THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2024-0121

Contoocook Valley School District, et al.,

v.

State of New Hampshire, et al.

BRIEF OF AMICUS CURIAE

STEVEN RAND, ROBETT GABRIELLI, JESSICA WHEELER RUSSELL, ADAM RUSSELL, JAMES LEWIS, AND JOHN LUNN,

PROPERTY TAXPAYERS AND PLAINTIFFS IN RAND, ET AL. V. THE STATE OF NEW HAMPSHIRE

John E. Tobin, Jr., Esq.
NH Bar No. 2556
60 Stone Street
Concord, NH 03301
(603) 568-0735
jtobinjr@comcast.net

Natalie Laflamme, Esq.
NH Bar No. 266204
Laflamme Law, PLLC
100 N. Main St, Suite 512
Concord, NH 03301
(603) 937-5434
natalie@laflammelaw.com

Wendy Lecker*
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(203) 536-7567
wlecker@edlawcenter.org
*admitted pro hac vice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW HAMPSHIRE CASES

OUT OF STATE CASES

STATUTES

CONSTITUTIONAL PROVISIONS

INTEREST OF AMICI CURAE

Amici are plaintiffs in the ongoing case of *Rand et al. v. The State of New Hampshire*, Rockingham Superior Court Case No. 215-2022-CV-00167 and Supreme Court Case No. 2024-0138 ("*Rand*"). Each of the Plaintiffs in *Rand* is a resident of New Hampshire, owns real property in New Hampshire, and pays school property taxes at widely varying and disproportionate rates to fund K-12 public education.

The Rand plaintiffs contend that these unequal tax rates are imposed by local school districts to make up the gap between the actual cost of an adequate education and the low amount of State funding, including insufficient levels of state aid for "base adequacy grants" and for "differentiated aid" for children who receive special education or whose families are low-income. As a consequence, the State's responsibility to provide an adequate education has been shifted to local property taxpayers who pay non-uniform rates, which are unconstitutional under Part II, Article 5 of the New Hampshire Constitution.

The *Rand* case is currently pending before the Rockingham Superior Court. The trial on the merits began on September 30, 2024. Thus, Amici have a vested interest in the outcome of this case, as it concerns many of the same questions of fact and law related to the State's obligation to fund an adequate education for all public-school students and to fund that education with taxes at uniform rates across the state.[1] Moreover, given

[1] The issues before the Superior Court in the *Rand* case include a challenge to the statutory amount of base adequacy, challenges to the amount of differentiated aid grants, and a claim based on Part II, Article 5 and the holdings in the *Claremont* cases that local education taxes assessed at disproportionate rates, which are used to fill in the gap in state adequacy payment levels, are unconstitutional. Thus, one of the issues in the two cases, the sufficiency of base adequacy grants, is the same, but the scope of the *Rand* case is broader. The *Rand* trial is scheduled to conclude on October 11, 2024, and the plaintiffs intend to seek an expedited post-trial briefing schedule. If the case is appealed, the issues in the *Rand* case will likely be

Amici's thorough examination of these questions in preparation for the *Rand* trial, Amici can provide additional insights and arguments that may assist the Court in making its determination in the instant case.

SUMMARY OF ARGUMENT

The trial court's decision was a valid exercise of judicial authority and must be upheld. After hearing overwhelming evidence that no school district in New Hampshire could possibly provide anything close to an adequate education with the amount of money provided by the base adequacy grants, the trial judge determined that the constitutional rights of the state's public school students were once again being violated, and he established a threshold for base adequacy as initial guidance for the legislature to create a constitutional funding scheme.

