THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0121

Contoocook Valley School District, et al.

v.

The State of New Hampshire, et al.

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND NATIONAL EDUCATION ASSOCIATION-NEW HAMPSHIRE
IN SUPPORT OF PLAINTIFFS

Appeal Pursuant to Supreme Court Rule 7 from
Rockingham County Superior Court
Docket No. 213-2019-cv-00069

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IDENTITY OF *AMICI 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, non-partisan, public-interest organization with over 1.7 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, including the right to an adequate education. In this role, the ACLU-NH was a supporter of the *Claremont* litigation and filed an *amicus* brief in *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154 (2021) ("*ConVal I*"), in support of the plaintiffs.

National Education Association-New Hampshire ("NEA-NH") is located in Concord, New Hampshire and was founded in 1854—then as the New Hampshire State Teachers Association. The NEA-NH became one of the "founding ten" state education associations that formed the National Education Association ("NEA") in 1857. The NEA-NH is comprised of more than 17,000 member educators in New Hampshire representing the majority of all public-school employees in the state. The NEA-NH's mission is to strengthen and support public education and serve their members' professional, political, economic, and advocacy needs. The NEA-NH's members are public school educators in all stages of their careers, including classroom teachers and other certified professionals, education support personnel, instructors and staff at public higher education institutions, students preparing for a teaching career, and those retired from the profession. In this role, the NEA-NH has been a supporter of, and advocate for, the state constitutional right to an adequate education, including through legislative testimony and the filing of *amicus* briefs in the

following cases: *Claremont Sch. Dist. v. Governor*, 138 N.H. 183 (1993) ("*Claremont I*"), *Claremont Sch. Dist. v. Governor*, 147 N.H. 499 (2002) ("*Claremont Accountability*"); *Londonderry Sch. Dist. v. State*, 154 N.H. 153 (2006) ("*Londonderry I*"); and *Londonderry Sch. Dist. v. State*, 157 N.H. 734 (2008) ("*Londonderry II*"). Public education is the "cornerstone of our democratic system," which serves to prepare students to thrive as "citizens who are able to participate intelligently in the political, economic and social functions" of our society. *Claremont I*, 138 N.H. at 192. The NEA-NH's members strongly believe that, without constitutionally adequate education, this goal becomes much harder.

The ACLU-NH and NEA-NH believe that their experience in these issues will make their brief of service to this Court.

SUMMARY OF ARGUMENT

New Hampshire's overall system for funding education continues to violate the right that students have under Part II, Article 83 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 and NEA-NH ask that this Court affirm those rulings and direct the State to fulfill its constitutional duty without further delay.

The ACLU-NH and NEA-NH write separately to make the following points. *First*, this Court should follow the holdings of *Claremont* and its progeny on the State's duty to provide an adequate education to public school students. The State's argument in support of overruling *Claremont* and its progeny is underdeveloped and offhand, and therefore should be rejected. But if this Court does consider this argument (and it should not), then it should reaffirm *Claremont* and its progeny, as the right to an adequate education is firmly

rooted in the text of the New Hampshire Constitution, its history, and this Court's jurisprudence. And if there was any further doubt as to the correctness of *Claremont* and its progeny, the legislature has—while failing to comply with these decisions—also simultaneously and repeatedly rejected efforts to overrule or narrow these decisions, thereby demonstrating both these decisions' importance and the public's reliance on them. Further, it is critical for this Court to recognize that adequate and equitable education funding helps alleviate racial inequities in our society—a principle that is especially important here where per pupil spending is comparatively low in New Hampshire's most racially diverse cities of Manchester and Nashua. *Second*, this brief explains how the applicable constitutional standards of heightened scrutiny that apply under Part II, Article 83 of the New Hampshire Constitution reject deference to the legislature and squarely place the burden on the State, not the Plaintiffs.

ARGUMENT

I. This Court Should Follow *Claremont* and its Progeny.

In this case, the State argues—with minimal analysis—that, if *Claremont* and its progeny "support what the trial court did here, then the right to an adequate education is nonjusticiable and should be declared as such in this case." *See* State of New Hampshire Opening Br. in *Contoocook Valley Sch. Dist. v. State*, No. 2024-0121 ("*ConVal II*"), at 19. The State adds that, if this Court's precedents support the lower Court's decision in *ConVal II*, "then there is no judicially discoverable and manageable standard against which to assess the right to an adequate education, and this Court's education-funding jurisprudence *should be overruled as nonjusticiable*." *Id.* at 45 (emphasis added). In other words, the

State presents a "heads I win/tails you lose" argument where it contends that the State prevails under existing, justiciable constitutional principles, but—if the State does not prevail—then those constitutional principles should be viewed as nonjusticiable.

The *amicus* brief of the Senate President in *ConVal II* similarly argues that "the progression of the *Claremont* cases guarantees improper judicial intrusion into legislative and executive branch essential functions." *See* Senate President Amicus Br. in *ConVal II* at 14 (Aug. 19. 2024).[1] The *amicus* memorandum of thirty-one (31) other legislators (including the current Speaker of the House) in *ConVal II* also asks this Court to "overrul[e] *Claremont I* and *Claremont II*, thereby returning education policy and funding matters exclusively to the elected branches of the government for disposition though the political process, just as intended by the authors of the Constitution." *See* 31 Legislative Members *Amicus* Memo. in *ConVal II* at 2 (Sept. 4, 2024). These 31 legislators go so far as to contend that this Court should "follow the example of the Supreme Court of the United States in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228

[1] The Senate President's *Amicus* Brief extensively cites *Duncan v. State*, 166 N.H. 630 (2014), for the proposition that "[s]tanding under the New Hampshire Constitution operates in a similar fashion to the federal case or controversy requirement of Article III and requires the parties to have an actual, not hypothetical, dispute, 'which is capable of judicial redress.'" *See, e.g.,* Senate President Amicus Br. in *ConVal II* at 28-29, 43-44 (Aug. 19. 2024). However, the voters through CACR15 overruled *Duncan* when, in 2018, they amended Part I, Article 8 of the New Hampshire Constitution to reinstate taxpayer standing. *See* Staff Writer "Taxpayers Should Have Standing to Sue Government," *Foster's Daily Democrat* (Mar. 7, 2018), https://www.fosters.com/story/opinion/editorials/2018/03/07/editorial-taxpayers-should-have-standing-to-sue-government/13364149007/. The Senate President voted "yea" on CACR15 when it was voted on in the Senate. *See* 2018 CACR15, https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/Roll_calls/Billstatus_billrollcalls.aspx?lsr=2374&sy=2018&sortoption=billnumber&txtsessionyear=2018&txtbillnumber=CACR15.

