THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0500

Contoocook Valley School District, Myron Steere, III, Richard Cahoon, Richard Dunning, Winchester School District, Mascenic Regional School District, and Monadnock Regional School District	v.	The State of New Hampshire, New Hampshire Department of Education, Christopher T. Sununu, both individually and in his official capacity as Governor of the State of New Hampshire, and Frank Edelblut, both individually and in his official capacity as Commissioner of the New Hampshire Department of Education

APPEAL PURSUANT TO RULE 7

REPLY BRIEF FOR THE PETITIONERS,

CONTOOCOOK VALLEY SCHOOL DISTRICT,
MYRON STEERE, III, RICHARD CAHOON,
RICHARD DUNNING,
WINCHESTER SCHOOL DISTRICT,
MASCENIC REGIONAL SCHOOL DISTRICT, and
MONADNOCK REGIONAL SCHOOL DISTRICT
(Oral argument requested, 15 minutes)

By their attorneys,
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QUESTIONS PRESENTED

1. Did the Superior Court err in not holding the State's education funding scheme was facially unconstitutional where the undisputed facts demonstrated that there is not a single school district in the State that can provide a constitutionally adequate education on the funding provided by RSA 198:40-a, II(a) and the State was unable to identify a single school district that can provide a constitutionally adequate education on the funding provided by RSA 198:40-a, II(a)? (Petitioners' Motion for Reconsideration.)

2. Did the Superior Court err in not holding the State's education funding scheme was facially unconstitutional where the vast majority of school districts in the State cannot provide a constitutionally adequate education with the funding provided by the State but must raise taxes on local taxpayers to meet the State's obligations? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

3. In light of the fact that the State has failed to implement a constitutional education funding system in the twenty years since *Claremont I* was decided, did the Superior Court err in concluding that it was "prohibited from instructing the Legislature on what is included in a constitutionally adequate education or how funding must be calculated[?]" (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

4. Did the Superior Court err in not granting preliminary declaratory and injunctive relief preventing the State from unconstitutionally requiring the local taxpayers to pay the State's obligation to fund a constitutionally adequate education for the 2019 fiscal year? (Petitioners' Motion for Preliminary Injunction.)

5. Did the Superior Court err in failing to grant declaratory and permanent injunctive relief to prevent the State from funding less than $9,929 per pupil, exclusive of transportation, for both the 2019 and the 2020 fiscal years? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

6. Did the Superior Court err in concluding that it could not rely on either the petitioning school districts' actual costs of delivering a constitutionally adequate education nor on the Department of Education data as the best evidence in determining whether the State had fully funded a constitutionally adequate education where the Legislature had relied on the same type of data in costing a constitutionally adequate education? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

7. Did the Superior Court err in not determining that facts asserted in affidavits of four school superintendents and not controverted by the affidavit submitted by the State's sole affiant must be deemed admitted for the purpose of summary judgment motions? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Objection to Respondents' Motion for Reconsideration.)

8. Did the Court err in not holding that superintendent services, school nurse services, food services, and all requirements that the State imposes on local school districts are elements of a constitutionally adequate education? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

9. Did the Superior Court err in not holding the State's per pupil transportation funding was unconstitutional where it did not fund the actual transportation costs in large and rural school districts which are higher than the state average and higher than the transportation costs in small and urban districts? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

10. Did the Superior Court err in finding there was no deprivation of a fundamental right to a constitutionally adequate education where the State chose to fund teachers' benefits at a level that could not fully fund mandatory benefits, including retirement contributions, federal employment taxes, workers' compensation coverage and unemployment insurance, and health and dental insurance? (Petitioners' Motion for

Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

11. Did the Superior Court err in failing to hold that the State did not meet its burden of showing that it fully funded facilities operation costs? (Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof.)

12. Did the Superior Court err in dismissing the claims against the Governor and the Commissioner in their individual capacities? (Petitioners' Objection to Respondents' Motion to Dismiss; Petitioners' Motion for Reconsideration.)

13. Did the Superior Court err in holding that it is the sole obligation of the Legislature to determine the amount of education funding necessary for the provision of a constitutionally adequate education where previous decisions of this Court hold that it is the obligation of the State and therefore require actions of the executive and potentially judicial branches of government? (Petitioners' Objection to Respondents' Motion to Dismiss; Petitioners' Motion for Summary Judgment and Memorandum of Law in support thereof; Petitioners' Motion for Reconsideration.)

