THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0518

Anna Carrigan

v.

New Hampshire Department of Health and Human Services
&
Lori Shibinette, Commissioner

RULE 7 APPEAL FROM THE JUDGMENT OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE APPELLEES

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES
&
LORI SHIBINETTE, COMMISSIONER

By Their Attorneys,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

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(Fifteen-Minute Oral Argument)

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ISSUE PRESENTED

Part I, Article 8 of the New Hampshire Constitution, as amended in 2018, provides that "any individual taxpayer eligible to vote in the State[] shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resided has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision." This language creates a narrow exception to the general rule that a plaintiff must allege a "concrete, personal injury" in order to have standing to maintain an action in state court. *See Duncan v. State*, 166 N.H. 630, 643 (2014). Invoking Part I, Article 8, the plaintiff alleges that the New Hampshire Department of Health and Human Services is failing to spend money at the level she believes is sufficient to adequately protect children. She acknowledges that this purported failure has not caused her any personal harm, and she does not identify any expenditure or the approval of any expenditure that she believes violated the law.

The question presented is:

Does the plaintiff have standing under Part I, Article 8 to maintain her claims?

STATEMENT OF THE FACTS AND THE CASE

Anna Carrigan initiated this action on February 7, 2020, by filing a six-count complaint in Merrimack County Superior Court against the New Hampshire Department of Health and Human Services ("DHHS") and several DHHS officials.[1] *See* PA 3-296. In four of those counts, Ms. Carrigan asserted employment-related claims, which were dismissed with prejudice by stipulation of the parties. *See* PA 50-53, 297 n.3, 387. In her remaining two counts—Counts I and II—Ms. Carrigan sought declaratory and injunctive relief against DHHS and its Commissioner (together "the appellees") based on DHHS's purported failure to protect abused and neglected children. PA 40-50, 52. As Ms. Carrigan at least tacitly acknowledges in her brief, PB 9-10, 15-20, she premised Counts I and II solely on the State's purported failure to spend public money in the manner and at the magnitude that she believes is necessary to protect children, PA 40-50; *see generally* PA 309-335 (factual background in objection to motion to dismiss).

Ms. Carrigan acknowledged in her complaint that she had suffered no personal harm or injury due to DHHS's purported failure to protect children. PA 39. She nonetheless contended that she had standing to bring Counts I and II "under Part I, Article 8, as a taxpayer and eligible voter." PA 39. Part I, Article was amended in 2018 to provide taxpayers with standing to petition the Superior Court for a declaration that the State "has spent, or has approved spending, public funds in violation of a law,

[1] Citations to the record are as follows:
"PB__" refers to the Ms. Carrigan's brief and page number.
"PA___" refers to Ms. Carrigan's appendix and page number.

ordinance, or constitutional provision." N.H. Const. pt. I, art. 8. Ms. Carrigan asserted in her complaint that she had standing to maintain Counts I and II under the 2018 amendment. PA 39-40.

The appellees disagreed and moved to dismiss for lack of standing. PA 297-306. Though the appellees did not dispute, for the purposes of their motion, that Ms. Carrigan was "a taxpayer and eligible voter" within the meaning of Part I, Article 8, they contended that she lacked standing under the 2018 amendment to that provision because she had not identified any expenditure, or the approval of any expenditure, that she believed to be unlawful. PA 297-306. The appellees emphasized that Ms. Carrigan's view of taxpayer standing under the 2018 amendment to Part I, Article 8 was both inconsistent with the language of that amendment and created profound constitutional concerns under the separation-of-powers doctrine. PA 297-306, 348-358. The appellees thus argued that Ms. Carrigan lacked standing to maintain Counts I and II. PA 297-306; 348-358.