(2022)," which overruled the recognition of a general constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). *Id.*

The positions of the State and various *Amici* amount to a direct effort to have this Court overrule the *Claremont* cases and the vital constitutional right to an adequate education that this Court has repeatedly recognized. This Court should unequivocally reject these efforts for the reasons explained below.

A. The State's Argument in Support of Overruling *Claremont* and its Progeny is Underdeveloped and Offhand, and Therefore Should Be Rejected.

Though the State asks this Court to overrule *Claremont* and its progeny if the trial court otherwise correctly applied these precedents, the State does so in an undeveloped manner without a robust analysis of the *stare decisis* factors to be considered. When previously confronted with such underdeveloped, off-hand arguments, this Court has not hesitated to reject consideration of the question. *See, e.g., Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 290 (2012) ("Having failed to brief any of the four stare decisis factors, the plaintiff has not persuaded us that our decision in *Trull* must be overruled."); *Boyle v. City of Portsmouth*, 172 N.H. 781, 787 (2020) ("The City does not address any of these [*stare decisis*] factors, but simply claims that the law is unfair in this case. In the absence of developed argument, we decline the City's request that we 'revisit' *Houston*."); *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 672 (2016) ("We reject, as underdeveloped, Sumner's remaining assertions that the ballot exemption statutes violate the New Hampshire Constitution."); *State v. Chick*, 141 N.H. 503, 504 (1996) (passing reference to constitutional claim renders argument waived); *Keenan v. Fearon*, 130 N.H. 494, 499 (1988) ("[O]ff-

hand invocations of the State Constitution [that] are supported neither by argument nor by authority … warrant[] no extended consideration."). This Court should especially decline to address this question here where the State's minimally-reasoned argument would, if adopted, have far-reaching ramifications on the State's legal obligations to fund public education. Further demonstrating the extraordinary nature of the State's argument here, the State explicitly told this Court four years ago that it was *not* making an argument that *Claremont* and its progeny were wrongly decided and should be overruled. *See* N.H. Supreme Ct. Oral Argument in *Contoocook Valley Sch. Dist. v. State*, No. 2019-0500 (Sept. 24, 2020) ("*ConVal I*"), *available at* https://vimeo.com/1000548128 (at 20:40-21:15) (the Department of Justice—in response to Justice Bassett's question asking to confirm his understanding that the State was making no claim, unlike various *amici*, "that *Claremont I* or *Claremont II* or any of its progeny were wrongly decided and should be reversed"—stating that "[m]y office's job is to defend the statutes of the state and that is what we are doing in this case, so we have not made that argument, your Honor, that's correct.").

B. If This Court Reconsiders *Claremont* and its Progeny (And it Should Not), *Stare Decisis* Demands That These Decisions Be Affirmed and Faithfully Applied.

Even if this Court were to consider overruling *Claremont* and its progeny—which it should not—the principle of *stare decisis* requires respect for, and deference to, these important decisions.

This Court has made clear that "[t]he doctrine of *stare decisis* demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and

unpredictable results." *Rallis v. Demoulas Super Markets*, 159 N.H. 95, 102 (2009) (quotation omitted). "Thus, when asked to reconsider a previous holding, the question is not whether we would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.* (quotation omitted). Indeed, "[a]dherence to precedent is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie*, 588 U.S. 558, 559 (2019) (quoting *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)); *see also Payne v. Tenn.*, 501 U.S. 808, 827 (1991) (*stare decisis* "contributes to the actual and perceived integrity of the judicial process"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) ("Fidelity to precedent . . . is vital to the proper exercise of the judicial function."). *Stare decisis* also "reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem." *Ramos v. La.*, 590 U.S. 83, 115 (2020) (Kavanaugh, J., concurring); *see also id.* at 105 (majority op.) ("[T]he precedents of this Court warrant our deep respect as embodying the considered views of those who have come before."). In other words, *stare decisis* is a doctrine of "judicial humility." *See Brown v. Davenport*, 596 U.S. 118, 141 (2022) (Gorsuch, J.).

Accordingly, several factors inform this Court's judgment of whether *stare decisis* demands respect for prior precedent, "including whether: (1) the rule has proven to be intolerable simply by defying practical workability; (2) the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine; and (4) the facts have so changed, or come to be seen so differently,

as to have robbed the old rule of significant application or justification." *See N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 326 (2021). None of these factors supports overruling *Claremont* and its progeny.

1. The Right to an Adequate Education is Firmly Rooted in the New Hampshire Constitution, its History, and this Court's Jurisprudence. This Enforceable, Mandatory Right is Neither Unworkable Nor a Remnant of an Abandoned Doctrine. Nor Have Facts Changed to Rob This Right of Significant Application or Justification.

As to the first, third, and fourth *stare decisis* factors, nothing about *Claremont* and its progeny is unworkable or a remnant of an abandoned doctrine. These decisions were correct when they were decided and they are correct now. They have a basis in both the text and history of the New Hampshire Constitution. And this Court should further be deferential to precedent here because the principle that the New Hampshire Constitution contains an enforceable, mandatory right to an adequate education is over three decades old and has been the centerpiece of not one, but multiple carefully-considered opinions of this Court, many years apart. A review of the history and rationale of these decisions demonstrates how they were rightly decided.

