IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2021-177

SADIE BOYD, MADELINE KLEIN, and
TOWN OF WHITINGHAM,
Plaintiffs-Appellants

v.

STATE OF VERMONT,
Defendant-Appellee

APPEAL FROM THE
SUPERIOR COURT, CIVIL DIVISION
(WINDHAM)
Docket No. 389-0-17 Wmcv

Brief of Appellee State of Vermont

STATE OF VERMONT

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STATEMENT OF ISSUES

1. Whether the trial court correctly concluded that Appellants' claims fail for lack of causation.
2. Whether Appellants are improperly seeking unequal, preferential treatment to be paid for on unequal terms by taxpayers in other districts.
3. Whether income sensitive tax formulas that link per-pupil spending and tax rates to cover part of the cost of giving school districts equal access to revenue per pupil statewide are reasonably related to legitimate state interests.
4. Whether a town can sue the State to challenge formulas that set taxes the town does not pay to cover part of the cost of schools the town does not operate or attend.

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STATEMENT OF THE CASE

Appellants are a student, Sadie Boyd, a taxpayer, Madeline Klein, and the Town of Whitingham. The student and taxpayer appellants reside within the Twin Valley Unified Union School District, which is not a party. The Town of Whitingham is also located within Twin Valley.

Appellants challenge components of two equalizing tax formulas the State adopted to correct for differences in property wealth across districts. The formulas cause school districts with the same spending to have the same homestead education property tax rate even if property values are much higher in one of the districts. They apply uniformly statewide and are made income sensitive by related formulas that Appellants do not challenge. Appellants specifically attack the use of "equalized pupil" and "excess spending" formulas, which link the education portion of homestead taxes to district spending per equalized pupil and control costs by causing taxes to rise faster if districts exceed a statutory excess spending threshold.

I. The State's contentions and the ruling below.

The State made four primary arguments below. First, the State contended that Appellants could not challenge per-pupil tax calculations on the theory that they disadvantaged districts Twin Valley's size without showing that Twin Valley's pupil count – as opposed to local choices or other factors – caused it to have higher than average tax rates or lower than average performance. Second, the State contended that Appellants were improperly seeking preferential treatment – the benefits of a smaller district, plus those of a larger district – paid for by taxpayers in larger districts. Third, the State argued that Appellants' claims are best characterized as tax claims, because Appellants challenge tax formulas and do not dispute that the State fully funds Twin Valley's budgets. Finally, the State contended that Whitingham was not a proper party because it did not have standing, claims, or the capacity to sue the State.

Appellants' brief accurately summarizes their contrary contentions below, with one exception. It does not acknowledge that Appellants declined to respond directly to the State's Statement of Undisputed Material Facts.

The trial court granted summary judgment on causation grounds and alternatively found that Appellants' claims failed under either rational basis review or the level of scrutiny applied in *Brigham v. State*, 166 Vt. 246 (1997). Accordingly, it did not find it necessary to decide whether Appellants were seeking preferential treatment contrary to *Brigham*'s mandate or whether the Town could theoretically bring claims.

II. The challenged tax statutes.

Within unified union districts, the education portion of the homestead tax rate is one dollar multiplied by an "education property tax spending adjustment" per $100 of property value. 32 V.S.A. § 5402(a)(2); 32 V.S.A. § 5402(e)(1). That adjustment is the greater of one, or a fraction calculated by dividing the "district's education spending plus excess spending, per equalized pupil" by a yield set by the Legislature, which Appellants do not challenge. 32 V.S.A. § 5401(13)(A). The resulting education tax rate is adjusted by the common level of appraisal, which Appellants also do not challenge, to correct for differences between municipal grand lists and fair market values. *See* 32 V.S.A. § 5402(a)(2).

The number of "equalized pupils" is a district's pupil count multiplied by increased weights for students with limited English proficiency, students from economically deprived backgrounds, and secondary students, and by a decreased weight for prekindergarten children. 16 V.S.A. § 4010(c)–(e). The excess spending threshold is 121% of the average district education spending per equalized pupil from FY 2015, adjusted for inflation. 32 V.S.A. § 5401(12)(B).

Applying the formulas together, a taxpayer's homestead property tax rate rises proportionally to their district's "education spending" per "equalized pupil," unless it exceeds the excess spending threshold, after which it rises twice as fast. As Appellants note, there is currently a moratorium on the excess spending threshold and the excess spending threshold will not be applied in fiscal years 2022 and 2023.

Before the State adopted equalizing tax formulas, districts with high property values could spend much more per-pupil, at lower tax rates, than districts with low property values. For example, when this Court decided *Brigham v. State*, 166 Vt. 246, 254 (1997), unequalized local property taxes

were the primary source of public education funding and property tax bases ranged from $118,000-2.5 million per student. *Id.* After referring more than 20 times to per-pupil metrics, *Brigham* found that "equal opportunity does not necessarily require precisely equal per capita expenditures" but does not allow "a system in which educational opportunity is necessarily a function of district wealth." 166 Vt. at 252, 254–55, 266, 268.

After *Brigham*, the State attempted to equalize access to revenue across districts by providing per-pupil block grants funded by a uniform property tax and allowing districts to raise additional funds subject to an equalization formula. *Anderson v. State*, 168 Vt. 641, 642 (1998). However, local funding continued to represent a substantial portion of the total spending of individual districts. For example, in FY 2004, local funding represented 46.4% of the total spending of the Whitingham School District.[1] And it was possible in practice for districts with high property values to avoid the equalization formula. As a result, a district like Ludlow could still spend nearly as much per-pupil in FY 2004 ($12,852) at a tax rate of $1.10 as Whitingham ($13,526) could at an alleged effective tax rate of $2.37.[2]

A group of students and taxpayers sued, correctly alleging that the State had equalized only a fraction of spending. *Brigham v. State*, Complaint, 2003 WL 25601265, ¶ 41. They further alleged that the Whitingham curriculum was so limited that students had "taken all offered courses by their senior year" and needed to "fill their schedule with gym classes." *Brigham v. State*, 2005 VT 105, ¶ 13. In *Brigham II*, this Court reversed an order dismissing the plaintiffs' complaint. *Id.* ¶ 1.

