VERMONT SUPERIOR COURT

STATE OF VERMONT **CIVIL DIVISION**
Washington County, s.s. **Docket No. _____**

Athens School District, Barnard School District, Barnard Select Board, Bellows Falls Union High School, Berlin School District, Brighton School District, Brownington Select Board, Calais School District, Calais Select Board, Charleston School District, Coventry School District, Craftsbury School District, Dummerston School District, Franklin School District, Franklin Select Board, Glover School District, Grafton School District, Greensboro School District, Greensboro Select Board, Highgate School District, Irasburg Planning Commission, Irasburg School District, Irasburg Select Board, Jay/Westfield School District, Lakeview Union School District, Lowell School District, Middlesex School District, Montgomery School District, Montgomery Select Board, Newbury School District, Newport Town School District, Richford School District, Sheldon School District, Stannard School District, Troy School District, Westminster School District, Windham School District, Worcester School District, Sarah Silva, Matthew Silva, Chloe Silva, Ethan Silva, Jonathan Betts, Ivy Betts, Audrey Betts, Bruce Sterling, Elise Manning Sterling, Nellie Sterling, John Douglas Sterling, Paul Normandeau, Jo Jean Normandeau, Dorothy Naylor, Cameron Scott Thompson, and Ashley Randall,

Appellant-Plaintiffs,

v.:

The Vermont State Board of Education, the Vermont Agency of Education, Vermont State Board of Education Members Krista Huling, William Mathis, John Carroll, Callahan Beck, Kyle Courtois, John O'Keefe, Oliver Olsen, Peter Peltz, Mark Perrin, and Stacy Weinberger in their official capacities as Members of the Vermont State Board of Education, and Dan French in his official capacities as Secretary of the Agency of Education and as a Member of the Vermont State Board of Education,

Appellee-Defendants.

ADMINISTRATIVE APPEAL
PURSUANT TO RULE 75
AND COMPLAINT

INTRODUCTION

"I don't believe it's appropriate — or legal — for the State Board to ignore [the law] just because members of the State Board may disagree with it. . . . A forced merger under these circumstances will have consequences for decades. These will not somehow iron themselves out. I am troubled by the casual dismissal of statute, of community concern, and of the possible negative consequences for students." – Representative Janet Ancel of Calais (who voted for Act 46 and Act 49), Letter to Vermont State Board of Education (Oct. 22, 2018).

"I don't think you will see ever a board saying 'you shall do this.' . . . I think Act 46 is optional." – Former Governor Peter Shumlin (who signed Act 46 into law), Vermont Public Radio Vermont Edition interview (Sept. 29, 2016).

Every action a Vermont state agency takes must comply with the United States Constitution, the Vermont Constitution, and all applicable statutes and regulations.

On November 28, 2018, the Vermont State Board of Education voted to *force* the merger of 45 democratically elected school boards. The Board issued its Final Report of Decisions and Order on November 30, 2018. These forced mergers are against the will of the local school boards and local communities that voted in opposition to merger and who believe that their children are better served by remaining independent districts. The Town of Huntington voted *four* times against a merger. The electorates of the towns of Franklin and Sheldon *unanimously* opposed merger and supported an alternative structure. In the Windham Southeast Supervisory Union, all four towns — Brattleboro, Putney, Dummerston, and Guilford — voted overwhelmingly against merger. Despite the will of the people, the Board decided to merge 45 school districts.

The Board's action is unconstitutional. And while the Board purports to have complied with Act 46 of 2015 and Act 49 of 2017, it has in fact ignored the plain text of those laws, the

clearly stated legislative intent underlying them, as well as long-standing statutory law, proper administrative procedure, and even the Board's own rules.

If upheld, the Board's "casual dismissal of statute" will have lasting impacts for decades, perhaps even centuries, to come. It is already tearing communities apart and pitting towns against each other. It is harming our students, our schools, the very fabric of rural life, the democratic process, checks and balances, and the foundational notion that governance requires consent of the governed.

The above-named Appellant-Plaintiffs bring this appeal under Vermont Rule of Civil Procedure Rule 75 and assert affirmative claims for relief. The Appellants are 30 school boards, 7 selectboards, 1 planning commission, 10 taxpayers who are also parents or grandparents of students or members of school boards, and 6 students, who would all be negatively impacted by forced mergers. They all oppose the forced mergers that have been ordered by the Board.

The Appellants ask this Court to vacate the Board's unlawful decision, to rule in their favor on their affirmative claims, and to grant the declaratory and injunctive relief described below.

The Appellant-Plaintiffs allege as follows:

PARTIES[1]

The Appellant-Plaintiffs are:

1. Athens School District operates PK-6 with choice for grades 7-8 and Bellows Falls Union High School for grades 9-12;

[1] Attached to this Appeal and Complaint as Attachment A is a grid that lists the school district Appellants and specific issues applicable to each. Issues such as equal protection, due process, common benefits, legislative intent, and violations of separation of powers principles, of course, apply to all.

2. Barnard School District operates PK-6 with Woodstock Union High School for grades 7-12;

3. Barnard Select Board is the legislative and primary governing body of the Town of Barnard;

4. Bellows Falls Union High School operates grades 7-12 for the Windham Northeast Supervisory Union;

5. Berlin School District operates PK-6 with U-32 for grades 7-12;

6. Brighton School District operates PK-8 with North Country Union High School for grades 9-12;

7. Brownington Select Board is the legislative and primary governing body of the town of Brownington;

8. Calais School District operates PK-6 with U-32 for grades 7-12;

9. Calais Select Board is the legislative and primary governing body of the town of Calais;

10. Charleston School District operates PK-8 with North Country Union High School for grades 9-12;

11. Coventry School District operates PK-8 with choice for grades 9-12;

12. Craftsbury School District operates PK-12;

13. Dummerston School District operates PK-8 with Brattleboro Union High School for grades 9-12;

14. Franklin School District operates PK-6 with Missisquoi Union High School for grades 7-12;

15. Franklin Select Board is the legislative and primary governing body for the town of Franklin;

16. Glover School District operates PK-6 with Lake Region for grades 7-12;

17. Grafton School District operates PK-6 with choice for grades 7-8 and Bellows Falls Union for grades 9-12;

18. Greensboro School District operates PK-6 with Hazen Union for grades 7-12;

19. Greensboro Select Board is the legislative and primary governing body for the town of Greensboro;

20. Highgate School District operates PK-6 with Missisquoi Union High School for grades 7-12;

21. Irasburg Planning Commission is responsible for developing long-range plans for the environmental, educational, and economic well-being of the town of Irasburg;

22. Irasburg School District operates PK-6 with Lake Region for grades 7-12;

23. Irasburg Select Board is the legislative and primary governing body of the Town of Irasburg;

24. Jay/Westfield School District operates PK-6 with Newport Junior High for grades 7-8 and North Country Union High School for grades 9-12;

25. Lakeview Union School District operates PK-6 with Hazen Union High School for grades 7-12;

26. Lowell School District operates PK-8 with North Country Union High School for grades 9-12;

27. Middlesex School District operates PK-6 with U-32 for grades 7-12;

28. Montgomery School District operates grades PK-8 with school choice for grades 9-12;

29. Montgomery Select Board is the legislative and primary governing body of the town of Montgomery;

30. Newbury School District operates PK-6 with Oxbow Union High School for grades 7-13;

31. Newport Town School District operates PK-6 with Newport Junior High for grades 7-8 and North Country Union High School for grades 9-12;

32. Richford School District operates PK-12;

33. Sheldon School District operates PK-8 with choice for grades 9-12;

34. Stannard School District operates PK-6 with choice for grades 7-12;

35. Troy School District operates PK-8 with North Country Union High School for grades 9-12;

36. Westminster School District operates PK-6 with choice for grades 7-8 and with Bellows Falls Union High School for grades 9-12;

37. Windham School District operates PK-6 with Leyland and Gray High School for grades 7-12;

38. Worcester School District operates PK-6 with U-32 for grades 7-12;

39. Sarah Silva is a taxpayer and a parent of students at Montgomery Elementary School;

40. Matthew Silva is a taxpayer and a parent of students at Montgomery Elementary School;

41. Chloe Silva is a student at Montgomery Elementary School;

42. Ethan Silva is a student at Montgomery Elementary School;

43. Jonathan Betts is a taxpayer and parent of students at Montgomery Elementary School;

44. Ivy Betts is a student at Montgomery Elementary School;

45. Audrey Betts is a student at Montgomery Elementary School;

46. Bruce Sterling is a taxpayer and a parent of students at Westminster Center School;

47. Elise Manning Sterling is a taxpayer and a parent of students at Westminster Center School and a member of the Westminster School Board;

48. Nellie Sterling is a student at Westminster Center School;

49. John Douglas Sterling is a student at Westminster Center School;

50. Paul Normandeau is a grandparent and taxpayer in Dummerston;

51. Jo Jean Normandeau is a grandparent, taxpayer, and clerk of the Dummerston School Board;

52. Dorothy Naylor is a taxpayer and clerk of the Calais School Board;

53. Cameron Scott Thompson is a taxpayer and parent in Calais and a member of the U-32 School Board; and

54. Ashley Randall is a taxpayer and the mother of four sons who attend Lowell Elementary School.

The Appellee-Defendants are:

55. The Vermont State Board of Education is a Vermont agency with its principal place of business at 219 North Main Street, Suite 402, Barre, Vermont 05641, in Washington County, Vermont;

56. The Vermont Agency of Education has its principal place of business at 219 North Main Street, Suite 402, Barre, Vermont 05641, in Washington County, Vermont;

57. Krista Huling, William Mathis, John Carroll, Callahan Beck, Kyle Courtois, John O'Keefe, Oliver Olsen, Peter Peltz, Mark Perrin, and Stacy Weinberger are Members of the State Board of Education and are sued in their official capacities; and

58. Dan French is the Secretary of the Agency of Education and a member of the State Board of Education and is sued in his official capacities.

JURISDICTION

59. This Court has jurisdiction pursuant to 4 V.S.A. § 31(2), and Vermont Rules of Civil Procedure Rule 75 contemplates that jurisdiction lies with the Vermont Superior Court.

VENUE

60. The Appellee-Defendant Vermont Board of Education is an agency with a principal place of business at 219 North Main Street, Suite 402, Barre, VT 05641, in Washington County, Vermont. Therefore venue is proper in Washington County.

FACTUAL BACKGROUND

61. The following Affidavits and Attachments, and all factual information within them, are incorporated as if fully set forth in this document:

a. Affidavit of Mary Niles, Chair of the Montgomery School Board;

b. Affidavit of Pamela Fraser, Member of the Windsor Central Modified Unified Union School Board;

c. Affidavit of Cameron Scott Thompson, Member of the U-32 School Board;

d. Affidavit of John Castle, Superintendent of the North Country Union Supervisory Union;

e. Declaration of Carolyn Page, Chair of the Windham School Board and Vermont State Representative;

f. Affidavit of Marty Strange, former Policy Director of the Rural School and Community Trust;

g. Affidavit of Margaret MacLean, former Vermont Principal of the Year and former member of the Vermont State Board of Education;

h. Attachment A: chart listing school district Appellants with issues specific to each district;

i. Attachment B: March 29, 2018 letter from Nicole Mace to chairs of House and Senate Education Committees;

j. Attachment C: September 15, 2016 email from then-Lieutenant Governor Phil Scott to Jay Denault;

k. Attachment D: Agency of Education Guidance Document with respect to Act 46 expectations;

l. Attachment E: December 8, 2017 email from Agency of Education Legal Counsel Donna Russo-Savage to Superintendent Joanne LeBlanc informing LeBlanc that schools in the OSSU cannot be merged;

m. Attachment F: June 2018 memorandum from Krista Huling to General Assembly asking General Assembly to revisit issue of small schools grants; and

n. Attachment G: Testimony of John Holden, Commissioner of Education, to Vermont Constitutional Revision Commission on May 6, 1960.