In *Claremont I*, this Court held that Part II, Article 83 of the New Hampshire Constitution imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding. 138 N.H. at 184. This Court ruled that Article 83—the Encouragement of Literature Clause, which states that it is the duty of the legislators and magistrates to cherish, among other things, the public schools—was not "merely a statement of aspiration," but

rather a command "in no uncertain terms" that "the State provide an education to all its citizens and that it support all public schools." *Id.* at 187. These holdings were not just based on textual considerations, but also the original intent of Article 83's framers:

> When New Hampshire became a separate province in 1680, it reenacted the education laws of Massachusetts then in existence. In 1693, the New Hampshire Legislature enacted a law requiring the towns' selectmen to raise money by "an equal rate and assessment" on the inhabitants for the construction and maintenance of the schools "and allowing a Sallary to a School Master." A penalty was provided for failure to comply with the statute. Similar laws were enacted in 1714, 1719, and 1721.
>
> The law of 1719 required every town having fifty householders or more to provide a schoolmaster to teach children to read and write, and in every town of 100 householders, a grammar school to be kept. A penalty was to be assessed for failing to comply with the law, to be paid "towards the Support of Such School or Schools within this Province where there may be most need." ….
>
> Although these laws required the towns to fund public education, Governor Wentworth made clear in an address to the Council Chamber of the House of Assembly, on April 13, 1771, that the duty to educate remained with the State: "Religion - Learning, and Obedience to the Laws, are so obviously the Duty & Delight of Wise Legislators, that their mention, justifies my Reliance on your whole Influence being applied to inculcate, spread & Support their Effect, in every Station of Life." It is also apparent from Governor Wentworth's subsequent message to the General Assembly on December 14, 1771, that the local town officials had failed to meet their duties under the prior laws and that corrective action was necessary by the State itself ….

Id. at 188-90 (internal citations omitted).

This Court elaborated on this history further and concluded that "[t]he contention that, despite the extensive history of public education in this State, the framers and general populace did not understand the language contained in part II, article 83 to impose a duty on the State to support the public schools and ensure an educated citizenry is unconvincing." *Id.* at 190. The Court added that "in New Hampshire a free public education is at the

very least an important, substantive right." *Id.* at 192. This Court further concluded that this "is a right held by the public to enforce the State's duty." *Id.*

Since *Claremont I*, this Court not only has affirmed this enforceable constitutional right to an adequate education, but also has actively enforced this right in the face of law-suits to ensure that this right has meaning. In *Claremont Sch. Dist. v. Governor*, 142 N.H. 462 (1997) ("*Claremont II*"), for example, this Court held that the then-existing system for financing elementary and secondary public education in New Hampshire was unconstitutional because, rather than paying the full cost of a constitutionally adequate public education, the State was utilizing local and disproportional tax levies to satisfy part of its exclusive obligation. There, this Court "made it clear that the State was responsible to: (1) define the content of a constitutionally adequate public education; (2) fund it; (3) ensure that any property tax used to pay for it was administered in a manner that was equal in valuation and uniform in rate; and (4) develop a system of accountability to ensure the delivery of a constitutionally adequate public education." *See Londonderry Sch. Dist. v. State*, 157 N.H. 734, 738 (2008) ("*Londonderry II*") (Broderick, C.J., dissenting) (summarizing *Claremont II* holding).

Later, in 1998, this Court denied the State's effort to obtain a two-year extension to fulfill the mandates of *Claremont II*, stating that, "[a]bsent extraordinary circumstances, delay in achieving a constitutional system [would be] inexcusable." *See Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 158 (1998) ("*Claremont Motion for Extension of Deadlines*"). The following year, this Court concluded that the State's proposal to phase-in a statewide property tax to fund constitutional adequacy would result in unconstitutional tax

disparities. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 210 (1999) ("*Claremont Statewide Property Tax Phase-In*"). And in *Claremont Sch. Dist. v. Governor*, 147 N.H. 499 (2002) ("*Claremont Accountability*"), this Court held that the accountability standards in Senate Bill 164 designed to provide an adequate education did not pass constitutional muster. The accountability rules the State had implemented allowed it to be relieved of its duty when a school district's tax base or other financial condition contributed to noncompliance with minimum standards. This Court held that there was "no accountability when the rules on their face tolerate[d] noncompliance with the duty to provide a constitutionally adequate education." *Id.* at 513. This Court then went so far as to conclude that the right to an adequate education was "settled law," concluding: "In light of the procedural history of this litigation, including efforts by the executive and legislative branches and their previous statements on this issue, and the application of *settled law*, this conclusion should be neither surprising nor unanticipated." *Id.* at 519 (emphasis added). This Court effectively affirmed *Claremont* once more when it held in *Londonderry I* that RSA 193-E:2, standing alone, did not fulfill the State's duty to define the substantive content of a constitutionally adequate education in the context of Part II, Article 83 in such a manner that the residents of the New Hampshire could know what the parameters of that educational program were. 154 N.H. at 161.

To overturn *Claremont* and its progeny now—after three decades in which New Hampshire courts have repeatedly enforced these decisions—would create a wave of political turmoil where state funds for education will perpetually be on the chopping block every legislative cycle. There is no precedent for this type of dramatic about-face from

such a longstanding, widely-known, and carefully-considered precedent, especially when it would require a dramatic holding that prior cases deemed justiciable actually were not justiciable. *See Dobbs*, 597 U.S. at 363-64 (Kagan, J., dissenting) ("The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion …. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed.").

This Court has rarely overruled a prior decision recognizing a core, enforceable right in the New Hampshire Constitution; rather, it has more commonly overruled decisions implicating how to interpret statutes and procedural rules in criminal cases. *See, e.g., Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) (overruling *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) with respect to how to interpret RSA 91-A:5, IV); *In re Blaisdell*, 174 N.H. 187, 188 (2021) (overruling *In the Matter of Blanchflower & Blanchflower*, 150 N.H. 226 (2003), to the extent that it limits the definition of "adultery," as that term is used in RSA 458:7, II, to sexual intercourse between persons of the opposite sex); *State v. Quintero*, 162 N.H. 526, 529 (2011) (overruling *State v. Williams*, 137 N.H. 343 (1993), which required the State to prove the charged acts occurred in the time frame alleged in the indictments); *State v. Duran*, 158 N.H. 146, 148 (2008) (overruling the statutory-based decision in *State v. Harnum*, 142 N.H. 195 (1997), on which the trial court had relied in holding that defendant was not entitled to credit for pretrial confinement in Colombia while awaiting extradition). To the contrary, this Court has rejected

at least one recent effort to overrule a decision expounding on constitutional rights, there with respect to the right to vote. *See N.H. Democratic Party*, 174 N.H. at 327 ("Under these circumstances, we are not persuaded that *Guare* should be overruled.").

