	0	1	\$363,121	\$4,375	\$18,646
Effingham	196	104	28	0	2	\$975,569	\$4,977	\$18,646
New Durham	358	104	52	0	7	\$1,629,564	\$4,552	\$18,646
Ossipee	548	309	133	6	8	\$2,881,161	\$5,258	\$18,646
Tuftonboro	252	87	45	0	4	\$1,189,181	\$4,719	\$18,646
Wolfeboro	711	184	61	2	11	\$3,107,586	\$4,371	\$18,646
Mascoma Regional								
Canaan	447	184	99	3	4	\$2,200,863	\$4,924	\$20,585
Dorchester	29	17	7	0	0	\$153,633	\$5,298	\$20,585
Enfield	420	137	102	2	6	\$2,020,242	\$4,810	\$20,585
Grafton	138	58	41	0	2	\$700,638	\$5,077	\$20,585
Orange	36	4	8	0	0	\$156,951	\$4,360	\$20,585
Merrimack Valley								
Andover	310	85	56	0	3	\$1,422,165	\$4,588	\$15,504
Boscawen	478	161	109	4	4	\$2,294,577	\$4,800	\$15,504
Loudon	654	148	121	1	12	\$2,950,978	\$4,512	\$15,504
Penacook	733	234	180	20	9	\$3,532,738	\$4,820	\$15,504
Salisbury	190	40	36	0	4	\$852,514	\$4,487	\$15,504
Webster	225	51	46	0	5	\$1,025,489	\$4,558	\$15,504
White Mountains Regional								
Carroll	56	22	4	2	1	\$257,405	\$4,597	\$18,224
Dalton	117	53	30	0	1	\$590,079	\$5,043	\$18,224
Jefferson	127	48	16	1	1	\$593,045	\$4,670	\$18,224
Lancaster	413	204	90	0	3	\$2,091,066	\$5,063	\$18,224
Whitefield	283	148	65	0	6	\$1,459,441	\$5,157	\$18,224
Winnisquam Regional								
Northfield	596	223	126	3	12	\$2,885,770	\$4,842	\$16,405
Sanbornton	319	77	43	3	5	\$1,417,335	\$4,443	\$16,405
Tilton	459	182	82	8	1	\$2,209,567	\$4,814	\$16,405

There is an enormous gap between the State funding levels, which the State contends are sufficient to pay for all of the components of its definition of an adequate education, and the actual per pupil cost.

In a 2019 study conducted in the Pittsfield School District, the amount the State defined as sufficient for an adequate education was compared to the district's actual expenditures in that school year. The focus of the analysis was to determine how much of Pittsfield's expenses would have to be cut for the district to operate within the State's adequacy level for Pittsfield of \$4,630 per pupil.<sup>8</sup> This line-by-line review of the school district's budget was conducted by John Freeman (the superintendent), the district's business manager, and Douglas Hall, the former founding executive director of the New Hampshire Center for Public Policy Studies and a former State Representative (R-Chichester). Their report is included in the Appendix to this Brief.

The study found that if the district was limited to the funding that the State said was sufficient to meet its constitutional obligation, a lengthy list of programs, staff, and resources would have to be eliminated. Living within the limits of the State's adequacy grant would require eliminating all school buses, art, music, physical education, sports teams, foreign languages, school nurses, librarians, and much more. The district would also be forced to cut dozens of teachers and paraprofessionals, resulting in an increased class size of 60 students per teacher. All health insurance for

<sup>8</sup> This figure differs from the amount for Pittsfield in the Table on page 13, for two reasons: (1) it uses the actual count of pupils in 2018/19 at the time the work was done by John Freeman, not the lower projected number in the NHDOE spreadsheet for 2018/19; and (2) the table on page 13 is the NHDOE projection for the next fiscal year 2019/20, except for the spending per pupil figures, which are the actual 2017-2018.

the remaining teachers would be cancelled. Many of these cuts would violate state and/or federal law and would constitute violations of the State's minimum school standards, which have been incorporated by the Legislature into the definition of an adequate education. *See* RSA 193-E:2-a (“Substantive Educational Content of an Adequate Education”); *see also* 198:40-a (referencing “the annual cost of providing the opportunity for an adequate education as defined in RSA 193-E:2-a”).

A similar study conducted by the Hopkinton School District reached the same conclusion: there is an obvious mismatch between the State's adequacy grants and the actual costs of operating a functioning school system.<sup>9</sup> Clearly, the amount the State provides to meet its constitutional obligation of providing an adequate education to each student falls far short in practice.

B. The State's defense of the current funding formula is incompatible with the State's own definition of a constitutionally adequate education and flies in the face of educational reality and common sense.

The NHDOE's own data demonstrate that there is an enormous gap between the State's adequacy formula and the actual expenditures of all of the school districts in New Hampshire. As noted above, by the State's own reckoning it is paying for only 31% of the total current cost of public education.<sup>10</sup> But at the same time, the State contends that this level of

<sup>9</sup>A summary of the Hopkinton study is also included in the Appendix at p. 26.

<sup>10</sup>“NHDOE State Summary [of] Revenue and Expenditures of School Districts 2018-2019,” December 18, 2019, published on the NHDOE website: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/state-summary18-19.pdf>. A copy is included in the Appendix to this brief at p. 30.

expenditure fully meets its obligation to fund a constitutionally adequate education. The implication of this contradiction is both startling and inescapable. According to the State’s brief, the rest of the money being spent by school districts — more than two thirds of the current, actual cost of public education — is paying for expenditures for educational services and resources that these districts “chose to make in excess of the constitutional baseline.” State’s Brief at 36.

The State’s extremely minimalist approach to what it will spend on constitutional adequacy flies in the face of this Court’s holdings about what adequacy must include in the modern global economy and is incompatible with the comprehensive definition of adequacy that the Legislature itself adopted. It does not even fit with the portions of the State’s minimum standards for school approval, a detailed set of administrative rules governing many aspects of public education, which the Legislature incorporated into the statutory definition of adequacy. *See* RSA 193-E:2-a, I, IV.

In *Claremont School District v. Governor*, 138 N.H. 183 (1993) (*Claremont I*) and again in *Claremont School District v. Governor*, 142 N.H. 462 (1997) (*Claremont II*), this Court explicitly set to rest the notion that constitutional adequacy is a narrow and circumscribed standard: “Given the complexities of our society today, the State’s constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.” *Claremont I*, 138 N.H. at 192.



In *Claremont II*, this Court again made it clear that a constitutionally adequate education encompasses a broad framework of goals and responsibilities:

A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. Mere competence in the basics — reading, writing, and arithmetic — is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.