In this appeal, the State attacks the trial court's decision to address the constitutionality of the base adequacy grant, which has always been the sole legal issue in this case, rather than broadening the case beyond the scope of the plaintiffs' complaint to include the separate grants for differentiated aid for certain categories of students. The State's attempt to recast the plaintiff's validly stated claim is inappropriate. Moreover, the court accommodated any concern of the State's by prohibiting the plaintiffs from adding to the calculation of base adequacy any funds spent on special services for students who would be eligible for differentiated aid, thus protecting the State from any double billing. Furthermore, even if the amount of the differentiated aid program had been considered by the court, the combined total of these grants is so low that it is significantly lower

---

before this Court in a matter of months. Two issues in the Rand case related to the Statewide Education Property Tax (SWEPT) are already before this Court. Docket, No. 2024-0138.

than the trial court's bare-bones threshold, and thus would not have changed the outcome of this case.

The other two claims in the State's brief essentially ask this Court to remove itself from ever determining whether the State is violating the constitutional right to an adequate education. These arguments, expressed in the name of the principles of "separation of powers" and "justiciability," ignore this Court's precedent, and precedent from courts across the country that the judiciary has the authority – and indeed the duty – to protect the constitutional rights of students and taxpayers in disputes with the State about the State's duty to provide a constitutionally adequate education. This Court should summarily reject the State's attempt to find yet another way to evade meeting its duty under the New Hampshire Constitution.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO FOCUS ON BASE ADEQUACY WAS APPROPRIATE.

The State's contention that the trial court was required to consider other components of adequacy aid is incorrect. As this Court has previously noted, the legal question in this case is now and has always been the same: "At issue in this case is the cost amount set forth in RSA 198:40-a II(a)." *Contoocook Valley School District v. State*, 174 N.H. 154, 159 (2021) (*ConVal*). This statute sets the cost of "base adequacy aid." The trial court appropriately addressed the legal question presented in the case before it.

A. IN ITS DECISION TO ADDRESS ONLY THE BASE ADEQUACY GRANT, THE TRIAL COURT PROTECTED THE INTERESTS OF BOTH THE PLAINTIFF SCHOOL DISTRICTS AND THE STATE.

In this case, which was first filed more than five years ago, the plaintiff school districts have consistently argued that the base adequacy amount was so low that it was impossible to provide a constitutionally

adequate education for this sum. After a remand by this Court[2] and a three-week trial, the trial court found that this amount was far below the minimum required to fulfill the State's duty. Now the State attacks the trial court's ruling, not because the State put forward any evidence to justify the current cost figure, but because the trial court did not expand the case beyond the scope of the plaintiffs' complaint to include the separate adequacy grants for "differentiated aid." State's Brief at 21-24. In doing so, the State ignores the trial court's ample justification for refusing to grant the State's request to unilaterally enlarge the scope of the case.

The statute at issue prescribes four different categories of grants under the adequacy rubric. *See* RSA 198:40-a II (a)-(d). Subsection (a) creates the base adequacy grant that is to be provided for every student. The other three sections, referred to as "differentiated aid," are not universally applied to all public school students. Instead, they are only provided for students who meet specific criteria: eligibility for the federal free and reduced-cost lunch (an indicator of family poverty); eligibility for special education services (students with disabilities) and English language learners (students whose primary language is not English).[3]

As the trial court emphasized, a school district receives a base adequacy grant for every student, but the number of students who qualify for the other three grants varies considerably and is not comprehensive. *See* App. I, 40-41.[4] As the trial court also noted, it is possible that a district may have few or no students who fit the categories for differentiated aid. *Id.* Base adequacy grants are the largest and only all-inclusive adequacy grant.

---

[2] This Court remanded this case to address the "mixed question of law and fact" as to "whether the amount of funding set forth in RSA 198:40-a II(a) is sufficient to deliver the opportunity for an adequate education." *ConVal*, 174 N.H. at 167.

[3] A fourth category, for students who score below proficiency on third grade reading tests, was repealed in 2023.

[4] "App. I" stands for Volume I of the State's Appendix.

Given the unique scope of these base adequacy grants, the plaintiff school districts were justified in focusing their case on them. While the State argues in effect that the plaintiffs should have been compelled to greatly broaden their case to include challenges to the three differentiated aid categories, its brief provides no support in caselaw or court rules for this notion.