The State made additional changes that took effect in FY 2005 and state and federal funding thereafter represented an average of 94.75% of

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[1] The Whitingham School District later merged with another district to form Twin Valley and no longer exists. In FY 2004, Whitingham's unduplicated local revenues were $1,224,195. AV-228. It spent $13,526 per student with 195.14 full-time equivalent students for a total budget of $2,639,463.64. AV–230. $1,224,195 is 46% of $2,639,463.64.

[2] AV-227 (showing zero dollars in local taxes for Ludlow); AV–229 ($12,852 in per-pupil spending for Ludlow); AV–230 ($13,526 in per-pupil spending for Whitingham); Brigham II Complaint, 2003 WL 25601265, ¶ 10 (alleging a $2.37 effective tax rate).

revenue spent on education through FY 2016, the year before this action was filed.[3] The State now funds all portions of school district budgets not covered by other sources and collects property taxes at uniform rates it sets to cover part of the cost. AV-274. The rates are set based on the formulas described above, which cause districts with the same per-pupil spending to have the same homestead property education tax rate, even if one of the districts has much higher property values. The State has also made property tax rates income sensitive by providing credits for lower income homeowners like Appellant Klein, which reduce housesite education property taxes along a sliding scale and cap them for taxpayers with household incomes below a statutory threshold. 32 V.S.A. § 6066(a).

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, this Court applies the same standard of review as the trial court: summary judgment is appropriate when the record before the court clearly shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Gilman v. Maine Mut. Fire Ins. Co.* 2003 VT 55, ¶ 7. Because Appellants "did not respond to" the State's "statement of undisputed material facts" the Court "consider[s] the [State's statement of] fact undisputed." *Rose v. Touchette*, 2021 VT 77, ¶ 2 n.1; V.R.C.P. 56(e)(2).

SUMMARY OF ARGUMENT

Appellants' claims are tax claims triggering rational basis review because they: (1) challenge tax formulas and (2) the State fully funds Twin Valley at more than twice the level at which Appellants' expert contends that spending increases improve student performance. And if Appellants' challenge to tax formulas could be considered a *Brigham* claim, it would trigger the relatively uniform intermediate scrutiny *Brigham* applied. Under either framework, Appellants' claims would fail for four reasons.

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[3] *See* Vermont State Board of Education, Summary of the Annual Statistical Report of Schools for 2016 at 7, https://education.vermont.gov/documents/data-annual-statistical-report-schools-2016.

First, Appellants cannot establish causation. Appellants contend that Twin Valley cannot benefit from economies of scale available to larger districts and that its students underperform state averages. But other districts Twin Valley's size have average spending levels similar to or below statewide averages. And Appellants' expert testified that there is a threshold at which spending increases are no longer associated with student performance increases and that Twin Valley is well over it.

Second, Appellants are seeking to create constitutional rights that this Court has never recognized. *Brigham* held that the State was required to "ensure substantial equality of educational opportunity," which it discussed primarily in terms of equalizing access to revenue-per-pupil across districts. 166 Vt. at 252, 254–255, 266, 268. Appellants seek preferential treatment, not equality – the same range of on-site classes as a much larger district, plus all the benefits of a smaller district. And what they seek would duplicate a small fraction of the thousands of courses the State already makes available to Twin Valley students, at great expense, without improving student performance. The Vermont Constitution does not require unequal preferential treatment for midsized districts that will not improve student performance and it certainly does not require larger districts to pay for such unequal treatment on unequal terms.

Third, Appellants' challenge to the tax formulas fails whether they are reviewed under the rational basis test, or the more uniform, intermediate standard applied in *Brigham,* because the formulas are closely related to four legitimate goals: (1) raising money on equal terms per student, (2) encouraging efficient spending, (3) preserving local control, and (4) fairly treating lower-income taxpayers.

Finally, Whitingham has no claims in its own right. It cannot assert taxpayer claims because it does not pay education taxes and cannot assert education claims because it is not a school district and does not operate or attend schools. And the Town cannot sue the State on the theory that it is protecting itself from potential liability because it does not set or control the State tax formulas and would not be a proper party to a suit challenging them.

ARGUMENT

I. Appellants cannot disclaim the burdens they bore below by claiming that strict scrutiny applies.

There are two standards that could potentially apply to Appellants' claims – the rational basis standard that applies to Proportional Contribution Clause claims, and the flexible intermediate standard that this Court applied in *Brigham*. Under both standards, statutes are presumed constitutional and the burden of challenging them is squarely on the plaintiff. *See In Re Property of 1 Church St. City of Burlington*, 152 Vt. 260, 270 (1989); *Badgley v. Walton*, 2010 VT 60 ¶ 20.

A. Appellants' claims trigger rational basis review because they challenge tax formulas.

The taxpayer Appellant asserts a Proportional Contribution clause claim, which is subject to "'the rational basis test used for federal equal protection analysis.'" *USGen New England, Inc. v. Town of Rockingham,* 2003 VT 102 ¶ 15 (quoting *Alexander v. Town of Barton*, 152 Vt. 148, 157 (1989)). The student Appellant nominally asserts claims pursuant to the Education Clause and the Common Benefits clause, which Appellants analogize to the claims asserted in *Brigham*. AV–20, 23 (Complaint Counts I, III). *Brigham* "acknowledged" but "eschewed the federal categories of analysis" for equal protection claims and instead applied "a relatively uniform standard" to the student claims before it similar in practice to intermediate scrutiny. *See Baker v. State*, 170 Vt. 194, 206, 212 (1999).

However, what Appellants are challenging is not the adequacy of Twin Valley's funding. It is how much they pay in taxes. All of Appellants' claims are best characterized as tax claims for two reasons. First, Appellants challenge tax formulas. As the complaint confirms, "[t]his action concerns the homestead property tax." AV–13 (Complaint ¶ 14). Appellants specifically challenge the State's setting of tax rates within Twin Valley based on: (1) its education spending per equalized pupil and (2) its education spending per equalized pupil above a statutory excess spending threshold. *Id.* at 21–24 (Complaint ¶¶ 55–56, 65–66, 76–77) (alleging that the use of equalized pupil and excess spending calculations are unconstitutional).

Second, the State fully funds whatever budget Twin Valley adopts each year by making an annual "education spending payment" to it, 16 V.S.A. § 4011(c), and defining "[e]ducation spending" as "the amount of the school district budget" excluding payments from other sources like federal funds. 16 V.S.A. § 4001(6). Indeed, Appellants' proposed expert testified that the State already funds districts statewide, including Twin Valley, at a level that exceeds the threshold at which increases in spending are no longer associated with increases in student performance by "30% or significantly more." AV–276.