*Claremont II*, 142 N.H at 474.<sup>11</sup>

In 2007, after this Court's prompting in *Londonderry School District v. State*, 154 N.H. 157 (2006), the Legislature enacted a detailed definition of an adequate education. This statute, RSA 193-E:2-a, mandates a “substantive educational program” in ten subject areas: English/language arts and reading; mathematics; science; social studies; arts education; world

<sup>11</sup> In reference to *Claremont I* and *II*, the State describes the right to an adequate education as “a newly declared constitutional right,” as if this Court had invented the State's responsibility for public education in those decisions. *See* State's Brief at 26. However, in *Claremont I*, this Court recited the history of Part II, Article 83 and demonstrated that support for education has been a central obligation of state government in New Hampshire since the Colonial era. 138 N.H. at 186-192. The Court did not describe the lengthy and active involvement of many governors and the Legislature in education policy and funding, but this history is available in “Lessons from New Hampshire: What We Can Learn from a History of the State's Role in School Finance 1642-1998,” a paper prepared shortly after *Claremont II* by Douglas E. Hall of the New Hampshire Center for Public Policy Studies in association with the University of New Hampshire. The short summary of the report's findings, at the beginning of the report, provides an overview of this history. The full report is included in the Appendix to this brief at p. 3.

languages; health education; physical education; engineering and technologies; and computer science and digital literacy.

The Legislature also incorporated into its definition of adequacy the sections of the “minimum standards for school approval” which address these ten substantive areas. These “minimum standards” are administrative rules governing many aspects of public education that are approved by the State Board of Education and codified in Chapter 306 of the regulations of the New Hampshire Department of Education.<sup>12</sup> Even a cursory review of the lengthy and detailed rules about the specific contents of an adequate education demonstrates that they spell out hundreds of wide-ranging requirements that school districts, teachers, and a range of other professionals must satisfy in educating their students in these ten substantive areas.<sup>13</sup> In its brief, the State contends, remarkably, that school facilities (and maintenance), food services, and school nurses are outside the definition of constitutional adequacy. State’s Brief at 44. This notion — that daily education conforming to the State’s adequacy definition can take place without school buildings and equipment, food services, or school nurses — is belied by the State’s own minimum standard on health

<sup>12</sup> These rules are available on the NHDOE website at [http://www.gencourt.state.nh.us/rules/state\\_agencies/ed300.html](http://www.gencourt.state.nh.us/rules/state_agencies/ed300.html)

<sup>13</sup> See, e.g. N.H. Admin. R. Ed 306.31 Arts Education Program, N.H. Admin R. Ed 306.37 English/Language Arts and Reading Program; N.H. Admin. R. Ed 306.40 Health Education Program; N.H. Admin. R. Ed 306.42 Digital Literacy Program.; N.H. Admin. R. Ed 306.45 Science Education Program.; N.H. Admin. R. Ed 306.47 Technology/Engineering Education Program.

education, one of the substantive areas that the Legislature incorporated into the definition. *See* N.H. Admin. R. Ed 306.40 Health Education Program which provides:

(a) Pursuant to Ed 306.26 and Ed 306.27, the local school board shall require that a school health education program for grades 1-12 provides:

- (1) Health education;
- (2) School health services;
- (3) Food and nutrition services;
- (4) A comprehensive guidance and counseling program;
- (5) Healthy school facilities; and
- (6) Family and community partnerships.

As noted above, because of RSA 193-E:2-a, I, these requirements, and those pertaining to the other nine substantive areas, are included in the definition of constitutional adequacy. *See also* RSA 193-E:3-b, I (a). Thus, the Legislature and the State Board of Education have created a definition of adequacy that is completely incongruent with and contradictory to the Legislature’s minimalist approach in RSA 198:40-a, in which it sets the cost of constitutional adequacy at a level that pays less than one-third of current average school costs. In light of this, the trial court was correct in determining that the costing formula in RSA 198:40-a is irrational and unconstitutional.

If local school districts are to provide educational programs that comply with the State’s definition of constitutional adequacy, including the incorporated minimum standards, their budgets must pay for credentialed teachers, teacher’s aides, and others with specialized training and skills. And, notwithstanding the recent sudden pandemic-driven attempt to provide temporary remote or “virtual” education, to teach these subjects to

their students, local school districts must also provide classrooms with heat and lights, desks and chairs, computers, textbooks, lab equipment, and other supplies. How could our school districts possibly meet the State's definition of a constitutionally adequate education and comply with the minimum standards incorporated therein with less than one-third of their current level of spending on these resources? Do school districts need only one-third of the teachers they currently employ to meet this duty and comply with the standards? Do they need only one-third of the classrooms? Are only one-third of the computers, books, and lab equipment necessary? Such a notion defies common sense.

The absurdity of the State's position provides the backdrop for the Petitioner's arguments and the trial court's decision. Even if one disagrees with the path that the trial court took to reach the conclusion that the current funding formula is irrational and insupportable, the woeful insufficiency of the funding level provided for in RSA 198:40-a cannot be denied. In light of the obvious and enormous gap between the limits of the current funding formula and the State's broad and detailed definition of adequacy, further exhaustive judicial review of the current funding formula is not warranted. Sending this case back to the trial court to more fully evaluate the current formula in a lengthy new proceeding is not necessary, and such a course will delay resolution of this problem for several more years at the very least. *See Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528 (1st Jud. Dist. Ct., Lewis & Clark Co., May 5, 2008) ("The Court must be mindful to use its judicial resources wisely. At this stage of the proceedings, it does not appear to the Court to be a wise use of its resources to have the parties begin a new lawsuit that would take months, if not years,

to prepare and weeks to try.”). This Court should instead acknowledge this reality now and direct the Legislature to address this issue forthwith.

Such a delay is not in the public interest and will only put off the day when the State’s funding formula is brought into alignment with its definition of constitutional adequacy. *Cf. State v. Chrisicos*, 158 N.H. 82, 86 (2008) (“[W]e choose to reach the constitutional issue, without deciding the statutory question, for reasons of judicial economy” because the statute at issue was not presented “as an untested statute, with the presumption of constitutionality intact, but as a statute already declared facially unconstitutional by the superior court. In light of the uncertainty raised by the trial court’s ruling, the issue of [the statute’s] constitutionality will likely continue to arise until a definitive declaration is made by this court. Accordingly, we consider immediate resolution of the constitutional issue both necessary and prudent.”) (citations and brackets omitted). The students and taxpayers of New Hampshire have waited two decades for resolution; they should not be asked to wait any longer.

**II. The Superior Court erred in failing to rule that the current education tax scheme, which entails widely disparate tax rates throughout the state, violates Part II, Article 5 of the State Constitution and contradicts the rulings of this Court.**

**A. New Hampshire’s educational funding tax system**

*1. New Hampshire relies on nominally local school property taxes to meet the State’s constitutional duty, with these taxes assessed at greatly differing rates.*

As noted above, the NHDOE calculated that in the 2018-2019 school year the State paid for 31.2 % of the cost of public education. The federal government and other sources provide 6.7% of the funding, leaving local

property taxpayers to cover the remaining 62.1% of the cost of K-12 public education (which totaled \$2,012,730,122 in 2018-2019).<sup>14</sup> This was almost exactly twice as much as the State provided, even though, as described above, the State has defined its constitutional obligation expansively and has enacted a detailed and complex set of requirements to spell out this obligation.