During the course of this litigation, the trial court repeatedly and carefully considered the State's arguments on this point. *See* Order on Cross Motions for Summary Judgment (App. I, 8-9); Order on Motions in Limine (App. I, 30-31); Order on the Merits (App. I, 40-41). In its Order on the Merits, the trial court summarized the reasoning for its decision to reject the State's request that differentiated aid be part of the calculus when interpreting the base adequacy statute. *See* App. I, 40-41. But in doing so it protected the State's interest by making clear that it would not allow the plaintiffs to include the cost of extra services provided to students eligible for differentiated aid in the calculation of the cost of base adequacy. *See id.* The court reasoned that "'differentiated aid is intended to fund extra services for those pupils who meet the statutory criteria,' and the State's approach could improperly divert differentiated aid funds to other purposes." (citing RSA 198:40-a)." But the court recognized that "costs attributable to the extra services contemplated by the differentiated aid scheme cannot support the plaintiffs challenge to the amount of base adequacy aid." App. I, 40. "In the Court's view, under the current statutory scheme, a school must be able to provide the opportunity for an adequate education if it had no students who qualified for differential aid. In fact, as the evidence at trial clearly demonstrates, many schools receive very little differential aid." *Id.* at 40-41. In addressing the State's concern about counting expenses for students eligible for differentiated aid in the calculation of the base adequacy standard, the trial court found a way to

address the State's concerns while not usurping the plaintiff school districts' decision to focus their case solely on base adequacy grants.

Unfortunately, in its brief, the State mischaracterized this thoughtful approach as an effort by the trial court to "micromanage a legislative costing formula." State's Brief at 22. The brief went on to say that the trial court "expressed a view that the Legislature must appropriate a single per pupil amount of base adequacy that covers the cost of an adequate education statewide," citing this same section of the trial court's order and adding that "[t]his approach amounts to judicial policy making." State's Brief at 22 (citing App. I, 40-41). However, as a review of that section of the Order makes clear, the trial court made no such statement. The State is being disingenuous at best in characterizing the trial court's approach in such an inaccurate and inflammatory way. It is beyond dispute that it was the Legislature, and not the trial court or this Court, that created the base adequacy grant and set a universal per-pupil amount for the whole state. *See* RSA 198:40-a, II. The trial court was simply assessing a challenge to the constitutionality of the base adequacy statute enacted by the Legislature, in a case brought forward in the appropriate legal forum by the plaintiff school districts.[5]

[5] The amicus brief filed by four former members of the New Hampshire Commission to Study School Funding also repeatedly attacks the trial court's decision as an example of a narrow and unsanctioned "Uniform Per Pupil Input Costing' assertion." Former Commissioners Brief, at 28-29. The brief accurately notes that this Court held in *Claremont II* that the right to a constitutionally adequate education does not require "horizontal resources replication form school to school and district to district." *Id*. at 35 (citing *Claremont II*, 142 N.H. at 473-474). Inexplicably, these veteran legislators do not acknowledge that neither this Court nor the trial court created the uniform statewide base adequacy standard in RSA 198:40-a II-a, and their brief roundly criticizes the trial court for following this model in its order. Their brief, which is in large part a policy discussion more suitable for the State House than the courtroom, includes several suggestions for alternate approaches. But attacking the trial court for following the structure they themselves created is nonsensical and not credible.

As this Court noted in *Claremont II* – and the State acknowledged in its brief, "the cost of a constitutionally adequate education may not be the same in each school district." State's Brief at 23 (citing *Opinion of the Justices (Reformed Public School Finance System)*, 145 N.H. 474, 478 (2000)). If the State now contends that a universal per-pupil grant is unwise public policy, the Legislature can always create a new funding approach. In the meantime, castigating the trial court for working within the framework the Legislature itself set up is absurd and unfair.