The fact that this Court has had to previously enforce the constitutional right to an adequate education in the face of legislative resistance—or that a state obligation to uniformly fund an adequate education may lead to "lengthy and expensive constitutional litigation," *see* 31 Legislative Members *Amicus* Memo. in *ConVal II* at 5 (Sept. 4, 2024)—also does not support a conclusion that the holdings in *Claremont* and its progeny are unworkable or that circumstances have meaningfully changed. Constitutional rights often require vigilance from the courts, including in the face of legislative inaction or even hostility. Collectively, both federal courts and New Hampshire state courts hear thousands of cases every year alleging violations of constitutional rights, including the rights under the First Amendment and Part I, Articles 22 and 5 of the New Hampshire Constitution to free speech and free exercise of religion, *see, e.g., Formella v. Hood*, No. 2023-0663 (N.H. Sup. Ct. pending); *State v. Mack*, 173 N.H. 793 (2020), the rights under the Second Amendment and Part I, Article 2-a to bear arms, *see Burt v. Speaker of the House of Representatives*, 173 N.H. 522 (2020), and rights under the Eighth Amendment and Part I, Article 33 to be free from cruel and/or unusual punishments, *see, e.g., State v. Addison*, 165 N.H. 381, 565 (2013); *In re State of N.H.*, 166 N.H. 659 (2014). Far from supporting the elimination of such rights, the existence of continued unconstitutional conduct only underscores the continued necessity for judicial enforcement.

It is the responsibility of the judiciary to adjudicate such disputes. When "a [constitutional] hurt or injury is inflicted . . . by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 313 (2014) (plurality). As this Court noted:

> Regardless, our decision in [*State v.*] *LaFrance* [, 124 N.H. 171 (1983)] does not permit us to treat the separation of powers as an "impenetrable barrier[ ]," *State v. Carter*, 167 N.H. 161, 166 (2014) (quotation omitted), and thereby disregard our "duty to interpret constitutional provisions and … determine whether the legislature has complied with them." *Hughes* [*v. Speaker of N.H. House of Representatives*], 152 N.H. [276, 288 (2005)]. The legislature may not, even in the exercise of its "absolute" internal rulemaking authority, violate constitutional limitations. *Id.* at 284, 288. Indeed, "[n]o branch of State government can lawfully perform any act which violates the State Constitution." *LaFrance*, 124 N.H. at 176. Therefore, "[a]ny legislative act violating the constitution or infringing on its provisions must be void because the legislature, when it steps beyond its bounds, acts without authority." *Id.* at 177.

Burt, 173 N.H. at 527-28. Moreover, as the United States Supreme Court observed in *West Virginia State Board of Education v. Barnette*, "[w]e cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S. 624, 640 (1943); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). It is neither unusual nor improper for individuals to look to the courts when their rights are violated; rather, it is a sign that the system is working—not that the rights at issue should be abandoned and left to the legislature with no judicial accountability.

Constitutional rights are, of course, often contentious. For example, the right to bear arms and the right to vote have both engendered significant litigation, including before this Court. *See, e.g., Burt*, 173 N.H. 522; *N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312 (2021); *Guare v. State of New Hampshire*, 167 N.H. 658 (2015). More than one thousand Second Amendment challenges were filed in less than eight years after *District of Columbia v. Heller*, 554 U.S. 570 (2008).[2] There were more than 400 voting-related lawsuits in connection with the 2020 election cycle—more than twice as many as in the 2000 election.[3] Extensive litigation over constitutional rights is no reason to diminish the underlying constitutional rights at issue or to abandon this Court's responsibility to protect them. To overrule a right because it is contentious and requires this Court to make hard decisions that will sometimes be met with disapproval by legislators would do grave damage to the rule of law. If the mere fact that constitutional disputes persist were sufficient to overturn constitutional decisions, those who are unhappy with a decision of the Court would have every incentive to continue to violate the right so that they could at some point argue that the existence of so many disputes is reason to abandon the Court's ruling. By contrast, adherence to *stare decisis* and the rule of law sends a clear message to avoid repetitive, untenable challenges to established law.

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[2] *See* Eric Ruben & Joseph Blocher, From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After *Heller*, 67 Duke L.J. 1433, 1455 (2018) (cataloguing "997 opinions address[ing] 1,153 distinct Second Amendment challenges" between June 2008 and February 2016).

[3] *See* Lila Hassan & Dan Glaun, COVID19 and the Most Litigated Presidential Election in Recent U.S. History, PBS: Frontline (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-ushistory/.

Consider, in this light, the United States Supreme Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), and *Brown v. Board of Education*, 349 U.S. 294 (1955) ("*Brown II*"). Those decisions were met with widespread and staunch opposition—including by legislators—and required extensive litigation to make progress toward their promise of ending racial segregation. Shortly after the Supreme Court's decision in *Brown II*, nearly one hundred members of Congress endorsed a statement read on the congressional floor that praised "those States which have declared the intention to resist forced integration" and pledged "to use any lawful means to bring about a reversal of" the Court's decisions.[4] State resistance to desegregation required resort to United States military troops to enforce court orders.[5] And yet the courts remained steadfast in adhering to *Brown* and the rule of law. *See, e.g., Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964) (holding Prince Edward County school board's decision to close public schools and fund private segregated schools violated equal protection); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting attempted suspension of Little Rock School Board's integration plan and ordering integration of public schools); *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 460–64 (M.D. Ala. 1967) (ordering desegregation plan after three prior injunctions against interference with desegregation efforts had been violated by state officials), *aff'd*, *Wallace v.*

[4] Declaration of Constitutional Principles ("Southern Manifesto on Integration"), 102 Cong. Rec. 4459–60 (Mar. 12, 1956) (statement of 19 Senators and 77 House members calling *Brown* "a clear abuse of judicial power").

[5] *See* Exec. Order 10,730, 22 Fed. Reg. 7,628 (Sept. 24, 1957) (ordering Arkansas National Guard under federal authority and sending federal troops in response to "willful[] obstruct[ion]" of court orders in the Eastern District of Arkansas); Exec. Order 11,111, 28 Fed. Reg. 5,709 (June 11, 1963) (similar order to enforce desegregation orders in Northern District of Alabama).