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Before the Superior Court, Petitioners pled that "[t]he State does not currently provide sufficient funds for each and every school district to provide a constitutionally adequate education." DAI[1] at 374, ¶ 24. In support of their summary judgment motion, Petitioners submitted affidavits from the superintendents of the petitioning districts attesting to facts supporting that allegation. DAI at 579, ¶¶ 8-10; DAI at 590, ¶ 94; DAI at 801, ¶¶ 6-8; DAI at 802, ¶ 19; DAI at 806, ¶ 6-8; DAI at 809, ¶ 6-8.The State never propounded any discovery requests. The Superior Court explicitly contemplated that discovery could occur; nevertheless, the State made no discovery requests at all. DAO at 19, n. 13. Petitioners' affidavits were not contradicted at summary judgment, and the Superior Court found that Petitioners had pled and proved an actual deprivation of the fundamental right to an adequate education, triggering strict scrutiny. DAO at 64. Finding no compelling interest in the State's allocation in RSA 198:40-a, the trial court granted Petitioners summary judgment but declined to award them injunctive relief. DAO at 125, 133. This appeal followed.

[1] DAI refers to Defendants' Appendix Volume I filed by the State. DAO refers to the Defendants' Appendix of Orders.

ARGUMENT

I. The Superior Court Applied the Correct Analytical Framework to Find the State's Educational Funding Scheme Unconstitutional

In its Answering Brief, the State alleges that the Superior Court "applied the wrong analytical framework" to its constitutional analysis as "the operative question should have been whether the per-pupil cost set forth in RSA 198:40-a is sufficient to fund an adequate education, as defined in RSA 193-E:2-a, within the plaintiff school districts. Neither the plaintiffs nor the trial court conducted that analysis." State's Answering Brief ("SAB"), p. 15-16. The State is wrong.[2] It was clearly alleged in the Petition, attested to in Petitioners' affidavits, and undisputed by the State, that the per-pupil cost set forth in RSA 198:40-a is insufficient for Petitioners, or any school district in the State, to provide a constitutionally adequate education.. *See, e.g.*, DAI, at 374, ¶ 24; DAI at 579, ¶¶ 8-10. Only after the Superior Court found that the $3,636.06 per pupil in state funding was not adequate did it turn to the Legislative Joint Committee's errors, as the Joint Committee's Report contained the State's rationale for funding at the level it chose and was specifically incorporated into the funding statute.[3] DAO at 105.

a. Petitioners Pled and Proved, and the Superior Court Found, an Actual Deprivation

First, the Petition clearly alleged that "[t]he State does not currently provide sufficient funds for each and every school district to provide a constitutionally adequate education." DAI, at 374, ¶ 24. "Most of the State . . . , including ConVal, Mascenic, Monadnock and Winchester, receive base adequacy aid at a rate of $3,636.06 per pupil and need to raise additional funds via local taxation in order to provide a constitutionally adequate education." *Id.* at ¶ ¶ 25-26. As discussed in Petitioners' opening brief, these allegations, alone or in conjunction with the additional allegations contained within the

[2] The State also waived this argument. *See* Petitioner's Brief ("PB") at 74, n. 5.
[3] In addition, Petitioners' uncontroverted evidence that specific categories of costs, incorporated into the definition of a constitutionally adequate education, are underfunded by the State proves that the cost "as a whole" is inadequate. *See* PB at 93, n. 7

Petition, were sufficient to plead an actual deprivation of a fundamental right. *See* PB at 67-68.

In support of their Motion for Summary Judgment, Petitioners submitted affidavits from four superintendents attesting that an adequate education could not be provided on the funds received without raising taxes locally and that not a single school district in the state spends less than $12,000 per pupil. DAI at 579, ¶¶ 8-10; DAI at 590, ¶ 94; DAI at 801, ¶¶ 6-8; DAI at 802, ¶ 19; DAI at 806, ¶ 6-8; DAI at 809, ¶ 6-8. The State did not produce contradictory evidence on either factual assertion. The Superior Court recognized that, because it had "received affidavits from the petitioning school districts' superintendents with more specific and *undisputed* allegations," summary judgment was warranted on that basis. DAO at 104, 125.