The trial court decided that it should not go beyond the plaintiffs' challenge to the base adequacy grant, but it also protected the State from any effort by the plaintiffs to include in the calculation of base adequacy the cost of any extra services provided for pupils who fit into the differentiated aid categories. This approach was fair to both parties and should be upheld.

B. EVEN IF THE TRIAL COURT HAD CONSIDERED THE DIFFERENTIATED AID GRANTS ALONG WITH THE BASE ADEQUACY AMOUNT, THE COURT'S RULING WOULD HAVE BEEN THE SAME BECAUSE THE TOTAL OF ALL OF THESE GRANTS FALLS BELOW THE COURT'S VERY CONSERVATIVE BENCHMARK OF $7,356.01 FOR BASE ADEQUACY.

In its Order on the Merits, the trial court painstakingly reviewed the evidence adduced during the three-week trial in the case and determined that "a very conservative" benchmark for base adequacy under the current statutory scheme would be $7,3056.01. App. I, 39. The trial court repeatedly emphasized that the definitive decision about the level of base adequacy was up to the Legislature, and that this benchmark was intended to set a threshold for the Legislature to consider. App. I, 79. As it evaluated the evidence and calculated what the components of such a starting point would be, the trial court reduced all the amounts of these individual calculations by percentages of at least 5% and sometimes 25% or more, and it entirely eliminated certain costs that had been proposed by the plaintiffs.

See, e.g., App. I, 80. In doing so, the trial court expressed a commitment to err on the side of caution and frugality and to give deference to the Legislature as the final decision-maker. App. I, 71, 79, 81-82. As the trial court said: "In total, these conservative choices and overcorrections demonstrate that a base adequacy aid figure of $7,356.01 would in actuality be far too low and would likely not survive scrutiny." App. I, 88.

It is a measure of the insufficiency of the current base adequacy grant that, even when the total of both base adequacy grants and all differentiated aid grants are considered, not one district receives total adequacy payments that equal the trial court's bare-bones calculation for base adequacy. The State provides data regarding the amount of aid each district receives in total adequacy (base and differentiated aid). Using the student population numbers of the districts (also provided by the State), it is possible to calculate how much total adequacy a district receives per student. In 2022-2023, the state average was $5,148 per child per district for both base adequacy and all differentiated aid. *See* N.H. Dep't of Education, Municipal Summary of Adequacy Aid (2022-2023), https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/adequacy-fy-24-muni-summary-4.1.24_0.pdf (last accessed Oct. 3, 2024). The trial court's minimum amount of $7,356.01, which the court found would very likely be insufficient, still exceeds the average by more than $2,000 per pupil.

Thus, if this Court concludes that the trial court should have considered differentiated aid funding in determining a threshold for the base adequacy grant, that approach would not have changed the outcome of the case. The current adequacy grant standard of $4,100 is so low that even when it is combined with the actual amounts of differentiated aid provided to every district, it does not come close to meeting the trial court's very

conservative minimal target.[6] For the reasons set out above, amici assert that the trial court's decision was **correct,** but if this Court concludes otherwise, it should not undo the trial court's ruling. Where a mistake by a trial court is harmless, this Court should not overturn the trial court's decision because of that error. *See, e.g.*, *State v. Boudreau*, 176 N.H. 1, 13-14 (2023) (affirming the trial court and holding that that trial court's error in admitting evidence during the State's case in chief was harmless); *see also Bradsher v. Sherwood Forest Manufactured Homes, Inc.*, No. 2006-0080, 2007 WL 9619441, at *1 (N.H. May 1, 2007) (concluding that any error in the admission of evidence by the trial court was harmless and affirming the trial court's judgment).

II. THE STATE'S ARGUMENTS ABOUT "SEPARATION OF POWERS" AND "JUSTICIABILITY" ARE A SMOKESCREEN INTENDED TO DISTRACT THIS COURT FROM THE STATE'S CHRONIC PATTERN OF INACTION AND NEGLECT IN FULFILLING ITS CONSTITUTIONAL DUTIES.