In contrast, the *Brigham* and *Brigham II* plaintiffs had funding claims because the State did not equalize access to funding for very large portions of their districts' budgets. The "Foundation Plan" in *Brigham* covered a small fraction of education spending, leaving local funding to cover "over 60% of the total cost." 166 Vt. at 252, 254. Because property tax bases ranged from $118,000-2.5 million per student, wealthy districts could spend much more per-pupil, at lower tax rates, than poor districts. *Id.* at 254-55. *Brigham* held that "equal opportunity does not necessarily require precisely equal per capita expenditures" but does not allow "a system in which educational opportunity is necessarily a function of district wealth." *Id.* at 166 Vt. at 252, 254–55, 266, 268.

The student plaintiffs in *Brigham II* alleged that the State failed to comply with *Brigham* by "equaliz[ing] only [a] base education payment" and that this left in place unconstitutional disparities in funding access. *Brigham II* Complaint, 2003 WL 25601265, ¶ 41. *Brigham II* separately addressed the standards applicable to the student and taxpayer claims and approvingly cited a rational basis case as applying to the taxpayers' claim. 2005 VT 105 ¶¶ 13, 15 (citing *In One Church St.*, 152 Vt. at 266). Treating the two claims separately made sense at the time because the State had equalized only a fraction of funding. As described in notes one and two above, when *Brigham II* was briefed, the Whitingham School District still existed, local funding represented 46.4% of its total spending, and Ludlow spent nearly as much per-pupil in FY 2004 ($12,852) at a tax rate of $1.10 as Whitingham ($13,526) did at an alleged effective tax rate of $2.37.

However, changes that took effect in FY 2005 made state and federal funding 94.75% of revenue spent on education through on average through FY 2016.[4] As described below, Appellant Boyd has not identified any classes she wished to take at any time that were not made available to her. And when asked "So Twin Valley would spend more money without an obvious connection to student achievement?" Appellants' 30(b)(6) witness responded "Yeah. My answer was yes." AV–282. In short, Appellants are challenging how much they pay in taxes, not the adequacy of Twin Valley's funding.

In a recent challenge to Act 46, the plaintiffs argued that students "might not obtain equal educational opportunities due to unequal levels of funding that could result from not obtaining tax incentives or qualifying for small-schools grants." *Athens Sch. Dist. v. Bd. of Educ.*, 2020 VT 52, 53. The State asserted that this was a tax claim because it fully funds district budgets, citing 16 V.S.A. § 4011(c) and § 4001(6). *Athens*, Br. of Appellees, 2019 WL 6915870, *29–30. And this Court observed that what the plaintiffs characterized as a *Brigham* claim "may actually be a proportional-contribution-clause claim, insofar as it turns on claimed disparate tax burdens." *Athens*, 2020 VT 52, n.7. That is exactly the case here, where Appellants seek preferential tax treatment – the equivalent of a small schools grant for midsized districts – that would result in taxpayers throughout the state subsidizing taxpayers in Twin Valley, which is already one of the highest spending districts in the state.

B. If Appellants were asserting a *Brigham* claim, a flexible intermediate standard, not strict scrutiny, would apply.

Even if Appellants were not challenging tax statutes, their claims would be subject, at most, to a flexible intermediate standard, not strict scrutiny. After making all the statements quoted by Appellants, *Brigham* "acknowledged" but "eschewed" the rigid, multitiered "federal categories of analysis" in favor of a more uniform, Vermont specific approach. *Baker v.*

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[4] *See* Vermont State Board of Education, Summary of the Annual Statistical Report of Schools for 2016 at 7, https://education.vermont.gov/documents/data-annual-statistical-report-schools-2016.

State, 170 Vt. 194, 206, 212 (1999). This intermediate approach required a more stringent "reasonableness inquiry than was generally associated with rational basis review" but "did not override the traditional deference accorded legislation having any reasonable relation to a legitimate public purpose." *Id.* at 203–04. Rather, it required a meaningful case specific analysis to ensure that any alleged exclusion "from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals." *Id.*

The Court has subsequently emphasized when applying this standard that statutes are "presumed to be constitutional" and "reasonable." *Badgley*, 2010 VT 68 ¶ 20. It has also observed that "the proponent of a constitutional challenge has a very weighty burden to overcome" and continues to "accord deference to 'legislation having any reasonable relation to a legitimate public purpose.'" *Id.* (quoting *Baker*, 170 Vt. at 204).

Brigham "emphasize[d] that *absolute* equality of funding is neither a necessary nor a practical requirement to satisfy the constitutional command of equal educational opportunity." 166 Vt. at 268 (emphasis in original). What is required is that "children who live in property-poor districts and children who live in property-rich districts" have "access to similar educational revenues." *Id.* They do. Districts set their own budgets, which are 95% covered by state and federal funding, and districts with the same spending have the same income sensitive tax rate, regardless of property values.

The out-of-state cases Appellants cite do not require a different result. Every case Appellants cite that invalidated a funding system, and described its equalization level, was between 25% and 89% un-equalized per-pupil. *See Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1354 (N.H. 1997) (non-equalized local property taxes were "seventy-four to eighty-nine percent" of revenue); *Leandro v. State,* 488 S.E. 2d 249, 252 (N.C. 1997) (plaintiffs alleged that all capital expenses and "twenty-five percent of current school expenses" were paid locally); *Rose v. Council for Better Educ., Inc.,* 790 S.W.2d 186, 194-96, 196 n.10 (Ky. 1989) (funding consisted of a minimum state funded foundation plan and equalization of 9-13 percent of local taxes); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W. 2d 391, 392 (Tex. 1989) ("districts provide[d] about fifty percent" of funding and per-pupil spending

varied by more than 9-1);*Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 323 (Wyo. 1980) (more than 40% of revenue came from local taxes); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 91 (Ark. 1983) (38.1% of revenue was local); *Pauley v. Kelly,* 255 S.E.2d 859, 892 (W.Va. 1979) (revenue per-pupil varied from less than $850 to more than $1400 based primarily on local tax differences); *Serrano v. Priest,* 487 P.2d 1241, 1246 (Cal. 1971) (local property taxes were "[b]y far the major source of school revenue"); *cf. Scott v. Commonwealth,* 443 S.E.2d 138, 140, 142 (Va. 1994) (no finding that a funding system was unconstitutional).