Because of the gap between the breadth and substance of the State’s self-defined constitutional obligation and the low level of funding the State actually provides, it is all but guaranteed that some significant portion of the funds raised by “local” school property taxes is actually being used to meet the State’s definition of adequacy. As the trial court found, in light of the State’s failure to develop a legitimate and credible formula for calculating the cost of constitutional adequacy, it is difficult to say exactly where the line should be drawn between the cost of meeting the State’s obligation and the school districts’ option to go beyond adequacy. But it cannot be seriously argued that 62% of the money spent on public schools is used for optional services that are outside of the State’s self-imposed comprehensive standards and requirements for constitutional adequacy. Nor can it be disputed that “[w]hatever 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.” *Londonderry v. State*, 154 N.H. at 162 (emphasis added).

<sup>14</sup> “State Summary [of] Revenues and Expenditures of School Districts 2018-2019,” dated December 18, 2019, on the NHDOE website: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/state-summary18-19.pdf>. A copy is also included in the Appendix to this brief at p. 30.

Under the current funding scheme, local school districts are responsible for raising more than \$2 billion — the bulk of the money spent on public education in New Hampshire. But their ability to raise money via local property taxes varies greatly because the aggregate value of real estate varies enormously from district to district. The NHDOE and the New Hampshire Department of Revenue Administration (DRA) have long measured these differences by calculating the “equalized value per pupil” of every school district, which simply means the value of the property in each district that is available to be taxed to support the education of each student.<sup>15</sup> These agencies have developed “equalization” calculations that adjust for the differing approaches to property valuations in different school districts, so that the valuations and tax rates can be compared across districts. The “equalized value per pupil” and the “equalized education tax rates” for each school district are calculated annually and can be readily compared.

In a district with a high equalized value per student, *i.e.* a “property-wealthy” district, local school tax rates can be relatively low while raising enough money to generously support its schools. In contrast, in a school district with less valuable property, a “property-poor” district, tax rates must be much higher to raise the same amount of money. The result is that the property-poor districts must impose local school taxes at much higher rates than their property-wealthy counterparts, but even when they do so,

<sup>15</sup> These calculations are available in a report, “Equalized Valuation Per Pupil, 2018-2019,” on the NHDOE website at <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/equal-pupil18-19.pdf>. A copy of this report is included in the Appendix to this brief at p. 32.

they cannot afford to support their schools at the level that property-wealthy districts can.

For the 2018-2019 school year, the NHDOE determined that the average equalized value per pupil in New Hampshire school districts was \$1,117,573.<sup>16</sup> For Portsmouth, however, the equalized value per student was \$2,710,480 per student, while for Derry and Hopkinton, two of the districts who joined this brief, it was \$708,399 and \$739,981 respectively. Derry must raise funds for its schools from property worth only about 26% of the property value per student available to support Portsmouth’s school budget. For Hopkinton, the ratio is about 27%. In Berlin, another of the districts on this brief, the equalized value per pupil was \$378,712, while in Moultonborough it was \$7,019,499. This means Berlin has property wealth per student about 5.3% (approximately 1/18<sup>th</sup>) of the property wealth per student in Moultonborough.

These differences in equalized value per student are reflected in the equalized tax rates of these districts:

<b>Town</b>	<b>Local Education Tax Rate</b>	<b>Equalized SWEPT Rate</b>	<b>Total Tax Rate</b>
Portsmouth	\$4.50	\$1.98	\$6.48
Moultonborough	\$1.83	\$1.96	\$3.79
Derry	\$14.13	\$1.87	\$16.00
Hopkinton	\$18.76	\$1.97	\$20.73
Berlin	\$15.71	\$1.71	\$17.42

<sup>16</sup> *Id.*



Even though property owners in Derry, Hopkinton, and Berlin were paying school taxes at much higher rates than those in Portsmouth and Moultonborough, spending per pupil in those three districts was lower. During the 2018-2019 school year, spending per pupil was \$18,685 in Portsmouth and \$25,687 in Moultonborough, compared with \$15,335 in Derry; \$17,175 in Hopkinton; and \$16,778 in Berlin.<sup>17</sup> These spending figures include the state adequacy aid and stabilization grants that these districts received. Comparing these school districts provides a stark picture of the disparate burdens on taxpayers and the unequal constraints on spending.

The taxpayers in Berlin, Derry, and Hopkinton must sacrifice at much higher rates to support their schools, but even after taking on this burden, they cannot spend as generously on their children's education as the residents of Portsmouth and Moultonborough. For example, based on the above spending per pupil amounts, for each classroom of 20 students, Moultonborough spent \$207,040 ( $\$10,352 \times 20$ ) more than Derry; \$170,240 ( $\$8,512 \times 20$ ) more than Hopkinton; and \$178,180 ( $\$8,909 \times 20$ ) more than Berlin per year, while paying about one-fifth to one-quarter of those towns' tax rates.

The disproportionality does not afflict just a small number of old mill towns or declining rural school districts. More than 77% of New Hampshire's school children live in school districts with below average

<sup>17</sup> NHDOE report: "Cost Per Pupil By District, 2018-2019, dated December 18, 2019, available on the NHDOE website at: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/cost-pupil-district18-19.pdf>. A copy of this report is included in the Appendix to this brief at p. 40.

equalized value per pupil.<sup>18</sup> These districts include approximately 75% of New Hampshire's property taxpayers.<sup>19</sup> All of New Hampshire's cities except Portsmouth and Lebanon have below average property values per student. This means that the taxpayers in all of these districts must sacrifice at a higher rate to support their schools. This table shows the tax rates and spending per pupil for the amici school districts and demonstrates the disparities in property wealth, tax rates, and spending that afflict the current school funding system<sup>20</sup>:

<sup>18</sup> Calculated by sorting towns from low to high equalized valuation per pupil on the NHDOE report on student enrollment and equalized value per pupil, "Equalized Valuation Per Pupil, 2018-2019," on the NHDOE website at <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/equal-pupil18-19.pdf>. This report was referenced in footnote 15. A copy of the report is included in the Appendix to this brief.

<sup>19</sup> Municipal population estimates for 2018 from NH Office of Strategic Initiatives. <https://www.nh.gov/osi/data-center/documents/population-estimates-2018.pdf>

<sup>20</sup> Columns 2 and 3 taken from Equalized Valuation Per Pupil 2018-2019 from NHDOE. Column 4 is sum of column V (local) and column W (SWEPT) in Valuations, Property Tax Assessments and Tax Rates of School Districts 2018-2019 on NHDOE website. Column 5 is column 4 multiplied by 250. Column 6 is taken from NHDOE report: "Cost Per Pupil By District, 2018-2019, dated December 18, 2019, available on the NHDOE website at: <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/cost-pupil-district18-19.pdf>. This report was referenced in footnote 17 and a copy is included in the Appendix.