In every school funding case that has come before this Court in the past 31 years, the Court has expressed a deep understanding and deference for the role of the Legislature in making educational and tax policy and has made clear that the role of the court is to hear cases brought before it and enforce the constitutional rights of the people of New Hampshire. *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 187 (1993); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 469 (1997); *Opinion of the Justices (Sch. Fin.)*, 142 N.H. 892, 897 (1998); *Londonderry Sch. Dist. SAU No. 12*

[6] The State relies on similar data, from FY21, which was presented during trial to argue that it provides districts with far more than base adequacy. State's Brief at 23, fn 2 (referencing Pls.' Ex. 678 at 1, 12), The State does not mention that the amount cited for Berlin includes the total adequacy funding *plus* other non-adequacy grants such as stabilization aid. Such aid is not considered adequacy funds, not should it be because it is not guaranteed, and indeed the State has often phased out these types of grants for school districts.

v. State, 154 N.H. 153, 163 (2006). The trial court followed this approach in all of its orders in this case, taking a respectful and measured approach to its responsibilities and acknowledging the Legislature's pre-eminent role in designing and funding the State's school funding system. *See* Order on Cross Motions for Summary Judgment (App I, 14); Order on the Merits (App. I, 71); Post-Trial Order (App. I, 96). Nonetheless, it is important to accurately summarize the overall course of school funding litigation over the past three decades, and the differing responses of the judicial and legislative branches of our state government. It has proceeded through several steps:

1) The courts, in response to repeated claims by school districts, parents, students and taxpayers that the State is acting in violation of their constitutional rights, set out the broad constitutional principles that must serve as guardrails for the school funding system, while explicitly and repeatedly acknowledging the primacy of the Legislature in creating and designing the school funding system.

2) The Legislature has not meaningfully fulfilled its responsibility to uphold the Constitution and has repeatedly put off or declined to adopt measures that would bring the system into compliance with the Constitution and the orders of the courts.

3) As the result of the Legislature's inaction and neglect, the rights of school districts, students, parents, and taxpayers continue to be violated, causing significant and often permanent harm and loss.

4) When these New Hampshire citizens return to the courts to enforce their constitutional rights, the State offers no evidence to defend the current system, but simply engages in procedural arguments and delay.

5) The courts again have found that the claims of continuing violation of constitutional rights are valid and indisputable, and they once again direct the Legislature to make the discretionary policy, spending, and

revenue-raising decisions that are required to cure the constitutional violations.

6) Out of substantive defenses, the State responds with arguments and proposals designed to put enforcement of these constitutional rights out of reach of the courts and the people of New Hampshire. At first, this approach led to proposed constitutional amendments that would have stripped the courts of their constitutional role in school funding matters or would have weakened or eliminated the underlying rights. No such constitutional amendment has ever gained widespread support.

7) When additional suits arise to defend the people of New Hampshire's constitutional rights, the State's last line of defense is the current push to deprive the people of our state of the judicial enforcement of their constitutional rights through false arguments, under the rubrics of "separation of power" or "justiciability," that the courts have exceeded their authority when they act, however respectfully and cautiously, to enforce those rights.

This is the context in which this Court should consider the State's heated but meritless arguments about the separation of powers and justiciability.

A. IT IS WELL WITHIN THIS COURT'S JURISDICTION TO INTERPRET THE STATE'S OBLIGATIONS UNDER THE CONSTITUTION

The State incorrectly argues that the questions before this Court are a violation of the separation of powers doctrine and are nonjusticiable. The State is wrong. The question of whether the State is upholding its constitutional obligation to define and fund all that is required to provide an opportunity for an adequate education is well within the power of the courts. Given the Legislature's repeated failures to act, it is the Court's responsibility to act to protect these rights.