In contrast, *Skeen v. State*, 505 N.W. 2d 299, 306, 318 (Minn. 1993) upheld the constitutionality of a funding system that was 93% equalized. And it correctly explained that most education funding cases explicitly recognize that some level of variation is permissible and that cases finding a constitutional violation have consistently involved "inadequacies in the levels of *basic* funding" and substantial funding disparities. *Id.* at 311.[5]

II. Under either standard, Appellants failed to show causation.

As the "proponent of a constitutional challenge," Appellants have "a very weighty burden to overcome," and the tax formulas they attack are "presumed to be constitutional." *Badgley*, 2010 VT 68, ¶ 20. Because the State did "not bear the burden of persuasion" it was required to show only "that there is an absence of evidence in the record to support the nonmoving party's case." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995). "The burden then shift[ed]" to Appellants "to persuade the court that there is a triable issue of fact." *Id.*

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[5] The remaining cases cited by Appellants either do not deal with funding at all or do not clearly identify funding percentages. *See Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So.2d 237, 238 (Miss. 1985) (considering the suspension of two students); *Robinson v. Cahill,* 351 A.2d 713, 716-24 (N.J. 1975) (ordering a provisional remedy after the Legislature failed to correct a local property tax based system); *Walker v. Ark. State Bd. of Educ.,* 365 S.W. 3d 899, 901 (Ark. 2010) (considering an objection to the closing of an isolated school).

Appellants did not. The State supported its motion with a 68-paragraph statement of undisputed potentially material facts. Appellants are represented by experienced counsel, had a retained proposed expert witness, and had more than two years to conduct discovery. Because Appellants could not dispute any of these facts, they declined to respond to them on a paragraph-by-paragraph basis and the Court may consider them undisputed.[6] *Rose*, 2021 VT 77, ¶ 2 n. 1; V.R.C.P. 56(e)(2).

A school district can have high spending for many reasons not caused by the State, including inefficient staffing and poor capital planning. Appellants' expert testified that he did not know whether Twin Valley was efficiently staffed. SPC-3. And Appellants did not dispute that it had more staff than state quality standards recommended at a number of positions or that its failure to develop required class size guidelines could reduce its efficiency by increasing its staffing levels. AV–184-85, 186; SPC-12-15. Appellants' 30(b)(6) witness acknowledged that one of Twin Valley's predecessors "did a poor job of facilities management" as to its high school, which he described as "a mess." AV–269-70. And Appellants acknowledge that the bond and maintenance costs for the facility that replaced it "likely contribute significantly to Twin Valley's unusual spending levels." AV–188.

Appellants do selectively address a handful of the many ways Twin Valley could be operating inefficiently. Br. at 17–18, 28. But they do not state or suggest that Twin Valley's staffing ratios or facilities spending compare favorably to other districts its size. They also mischaracterize Dr. Deweese's testimony, which describes the State quality standards as establishing staffing ratios for specific positions, e.g., one staff member of a particular type for every 300 students, that apply uniformly to both large and small districts and contemplate pro rata staffing both above and below the specified thresholds, not as double standards. AV-409-427. And Appellants cannot carry their burden of establishing that Twin Valley spends more

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[6] Appellants instead submitted what they called a Statement of Disputed Facts, which did not respond to any of the paragraphs of the State's statement and contained assertions that were either undisputed, or not facts. *Compare* AV-327-335 *with* AV-463-472.

because of its size by attempting to explain away a few of the many potential alternative reasons for its high spending while ignoring or conceding others.

Indeed, Twin Valley, which is not a party, is currently working to address many of these issues. It has retained a consultant to develop a "phased approach" to reducing its budget "without impacting the programs offered" and proposed a 3.48% lower budget for the most recent fiscal year. Twin Valley Annual Report, 2021 at 4; available at https://www.twinvalleyschooldistrict.us/news. Among other things, it decided to review its class-size policy, directed its administration to improve staffing ratios, and improved its capital planning by developing "a schedule of capital needs projects." *Id.* at 4 (capital plan), 7 (staffing); November 5, 2020 Financial Sustainability Committee Approved Minutes; available at https://sites.google.com/wswsu49.org/windhamswsupervisoryunion/superboard-minutes/tvuusd (class-size policy).

Many local factors also influence student achievement, including having strong and stable leadership, an effective curriculum, tracking and analyzing performance results, teacher quality, and effective professional development. AV–131–32. Indeed, Appellants' proposed expert worked at a charter school that improved its performance, as its funding dropped sharply, by making curriculum changes, generating and analyzing performance data, and doing intensive professional development. Appellants' 30(b)(6) witness acknowledged that Twin Valley's Supervisory Union has had four or five superintendents in the last 10 years and merged the director of curriculum position with another position within the union. AV–178, 182–83. He did not know whether Twin Valley had a written plan for assessing student performance, or how it used data to look at its instruction. *Id.* at 179. And he believed that student performance was not linked to staffing decisions and did not know whether Twin Valley tracked teacher performance. *Id.* at 179–181.

In sum, there are many reasons a school district can have above average spending, or below average performance. But Appellants do not ask the State to change anything other than the two tax formulas. They do not ask the State to help Twin Valley examine its performance or spending, provide technical assistance to Twin Valley, make changes to its

administration, curriculum, or spending, or merge Twin Valley to increase its size. They seek only to invalidate equalized pupil and excess spending tax formulas. To do so on an economies-of-scale theory, Appellants needed to show that Twin Valley's pupil count, rather than local choices or other factors, caused it to spend more and get less in return. They did not.

A. Education spending in Vermont.

As a whole, Vermont spends more of its total economic output, as measured by gross domestic product, on education than any other state in the country and has some of the highest overall levels of per-pupil spending. AV–274. Education spending in Vermont as a whole is not highly associated with student achievement. Indeed, Appellants' proposed expert testified that he "didn't see any specific relationship between the amount of money spent and student achievement in Vermont in the year [he] looked at." AV–275.

When asked if he would agree that spending in Vermont is above the threshold at "which point increases in spending are no longer associated with increases in student performance?" he responded, referring to international research he cited in his disclosure, "According to this research, yes." *Id.* at 276. When asked "And would you agree that spending in Twin Valley is above that threshold?" He responded "Yes." *Id.* He then asked to "elaborate on one point" and observed that there are differences across states and within countries about what qualifies as education spending, before stating "But, as in gross terms, absolutely what we see is that Vermont, and you know, and all of the schools, all of the districts, all of the spending entities that we see are far exceeding what is that threshold in the nature of 30% or significantly more." AV–276.