The trial court granted the appellees' motion and dismissed Ms. Carrigan's remaining claims. PA 387. The trial court noted that "[n]othing in the text of [Part I,] Article 8 suggests that it grants every taxpayer the right to seek a judicial determination of whether the government has sufficiently funded the programs that it runs." PA 387. The trial court observed that "[s]uch a reading would allow virtually every resident of the [S]tate to challenge as legally inadequate the funding level for virtually every line item in the State budget." PA 387. The trial court emphasized that "[t]his would be contrary to the plain, ordinary and objectively reasonable meaning of the words in [Part I,] Article 8," which it viewed as "the meaning that the voters would have understood when they made the

amendment to Article 8 part of the basic law of this State." PA 387. In the trial court's view, the 2018 amendment to Part I, Article 8 confers qualifying taxpayers with standing to "complain in court that the public fisc is being tapped for an unlawful purpose." PA 387. Because Ms. Carrigan asserted no such complaint, the trial court concluded that she did not have taxpayer standing to bring Counts I and II. PA 387.

This appeal followed.

STANDARD OF REVIEW

"In reviewing a trial court's order on a motion to dismiss," this Court "assume[s] the plaintiff's pleadings to be true and construe[s] all reasonable inferences in the light most favorable to the plaintiff." *Mentis Scis., Inc. v. Pittsburgh Networks, LLC,* 173 N.H. 584, 588 (2020) (citation omitted). The Court "need not, however, assume the truth of statements in the plaintiff's pleadings that are merely conclusions of law." *Id.* (citation omitted). When a motion to dismiss challenges standing, this Court must determine "whether the [plaintiff] has sufficiently demonstrated a right to claim relief." *Matter of Chrestensen*, 172 N.H. 40, 42 (2019) (citation omitted). This requires only an assessment of the "relevant facts." *Petition of Lundquist*, 168 N.H. 629, 630 (2016); *see also Palmer v. U.S. Sav. Bank of Am.*, 131 N.H. 433, 442 (1989) ("[I]n determining whether to grant a motion to dismiss for lack of standing, a court must look at all the relevant facts . . . ."). This Court "review[s] the trial court's interpretation of the constitution *de novo*." *Bd. of Trustees of N.H. Jud. Ret. Plan v. Sec'y of State*, 161 N.H. 49, 53 (2010) (citation omitted).

SUMMARY OF THE ARGUMENT

As a general rule, a taxpayer, like any other plaintiff, must have a "sufficiently personal and concrete interest to confer standing" in order to "seek judicial relief." *Duncan*, 166 N.H. at 648. In 2018, Part I, Article 8 of the New Hampshire Constitution was amended to provide a narrow exception to this general rule. As amended, Part I, Article 8 provides that "any individual taxpayer eligible to vote in the State[] shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance or constitutional provision." This language, by its express terms, contemplates challenges only to the lawfulness of a particular, identifiable expenditure or the approval of a particular, identifiable expenditure. *See infra* pp 15-22.

Ms. Carrigan does not identify any expenditure or the approval of any expenditure that she believes to be unlawful. Instead, she invokes Part I, Article 8 to challenge the State's purported *failure* to spend money in the manner or at the magnitude that she believes is necessary to protect children. The trial court correctly concluded that "[n]othing in the text of [Part I,] Article 8 suggests that it grants every taxpayer the right to seek a judicial determination of whether the government has sufficiently funded the programs that it runs." PA 387. As the trial court noted, "[s]uch a reading would allow virtually every resident of the [S]tate to challenge as legally inadequate the funding level of virtually every line item in the State budget," which is "contrary to the plain, ordinary and objectively reasonable meaning of the words of [Part I,] Article 8." PA 387.

Ms. Carrigan's reading also raises profound separation-of-powers concerns. For one, it would violate Part II, Article 74 of the New Hampshire Constitution by allowing superior courts to provide advisory opinions to private litigants. *See Duncan*, 166 N.H. at 640-45. Additionally, it would allow the judiciary to assume the legislature's appropriation power and the executive's spending power any time a taxpayer asserted that the legislature should have appropriated more money to a particular cause or the executive branch should have spent the money that was appropriated in a particular way. It is well established that "the constitution as it now stands is to be considered as a whole as if enacted at one time . . . ." *Bd. of Trustees of N.H. Jud. Ret. Plan*, 161 N.H. at 53-54. There is no indication that the voters who adopted the 2018 amendments to Part I, Article 8 intended it to fundamentally alter the balance of powers the Constitution otherwise embodies.