1. Separation of Powers and Justiciability in New Hampshire

The State argues that the trial court's determination of $7,356 as the minimum base adequacy funding per pupil violates the separation-of-powers doctrine and that assessing the adequacy of education funding is nonjusticiable. State's Brief, 39. The State asserts that the New Hampshire Legislature (not the judiciary) has the sole role of defining the adequacy of education funding as mandated by the New Hampshire Constitution. *Id*. at 43. These arguments are false.

First, New Hampshire adheres to the separation of powers among its three branches. The separation of powers doctrine prohibits each branch from encroaching on the powers and functions of another branch. N.H. Const. Pt. I, Art. 37. The primary function and duty of the courts is "to say what the law is." *Saloshin v. Houle*, 85 N.H. 126, 155 (1931). It is squarely within the power of the courts to determine whether the State has met its constitutional obligation to provide an opportunity for an adequate education to New Hampshire students, as this Court has done multiple times in the past. Contrary to the State's argument, the judiciary plays the vital role of ensuring that State actions do not infringe on fundamental constitutional rights. *See State v. Gagne*, 129 N.H. 93, 97 (1986) ("The authority of the judiciary to provide a remedy guaranteed by the constitution . . . stems from the constitution itself and is inherent in the very nature of the judicial function."). In defining and funding an adequate education, the State must operate within the provisions of our constitution, which the judiciary is required to interpret. This Court has repeatedly recognized and embraced this role. *See, e.g.*, *Horton v. McLaughlin*,149 N.H. 141, 145 (2003) ("The court system [remains] available for adjudication of issues of constitutional or other fundamental rights."); *Baines v. N.H. Senate President*,152 N.H. 124, 129 (2005) ("While it is

appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation.").

Second, and relatedly, the justiciability doctrine prevents the judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government. N.H. Const. Pt. I, Art. 37. The New Hampshire Supreme Court has held in no uncertain terms that actions concerning a lack of State compliance with constitutional provisions are inherently justiciable. *See Baines*, 152 N.H. at 132 ("Claims regarding compliance with … mandatory constitutional provisions are justiciable"); *see also Richard v. Speaker of the House of Representatives,* 175 N.H. 262, 268 (2022) (holding that the question as to whether the Speaker of the New Hampshire House of Representatives and Senate President complied with constitutional mandates was "justiciable").

Moreover, this question has already been asked and answered in the realm of school funding under Part II, Article 83 and Part II, Article 5 of the New Hampshire Constitution. The *Claremont* line of cases incontrovertibly demonstrates that the determination of whether the State is abiding by its constitutional obligation to provide an adequate education is a question that is clearly within the purview of the courts and is justiciable. In *Claremont I*, this Court confirmed that the State has an obligation "to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire" and "to guarantee adequate funding." *Claremont I*, 138 N.H. at 184. There, this Court took care to abide by separation of powers principles, articulating that the responsibility of defining "the parameters of the [adequate] education" were for "the

legislature and the Governor." *Id.* at 192. The Supreme Court reaffirmed these findings in *Claremont II*, 142 N.H. at 475-76.[7]

After *Claremont II*, the State finally passed RSA 193-E:2 in an attempt to define an adequate education. 1998 N.H. Laws Ch. 389:1. However, RSA 193-E:2 simply provided a list of skills and subject areas, which meant that this Court again had to provide guidance. That came in *Londonderry*, where this Court held that the legislature had failed to meet the Court's mandate because its definition of an adequate education was still too vague. *Londonderry*, 154 N.H. at 155 . The Court once again urged the legislature to take action, stating that if it again failed to sufficiently define an adequate education, the judicial branch would be required to step in. *Id.* at 163 ("We agree with [the] concern that this court or any court not take over the legislature's role in shaping educational and fiscal policy. For almost thirteen years we have refrained from doing so and continue to refrain today. However, *the 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*.") (emphasis added).

