UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

NATIONAL EDUCATION ASSOCIATION-NEW HAMPSHIRE; OYSTER RIVER COOPERATIVE SCHOOL DISTRICT; DOVER SCHOOL DISTRICT; SOMERSWORTH SCHOOL DISTRICT; GRANTHAM SCHOOL DISTRICT; DOTTIE MORRIS; JAMES T. MCKIM, JR.; and NEW HAMPSHIRE OUTRIGHT,

Plaintiffs,

v.

JOHN M. FORMELLA, in his official capacity only as the Attorney General of the State of New Hampshire;

CAITLIN DAVIS, in her official capacity only as the Commissioner of the New Hampshire Department of Education;

CHARLIE ARLINGHAUS, in his official capacity only as the Commissioner of the New Hampshire Department of Administrative Services; and

MONICA MEZZAPELLE, in her official capacity only as the State Treasurer of New Hampshire,

Defendants.

Case No.: 1:25-cv-293-LM

PLAINTIFFS' CONSOLIDATED (I) OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND (II) REPLY TO DEFENDANTS' OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION……...1

I. Defendants' Effort to Rewrite HB2's Scope……...3

II. HB2 Violates the Fourteenth Amendment's Prohibition on Vagueness (Count I)……..4

A. The Vagueness Standard, and Defendants' Failure to Acknowledge Plaintiffs' Evidence, Including How Enforcers Have Interpreted HB2……...4

B. HB2 Fails to Give a Person of Ordinary Intelligence a Reasonable Opportunity to Know What is Prohibited…….7

C. As an Independent Basis for Vagueness, HB2 Leads to Arbitrary Enforcement..13

III. HB2 Violates the First Amendment (Count II)……..15

IV. The ADA, Section 504, and IDEA Pre-empt HB2 (Count III)……..19

V. Scope of Relief……...22

INTRODUCTION

On October 2, 2025, this Court issued a preliminary injunction enjoining Defendants' ability to enforce HB2's anti-diversity, equity, and inclusion provisions against Plaintiffs and defined "covered entities." *See Nat'l Educ. Association-New Hampshire v. NH Att'y Gen. ("NEA-NH")*, 806 F. Supp. 3d 166 (D.N.H. 2025) (ECF No. 40). Nothing has changed since the issuance of that decision that should prevent the preliminary injunction from becoming final.

Defendants' Objection does not meaningfully oppose Plaintiffs' Statement of Facts. Accordingly, these facts should be "deemed admitted" for the purposes of this motion. *See* Local Rule 56.1(b). Defendants' failure to contend with Plaintiffs' Statement of Facts is significant when this evidence—including the New Hampshire Department of Education's ("NHDOE") decision to enforce HB2 against private (including religious) colleges and universities that receive public funds through state scholarship grants, while *not* enforcing HB2 against private K–12 institutions (including religious schools) that receive public funds through "Education Freedom Accounts" ("EFAs")—establishes arbitrary enforcement. *See* Statement of Facts ("SF") No. 6; *see also NEA-NH*, 806 F. Supp. 3d at 199 (noting this "incongruity"). Defendants' only substantive response to these now-admitted facts is that they are irrelevant in a facial vagueness challenge where, Defendants argue, only a pure "textual analysis" is permitted. *See* Obj. at 12. But courts have repeatedly considered such extrinsic evidence implicating arbitrary enforcement when evaluating a law's vagueness, including when—as it the case here—the law's text is not sufficiently clear. In any event, even if Defendants are correct (and they are not) about the proper role of extrinsic evidence in a facial vagueness claim, Plaintiffs should prevail on a pure textual analysis. Further,

Defendants have not argued that extrinsic evidence cannot be examined as to Plaintiffs' First Amendment and pre-emption claims.[1]

Finally, unlike *Clark v. N.H. Attorney General,* No. 1:25-cv-00379-PB-AJ, and *Local 8027, AFT-N.H., AFL-CIO v. Edelblut*, No. 21-cv-1077-PB—where the New Hampshire Department of Justice ("NHDOJ") made clear that it would not enforce against non-parties a law declared to be facially vague because such a declaration "has the effect of invalidating the challenged provision in its entirety"[2]—Defendants (including NHDOJ) do *not* make that commitment here if this Court declares HB2 to be facially unconstitutional. To the contrary, even if this Court concludes that HB2 is unconstitutional on its face, Defendants suggest the possibility of future enforcement of HB2 as to non-plaintiffs and non-"covered entities," *see* Obj. at 44, despite the well-established rule that a "facial challenge … means a claim that the law is invalid in toto—and therefore incapable of any valid application." *See Hoffman Estates v. Flipside, Hoffman Estates., Inc.*, 455 U.S. 489, 494 n.5 (1982) (internal quotation marks and citation omitted). Defendants' suggestion of future enforcement despite a declaration of facial invalidity reinforces the need for a clear declaration from this Court that HB2 is unconstitutional on its face.

[1] As explained in footnote 2 on Page 2 of Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment and Permanent Injunction, Plaintiffs do not object to their claims under Part I, Article 15 and Part I, Article 22 of the New Hampshire Constitution (Counts IV and V) being dismissed without prejudice to refiling in state court, as Plaintiffs recognize the doctrine set forth in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *See* Pls.' Memo. at 2 n. 2.

[2] *See Clark*, No. 1:25-cv-00379-PB-AJ, ECF No. 14-1, at 4-5 (NHDOJ arguing the following: "The plaintiff seeks a declaration that RSA 644:6 is facially invalid. As this Court has previously observed, this type of remedy will sufficiently protect the plaintiff's interests — and, indeed, those of any putative class members — because it has the effect of invalidating the challenged provision in its entirety …. This Court has no reason to believe that the defendant[] will fail to respect this court's ruling if it were to rule that RSA 644:6 is facially unconstitutional.") (internal quotations omitted); *Local 8027, AFT-N.H., AFL-CIO*, No. 21-cv-1077-PB, 2024 U.S. Dist. LEXIS 94052, at *51 (D.N.H. May 28, 2024) (concluding that injunctive relief was unnecessary in light of declaration that three state laws were facially unconstitutional where the Court has "no reason to believe that the defendants will fail to respect this court's ruling that the Amendments are unconstitutional on their face").

I. Defendants' Effort to Rewrite HB2's Scope.

At the outset, Defendants seek to rewrite the law's scope, arguing that HB2's "DEI" ban is limited to "prohibit[ing] *expending state funds* on anything that is intended to evaluate or make a judgment about any program, initiative, training, or policy that classifies individuals based on a certain characteristic for the purpose of achieving an outcome based on demographics." Obj. at 26 (emphasis added); *see also id.* at 4-5 (adopting this "state funds" limitation in RSA 21-I:113 and RSA 186:76, and arguing that RSA 186:76 "does not prohibit public schools from using other sources of funding for such activities"), 41 (same). Defendants' interpretation is both wrong and an impermissible attempt to have this Court "rewrite a law to conform it to constitutional requirements." *See Local 8027, AFT-N.H., AFL-CIO v. Edelblut*, No. 21-cv-1077-PB, 2024 U.S. Dist. LEXIS 94052, at *21–22 (D.N.H. May 28, 2024) (appeal filed July 26, 2024; 1st Cir. argued Apr. 8, 2025) (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). HB2's restrictions on public entities, political subdivisions, and "public schools" that are "supported by public funds"—which would include private schools that receive public funds under RSA 186:71, II—are categorical and exist even where *no state funds* are used to engage in the prohibited program or initiative.[3] This interpretation is confirmed by the law's certification requirement for "public schools," which requires reporting of "*all* existing contracts containing DEI-related provisions in public schools" regardless of whether state funds are used as part of these contracts. RSA 186:74 (emphasis added); *see also* RSA 186:75, II. HB2's penalty provisions also reflect this broad scope