A proper reading of Part I, Article 8, as written, does not raise these constitutional problems. It preserves Part II, Article 74's limit on advisory opinions by restricting taxpayer challenges to discrete, identifiable expenditures. It similarly minimizes any encroachment by the judiciary into the core functions of the other, co-equal branches of government by focusing on affirmative spending decisions, not an abstract failure to act. It is therefore both consistent with the plain language of Part I, Article 8 itself and, more generally, with the Constitution "as a whole." *Bd. of Trustees of N.H. Jud. Ret. Plan*, 161 N.H. at 53-54.

For all of these reasons, and those stated below, the trial court did not err in concluding that Ms. Carrigan lacked standing under Part I, Article 8 to maintain Counts I and II of her complaint. The trial court correctly

dismissed those claims for lack of standing, and this Court should affirm that judgment.

ARGUMENT

I. MS. CARRIGAN LACKS TAXPAYER STANDING TO MAINTAIN COUNTS I AND II.

A. Standing Generally.

Prior to 2010, this Court's precedents contained "two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action." *Baer v. N.H. Dep't of Educ.*, 160 N.H. 727, 730 (2010), *superseded by statute as recognized in Duncan*, 166 N.H. at 638. In an older line of cases, this Court "permitted taxpayers to maintain an equity action seeking redress for the unlawful acts of their public officials, even when the relief sought was not dependent upon a showing that the illegal acts of the public officers resulted in a financial loss to the town." *Id.* (citing *Green v. Shaw*, 114 N.H. 289, 291-92 (1974)). More recently, this Court "required taxpayers to demonstrate that their rights [were] impaired or prejudiced in order to maintain a declaratory judgment action." *Id.* (collecting cases).

In *Baer*, this Court confronted these conflicting lines of authority. *See id.* at 730-31. Finding the "more recent analysis of taxpayer standing to be more consistent with the language of RSA 491:22," this Court disavowed the older line of cases. *Id.* at 730. The Court reasoned that "[t]o the extent that [it] previously permitted a declaratory judgment action to proceed based only upon a party's taxpayer status without any evidence that his personal rights ha[d] been impaired or prejudiced, those cases were implicitly overruled by [the] more recent case law." *Id.* at 731. This Court thus held in *Baer* that "taxpayer status, without an injury or an impairment

of rights, is not sufficient to confer standing to bring a declaratory judgment action under RSA 491:22." *Id.*

In the wake of *Baer*, the legislature amended RSA 491:22 to allow a taxpayer to maintain a declaratory judgment action based solely on taxpayer status. *See Duncan*, 166 N.H. 919-20. As amended, RSA 491:22 provided, in relevant part, that

> any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

RSA 491:22, I (2012). This Court observed that "[t]he intent of the 2012 amendment was to restore taxpayer standing as it had been interpreted in the older line of cases identified in *Baer*." *Duncan*, 166 N.H. at 638.

In *Duncan*, this Court struck down the 2012 amendment to RSA 491:22, concluding that it violated the prohibition against advisory opinions set forth in Part II, Article 74. *See id.* at 639-45. This Court noted that under Part II, Article 74, the Justices of this Court "may render advisory opinions," but "'only upon important questions of law and upon solemn occasions,' and only to 'each branch of the legislature as well as the governor and council.'" *Id.* at 640 (quoting N.H. Const. pt. II, art 74) (bracketing omitted). The Court emphasized that Part II, Article 74 "does not authorize this [C]ourt to render advisory opinions to private individuals," "[n]or does it empower the [C]ourt to issue advisory opinions to either branch of the legislature regarding existing legislation." *Id.* at 640-

41 (citations and quotation marks omitted). This Court held that "RSA 491:22, I, as amended in 2012, contravenes Part II, Article 74 because it confers standing upon taxpayers without requiring them to demonstrate that any of their personal rights were violated." *Id.* at 645 (citation and quotation marks omitted).