At each juncture, when the question arose, this Court has determined that the authority to determine the constitutionality of the States' school funding system is inherent in its role under our constitution. There is no reason to deviate from that approach here. Indeed, if these rights are to

[7] In its previous ruling in this case, this Court explicitly held that the plaintiffs' allegations that the State has failed to meet its obligation to fully fund an adequate education as required by Part II, Article 83, of the New Hampshire Constitution by underfunding base adequacy aid stated a viable claim. *ConVal*, 174 N.H. at 162. Thus, the Court has already recognized that challenging the base adequacy amount was a proper constitutional claim to adjudicate.

endure rather than fade away, it is imperative that this Court respectfully but firmly reassert its constitutional role. *Cf. Below v. Gardner*, 148 N.H. 1, 786 (2002) (holding that the Supreme Court was required to enact a new district plan "because the New Hampshire Legislature failed to enact a new district plan for the New Hampshire Senate following the 2000 census.").

2. Separation of Powers and Justiciability in other Jurisdictions

New Hampshire is not the only state in which the question of whether the state has complied with its duty under the state constitution's education clause has been found to be justiciable. Courts across the United States have overwhelmingly held that although the primary responsibility for creating and maintaining schools rests with the legislative and executive branches, it is the judiciary's role, and indeed its duty, to interpret and enforce those branches' constitutional obligations, including by holding them accountable when they breach them. *See, e.g.*, *William Penn School District v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 455 (Pa. 2017) ("[C]ourts in a substantial majority of American jurisdictions have declined to let the potential difficulty and conflict that may attend constitutional oversight of education dissuade them from undertaking the task of judicial review."); *Gannon v. State*, 319 P.3d 1196, 1226 (Kan. 2014) ("[W]hen the question becomes whether the legislature has actually performed its [constitutional] duty, that most basic question is left to the courts to answer under our system of checks and balances.") *Campaign for Fiscal Equity v. State,* 801 N.E.2d 326, 349 (NY 2003) ("Courts are . . . well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights.").[8]

[8] Numerous states have similarly found education article claims justiciable: Arkansas, *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002);

Indeed, courts have consistently ruled that leaving the Legislature to police itself is an abrogation of the court's duty. *See William Penn,* 170 A.3d at 457 (rejecting the notion that the court "may only deploy a rubber stamp [of the Legislature's actions] in a hollow mockery of judicial review"); *Rose v. Council for Better Education* 790 S.W.2d 186, 209 (KY 1989)("To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.")

Moreover, while courts in school funding cases are initially deferential to legislatures, as legislatures persist in failing to comply with constitutional mandates, courts become increasingly prescriptive in their rulings. For example, the New Jersey Supreme Court ruled in 1985 that the State's school finance system was unconstitutionally inadequate as to the low-wealth urban districts. *Abbott v. Burke,* 575 A2d 359 (NJ 1990). When faced with the State's continual failure to fund the court-ordered remedies, the Court expressly ordered the state to "provide increased funding" to students in urban districts to "assure" per pupil funding for the regular education program at the levels spent on that program in successful suburban districts. *Abbott v. Burke,* 693 A.2d 417, 446 (NJ 1997). And

---

Connecticut*, Conn. Coal. for Justice in Educ. Fin. v. Rell*, 990 A.2d 206 (Conn. 2010); Idaho, *Idaho Schs. for Equal Educ. Opportunity*, 976 P.2d at 919; Kansas, *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); Kentucky, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); Maryland, *Hornbeck*, 458 A.2d at 780; Massachusetts, *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); Montana, *Columbia Falls Elementary Sch. Dist. v. State*, 109 P.3d 257 (Mt. 2005); New Jersey, *Abbott v. Burke*, 495 A.2d 269 (N.J. 1985); New York, *Hussein v. State*, 973 N.E.2d 752 (N.Y. 2012); North Carolina, *Leandro*, 488 S.E.2d at 259; Ohio, *DeRolph v. State*, 677 N.E 2d 733 (Ohio 1997); Pennsylvania, *William Penn*, 170 A.3d 414; Tennessee, *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); Texas, *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); Vermont, *Brigham v. State*, 889 A.2d 715 (Vt. 2005); Washington, *McCleary*, 269 P.3d at 258; West Virginia, *Pauley*, 255 S.E.2d 859; Wisconsin, *Vincent*, 614 N.W.2d 388; and Wyoming, *Campbell Cty. Sch. Dist.*, 907 P.2d 1238.