**2018/19 Equalized Valuation Per Pupil and Tax Differences Among School Districts**

Town	Pupils	Equalized Value per Pupil	Equalized School Tax Rate	Tax on \$250K Home	Spending per Pupil
Bath	136	\$829,966	\$17.11	\$4,278	\$15,975
Berlin	1,070	\$378,712	\$17.42	\$4,355	\$16,779
Chesterfield	432	\$1,232,034	\$12.52	\$3,130	\$15,425
Claremont	1,706	\$422,632	\$24.08	\$6,020	\$16,755
Concord	4,375	\$920,034	\$14.64	\$3,660	\$15,658
Derry	4,893	\$708,399	\$16.00	\$4,000	\$15,336
Harrisville	85	\$2,430,549	\$8.50	\$2,125	\$20,660
Haverhill	598	\$576,863	\$22.21	\$5,553	\$18,166
Hopkinton	983	\$739,981	\$20.73	\$5,183	\$17,175
Keene	2,592	\$740,885	\$17.87	\$4,468	\$13,240
Manchester	13,901	\$805,197	\$9.19	\$2,298	\$12,389
Marlborough	266	\$720,778	\$21.76	\$5,440	\$15,684
Marlow	74	\$905,841	\$13.86	\$3,465	\$12,555
Nashua	11,579	\$948,483	\$10.94	\$2,735	\$13,261
Nelson	64	\$1,987,053	\$9.04	\$2,260	\$17,963
Newport	819	\$555,039	\$14.98	\$3,745	\$15,960
Piermont	86	\$1,184,908	\$14.06	\$3,515	\$18,950
Pittsfield	581	\$493,961	\$19.24	\$4,810	\$16,442
Warren	110	\$694,178	\$18.00	\$4,500	\$19,109
Westmoreland	209	\$827,683	\$16.71	\$4,178	\$13,831
Governor Wentworth					
Brookfield	84	\$1,508,823	\$10.55	\$2,638	\$18,646
Effingham	200	\$897,775	\$12.35	\$3,088	\$18,646
New Durham	364	\$1,343,484	\$12.62	\$3,155	\$18,646
Ossipee	563	\$1,407,322	\$10.97	\$2,743	\$18,646
Tuftonboro	253	\$4,380,406	\$6.11	\$1,528	\$18,646
Wolfeboro	716	\$3,129,647	\$7.51	\$1,878	\$18,646
Mascoma Regional					
Canaan	451	\$804,665	\$21.95	\$5,488	\$20,585
Dorchester	32	\$1,271,749	\$13.00	\$3,250	\$20,585
Enfield	426	\$1,413,413	\$15.06	\$3,765	\$20,585
Grafton	140	\$901,920	\$19.46	\$4,865	\$20,585
Orange	36	\$956,664	\$18.85	\$4,713	\$20,585
Merrimack Valley					
Andover	313	\$958,417	\$13.04	\$3,260	\$15,504
Boscawen	496	\$571,278	\$15.90	\$3,975	\$15,504
Loudon	676	\$978,391	\$12.40	\$3,100	\$15,504
Penacook	774	\$528,768	\$19.90	\$4,975	\$15,504
Salisbury	192	\$782,996	\$16.35	\$4,088	\$15,504
Webster	230	\$954,649	\$13.88	\$3,470	\$15,504
White Mountains Regional					
Carroll	57	\$6,564,347	\$8.48	\$2,120	\$18,224
Dalton	120	\$741,096	\$13.95	\$3,488	\$18,224
Jefferson	128	\$1,062,803	\$12.36	\$3,090	\$18,224
Lancaster	431	\$614,305	\$12.65	\$3,163	\$18,224
Whitefield	299	\$665,745	\$12.92	\$3,230	\$18,224
Winnisquam Reginal					
Northfield	630	\$586,110	\$12.37	\$3,093	\$16,405
Sanbornton	328	\$1,610,661	\$10.74	\$2,685	\$16,405
Tilton	476	\$1,261,020	\$11.48	\$2,870	\$16,405

As this chart shows, school districts in New Hampshire vary considerably in size. One might hypothesize that some differences in spending could be accounted for by economies of scale. But comparing property-wealthy and property-poor school districts with very similar student enrollment levels demonstrates that the disparities in property values have a great impact on both tax rates and spending per pupil in school districts of almost identical size.<sup>21</sup>

<b>2018/19 Tax Differences in Towns with Similar Numbers of Students</b>						
<b>Town</b>	<b>Pupils</b>	<b>Equalized Value per Pupil</b>	<b>Equalized School Tax Rate</b>	<b>Tax on \$200K Home</b>	<b>Tax on \$10M Business</b>	<b>Spending per Pupil</b>
Milford	2,230	\$739,014	\$18.13	\$3,626	\$181,300	\$16,082
Portsmouth	2,265	\$2,710,480	\$6.48	\$1,296	\$64,800	\$18,685
Pittsfield	581	\$493,961	\$19.24	\$3,848	\$192,400	\$16,442
Rye	543	\$4,738,085	\$5.07	\$1,014	\$50,700	\$24,727

Five of the school districts who have joined this brief<sup>22</sup> are cooperative regional school districts, authorized by RSA ch. 195, in which multiple local school districts have banded together to create one school district. These districts adopt financial agreements that specify how costs are allocated among the towns, and school taxes are assessed and collected by each municipality in the district. Even though the spending per pupil is the same across the district, disparities in school tax rates exist from town to town within these regional school districts because of the variations in

<sup>21</sup> See the NHDOE data sources described in footnotes 18 and 20.

<sup>22</sup> Mascoma Regional, Merrimack Valley Regional, White Mountains Regional, Winnisquam Regional, and Governor Wentworth School District.

property wealth in these towns. For example, the table on page 27 shows the differences in equalized values and school tax rates for the towns within the Merrimack Valley and White Mountains Regional School Districts. While two classmates at Merrimack Valley High School, one from Loudon and one from Penacook, receive access to the same level of educational resources because the spending per pupil is equal across the district, their parents pay for this education at unequal rates: \$12.40 in Loudon and \$19.90 in Penacook. This means that the Loudon parents pay \$3,100 in school taxes on a \$250,000 home, while the Penacook parents pay \$4,975 on a house with the same value, a difference of \$1,875 and more than 60% higher than the bill in Loudon.