In reaching this holding, this Court clarified in *Duncan* the general requirements for standing under the State Constitution. *See id.* at 642-43. The Court reasoned that "although the standing requirements under Article III of the Federal Constitution are not binding upon state courts, and although the State Constitution does not contain a provision similar to Article III, as a practical matter, Part II, Article 74 imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution." *Id.* at 642 (citations omitted). The Court noted that "[e]xcept as provided in Part II, Article 74 and similar to the 'case or controversy' requirement of Article III, standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical dispute, which is capable of redress." *Id.* at 642-43 (citations omitted). The Court emphasized that a taxpayer, like any other plaintiff, must have a "sufficiently personal and concrete interest to confer standing" in order to "seek judicial relief." *Id.* at 648.

B. The 2018 amendment to Part I, Article 8.

In 2018, the legislature passed and the voters approved an amendment to Part I, Article 8 to allow for limited taxpayer standing. Part I, Article 8 now provides, in relevant part, that "any individual taxpayer

eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision." N.H. Const. pt. I, art. 8. "In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer." *Id.* Thus, a taxpayer can now seek a declaration that the government "has spent, or has approved spending, public funds" in an unlawful manner which his or her rights as a taxpayer were impaired. *See id.*

At the outset, it bears emphasizing that the 2018 amendment to Part I, Article 8 stands as an exception to, not a repudiation of, the central holding in *Duncan*. This is clear from the fact that Part I, Article 8 provides for far narrower taxpayer standing than the statutory language at issue in *Duncan*. The latter provided that a plaintiff could maintain a "petition for relief . . . when it [was] alleged that the taxing district or any agency or authority thereof ha[d] engaged, or propose[d] to engage, in conduct that is unlawful or unauthorized" regardless of whether that conduct involved the expenditure of public funds. RSA 491:22, I (2012). In contrast, the 2018 amendment to Part I, Article 8 expressly limits taxpayer standing to actions seeking a declaration that "the State or political subdivision in which the taxpayer resides has *spent*, or has approved *spending*, public funds in" an unlawful manner. N.H. Const. pt. I, art. 8 (emphases added). Moreover, the pre-*Duncan* version of RSA 491:22 provided only that a taxpayer "shall not have to demonstrate that his her personal rights were impaired or prejudiced," RSA 491:22 (2012), whereas Part I, Article 8 provides that a

taxpayer need not demonstrate an impairment of personal rights "beyond his or her status as a taxpayer." The amendment to Part I, Article 8 therefore did not abrogate *Duncan* by reinstating the language struck down in that case, but rather sought to conform to the analysis in *Duncan* by creating a narrow exception to the general rules of standing that case enunciated. As one superior court judge has put it, "*Duncan* remains good law on the topic of standing generally." PA 367.

This Court's reliance on *Duncan* in cases involving standing even after Part I, Article 8 was amended only confirms as much. In *Teeboom v. City of Nashua*, this Court assumed without deciding that the 2018 amendments did not apply, then assessed the plaintiff's standing by conducting a detailed analysis under *Duncan*, other pre-amendment decisions, and United States Supreme Court decisions assessing standing under Article III. *See* 172 N.H. 301, 307-09 (2019). Similarly, in *New England Backflow, Inc. v. Gagne*, the Court cited *Duncan* for the proposition that "[t]o bring a declaratory judgment claim under RSA 491:22 (Supp. 2018), a party must show that some right of the party has been impaired or prejudiced by the application of a rule or statute." 172 N.H. 655, 666 (2019). If the 2018 amendment to Part I, Article 8 so fundamentally altered this Court's standing jurisprudence that *Duncan* no longer remained good law, then it would make little sense for this Court to continue to apply *Duncan* even after that amendment.

Ms. Carrigan only invokes standing to bring Counts I and II "under Part I, Article 8, as a taxpayer and eligible voter." PA 39. This Court has not yet had occasion to address the scope of taxpayer standing under the 2018 amendment to Part I, Article 8. When interpreting the scope of

taxpayer standing under Part I, Article 8, this Court must "first look to the natural significance of the words used by the framers." *State Employees' Ass'n of N.H. v. State*, 161 N.H. 730, 740 (2011) (citation omitted). "The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption." *Id.* at 740-41 (citation and quotation marks omitted). This Court "will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." *Id.* at 741 (citation and quotation marks omitted).