Act 46 and Act 49

62. Section 2 of Act 46 sets out the Vermont Legislature's intent. It identifies the Act's goals and purposes to "move the State toward sustainable models of education governance" and "encourage and support local decisions and actions" that:

(1) provide substantial equity in the quality and variety of educational opportunities statewide;
(2) lead students to achieve or exceed the State's Education Quality Standards, adopted as rules by the State Board of Education at the direction of the General Assembly;
(3) maximize operational efficiencies through increased flexibility to manage, share, and transfer resources, with a goal of increasing the district-level ratio of students to full-time equivalent staff;
(4) promote transparency and accountability; and
(5) are delivered at a cost that parents, voters, and taxpayers value.

63. To accomplish these goals Act 46 established a scheme of incentives, to encourage the dissolution of local school boards and the creation of new, merged regional boards.

64. Act 46 provided that the taxes to be paid into the Vermont State Educational Fund by districts that adopted a "preferred structure" merger, as set forth in Section 5, would be significantly reduced by a reduction in the homestead property tax rate.

65. For accelerated mergers operational before July 1, 2017, Section 6 provides for "enhanced tax incentives," with a progressively decreasing reduction over a five-year period, from a ten-cent reduction in the first year to two cents in the fifth. *See* Act 46, Section 6.

66. For mergers operational after July 1, 2017, Section 7 provides for "tax incentives," with a progressively decreasing reduction over a four-year period, from eight cents in the first year to two cents in the fourth year. *See* Act 46, Section 7.

67. For accelerated mergers, Section 6(b)(2) of Act 46 provided that merged school districts with any forming districts that qualified for a "Small Schools Grant" would continue to get the equivalent sums in the form of a "Merger Support Grant," in perpetuity, until the support

was explicitly repealed or until the merged district closed the closed the school in the eligible forming district.

68. Section 5 specifically provides for and permits an "Alternative" structure of a supervisory union with member districts, recognizing that pre-K through grade 12 supervisory districts with a larger regional board—what the Legislature referred to as "preferred structures"—"may not be possible or the best model to achieve Vermont's education goals in all regions of the State." *See* Act 46, Section 5(c). In such situations, Supervisory Unions with separate districts and separate school (in other words, the current structure of most school boards, including Appellants) "can meet the State's goals" and remain as separate districts "particularly if:"[2]

(1) The member districts consider themselves to be collectively responsible for the education of all prekindergarten through grade 12 students residing in the supervisory union;
(2) The supervisory union maximizes efficiencies through economies of scale
(3) The supervisory union has the smallest number of member school districts practicable, achieved wherever "possible" by the merger of districts with similar operating and tuitioning patterns.[3]
(4) The average daily membership of all member districts was 1,100.[4]

69. The word "practicable" or the circumstances that constitute impracticability were never defined by the General Assembly, the Agency of Education, or the State Board of Education.

70. These "alternative structures" would not receive any of the property tax reductions given to the "preferred structures."

71. These "alternative structures" would no longer receive small schools grants unless there were "lengthy driving times and inhospitable travel routes to the nearest school in which

[2] The language "can meet" used in Act 46 was amended to "may meet" by Act 49.
[3] The law recognized that a district that operated a school could not be forcibly merged with a district that tuitioned students for the same grades and that districts that operated schools with different grades likewise were not "possible" to merge.
[4] This was later changed to 900 by Act 49, Section 7.

there is excess capacity" or unless they could demonstrate "academic excellence and operational efficiency." *See* Act 46, Section 20.

72. Section 6(d) of Act 46 also provided that accelerated mergers operational by July 2017 would provide yet unknown and needed data regarding whether those mergers could actually achieve Act 46's goals. Section 6(d) provides that the Secretary of Education "shall collect and analyze data from the new districts created under this section [providing for accelerated mergers] regarding educational opportunities, operational efficiencies, transparency, accountability, and other issues following merger." Further, Section 6(d) mandates that every January, beginning in 2016, the Secretary "shall submit a report to the House and Senate Committees on Education and on Appropriations, the House Committee on Ways and Means, and the Senate Committee on Finance regarding the districts merging under this section, conclusions drawn from the data collected, and any recommendations for legislative action."

73. Of the three reports submitted to date, none cites any actual, verifiable, or collected data regarding educational opportunities, operational efficiencies, transparency, or accountability. In fact, these reports focus primarily on a small amount of savings that might be realized through the merger of supervisory unions (which can eliminate paid administrative positions). Act 46 provides no incentives for districts to merge supervisory unions. Instead, Act 46 focuses solely on the merger of school boards, which are volunteer positions.

74. In recognition that accelerated mergers were an experiment and may not necessarily be the best structure to achieve Act 46 goals, Section 6(a)(9) also conditioned the receipt of tax incentives on compliance with the statutory requirement that any newly merged district "provides data as requested by the Agency of Education and otherwise assists the Agency to

assess whether and to what extent the consolidation of governance results in an increased ability to meet the goals set forth in Sec. 2 of this act."

75. Section 8 identified issues relevant to the Board of Education's evaluation of accelerated and post-July 2017 merger proposals, and mandated the Board "shall" "be mindful" a district may become "geographically isolated." It specifically authorizes the Board to deny approval of any proposal that geographically isolated a district. The importance our General Assembly placed upon a consideration of geographic isolation was underscored even further in Act 49, Section 4.

76. Section 9 defined a separate and distinct path by which an unmerged district or districts could qualify to "retain its current governance structure" or "work with other districts to form a different governance structure or enter into another model of joint activity." Act 46, Section 9(a)(3)(A) - (C). Section 9 explicitly contemplates and provides that models other than the preferred structure, or alternative structures described in Section 5, could meet the goals of Act 46. The Section requires districts to demonstrate an ability to meet or exceed the goals of Section 2 and to detail actions they expect to engage in to continue to improve.

77. The Legislature did not establish any yardstick, standard, or measure for evaluating whether a Section 9 proposal meets the goals of Section 2.

78. Section 10(a)(2) of Act 46 called for the Agency to develop a plan that "to the extent *necessary*" could propose districts move into the "preferred" model, and if not possible or practicable to propose realignment, it could propose Section 5 or Section 9 structures.

79. Section 10(b) of Act 46 authorized the state Board to issue a "plan" that approved the Agency's proposal in its original form or in amended form, and to "publish on the Agency's website its order merging and realigning districts and supervisory unions where necessary."

80. Numerous communities encountered difficulties with the law and communicated these difficulties to their legislators. Those communications led to the passage of Act 49, which was "designed to make useful changes to the merger time lines and allowable governance structures." Act 49, Section 1(f).

81. Among other changes, Act 49 recognized "lengthy driving times or inhospitable travel routes," "greatly differing levels of debt," and structural isolation as barriers to merger. Act 49, Section 1(e). It also recognized "greatly differing levels of indebtedness" as a consideration for permitting an alternative governance structure and not merging school districts. Act 49, Section 7.

82. Act 49 permits formation and extended incentives to additional structures, including mergers of fewer than four districts (Act 49, Section 2), a three-by-one side-by-side structure (Act 49, Section 3), and a two-by-two-by-one side-by-side structure (Act 49, Section 4).

83. Section 5 of Act 49, using express language of repeal that "notwithstanding any provision of 16 V.S.A. § 721a to the contrary," provided for temporary authorization for the town of Vernon, the only town in Vermont satisfying the section's conditions, to withdraw from Brattleboro Union High School without approval of the remaining members of the high school, after attempts to withdraw using existing statutory process failed to gain approval in Dummerston. Act 49, Sections 5 and 6.

84. Section 6 of Act 49 is an explicit statement of repeal of Section 5, providing that this section is repealed on July 2, 2019.

85. Recognizing that the so-called "preferred model" "might not be possible or the best model to achieve Vermont's education goals in all regions of the State," Act 49 Section 7

provided that "a supervisory union with multiple member districts, each with its separate school board may meet the State's goals "particularly if" they demonstrated:

1. collective responsibility for Pre-K through 12;
2. shared resources with a common personnel system;
3. the smallest number of school districts "practicable";
4. greatly differing levels of debt; and
4. combined average daily membership of not less than 900.

Act 49, Section 7, amending Act 46, Section 5.

86. In direct response to concerns that the Agency of Education and the State Board of Education might impose more stringent requirements on Alternative Governance Structures, the Legislature explicitly forbid these agencies from doing so: "The State Board may adopt rules designed to assist districts in submitting alternative structure proposals, but shall not by rule or otherwise impose more stringent requirements than those in this act." Act 49, Section 20

87. State Board of Education Rule 3400 was adopted by the Board for consideration of proposals for alternative structures. At Section 3440.11, the Rule states: "The State Board evaluates every type of education governance proposal not only on its own merits, but also on the impact it may have on the students, the districts, the Region and the State."

88. Section 8 of Act 49 provided that the statewide plan would include default Articles of Agreement to be used unless and until new or amended articles were approved. It further provided that districts subject to the plan shall have 90 days to form a study committee under 16 V.S.A. Chapter 11 and draft Articles of Agreement for the new district.

89. The law provides this opportunity to draft Articles of Agreement to all districts subject to the plan.

90. If the committee's draft Articles are not approved within 90 days, the "provisions in the State Board's default articles of agreement included in the statewide plan shall apply to the

new district." Act 49, Section 8(d). The Act articulated no intelligible principle, no guidelines, and virtually no guidance to the Board or Agency for what the default "Articles of Agreement" should or could provide.

91. Section 8 of Act 49 also provided that the Vermont School Boards Association and the Vermont Superintendents Association in consultation with the Agency of Education, shall propose legislation that:

> 1. addresses which articles developed by any newly formed study committee must or should require approval by the electorate, and
> 2. would amend 16 V.S.A. § 706n regarding which articles of agreement would require a vote by the electorate.

Act 49, Section 8(d)(3)(A) & (B).

92. On behalf of the Vermont School Boards Association, the Vermont Superintendents Association, and the Agency, Nicole Mace, the Executive Director of the Vermont School Boards Association, wrote to the chairs of the House and Senate Education Committee on March 29, 2018, and told them that no changes were necessary. *See* Attachment B.

93. Section 8 of Act 49 also provides that the state plan shall not apply to interstate school districts, regional career technical center school districts, unified union school districts, preferred structures or Education Districts defined in 5(b), and any regional education district or any district eligible to receive incentives pursuant to Act 153 of 2010, as amended by Act 156 of 2012.

94. Nothing in either Act 46 or Act 49 expressly repeals the Vermont statutes that call for "Articles of Agreement" to be voted upon by the electorate. The use of the statutory term "Articles of Agreement" plainly requires formation of the municipal charter by *agreement* of a majority of the electorate of all proposed member school districts. Nothing in Act 46 or 49 is inconsistent with the electorate voting upon the Board's default Articles of Agreement. *See*

United States v. U.S. Fidelity & Guar. Co., 80 Vt. 84, 96-97 (1907) (repeal of statutes by implication disfavored, and "every doubt shall be resolved against" it).

