

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

**OBJECTION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING  
ORDER WITH NOTICE TO PRESERVE THE STATUS QUO WHILE THE  
COURT ASSIGNS A NEW JUDGE TO PRESIDE AFTER PRIOR JUDGE'S  
RECUSAL**

The State of New Hampshire, by and through counsel, hereby objects to the plaintiffs' motion for temporary restraining order. In support thereof, the State provides the following:

1. The Statewide Education Property Tax ("SWEPT") has been in place in its current form since at least 2011.
2. The plaintiffs—five individual taxpayers and two businesses—filed their complaint in this matter on June 28, 2022, challenging, in part, the SWEPT, as unconstitutional under Part II, Article 5 of the New Hampshire Constitution.
3. On October 5, 2022, the plaintiffs filed a motion to preliminarily enjoin the SWEPT accompanied by a memorandum of law. The State filed an objection to the motion on October 28, 2022, supported by a memorandum of law and affidavits. The plaintiffs filed a reply on October 31, 2022, supported by an affidavit. On November 2, 2022, the State filed a surreply supported by an affidavit.
4. On November 4, 2022, the superior court held a hearing on the motion for preliminary injunction that went over an hour in length. At the hearing, the parties

agreed that the witness affidavits could come into evidence. The parties also presented argument. The superior court heard the case and took it under advisement.

5. In opposing preliminary injunctive relief, the State emphasized that the tax rate setting process for municipalities was already underway. It was underway when the State filed its objection. It was underway when the preliminary injunction hearing was held. It was underway when Judge MacLeod's recusal order issued. It remains underway today.<sup>1</sup>

6. This process, which has been completed already for a significant number of municipalities, needs to be finished by early December, so the remaining municipalities can send out tax bills, collect revenues for the many critical things local governments do, fashion warrant articles for municipal elections in the spring, and receive adequate education grants to fund their school districts. Some towns' cash flow will be low by the end of the year since they have not been collecting taxes since the last tax bill issued in June 2022. Those towns may be unable to pay their bills unless they borrow money through tax anticipation notes and repay those notes later in time with interest.

7. In opposing the motion for preliminary injunction, the State emphasized the significant and chaotic harm to the public an interim injunction would cause. The plaintiffs shifted the nature of their preliminary injunctive relief after the State made these arguments to the form of injunctive relief that targets revenues due to municipalities

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<sup>1</sup> This reality was not lost on the plaintiffs. Plaintiffs observed in their memorandum in support of their motion for a preliminary injunction that the Department of Revenue Administration "sets the SWEPT rates and begins issuing warrants starting in late September through November, and towns collect the SWEPT taxes beginning in December." Pls. Mot. Prelim. Inj. at 11 & n.6. The plaintiffs referred to a 2019 publication available on the Department of Revenue Administration's website in support of this observation. *See id.* The timing constraints the plaintiffs now rely on in support of their request for a temporary restraining order therefore should not have come as a surprise.

that were not before the court. The State emphasized that the plaintiffs' revised form of relief would still adversely impact those municipalities that the plaintiffs targeted by causing their local property tax rates to increase because revenue those municipalities planned on utilizing to meet their obligations becomes frozen and unusable via a court-imposed injunction.

8. The State also emphasized in opposing the preliminary injunction that the plaintiffs sought this extraordinarily disruptive form of relief when they had suffered no irreparable harm, their requested injunction would neither benefit them or ameliorate any harm to them, and would disrupt municipal budgets. The State also pointed out that the plaintiffs lack standing, indicated why the legal theory the plaintiffs presented was unlikely to succeed on the merits, and made clear by citation to *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 476 (1997) ("*Claremont IP*"), that the appropriate remedy in a case like this is not an injunction (whether temporary, preliminary, or permanent), but a final declaration that gives the legislature an appropriate amount of time to fix any problem without jeopardizing the functioning of the State's municipalities and school districts to the detriment of local taxpayers and students.

9. On November 4, 2022, the same day as the preliminary injunction hearing, an entity called the Coalition Communities, an association of New Hampshire municipalities, who claim that they would be adversely impacted by the type of preliminary injunctive relief the plaintiffs are seeking, moved to intervene in the case and asked to brief why the preliminary injunctive relief the plaintiffs were seeking would adversely impact those municipalities.

10. On November 9, 2022, Justice MacLeod recused himself from the case.

11. Shortly thereafter, plaintiffs' counsel requested that the State voluntarily cease setting municipal tax rates for certain municipalities that generate excess SWEPT revenue or would generate negative rates to give the court time to assign the case to a new judge for the judge to become familiar with the case. The State indicated that it would not disrupt the ongoing administrative process in place for setting these municipal tax rates. It further related that a preliminary injunction is not an appropriate remedy and would be significantly and needlessly disruptive of a critical state funding system and the operations of local government.