[3] *See* RSA 21-I:113 ("No public entity shall implement, promote, or otherwise engage in any DEI-related initiatives, programs, training, or policies."); RSA 21-I:114 ("No agencies or political subdivisions shall enter into or renew any contract that includes DEI-related provisions, including requirements for contractors to implement DEI programs, conduct DEI training, or comply with DEI-related reporting obligations."); RSA 186:72 ("No public school shall implement, promote, or otherwise engage in any DEI-related initiatives …."); RSA 186:73 ("No public school shall enter into, renew, or amend any contract that includes DEI-related provisions ….").

where it is not just state funding that can be halted; rather, it is *all* "public funding." *See* RSA 187:77.

Consistent with this statutory interpretation, Defendants have not enforced RSA 21-I:113 using this purported "state funds" limiting construction. For example, NHDOJ's January 8, 2026 enforcement letter to municipal town and city clerks seeks to impose *a categorical ban* under RSA 21-I:113 without any "state funds" limitation. *See* SF Nos. 24-25 (*Exhibit 50*). Further, Defendants' narrower interpretation exists nowhere in NHDOE's July 11 and 17, 2025 enforcement letters, *see Exhibits 2*[4] *and 3*, and is rebutted by the law's legislative history seeking to impact even a private college. *See* SF No. 33.

II. HB2 Violates the Fourteenth Amendment's Prohibition on Vagueness (Count I).

A. The Vagueness Standard, and Defendants' Failure to Acknowledge Plaintiffs' Evidence, Including How Enforcers Have Interpreted HB2.

The standard to be applied in a facial vagueness claim has been addressed by this District, including in this case. *See NEA-NH*, 806 F. Supp. 3d at 192 n.16; *see also Local 8027, AFT-N.H., AFL-CIO v. Edelblut*, 651 F. Supp. 3d 444, 457–59 (D.N.H. 2023) (Barbadoro, J.); *Nat'l Educ. Ass'n v. United States Dep't of Educ.*, 779 F. Supp. 3d 149, 185-86 (D.N.H. 2025) (McCafferty, C.J.) (adopting standard in *Local 8027*). "[T]he void-for-vagueness doctrine does not require a showing that a statute is vague in all of its applications, especially where, as here, the law subjects a violator to serious consequences, lacks a scienter requirement, and implicates First Amendment rights." *Local 8027*, 651 F. Supp. 3d at 459.

[4] NHDOE's proposed certification form, in fact, confirms this broad scope without any "use of state funds" limitation, asking school districts to certify that they (i) "will not enter into, renew, or amend any contract that includes DEI-related provisions, including requirements for contractors to implement DEI programs, conduct DEI training, or comply with DEI-related reporting obligations," and (ii) have or have not "implemented, promoted, or engaged in any DEI-related initiatives, training, assessments, or policies." *See Exhibit 2*.

Defendants do not contest this standard but do assert that "[d]etermining whether a statute is constitutionally vague requires a purely textual analysis." Obj. at 12. In so arguing, Defendants reduce this case to an abstract law school exam problem without consideration of (i) how HB2 was arbitrarily enforced by Defendants, and (ii) the real-world impact HB2 had while it was enforced (and would have had if this law not been preliminarily enjoined). But in a facial vagueness case, courts are free to evaluate, including through evidence, the "interpretation of the statute given by those charged with enforcing it." *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (citing *Cole v. Richardson*, 405 U.S. 676, 685 (1972) (assessing vagueness of statute by looking to record of enforcement before the Court)).[5] Accordingly, courts today readily consider factual evidence in assessing a statute's vagueness. *See, e.g., Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 784 (4th Cir. 2023) (considering deposition testimony, statistics showing disparate enforcement, and evidence from individual enforcement actions). And this makes sense because there can hardly be better evidence of arbitrary enforcement than the arbitrary "interpretation of the statute given by those charged with enforcing it." *See Grayned*, 408 U.S. at 110. Further, the First Circuit has considered factual evidence to be relevant to the vagueness analysis. *See Whiting v. Town of Westerly*, 942 F.2d 18, 22 (1st Cir. 1991) (holding that ordinance prohibiting sleeping in public was not vague based on the text and Defendants' narrowing construction, and noting that "plaintiffs presented no evidence to suggest that the ordinance had ever been enforced against 'mere nappers'"); *see also United States v. Facteau*, 89 F.4th 1, 35 (1st Cir. 2023) (noting that the Court may consider contradictory or misleading public interpretations issued by federal agencies

[5] *See also Johnson v. United States*, 576 U.S. 591, 598 (2015) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)) (concluding that statute was vague where record showed "persistent efforts . . . by administrative officers … to establish a standard" for enforcement)); *Smith v. Goguen*, 415 U.S. 566, 580 (1974) (rejecting as unsupported in the record, state's argument that "law enforcement authorities have shown themselves ready to interpret this penal statute narrowly").

in assessing the vagueness of agency regulations), *cert. denied*, 145 S. Ct. 137 (2024).[6] If there was further doubt, Defendants themselves rely on their own "extrinsic" January 2026 enforcement letter to municipal town and city clerks. Obj. at 8-9, 14.

To be sure, HB2 is facially vague even without reliance on the record created in this case. *See* Pls.' Memo. at 27-36. But Defendants cite no case from this Court or any other definitively holding that a court must ignore actual evidence of arbitrary and discriminatory enforcement where the law is prone to such enforcement. Defendants' cases merely suggest that, unlike here, such evidence cannot render a law vague where the law's text is otherwise sufficiently clear. *See United States v. Lachman*, 387 F.3d 42, 58-59 (1st Cir. 2004) (declining to consider informal interpretation of agency officials to determine the meaning of a federal regulation where the court otherwise arrived at a clear interpretation consistent with congressional intent); *Modern Cont'l/Obayashi v. Occupational Safety and Health Rev. Comm'r*, 196 F.3d 274, 281 (1st Cir. 1999) (concluding that, because a federal regulation's application was clear "from a plain reading of the regulation," it was inappropriate to "inquire into industry standards").[7] Here, as explained on pages 27-36 of

[6] In *Frese v. Formella*, this Court declined to "address precisely what extrinsic context a court may consider in a vagueness analysis" because, there, "the core statutory text of the [challenged] statute provide[d] adequate enforcement guidelines" such that the "prosecution scheme d[id] not alter or overcome this conclusion." 53 F.4th 1, 9 n.5 (1st Cir. 2022), *cert. denied*, 144 S. Ct. 72 (2023). Here, however, the law has no enforcement guidelines. *See* Part II.C., *infra*.

