THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0500

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

v.

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

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT OF PETITIONERS

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IDENTITY OF *AMICUS CURIAE*

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU")—a nationwide, nonpartisan, public-interest organization with over 1.5 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation by direct representation and as *amicus curiae* to encourage the protection of individual rights guaranteed under the New Hampshire and United States Constitutions, including the right to an adequate education as enshrined in Part II, Article 83 of the New Hampshire Constitution. In this role, the ACLU-NH was a supporter of and advocate for the *Claremont* litigation. The ACLU-NH believes that its experience in these issues will make its brief of service to this Court.

STATEMENT OF THE CASE AND THE FACTS

Amicus Curiae ACLU-NH incorporates by reference the Statement of the Case and Facts in Petitioners' Responsive Brief.

SUMMARY OF ARGUMENT

Amicus Curiae ACLU-NH adopts and incorporates by reference the arguments made in the brief of the *Amici* School Districts that together educate more than 30% of public school students in the state. As that brief thoroughly explains, the property tax disparities that exist today to fund education in New Hampshire are just as significant as those that existed in 1997 when this Court decided *Claremont Sch. Dist. v. Governo*r ("*Claremont II*"), 142 N.H. 462 (1997). New Hampshire's overall tax system for funding education continues to be disproportional and therefore is unconstitutional under Part II,

Article 5 of the New Hampshire Constitution. As this Court has already spoken clearly and directly about these flaws and injustices in its prior school funding decisions, the ACLU-NH joins the *Amici* School Districts to ask that this Court affirm those rulings and direct the State to fulfill its constitutional duty without further delay.

Moreover, the ACLU-NH writes separately to make two points. First, this brief explains how the applicable constitutional standards of heightened scrutiny that apply to the current per student base adequacy aid award under Part II, Article 83 of the New Hampshire Constitution reject deference to the legislature and squarely place the burden on the State of New Hampshire, not the Petitioners. As both the Petitioners and the Superior Court have amply demonstrated, the State cannot meet its high burden of showing that the current per student base adequacy aid award under RSA 198:40-a, II(a) survives heightened scrutiny, and therefore it violates Part II, Article 83 of the New Hampshire Constitution. Second, this brief explains how the Superior Court did not err in considering "extrinsic" evidence in assessing the constitutionality of the per student base adequacy aid award. As this Court has explained, consideration of such "extrinsic" evidence is not only appropriate in assessing the constitutionality of a challenged statutory regime, but it is also required to ensure that the State has satisfied its burden.

ARGUMENT

I. Heightened Scrutiny Under Part II, Article 83 of the New Hampshire Constitution Rejects Deference to the Legislature.

The ACLU-NH adopts and incorporates by reference the arguments raised in the brief of the *Amici* School Districts that together educate more than 30% of public school

students in the state. As in *Claremont Sch. Dist. v. Governo*r ("*Claremont II*"), 142 N.H. 462 (1997), New Hampshire's current education funding system violates Part II, Article 5 of the New Hampshire Constitution because of the disproportionality of the property taxes levied to fund this system. Indeed, as amply demonstrated in the *Amici* School District's brief, the property tax disparities that exist today to fund education in New Hampshire are just as significant as those that existed in 1997 when this Court decided *Claremont II* and concluded that "the framers of the New Hampshire Constitution could not have intended the current funding system with its wide disparities." *Id.* at 470. In short, New Hampshire—just as it was over 20 years ago—is again leaving behind students in property-poor school districts, which includes the state's poorest and most vulnerable children.

The ACLU-NH writes separately to explain how the applicable constitutional standards of heightened scrutiny that apply to the current per student base adequacy aid award[1] under Part II, Article 83 of the New Hampshire Constitution reject deference to the legislature and squarely place the burden on the State of New Hampshire, not the Petitioners. As this Court explained in *Claremont II*, when "an individual school or school district offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny." *Claremont II*, 142 N.H. at 474; *see also State v. Hollenbeck*, 164 N.H.