In the sole affidavit submitted by the State in objecting to summary judgment, the State asserted facts related to the reliability of DOE data submitted by Petitioners, which would have allowed the Superior Court to set the amount of minimum funding to be $9,929 per student, exclusive of transportation. The State's affidavit did not, however, contradict or dispute the superintendents' affidavits on issues other than the reliability of DOE data. For example, the State's affiant did not contest or contradict Superintendent Rizzo Saunders' attestation that "ConVal cannot provide the requirements of RSA 193-E:2-a on only $3,636.06 per pupil. ConVal has to raise additional funds via local taxation in order to provide a constitutionally adequate education." DAI at 579, ¶¶ 9-10; *see generally* Davis Aff., DAII at 19-30. Likewise, the State's affidavit did not contradict Superintendent Dassau attestations that: "Winchester does not have its own high school and must pay tuition of $14,023 to have Winchester high school students attend Keene High School[;]" "[t]here are no high schools anywhere in the state of New Hampshire where Winchester could tuition its students for the $3,636.06 provided in base adequacy[;] [t]here are no high schools in the state of New Hampshire, in reasonable geographical proximity to Winchester, where Winchester could tuition its students for less than $10,000 per pupil[;] [and t]he State is unable to identify any high school that could provide a constitutionally adequate education at a cost anywhere near what the

State provides Winchester in constitutional adequacy aid." DAI at 801-02, ¶¶ 10, 18-20; *see generally* Davis Aff., DAII at 19-30. In other words, the State's affidavit challenged the reliability of the DOE data that the Superior Court could have used to fashion an equitable remedy but did not dispute the factual assertions demonstrating a deprivation of the constitutional right to state funding. Therefore, these undisputed facts were admitted, and there was no need for the Superior Court to engage in lengthy analysis of what the State did not dispute.

b. The State's Joint Legislative Committee Rationales Did Not Meet Strict Scrutiny

In order to meet strict scrutiny, the burden was on the State to demonstrate a compelling governmental interest in providing only $3,636.06 in base adequacy funding. In meeting its burden, the State "may not rely upon justifications that are hypothesized or "*invented post hoc in response to litigation*," nor upon "overbroad generalizations." *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007) (emphasis added). The State's only affiant agreed with Petitioners that the State's justifications for their funding level was contained in the Legislative Joint Committee Report. Davis Aff., DAII at 21-22, ¶ 12. And the Legislature itself specifically incorporated the justifications of the Joint Committee into the funding bill as the justifications for RSA 198:40-a. *See* 2008 NH Laws 173:1, II. Therefore, the Superior Court did not err in looking to the Joint Committee Report for the State's justifications for its funding. The State provided no other justifications. And the Superior Court properly held that "the Joint Committee's Final Report fails to provide any compelling government interests for its allocations." DAO at 125.

II. The State Had, and Ignored, the Opportunity to Request Discovery in Its Objection to Petitioners' Motion for Summary Judgment

In their Answering Brief, the State alleges it requested the ability to conduct discovery and was prevented from doing so by the Superior Court. See SAB, at 9, 33. This is not accurate. At no point did the trial court prohibit the State from conducting

discovery. The State cites only the Superior Court's April 5, 2019 Order denying a Preliminary Injunction and the Superior Court's April 29, 2019 Order on the Emergency Motion to Strike. SAB at 9 (citing DAO 30-31, 36, 38).The trial court expressed an opinion as to how much discovery was necessary in its Order on Plaintiffs' Motions for Preliminary Injunction, and, in its Order on the State's Emergency Motion to Strike, the court simply explained that the inclusion of two additional school districts, which relied on the same evidence already at issue, did not require substantially different discovery than that necessitated by the original Petition. DAO at 21, n. 13; 30-31, 36, 38. Had the State wanted to conduct the discovery it now claims it needed, it could have propounded discovery at any time. *See* Superior Court Rule 23(d) ("Interrogatories may be served at any time after service of the action."); *see also* MacDonald, Gordon J., NEW HAMPSHIRE PRACTICE, Vol. 4, § 22.04, 4th Ed. (2018) ("[P]retrial discovery may begin as soon as the initial pleading has been filed.").

The State expressed a desire to propound discovery in March but failed to do so. Then, the State expressed a desire to conduct discovery in its April 24, 2019 Motion to Strike, but, again, propounded nothing. After receiving the Superior Court's Order denying its Motion to Strike, the State could have conducted discovery; again, it did not.