As amended, Part I, Article 8 allows a qualifying taxpayer to seek a declaration that the State "has spent[] or has approved spending" in violation of the law. "Spend" means "to use up or pay out" or to "expend." *Spend Definition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/spend (last visited Mar. 30, 2021). "Approve" means "to give formal or official sanction to." *Approve Definition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/approve (last visited Mar. 30, 2021). The voters who approved the 2018 amendment to Part I, Article 8 would thus have understood the words of that provision to refer to either the act of "using up," "paying out," or "expending" public funds or the act of "formally or officially sanctioning" public funds to be "used up," "paid out," or "expended." In either instance, the natural significance of the language used in Part I, Article 8 is that it allows a taxpayer to challenge the lawfulness of a particular, identifiable expenditure or the approval of a particular, identifiable expenditure.

C. Ms. Carrigan does not identify any particular expenditure or the approval of any particular expenditure that she believes to be unlawful.

In this case, Ms. Carrigan does not identify any expenditure, or the approval of any expenditure, that she believes to be unlawful. Rather, she acknowledges in her brief that she premised Counts I and II of her complaint on the State's purported *failure* to spend public funds in the manner, and at the magnitude, that she believes is required. PB 9-10, 15-20. The trial court correctly concluded that Part I, Article 8 does not confer taxpayer standing to maintain such a claim. This Court should reach the same conclusion.

As the trial court noted, "[n]othing in the text of [Part I,] Article 8 suggests that it grants every taxpayer the right to seek a judicial determination of whether the government has sufficiently funded the programs that it runs." Indeed, "[s]uch a reading would allow virtually every resident of the [S]tate to challenge as legally inadequate the funding level of virtually every line item in the State budget." PA 387. "This would be contrary to the plain, ordinary and objectively reasonable meaning of the words in [Part I,] Article 8." PA 387. As the trial court observed, this is the "plain, ordinary and objectively reasonable meaning" that "the voters would have understood when they" voted to amend Part I, Article 8. PA 387.

The trial court's reasoning demonstrates that it faithfully applied the language of Part I, Article 8 as it would be commonly understood by the voters who passed it when dismissing Ms. Carrigan's remaining claims. *State Employees' Ass'n of N.H.*, 161 N.H. at 740. Ms. Carrigan's contention

that she may maintain taxpayer claims against the defendants based solely on their purported failure to allocate, appropriate, or spend funds in a particular way finds no support in Part I, Article 8's plain language. Because Ms. Carrigan identifies neither a particular expenditure nor the approval of a particular expenditure that she believes to be unlawful, she lacks taxpayer standing to maintain Counts I and II. This Court should accordingly affirm the trial court's judgment.

While this alone is dispositive, it bears noting that several other courts analyzing other states' taxpayer standing doctrines have reached similar conclusions. For instance, the Missouri Court of Appeals noted that "Missouri courts have . . . declined to confer taxpayer standing on individual plaintiffs *in the absence of unlawful expenditures of public funds* or pecuniary losses directly attributable to the challenged transaction." *Bethman v. Faith*, 462 S.W.3d 895, 903 (Mo. Ct. App. 2015) (emphasis added). Similarly, the Appellate Division of the Supreme Court of New York has held that New York's taxpayer standing statute "offers a means for citizens to challenge illegal or improper *disposition* of state funds or property, but provides no avenue for taxpayers *seeking the allocation of additional funds*." *N.Y. State Ass'n of Small City Sch. Dists., Inc. v. State*, 840 N.Y.S.2d 179, 182 (N.Y. App. Div. 2007) (emphasis added). And the Minnesota Court of Appeals has likewise held that a taxpayer has standing to challenge "illegal expenditures," not "the government's failure to make discretionary expenditures." *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App. 2004).

In contrast, Ms. Carrigan does not cite, and defense counsel have not identified, *any* decision that supports the broad view of taxpayer standing

that Ms. Carrigan advocates.[2] Rather, Ms. Carrigan largely rests her appeal on an assertion that "[i]f a lawsuit alleges that the State has 'not spent enough,' that does not mean that the lawsuit is any less about whether . . . the State 'has spent' funds legally in the first place." PB 16. Whether intentional or not, this statement reveals the gulf between Ms. Carrigan's claims and the type of claim contemplated under the plain and ordinary meaning of the language of Part I, Article 8. While allegations about what the State "has not spent" may concern spending in the abstract sense, they in no way inform whether the manner in which the State "has spent, or has approved spending, public funds" comports with the law.