[1] During the 2018-2019 school year, at the time when the trial court was considering this case, the "base adequacy" amount was set at $3,606 per student. For the 2019-2020 and 2020-2021 school years, this amount has increased to $3,709 per pupil.

154, 160 (2012) ("[A] heightened standard of review applies when a fundamental right or protected liberty interest is at issue."). As the Superior Court correctly noted: "The fundamental right articulated in *Claremont II* encompasses more than simply receiving an education that meets the definition of adequate education; it is a right to *a State-funded adequate education*." *See* June 5, 2029 Superior Court Decision, at p. 24 (Defs.' Appendix of Appealed Decisions at 65) (emphasis added) (citing *Claremont II*, 142 N.H. at 473 ("We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education.")). This right consists of four constitutional mandates—namely, to "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." *Claremont Sch. Dist. v. Governor ("Accountability")*, 147 N.H. 499, 505 (2002). For example, this Court previously found that a bill that would "rely, in part, upon local property taxes to pay for some of the cost of an adequate education" would "directly contradict the mandate of Part II, Article 83, which imposes *upon the State* the exclusive obligation to fund a constitutionally adequate education." *Opinion of the Justices (Reformed Public School Financing System) ("Claremont IX")*, 145 N.H. 474, 476 (2000) (emphasis added); *see also Londonderry v. State ("Claremont XII")*, 154 N.H. 153, 156 (2006) ("[T]hese four mandates comprise *the State's duty* to provide an adequate education.") (emphasis added). Thus, the Superior Court was correct to hold that "[t]he scope of the State's duty to provide an adequate education—and the scope of the fundamental right to an adequate education—must therefore also include the costing and funding." *See* June 5, 2029 Superior Court Decision, at p. 25 (Defs.' Appendix of Appealed Decisions at 66).

To be sure, strict scrutiny only applies if a threshold showing can be made that the base adequacy amount under RSA 198:40-a, II(a) implicates the deprivation of the right to an adequate education and the four mandates articulated by this Court. *See State v. Lilley*, 171 N.H. 766, 204 A.3d 198, 208 (2019) ("For limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of the right."); *see also Sheff v. O'Neill*, 678 A.2d 1267, 1286-87 (Conn. 1996) (explaining that the strict scrutiny analysis used by the Connecticut Supreme Court in scrutinizing legislation which allegedly violates the state's recognition of a fundamental right to education involves a three-step process, with the Petitioners being required to "make a prima facie showing that the disparities . . . are more than de minimis in that the disparities continue to jeopardize the plaintiffs' fundamental right to education"; holding that racial disparities in Connecticut's education system violated strict scrutiny). But, here, the inadequacy is obvious. No student can be adequately educated as a cost of $3,709 under RSA 198:40-a, II(a), and thus the State's regime downshifts the cost of an adequate education to municipalities. As the Superior Court noted in characterizing Petitioners' allegations as requiring heightened scrutiny:

> [T]he State is failing to sufficiently fund what the Legislature has determined it is obligated to fund according to its definition of an adequate education …. [T]he underfunding forces the petitioning school districts to raise their local taxes to compensate for the insufficient funds and that this impinges on the students' fundamental right to ***a State-funded*** adequate education …. The scope of the State's duty to provide an adequate education—and the scope of the fundamental right to an adequate education—must … include the costing and funding.

See June 5, 2029 Superior Court Decision, at p. 23, 25 (Defs.' Appendix of Appealed Decisions at 64, 66). (emphasis added; citations omitted). Accordingly, strict scrutiny applies to New Hampshire's education funding scheme.

Under strict scrutiny, the governmental restriction in question must "be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.'" *Akins v. Sec'y of State*, 154 N.H. 67, 73 (2006) (*quoting Follansbee v. Plymouth Dist. Ct.*, 151 N.H. 365, 367 (2004)). Critically, under this standard, the burden is "upon the State to prove that the statute is narrowly tailored to promote a compelling [state] interest." *State v. Zidel*, 156 N.H. 684, 686 (2008); *see also Fisher v. Univ. of Tx. at Austin*, 136 S. Ct. 2198, 2222 (2016) ("Strict scrutiny is a searching examination, and it is the government that bears the burden of proof."). In applying strict scrutiny, the traditional presumptions in favor of constitutionality and deference to the legislature are discarded. In other words, strict scrutiny carries a "presumption of unconstitutionality." *Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 699 (2007).