95. Nothing in Acts 46 or 49 authorizes the Secretary of Education or the State Board of Education to impose debt upon a municipality without the consent of the electorate or to transfer the property of a municipality without the consent of that municipality. On the contrary, existing law, which has not been repealed or amended, would still require a vote of the electorate. *See* 16 V.S.A. § 706(f).

96. Similarly, the Legislature has taken no steps to amend Section 706n, which governs how Articles of Agreement are amended. Neither Act 46 nor Act 49 repealed Section 706n. Nothing in either Act delegates authority to either the Agency or the Board of Education to devise alternatives or exceptions to Section 706n.

Allowing Alternative Governance Structures Under Act 46 and Act 49

97. Multiple statements about Act 46 by legislators and the Governor at the time of passage and during its implementation point to a consistent viewpoint among lawmakers that Section 9 recognized the need for flexibility and that "one-size-fits-all" would not work.

98. For instance, when the Senate passed Act 46, lawmakers noted that their support for Act 46 was based on an understanding that those districts "who can prove they are educationally and fiscally sound" will be allowed "to stay on their own." Terri Hallenbeck, *Senate Backs School District Consolidation* (May 07, 2015), available at https://www.sevendaysvt.com/OffMessage/archives/2015/05/07/senate-backs-school-consolidation. That statement was attributed to David Zuckerman, a Progressive/Democrat from Chittenden. In the same article, Senator Joe Benning, a Republican from Caledonia, noted that he disagreed with claims by the 1,100 signers of a petition who claimed that Act 46 would

negatively impact small schools: "'It occurred to me very clearly that the commentators have not read the deep weeds of this bill," he said. 'If you are indeed operating in an efficient way and you feel your children are getting a good education, this bill seeks to leave you alone.'" *Id.*

99. Similarly, in 2016, Representative David Sharpe, who was Chair of the House Education Committee when Act 46 passed, explicitly recognized in a letter to the Addison Northeast Supervisory Union that Act 46 provided flexibility and was not one-size-fits-all: "The legislature structured act 46 with an alternative structure provision intentionally. We, in the legislature, realize the legislation *clearly does not call for a one size fits all*. Or that Montpelier knows best for [your district]'s governance structure." Letter from David Sharpe to Addison Northeast Supervisory Union Act 46 Study Committee (emphasis added).

100. Many lawmakers did not view Act 46 as allowing the State Board to force mergers against the will of the people in those affected areas. For instance, Governor Shumlin, who signed Act 46 into law, told reporters on Vermont Public Radio that: "I don't think you will ever see a board saying 'you shall do this.' . . . I think Act 46 is optional." Vermont Public Radio Vermont Edition interview (Sept. 29, 2016), available at http://digital.vpr.net/post/governor-shumlin-live-0#stream/0.

101. When the Agency of Education first proposed rules that would make it difficult to obtain approval of an alternative governance structure proposal, Senator Ann Cummings, Senator Anthony Pollina, and Representative Janet Ancel wrote a letter to the Agency of Education and the State Board explaining that Act 46 was intended to allow alternative structures:

> While we appreciate your efforts to provide further guidance on alternative models under Act 46, we do not believe the "Draft Rule on Proposals for Alternative Structures Under Act 46" is consistent with the provisions of Act 46. We respectfully ask that you revise the Draft Rule so that it reflects the

Legislature's determination that Act 46 is not a "one size fits all" approach.

The Draft Rule claims that the goals of Act 46 are always "best met by a school district organized and operating as a Preferred Structure." That is not what Act 46 says. Section 5a of Act 46 identifies one model of governance as "preferred" over other models, but *Section 5b explicitly recognizes that the "preferred" model "may not be . . . the best model" for a particular district. The Legislature then specifically authorizes the use of an "alternative" model wherever such a model would better meet the goals of Act 46.*

The Draft Rule also provides that an alternative model must meet a set of rigid requirements before it can be approved. Again, that is not what Act 46 says. To the contrary, Act 46 imposes no specific requirements on alternative models. This was intentional—while Act 46 creates incentives to merge districts, *it is ultimately up to each town to decide which structure is best for its students and its citizens. The state should step in only if a town is failing to meet the goals of Act 46, and fails to choose one of the options under the law.*

After all, what is "best" for a particular district depends on a number of factors, many of which are best known by residents of the district. Section 5b of Act 46 lists some factors that may lead towns to conclude that an alternative model is best, but *ultimately leaves that choice to the towns*. The Draft Rule, by contrast, mandates rigid requirements that must be met for an alternative model to be accepted. This goes far beyond the spirit and letter of Act 46.

Our concerns are not merely hypothetical. Representatives from the five towns within the Washington Central Supervisory Union (Berlin, Calais, East Montpelier, Middlesex, and Worcester) have spent countless hours over the last year studying consolidation and are at an impasse regarding the "preferred" model. Work is being done on an alternative model that aims to take the best parts of the "preferred" model and adapt them to local concerns.

That is exactly why the Legislature created an alternative model when Act 46 was adopted. *One size does not fit all, and there are districts—like Washington Central—where an alternative model may work better, with far greater community support, than the consolidated model.* Instead of creating roadblocks, the Draft Rule should facilitate these types of creative solutions.

For these reasons, we respectfully request that you reconsider the Draft Rule and replace it with *a model that allows flexibility in how our schools are governed, as Act 46 envisions*.

Letter from Senator Ann Cummings, Senator Anthony Pollina, and Representative Janet Ancel to Agency of Education and State Board of Education (Oct. 4, 2016) (emphasis added), available at

Tiffany Danitz Pache, *Lawmakers: Education officials misapplying Act 46 in new rules* (Oct. 5, 2016), https://vtdigger.org/2016/10/05/lawmakers-education-officials-misapplying-act-46-in-new-rules/.

102. Heidi Scheuerman, a Republican from Stowe, also explained that Act 46 allowed alternative structures: "*Our intent was to ensure that alternative structures were a viable option*, and one that local communities could explore and develop, as long as they meet the established goals. Indeed, maybe some in the Legislature believe that the one-size-fits-all approach is the only approach local communities should take, but *the intent of the Legislature as a whole was to ensure the option is obtainable for those communities that choose to do so*." Stowe Reporter, *Act 46 proposals go beyond what the Legislature intended* (Dec. 22, 2016) (emphasis added).

103. On September 15, 2016, then-Lieutenant Governor Phil Scott, in response to an email from a concerned citizen in the Franklin school district, reassured the citizen that "Franklin is an example of where the existing provisions in Act 46 do not always work the way lawmakers intended them to. There is no 'one size fits all' policy when it comes to education in Vermont, since all of our communities and schools are in unique situations. Act 46 consolidation does not work when educational outcomes are worsened and when per-pupil costs rise, which, as you have described, appear to be the case in Franklin." Attachment C.

104. During this same time period, the Agency of Education's then-Secretary Rebecca Holcombe made numerous statements explaining that local input matters and one size does not fit all. For instance, on April 12, 2016, then-Secretary Holcombe stated that "[v]oters in these districts will make different decisions based on their region, their local opportunities, their perception of equity challenges and their cost pressures" and that "[o]nly the voters can decide." Rebecca Holcombe, Commentary, *Holcombe: Only the voters decide* (Apr. 12, 2016), available

at https://vtdigger.org/2016/04/12/holcombe-only-the-voters-decide/. Similarly, on December 14, 2017, when discussing the testimony the State Board would receive regarding the statewide plan, then-Secretary Holcombe stated that "You always want to work with local intent." Tiffany Danitz Pache, *Education Board to lawmakers: 'Tread lightly' with demands, costs* (Dec. 14, 2017), available at https://vtdigger.org/2017/12/14/education-board-to-lawmakers-tread-lightly-with-demands-costs/.

105. In its Guidance Documents to school districts, the Agency of Education underlined, in order to be emphatic, that "the State Board of Education in 2018 will merge previously unmerged districts only to the extent necessary." Attachment D.

106. In 2018, after numerous districts filed their alternative governance structure proposals seeking to remain independent districts, many lawmakers wrote to the Agency and State Board to explain that these proposals were consistent with Act 46 and should be approved. For instance, on January 26, 2018, the *entire* legislative delegation — Senators and Representatives — for all 5 of the towns that constitute the Washington Central Supervisory Union signed a letter supporting their districts' alternative proposal:

> We write to express our support for the work of our six WCSU school boards and the Alternative Governance Structure proposal that was approved last month by all of them. Just as all six school boards have presented a unified front in support of this proposal, we — the full delegation of legislators representing the five towns in this school district — present a unified front as well.
>
> As the Alternative Governance Structure proposal explains, this "proposal is a hard-won compromise representing the best option available" to this school district. It is the result of two years of hard work during which "school board members in WCSU . . . met at least 45 times, amounting to more than 100 hours for each participant in meetings alone."
>
> We hope the Agency of Education will respect the hard work of our school board members and approve the proposal they put forward. Although some have claimed that WCSU is the "poster child" for consolidation, the process that our

school board members went through revealed at least two reasons why this is not so.

First, as explained in the proposal, our towns do not currently support consolidation:

> "The community engagement data, overall, made it clear that there is not majority support for consolidation, and in fact, there is considerable stated opposition (Moser, 2017). Disregarding or overriding this degree of opposition to consolidation across the supervisory union among those most likely to be politically active would invite bitterness, division, and resistance that, in our judgment, would outweigh or counteract any theoretical benefits. While this could change with time — public sentiment does evolve — our conclusion is that now is the wrong time for consolidation."

Second, as explained in the proposal, "to a larger degree than in any other supervisory union we are aware of, WCSU has greatly differing levels of indebtedness among its districts," with three towns having "large, multi-million dollar bonds of differing amounts that mature in the 2030s, while the other two towns — Worcester and Calais — carry no bonded debt and plan their capital budgets so as not to have to bond." This is precisely what was envisioned in Act 49's amendments to Act 46, which explicitly recognized that consolidation may not be "practicable after consideration of greatly differing levels of indebtedness among the member districts."

Additionally, the Alternative Governance Structure proposal explains in detail how it meets all five of the goals of Act 46: equity, quality, efficiency and sustainability, transparency and accountability, and value. As our school boards note in their proposal, WCSU plans to 'build upon the coordination we have already developed among our five local school boards and our U-32 school district so that we may achieve the goals under our current governance structure."

The proposal also explains that it complies with the requirements for an alternative governance model and should therefore be approved. We agree. The Legislature created an alternative model when Act 46 was adopted. One size does not fit all, and there are districts — like WCSU — where we believe an alternative model will work better, with far greater community support, than the consolidated model.

For these reasons, among others, we support the Alternative Governance Structure proposal of our six WCSU school boards. We agree with the school boards that *their proposal complies with Act 46 and Act 49*, and that it is "the best option available" for our communities at this time. We encourage you to support their proposal as well.

Letter from Senator Francis Brooks, Senator Ann Cummings, Senator Anthony Pollina, Representative Janet Ancel, Representative Anne Donahue, Representative Kimberly Jessup, Representative Patti Lewis, Representative Gary Nolan, and Representative David Yacovone to State Board of Education and Agency of Education (Jan. 26, 2018).