It bears noting, too, that many of the "spending decisions" Ms. Carrigan pointed to below as a basis for standing are in fact purported failures by the legislature to appropriate enough money to DHHS, not a failure by DHHS to spend it. *See* PA 315, 320, 322, 339. The power to appropriate money is distinct from the power to spend money, and the New Hampshire Constitution confers each power on a different branch of the state government. *See N.H. Health Care Ass'n v. Governor*, 161 N.H. 378, 387 (2011) ("The New Hampshire Constitution specifically charges the legislative branch with appropriating and the executive branch with

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[2] Notably, none of this Court's pre-*Baer* decisions involving taxpayer standing endorsed the expansive view advocated by Ms. Carrigan in this case. Rather, those cases involved either (a) the lawfulness of affirmative governmental conduct, including the affirmative expenditure of public funds, *see, e.g.*, *Green*, 114 N.H. at 290-91; *O'Neil v. Thomson*, 114 N.H. 155, 157 (1974); *Clapp v. Town of Jaffrey*, 97 N.H. 456, 458 (1952); *Blood v. Manchester Elec. Light Co.*, 68 N.H. 340, 39 A. 335, 335 (1895); or (b) challenges to the lawfulness (and, usually, the constitutionality) of specific state statutes or constitutional provisions, *see, e.g.*, *Grinnell v. State*, 121 N.H. 823, 825 (1981); *Smith v. State*, 118 N.H. 764, 766 (1978); *Gerber v. King*, 107 N.H. 495, 496 (1967); *N.H. Wholesale Beverage Ass'n v. N.H. State Liquor Comm'n*, 100 N.H. 5, 6-7 (1955).

spending state revenue . . . ."). Part I, Article 8, by its express terms, provides only a narrow path for taxpayers to challenge spending; it makes no reference to appropriations at all. That Ms. Carrigan's own arguments conflate these distinct constitutional functions further demonstrates that her view of taxpayer standing lacks textual support.

In sum, Part I, Article 8's plain language forecloses Ms. Carrigan's attempt to invoke taxpayer standing in this case, as she does not identify any expenditure (or the approval of any expenditure) that she alleges was unlawful. The trial court therefore correctly dismissed her claims for lack of standing, and this Court should affirm that dismissal.

II. MS. CARRIGAN'S VIEW OF TAXPAYER STANDING RAISES PROFOUND CONSTITUTIONAL CONCERNS.

In addition to finding no support in the language of Part I, Article 8, Ms. Carrigan's view of taxpayer standing also raises profound constitutional concerns. It is well established that "the constitution as it now stands is to be considered as a whole as if enacted at one time . . . ." *Bd. of Trustees of N.H. Jud. Ret. Plan*, 161 N.H. at 53-54. As noted, this Court "will give the words in question the meaning that they must be presumed to have had to the electorate when the vote was cast." *State Employees' Ass'n of N.H.*, 161 N.H. at 741 (citation and quotation marks omitted). "By reviewing the history of the constitution and its amendment, the [C]ourt endeavors to place itself as nearly as possible to the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances." *Baines v. N.H. Senate President*, 152 N.H. 123, 133 (2005) (citation and quotation marks omitted).

Ms. Carrigan's view of Part I, Article 8 runs headlong into long-established separation-of-powers principles. As this Court acknowledged in *Duncan*, one way the New Hampshire Constitution enshrines the separation-of-powers doctrine is through the limitation on advisory opinions set forth in Part II, Article 74. *See* 166 N.H. at 643. The recognition of that limitation is long entrenched in this Court's jurisprudence. *See, e.g.*, *Piper v. Town of Meredith*, 108 N.H. 328, 330 (1969). As this Court recognized in *Duncan*, "[w]hen the concrete, personal injury requirement [of standing] is eliminated, courts assume a position of

authority over the governmental acts of another and co-equal department." 166 N.H. at 643 (citation and quotation marks omitted).