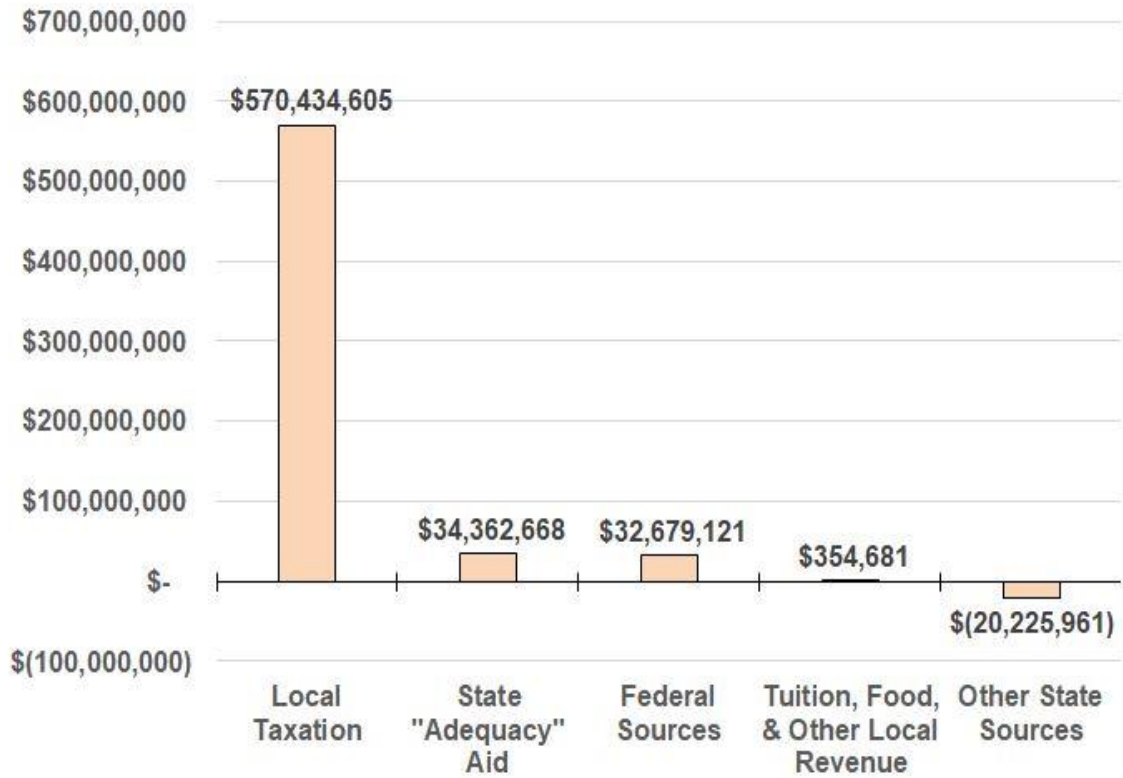
In the White Mountains School District there is a comparable inequality in the tax rates and property tax bills in Carroll and Lancaster. In the Governor Wentworth School District, where all the towns but Effingham are above average in equalized value per pupil, the differences between the school tax rates in Effingham and Tuftonboro is striking: \$12.35 in Effingham compared to \$6.11 in Tuftonboro. The school tax bill on a \$250,000 home in Effingham (\$3,088) is more than double the amount on property of equal value in Tuftonboro (\$1,528). These differences increase tension in many regional school districts, sometimes prompting public pressure for withdrawal in individual towns.

*2. School property tax inequities have worsened across the State since 2008, with the State aid to education stagnating and equalized property value per student increasing in some communities and falling in others.*

The current adequacy formula was created by the Legislature in 2008. Since then, the amount of property taxes levied to support New Hampshire's public schools has increased by more than \$500 million. During the same period, state funding has largely stagnated, with very small increases in adequacy grants being largely offset by cuts in other state support for school districts, such as the elimination of building aid. The following chart demonstrates this pattern<sup>23</sup>:

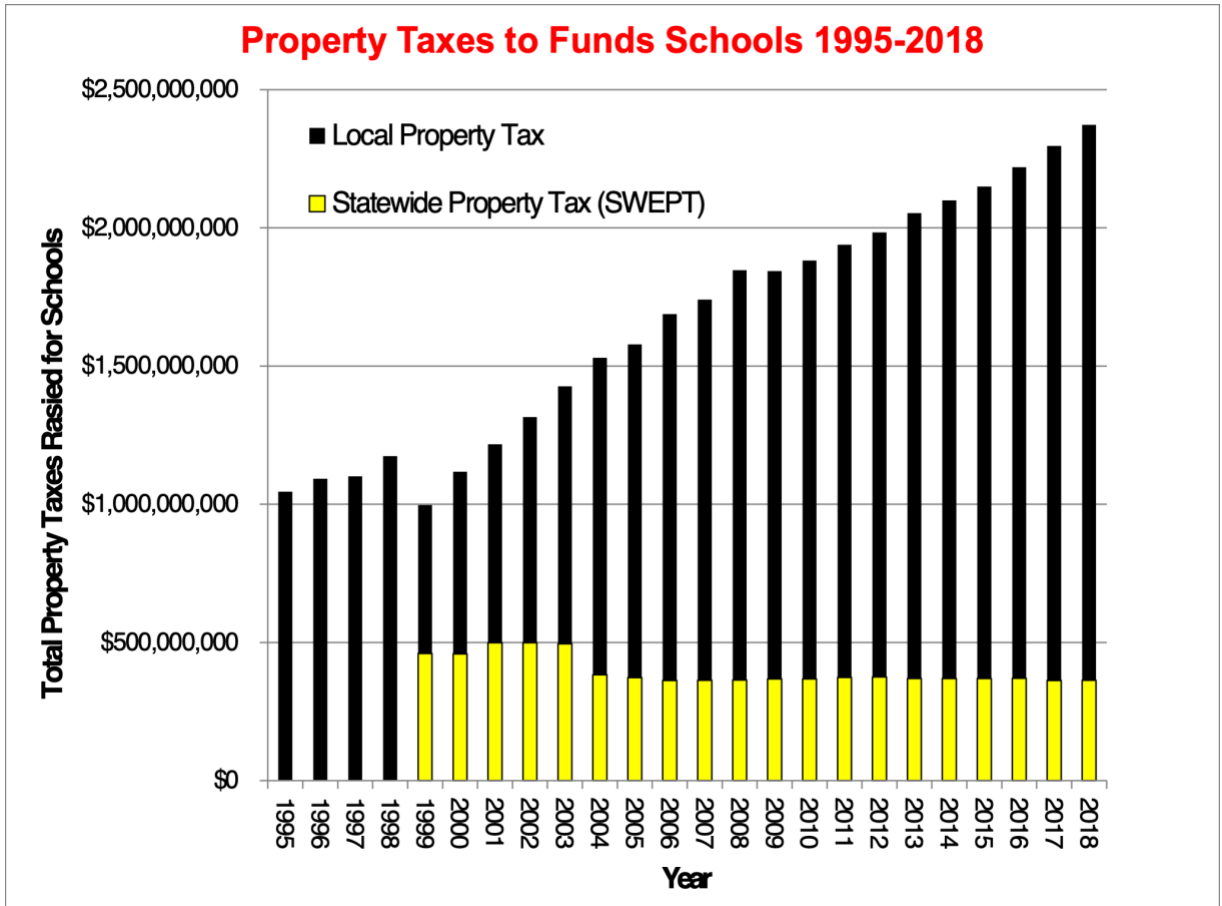
<sup>23</sup> This chart is based on the NHDOE annual report, "State Summary Revenue and Expenditures of School Districts" from 2007-2008 through 2017-2018. These reports are available at <https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-education-statistics/financial-reports>. A copy of the 2018-2019 report is in the Appendix to this brief.