107. In August 2018, Senator Becca Balint, who is now Vice-Chair of the Senate Education Committee, sent a letter to the State Board of Education imploring the Board to "not ignore the sentiment of my constituents," who requested an alternative governance structure. Senator Balint's letter explained the importance of the various off-ramps that the Legislature intentionally placed in Act 46, and how because she was not Vice-Chair of Education at the time, she sought out and received reassurance on this matter from other Legislators:

> I explicitly sought information related to Section 5 and Section 9 of the bill to insure that there were "off ramps" included in the proposed legislation. *I was reassured on numerous occasions that the Alternative Governance Structure option was indeed a potential off-ramp* for an SU that could meet the goals of the law without fully merging its governance structure. *I also understood when we passed the law, that the local vote in regard to any proposed governance merger was designed to guarantee that any change in governance structure would have to be acceptable to voters in those districts affected*."

Letter from Senator Becca Balint to State Board of Education (August 2018) (emphasis added).

The Agency's Proposed Plan

108. In accordance with Act 46 and Act 49, districts that sought to qualify as alternative structures submitted timely proposals to the Secretary of Education.

109. On June 1, 2018, the Agency of Education issued a proposed plan of recommendations to the Board. *See* Act 46, Section 10(a)(1) & (a)(2). The proposed plan recommended:

- Merger with respect to **18** of the Alternative applications, covering 54 districts.

- No action with respect to **3,** so that each community's ongoing voluntary merger process could proceed.
- Did not recommend merger with respect to **12** for various reasons.
- Did not recommend merger with respect to **10** because it was not legally possible due to differing operating or tuitioning structures within the region.

110. The Agency's proposed plan also noted that as of June 1, 2018, voluntary mergers had already eliminated 118 districts. The proposed plan also noted that as a result of these mergers and districts that were already large enough to qualify as "preferred" without merging, 70% of Vermont students were already in districts that met the "preferred" model of governance.

The State Board's Decision Forcing Merger on 45 Unwilling Districts

111. On November 28, 2018, the State Board voted to approve a statewide plan that (1) forced the merger of 45 school districts; and (2) included default Articles of Agreement for most of the force-merged districts.

112. Two members of the State Board, William Mathis and John Carroll, voted against the Board's final order.

113. The Board's final Order was published on November 30, 2018.

The Forced Merger of 45 School Districts

114. Neither the Agency of Education nor the State Board has ever established any yardstick, standard, or measure for evaluating whether an alternative structure proposal meets the goals of Section 2.

115. When the Board began deliberation over the fate of unmerged districts and their section 9 proposals, it considered adopting "guiding principles" it would use to evaluate those proposals, but, after being informed that such guiding principles would need to go to the Legislative Committee on Administrative Rules, the Board abandoned any attempt to have the

legally necessary guiding principles. Consequently, school districts were left to guess as to what the fate of their districts would ultimately be, and many school districts found out they were slated for merger only when the Board took provisional votes in late October.

116. On November 30, 2018, the State Board issued its final plan that forced the merger of 45 school districts into 11 new union school districts, enlarged 3 existing union school districts and conditionally required that 4 additional districts be forced into merger with 4 existing modified unified union school districts (MUUDs).

117. This forced merger will eliminate 41 of those school boards and replace them with the 11 new school districts or with a position on an already existing board.

118. The effect on school boards begins immediately—their powers are already purported to be reduced—and the elimination will be complete by June 30, 2019.

119. The members of those school boards are duly elected representatives of their towns, and most of them were elected for terms that extend well beyond June 30, 2019.

120. As noted above, elected representatives could not have been clearer in their appreciation of the importance of local school boards to the governance of Vermont, and they crafted a law that might allow the loss of school boards only to "the extent necessary."

121. School boards in Vermont have a larger percentage of female members than male members, relative to all other municipal and statewide offices. For the Appellant school districts that face forced merger under the Board's Order, around 53% of their board members are female.

122. School boards represent a key entrance-level leadership opportunity, especially for women. For Vermont's only female governor, Madeleine Kunin, her first elective office was as a school board member.

123. Women make up just 25.4% of all state legislators nationwide, while the Vermont legislature is tied with Arizona for having the highest percentage of female state legislators in the U.S., with 40% women. This is likely due at least in part to the strong feeder system from local school boards, where representation is even higher (for instance, the 53% female representation on the school boards who are Appellants in this matter). The State Board's order does great harm to this feeder system for higher elected office.

124. The final plan did not take formal action on any Section 9 proposals. It only accepted or rejected the Agency's recommendations. If the Board rejected the Agency's recommendation, it then approved a separate course of action, accepting the district's desire not to merge but without approving any Section 9 proposal.

125. On the other hand, there were 31 districts where the Board accepted the Agency's recommendation to force merge, and 11 where the Board forced merger despite the Agency's recommendation to not merge (Athens-Grafton-Westminster and EMUU-Stowe), or made no recommendation (6 districts in Orleans Southwest). Nearly all of these mergers were over Section 9 objections.

126. The Board's final order only identified three Section 9 proposals that they claimed did not meet the requirements of Act 46: Cabot, Danville, and North Country.[5]

127. Despite the Board concluding that those three Section 9 proposals did not meet the "requirements" of Act 46, the State Board chose *not* to forcibly merge any of those districts.

128. Regarding the 45 school districts that the Board is forcibly merging, the Board's final order did not make any findings concluding that these districts failed to meet the requirements or goals of Act 46.

[5] The Board never voted on these in its deliberations.

129. The Section 9 proposals for these districts, on the other hand, demonstrate that these school districts are meeting the requirements and goals of Act 46.

130. In the final Order, the State Board stated that "the Board has chosen to hew as closely to the intent of the Act as that authority will allow, creating preferred structures *wherever possible*." Final Order at 6 (emphasis added). The Board's position reveals a breathtaking misunderstanding of the law. The Board's mandate was not to realign districts wherever "possible," but to do so only where it was deemed "necessary." Act 46, Sec. 10(a)(20).

131. As a consequence of the Board's misunderstanding, its Order forcibly merges dozens of school districts that are functioning incredibly well, including districts like Franklin and Montgomery, which have some of the best test scores in the State and obtain those results at low per-pupil costs. There is no rational explanation—nor does the Board provide one—for these mergers being "necessary."

132. As a result of the way Act 46 treats "small schools grants," the students in schools with voluntary mergers (under Sections 6 and 7 of Act 46) receive substantially more favorable financial treatment than the students in schools with forced mergers, even though all of these schools followed a proper path as designated by Act 46 and 49.

133. The result of this disparate financial treatment and disparate eligibility for small school grants is that students in some of Vermont's richest school communities receive financial support that may be denied to some of Vermont's poorest school communities. For instance, a district with only 21% free and reduced lunch (Westford) gets a small schools grant in perpetuity, but a school with 84% free and reduced lunch (Lowell) can be denied a small schools grant.

134. The State Board's decision overlooked vast amounts of data, analysis, and other

supporting information that the school districts proposed in their lengthy Alternative Governance Structure proposals.

135. The record reveals that most Board members likely did not even read the Alternative Governance Structure proposals submitted by the districts.

136. The Board's decision involves numerous unexplained inconsistencies, including statements that are empirically incorrect.

137. For instance, in the Board's decision to keep Hartland and Weathersfield separate, rather than requiring merger of these two districts, the Board's explanation of its reasoning is incorrect. According to the Board, for these districts, there were "no viable merger options for any of them in light of the statutory prohibition of making changes to a district's operating and/or tuitioning structure." Final Order at 9. This is not true. As the Agency of Education explicitly recognized in its proposed plan, Hartland and Weathersfield have similar operating structures. They are both preK-8 and tuition students for 9-12. Yet, these two districts were spared a forced merger, while 45 other districts were not. The Board provides no explanation—other than its incorrect one about operating structures—for treating these two districts more favorably than the other 45 districts.

138. The Board also relied on incorrect information in its evaluation of current debt loads in Richford and Enosburg. Those districts submitted an alternative governance proposal that explains that Enosburg currently has around $2.5 million in outstanding debt, while Richford has no outstanding debt. Enosburgh & Richford Town School Districts' Joint Submission at 32, available at https://education.vermont.gov/sites/aoe/files/documents/enosburgh-richford-school-districts-section-9-proposal.pdf. Despite this enormous disparity in debt, the State Board's final Order contains no discussion whatsoever of the debt issue. The Order does, however, state that it

is merging these districts for "the reasons articulated in the Secretary's Proposed Plan." Final Order at 17. The Agency's Proposed Plan incorrectly states that "[t]he Richford District has capital debt and the Enosburgh District does not." Agency's Proposed Plan at 154. The Agency then incorrectly states that "the Enosburgh community sees [debt] as a barrier to merger." *Id.* It is *Enosburgh* that carries the debt load, and *Richford* that sees this as a barrier to merger since Richford would have to help pay for Enosburgh's debt. Further, which town carries the debt is significant because Enosburgh has a higher per capita income that Richford. Thus, shifting debt from the higher-income town to the lower-income town creates an inequity that does not currently exist. Perhaps because of both the Agency and the Board's incorrect belief that Richford carries debt, the final Order contains no analysis whatsoever of the inequity of shifting debt.

139. Instead of analyzing the real-world impacts of shifting debt from a wealthier town to a poorer town, the Agency's Proposed Plan — which the Board cited as its rationale for merging — recites the same line it used repeatedly (and verbatim) when talking about debt: that "today's district with little or no debt will tomorrow become the district that needs a new roof." Agency's Proposed Plan at 154. This is in direct contradiction to the jointly submitted plan for these two towns, which states that "there are no major capital projects pending for either district" because both towns "have strong traditions of care and pride in their schools' physical plants" and have recently completed all required renovations. Enosburgh & Richford Town School Districts' Joint Submission at 32, 34.

140. The Board's final Order contains a number of contradictions. For instance, the Board's final Order leaves many of the Northeast Kingdom districts alone because of "challenges with realizing any meaningful economies of scale, owing to the relatively small

population density within the region" (p.19), while simultaneously force-merging other small districts because "as stand-alone districts these districts are so small that federal student privacy laws prevent sharing of student performance data, making it nearly impossible for anyone to get a true sense of what is going on with performance" (p.22). The Board provides no explanation for why the exact same factor — small population density — weighs against merger in some circumstances and in favor of merger in others.

141. The Board did not explain why it chose to merge the particular groupings of districts it selected. For instance, the 7 towns surrounding Montpelier were all merged into 2 separate unified union districts, based on supervisory union boundaries, but there is no explanation for why Montpelier was not merged with these districts. Although the Board was presumably keeping supervisory unions separate in this case, the Board in at least one instance decided to merge districts from different supervisory unions (moving Sheldon from the Franklin Northwest Supervisory Union to the Franklin Northeast Supervisory Union). The Board provided no explanation for what standards, if any, it was using to determine when to merge across supervisory unions and when to keep supervisory unions separate.

142. Had the Board focused its analysis on the handful of schools, if any, that might be failing to maintain the goals of Act 46, the Board could have engaged in an in-depth analysis and provided the due process that the law requires before a state agency takes the drastic measures the Board has taken here. For instance, the Board could have provided full-day hearings for each district facing merger. Instead, the Board provided each group of districts with a mere 20-minute timeslot, with only 10 of those minutes to present to the Board and 10 minutes for questions.

The Default Articles of Agreement

143. The Board's final Order issued on November 30, 2018 includes "default" Articles of Agreement and purports to apply them to districts without an electorate vote.

144. The default Articles of Agreement legislate exceptions to the applicability of Section 706n, creating special rules regarding the amendability of each article.