United States, 389 U.S. 215 (1967).[6] This history—namely, decades of litigation to enforce the United States Constitution, often in the face of open resistance—was no basis for overruling *Brown*. The same is true of *Claremont* and its progeny.[7]

Brown, as it celebrates its 70th anniversary, is insightful here for another reason: adequate and equitable education funding helps alleviate racial inequities in our society[8]—a principle which is especially important here where per pupil spending is comparatively low in New Hampshire's most racially diverse cities of Manchester and Nashua. New Hampshire rapidly is becoming more racially diverse. While New Hampshire's population grew by a modest 4.6% during the past decade, the number of residents who are people of

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[6] *See generally* Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit who Translated the Supreme Court's* Brown *Decision Into a Revolution for Equality* (1981); Equal Justice Initiative, "Massive Resistance," in Segregation in America 20–39 (2018), https://segregationinamerica.eji.org/report.pdf.

[7] There is another parallel between *Brown* and *Claremont*. This Court's refusal to delay the deadline to fulfill the mandates of *Claremont II* by two years in *Claremont Sch. Dist. v. Governor*, 143 N.H. 154 (1998) ("*Claremont Motion for Extension of Deadlines*") was handled in similar ways to the United States Supreme Court's refusal to postpone the deadline for the Little Rock School Board to comply with *Brown* in *Cooper v. Aaron*, 358 U.S. 1 (1958). Both cases—*Claremont Motion for Extension of Deadlines* and *Cooper*—resulted in an order refusing delay that was personally signed by all the justices. And this Court in *Claremont Motion for Extension of Deadlines*, in rejecting delay, specifically cited *Cooper*. *See Claremont Motion for Extension of Deadlines*, 143 N.H. at 158.

[8] *See* Victoria E. Sosina and Ericka S. Weathers, *Pathways to Inequality: Between-District Segregation and Racial Disparities in School District Expenditures, AERA Open,* 5(3), https://doi.org/10.1177/2332858419872445 ("We find that changes in racial/ethnic segregation within a state from 1999 through 2013 are associated with racial/ethnic disparities in spending, even after accounting for disparities in poverty."); "School Districts That Serve Students of Color Receive Significantly Less Funding" *EdTrust* (Dec. 8, 2022), https://edtrust.org/press-room/school-districts-that-serve-students-of-color-receive-significantly-less-funding/ ("Across the country, districts with the most Black, Latino, and Native students receive substantially less state and local revenue — as much as $2,700 per student — less than districts with the fewest students of color.").

color increased by 74.4% to 176,900 in 2020.[9] For example, the population of Manchester and Nashua was 98% White in 1980[10]; now the population is 77.4% and 77.8% White, respectively, in these cities.[11] And "children are at the leading edge of the state's growing diversity,"[12] with "[t]he number of non-white students [having risen] by 200% statewide in the last 20 years, driven in large part by growing diversity in cities like Manchester and Nashua."[13] The *Union Leader* has also reported that "more than 2 of every 5 children in Manchester and Nashua hail from families of color," and that, "[i]n 30 years, Manchester's youngest generation has shifted from 94% White in 1990 to 57% last year."[14] Significantly, Manchester's level of spending per pupil ($16,636.35 for 2022-23) is among the

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[9] Kenneth Johnson, "Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard," *Carsey School of Public Policy* (Aug. 30, 2021), https://carsey.unh.edu/publication/modest-population-gains-growing-diversity-new-hampshire-children-vanguard.

[10] *See* Campbell Gibson and Kay Jung, "Historical Census Statistics On Population Totals By Race, "1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States," *U.S. Census Bureau* (Feb. 2005), *available at* https://www.census.gov/content/dam/Census/library/working-papers/2005/demo/POP-twps0076.pdf (Census Data for 1980 at Table 30, page 76).

[11] 2023 Population Estimates for Manchester, https://www.census.gov/quickfacts/fact/table/manchestercitynewhampshire/PST045219; 2023 Population Estimates for Nashua, https://www.census.gov/quickfacts/fact/table/nashuacitynewhampshire/PST045219.

[12] Kenneth Johnson, "Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard," *Carsey School of Public Policy* (Aug. 30, 2021), https://carsey.unh.edu/publication/modest-population-gains-growing-diversity-new-hampshire-children-vanguard.

[13] *See* Sarah Gibson, "How New England's Lack of Teacher Diversity is Affecting Students at N.H.'s Largest School District," *NHPR* (June 22, 2022), https://www.nhpr.org/nh-news/2022-06-22/manchester-nh-student-teacher-diversity-enrollment-demographics.

[14] *See* Michael Cousineau, "NH Grows More Diverse, Faces Call for Change," *Union Leader* (Dec. 18, 2021) (updated Mar. 22, 2022), https://www.unionleader.com/news/business/whats_working/nh-grows-more-diverse-faces-call-for-change/article_8c1cfc2d-73c1-51f3-9a5d-939525c3c21e.html.

lowest in the state, and Nashua's level of spending per pupil ($18,107.16 for 2022-23) is well below the state average of $20,322.52—both districts where racial/ethnic diversity among the student population is the largest in New Hampshire.[15]

The Legislative *Amici*'s attempt to paint the right of New Hampshire public school students to an adequate education as somehow unique among constitutional rights because this right is perceived to be "hotly contested" similarly fails. *See* 31 Legislative Members *Amicus* Memo. in *ConVal II* at 4 (Sept. 4, 2024). Many rights are controversial or unpopular; indeed, that is why they cannot exclusively be left to the political process, and why individuals must often turn to an independent judiciary for their enforcement. Consider also criminal procedure rights for those accused of murder, free exercise rights of Jehovah's Witnesses, or free speech rights of those who burn the United States flag in protest or have views many deem repugnant—all of which retain constitutional protection despite often intense public criticism. As the United States Supreme Court remarked in *Brown II*,

[15] *See* N.H. DOE, Enrollments by Race/Ethnicity In New Hampshire Public Schools, As of October 1, 2023 (Feb. 23, 2024), *available at* https://my.doe.nh.gov/iPlatform/Report/Report?path=%2FBDMQ%2FiPlatform%20Reports%2FDemographic%20Data%2FEnrollments%20-%20Demographic%20Categories%2FRace%20-%20Ethnic%20Enrollments&name=Race%20-%20Ethnic%20Enrollments&categoryName=Enrollments%20-%20Demographic%20Categories&categoryId=19 (indicating that, as of October 1, 2023, Manchester's student population is 48.70% White/Non-Hispanic and Nashua's student population is 50.20% White/Non-Hispanic, making them the most racially diverse districts in New Hampshire); N.H. DOE, Cost Per Pupil by District, 2022-23 (Jan. 2, 2024), *available at* https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/cpp-fy2023.pdf (indicating that Manchester is the sixth lowest district in per pupil spending out 162 districts with figures, and indicating that Nashua is the twenty-third lowest district in per pupil spending out 162 districts with figures).