[7] In another case relied upon by Defendants, the Court acknowledged that "there is some evidence in this record that section 108.13 is susceptible of inconsistent application." *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 411 (D.C. Cir. 2017). While that Court concluded that the evidence showed that the law "might be misapplied in certain cases"—but "does not show that section 108.13 lacks criteria to cabin enforcement discretion," *see id*. at 412—here, the evidence in this case goes beyond merely showing how HB2 "might be misapplied in certain cases." Rather, unlike the law in *Act Now to Stop War*, HB2's text itself lacks criteria to cabin enforcement, and the evidence confirms that Defendants' own practices "lack[] criteria to cabin enforcement discretion" because these practices themselves are arbitrary and confirm inconsistent enforcement.

Several of Defendants' other cases, *see* Obj at 15-18, are either inapposite or merely demonstrate that extrinsic evidence was not necessary where the law was reasonably clear. *See Platt v. Bd. Of Comm'rs on Grievs. & Discipline of the Ohio Supreme Court*, 894 F.3d 235, 247, 249-50 (6th Cir. 2018) (declining to consider "incomplete and ill-defined factual scenarios" proposed by the plaintiff where the plain language, clarifying comments, and advisory opinions demonstrated that the challenged provisions were not unconstitutionally vague); *Hernandez v. City of Phoenix*, 43 F.4th 966, 982-83 (9th Cir. 2022) (in the context of regulating speech of government employees, determining that police department's employee social media policy language was clear and could be "framed in broad and general terms"; hypothetical social media posts proposed by plaintiffs "merely reflect[ed] the fact that deciding

Plaintiffs' opening memorandum and below, a plain reading of HB2 illustrates its lack of clarity, so it is appropriate for this Court to know how agencies have interpreted and enforced it.

B. HB2 Fails to Give a Person of Ordinary Intelligence a Reasonable Opportunity to Know What is Prohibited.

HB2 is vague because it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). Much of Defendants' argument that HB2's anti-DEI provisions are not vague rests on a rigid theory of statutory interpretation that employs dictionary definitions in a vacuum instead of reading the statute in context and examining it in the real world in which it applies. The clarity of a statutory provision "does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015). Rather, "'[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* at 537 (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997)). And using "real words found in an English dictionary does not magically extinguish vagueness concerns." *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1181 (N.D. Fla. 2022), *aff'd*, 94 F.4th 1272, 1283 n.6 (11th Cir. 2024) (declining to address vagueness claim). "If that were true, the Due Process Clause would tolerate laws containing the most incomprehensible stream-of-consciousness word salads so long as they used actual words." *Id.* When taken in context—and even when using Defendants' own dictionary definitions—HB2 remains vague and indecipherable.

---

whether any given social media post violates the policy involves a heavily fact-and context-dependent exercise"); *United States v. Bronstein*, 849 F.3d 1101, 1109 (D.C. Cir. 2017) (concluding that the phrase "make a harangue or oration" was not unconstitutionally vague because, although these terms "cover public speeches of myriad forms," when read in the context of a statute focused on the Supreme Court's building and grounds, they were clearly only "meant to cover any form of public speeches that tend to disrupt the Supreme Court's operations"; not addressing whether the statute resulted in arbitrary enforcement).

"Classifying" and "Achieving Demographic Outcomes." Defendants address this language mainly through the prism of using quotas based on demographic groups,[8] and only minimally address the numerous ways in which educators are unsure whether the routine practices they engage in are covered under HB2's prohibition of engaging in "classifi[cations]" of individuals based on characteristics under RSA 354-A:1 "for the purpose of achieving demographic outcomes," *see* RSA 21-I:112, II; RSA 186:71, I, including many which are required under state and federal law. Plaintiffs are not presenting trivial hypotheticals. Rather, Plaintiffs present real-world questions that educators will face every day, including, for example, whether a public school district (i) can create school sports teams for girls,[9] (ii) can establish a non-discrimination policy under RSA 193:39 specifically to "achieve the demographic outcome" of protecting the civil rights of transgender students, *see* Compl. ¶ 13, or (iii) can track—consistent with Section 1111(c)(2) of the federal Elementary and Secondary Education Act of 1965 (*see* 20 U.S.C. § 6311(c)(2))—racial and ethnic groups in its student population.[10] Defendants make no effort to use their own dictionary definitions of "demographic," "achieve," and "outcome" to answer many of these important questions. This is perhaps because these answers are unknowable given HB2's vague provisions.

Defendants also concede that the "DEI" definition addressing the "classif[ication] [of] individuals based on a characteristic identified under RSA 354-A:1 for the purpose of achieving demographic outcomes," *see* RSA 21-I:112, II; RSA 186:71, I, "prohibit[s] public schools from

---

[8] *See* Obj. at 4 ("Under [the challenged law], a public entity may not implement a policy or initiative that seeks to staff itself internally with a certain number or percentage of persons of a certain age, race, or gender. A public school may not implement a policy or initiative that seeks to place a certain number or percentage of students based on their race or gender into honors courses.").

[9] *See* 44 Fed. Reg. 71413, 71418 (1979) (establishing three-part test to determine whether an educational institution is in compliance with Title IX).

[10] *See* NHDOE, *Consolidated State Plan, The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act*, at 16 (Revised Submission V.3 ~ February 1st, 2023), https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/nh-state-plan-2023_used_0.pdf.

implementing, promoting, or engaging in any activity that classifies individuals based on a characteristic identified under RSA 354-A:1 for the purpose of achieving a specific outcome for the identified demographic." Obj. at 4, 22. However, Defendants elsewhere say that the law somehow effectively exempts classifications of persons based on disability and differing religious backgrounds—which are characteristics under RSA 354-A:1—because such classifications are necessary "to facilitate their equal treatment under the law." *Id.* at 8-9.[11] These two statements—one consistent with HB2's broad scope, and the other providing exemptions for disability and religion not specified in HB2—conflict with each other. And why cannot Defendants' purported exemptions for disability and religion similarly be extended to other RSA 354-A:1 characteristics like age, gender, race, sexual orientation, or gender identity that may also help foster "equal treatment under the law"? *See* Pls.' Memo. at 29 (citing classifications based on age, gender, and gender identity). And, outside the context of disability and religion specified by Defendants, how are educators supposed to know what demographic outcome classifications based on RSA 354-A:1 characteristics are acceptably designed to "treat[] individuals equally under the law," RSA 21-I:112, II; RSA 186:71, I, and/or to "ensure a program is available to all," *see* Exhibit 50 at 4-5, and which are not (and thus are prohibited)? This confusion—and selective application as explained in Part I.C *infra*—confirm what educators already know: that HB2 is hard to understand, is easy to violate, is subject to arbitrary enforcement, and imposes massive penalties for violations. *See NEA-NH*, 806 F. Supp. 3d at 195 (noting that "[t]he breadth of the anti-DEI laws' prohibition," including its "achieving demographic outcomes" language, "is startling").

[11] *See also* Exhibit 50 at 4 (NHDOJ in Jan. 8, 2026 correspondence stating that "[p]rovisions or programs that require accommodating people with disabilities or of differing religious backgrounds … do not constitute DEI for the purposes of this law because state and federal law require providing reasonable accommodations to people with disabilities or of differing religious backgrounds to facilitate their equal treatment under the law").