A proper reading of Part I, Article 8 preserves Part II, Article 74's limit on advisory opinions by restricting taxpayer challenges to discrete, identifiable expenditures. Ms. Carrigan's reading, in contrast, transforms Part I, Article 8's circumscribed language into something far more akin to the language struck down in *Duncan*. Under Ms. Carrigan's reading, the superior court has broad license to render advisory opinions to a private litigant any time the State is alleged to have failed to expend money in the manner that litigant believes is appropriate. This would eviscerate this Court's longstanding view on the constitutional limits on advisory opinions. *See Piper*, 108 N.H. 330 (noting that "[t]he Superior Court has no jurisdiction to give advisory opinions" and that "there is [no] right to give such opinions to private litigants").

There is nothing in the language of the 2018 amendment to Part I, Article 8 that would presage such upheaval. Rather, the fact that the language of 2018 amendment is far narrower than the statutory language struck down in *Duncan* on Part II, Article 74 grounds suggests an attempt to limit any potential conflict with that provision. Moreover, as discussed, the 2018 amendment would have been commonly understood by the voters who passed it to allow a taxpayer to challenge only the lawfulness of a particular, identifiable expenditure or the approval of a particular, identifiable expenditure, not any governmental decision that touches upon spending no matter how attenuated. *See supra* pp. 15-22. Ms. Carrigan's view of standing under Part I, Article 8 is therefore not a fair reading of the

Constitution "as a whole." *Bd. of Trustees of N.H. Jud. Ret. Plan v. Sec'y of State*, 161 N.H. 49, 53-54 (2010).

Ms. Carrigan's reading also conflicts with the separation-of-powers doctrine more generally. "Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people." *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 746 (2007) (citation omitted). The separation-of-powers doctrine is violated "when one branch usurps an essential power of another." *N.H. Health Care Ass'n*, 161 N.H. at 387 (citation and quotation marks omitted).

"The New Hampshire Constitution specifically charges the legislative branch with appropriating and the executive branch with spending state revenue . . . ." *Id*. Under Ms. Carrigan's reading of Part I, Article 8, however, the judiciary stands ready to assume each of these core functions whenever a taxpayer asserts that the legislature should have appropriated more money to a particular cause or the executive branch should have spent the money that was appropriated in a particular way. Ms. Carrigan cites nothing to support the proposition that the voters of New Hampshire intended to upend the balance of powers enshrined in our Constitution when they amended Part I, Article 8, and one certainly cannot infer such an intent from the actual language of the 2018 amendment. *See State Employees' Ass'n of N.H.*, 161 N.H. at 741. For this reason, too, Ms. Carrigan's reading is incompatible with the constitution when read "as a whole as if enacted at one time." *Bd. of Trustees of N.H. Jud. Ret. Plan*, 161 N.H. at 53-54.

In short, Ms. Carrigan's reading of Part I, Article 8 triggers profound constitutional problems that do not exist if the language of the 2018 amendment is given its ordinary, commonly understood meaning. The trial court correctly rejected that reading, and this Court should do the same.

CONCLUSION

For the reasons stated above, Ms. Carrigan lacks standing under the 2018 amendment to Part I, Article 8 to maintain a taxpayer challenge based on DHHS's purported failure to expend funds in the manner and at the magnitude that Ms. Carrigan would prefer. Ms. Carrigan's arguments to the contrary are inconsistent with the language of the 2018 amendment to Part I, Article 8 and raise profound separation-of-powers concerns. The trial court correctly rejected those arguments. This Court should do likewise and affirm the trial court's judgment.

The appellees request a 15-minute oral argument.

Respectfully submitted,

THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES and
LORI SHIBINETTE, COMMISSIONER

By their attorneys,

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March 30, 2021

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CERTIFICATE OF COMPLIANCE

I, Samuel R.V. Garland, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,343 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 30, 2021 /s/*Samuel R.V. Garland*
Samuel R.V. Garland

CERTIFICATE OF SERVICE

I, Samuel R.V. Garland, hereby certify that a copy of the State's brief shall be served on all counsel of record through the New Hampshire Supreme Court's electronic-filing system.

March 30, 2021 /s/*Samuel R.V. Garland*
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