When asked "What changes, if any, would you recommend for Twin Valley?" Appellants' proposed expert witness responded: "Not having studied specifically the way in which they are running their school, I cannot say." AV–278. When asked "Does that mean you wouldn't recommend any particular funding level for Twin Valley as well?" he responded: "A specific funding level? No." *Id*. When asked "And you also wouldn't recommend any district specific changes?" He responded: "I can't speak intelligently at this time about it." *Id.*

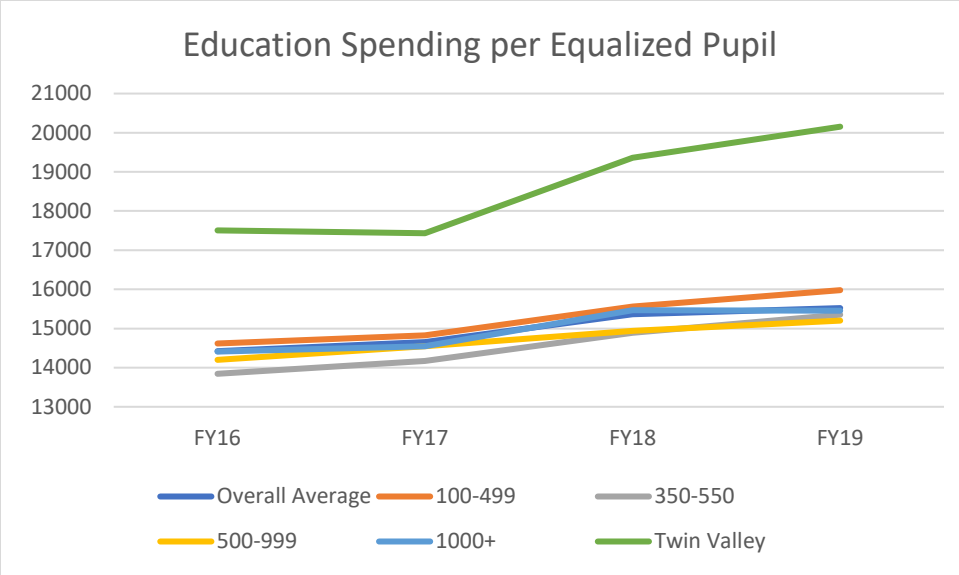
B. Appellants' claims fail for lack of causation because they cannot establish that Twin Valley's size causes its unusual spending.

Appellants' size theory fails because Appellants offered no support for their claim that Twin Valley's spending and size are related. To the contrary, similarly sized districts have spending levels that are lower than or similar to overall statewide averages.

In fiscal years 2016-2019, Twin Valley had between 400 and 500 equalized pupils and its education spending exceeded the statewide average by between 19% and 30%. AV-276, 278. The average spending of all districts with between 100 and 499 students, in contrast, was similar to the statewide average for all districts in every fiscal year from 2016 through 2019. AV-279. Twin Valley's spending is equally exceptional when compared more specifically with other districts with between 350 and 550 equalized pupils that operated schools for all grades. AV-279. In FY 16-19, Twin Valley spent an average of $4047 more per-pupil than the average spending of such districts, which was *less* than the statewide average. *Id.* at 279.

Indeed, excluding Twin Valley, in FY16-18, districts with between 350 and 550 equalized pupils operating schools for all grades spent less per pupil than the statewide average for larger districts with both 500-999 equalized pupils and with 1000 or more equalized pupils. *Id.* And in FY 2019, the averages for all three groups were within $300 per equalized pupil.

In sum, from FY 2016-2019, the average education spending per equalized pupil for every potentially relevant comparison group fell within an $800 band. And in every year, Twin Valley's education spending per pupil was at least $2600 more than the highest average for that year. The below chart, which shows the averages for every potentially relevant comparison group clustered at the bottom, and Twin Valley alone at the top, is illustrative:



See AV-272-73, AV196 (spreadsheets reflecting the depicted averages).

Appellants' 30(b)(6) witness did state the conclusion that a "funding formula that is hinged on per-pupil spending doesn't allow the midsize or smaller schools to take advantage of the economies of scale" available to larger districts. Appellants' Br. 15. But conclusory assertions, unsupported by any specific facts, cannot create a disputed issue of fact. *See, e.g.*, *Gray v. State*, No. 2002–34, 2002 WL 34423181, *1 (Vt. June 2002) (rejecting as inadequate a "bare assertion as to causation"); *Starr Farm Beach Camp Owners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 506 (2002) ("[t]estimony which presents nothing but conclusions is insufficient to defeat a motion for summary judgment"). That is particularly so where, as here, Appellants bore the burden of establishing causation. *See Ross*, 164 Vt. at 18 (where "the moving party does not bear the burden" and shows "an absence of evidence" supporting "the nonmoving party's case" the burden "shifts to the nonmoving party to persuade the court that there is a triable issue of fact").

Indeed, the factors Appellants' 30(b)(6) witness listed before stating his economies of scale conclusion – student needs, demographics, special education costs, and bond payments – are unrelated to size. Br. at 11. Appellants' expert testified that "there is an association" between spending and special education needs, English language learning students, and students living in poverty. AV–280. But large districts can and do have students needing special education services, learning English, and living in poverty. Indeed, Mr. Boyd conceded that Twin Valley does not have a

significant English-language-learning population and that a larger district like Winooski that does might have substantial costs Twin Valley does not.[7] *Id.* And districts of all sizes can incur bond payments and manage facilities well or badly.

Mr. Boyd's unsupported size conclusion – and speculation that Twin Valley's size could impact its spending — also fail because he is not an expert qualified to opine that Twin Valley spends more than larger districts because of its size, even though other similarly sized districts do not. Indeed, when Appellants' proposed expert was asked if "Twin Valley spends more per student than other similarly sized districts?" he responded "Off the top of my head . . . the answer is probably 'yes.'" AV–278.

Finally, Mr. Boyd was asked "Are you aware of any data suggesting that Twin Valley does not spend significantly more than other similarly sized districts?" and responded "I'm not aware of any data." AV–279. And when asked "If Twin Valley is spending more than other districts of the same size, does that mean its spending is driven by other factors . . . than size?" he responded "Yes. I would say so." AV-488.