While the per student base adequacy aid award must be examined under strict scrutiny because this regime implicates the deprivation of a fundamental right, this system would also be unconstitutional if examined under the lesser standard of intermediate scrutiny. Under intermediate scrutiny, the challenged action must be substantially related to an important governmental objective. *See United States v. Virginia*, 518 U.S. 515, 524 (1996). This level of scrutiny also rejects deference to the legislature. As the United States Supreme Court has explained in the federal equal protection context governing sex-based classifications, "[t]he burden of justification [when applying intermediate scru-

tiny] is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533. As part of this analysis, the State's justifications for its actions "must be genuine, not hypothesized or invented post hoc in response to litigation. *Id.* at 533; *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (noting that the burden falls on the "defender of [the] legislation"). This Court has also not hesitated to reject post-hoc justifications in applying intermediate scrutiny. Put another way, the justifications to be reviewed by the court are only those that were before the legislature, thereby necessitating a review of legislative history. *See, e.g.*, *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007) ("To meet this burden, the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations.") (internal quotations omitted); *see also Guare v. State*, 167 N.H. 658, 665, 668 (2015) (same; rejecting changes to voter registration form on intermediate scrutiny grounds, including post hoc justifications).

Particularly in recent years, courts have rigorously applied the intermediate scrutiny standard in the context of content-neutral speech restrictions and made clear that the burden under this standard falls on the government to present actual evidence justifying the restriction and whether it is tailored to the interests asserted. *See McCullen v. Coakley*, 573 U.S. 46, 134 S. Ct. 2518, 2537-40 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate [that the speech restriction meets the relevant requirements]"; striking down content-neutral 35-foot buffer zone around reproductive health care facilities applying intermediate scrutiny, in part, because "the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools

readily available to it"); *Cutting v. City of Portland*, 802 F.3d 79, 91 (1st Cir. 2015) (striking down City of Portland's blanket content-neutral median ban applying intermediate scrutiny, in part, because "the City did not try—or adequately explain why it did not try … less speech restrictive means of addressing the safety concerns it identified"); *Rideout v. Gardner*, 838 F.3d 65, 73 (1st Cir. 2016) (noting that "the government's burden is not met when a State offer[s] no evidence or anecdotes in support of its restriction"; striking down New Hampshire's content-neutral restriction on so-called "ballot selfies" when applying intermediate scrutiny, in part, because the State could provide no evidence supporting the need for the restriction) (internal quotations omitted); *Doyle v. Comm'r, N.H. Dep't. of Res. & Econ. Dev.*, 163 N.H. 215, 223 (2012) (striking down content-neutral special-use permit requirement applying intermediate scrutiny); *see also United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (collecting cases). Indeed, the tailoring inquiry as part of the intermediate scrutiny test rejects blanket deference to the government; instead, the government must present actual evidence demonstrating the need to intrude upon constitutional rights. For example, as the United States Supreme Court recently made clear in *McCullen*, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540; *see also Cutting*, 802 F.3d at 92 ("Such a [blanket median] ban is obviously

more efficient, but efficiency is not always a sufficient justification for the most restrictive option.").

Here, as explained by both the Superior Court and Petitioners, the State cannot meet its substantial burden of justifying the current per student base adequacy aid award under any of these forms of constitutional scrutiny. The Superior Court was correct in concluding that the current per student base adequacy aid award under RSA 198:40-a, II(a) triggers strict scrutiny and violates Part II, Article 83 of the New Hampshire Constitution.