"DEI"-"related" and "Promote": Defendants acknowledge that HB2's "prohibitions apply to all 'initiatives, programs, training, or policies' that are *related to* the defined term, 'DEI.'" Obj. at 23 (emphasis added). As this Court previously concluded, this confirms HB2's ambiguity, as those subject to its prohibitions and penalties must not only decipher what "DEI" means, but also what is sufficiently "related to" "DEI" to fall under the law's prohibitions. *See NEA-NH*, 806 F. Supp. 3d at 198 ("the ban on 'DEI-related' activities in the anti-DEI laws is so broad that the laws' contours—the activities that the laws actually prohibit—will necessarily be shaped by the manner in which enforcement decisions are made") (emphasis in original); *see also id.* at 197 (noting that "[u]se of the phrase 'including but not limited to' indicates legislative intent for these specified categories to constitute illustrative examples of 'activities' that are 'related' to DEI"). Defendants seek to avoid this result by arguing that "DEI-related" effectively means the same thing as "DEI." *See* Obj. at 23-24. This cannot be the case, as it would read out of the law the term "related," which must "have meaning" and "be given effect." *See Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999). Indeed, as explained in more detail below, the independent significance of the term "related" and its intended broader meaning are confirmed by the law's prohibition of "critical race theory" and "implicit bias trainings" even in circumstances when these specified categories do *not* fit within the definition of "DEI" under RSA 21-I:112, II and RSA 186:71, I. *See NEA-NH*, 806 F. Supp. 3d at 198.

Lastly, Defendants' explanation of HB2's term "promote" is indecipherable and confirms how that term is vague. For example, Defendants state that an educator *endorsing* Justice Sotomayor's position that the Fourteenth Amendment "can be enforced through race-conscious means" would not run afoul of HB2 because Justice Sotomayor's position is a "historical fact." Obj. at 25. But the reality that it is a "historical fact" that Justice Sotomayor conveyed this position

is a red herring. Under HB2, in teaching Justice Sotomayor's dissent, an educator runs the risk of having any statement they make being construed *as an endorsement* of this position that arguably implicates the impermissible "promot[ion]" of a "policy" that "classifies individuals based on" race "for the purpose of achieving demographic outcomes" under RSA 21-I:112-113 and RSA 186:71-72. How any such "endorsing" (perhaps allowed according to Defendants) is any different from "promoting" (which is barred under HB2) is entirely unclear based on Defendants' Objection, and how is an educator expected to know the difference?[12]

"Implicit Bias Training," "Critical Race Theory," and "DEI Assessments." Defendants also simply refer this Court to the dictionary definitions of "implicit bias training," "critical race theory," and "DEI assessments" to argue that they are not vague. But these definitions are especially unhelpful where RSA 21-I:113 and RSA 186:72 make clear through the use of the term "including" that these specified categories can be examples of barred "DEI-related" activity *regardless* of whether they actually satisfy (or are "related" to) the "DEI" definition of "a program, policy, training, or initiative that classifies individuals based on a characteristic identified under RSA 354-A:1 for the purpose of achieving demographic outcomes." *See* RSA 21-I:112, II ("DEI" definition); RSA 186:71, I (same). How is an educator supposed to know whether their instruction is barred as impermissible "DEI" when these specified, prohibited categories are viewed as "DEI-related" despite being unrelated to the actual definition of "DEI"? *See NEA-NH*, 806 F. Supp. 3d 166 at 198 ("the inclusion of specific statutory categories purported to be illustrative of 'DEI-related activities' exacerbates rather than diminishes vagueness concerns, because 'implicit bias training' and 'critical race theory' do not necessarily meet the statutory

[12] *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 599-600 (1967) (striking down a prohibition on the employment of a university professor who "advocates, advises or teaches" a prohibited doctrine as unconstitutionally vague because they "may well [reach] one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others").

definition of 'DEI,' and are not necessarily 'related' to that definition either"). This broad interpretation is further confirmed by the fact that one legislator intended the law to capture a class at Southern New Hampshire University that addressed "socioeconomic factors," including questions like "why is it that you have better health outcomes in white neighborhoods?" *See* SF No. 23 (*Exhibit 10*, at 15:7–23).

"DEI assessments" is vague for the same reason that HB2's definition of "DEI" is vague under RSA 21-I:112, II and RSA 186:71, I. Defendants' attempt to address "critical race theory" also is unhelpful. Defendants simply define "critical race theory" using a dictionary definition—a definition that is absent from NHDOE and NHDOJ's enforcement letters—and leave it at that. But Defendants fail to explain how educators can interpret and apply these definitions in real-world classroom situations. The Merriam-Webster's dictionary definition Defendants cite even states that this theory includes a "group of concepts," with only one example being "the idea that race … is a sociological rather than biological designation, and that racism … pervades society and is fostered and perpetuated by the legal system." Obj. at 27. Setting aside the fact that this definition proves that HB2 is seeking to ban *ideas*, does this include teaching books like Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010)? Can an educator even say (and, be viewed as "promoting") that "race is a social construct" or that "racism pervades society"? *See* Obj. at 27. And what are the other examples beyond those cited in the definition that are covered? Defendants will not say.[13]

[13] As to "implicit bias training," Defendants again resort to dictionary definitions without any real-world application. Do Defendants, who enforce this law and can revoke public funding, interpret this term to apply to Plaintiff James T. McKim's very trainings addressing biases that he conducted for the New Hampshire Department of Justice? *See* SF Nos. 30-31 (*Exhibit 6*). We do not know.

C. As an Independent Basis for Vagueness, the Law Leads to Arbitrary Enforcement.

HB2 also is vague for the separate and independent reason that it "authorizes or even encourages arbitrary and discriminatory enforcement." *See Hill*, 530 U.S. at 732. Once again, the prospect of arbitrary enforcement can be evaluated through "the interpretation of the statute given by those charged with enforcing it." *See Grayned*, 408 U.S. at 110.

Defendants do not engage the (at least) three ways in which NHDOE has already selectively applied HB2's anti-DEI provisions, *see* Pls.' Memo. at 39-41, some on which this Court has already relied to find arbitrary enforcement. *See NEA-NH*, 806 F. Supp. 3d at 198-99. And Defendants' lack of meaningful engagement with educators' numerous examples of uncertainty confirms how this legal regime is really intended to operate—with enforcers given the discretion to pick and choose what will be covered based on subjective judgments and political calculations. Enforcers clearly will let slide, for example, efforts to promote outcomes for K-12 public school students with disabilities and of differing religions, *see* Obj. at 38–41[14], and may similarly let slide efforts to promote outcomes for politically popular groups[15], but may—especially in this current climate where legislators supporting HB2 are closely scrutinizing how the law is enforced, *see* Compl. ¶¶ 153–54—subjectively construe efforts to promote outcomes for students of color or transgender students as being "for the purpose of achieving demographic outcomes." *See* RSA

[14] Defendants' strained interpretation excluding disability from HB2's scope exists nowhere in NHDOE's July 11 and July 17, 2025 communications to "public schools" (*see* Exhibits 2 and 3) and NHDAS's July 23, 2025 communications to state entities (*Exhibit 4*). However, an exclusion for "[p]rovisions or programs that require accommodating people with disabilities or of differing religious backgrounds" emerged in Defendants' January 8, 2026 enforcement memorandum to non-state agency municipal town and city clerks. *See Exhibit 50*.