## 2008 to 2018: Change in School District Revenue



Local school taxes have climbed over the past two decades from their brief decline after this Court issued its *Claremont II* decision, while the amount raised by SWEPT, a state tax at least in name, has been virtually unchanged

since 2003. The following chart shows these two contrasting patterns.<sup>24</sup>



The growing chasm in equalized values per student between some property-wealthy and property-poor communities has aggravated this problem. Towns such as Pittsfield, Berlin, and Claremont have seen significant drops in their tax bases, leading to decreases in their equalized values per pupil. At the same time, the aggregate value of property in

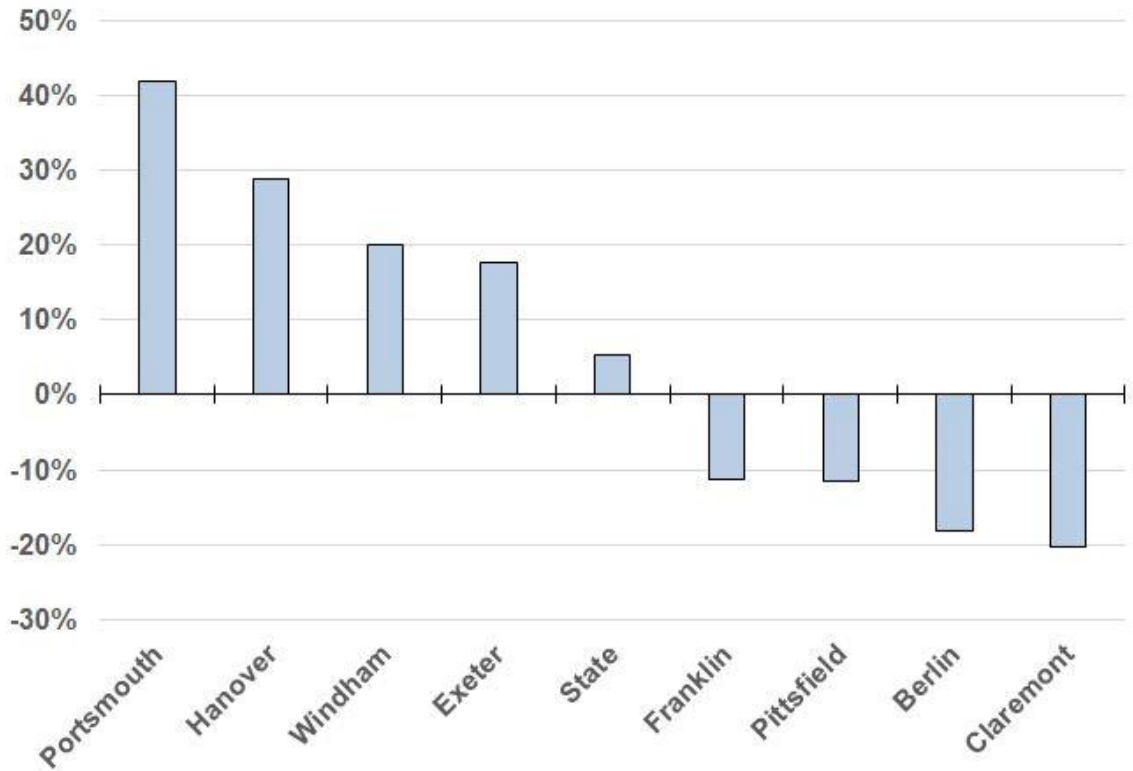
<sup>24</sup> Total property tax data taken from each annual State Summary Revenue and Expenditures of School Districts by NHDOE. The SWEPT portion is broken out of the total based on annual NHDOE spreadsheets identifying SWEPT contribution to state adequacy aid.



places such as Portsmouth and Hanover has increased significantly. In districts with declining property values, even if a school district's budget remains flat, the tax rate must increase to make up for the loss in the value of the taxable property. In contrast, a wealthy district can raise the same amount of money for its schools at an even lower rate because there is more valuable property to tax. This spiral exacerbates the inequalities in school districts' ability to support their schools and increases the disparities in their tax rates. The following chart demonstrates these contrasting trends<sup>25</sup>:

<sup>25</sup> This chart is based on NHDOE's annual report, "Equalized Valuation Per Pupil" for 2007-2008 through 2017-2018. These reports are available at <https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-education-statistics/financial-reports>.

## Equalized Property Value - Change 2007 - 2017



B. Petitioners raised a valid challenge to both the SWEPT and local property taxes.

The Petitioners alleged in their pleadings that the State’s failure to fully fund a constitutionally adequate education compelled local districts to raise the majority of their funds through local education taxes at disparate rates. These disproportionate and unequal school tax rates violate Part II, Article 5 of the New Hampshire Constitution, and the express commands of *Claremont II* and subsequent opinions. The Petitioners asserted that “[t]he State obtains a majority of the funds for base adequacy aid by the Statewide

Education Property Tax (SWEPT) collected pursuant to RSA 76:3,” Def. Appx. I at 386, ¶ 123, and that SWEPT’s rate has been decreased over time, *id.* at ¶ 124-25. Therefore, local communities “have had to increase their tax rates to make up for decreased or stagnant state aid with increasing educational expenditures.” *Id.* at ¶ 127. To support the claim, the Petitioners presented as evidence the public tax rates for each municipality in 2018 as published by the New Hampshire Department of Revenue Administration. Def. Appx. I at 448-56.

The State sought to dismiss this claim, contending that the Petitioners did not assert that the SWEPT is applied disproportionately, nor that it results in the delivery of a constitutionally inadequate education. Def. Appx. I at 286-87. The Petitioners’ claim, however, went beyond the SWEPT. They specifically asserted that “[e]ducation property taxes vary greatly throughout the state,” and that “[t]he State cannot constitutionally fund education through tax rates that vary by more than 400% throughout the state.” *Id.* at 389, ¶ 152, 157.

Although the trial court correctly ruled that the Petitioners sufficiently alleged a constitutional challenge to the SWEPT and denied the State’s motion to dismiss, the court declined to rule on the constitutionality of the current education tax system. The court reasoned that because its order invalidated RSA 198:40-a, II(a), it invalidated any starting point for determining any “gap” in SWEPT and, thus, the claim could not be addressed. Def. Appx. Decisions at 126. Specifically, it ruled that whether the SWEPT has an unconstitutional effect as a product of that statute is a question not ripe for adjudication. *Id.* at 133.

The trial court erred by not addressing this issue. This error stems from the Petitioners' mislabeling of their challenge regarding disproportional property taxes, which was perhaps inappropriately styled as simply a challenge to the SWEPT. In fact, the ongoing and flagrant violation of the State Constitution's command that the taxes raised to meet the State's educational duty must be proportional and reasonable, *i.e.* uniform in rate, is ripe for adjudication and should be addressed at this time.