145. The default Articles purport to go into effect immediately upon publication on November 30, 2018.

146. The default Articles are purported to apply to 36 of the districts that the State Board forcibly merged.

147. None of those 36 districts has ever agreed to the default Articles of Agreement.

148. None of the voters in any of those 36 districts has ever had an opportunity to vote on the default Articles.

149. The default Articles also legislate a deadline of January 29, 2019, for a unified district organizational meeting.

150. Act 46 and Act 49 are silent on whether an organizational meeting can or should be held and impose no deadline for an organizational meeting.

151. Instead, Act 49 makes clear that districts have 90 days to adopt new articles of agreement following issuance of the state-wide plan.

152. The law provides this opportunity to draft Articles of Agreement to all districts subject to the plan. However, the Agency has maintained, contrary to statute, that some do not.

153. Nothing in Acts 46 or 49 authorizes the Secretary of Education to designate component town school districts, a unified union school district, nor certify it as such to the Secretary of State, before the expiration of this 90-day period.

154. Nothing in Acts 46 or 49 authorizes the Secretary of Education to file a certified copy of such record with the clerk of each town school district before the expiration of this 90-day period.

155. Nothing in Acts 46 or 49 authorizes the Secretary of Education or the State Board of Education to create "transitional boards."

156. Nothing in Act 46 or Act 49 authorizes the State Board of Education to impose a transfer of debt or property without the consent of each district. Section 706(f) of Title 16 requires that consent. If the Legislature had intended to repeal or amend a right as fundamental as the right to vote on incurring debt and raising taxes, it would have done so explicitly. Yet the default Articles purport to transfer both debt and property without the consent of the districts.

157. Some of these issues might have been clarified if the default Articles had ever been subjected to rulemaking. They were not, but they should have been. The default Articles fall within the definition of a "rule" under Vermont's Administrative Procedures Act. 3 V.S.A. § 801(b)(9).

158. The Assistant to the Secretary of Education testified to the Board that there would be no time within 90 days to adopt alternative articles, even though the Legislature provided districts with this option. *See* October 29, 2018 State Board of Education Meeting (available at https://www.youtube.com/watch?v=BBFk_GvcOYA&t=0s&index=3&list=PLaXzAQwtzpj73XVGfJsjvuUGbcYe0td0a), starting at time clock 4:59:49. Consequently, the "default" Articles have become the de facto Articles.

159. No public meeting or opportunity for public comment was offered following the presentation of either the default Articles of Agreement or the final default Articles of Agreement to the Board.

Immediate Effects of the Board's Order

160. The Board's final Order issued on November 30, 2018, and has already set into motion a series of actions that, once taken, may prove to be irreversible.

161. The default Articles improperly legislate and exercise legislative power in creating transitional boards, appointing individuals to populate those transitional boards, and awarding them statutory and municipal powers, including spending, borrowing, and taxing powers.

162. The default Articles require the transitional board for each new district to be composed of two members of each district that is being forcibly merged into that new district. The two members are the "Chair" and "Clerk" unless a majority of an existing school board votes to replace one of those members with another. The default Articles provide no explanation for why the "Chair" and "Clerk" were selected, as opposed to, for instance, the "Chair" and "Vice Chair."

163. For forced mergers that include union districts, the default Articles explicitly note that the union district also gets two members on the transitional board.

164. Existing union district boards are composed of representatives from multiple member towns, as directed by each union district board's existing Articles of Agreement. To comply with constitutional requirements of proportional representation, larger towns often have multiple members on a union district board, while smaller towns often have only one representative. There is no requirement that the Chair or Clerk of a union district board be from one of the district's larger towns.

165. In the 7-member U-32 union board, for instance, East Montpelier and Berlin each has 2 members on that board, with Calais, Worcester, and Middlesex each having only one. The Chair of the U-32 board is from Middlesex, and the Clerk of the U-32 board is from Worcester.

166. Consequently, under the default Articles, Middlesex and Worcester each get 3 members on the transitional board, while the far-more-populous towns of Berlin and East Montpelier each get only 2 members.

167. A public notice, signed on December 4, 2018 by Secretary of Education Dan French, and published over the next few days in local newspapers serving the new Unified Union School Districts throughout the state, warned special meetings across the state for the hastily certified Unified Union School Districts.

168. The earliest warned meeting is scheduled for January 3, 2019, for the Orleans Southwest Union Elementary School District, and January 9 at 7:00 p.m., for the yet-unformed Windham Southeast Unified Union School District.

169. The warnings cite the business to be conducted as follows:

i. To elect a temporary presiding officer and clerk of the District from among the qualified voters of the district.
ii. To swear in the members of the Transitional Board created in Article 9 of the District's Articles of Agreement, who shall immediately assume office and serve until the voters of the District elect the initial members of the Board of Directors and those members are sworn in and assume their duties.
iii. To adopt Robert's or other rules of order, which shall govern the parliamentary procedures of the organizational meeting and all subsequent annual and special meetings of the District.
iv. To elect the following officers of the District from among the qualified voters of the district, which officers shall assume office upon election and serve for a term of one year or until their successors are elected and qualified:
    - Moderator
    - Clerk
    - Treasurer
v. To determine a date and location for the first annual meeting of the District and all subsequent annual meetings, which shall be not earlier than February 1 and not later than June 1 in each year.
vi. To determine whether to vote on the District's budget and all other public questions by Australian ballot.
vii. To determine whether to elect members of the District Board by Australian ballot.
viii. To determine and approve compensation, if any, to be paid to officers of the District.

ix. To determine and approve compensation, if any, to be paid to members of the District Board.
x. To establish provisions for the payment of any expense incurred by the District before it becomes operational on July 1, 2019 under a voter-approved budget for the fiscal year beginning on that date.
xi. To authorize the District to borrow money pending receipt of payments from the State Education Fund by the issuance of its notes or orders payable not later than one year from date; provided, however, that the District is authorized by Vermont Statutes to borrow sufficient funds to meet pending obligations.
xii. To determine whether to authorize the Board of School Directors, pursuant to the provisions of 16 V.S.A. § 563(10) & 11(c), to provide mailed notice to residents of the availability of the Annual Report and proposed school budget in lieu of distributing the Annual Report and proposed budget.

Dated this 4th day of December, 2018.
Daniel M. French, Ed. D. /s/ Secretary of Education
12/8/18

170. To date, the Legislature has passed no special law repealing, replacing, or supplementing the provisions in 16 V.S.A. § 706 governing the formation of union school districts or the procedures for an organizational meeting (§ 706i), or the business to be transacted at the meeting (§ 706j).

180. A temporary procedure supplanting the procedures of 16 V.S.A. §§ 706k (governing election of union district officers) and 706l (governing vacancies in union district offices), enacted in Act 49, Sec. 23, was expressly repealed as of July 1, 2018. *See* Act 49, Sec. 23. These were expressly temporarily reenacted by Act 11 of the 2018 Special Session.

181. Act 49 provides districts 90 days after November 30, 2018, to consider and form a Study Committee governed by 16 V.S.A. §§ 706, *et seq*., to consider drafting articles of agreement. Act 49, Sec. 8.

182. The plain text of Act 49 provides that only at the expiration of the 90-day period can the Board's "default" Articles be "applicable." Act 49, Sec. 8 (d)(2).

183. The 90 days expires on February 28, 2019.

184. To date, the Legislature has not delegated to either the Board of Education or to the Secretary of Education its legislative power to create elected positions or to appoint district officers to a municipality, or to an organizational board vested with municipal powers.

185. Nothing in Act 46 or Act 49 provided for the formation of a transitional board or delegated authority to either the Agency, the Secretary, or the Board of Education, to draft or otherwise create exceptions to existing legislation.

186. There is no authority in Sections 706 et seq. providing that Articles of Agreement could contain procedures, or define powers of a transitional board, that could supplant those provided in § 706j.

187. The Legislature has passed no special law exempting union district organizational meetings from the mandated election of three auditors. *See* 16 V.S.A. § 706i.

188. The Legislature has passed no special law exempting union district directors from election by Australian ballot, such that the possibility of not electing directors by Australian ballot could be put to the voters of a proposed union district. 16 V.S.A. §§ 706e, 706k(a).

189. The warning points to Vermont statute, presumably 16 V.S.A. § 706j, as the governing authority that confers on the proposed unified district the power to "borrow sufficient funds to meet pending obligations." 16 V.S.A. § 706j(8).

190. The Legislature has not amended or repealed 16 V.S.A. § 563(10), which provides that only "[a]t a school district's *annual* meeting," the electorate "may vote to provide notice of availability" of the annual financial report required to be produced to the electorate at every annual meeting, "in lieu of distributing the report." 16 V.S.A. § 563(10) (emphasis added).

191. The Legislature has not amended or repealed 16 V.S.A. § 563(11)(C), which provides that only "at a school district's annual or special meeting," the electorate "may vote to provide notice of availability of the school budget," "in lieu of distributing the budget."

192. The warnings for organizational meetings, contrary to these statutes, purports to put this question to those present at an organizational meeting, conducted by individuals not elected to the transitional board to perform transitional board duties, rather than at the statutorily required annual meeting as required for the report, and rather than at an annual or special election as required for the budget.

193. The State Board's default Articles purport to transfer the existing districts' debt and assets to the merged district without a vote and states that these provisions may not be amended.

194. Article 14 of the default Articles places the vast majority of these default Articles as unable to *ever* be amended by anyone other than the Legislature:

> The substance of the following Articles *cannot be amended* by the electorate of the New Union District, the elected board of the New Union District, the Transitional Board, or the electorate or board of any Forming District, except as expressly authorized by the Vermont General Assembly:
>
> a. Initial Paragraph (statement of creation)
> b. Article 1, Paragraph (A) (identity of Forming Districts)
> c. Article 5 (financial transfer to New Union District)
> d. Article 6, Paragraph (A) (real property transfer to New Union District)
> e. Article 7 (continuity of contractual obligations)
> f. Article 8 (organizational meeting for the new district)
> g. Article 9 (transitional board to warn special meetings and prepare first draft of FY2020 budget until first board is elected)
> h. Article 10, Paragraph (D) (swearing in and assumption of duties)
> i. Article 10, Paragraph (E) (preparation and presentation of FY20 budget)
> j. Article 12 (initial board must prepare for full operations)
> k. Article 13 (dissolution of Forming Districts; SU)
> l. This Article 14, Paragraph (A)(i) m. Article 14, Paragraph (B) (processes by which articles are amended)

Default Articles of Agreement, Article 14.

195. The default Articles state that some other Articles can be amended by the new Board, while others require a vote of the new electorate.

196. In the State Board's final Order and the accompanying default Articles of Agreement, neither the State Board nor the Agency of Education provides any explanation for why certain Articles can or cannot be amended.

197. Appellants are concerned that the organizational meetings, and any votes that take place at those meetings, could be used by the State to claim that the districts being force-merged are consenting to merger, before the legality of forced-mergers is resolved.

198. The Board's order has created significant confusion among the taxpayers, parents, board members, and schoolchildren in districts being force-merged. It has also created much confusion among lawmakers and the general public.

199. Governor Phil Scott recently stated that he thought an unelected state board should not be able to force a merger on districts like Stowe and Elmore-Morristown, and that "we've gotten to a point where the state board has too much power." Josh O'Gorman, *Governor questions authority of State Board of Education*, Stowe Reporter (Dec. 13, 2018).