[15] For example, it is unclear whether Defendants will apply HB2, for example, to politically popular efforts to promote outcomes for (i) public higher education students who are older than 65 through the Senior Citizen Tuition Waiver Program, *see* Univ. of N.H., *Tuition Waivers & Discounts*, https://cps.unh.edu/online/tuition-aid/tuition-waivers-discounts (last visited Nov. 24, 2026), and (ii) older men who are subject to lower fitness requirements as they get older in their law enforcement careers, *see* N.H. Police Stand. and Training Council, *Physical Fitness Testing Standards*, https://www.pstc.nh.gov/sites/g/files/ehbemt896/files/media/media_document/police-physical-fitness-standards.pdf (last visited Nov. 24, 2026).

21-I:112, II; RSA 186:71, I. And if classifications based on disability and religion are discretionarily permitted because they are designed to ensure that groups are treated "equally under the law," then why would not such classifications and remedies based on race, sexual orientation, and gender identity that are similarly designed to ensure that these groups are treated equally similarly be covered? Defendants have no answer to this concern of selective enforcement, which was raised by this Court in its preliminary injunction decision. *See NEA-NH*, 806 F. Supp. 3d at 202 (noting Defendants' efforts to "handwave the notion that the anti-DEI laws could be used to punish schools seeking to 'achieve demographic outcomes' for disabled students," while Defendants contend that the "question is closer" with respect to "a non-discrimination policy intended to protect transgender students").[16]

It is this mere prospect of arbitrariness that creates the law's intended chill and self-censorship, even without actual enforcement. Educators know that, if they guess wrong as to how enforcers may use their unfettered discretion, their schools stand to lose all public funding, even for an "unknowing" violation. *See NEA-NH*, 806 F. Supp. 3d at 200 (noting lack of a scienter requirement). Defendants concede, as they must, "the serious consequences a public school or other entity could face for violating the challenged provisions." Obj. at 28. This Court correctly called the penalties for noncompliance "crippling." *See NEA-NH*, 806 F. Supp. 3d at 200. Defendants also do not dispute "that there is no process by which a public school can challenge the Education Department's determination that the challenged provisions were violated." Obj. at 28; *see cf. Platt*, 894 F.3d at 252 (finding no arbitrary enforcement where the challenged code included a "'multi-step process mandated before a candidate can[] be deemed to have violated any

[16] *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 685 (1968) ("Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial.").

Rule; the requirement of proof by clear and convincing evidence before a five-member panel may address sanctions; and appeal to the Ohio Supreme Court.' These safeguards are extensive."). And Defendants also concede the law's lack of scienter requirement. Obj. at 28.[17] All of these deficiencies elevate the specter of arbitrary enforcement, as this Court previously found. *See NEA-NH*, 806 F. Supp. 3d at 198–99.[18]

III. HB2 Violates the First Amendment (Count II).

Defendants ignore the fact that HB2 impacts the rights of educators at private educational institutions if they are merely "supported by public funds." *See* RSA 186:71, II. The *Pickering-Connick-Garcetti* analysis does not apply to these educators who are not government employees. Further, Defendants are correct that Plaintiffs do not raise a First Amendment argument with

[17] Even with a scienter requirement, HB2 would be facially vague. *See Lifchez v. Hartigan*, 735 F. Supp. 1361, 1372 (N.D. Ill. 1990) ("a scienter requirement cannot save a statute … that has no core of meaning to begin with") (citing *Colautti v. Franklin*, 439 U.S. 379, 395 n. 13 (1979)).

[18] *Jackson Fed'n of Tchrs. v. Fitch*, 2026 U.S. App. LEXIS 32221 (5th Cir. Oct. 22, 2026), does not help Defendants. There, a panel of the Fifth Circuit Court of Appeals vacated a preliminary injunction against Mississippi's H.B. 1193, which applied to K-12 schools and public colleges and universities, and remanded to a new judge with "Instructions for the District Court on Remand" on the First and Fourteenth Amendment claims. It left for the new judge to decide the merits on a developed record. *Id.* at *20-30. The Mississippi law at issue differs from HB2, including (i) not containing the "achieving demographic outcomes" language in defining prohibited "diversity, equity, and inclusion" and, (ii) unlike HB2, having specific safe harbor provisions implicating "students with disabilities," and "scholarly research," among other things. *Id.* at *27 ("H.B. 1193 excepts several activities from its sweep, including scholarly work, the activities of students and their groups, and creative engagement.").

Nor does *Black Emergency Response Team v. Drummond ("BERT")*, 191 F.4th 1198 (10th Cir. 2026), assist Defendants where the Oklahoma law at issue there is far different than the New Hampshire law here. Indeed, *BERT* distinguished the decisions of the District of New Hampshire in *Local 8027, AFT-N.H., AFL-CIO v. Edelblut*, No. 21-cv-1077-PB, 2024 U.S. Dist. LEXIS 94052 (D.N.H. May 28, 2024) (appeal filed July 26, 2024; 1st Cir. argued Apr. 8, 2025) and other courts in a footnote, noting that these courts did not "consider[], let alone reject[]," the majority's "plain-text reading of subsection B" of the Oklahoma law. *Id.* at 1218 n. 18. Under this reading of subsection B, *BERT* held that the phrase "require or make part of a course" means only "teaching the prohibited concepts as correct principles." *Id.* at 1206, 1209 (emphasis added). Here, however, HB2's 2025 language is different from Oklahoma's law based on President Trump's 2020 executive order. *See* Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020). HB2 broadly implicates the "implementation," "promotion," or "engagement" in any "DEI-related "initiatives, programs, training, or policies." *See* RSA 186:72; RSA 21-I:113. Unlike the Oklahoma law, these provisions in HB2 do not contain "require or make part of a course" language that arguably would make it susceptible to a construction that limits its scope to teaching prohibited "DEI"-concepts "as correct principles." In any event, the majority's decision in *BERT* is an outlier. Setting aside the sparseness of the majority's vagueness analysis as to the Oklahoma law's specific eight banned concepts, the dissent correctly explained that, "[e]xcept for the district court below and the majority here, every court that has ruled on the vagueness of these types of laws … has concluded that they are vague in full." 191 F.4th at 1224. The dissent added that "it makes sense that those [other court] decisions neither considered nor rejected the majority's reading, which goes well beyond [the law]'s plain text." *Id.*

respect to K-12 public school teachers. *See* Obj. at 29. Accordingly, Defendants' pages of argument explaining that HB2 does not violate the First Amendment rights of K-12 public school teachers can be set aside. *See id.* at 29-35.

In the context of public institutions of higher education, Plaintiffs' argument is that HB2 violates the First Amendment by discriminating against specific viewpoints, including viewpoints that "promote" "critical race theory" or "implicit bias training," or viewpoints that "classify" groups to "achieve demographic outcomes" for these groups. *See* Compl. ¶ 210. This First Amendment violation applies just as much to RSA 21-I:113 governing "public entities" as it applies to RSA 186:72 governing "public schools." This is because—setting aside the fact that RSA 186:72 (unlike RSA 21-I:113) more broadly covers private colleges and universities that are "supported by public funds"—*both* RSA 21-I:113 (governing "public entities") and RSA 186:72 (governing "public schools") explicitly encompass the instruction of educators in the classrooms of public colleges and universities. Indeed, colleges and universities have an independent obligation to enforce HB2's prohibitions at RSA 21-I:113 (and RSA 186:72) against individual educators, which would include fielding complaints, conducting investigations, and imposing discipline. *See* SF No. 11. Because colleges and universities are "public entities" under RSA 21-I:113 and "public schools" under RSA 186:72, certain curricular instruction by faculty is effectively banned under HB2.