II. The Superior Court Did Not Inappropriately Conduct a "Hybrid" Constitutional Analysis.

As the standards of review explained above indicate, the State is off base in its claim that the Superior Court improperly employed a "hybrid" constitutional inquiry by examining RSA 198:40-a's legislative history. *See* State's Br. at 23, 39-43. As explained above, heightened standards of constitutional scrutiny—whether it be in determining a statute's facial constitutionality or its constitutionality on an as applied basis—require a probing review of, for example, (i) the State's justifications for the statute (including those before the legislature) and whether they are supported by evidence, (ii) whether the law is tailored to such justifications, and (iii) whether the legislative body attempted or studied less restrictive means of accomplishing its legislative objectives. All of these analyses are not assessed by a court in a vacuum, but rather are based on extrinsic evidence—including evidence that may have been before the legislature when it considered the challenged statute. This Court and others have made this clear time and time again.

See Guare, 167 N.H. at 665, 668 (requiring, for intermediate scrutiny, that the State can only use state interests in the legislative history in justifying a law's constitutionality; noting that "[c]omplying with HAVA is not among the reasons for enacting SB 318 articulated in the legislative history"); *Rideout*, 838 F.3d at 69, 73 (requiring that governmental interests must be supported by evidence in applying intermediate scrutiny; noting that "[t]he legislative history of the bill does not contain any corroborated evidence of vote buying or voter coercion in New Hampshire during the twentieth and twenty-first centuries," and that the State "admitted that New Hampshire has not received any complaints of vote buying or voter intimidation since at least 1976, nor has he pointed to any such incidents since the nineteenth century"). An "as applied" constitutional analysis similarly allows an examination of extrinsic evidence, particularly in the form of information demonstrating the degree to which a constitutional right has been harmed. *See Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. 128, 155 (2018) ("An as-applied challenge is, therefore, necessarily fact intensive.") (Hicks, J. and Bassett, J.). In sum, there is nothing inappropriately "hybrid" in examining extrinsic evidence—particularly when the evidence is derived from the legislative history—when testing the constitutionality of a statute both facially and as applied. In fact, this is precisely how constitutional analysis works in determining whether a legislative action is permissible.

Moreover, in assessing a statute's constitutionality, it is entirely appropriate for a court's analysis to go beyond the statute's plain text and, instead, examine the challenged statute in the context of its entire regulatory regime. *See Frese v. Macdonald*, No. 18-cv-

1180-JL, 2019 DNH 184, 2019 U.S. Dist. LEXIS 184746, at *27 (D.N.H. Oct. 25, 2019) ("In assessing a facial challenge to a statute, courts may consider not just the 'words of a statute,' but also 'their context' and 'their place in the overall statutory scheme.'") (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also In re Consol. Freightways Corp. of Del.*, 564 F.3d 1161, 1165 (9th Cir. 2009) (stating that courts must "construe th[e] provision [at issue] with the statutory scheme in which it is embedded"). For example, in *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc), the Fourth Circuit held that the statute in question addressing "habitual drunkards" should receive heightened vagueness scrutiny because other statutes in Virginia used it as a predicate for increasing criminal sentences. As that Court explained:

> The integrated structure of the challenged scheme reinforces this conclusion. "[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989); *In re Consol. Freightways Corp. of Del.*, 564 F.3d 1161, 1165 (9th Cir. 2009) (recognizing that courts must "construe th[e] provision [at issue] with the statutory scheme in which it is embedded"). A civil interdiction order issued under Virginia Code § 4.1-333 is a necessary predicate for imposing the increased criminal penalties set forth in the other statutes addressing interdiction. Indeed, such an interdiction order would be meaningless without the conditions and criminal consequences that follow from a violation of that order. And although the portions of the scheme that impose those conditions and consequences do not use the term "habitual drunkard," that term is incorporated by reference. *See, e.g.*, Va. Code §§ 4.1-304 (prohibiting the sale of alcoholic beverages to "interdicted person"), 4.1-322 (prohibiting "person[s] who [have] been interdicted pursuant to § 4.1-333" from possessing alcoholic beverages), 4.1-100 (defining "interdicted person" to mean "a person to whom the sale of alcoholic beverages is prohibited by order pursuant to this title"). Thus, these interrelated statutes must be construed together to give effect to their various provisions and, because they are quasi-criminal in nature, a "relatively strict" test for vagueness applies here. [*Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982)].