If Twin Valley's size caused its high spending, similarly sized districts would be similarly high spenders. It was undisputed below that they are not.

C. Appellants failed to show that the tax formulas they challenge caused any harm to students.

Appellants contend that "[s]tudent outcomes. . . reflect unequal educational opportunity," Appellants' Br. 12, but offer no evidence connecting the tax formulas to performance issues at Twin Valley. They do not dispute that the State already funds Twin Valley at more than twice the level at which their expert indicated that more spending alone will likely lead to better performance. Indeed, when asked if Twin Valley's funding "is causing its relatively poor outcomes" he frankly responded "probably not." AV–281.

When asked if he was aware of anything the State was doing to cause Twin Valley to have below average outcomes, Appellants' expert responded "no, I'm not." AV–281. He also "didn't see any specific relationship between

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[7] Appellants' primary 30(b)(6) witness was Seth Boyd, who is the father of the student Appellant, Sadie Boyd. Neither are related to Appellee's counsel.

the amount of money spent" by districts "and student achievement in Vermont." AV–275. And when asked whether she ever felt underprepared for testing "because of something Twin Valley did or failed to do," the student Appellant responded "I don't believe so." AV–282.

Appellants' 30(b)(6) witness testified similarly. When asked "Is there a relationship between total spending and students' achievement in Vermont?" he responded: "I don't think so." AV–282. When asked "Would sending more money to Twin Valley without making any other changes improve its achievement results?" he responded: "Not necessarily. No." *Id*. When asked "Would student achievement be higher at Twin Valley if it spent more money?" he responded: "Not necessarily. No." *Id*. And when asked "So Twin Valley would spend more money without an obvious connection to student achievement?" he responded: "Yeah. My answer was yes." *Id*.

Appellants also observe that smaller schools offer fewer courses on site then larger schools. Br. at 10-11.[8] They specifically contend, as their 30(b)(6) witness testified, that "the smallest school district in the state" should offer a course load "similar in range to the CVU-sized schools." AV–283. Champlain Valley Union High School offered more than 150 courses on-site in the 2018-19 school year. *Id.* But it had about 13 times as many students that year as Twin Valley and Appellants' 30(b)(6) witness conceded that Twin Valley could not "offer 150 courses and fill them with students in its high school." *Id.* Indeed, Appellants produced class size spreadsheets for two years for Twin Valley Middle High School and they contain more than 90 entries reflecting class sizes of five or less. In the 2017-18 school year, Twin Valley offered seventeen courses with one to three students enrolled—including Studio Art, All Things Metal, Printmaking, Woodworking 2, and Ancient History. *Id.* at 284.

And Appellants do not dispute that the State provides all students access to thousands of in-person and online courses – at least 10 times as many as are taught on site in any school in the state. AV–285. Appellant

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[8] Appellants' suggestion that Twin Valley offered only 69 courses in the 2017-18 school year is surprising because, as the State noted below, the exhibit they cite lists more than 90 courses. AV-439-47.

Boyd has taken Dual Enrollment classes and has classmates enrolled in Early College. *Id*. at 285-86. For example, after indicating that she would be interested in taking business and career classes, she confirmed that she could take business classes through CCV, provided Anatomy 2 as an example of a career class, and said she would be taking it through CCV this year. AV-464. She also explained that there were "quite a few" AP classes available to her including "a whole list" available through CCV. AV–402.[9]

In short, Appellant Boyd has never "wanted to take a class that wasn't available" to her and does not "know of any other students who have." AV–286. Appellants concede that these courses are educational opportunities. *Id*.

Finally, Appellants suggest that Twin Valley offers fewer sports then larger schools. But according to their expert, enrollment, not funding, predicts how many sports a school offers, including at Twin Valley, where sports offerings "are well-aligned" with enrollment. AV–284. Indeed, he specifically confirmed that schools with similar enrollments with higher budgets do not tend to offer more sports than schools with lower budgets. *Id.* Appellants also cite no cases suggesting Appellant Boyd has a constitutional right to play more sports.

Appellants' efforts to raise theoretical doubt about the excess spending threshold, and current spending levels in Vermont, as compared to when *Brigham* was decided, fail for substantially the same reasons. Appellants' Br. 27. Victory and Ferdinand are not relevant comparators because they had 11.7 and 4.5 equalized pupils in FY 2018 respectively and did not operate any schools. Indeed, Appellants' expert expressly excluded budgetary entities

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[9] Appellant Boyd also asserts that more students would consider going to Twin Valley if it had more money and used that money to offer more classes. But Appellants did not establish below: (1) that Appellant Boyd is qualified to opine on the complex topic of school choice, (2) what factors are relevant to school choice, (3) that the tax formulas disadvantage Twin Valley because of its size, (4) that if the tax formulas changed, voters would approve higher budgets for Twin Valley, (5) that if Twin Valley had a higher budget, it would offer more courses, rather than addressing other priorities, and (6) that if Twin Valley offered more courses, more students would attend Twin Valley. *See, e.g., Starr Farm*, 174 Vt. at 506 (conclusory assertions, unsupported by any specific facts, cannot defeat summary judgment).

with 10 or fewer students from his analysis. AV–352. And the only data Appellants provide linking performance and spending is a $9250 per pupil figure their expert suggested is a threshold below which research suggests more spending can improve performance and above which increases in spending are no longer associated with performance increases. *Id.*

Assuming, solely for purposes of argument, the accuracy of this $9250 threshold, the lowest spending district in Appellants' *Brigham* chart could have improved student performance by spending more because it spent about half that much ($4905). In contrast, the lowest spending district in FY 2018 that did not tuition all of its students already spent more than $9250 (Sutherland at $10,063.39). And the excess spending threshold – 121% of the statewide average from 2015, adjusted for inflation – was $17,386, or $8,136 more per-pupil. AV–272–73. Appellants point to no evidence suggesting that any district needs to spend more than the excess spending threshold.

III. Appellants are seeking to create a new, never before recognized right to preferential treatment contrary to *Brigham*'s substantial equality mandate.