Defendants' main argument here is that Plaintiffs "have not demonstrated that the laws they challenge here are facially constitutional" because Plaintiffs' "claims here do not present case- and fact-specific applications of [the] *Pickering-Connick*" standard governing speech of government employees. *See* Obj. at 35-36. But no "case- and fact-specific" analysis of a public college's response to a given incident is necessary where HB2's anti-DEI provisions are a broad

ban on speech. Indeed, *ex ante* rules like those in HB2 that operate as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" raise "far more serious concerns than could any single supervisory decision." *United States v. Nat'l Treasury Emps. Union ("NTEU")*, 513 U.S. 454, 467-68 (1995) (Stevens, J.). Given these concerns of chilling speech before it happens, "the government must shoulder a correspondingly 'heav[ier] burden,' and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 907 (2018) (Alito, J.) (citation modified) (quoting *NTEU*, 513 U.S. at 466). Under the heavier burden, a public employer must "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968)). To meet this "heavy" burden, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *NTEU,* 513 U.S. at 475 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

Here, Defendants have not met their heavy burden to justify HB2's sweeping, *ex ante* restrictions on classroom speech in public higher education. Defendants have made no effort to present a state interest or legitimate pedagogical purpose that would justify HB2's provisions. *See* Obj. at 29-35. As the Eleventh Circuit explained in *Pernell*, the chief concerns motivating *Pickering/Connick/Garcetti* "were about workplace management." *Pernell v. Fla. Bd. Of Governors of the State Univ.*, 181 F.4th 1135, 1151 (11th Cir. 2026) (cert. petition filed). But

"[t]hese kinds of managerial concerns are not at play here." *Id.*[19] Indeed, Defendants have "not asserted that its law plays any role in allowing proper performance of professors' daily duties, avoiding classroom disruptions, or the like." *See Pernell*, 181 F.4th at 1152; Obj. at 29-35. Instead, HB2 is a "per se ban on speech the state disagrees with" imposed "by political authorities"—here, the state legislature—"who are not the professors' employers and who exercise no direct supervision or control over their employment." *See Pernell*, 181 F.4th at 1152.

Defendants' earlier briefs only conclusorily contended that HB2 was necessary to eliminate "textbook discrimination." *See* Defs.' Opp'n for Prelim. Inj. at 36, ECF No. 26. But HB2 does not actually seek to bar the practice of "discrimination"—which already is prohibited under RSA 354-A:27-28 and RSA 193:38, as well as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 with respect to certain programs that receive federal financial assistance. Rather, HB2 bars ideas and speech in the classroom that the legislature dislikes even where such ideas are relevant to approved courses and when the instruction has no nexus to workplace management. Of course, "[p]reventing professors from positively discussing a viewpoint is not the same as regulating discrimination, which the State can certainly do." *See Pernell*, 181 F.4th at 1161. And even if this "discrimination" state interest has any validity—and it does not in this case—this state interest cannot be "satisfied by the assertion of abstract interests" without actual evidence. *See Rideout v. Gardner*, 838 F.3d 65, 72 (1st Cir. 2016). None has been presented here. For these reasons—and consistent with the decisions of other courts[20]—the record

[19] *See also, e.g.*, *Kilborn v. Amiridis*, 131 F.4th 550, 558 (7th Cir. 2025) (declining "to extend [*Garcetti v. Ceballos*, 547 U.S. 410 (2006)] to speech involving university teaching and scholarship when the Supreme Court was unwilling to do so" and noting that "[e]very other circuit to decide the issue has recognized that *Garcetti* does not apply ….") (collecting cases).

[20] *See NTEU*, 513 U.S. at 472 (rejecting on First Amendment grounds rule that prohibited federal employees from accepting compensation for making speeches or writing articles even when the speech had no connection with the employee's official duties); *Pernell*, 181 F.4th at 1164 (cert. petition filed) (concluding that Florida's Individual Freedom Act "violates the First Amendment as applied to these plaintiffs"); *Nat'l Educ. Ass'n v. U.S. Dep't of Ed.*, 779 F. Supp. 3d 149, 194 (D.N.H. 2025) (preliminarily enjoining Dear Colleague Letter as to NEA members that work

justifies this Court holding that HB2 cannot be constitutionally applied to members of Plaintiff NEA-NH who teach at UNH Law, as well as Plaintiff Dr. Dottie Morris.[21]

IV. The ADA, Section 504, and IDEA Pre-empt HB2 (Count III).

At the outset, Defendants are wrong that the four Plaintiff school districts cannot bring a pre-emption claim against Defendants. Obj. at 37-38. The U.S. Supreme Court has rejected the notion that subdivisions are broadly prevented from suing a state, clarifying that any such restrictions turned on "particular prohibitions of the Constitution considered in those cases." *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960). So, thus, while a state may not be "bound by substantive fourteenth amendment limitations (due process and equal protection) when dealing with its municipalities," *see Santiago Collazo v. Franqui Acosta*, 721 F. Supp. 385, 393 (D.P.R. 1989), political subdivisions can still "sue their states on constitutional grounds when the right asserted is protected." *Id.* (emphasis omitted) (collecting cases outlining when the right asserted is protected, including under the supremacy clause); *see also Municipality of San Sebastian v. Puerto Rico*, 89 F. Supp. 3d 266, 277 (D.P.R. 2015). Here, as courts repeatedly have found, such a protected right exists under the supremacy clause to be free from state laws that conflict with federal mandates.[22] Plaintiffs therefore have standing to challenge Defendants' enforcement of HB2's terms and funding penalties that conflict with federal civil rights laws.

---

in colleges and universities, in part, where the Letter "targets speech based on viewpoint"); *see also Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (holding that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship"); *Reges v. Cauce*, 175 F.4th 1014, 1036 (9th Cir. 2026) (holding that, under *Pickering*, avoiding the disruption on college campuses accompanies controversial speech, cannot justify the suppression of the very diversity of views that is central to the mission of higher education); *but see Jackson Fed'n of Tchrs.*, 2026 U.S. App. LEXIS 32221 at *20-28 (5th Cir. Oct. 22, 2026) (leaving for new judge to decide the merits of First Amendment claim on a developed record).

[21] *See* SF Nos. 32 (*Exhibit 34* (NEA-NH Decl.) ¶ 8), 33 (*Exhibit 42* (Morris Decl.) ¶¶ 18–19).

[22] *See, e.g.*, *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 (2d Cir. 2019) (holding that "a subdivision may sue its state under the Supremacy Clause"); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) (holding that "a political subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law"); *see also Rogers v. Brockette*, 588 F.2d 1057, 1068-69 (5th Cir. 1979) (holding that the school district had standing to sue state education

Plaintiffs have advanced two independent bases for finding HB2 pre-empted: (1) that HB2 directly conflicts with federal disability rights laws; and (2) that HB2 stands as an obstacle to the objectives of those laws. But Defendants do not engage with these theories' central contention: that the plain meaning of HB2 prohibits public schools from doing exactly what the ADA, Section 504, and IDEA each require—treating disabled students differently by "considering [them] as disabled for the purposes of achieving disability-related outcomes," such as access, integration, and improving academic achievement. Pls.' Memo. at 46–47; 52–53; *see* Obj. at 21–22 (confirming Plaintiffs' interpretation of HB2, without exception). Instead, Defendants limit their analysis to Plaintiffs' first pre-emption theory, arguing that HB2's directive to "treat[] individuals equally" saves the statute from a direct conflict because it aligns with the ADA, Section 504, and IDEA's purpose of ensuring "equality of opportunity." Obj. at 38–44.