200. Appellants do not consent to merger.

CAUSES OF ACTION

FIRST CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF
The Board's Order Forcing Mergers and Its Means of Executing Forced Mergers Violate the Plain Language of Act 46, Act 49, 16 V.S.A. § 706n, 16 V.S.A. § 721(b), and Other Applicable Statutes, Is Contrary to Legislative Intent, Is Arbitrary and Capricious, and Fails to Follow the Board's Own Rules

201. Appellants incorporate paragraphs 1 through 200 above and further allege as follows:

202. The State Board of Education is a state agency.

203. The Vermont Supreme Court has held that a state agency "*has only such powers as are expressly conferred upon it by the Legislature*, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State *for carrying into effect the will of the State as expressed by its legislation*." *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941) (emphasis added). Thus, *all* actions of the Board must follow statutory directives and legislative intent.

204. The Vermont Supreme Court has held that "an agency has *no discretion* to ignore statutory policy." *Petition of Town of Sherburne*, 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (emphasis added).

205. The Supreme Court has further held that "a decision arrived at without reference to any standards or principles is arbitrary and capricious; such ad hoc decision-making denies the applicant due process of law." *In re Miserocchi*, 170 Vt. 320, 325, 749 A.2d 607, 611 (2000) (citations omitted).

1. The Board ignored the Legislature's explicit directive in Act 46 to analyze and allow alternative governance structure proposals in light of the fact that a merger "may not be possible or the best model to achieve Vermont's education goals in all regions of the State." Act 46, Sec. 5(c).

206. Act 46 explicitly recognizes that a merger "may not be possible or the best model to achieve Vermont's education goals in all regions of the State." Act 46, Sec. 5(c). In fact, several sections of Act 46 and Act 49 are dedicated solely to the process for allowing school districts to develop an alternative structure that allows the district to remain independent and not merge with other districts. These sections include:

- Act 46, Sec. 5(c) (explicitly recognizing that merger "may not be possible or the best

model to achieve Vermont's education goals in all regions of the State" and providing examples of where that may be the case);

- Act 46, Sec. 8(b) (explicitly recognizing that if certain criteria are met, then the "State Board *shall approve* the creation, expansion, or *continuation of a supervisory union*" (emphasis added));
- Act 46, Sec. 9 (entire section dedicated exclusively to laying out the process for developing alternative governance proposals and submitting them for approval) and particularly at Section 9(a)(3)(B) which is predicated on the district's or districts' ability to meet or exceed each of the goals set forth in Sec. 2 of this act";
- Act 46, Sec. 10 (Agency's "review shall include consideration of any proposals submitted by districts or groups of districts pursuant to Sec. 9 of this act and conversations with those and other districts" and shall recommend merging those districts only "to the extent *necessary* to promote" Act 46's educational goals (emphasis added));
- Act 49, Sec. 7 (explicitly adding the example of districts being allowed to have an alternative governance structure where "the supervisory union has the smallest number of member school districts practicable after consideration of greatly differing levels of indebtedness among the member districts" and also lowering the threshold from 1100 students to 900 students for supervisory unions keeping independent districts);
- Act 49, Sec. 20 ("The State Board may adopt rules designed to assist districts in submitting alternative structure proposals, but shall not by rule or otherwise impose more stringent requirements than those in this act."); and

- Act 46 and Act 49 both underscore the importance of recognizing the barriers imposed by "lengthy driving times or inhospitable travel routes."

207. Even though the Legislature created a "preferred" governance designation, it stated in Act 46 Sec. 5(c) that the preferred structure "may not be possible or the best model to achieve Vermont's education goals in all regions of the State." The intent of the law was to achieve its goals of academic quality, fiscal efficiency, transparency and sustainability. The entire purpose of Section 9 of Act 46 was to allow alternative pathways to those goals.

208. In compliance with this allowed pathway, volunteer school board members and citizens spent *thousands of hours* working on what they believed would be the best model for their students and community and preparing lengthy alternative governance structure proposals pursuant to Section 5 and/or Section 9.

209. Forty-four individual or joint section 9 proposals were submitted representing in aggregate ninety-five school districts serving 90 towns. With appendices included, these proposals totaled approximately *five thousand pages*. One proposal consisted of a summary document with four volumes of supporting data and documents.

210. Despite the fact that neither the Agency nor the Board ever developed any standards or yardsticks by which to measure satisfying these goals, many schools that submitted Alternative Governance Proposals are plainly meeting the goals of Act 46 with high academic outcomes, fiscal efficiency, and increasing student populations and yet that data was for the most part ignored by the Agency and the Board.

211. In fact, by all indications, only 3 members of the 9-member Board were assigned to be the lead on groups of alternative governance proposals, implying that the other 6 members of the Board *did not even read* all of the 44 alternative governance structure proposals that were

submitted by 95 districts.

212. Courts routinely overturn agency actions when the agency "not only failed to provide an adequate response to [a party's] argument, it failed to take seriously its responsibility to respond at all." *NorAm Gas Transmission Co. v. F.E.R.C.*, 148 F.3d 1158, 1165 (D.C. Cir. 1998); *see also, e.g.*, *In re New Haven GLC Solar, LLC*, 2017 VT 72, ¶ 21, 175 A.3d 1211 (holding that an agency erred when it failed to consider comments that were timely filed). That is precisely what happened here. The Alternative Governance Structure proposals contain lengthy arguments explaining why each non-merged district would best serve the goals of Act 46 by remaining independent. The Board failed to address these arguments.

213. Although Section 8 of Act 49 allows the Board to "approve an alternative governance proposal at any time on or before November 30, 2018," the Board chose not to approve a *single* alternative governance structure proposal at any point before its issuance of the statewide plan.

214. The Board's failure to address the Alternative Governance Structure proposals on their merits also violated the Board's own rules for evaluating Alternative Governance Structure proposals. Those rules Rule 3400 requires the Board to consider each Alternative Governance Structure proposal on its merits: "The State Board evaluates every type of education governance proposal not only *on its own merits*, but also on the impact it may have on the students, the districts, the Region and the State." (Emphasis added.)

215. In the case of the Section 9 proposals vs. involuntary merger, the Board never—in any of those cases made any findings that any of those proposals were not the "best models," as set forth in Section 5(c) of Act 46, for achieving the goals of Section 2 of Act 46.

216. The Board never made any findings that merger was "necessary" and never

explained why merger was "necessary" as set forth in Section 10(a)(2) of Act 46. The word "necessary" does not even appear in any context related to mergers in any motion or in any discussions as recorded in the minutes of the meetings of the State Board of Education in their consideration of Section 9 proposals on October 2, October 17, October 29, November 15, and November 28. It appears in the Final order only in a subheading: "State Board of Education's 'order merging and realigning districts and supervisory unions where necessary,' pursuant to Act 46, Sec. 10(b)."

217. The Board never considered nor evaluated any of the Section 9 proposals compared to forced merger on their merits as required by Agency of Education Rule 3440.11.

218. There was never any analysis of greatly differing levels of indebtedness as a barrier to merger as required by Section 7 of Act 49, amending Act 46 by adding Section 5(c)(4). The Board got some numbers on tax rates and total indebtedness from the Agency but the only time greatly differing levels of indebtedness was even discussed (not analyzed) was during the discussion concerning the Washington Central Supervisory Union, where it was brought up and summarily dismissed by Board Member Oliver Olsen as "not meeting the threshold" for greatly differing levels of indebtedness. No one responded to this claim. No one suggested what that threshold might be.

219. Geographic isolation was raised by thirteen different districts. It was discussed by the Board in the case of Montgomery and dismissed as not consequential. Again, there were no yardsticks or standards for meaningful evaluation.

220. Marlboro was approved as a stand-alone district based on geographic isolation. The same could have applied equally to Windham, Franklin, Barnard and Montgomery but was not.

221. The NCSU districts (Brighton/Charleston, Lowell/Troy etc.) were not merged based

on their small scale and "sparseness." The same circumstances applied to Westminster, Athens, Grafton, Greensboro, Stannard, Woodbury, Hardwick, Brownington, Irasburg, Barton, Glover, and Albany, but they were merged.

222. A number of districts, including Franklin and Barnard, detailed factual mistakes in the Agency's proposed plan and made multiple efforts to correct the record. The mistakes were never even discussed and presumably the Board considered the incorrect information.

223. Geography and indebtedness are plainly recognized by the law as barriers to merger but were ignored by the Board.

224. Again there is no evidence the Board adhered to the analysis set forth by Rule 3400. Instead they simply defaulted to the "preferred model."

225. For instance, in the discussion of Barnard, Board Member Stacy Weinberger noted that Barnard made a "rigorous" case for remaining independent. In response, Secretary French said that he agreed that the case was "compelling," but that merger was still possible and practicable. *See* Oct. 17, 2018 Meeting, beginning at timestamp 3:40:08.

226. In fact, in the final Order, the State Board explicitly stated that "the Board has chosen to hew as closely to the intent of the Act as that authority will allow, creating preferred structures *wherever possible*." Final Order at 6 (emphasis added).

227. Because the Board's decision rests on an erroneous view of the law—the incorrect belief that it must deny all alternative governance structure proposals whenever the so-called preferred model is "possible"—the Board's decision is not entitled to any deference and should be vacated. *See, e.g.*, *Prill v. N.L.R.B.*, 755 F.2d 941, 947 (D.C. Cir. 1985) ("An agency decision cannot be sustained, however, where it is based not on the agency's own judgment but on an erroneous view of the law.").

2. The Board violated Act 49's explicit requirement that "the state board of education shall not by rule or otherwise impose more stringent requirements upon an alternative governance structure than those of this Act." Act 49, Sec. 20.

228. The State Board of Education is required to comply with Act 49 Section 20. In that Section of Act 49, the Legislature explicitly directed that "the state board of education *shall not by rule or otherwise* impose more stringent requirements upon an alternative governance structure than those of this Act." Act 49, Sec. 20 (emphasis added).

229. This explicit legislative mandate contains two components. First, the Board is prohibited from imposing "by rule" any more stringent requirements on alternative governance structure proposals than what Act 46 and Act 49 require. Act 49, Sec. 20. Second, the Board is prohibited from imposing more stringent requirements by *any* other method, because the prohibition is against imposing requirements "by rule *or otherwise*." Act 49, Sec. 20 (emphasis added).

230. By prohibiting the Board from imposing any requirements on alternative governance structure proposals beyond the minimum imposed by Act 46 and Act 49, the Legislature made those requirements both a floor and a ceiling on what was required to maintain an independent district. Whether a "preferred model" or "alternative governance proposal," the only requirement is to aim toward meeting the goals of Section 2 of Act 46.

231. The clear statutory language and legislative intent of Act 49, Section 20 is to require that the Board approve every alternative governance structure proposal that meets the statutory requirements.

232. For all the reasons noted above, the Board's actions imposed requirements on alternative governance structures that are far beyond what the statutes require.

233. At its October 2, 2018 meeting, the Board adopted four criteria it planned to use to

determine if an alternative governance proposal would be evaluated on its merits. None of these four criteria were in Act 46, Act 49 or Rule 3400. Further, these criteria were adopted nine months after Alternative Governance Proposals were supposed to be submitted. When told they would need to go through rulemaking, the Board, at its very next meeting, simply stated that it would not use those criteria. Yet, the Board failed to explain how it was evaluating Alternative Governance Structure proposals, and the Board appears to have used those same criteria that are not part of Rule 3400, did not go through rulemaking, and are inconsistent with the requirement in Section 20 of Act 49 to not impose more stringent requirements on Alternative Governance Structure proposals. In fact, those four criteria remain to this date on the State Board's website, in a document titled "Working Understanding of Principles for Considering Alternative Governance Structures." *See* https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-principles-for-ags-consideration.pdf.