Both the State's argument, and the trial court's framing of it, miss the point and misunderstand the real nature of the State's education tax funding scheme. The trial court stated: "The Petitioners have asserted that the SWEPT, in concert with RSA 198:40-a, II(a), violates Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution because it has caused communities like ConVal, Winchester, Monadnock, and Mascenic, to increase their tax rates to make up for decreased or stagnant aid with increasing educational expenses." *Id.* at 96 (emphasis added). Contrary to the trial court's wording, it is not the SWEPT that "causes" communities to raise tax rates. Rather, it is the whole education tax scheme, of which SWEPT is merely a part. Any argument that focuses solely on the amount or proportionality of the SWEPT misses the big picture: property taxes used to fund public education in the state are disproportionate. As explained above, more than 70% of the cost of education is paid for by property taxes. "Local" education property taxes pay for more than 60% of the cost and the "state" property tax, or SWEPT, pays for about 11.4%. Despite the nominal distinction between the two components of the school property tax,

the Petitioners' challenge to the SWEPT must be understood as a challenge to the entire tax scheme.

C. The State's overall tax system for funding education is not proportional and, therefore, not constitutional.

As this Court has clearly explained, "Part II, article 5 of the State Constitution provides that the legislature may 'impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state.' *Claremont II*, 142 N.H. at 468. "This article requires that 'all taxes be proportionate and reasonable - that is, equal in valuation and uniform in rate.'" *Id.* (quoting *Opinion of the Justices*, 117 N.H. 749, 755 (1977)). "The test to determine whether a tax is equal and proportional is to inquire whether the taxpayers' property was valued at the same per cent of its true value as all the taxable property in the taxing district.'" *Claremont II*, 142 N.H. at 468 (quoting *Bow v. Farrand*, 77 N.H. 451, 451-52 (1915)). The Court, while acknowledging that "the State, through a complex statutory framework, has shifted most of the responsibility for supporting public schools to local school districts," held that the purpose of education taxes were "overwhelmingly a State purpose." *Claremont II*, 142 N.H. at 469. Put another way, "[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." *Id.*

Based on that, the Court unequivocally held: "To 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. This Court has reiterated this requirement several times. *See Opinion of the Justices*, 145 N.H. 474, 478 (2000) (“If the legislature chooses to use a property tax, however, the tax must be equal and proportional across the State.”); *Opinion of the Justices*, 142 N.H. 892, 902-03 (1998).

The Legislature has continued to choose the property tax as the primary method to fund education, through a mix of both the SWEPT and local taxes, with local taxes providing more than five times the SWEPT’s level of funding. As outlined above, it is plain that the taxes used to fund schools are not proportional throughout the state, notwithstanding that the small portion referred to as the SWEPT might technically be so. Focusing solely on the SWEPT is a disingenuous way to analyze the issue, however, as the nominal separation between SWEPT revenue and “local” revenue is a distinction without a difference for most, if not every community.

There is no practical difference between how the SWEPT and “local” education property taxes are collected and used, as both amounts are raised by the locality and remain there. The State’s selective focus on the SWEPT and the fact that the SWEPT rate is the same across the state ignores the disproportionate local tax rates across the state which, as noted above, are used to raise funds to meet the State’s adequacy duty because the State’s adequacy formula is so deficient. Per this Court’s precedent, all property taxes that pay for education (up to the point of what is truly required for an adequate education) are state taxes and must be proportional. This is true whether the tax expressly has “statewide” in its name or not.

Under the current funding scheme, with an adequacy formula far below any reasonable estimate of the cost of meeting the State’s definition of adequacy (or the broad principles laid out by this Court), the State knows and expects that local communities must levy local school taxes, with their greatly disparate rates, to fill in the funding gap left unmet by the State. Rather than allow the State’s funding failure to cripple their ability to provide students with an adequate education, the local school districts, and their taxpayers, have stepped up and done the State’s job. The consequences of the State’s abdication of its responsibility fall very unevenly on property taxpayers across the state. The State cannot argue that state education taxes are proportionate in rate while ignoring this reality and taking no action to rectify the obvious disparity. In the words of this Court, “[t]he legality of such a wrong can be maintained only by a failure to understand what taxation is,” which is “an equal division among the members of the community of an expense incurred by them for their common benefit.” *Robinson v. Dover*, 59 N.H. 521, 526 (1880).

As noted earlier in this brief, this Court has made clear that “[w]hatever 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.” *Londonderry v. State*, 154 N.H. at 162 (emphasis added); *see also Opinion of the Justices*, 145 N.H. at 477-78 (“[T]he New Hampshire Constitution imposes solely upon the State the obligation to provide sufficient funds for each school district to furnish a *constitutionally* adequate education to every educable child.”). Regardless of what the State includes in the definition of adequacy or what the overall cost to include all of those attributes ends up

being, it is the State's obligation to fund to that level, and, if accomplished through any sort of property tax, it must be at an equal and proportionate rate throughout the state. It is plain that the State's current system for funding education, which includes the SWEPT but unquestionably necessitates property taxes at highly unequal rates above and beyond that, is not proportionate and, therefore, not constitutional. This Court's interpretation of this issue "has been consistent and to advise otherwise now would be the first step down a dangerous path leading to frustration of the document upon which our government rests. The language of our constitution commands that taxes be no less than fair, proportional, and reasonable." *Opinion of the Justices*, 142 N.H. at 902.

D. While the trial court should have addressed this issue in the first instance, it is within this Court's authority to resolve this issue now without needing to remand back to the trial court.

The trial court was incorrect in ruling that determining the exact amount required for an adequate education was necessary to rule on the question of whether the current system of disproportionate tax rates violates Part 2, Article 5 of the State Constitution. It cannot be reasonably disputed that the current formula for determining the cost of an adequate education is not at all congruent with the broad scope of constitutional adequacy as the Legislature itself has defined it. The dollar level is unrealistic and insufficient by any measure and defies common sense. This being the case, it is clear that local districts have been forced to use their "local" school property taxes to make up the difference to reach the level of adequacy, whatever the correct adequacy amount may be, and that they are doing so at widely different tax rates. *See* Def. Appx. I at 448-56 (DRA tax rate chart).



No matter what the Legislature determines to be the exact cost of an adequate education, a system that pays for it by requiring some towns to use a massively higher tax rate than others is blatantly unconstitutional and “destroys the theory of equality of taxation of all inhabitants, residents, and estates, not through the subtle medium of exemption, nor by reason of the varying standards of municipal assessments, but by deliberate legislative enactment.” *State v. U.S. & Canada Express Co*, 60 N.H. 219, 224 (1880). This Court should unequivocally state (again) that the State’s current system cannot be allowed to continue, and, this time, set a deadline for compliance.