But as this Court already recognized, *see NEA-NH*, 806 F. Supp. 3d at 204, this argument erroneously conflates equal *opportunities* with equal *treatment*—a conflation that finds no purchase in federal disability rights laws. Indeed, as Plaintiffs explain at length and as this Court found, the ADA, Section 504, and the IDEA recognize that *different treatment* may be required to allow people with disabilities to achieve *equal opportunities*. Pls.' Memo. at 48–54; *NEA-NH*, 806 F. Supp. 3d at 204. It is this foundational concept of disability rights laws, explicit in the statutes themselves and confirmed by the Supreme Court, that runs directly contrary to HB2.[23]

---

authorities under the supremacy clause and reaching the merits of that challenge); *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283, 290 (S.D. Cal. 1978) (explaining that "[i]f the Supremacy Clause is to be effective in achieving its purpose, its dictates must be enforceable by political subdivisions of states as well as by individuals"), *aff'd*, 651 F.2d 1306 (9th Cir. 1981); *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1268 n.4 (10th Cir. 2011) (Matheson, J., dissenting)(collecting cases).

[23] *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("[P]references will sometimes prove necessary to achieve the [ADA's] basic equal opportunity goal."); *Lartigue v. Northside Indep. Sch. Dist.*, 100 F.4th 510, 521 (5th Cir. 2024) ("[T]he ADA … shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities. Of course, children with disabilities receive different treatment, that is the point of an 'accommodation.'") (internal quotations omitted); *McGary v. City of Portland*, 386 F.3d 1259, 1267 (9th Cir. 2004)

Plaintiffs have cited numerous statutory and regulatory provisions alongside actual examples to show how the structure of these laws requires schools to *treat* disabled students differently from the general population by providing accommodations or special education services not provided to others in order to achieve equal *outcomes*. Pls.' Memo. at 49–51, 53. Plaintiff school districts and federal courts apply these principles every day, refuting Defendants' contrary suggestion. Obj. at 41. But Defendants ignore the key distinction in these examples between equal treatment and equal outcomes and fail to explain how the structure of disability rights laws or their applications could be harmonized with the text of HB2. Defendants further fail to explain why, even under their generous reading of HB2's "equal treatment" clause, HB2 does not frustrate a core objective of federal disability rights law—improving demographic outcomes. Pls.' Memo. at 50–53.

Moreover, HB2 "cannot be saved by invoking the State's traditional power to regulate" state funds, schools, and state entities. *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 325 (2016); Obj. at 40–41. The Supreme Court has nearly always invoked this heightened presumption against pre-emption only where "federal law is said to bar state action in *fields* of traditional state regulation," not where it impliedly conflicts with state law.[24] Even if this presumption applies, courts have readily found pre-emption where, as here, a traditional state regulation unambiguously conflicts with and frustrates the purposes of federal law, including the ADA.[25] In response,

("The purpose of the ADA's reasonable accommodation requirement is to guard against the facade of 'equal treatment' when particular accommodations are necessary to level the playing field.").

[24] *See, e.g.*, *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (emphasis added); *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 715 (1985); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001).

[25] *See, e.g.*, *Equal Rts. Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010) (finding traditional common-law indemnity claims pre-empted because they "diminish[] … incentive to ensure compliance" with the ADA); *Independent Living Center v. City of Los Angeles*, 973 F.Supp.2d 1139, 1157–58 (C.D. Cal. 2013) (same); *Algonquin Gas Transmission, LLC v. Weymouth, Massachusetts*, 919 F.3d 54, 64 (1st Cir. 2019) (holding that local environmental health and safety ordinance frustrated the purpose of and was therefore pre-empted by federal law).

Defendants cite only a dissenting opinion in a case where the majority of the Supreme Court found that traditional common-law remedies *were* pre-empted. *See* Obj. at 40–41 (quoting *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008)). And Defendants continue to ignore this Court's prior holding rejecting their arguments. *See NEA-NH*, 806 F. Supp. 3d at 204–05. HB2 presents a direct conflict that Defendants cannot mend by simply raising the presumption against pre-emption.

In any event, Congress "certainly contemplated the pre-emption of substantial areas of traditional state regulation." *Gobeille*, 577 U.S. at 325. Congress passed the IDEA and Section 504 pursuant to its spending powers to ensure the nondiscriminatory use of funds in public entities, including schools.[26] And the ADA prohibits disability discrimination in "anything a public entity does." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001). Because Congress clearly intended to regulate traditional areas of state concern, the State cannot invoke its police powers to save a law that unambiguously undermines federal law.

V. Scope of Relief.

The proposed permanent injunction, which is identical to this Court's preliminary injunction, addresses all of Defendants' concerns. Nothing in this proposed injunction "sweeps broader than what would be required to redress the plaintiffs' harms" under *Trump v. CASA, Inc.*, 606 U.S. 831 (2025). *See* Obj. at 44 (emphasis omitted). Here, consistent with *CASA*, the proposed injunction *only* prevents (i) Defendants and their agents from enforcing HB2 (ii) against "Plaintiffs National Education Association-New Hampshire and its members, Oyster River Cooperative School District, Dover School District, Somersworth School District, Grantham School District, Dr. Dottie Morris, James T. McKim, Jr., New Hampshire Outright, and any covered entity."[27]

[26] *See* 20 U.S.C. § 1412(a)(17)(C) ("[F]unds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds … expended for special education[.]"); 29 U.S.C. § 794(a).

[27] A "covered entity" means any "public entity" within the meaning of RSA 21-I:113 or other entity that meets the definition of "public school" in RSA 186:71, II, "agency" in RSA 21-I:112, I, or "political subdivision" in RSA 21-

Significantly, Defendants have not meaningfully engaged either the "covered entity" definition that this Court correctly used in its preliminary injunction or this Court's rationale for why this definition was necessary to provide complete relief to Plaintiffs under *CASA*. As this Court thoughtfully explained:

> An injunction limited to enjoining defendants from enforcing the anti-DEI laws against the named plaintiffs would fail to provide plaintiffs with complete relief. The anti-DEI laws only directly regulate the conduct of "public school[s]," "public entit[ies]," "agencies," and "political subdivisions." RSA 21-I:113, :114; RSA 186:72. Neither NEA-NH, its members, the individual plaintiffs, nor New Hampshire Outright come within any of those categories. Rather, these plaintiffs experience harm through the anti-DEI laws' enforcement against regulated entities that employ or work with plaintiffs or their members. Therefore, to provide these plaintiffs with complete relief, it is necessary to enjoin defendants from enforcing the anti-DEI laws against regulated entities that employ or contract with plaintiffs or plaintiffs' members.

See NEA-NH, 806 F. Supp. 3d at 211 (citations omitted). There is no reason to disturb this analysis.

To be clear, the proposed injunction only implicates enforcement by Defendants or their agents "against" Plaintiffs and "covered entities"; it does *not* seek to enjoin HB2's enforcement "against" any non-covered state government or state agency. *See* Obj. at 42. However unwise it may be for Defendants to enforce HB2 against non-covered, non-plaintiffs in the face of any order declaring HB2 to be facially unconstitutional, nothing in the injunction itself prevents Defendants from enforcing HB2 against any non-covered state agency.