Even after the State's repeated decisions not to propound discovery before summary judgment, had the State believed it needed additional information to oppose summary judgment, the State should have "filed an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits." RSA 491:8-a, II. The State failed to do so and failed to file "contradictory affidavits based on personal knowledge." RSA 491:8-a, II. The assertions in Petitioners' affidavits are therefore deemed admitted. *Id.* Instead of following the statutory procedure, the State objected to the Petitioner's Motion for Summary Judgment without asserting contrary facts to dispute Petitioners' affidavits. The State's failure to conduct discovery or to follow the statutory procedure outlined in RSA 491:8-a is not grounds to overturn the trial court's decision.

III. Discovery by the State Would Not Have Been Relevant to Whether or Not the State's Funding Scheme Was Unconstitutional

Throughout the course of this litigation, the State has never asserted that it is actually providing constitutionally adequate funding to any of the Petitioner School Districts. As the Superior Court recognized, it was uncontroverted that "that not a single school in the State of New Hampshire could or does function at $3,562.71[4] per student." See DAO at 40. In fact, the State does not dispute that there in not a single "district in the state of New Hampshire where the per pupil expenditures are less than $12,000 per pupil." DAI at 590, ¶ 94. Furthermore, the State does not explain what discovery it would have conducted that would have allowed it to demonstrate that $3,636.06 was sufficient. Instead, the State asserts that it should conduct discovery into how each school district spends the funds that each school district has had to raise locally. SAB, at 29. (alleging the State "needed discovery into how the plaintiff school districts spend their money"). But, as the State has itself repeatedly argued, what a district spends is not determinative of what the State must fund. In fact, in the same Answering Brief where the State argues that it should have been allowed to conduct discovery into what each district spends, the State acknowledges that "the amount the plaintiff school districts spend on specific services or a particular school district's teacher-student ratio is of no consequence in determining whether the State is meeting its funding obligation." SAB, at 29-30. Where the State acknowledges that its requested discovery was irrelevant and never propounded any discovery, the State cannot object to the Superior Court's Order granting summary judgment.

Had Petitioners sought State funding of the full $18,901 per pupil they spend as part of the State's constitutional obligation, then the discovery desired by the State may have been relevant. DAO at 40. Nevertheless, discovery is irrelevant to the threshold question of whether State funding at $3,636.06 per pupil is unconstitutional where it was

[4] $3,561.27 per pupil is the amount stated in RSA 198:40-a, II(a). Nevertheless, when adjusted for inflation pursuant to RSA 198:42-d, the amount is $3,636.06 for the 2019 fiscal year.

undisputed that there is not a single "district in the state of New Hampshire where the per pupil expenditures are less than $12,000 per pupil." DAI at 590, ¶ 94; *cf.* Davis Aff., DAII at 19-30.

IV. Even if RSA 198:40-a, II(a) Was Intended to Provide Funding for Different Services than Required to be Provided by RSA 193-E:2-a, the State Did Not Dispute that the $3,636 in Funding was Inadequate

The State argues that the minimum requirements of a constitutionally adequate education, as defined by RSA 193-E:2-a, are somehow different than what the State chose to fund in RSA 198:40-a, II(a). SAB, at 24-30. First, that argument is contradicted by the only affidavit submitted by the State. *See* Davis Aff., at DAII 21-22, ¶ 12. Second, the State does not say how the requirements of RSA 193-E:2-a differ from RSA 198:40-a, II(a) or what providing just the requirements of RSA 193-E:2-a costs, as the State is obligated to do under *Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 162 (2006). Nevertheless, even if the State were correct that the $3,636.06 provided by RSA 198:40-a, II(a) was intended to fund more than the requirements of RSA 193-E:2-a, that would not impact the Superior Court's holding that RSA 198:40-a is unconstitutionally inadequate. All four superintendents attested to the fact that their districts could not meet the requirements of RSA 193-E:2-a on the funding provided by the State. DAI at 579, ¶ 9; DAI at 801, ¶ 7; DAI at 806, ¶ 7; DAI at 809, ¶ 7. The State did not dispute these facts. *See* Davis Aff. at 19-30. Therefore, these facts are admitted. *See* RSA 491:8-a, IV.

V. The State's Failure to Dispute Petitioners' Affidavits Should Have Resulted in Petitioners Prevailing on their Facial Challenge

The State's failure to dispute Petitioners' affidavits, which attested to the fact that an adequate education could not be provided for $3,636.06 without raising taxes locally, should have resulted in Petitioners prevailing on their facial challenge because that fact was admitted under RSA 491:8-a. DAI at 579, ¶¶ 8-10; DAI at 590, ¶ 94; DAI at 801, ¶¶ 6-8; DAI at 802, ¶ 19; DAI at 806, ¶ 6-8; DAI at 809, ¶ 6-8. "To prevail on a facial

challenge, the challenger must establish that no set of circumstances exists under which the challenged statute . . . would be valid." *State v. Lilley*, 171 N.H. 766, 772 (2019). Where the State did not dispute the fact that an adequate education could not be provided with the funds allocated by RSA 198:40-a, that statute is not valid under any set of circumstances.