when the state drastically cut a billion dollars in state school funding below the constitutionally adequate levels for FY 2011, the New Jersey Supreme Court once again stepped in and ordered the state to restore the funding. *Abbott v. Burke,* 20 A.3d 1018, 1100 (NJ 2011). In Tennessee when the State similarly failed to fully remedy the unconstitutional funding system, the Tennessee Supreme Court ordered the state to equalize teacher salaries across Tennessee. *Tennessee Small Sch. Sys. v. McWherter,* 894 S.W.2d 734, 738 (TN 1995). Courts have noted the manifest injustice in standing idle in the face of repeated failure by the state to uphold its constitutional obligations. *See State v. Campbell County Sch. Dist.,* 32 P.3d 325, 333 (WY 2001) ("[S]taying the judicial hand in the face of continued violation of constitutional rights makes the courts vulnerable to becoming complicit actors in the deprivation of those rights.").

In New Hampshire, the State has failed to comply with its constitutional duty to adequately fund public school schools for over thirty years. In response, the trial court declined to set a definitive level of base adequacy funding. App. I, 79. Rather, the court established a conservative minimum threshold. *Id*. The measured approach taken by the trial court in the instant case is not only appropriate in view of the decades of the State's persistent failure to comply with its constitutional duty to fund public schools, but it is also consistent with—and in fact much more limited than—the approach taken by courts in sister states faced with state failure to comply with education clause orders.

As set forth above, the question at the heart of this case — whether the State is providing sufficient adequacy finding to ensure that each public-school student has the opportunity to receive a constitutionally adequate education — is most certainly within this Court's power to decide. The Court is specifically tasked with stating "what the law is" and determining whether a co-equal branch of government is fulfilling its

constitutional obligations. The State's contentions that judicial consideration of these questions violates the separation of powers principle and that these questions are nonjusticiable are without merit. They should be quickly rejected by this Court.

CONCLUSION

This Court should affirm the trial court's ruling that, as long as the State maintains its current adequacy funding structure, it should fund the base adequacy component of this system no lower than the minimum benchmark set out in the trial court order, while the Legislature steps up to its responsibilities to make the broad range of policy and structural decisions, including a more definitive determination of the level of the base adequacy grant, that will bring the school funding system into compliance with the constitution and thereby vindicate instead of ignore the rights of the people of our state.

Date: October 3, 2024

Respectfully submitted,

/s/ John E. Tobin, Jr.
John E. Tobin, Jr., NH Bar No. 2556
60 Stone Street
Concord, NH 03301
(603) 568-0735
jtobinjr@comcast.net

Natalie Laflamme, NH Bar No. 266204
Laflamme Law, PLLC
100 N. Main St, Suite 512
Concord, NH 03301
(603) 937-5434
natalie@laflammelaw.com

Wendy Lecker*
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(203) 536-7567
wlecker@edlawcenter.org

Alice Tsier*
Aditi Padmanabhan*
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819-8200
alice.tsier@whitecase.com
aditi.padmanabhan@whitecase.com

Andru Volinsky, NH Bar No. 2634
160 Law, PLLC
P.O. Box 1181,
Concord, NH 03302
(603) 491-0376
andruvolinsky@gmail.com

Michael-Anthony Jaoude*
Harter Secrest & Emery LLP
50 Fountain Plaza, Suite 1000
Buffalo, NY 14202
(716) 844-3756
mjaoude@hselaw.com

*admitted pro hac vice

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 5,702, 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.
John E. Tobin, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 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.

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