Appellants seek preferential treatment, not equality. They recognize that smaller districts offer distinct benefits, including smaller class sizes and individual attention. AV–284–85. As the student Appellant explained "[y]ou get . . that bond with the teacher" and "more one-on-one time" and having "a personal connection with the teacher makes things easier in the classroom." AV–285. Appellants admit that Twin Valley, which already spends more than almost every other district in the State, would not likely improve its achievement by spending more. AV–276, 278, 281-82 (SOF ¶¶ 9, 11, 20, 35, 37–42). And they acknowledge that Twin Valley students have access to thousands of course options in-person and online – many more than any Vermont school offers on-site – through programs such as Dual Enrollment, Early College, regional career centers, and the Vermont Virtual Learning Cooperative. AV–285.

Appellants nevertheless claim Twin Valley is entitled to even more funding to try to offer the same range of classes on-site for its 90 students as the largest high school in the State offers for 1,222 students. AV–282–83. But Appellants do not have a constitutional right to unequal preferential

treatment – the benefits of a smaller district, plus the benefits of a larger district – much less to have it paid for by taxpayers in larger districts. No State has recognized such a right, and the preferential treatment Appellants seek is directly contrary to *Brigham*'s substantial equality mandate.

Brigham referred more than 20 times to per-pupil metrics before invalidating a system that allowed wealthy districts to spend much more per-pupil at lower tax rates than poorer districts. 166 Vt. at 252, 254–55, 266, 268. It concluded that children "should be afforded a substantially equal opportunity to have access to similar educational revenues" regardless of property values and that the State "must ensure *substantial* equality of educational opportunity throughout Vermont." *Id.* at 268 (emphasis in original). Appellants' claim is not a *Brigham* claim that unequal access to funding harms students. The State already funds Twin Valley well above the level at which Appellants' expert indicated spending increases are no longer associated with performance increases. And it does so at the same tax rate as other districts with the same spending level, while providing Twin Valley students access to thousands of courses. Instead, Appellants seek extra funding, paid for on unequal terms by taxpayers in other districts, by invalidating tax formulas that equalize access to funding per-pupil in furtherance of *Brigham's* mandate.

In addition to contravening *Brigham*, Appellants' proposed new right does not make sense for four reasons. First, the State already provides students equal access to thousands of courses – at least 10 times as many as are taught on-site in any school in the state – through programs such as Dual Enrollment, Early College, regional career centers, and the Vermont Virtual Learning Cooperative. AV–285. Second, according to Appellants' expert, Twin Valley's spending is well above the point at which "increases in spending are no longer associated with increases in student performance" and Appellants do not seek to change any of the factors he contended could matter, including how Twin Valley spends its funding. AV–276. Third, Vermont already spends more of its total economic output on education than any other State. AV–274. Fourth, Twin Valley's 90 students simply could not fill the 150 on-site courses CVU's 1222 students do. AV–283-84.

The Vermont Constitution does not require the State to inefficiently duplicate already available courses at great expense without improving student performance. And it certainly does not require larger districts to subsidize unequal preferential treatment for midsized districts. Appellants cite no cases suggesting that students in midsized districts have a constitutional right to a subsidy paid for by larger districts for extra classes and athletics.

IV. The equalized pupil and excess spending tax formulas are sufficiently tailored to legitimate state interests to survive any scrutiny that could apply.

Appellants' claims are best characterized as tax claims, but the classification ultimately does not matter because they fail under either rational basis review or the more uniform intermediate standard applied in Brigham. Using equalized pupil and excess spending formulas is reasonably related to the State's legitimate interests in raising money for education, equalizing districts' access to funds, encouraging wise spending, preserving local control, and ensuring fair treatment of low-income taxpayers. Moreover, the formulas treat taxpayers within each classification equally.

First, the equalized pupil and excess spending calculations serve the core constitutional purpose of raising money to provide school districts with "substantially equal access to similar revenues per pupil." *Brigham*, 166 Vt. at 268 (quotations omitted); *see also One Church St.* 152 Vt. at 267 (raising revenue is a "valid legislative purpose"). The equalized pupil and excess spending calculations are closely tailored to providing districts "with substantially equal access to similar revenues per pupil" because they correct for differences in property wealth that historically prevented equal access. 166 Vt. at 254–55, 268. Indeed, Appellants' proposed expert acknowledged that the purpose of the excess spending threshold is to "enhance the equity" of school funding by ensuring that districts "spending a tremendous amount of money . . . also contribute to towns that cannot afford to do so" and "controlling spending above a certain point." SPC-6.

Second, tying tax rates to spending, and penalizing excess spending, serves the reasonable purpose of encouraging wise spending to avoid a tragedy of the commons in which each district has no incentive to control its

spending to the detriment of all taxpayers statewide. "[E]nsur[ing] the financial integrity and liquidity of [a] fund" is a reasonable legislative purpose. *Holton v. Dep't of Emp. & Training (Town of Vernon)*, 2005 VT 42, ¶ 30. Indeed, Appellants' proposed expert indicated that districts already spend "30% or significantly more" than the level at which more spending improves student achievement. AV–276. Because the State must fund whatever budget districts' voters approve, it has a valid interest in encouraging districts to find efficiencies where they can and spend the State's Education Fund wisely.

Third, equalized pupil and excess spending calculations support "the laudable goal" of facilitating local control over education. *Brigham*, 166 Vt. at 265. By correcting for differences in property wealth, these calculations eliminated the "cruel illusion" of fiscal free will that predated them in which poorer districts could not "realistically choose to spend more for educational excellence than their property wealth" allowed. *Id.* at 266. By giving districts statewide "substantially equal access to similar revenues per pupil," the Legislature struck a careful balance, creating a system that does "not necessarily require precisely equal per capita expenditures" or "prohibit cities and towns from spending more on education if they choose" while ensuring that the system is not a function of district wealth. *Id.* at 268.

Finally, property tax credits for lower income homeowners ensure that the calculations do not lead to unmanageable housesite tax burdens. *Schievella v. Dep't of Taxes*, 171 Vt. 591, 593–94 (Vt. 2000) (tax classifications based on need are legitimate). Housesite is defined as a taxpayer's home, plus two acres. 32 V.S.A. § 6061(11). The credits reduce housesite education property taxes along a sliding income scale and cap them for taxpayers with incomes below a statutory threshold. *Id*. § 6066(a). Thus, although Twin Valley's spending has fluctuated, Appellant Klein has paid about $2000 per year after credits on her housesite and the two surrounding acres for the last 10 years, which would have been her total State property tax liability if she did not own an additional 39 acres. AG–286. The Legislature reasonably determined that homeowners should support their district's spending and that those with higher incomes and more land should pay more. *Schievella*, 171 Vt. at 593–94 (finite funding is legitimate reason to limit property tax

breaks to lower-income taxpayers because "the Legislature may consider how much revenue it can afford to lose").