234. Further, the General Assembly acknowledged that geographic isolation would be a barrier to merger, recognizing that "lengthy driving times or inhospitable travel routes between the school and the nearest school in which there is excess capacity" can make merger impracticable. Act 49, Sections 3(2)(a) and (4)(a)(2)(A).

235. The Board has created an entirely different metric based on 5% of the population living 15 miles or more from the nearest school with capacity. Capacity is not defined and does not take into consideration either lengthy driving times or inhospitable travel routes. Fifteen miles on a highway is different than fifteen miles on a class 3 road. The Board did not appear to give any substantive consideration to driving times or travel routes except in the most vague terms when they referred to the sparseness of North Country as a reason not to force merger. And even this last rationale was applied inconsistently, as the Board merged similarly sparse

districts in Orleans Central. The Board's metric is unrelated to the law and it strains credulity that the Board can create a Plan where genuine geographic isolation is not a barrier that may make merger impracticable. *See also* Act 49, Sec. 1(e).

236. As just one example, the roads from Montgomery to two of its neighboring towns are not roads that permit travel many times of the year. Route 58 to the bordering town Lowell is closed 6 months of the year and it takes an extra 15 miles of driving to get from Montgomery to Lowell. Also, Bakersfield is a bordering town to Montgomery, but the roads that connect them directly are not suitable for buses much of the school year. You would be lucky to get a tractor or ATV over them parts of the year.

3. The Board violated Act 49's explicit recognition that districts in a supervisory union of 900 or more students should be allowed to remain independent where "the supervisory union has the smallest number of member school districts practicable *after consideration of greatly differing levels of indebtedness among the member districts*." Act 49, Sec. 7 (emphasis added).

237. Act 49 explicitly recognizes greatly differing levels of debt as a barrier to merger, but the Agency and the Board have both ignored this aspect of the law.

238. Many of the towns facing forced merger have greatly differing levels of debt. For example, in the proposed merger of the 5 towns in the Washington Central Supervisory Union, three towns carry approximately $15 million in bonded debt: East Montpelier carries a bond debt of approximately $7 million, Berlin has approximately $4 million in bonded debt, and Middlesex also has approximately $4 million in bonded debt. Calais and Worcester, on the other hand, have *no* debt.

239. As explained in the Affidavit of Cameron Scott Thompson, the forced merger of the five towns in Washington Central results in the two towns with the *lowest* average and median adjusted gross income—Calais and Worcester—taking on millions of dollars in future bond

repayment obligations. East Montpelier, by contrast, which has the second-highest level of income of these towns, receives nearly 50% debt relief. East Montpelier is also the only town in Washington Central that has not appealed the Board's Order. The other four towns—Berlin, Calais, Middlesex, and Worcester—are Appellants and oppose forced merger.

240. More than a month before issuing the final Order, the Board received an email from Representative Janet Ancel of Calais explicitly informing them that the legislative history of Act 49 demonstrates that the reference to "greatly" differing levels of debt was explicitly intended, at a minimum, to apply to Washington Central Supervisory Union and its "wide disparity of debt between member districts": "I worked hard to get the references to debt included in Act 49. It was an uphill fight, given the AOE's opposition and the fact that it was of little interest to other legislators because *it was intended to apply specifically to WCSU*. This was discussed at length in the House Education Committee." Representative Janet Ancel of Calais (who voted for Act 46 and Act 49), Letter to Vermont State Board of Education (Oct. 22, 2018) (emphasis added).

241. The State Board does not have authority to ignore specific legislative direction to consider an important issue in making its decision. *See, e.g.*, *Petition of Town of Sherburne*, 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) ("[A]n agency has no discretion to ignore statutory policy. Thus, [it] *must consider all the criteria required by its statute*, although it retains discretion in determining the relative weight to give each criterion." (emphasis added)); *id.* at 605, 581 A.2d at 279 (holding that while an agency has wide discretion over what weight to give criteria and what conclusions it reaches, the agency's conclusions must be "consistent with legislative . . . policy").

242. When legislative language speaks directly to a situation—here, Act 49 Section 7's requirement to consider greatly differing levels of indebtedness, which is directly applicable to

districts such as those in the Washington Central Supervisory Union—that language must be given extra weight relative to general provisions regarding all alternative governance structure proposals. *See, e.g.*, *Smith v. Desautels*, 2008 VT 17, ¶ 17, 183 Vt. 255, 953 A.2d 620 ("[W]e are mindful that specific statutory provisions generally trump more general ones.").

243. Dummerston, Windham, Athens, Grafton, Westminster, Cabot, Danville, Franklin, Montgomery, Newbury, Richford, Enosburg, and the six boards of Washington Central Supervisory Union (Berlin, Calais, East Montpelier, Middlesex, Worcester, and U-32) all made reference in their Alternative Governance Structure proposals to greatly differing levels of debt as an obstacle to merger.

244. In violation of Act 46 as amended by Act 49, in none of these cases did the Board evaluate the merits or consequences of a school district absorbing substantial debt of another district without the explicit consent of the district being burdened with the debt of others.

245. The sole mention of debt relative to any of these districts in the Board's final order is this one sentence regarding the six districts in the Washington Central Supervisory Union: "While there is clearly a differential in debt, the Board does not find that it meets the threshold in the law of 'greatly' differing levels of debt."

246. Thus, after being informed by the Legislator who drafted that provision that she *specifically* drafted it to address the different debt loads in Washington Central, the Board inexplicably concluded that this very same language did not apply to Washington Central.

247. The Board also relied on incorrect information in its evaluation of current debt loads in Richford and Enosburg. Those districts submitted an alternative governance proposal that explains that Enosburg currently has around $2.5 million in outstanding debt, while Richford has no outstanding debt. Enosburgh & Richford Town School Districts' Joint Submission at 32,

available at https://education.vermont.gov/sites/aoe/files/documents/enosburgh-richford-school-districts-section-9-proposal.pdf. Despite this enormous disparity in debt, the State Board's final Order contains no discussion whatsoever of the debt issue. The Order does, however, state that it is merging these districts "the reasons articulated in the Secretary's Proposed Plan." Final Order at 17. The Agency's Proposed Plan incorrectly states that "[t]he Richford District has capital debt and the Enosburgh District does not." Agency's Proposed Plan at 154. The Agency then incorrectly states that "the Enosburgh community sees [debt] as a barrier to merger." *Id.* It is *Enosburgh* that carries the debt load, and *Richford* that sees this as a barrier to merger since Richford would have to help pay for Enosburgh's debt. Further, which town carries the debt is significant because Enosburgh has a higher per capita income that Richford. Thus, shifting debt from the higher-income town to the lower-income town creates an inequity that does not currently exist. Perhaps because of both the Agency and the Board's incorrect belief that Richford carries debt, the final Order contains no analysis whatsoever of the inequity of shifting debt.

248. Instead of analyzing the real-world impacts of shifting debt from a wealthier town to a poorer town, the Agency's proposed plan--which the Board cited as its rationale for merging — recites the same line it used repeatedly (and verbatim) when talking about debt: that "today's district with little or no debt will tomorrow become the district that needs a new roof." Agency's Proposed Plan at 154. This is in direct contradiction to the jointly submitted plan for these two towns, which states that "there are no major capital projects pending for either district" because both towns "have strong traditions of care and pride in their schools' physical plants" and have recently completed all required renovations. Enosburgh & Richford Town School Districts' Joint Submission at 32, 34.

249. The Board's order provides no explanation of what it believed would meet the threshold of "greatly" differing levels of debt.

250. Not only has one municipality been denied the right to consider and consent to this indebtedness but, additionally, the State Board of Education has no taxing power whatsoever. The essential terms guiding involuntary mergers, such as "impracticable" or "greatly differing levels of debt" have never been defined but presumably by including greatly differing levels of debt as a barrier to merger the General Assembly intended that to at least be one form of "impracticability."[6]

4. The Board violated Act 49 and 16 V.S.A. § 706n by imposing default Articles of Agreement without an opportunity to make use of the 90-day period to draft their own articles and by replacing articles for already-existing union boards without following the requirements of 16 V.S.A. § 706n.

251. Section 8 of Act 49 provides that districts subject to the state-wide plan shall have 90 days to form a study committee under 16 V.S.A. Chapter 11 and draft Articles of Agreement for the new district.

252. As noted above, the Assistant to the Secretary of Education testified to the Board

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[6] "Here the authority to assess is delegated to an administrative commission having quasi-judicial functions with reference to certain matters. The assessments are to be made against and not by the municipal corporations. In reality, of course, the municipality is a mere conduit and the ultimate burden of the assessment is placed upon the individual taxpayers of the town and must be borne by each in proportion to the amount of his taxable property, apparently without regard to whether his property does or does not receive special benefits . . . . In the expressive language used by Justice Cardozo in the *Panama Refining Co.* case and again in the *Schecter* case the delegated power of legislation here is not canalized within the banks that keep it from overflowing, but is unconfined and vagrant." *Village of Waterbury v. Melendy*, 199 A. 236 (Vt. 1938).

Other jurisdictions have dealt with similar issues. For example, *Helena Waterworks Co. v. Steele*, 20 Mont. 1 at 7 (1897), quotes Chief Justice Breese in *People v. Mayor etc., of Chicago*, 51 Ill. 17 — a case involving the question as to whether the City of Chicago could be compelled to assume a local indebtedness without its consent: "If the principle be admitted that the legislature can, uninvited, of their mere will, impose such a burden as this upon the City of Chicago, then one much heavier and onerous can be imposed; in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature."

that there would be no time within 90 days to adopt alternative articles. This violates Act 49.

253. Section 706n of Title 16 requires a vote of the district's citizens to amend articles of agreement for an already existing union school district.

254. Act 49 recognized this and called for new legislation that amends 16 V.S.A. § 706n.

255. That amendment was never enacted. Nevertheless, the Board has presumed it has the power to amend existing articles of agreement by replacing them with the default Articles, contrary to existing law.

256. The default Articles, if not adopted by electorate vote, cannot apply to forcibly merged districts that include a union or other district that already has existing articles of agreement. Yet, the Board's Order purports to do precisely that. This violates 16 V.S.A. § 706n.

5. The Board's proposed commingled votes to merge Windham, Barnard, Cambridge, Orwell, and Huntington with their respective unified districts in a Modified Unified Union School District violate 16 V.S.A. § 721(b) and Act 49, which exempts Modified Unified Union School Districts from the State Plan.

257. The Agency claims that NMEDs (Non-Merged Education Districts), a nomenclature and entity not defined by any statute, can be forced into the MUUSDs (Modified Unified Union School Districts).

258. The Board's Order designates the school districts of Windham, Barnard, Cambridge, Orwell, and Huntington as part of a MUUSD, provided a majority of voters of the MUUSD vote to approve the district's addition to that district pursuant to 16 V.S.A. § 721.

259. Section 721(b) of Title 16 provides that a union school district may take action to initiate the inclusion of additional school districts.