12. On November 10, 2022, Chief Justice Nadeau transferred venue in this case to Rockingham County Superior Court and specially assigned the matter to Justice David W. Ruoff. The parties did not receive this order until the morning of November 14, 2022.

13. On November 12, 2022, the plaintiffs filed a motion for a temporary restraining order. The State opposes the motion, takes the position that no temporary restraining order should issue in this case per New Hampshire Supreme Court precedent, and, in light of this case's swift reassignment, believes the motion is functionally moot.

14. In *Claremont II*, a case challenging the SWEPT as initially constructed as unconstitutional, the New Hampshire Supreme Court did not endorse enjoining this critical education funding mechanism midstream. Instead, the New Hampshire Supreme Court declared the tax unconstitutional, did not remand for consideration of remedies, stayed the appeal, and provided the legislature "a reasonable time to effect an orderly transition to a new system" leaving the present system "in effect through the 1998 tax year." *Claremont II*, 142 N.H. at 476-77.

15. To the extent there is any defect with the SWEPT as presently constructed, the same approach should be employed in this case.

16. The State understands that the plaintiffs have constitutional concerns about the SWEPT, but those concerns are better resolved through dispositive motion practice and a final merits determination, not by a temporary restraining order. The State worked with the plaintiffs to craft a case structuring order that is expeditious, making summary judgment motions due in early February 2023, and the plaintiffs are free to file a motion for summary judgment at any time. They do not need to seek the extraordinarily disruptive remedy that their motion for temporary restraining order presents.

17. The motion for temporary restraining order seems crafted out of fear that the judiciary would not swiftly reassign this case to another judge. That did not happen. This case was swiftly reassigned.

18. Additionally, the court has before it a complete record on which to decide the pending motion for a preliminary injunction. The parties have fully briefed, submitted evidence, and presented argument on the issues involved to the court. The court can review those materials and making a decision on the motion for preliminary injunction in a timely way. As a result, the motion for a temporary restraining order is functionally moot.

19. Also, the municipalities directly and adversely affected by any such temporary or preliminary injunction order should be heard from through their counsel. The uncontested evidence already before the court shows that taxpayers in those

jurisdictions may see their local property tax rates suddenly increase in the event a temporary restraining order or preliminary injunction issues.

20. Finally, the State finds it unfortunate that plaintiffs would ascribe to it a motive to take advantage of Judge MacLeod's recusal in order to moot their motion for preliminary injunction. The plaintiffs could have filed for preliminary injunctive relief in June 2022, well before the Department of Revenue began setting municipal tax rates for the upcoming tax year. They could have filed the motion in early September 2022 and chose not to do so. Moreover, Judge MacLeod did not promise to resolve the motion for preliminary injunction on any particular timetable.

21. Ultimately, it is the plaintiffs who chose to file for preliminary injunction when they did, at a time when the remedy they seek would be profoundly disruptive to the workings of state and local government, without any demonstrable irreparable harm to them and without making any showing as to how the preliminary injunctive relief they seek is not more harmful to the public than helpful. "Self-created hardships hold little weight in the balancing of the equities." *State v. Tallman*, 139 N.H. 223, 225 (1994).

22. It is the State's position, based on the established case law, that the preliminary injunctive remedy the plaintiffs seek cannot be obtained. *Claremont II*, 142 N.H. at 476-77

23. Accordingly, for all of the above reasons, the court should deny the motion for a temporary restraining order.

24. This court has the preliminary injunction briefing, evidence, and hearing recording available to it in order to rule on the motion for preliminary injunction, and the

State hereby incorporates all of its preliminary injunction briefing, argument, and evidence into this objection by reference.

25. This court can permit the intervenor to file a brief on an expedited basis and can resolve the motion for preliminary injunction in a timely manner.

26. Taking time away from resolving the motion for preliminary injunction in order to resolve the plaintiffs' motion for a temporary restraining order promises only to delay the time it takes to resolve the plaintiffs' motion for preliminary injunction.

WHEREFORE, the State respectfully requests that this Honorable Court issue an order:

- A. Denying the plaintiffs' motion for a temporary restraining order;
- B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: November 14, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of November, a copy of the foregoing was served via the court's electronic filing system to all counsel of record.

/s/ Anthony J. Galdieri  
Anthony J. Galdieri