Moreover, it is perfectly appropriate for the injunction to prohibit Defendants from enforcing RSA 21-I:112-116 against all Plaintiffs, their members, and any "covered entity." RSA 21-I:112-113—which also is separately enforced through RSA 21-I:115-116—does not just prohibit the actions of state agencies, but rather more broadly prohibits the actions of any state *or*

I:112, III that (i) employs, contracts with, or works with one or more plaintiffs or one or more of plaintiffs' members or schools; or (ii) provides services to a student of a plaintiff school district under the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, or the Individuals with Disabilities Act ("IDEA").

non-state "public entity," *see* RSA 21-I:113, and any state *or non-state* "agencies or political subdivisions," *see* RSA 21-I:114. Defendants, themselves, have acknowledged that these provisions impose prohibitions on state and non-state "agencies" alike, including municipalities. *See* SF No. 24 (*Exhibit 50* (NHDOJ Jan. 8, 2026 correspondence on HB2 where NHDOJ applies 21-I:112-116 to non-state agency municipal town and city clerks)). Plaintiffs are, by definition, educators and contractors who work (and have worked) for state and non-state "public entities" and for state and non-state "agencies or political subdivisions" under RSA 21-I:113-114, including public schools, municipalities, public libraries, and state agencies.[28] Plaintiffs' work can be attributed to any such "public entity," "agency" or "political subdivision," with potential consequences—including loss of work, loss of a contract, or discipline—if they are perceived to violate the vague prohibitions in RSA 21-I:113-114. Thus, Plaintiffs—and those that contract with them—are entitled to protection against any enforcement of RSA 21-I:112-116 by Defendants.

Defendants further argue that "relief on any claim must be limited to the plaintiffs who actually brought it." *See* Obj. at 43. But this is precisely what the proposed injunction does. *Every* Plaintiff is entitled to the proposed injunction where *every* Plaintiff prevails on at least one of the three claims raised in this Motion that entitles them to this relief.[29] If this Court is to grant relief

[28] It is inaccurate to say that the only entities covered by RSA 21-I:112-116's prohibitions would be the four school-district plaintiffs in this case, *see* Obj. at 42, as the NEA-NH and its members, Dr. Dottie Morris, James T. McKim, Jr., and New Hampshire Outright all work for, or have contracted with, "public entities" under RSA 21-I:113 and "agencies or political subdivisions" under RSA 21-I:114. *See Exhibit 42* (Morris Decl.) ¶ 19 (addressing "implicit bias" instruction at public state college); *Exhibit 43* (McKim Decl.) ¶ 4 (discussing "training and engaging in consulting/speaking on inclusion, diversity, equity, accessibility, and bias throughout New Hampshire, including for the New Hampshire Department of Justice, the New Hampshire Lottery Commission, multiple public school districts, public libraries, and the public university system"); *Exhibit 44* (N.H. Outright Decl.) ¶ 4 (noting that New Hampshire Outright "frequently provides trainings to educators and school staff at K-12 public schools in New Hampshire. These trainings have also occurred at public colleges and universities, as well as private K-12 schools in New Hampshire").

[29] Below is a breakdown of the specific plaintiffs entitled to relief under each claim, with each claim independently justifying the relief sought for each prevailing plaintiff:

- Fourteenth Amendment's Prohibition on Vagueness (Count I): Plaintiffs National Education Association-New Hampshire and its members; Dr. Dottie Morris; James T. McKim, Jr.; and New Hampshire Outright.
- First Amendment (Count II): Plaintiffs National Education Association-New Hampshire and its members; and Dr. Dottie Morris.

as to Counts I (vagueness) and III (pre-emption), as the Court did at the preliminary injunction stage of this case, then *all Plaintiffs* are entitled to the injunctive relief requested.

Defendants also complain that "the Court cannot invalidate the reporting requirements in RSA 21-I:115 because that provision applies only to the state government." *See* Obj. at 42. But nothing in the injunction wholesale enjoins state agencies from engaging in this reporting (though, of course, any enforcement of this reporting process as to Plaintiffs and "covered entities" understandably would implicate the injunction, as this reporting would effectively be enforcing against them the prohibitions in RSA 21-I:112-113). For the same reasons, the requested injunction does not wholesale enjoin the enforcement of NHDOJ's obligation under RSA 21-I:116 to "establish a process by which all political subdivisions review their existing contracts for the presence of DEI-related provisions." *See* Obj. at 42-43. Indeed, NHDOJ has already established this process, making clear that it does not view the injunction as wholesale covering this obligation under RSA 21-I:116. *See* SF No. 24. Similarly, nothing in the proposed injunction wholesale bars the NHDOE from imposing a certification process under RSA 186:75 and creating a compliance report under RSA 186:76. *See* Obj. at 43. While any enforcement against Plaintiffs and "covered entities" of RSA 186:75-76—which act as tools to enforce the prohibitions in RSA 186:73-74—understandably would implicate the injunction, NHDOE is free under the injunction to comply with these certification and reporting obligations while excluding Plaintiffs and "covered entities" from these obligations.[30]

- ADA, Section 504, and IDEA Pre-emption (Count III): Plaintiffs National Education Association-New Hampshire and its members; Oyster River Cooperative School District, Dover School District, Somersworth School District, Grantham School District; Dr. Dottie Morris; and James T. McKim, Jr.

[30] However, as a practical matter, given the size of NEA-NH, almost all K-12 public schools are covered under the injunction.

Dated: November 24, 2026

Respectfully submitted,

/s/ Gilles R. Bissonnette

Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
Maria D. Savarese (N.H. Bar. No. 273285)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301
(603) 224-5591
gilles@aclu-nh.org
henry@aclu-nh.org
maria@aclu-nh.org

Zoe Brennan-Krohn*
Malhar Shah*
Disability Rights Program
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street
San Francisco, CA 94104
(415) 343-0769
zbrennan-krohn@aclu.org
mshah@aclu.org

Callan E. Sullivan[T] (N.H. Bar No. 20799)
Lauren Snow Chadwick[T] (N.H. Bar No. 20288)
NATIONAL EDUCATION ASSOCIATION-NEW HAMPSHIRE
9 South Spring Street
Concord, NH 03301
(603) 224-7751
csullivan@nhnea.org
lchadwick@nhnea.org

Sarah Hinger*
Alexis Alvarez*
Racial Justice Program
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7882
shinger@aclu.org
alexisa@aclu.org

James A. O'Shaughnessy[+] (N.H. Bar No. 19719)
Meghan S. Glynn[+] (N.H. Bar No. 21168)
DRUMMOND WOODSUM & MACMAHON
670 N. Commercial Street, Suite 207
Manchester, NH 03101
(603) 792-7414
joshaughnessy@dwmlaw.com
mglynn@dwmlaw.com

Chris Erchull (N.H. Bar No. 266733)
Hannah Hussey*
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont, Suite 950
Boston, MA 02108
(617) 426-1350
cerchull@gladlaw.org
hhussey@gladlaw.com

* admitted *pro hac vice*
[T] appearing only on behalf of NEA-NH
[+] appearing only on behalf of the Oyster River Cooperative School District, the Dover School District, and the Grantham School District