"it should go without saying that the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." 394 U.S. at 300.

It is also wrong to suggest that *Claremont* and its progeny have "abandoned the proper limits of judicial power and improperly enmeshed [the Court] in the lawmaking process." *See* Senate President Amicus Br. in *ConVal II* at 14 (Aug. 19. 2024). Just as separation of powers principles were not violated by allowing a challenge to the legislature's rule prohibiting firearms in certain state house locations in *Burt*, no such violation occurs here in enforcing the constitutional mandates of the *Claremont* decisions where it "is the role of this court in our co-equal, tripartite form of government to interpret the Constitution." *See Burt*, 173 N.H. at 528 (quoting *Petition of Judicial Conduct Comm.*, 145 N.H. 108, 113 (2000)). *Claremont* and its progeny present even less of a separation of powers concern than in *Burt* where these education cases do not implicate internal legislative rules governing legislative behavior, but rather a fundamental and mandatory right "held by the public," *see Claremont I*, 138 N.H. at 192, including New Hampshire's poorest residents. In other words, far from constituting a violation of separation of powers, *Claremont*—and *Burt*—represent the foundational principle that New Hampshire is a State of checks and balances in which the court system plays a vital role in protecting fundamental, mandatory constitutional rights. *See also Horton v. McLaughlin*, 149 N.H. 141, 145 (2003) ("The court system [remains] available for adjudication of issues of constitutional or other fundamental rights."); *Baines v. N.H. Senate President*, 152 N.H. 124, 129, 132 (2005) ("Claims regarding compliance with these kinds of mandatory constitutional provisions are justiciable."; holding that claims under the mandatory provisions of N.H. Const.

pt. II, art. 2, 20, 37, and 44 are justiciable; also noting that, "[w]hile it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation"); *Richard v. Speaker of the House of Representatives*, 175 N.H. 262, 268 (2022) ("Here, in effect, we have been asked whether the Speaker and the Senate President, on behalf of their respective legislative bodies, failed to comply with constitutional mandates. We conclude that this question is justiciable."). And New Hampshire is far from the only state that recognizes these educational rights as being enforceable.[16]

Here, making this justiciability conclusion stronger—unlike *Brown v. Sec'y of State*, 176 N.H. 319 (2023), where this Court concluded that the claims for partisan gerrymandering were nonjusticiable under the New Hampshire Constitution—the right to an adequate education *has been previously (and repeatedly)* deemed a justiciable, mandatory right by this Court using discernable standards. The standards this Court has used in adjudicating this educational right are no less discernable than the tiers of constitutional scrutiny that this Court has ubiquitously used elsewhere in adjudicating fundamental rights.

[16] *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 42-43 (2018) ("All told, roughly forty-four states by now have faced state-constitutional challenges to their systems of funding public schools. Plaintiffs have won twenty-seven of these challenges at some point and in the process compelled legislatures to adopt a host of additional reforms, many of which increased funding and closed equity gaps."); *see also* SchoolFunding.Info, Overview of Litigation History, https://www.schoolfunding.info/litigation-map/ (noting 26 states, including New Hampshire, that have a legal right to education that is enforced); *see also* Molly S. McUsic, The Future of *Brown v. Board of Education*: Economic Integration of the Public Schools, 117 Harv. L. Rev. 1334, 1344 & n. 63 (2004).

See infra Section II. The fact that some legislators may not like these standards in the context of education adequacy (or that they are being held accountable by a system of checks and balances) does not make these standards any less discernible. This Court, in fact, has taken great care to accommodate separation of powers concerns in its education funding decisions by drawing a fine line to exercise its duty to declare whether the right to an adequate education under Article 83 is being complied with, while at the same time giving the legislature the breadth and discretion to find the best ways to comply with these decisions. *See Claremont I*, 138 N.H. at 193 ("We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government."), *Claremont II*, 142 N.H. at 476-77 ("Decisions concerning the raising and disposition of public revenues are particularly a legislative function and the legislature has wide latitude in choosing the means by which public education is to be supported."). Unfortunately, while this Court has faithfully complied with its mandated obligation to "say what the law is," it is the legislature that has continued to skirt this obligation even when given a long leash by the courts for years.

The principle that this Court has a vital role to play in enforcing constitutional rights is no less true if, to meaningfully provide a constitutional right, the legislature needs to use funds. It is not particularly remarkable that the State is subject here in the education context to constitutional mandates that may cause it to spend financial resources—just as, for example, the State is constitutionally required to provide adequate care to prison residents and must therefore spend funds to do so. This has been litigated time and time again in the

context of federal constitutional rights, where federal courts have explained that "[r]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *See, e.g., Papasan v. Allain*, 478 U.S. 265, 278 (1986).[17] Indeed, it would be paradoxical for this Court to conclude that—while the State clearly can be ordered by a federal court to take steps to enforce a federal substantive constitutional right that may have a "substantial ancillary effect" on the state treasury without running afoul of sovereign immunity—a state court does not have that similar power to enforce a state constitutional right in a manner that has an ancillary impact on the treasury. *Claremont* and its progeny are also readily distinguishable from *Carrigan v. N.H. Dep't of Health & Human Servs.*, where the plaintiff there asked this Court to sweepingly "[s]crutiniz[e] the entire realm of a governmental body's spending activity … to determine what aspects of its spending decisions, if any, are causing injury," 174 N.H. 362 (2001); here, rather, the question before this Court can be viewed as more targeted in focusing on whether RSA 198:40-a, II(a) is unconstitutional.