The equalized pupil and excess spending calculations treat all taxpayers within the same classification equally. As described above, when *Brigham II* was briefed, districts could still have very different tax rates at similar levels of per-pupil spending. Appellants correctly do not contend that that is still the case. To the contrary, taxpayers now are classified based on income, acreage, and their district's per-equalized-pupil spending and all taxpayers pay the same rate as others in their classification. *See* 32 V.S.A. § 5402(a)(2); *id.* § 6066(a). Equality within reasonable classifications is all the Proportional Contribution Clause requires. *See One Church St.*, 152 Vt. 260, 265 (1989) (clause allows creation of reasonable classifications of property within which taxpayers are treated equally).

Appellants' primary challenge is to the fit between the equalized pupil and excess spending calculations and the goals of those calculations. But Appellants have failed to establish that there is a causal relationship between Twin Valley's size or demographics and its homestead property tax rates. Indeed, after responding "As far as I know, no" when asked "Is Twin Valley's relatively high spending driven by its demographics?" Appellants' proposed expert identified three factors that can influence district costs—special education, English language learning status, and poverty—each of which the Legislature has addressed by sharing special education costs with districts and weighting pupil counts for students learning English and poverty levels. AV–280. The Legislature is also currently considering revising the existing weights.[10] Deference to the Legislature's weighting judgments is particularly appropriate because they "remain under active investigation and consideration in the political process." *Badgley,* 2010 VT 68, ¶ 40.

And even if Appellants could establish causation, the testimony of their own proposed expert establishes that "it is evident" that what specific weights Vermont should apply "is at least debatable." *Badgley*, 2010 VT 68, ¶

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[10] *See* Task Force on the Implementation of the Pupil Weighting Factors Report; https://ljfo.vermont.gov/committees-and-studies/task-force-on-the-implementation-of-the-pupil-weighting-factors

38. When asked "Am I correct in understanding that there is not a known level of spending that can equalize educational outcomes across districts?" he responded "Not as far as I know." AV–281. He went on to reiterate that how money is spent, a topic Appellants do not address, rather than how much money is spent, can be significant. *Id.* at 275. He also testified that Vermont already funds all districts at levels well above the point at which increasing spending is likely to improve student performance. *Id.* at 276.

V. The town of Whitingham is not a proper party.

Whitingham's claims fail for the additional reason that it is not a proper party. The town of Whitingham and the Twin Valley school district are separate and distinct legal entities with no overlapping board members. AV–276–77. The Town does not set the tax formulas Appellants challenge, adopt school district budgets, operate schools, spend money on education, or decide what offerings Twin Valley provides. AV–277; 16 V.S.A. § 4029(b). It has never been sued based on education taxes or the operation of schools, *id.*, and could not be because it does not set education taxes or operate schools.

The Town does not have a *Brigham* claim, because it is not being deprived of an education, and it does not have a tax claim, because it does not pay education taxes. Appellants argue the Town has standing because the State's education tax is "depriving it of revenue." Br. at 30. But this argument was not raised in the Complaint. *See Stevens v. Helming*, 163 Conn. App. 241, 247–48 (2016) (holding "trial court, in ruling on the defendants' motion for summary judgment, was limited to the facts alleged in the complaint standing alone"). And it would apply equally to every tax of every kind not set at the municipal level, because every tax a taxpayer must pay diminishes their ability to pay other taxes. Having "high[] education costs and school taxes" is not an "invasion of a legally protected interest," but rather a "generalized" allegation of harm insufficient to establish standing. *Paige v. State*, 2018 VT 136, ¶ 9 (holding plaintiff lacked standing to sue state where he alleged residents of his town would bear additional tax burden after school-district merger). "To the extent [a] plaintiff alleges that town funds will be affected by the state law, this does not suffice to give plaintiff standing to sue the State." *Id.* ¶ 14 n.3.

Moreover, the State cannot be sued by one of its political subdivisions. Appellants claim that, despite the "general rule barring local government challenges to state legislation," *Town of Andover v. State*, 170 Vt. 552, 553 (1999), Whitingham may sue the State because the State is requiring it "to violate constitutional provisions." Br. at 31. *Andover* recognized an exception to the rule "where municipalities assert that compliance with a state statute will force them to violate the constitution." 170 Vt. at 553.

Appellants argue that because Vermont allows towns that timely remit education taxes to the State to "retain 0.225 of one percent of the total education tax collected," a taxpayer could sue the Town. Br. at 32. But they cite no authority suggesting that a statute compensating towns for costs incurred in collecting state taxes would allow a plaintiff to sue a town to challenge how the State sets tax rates. Any such suit would fail for lack of causation because a plaintiff "who shows no particular injury that is attributable to the defendant has no standing to bring a suit." *Baird v. City of Burlington*, 2016 VT ¶ 13. Like the municipal plaintiffs in *City of New York v. State,* Whitingham could not "be held accountable" for State tax rates over which it has "absolutely no control." 86 N.Y. 2d 286, 295 (N.Y. 1995).

The cases Appellants cite in response, Appellants' Br. 31, are not to the contrary. Cases are not precedent on questions "neither brought to the attention of the court nor ruled upon." *Cooper Indus., Inc. v. Aviall Servs., Inc*, 543 U.S. 157, 170 (2004). Most of the cases Appellants cite contain no standing or capacity analysis at all and all involved entity plaintiffs directly involved in operating schools and districts funded in significant part by locally set, non-equalized taxes. *See Londonderry Sch. Dist. SAU # 12 v. State*, 907 A.2d 988, 989-90 (N.H. 2006); *Edgewood*, 777 S.W. 2d at 391-92; *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 480–81 (Ark. 2002); *Rose*, 790 S.W. 2d at 190–91, 194–96; *Washakie*, 606 P.2d at 317. None suggest that a town can challenge the operation of schools it does not operate or tax formulas it does not set.

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CERTIFICATE OF COMPLIANCE

David Boyd, Assistant Attorney General and Counsel of Record for the Appellee, State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(4). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 8,939 words.

/s/ David Boyd
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