Id. at 273; *see also Frese*, 2019 U.S. Dist. LEXIS 184746, at *27 (examining facial constitutionality of New Hampshire's criminal defamation statute in context of entire statutory and regulatory regime, and noting that "New Hampshire's distinctive criminal process may exacerbate the potential for arbitrary or selective prosecutions"). Thus, as *Manning* and *Frese* make clear, the Superior Court's constitutional analysis was proper in examining both RSA 198:40-a and how it fit within the entirety of New Hampshire's educational regime, along with the Legislative Study Commission Report. *See* Superior Court's July 26, 2019 Order on State's Motion to Reconsider, at pp. 5-6 (Defs.' Appendix of Appealed Decisions at 142-143); *see also* Superior Court's July 26, 2019 Order on Petitioners' Motion to Reconsider, at pp. 10-12.

It is worth noting that the Superior Court appeared to look to the Legislative Study Commission Report because the Respondents offered no evidence contesting the fact that the base adequacy aid award amount was, by itself, insufficient to educate students. *See* Superior Court's July 26, 2019 Order on Petitioners' Motion to Reconsider, at p. 9 (noting that the State had not contested that "no New Hampshire school district can provide an adequate education on the amount of base adequacy aid contained in RSA 198:40-a, II(a)"; further noting State's complaint that it needed discovery to do so). The Respondents—which includes the Department of Education—had ample opportunity, with vast amounts of educational information in its possession, to try to establish before the Superior Court with affidavits and other evidence that New Hampshire students could be adequately educated at the sole cost of nearly $4,000 per student. The State apparently made little effort to do so. This failure is because the inadequacy of this regime is apparent.

This failure is also fatal. *See El Día, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005) ("[T]he government's burden is not met when a 'State offer[s] no evidence or anecdotes in support of its restriction'") (alteration in original)) (quoting *Fla. Bar v. Went For It, Inc*., 515 U.S. 618, 628 (1995)); *see also Rideout*, 838 F.3d at 73. In any event, the Legislative Study Commission Report is not truly "extrinsic" evidence; rather, as in *Manning* and *Frese*, it is part of the statutory and regulatory regime itself, as it was specifically incorporated in the funding statute. *See* 2008 New Hampshire Laws Ch. 173:1, III (S.B. 539) (State's Appendix, Volume I, page 465) ("The joint legislative oversight committee on costing issued detailed findings and recommendations on the composition of the cost of an adequate education and how the funds for an adequate education should be allocated and accounted for in order to ensure that the educational needs of all public school students are met. These findings and recommendations were submitted to the general court and are an integral basis of the costing determinations reflected in this act.").

In sum, while the State complains that the Superior Court erred in "audit[ing] the legislative process," *see* State's Br. at 38, such an audit is precisely the type of analysis that constitutional standards of review require.

CONCLUSION

Amicus Curiae ACLU-NH asks that this Court adopt the relief requested in the *Amici* School Districts' Brief. As explained in that brief, "[b]ecause this Court has already spoken clearly and directly about these flaws and injustices in its prior school funding decisions, *amici* ask that this Court affirm those rulings [*in Claremont II*] and direct

the State to finally fulfill its constitutional duty without further delay, bringing a rapid end to the irresponsibility and evasion of the past two decades." *See Amici* School Districts' Br. at 8. The ACLU-NH also asks that this Court affirm the Superior Court's conclusion that the current per student base adequacy aid award violates Part II, Article 83 of the New Hampshire Constitution. As is obvious, no student can be adequately educated at a cost of $3,709. In the face of this apparent inadequacy, deference to the legislature in the form of rational basis review is inappropriate. Indeed, such deference would not only conflict with *Claremont II* and its progeny, but also would carry the potential of rendering Part II, Article 83 a dead letter. It would also leave behind New Hampshire's poorest and most vulnerable children.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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Dated: April 20, 2020

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 3,886 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Gilles Bissonnette
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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 20th day of April 2020 through the electronic-filing system on counsel for the Petitioners (Michael Tierney, Esq.) and the Respondents (Dan Will, Esq.).

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.