Claremont and its progeny also cannot be viewed as unworkable and "no more than a remnant of an abandoned doctrine" where the legislature—while not complying with the mandates of the *Claremont* decisions—has simultaneously repeatedly rejected efforts to

[17] *See also, e.g., Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (affirming that *Ex parte Young* "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"); *Edelman v. Jordan*, 415 U.S. 651, 667–68 (1974) ("[A]n ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.").

overrule or limit the impact of these decisions dating all the way back to 1998. *See, e.g.,* 1998 CACR46 (House deeming inexpedient to legislate proposed constitutional amendment stating, in part, that the right of every child to an adequate education shall be enforced by appropriate legislation)[18]; 1999 HB737 (bill "declaring the New Hampshire supreme court's Claremont II decision to be an unconstitutional violation of the separation of powers mandate under part I, article 37 of the New Hampshire constitution" was inexpedient to legislate in the House)[19]; 2000 HB113 (Senate deeming inexpedient to legislate House bill intended to affirm sovereign immunity as it relates to the *Claremont* ruling)[20]; 2003 HCR14 (Senate rejecting as inexpedient to legislate House concurrent resolution stating that the *Claremont* cases are not binding on the legislature and executive branches)[21]; 2004 HCR25 (same House concurrent resolution deemed inexpedient to legislate in House)[22]; 2007 HCR1 (same House concurrent resolution deemed inexpedient to legislate in

[18] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=2925&sy=1998&sortoption=&txtsessionyear=1998&txtbillnumber=CACR46.

[19] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=1021&sy=1999&sortoption=&txtsessionyear=1999&txtbillnumber=HB737.

[20] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=640&sy=2000&sortoption=billnumber&txtsessionyear=2000&txtbillnumber=HB113.

[21] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=15&sy=2003&sortoption=&txtsessionyear=2003&txtbillnumber=HCR14.

[22] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=2336&sy=2004&sortoption=&txtsessionyear=2004&txtbillnumber=HCR25.

House)[23]; 2008 CACR34 (House deeming inexpedient to legislate constitutional amendment proposed by Senate stating that it is the legislature that shall define an adequate education)[24]; 2009 CACR11 (Senate tabling proposed constitutional amendment stating that it is the legislature that shall define an adequate education)[25]; 2010 CACR34 (Senate tabling proposed constitutional amendment stating that it is the legislature that shall define an adequate education)[26]; 2012 HCR26 (House concurrent resolution stating that the *Claremont* cases are not binding on the legislature and executive branch sent to interim study in House, with the report not recommending it for legislation)[27]; 2015 CACR3 (Senate deeming inexpedient to legislate proposed constitutional amendment stating that the legislature determine the standards for an adequate education)[28]; 2021 HCR3 (House concurrent resolution stating that the *Claremont* cases are not binding on the legislature and executive branch

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[23] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=171&sy=2007&sortoption=&txtsessionyear=2007&txtbillnumber=HCR1.

[24] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=2915&sy=2008&sortoption=billnumber&txtsessionyear=2008&txtbillnumber=CACR34.

[25] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=926&sy=2009&sortoption=billnumber&txtsessionyear=2009&txtbillnumber=cacr11.

[26] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=2906&sy=2010&sortoption=billnumber&txtsessionyear=2010&txtbillnumber=CACR34.

[27] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=669&sy=2012&sortoption=billnumber&txtsessionyear=2012&txtbillnumber=HCR26.

[28] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=190&sy=2015&sortoption=billnumber&txtsessionyear=2015&txtbillnumber=CACR3.

recommended inexpedient to legislate).[29] These legislative rejections are especially salient where the legislature and the people have elsewhere demonstrated their ability to overrule this Court's decisions interpreting the New Hampshire Constitution, including this Court's taxpayer standing decision in *Duncan v. State*, 166 N.H. 630 (2014), through the amendments to Part I, Article 8 in 2018. All of this confirms that the relief sought here in overruling or narrowing the *Claremont* decision and its progeny is precisely something that the legislature has repeatedly refused to do, and therefore is even more extreme.

2. The Reliance Interests on *Claremont* and its Progeny are Overwhelming Where, For Over 30 Years, New Hampshire Residents and Municipalities Have to Come to Expect Significant, Uniform Financial Support from the State to Support an Adequate Education.

As to the second *stare decisis* factor—namely, whether *Claremont* and its progeny are subject to a kind of reliance that would lend a special hardship to the consequence of overruling them—the reliance interests here are overwhelming. With these repeated decisions affirming this "settled" constitutional right, *see Claremont Accountability*, 147 N.H. at 519, it can hardly be disputed that residents and municipalities have undoubtedly come to rely on aid provided by the State which could either be reduced or eliminated entirely if *Claremont* and its progeny are overruled. Indeed, these decisions may even be the only thing incentivizing the legislature to provide any funding for education <u>at all</u>, with the potential for existing funding to be cut if these decisions are washed away. If this Court

[29] *See* https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=0691&sy=2021&sortoption=billnumber&txtsessionyear=2021&txtbillnumber=HCR3.

overturns the *Claremont* cases, it may even be only a matter of time before the State reduces per pupil aid under RSA 198:40-a, II(a) or its obligation to fund the adequacy formula—the structure that gives assistance to towns that cannot raise enough for their schools through the statewide education property tax (SWEPT). The end result would be further downshifting of the cost of vital services from the State to cash-strapped municipalities—a trend that has accelerated since the Great Recession of 2008-2009 and increased the burdens on municipal taxpayers.[30]

The State's attempt to distance itself from its constitutional obligation to appropriately fund the costs associated with adequate education[31]—which are already woefully insufficient—further underscores the reliance issue. In its opinion, the trial court (Ruoff, J.) took mindful steps in confirming the essential role our State's public-school employees have in "delivering the opportunity for a constitutionally adequate education" and the

[30] *See* "For NH's Cities and Towns, Budget 'Downshift' is Business as Usual," *NHPR* (June 19, 2015), https://www.nhpr.org/nh-news/2015-06-19/for-nhs-cities-and-towns-budget-downshift-is-business-as-usual ("Since the Great Recession, local governments across New Hampshire have had to rely less and less on one of their main sources of revenue: state aid. To balance the budget, state lawmakers have suspended, eliminated or reneged on agreements that for decades have helped cities and towns pay for the services they provide residents."); *see also* Ethan Dewitt, "Cities, Towns Hoping State Will Make Retirement Contributions Permanent," *N.H. Bulletin* (Jan. 19, 2023), https://newhampshirebulletin.com/2023/01/19/cities-towns-hoping-state-will-make-retirement-contributions-permanent/.