VI. The State Has Failed to Distinguish Controlling New Hampshire Law Authorizing a Suit Against Governor Sununu and Commissioner Edelblut in their Individual Capacities

"[R]estraint of forbidden action is not imposed by the courts upon the state, but upon those asserting the right to take the action as though it were the state's and as though binding upon it." *Conway v. New Hampshire Water Res. Bd.*, 89 N.H. 346, 346 (1938). Failing to provide funding for a constitutionally adequate education is forbidden by the Constitution. Under New Hampshire law, Petitioners therefore properly brought suit against Governor Sununu and Commissioner Edelblut individually. The United States Supreme Court case cited by the State in its Answering Brief has no bearing on this issue.

VII. Petitioners Are Entitled to Injunctive Relief

The State's abdication of its constitutional obligation to fund an adequate education has gone on for decades as the Court has granted the State latitude, time and again, to meet its obligations without judicial intervention. Even now, after extensive briefing over the course of more than a year, the State has never represented that a constitutionally adequate education can be provided with $3,636.06. A judicial remedy is necessary. *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 163 ("[T]he judiciary has a responsibility that constitutional rights not be hollowed out and, in the absence of action by other branches, *a judicial remedy is not only appropriate but essential*." (emphasis added)).

VIII. French Amicus Arguments Regarding Overturning Claremont I Are Not Persuasive, Not Relevant and Have Been Waived

In an amicus brief, filed this Court, the French amici argue that *Claremont I* was wrongly decided in 1993 and should be overturned now because the Court did not consider the effect of Article 6 of the Constitution.

First, this issue has not been raised by any party to this case. An amicus cannot raise a new issue. "Although an amicus curiae is permitted to make useful suggestions to the court on matters of law which may escape the court's attention, an amicus curiae is bound by the issues presented by the parties." *Thomas Tool Srvs., Inc. v. Town of Croydon*, 145 N.H. 218, 221 (2000); *see also* Petitioners' Objection to Proposed Amicus Late Filing of Reply Amicus Brief, at ¶ 12.

Second, the amici's argument is without merit. This Court, in its 1993 *Claremont I* decision, did not consider the effect of Article 6 because Article 6 was not relevant to the school funding issues then before the Court. Article 6 authorized municipalities to run publicly supported churches, without funding from the State. It was repealed long before *Claremont I* was decided and is irrelevant to the issues before this Court today.

CONCLUSION

"Whatever the State identifies as comprising constitutional adequacy it must pay for." *Londonderry Sch. Dist. SAU No. 12*, 154 N.H. at 162. For the foregoing reasons, and the reasons set forth in Petitioners' Opening Brief, the State has failed in meeting that basic obligation for decades. Petitioners therefore request that the Court affirm the award of summary judgment and remand for the Superior Court to determine the appropriate injunctive relief.

Respectfully submitted,

CONTOOCOOK VALLEY SCHOOL DISTRICT,
MYRON STEERE, III,
RICHARD CAHOON,
RICHARD DUNNING,
WINCHESTER SCHOOL DISTRICT,
MASCENIC REGIONAL SCHOOL DISTRICT, and
MONADNOCK REGIONAL SCHOOL DISTRICT

July 10, 2020

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CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that the foregoing brief, has this day been served upon Daniel E. Will, Esq., Anthony J. Galdieri, Esq., Lawrence M. Edelman, Esq, and Samuel R.V. Garland, Esq., counsel for the State Defendants, John E. Tobin, Jr., Esq. and Natalie Laflamme, Esq. for the Amici Schools, and Gregory Sorg, Esq. for the French Amici, all through the Supreme Court's e-filing system.

/s/ *Michael J. Tierney*
Michael J. Tierney

CERTIFICATE OF COMPLIANCE

I, Michael J. Tierney, certify that the foregoing brief complies with N.H. Supreme Ct. R. 16(11) and contains approximately 2,996 words, excluding the table of contents, and table of authorities. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ *Michael J. Tierney*
Michael J. Tierney