In the interest of judicial economy, this conclusion can and should be reached now. *See State v. Porelle*, 149 N.H. 420, 422 (2003) (addressing constitutional claim in interest of judicial economy); *State v. Brosseau*, 124 N.H. 184, 195 (1983) (Douglas and Batchelder, JJ., concurring specially) (“In light of the fact that constitutional claims have been presented in these cases, and because the New Hampshire Legislature is currently studying proposed legislation which would overrule the implied waiver doctrine as a basis for resolving cases like these on statutory grounds, . . . in the interest of judicial economy, these cases should have been decided on a constitutional basis so that we will not be required to adjudicate these issues again in the near future and to be of assistance to the legislative study.”). It is incontrovertible that the State has not remedied the violation of Part 2, Article 5 struck down by this Court more than two decades ago. More court proceedings at the trial level or in this Court are not needed or desirable; further discovery, fact finding, or legal analysis

would serve only to prolong the already lengthy saga of school funding litigation in New Hampshire.

This Court may take judicial notice of the tax rates, published by the DRA and NHDOE and presented by the Petitioners to the trial court, in concluding that the tax rates paying for education in this state are widely disparate. *See* N.H. R. Ev. 201 (permitting court to take judicial notice of facts that are not subject to reasonable dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned); *Appeal of Public Service Co. of New Hampshire*, 170 N.H. 87, 92 (2017) (affirming BTLA’s decision when the BTLA “took judicial notice of the DRA’s equalization process”); *Johnson v. Lucas*, 664 S.E.2d 79 (N.C. 2008) (affirming award of damages that the trial court determined by taking judicial notice of the applicable tax rates); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 292 (9th Cir. 1975) (“We can see absolutely no reason why a court cannot admit evidence of the tax payments that a decedent or an injured earner would have been required to make, taking judicial notice of the current tax rates, and cautioning the jury to consider future changes. . .”); *see also Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 421, 445 (1934) (taking judicial notice of the economic conditions of the Great Depression, which served as a sufficient basis for Minnesota’s emergency enactment of a statute and stating it was “futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here” because “[t]he particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil”).

In light of more than twenty years of legislative irresolution, this Court would not be overstepping its bounds to hold the State accountable for failing to meet its constitutional duties regarding education funding. Time and again, this Court has been careful to observe its role in relation to the legislative and executive branches. However, this Court has also noted that any such deference has limits. *See Londonderry v. State*, 154 N.H. at 163 (“[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.”) (citing *Petition of Below*, 151 N.H. 135 (2004)). In other circumstances, this Court has recognized the necessity of stepping in when the legislature has failed to fulfill one of its responsibilities. For example, in *In re Below*, 151 N.H. at 136, 151, the New Hampshire legislature failed to reapportion the house and senate during its session, despite its constitutional mandate to do so and despite having had an adequate opportunity to do so. The task then fell to the Court to reapportion and safeguard voting rights in the state. *See also Burling v. Chandler*, 148 N.H. 143, 144 (2002) (“Therefore, when the legislature has failed to act, it is the judiciary’s duty to devise a constitutionally valid reapportionment plan.”); *Monier v. Gallen*, 122 N.H. 474, 476 (1982) (“[T]he petition before us is a particularly appropriate action when the parties desire and the public need requires a speedy determination of the important issues in controversy.”) (citation omitted). Although those cases dealt with redistricting, the same principle should be applied here as “[i]t 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. [This Court] would shirk [its] duty were [it] to decline to act in

this case merely because our task is a difficult one.” *Monier*, 122 N.H. at 476.

In fact, education is a realm of law and policy where the Court is perhaps better suited to weigh in. As one commentator opined: “Courts have inherent strengths that are particularly well suited to shepherding the implementation of the kind of reforms that are needed for success in sound basic education cases.” Michael A. Rebell, *Courts & Kids: Pursuing Educational Equity Through the Courts*, 51-52 (2009). “Compared with elected officials, courts are an independent body and are relatively insulated from political pressure. Judges are oriented to delve deeply into issues and to explore and deal with them in depth, even when they reveal difficult and politically thorny problems. They have “staying power” and an ability to respond flexibly to changed circumstances that legislatures and executive agencies lack.” *Id.* (citations omitted). “[J]udicial intervention is especially justified when there is a substantial malfunction in the democratic processes of one or both of the other political branches,” as “often occurs in decision making on educational finance and sound basic education issues” because “the legislative process, left to its own natural political propensities, will tend to create education finance systems that strongly disfavor urban and rural school systems.” *Id.*; see also Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Constitutional Structure, Education Finance, and the Separation of Powers Doctrine*, 33 *Land & Water Law Rev.* 281 (1998) (“[T]he very fact that state legislatures are comprised of locally elected officials to some degree works against the development of a coherent, comprehensive solution to a statewide problem that some legislators are likely to acknowledge, even if only privately.”).

Although this 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.” *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 160-61 (1998). “For this to occur our co-equal branches of government must act.” *Id.* at 160; *see also* *Rebell, Courts & Kids: Pursuing Educational Equity Through the Courts*, at 53 (“[C]ourts have an important and continuing role to play in ensuring effective implementation of funding and programmatic reforms if America is to meet the educational challenges it faces. This does not mean, however, that courts can accomplish this task alone. Experience has shown that if constitutional rights in this area are to be upheld, it will be through the combined efforts of all three branches of government.”)

## CONCLUSION

For more than two decades since this Court's rulings in *Claremont I* and *II*, the State has failed to fully meet its responsibilities under our Constitution. The current funding formula pays for less than one-third of the actual cost of public K-12 education in New Hampshire. This bare-bones approach does not fit with the State's own expansive and detailed definition of a constitutionally adequate education. To fill in the funding gap created by the State, local property owners have continued to pay school taxes at highly unequal rates, and another generation of New Hampshire children has passed through school systems across the state which have been funded inequitably.

The State's ongoing failure and the resulting inequities are readily apparent from the record in this case and common sense. A remand of this case for further proceedings is unnecessary and will only prolong and deepen the harm caused by the current system. For these reasons, amici respectfully ask this Court to affirm the trial court's holding that the State's current funding formula, set out in RSA 198:40-a, violates the State's duty under Part 2, Article 83 of the New Hampshire Constitution to provide a constitutionally adequate education to all of New Hampshire's public school students.. We also respectfully ask this Court to hold that the current funding system continues to violate the requirement of Part 2, Article 5 of the New Hampshire Constitution that the taxes levied to meet the State's duty must be uniform in rate across the state. Amici request that this Court direct the Legislature to act without further delay, by July 1, 2021, to reform the current funding scheme to bring it into compliance with

the Constitution and end the injustice and unfairness that continue to afflict our school children and our taxpayers.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I John E. Tobin, Jr., hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9448 words, excluding the table of contents and the table of authorities, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

*/s/ John E. Tobin, Jr.*  
John E. Tobin, Jr., Esq.



**CERTIFICATE OF SERVICE**

I, John E. Tobin, Jr., hereby certify that a copy of forgoing brief, along with the accompanying appendix, was served this 17th day of April 2020 on counsel for the Petitioners, Michael Tierney, Esq., and Elizabeth E. Ewing, Esq., and counsel for the State/Defendants, Daniel E. Will, Esq., Anthony J. Galdieri, Esq., Lawrence M. Edelman, Esq, and Samuel R.V. Garland, Esq. through the Supreme Court's e-filing system.

*/s/ John E. Tobin, Jr.*  
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