[31] *See* State's Opening Brief in *ConVal II* at 29 ("The trial Court found that the State is required under Part II, Article 83 to pay for facilities, transportation, nurse services, principal services and custodial services, though none of those can be found in RSA 193-E:2-a or the regulations associated with the learning areas listed therein.") (internal citations omitted).

State's obligation to fund that opportunity.[32] By removing and failing to appropriately account for and/or fund so-called "cost drivers"—namely, employee (teachers, nurses, support staff) salaries and benefits, transportation, teacher-student ratios, food services, facility and maintenance, etc.—from the analysis of an adequate education, our State fails to adequately support children in public education. The importance of the so-called "cost drivers" to our public education system cannot be ignored, as they are vital to ensure adequate public education and that the State fulfills its obligations under *Claremont I* and *Claremont II*. *See Claremont II,* 142 N.H. at 474; *Claremont I*, 138 N.H. at 191-92; *see* State's Appendix I in *ConVal II* at 84 (Order dated November 20, 2023; "New Hampshire is a rural state, and students cannot access the opportunity for a constitutionally adequate education without getting to school.").

Even now, as the record and data reflect, the State is failing to remedy the condition of our State schools, as well as adequately fund facilities operation and maintenance. Indeed, roughly one-fifth (20%) of all New Hampshire public school students go to school in buildings that have not been updated in 35 years.[33] Towns with schools housed in older

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[32] *See* State's Appendix I in *ConVal II* at 69-70 (Order dated November 20, 2023; "this case concerns the State's obligation to fund the *opportunity* for a constitutionally adequate education…") (emphasis of the Court); *see also id*. at 63 ("Absent the prompt and accurate exercise of such judgement, illness spreads, temporarily depriving affected students of the opportunity for a constitutionally adequate education … the Court finds that nurse services are a necessary component of base adequacy aid.").

[33] *See* N.H. School Funding Fairness Project, "State Building Aid and the Condition of New Hampshire's Public Schools," (Jul. 2023), https://www.fairfundingnh.org/wp-content/uploads/2023/07/Building-Aid-Analysis-Final.pdf; *see also* Michael Kitch, "Need for School Building Aid Exceeds Appropriated Funds in State Budget," *N.H. Business Review* (Jul. 31, 2023), https://www.nhbr.com/school-building-aid-exceeds-appropriated-funds-in-state-budget/#:~:text=July%2031,%202023.%20Michael%20Kitch.%20While%20the.

buildings sometimes lack basic utilities (such as air conditioning) or have utilities that are unreliable and unsafe, including heat, water, or electricity. These types of conditions disrupt both students and employees' focus—not to mention posing an immense safety risk. The same is true for salary and benefit packages which are inadequate to retain and recruit personnel, leading to educator shortages throughout our State. Of note, public school employees cite salary and benefits as a top concern in their current roles, and many report that they are the main reason for leaving the profession.[34] And this failure has serious implications on the other "cost drivers" addressed by the trial court—impacting student-to-teacher ratios, and educator shortages that lead to a host of issues, including but not limited to the health and safety of students with school nursing shortages, and compliance with Individual Education Plans.

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

This case also highlights how the applicable constitutional standards of heightened scrutiny that apply under Part II, Article 83 of the New Hampshire Constitution reject deference to the legislature and squarely place the burden on the State, not the Plaintiffs. As this Court explained in *Claremont II*, when "an individual school or school district offers

[34] Comm. to Study N.H. Teacher Shortages and Recruitment Incentives, "Final Reports of the Committee to Study New Hampshire Teacher Shortages and Recruitment Incentives. SB 236, Chapter 150:1, Laws of 2022.," 106, 113 (Nov. 30 2023), *available at* https://www.gencourt.state.nh.us/statstudcomm/committees/1576/reports/SB%20236-%20Final%20Report.pdf; Reaching Higher N.H., "What Impacts the Educator Workforce?," 2, 6, 14 (Spring 2023), *available at* https://reachinghighernh.org/wp-content/uploads/2023/04/What-Impacts-the-Educator-Workforce-Results-from-the-New-Hampshire-School-Staff-Educator-Transition-Survey.pdf.

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. 154, 160 (2012) ("[A] heightened standard of review applies when a fundamental right or protected liberty interest is at issue."). 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 Accountability*, 147 N.H. at 505.

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*, 579 U.S. 365, 400-401 (2016) ("Strict scrutiny is a searching examination, and it is the government that bears the burden of proof."). Where a showing has been made that the fundamental right to an adequate education has been adversely impacted thereby triggering strict scrutiny—as is the case here—the traditional presumptions in favor of constitutionality and deference to the legislature are discarded. In other words, strict scrutiny rejects deference to the legislature and, instead, carries a "presumption of unconstitutionality." *Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 699 (2007).

And even if the lesser standard of intermediate scrutiny applied, deference to the legislature is rejected. 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). 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 scrutiny] is demanding and it rests *entirely on the State*." *Id.* at 533 (emphasis added). As part of this scrutiny, the State's justifications for its actions "must be genuine, not hypothesized or invented post hoc in response to litigation. *Id.*; *see also Sessions v. Morales-Santana*, 582 U.S. 47, 59 (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 in the equal protection and voting contexts. *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*, 167 N.H. at 665, 668 (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. 464, 495, 489-96 (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) (same; 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), *cert. denied*, 581 U.S. 904 (2017); *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). The tailoring inquiry as part of the intermediate scrutiny analysis 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 Supreme Court 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*, 573 U.S. at 495; *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.").

CONCLUSION

Accordingly, *Amici* ask that this Court affirm that *Claremont* and its progeny are good law in New Hampshire and direct the State to finally fulfill its constitutional duty to provide an adequate education.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,499 words, which is fewer than the 9,500 words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 3rd day of October 2024 to all counsel of record.

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