260. Section 721(b) first requires the union board to submit its plan for incorporation to the Board of Education for approval, then warn a meeting of its union electorate, and if a

majority of that electorate votes in favor of inclusion, the additional district is required to warn a meeting to vote on the plan.

261. Section 721(b) requires that "a majority of the voters voting at the meeting of the additional district" must vote for inclusion in order for the inclusion to take effect.

262. The Agency of Education's position is that the Board's November 30, 2018 Order has suspended the applicability of 16 V.S.A. § 721, and that an agency-devised alternative to, and modification of, the Section 721 statutory process can take place, where there would be a single commingled vote of an electorate, yet-unformed in Windham's case. This would be in place of the statutorily required two-step Section 721 voting process that gives the elementary school district a veto to being subsumed into the unified district. *See* State Agency of Education Guidance on MUUSDs and NMEDs, available at https://education.vermont.gov/sites/aoe/files/documents/edu-sbe-act46-mmusd-nmed-guidance.pdf, and appended to the Board's Final Plan under the caption "Other Documents."

263. This is a radical departure from long-standing Vermont statutes governing union school formation and enlargement, and the Agency's interpretation, and the Board's implementation of it, have been invented whole cloth, amount to pure legislation, and are in violation of separation of powers.

264. Nothing in Act 46 or Act 49 contemplates or permits the rewriting of existing Vermont statutes, or the creation of a parallel, agency-created set of special laws governing union formation.

265. Furthermore, Act 49, Section 8(e), exempts Modified Unified Union School Districts from the State Plan, and an isolated district cannot be subjected to any Board action or order pursuant to the Plan. *See* Act 49, Section 8(e) (providing that state plan "shall not apply

to" unified union school district that began to operate between June 30, 2013 and July 2, 2019 and is a regional education district or any other district eligible to receive incentives pursuant to 2010 Acts and Resolves No. 153, as amended by 2012 Acts and Resolves No. 156); *see also* Act 156, Section 17(c) (providing that a Modified Unified Union School District is "eligible for the incentives provided to a regional education district ("RED") in Sec. 4 of that act [Act 153]" provided the effective date of the merger is within the period required for RED formation).

6. The Board's actions were arbitrary and capricious because they were standardless and inconsistent.

266. The Vermont Supreme Court has held that "a decision arrived at without reference to any standards or principles is arbitrary and capricious; such ad hoc decision-making denies the applicant due process of law." *In re Miserocchi*, 170 Vt. 320, 325, 749 A.2d 607, 611 (2000) (citations omitted).

267. Act 46 at Section 9(a)(3) requires a proposal "that supports the district's or districts' ability to meet or exceed the goals of Section 2." But the Board never developed a yardstick or standard for measuring when the goals are being met. The Board never at anytime held districts up to any meaningful standard in determining if they were meeting the goals of Act 46 as spelled out in Section 2.

268. The Vermont Supreme Court has "consistently affirmed the necessity of the clear application of applicable standards in both judicial and administrative decisions." *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 20, 203 Vt. 274, 155 A.3d 1207; *see also, e.g.*, *In re Handy*, 171 Vt. 336, 349, 764 A.2d 1226, 1238 (2000) (holding that there must be "neutral, predictable, and universal administrative standards").

269. As noted above, the Agency and the Board at various points imposed additional

criteria on alternative governance structure proposals beyond what Act 46 and Act 49 require. As a result, the Appellants and other school districts often had no idea how the Board was making its decisions. After the Board announced four entirely new "guiding principles" at its October 2, 2018 meeting (none of which were in Act 46, Act 49 or Rule 3400), the Board was told by an attorney that those guiding principles would need to go through rulemaking. At its very next meeting, the Board simply stated that it would not use those criteria. There is nothing in the record that indicates consistent standards, measurements or yardsticks for evaluating Section 9 proposals. It would appear that the Board tried to use the guiding principles they said they were not going to use, even though those principles did not go through rulemaking, were not part of Rule 3400, and are inconsistent with the requirement in Section 20 of Act 49 to not impose more stringent requirements on Alternative Governance Structure proposals. And, as was noted above, those four criteria remain to this date on the State Board's website, in a document titled "Working Understanding of Principles for Considering Alternative Governance Structures." *See* https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-principles-for-ags-consideration.pdf.

270. In addition to violating Act 49 Section 20's explicit prohibition on adding new non-statutory criteria in evaluating alternative governance structures, the Board's decision to add non-statutory was also arbitrary and capricious. This warrants vacating the Board's decision. *See, e.g.*, *In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29, ¶ 16, 196 Vt. 175, 95 A.3d 999 (holding that when an agency action was "clearly erroneous" when it "imposed additional nonstatutory eligibility criteria" on a project "without prior notice"); *Royalton Coll., Inc. v. State Bd. of Ed.*, 127 Vt. 436, 450, 251 A.2d 498, 508 (1969) (holding that the State Board of Education cannot impose "essentially, a new condition" without first raising it during the

proceedings); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620–21 (5th Cir.), *opinion modified on reh'g*, 36 F.3d 89 (5th Cir. 1994) ("We conclude that the Procedure Paper does have a substantial impact on those regulated in the industry. . . . Thus, the Procedure Paper should have been published in the *Federal Register* and offered for notice and comment.").

271. As noted above, the Board's decisions were also inconsistent. The Vermont Supreme Court has held that it will "find error when a regulation is inconsistently applied" because a "fundamental norm of administrative procedure requires an agency to treat like cases alike." *In re Stowe Cady Hill Solar, LLC*, 2018 VT 3, ¶ 21, 182 A.3d 53 (quotation omitted).

272. For two years the Orleans Southwest Supervisory Union was told that they could not be merged and that their Alternative Structure Proposal should be approved. At the October 29 meeting that changed. That changed with almost no analysis, but instead right after a briefing on the OSSU's governance structure, the Board took a short recess, apparently to write a motion and then Woodbury, Hardwick, Greensboro and Stannard were merged. Those communities, having been told they could not and would not be merged were denied the opportunity to make an informed decision before it was too late. *See* Attachment E (Email from Donna Russo-Savage to Joanne LeBlanc, Superintendent of Orleans Southwest Supervisory Union dated Dec. 7, 2017, informing Ms. LeBlanc "that in the case of OSWSU districts, the Board is unable to require governance merger").

273. Marlboro was approved as a stand-alone district based on geographic isolation. The same could have applied equally to Windham, Franklin, Barnard, and Montgomery, but the Board instead treated these similarly situated districts differently, and failed to provide an explanation for this disparate treatment. This is arbitrary and capricious

274. The North Country Supervisory Union districts were not merged based on their

small scale and "sparseness." The same circumstances applied to Westminster, Athens, Grafton, Greensboro, Stannard, Woodbury, Hardwick, Brownington, Irasburg, Barton, Glover, and Albany, but they were merged.

275. The Agency and the Board entirely misread Act 46's use of the word "region." Act 46 uses that term primarily to refer to a particular area of the state. For instance, Section 5 of Act 46 reads: "(c) Alternative structure: supervisory union with member districts. An Education District as envisioned in subsection (b) of this section may not be possible or the best model to achieve Vermont's education goals *in all regions of the State*." Act 46, Sec. 5 (emphasis added). This is plainly shorthand for "in every part of the State" and could just as easily be read as saying "in every district of the State." Yet, the Agency of Education, and then the State Board, mistakenly converted this phrase into a mandate to override what works in one district if they thought something else would serve some undefined "region" better.

276. This is just one of many examples of the Agency and Board misinterpreting what the Legislature actually said in Act 46 and Act 49. While Act 46 may have authorized the Board to force mergers in the case a *failing* school district that was refusing to merge, there is *no* indication that the Legislature intended the Board to force mergers on schools that are by most measures successful (for instance, Montgomery, Barnard, Franklin, Huntington, Stowe, Middlesex, and Calais, all of which are considered to have some of the best schools in the State). To the contrary, in Sections 5, 9, and 10 of Act 46, the Legislature clearly directed the Agency and Board to let those districts, and all others that demonstrated working toward meeting the goals of Act 46, to remain independent.

277. For instance, the town of Franklin noted in its alternative governance structure proposal that "Franklin Elementary has some of the highest test scores and lowest cost per pupil

in the state." FNWSU Act 46 Study Committee Recommendations at 2, available at https://education.vermont.gov/sites/aoe/files/documents/franklin-northwest-su-section-9-proposal.pdf.

278. Franklin further noted that its "analysis shows that merging will increase per pupil costs by more than $1,000 dollars as well as education taxes for Franklin citizens" and was "not likely to increase Franklin's existing high student performance." *Id.*

279. Franklin voted *unanimously* 161 to 0 against merger.

280. The Board's failure to address the factual matters put before it, and failure to make any findings on those matters, violate Vermont law, which, as the Vermont Supreme Court has held, requires addressing these matters: "Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made. The Commission addressed itself neither to the possible shortcomings of [certain] procedures, to the advantages of certification, nor to the serious objections to the latter." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

281. The Board's order is so thinly reasoned, and so riddled with inconsistencies and contradictions, that its rationale cannot be discerned. This also violates Vermont law, as the Vermont Supreme Court has held: "We cannot conclude, based on the record before us, that [the Green Mountain Care Board] has given us an adequate explanation to determine the reasons for GMCB's decision and how they are consistent with the statutory standards." *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 26, 203 Vt. 274, 155 A.3d 1207.

282. The Board's decision is also arbitrary and capricious because it fails to consider the record that was before it, and entirely ignores substantial evidence that is directly contrary to the

Board's conclusions, including vast amount of information in the various alternative governance structure proposals explaining how each district meets the goals of Act 46. An agency must "explain why it rejected evidence that is contrary to its finding." *Carpenters & Millwrights, Local Union 2471 v. N.L.R.B.*, 481 F.3d 804, 809 (D.C. Cir. 2007). As the United States Supreme Court has held, when agencies are evaluating whether evidence is substantial enough to support a particular action, they "must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

283. The Board's decision comes nowhere near meeting this standard. Neither the Agency nor the Board adequately addressed all of the evidence put forth in the alternative governance structure proposals demonstrating that those proposals would best meet the goals of Act 46 and that a forced merger of these districts was not necessary.

284. Further, the Board had a duty to explain in detail why it was rejecting the data, analysis, and recommendations of alternative governance structure proposals because those proposals came from local school boards — the people who are *most familiar* with the very schools at issue in each proposal. Courts have held that when agencies review decisions made by others analyzing the same data, those previous analyses are part of the record and any "departures from the [previous fact finder's] findings are vulnerable if they fail to reflect attentive consideration to the [the previous] decision." *Morall v. Drug Enf't Admin.*, 412 F.3d 165, 177 (D.C. Cir. 2005) (quotation and alteration marks omitted).

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285. In short, the Board violated statutory directives by ignoring multiple aspects of Act 46, Act 49, and other applicable laws. The Board's Order is also contrary to legislative intent, arbitrary and capricious, and fails to follow the Board's own rules.

286. Appellants seek a declaration that the Board's November 30, 2018 Order is vacated because it violates the plain language of Act 46, Act 49, 16 V.S.A. § 706n, 16 V.S.A. § 721(b), and other applicable statutes, is contrary to legislative intent, is arbitrary and capricious, and fails to follow the Board's own rules.

287. Appellants also seek a preliminary and permanent injunction against any action by Defendants to effectuate the Board's Order.

SECOND CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

The Board's Order Forcing Mergers and Its Means of Executing Forced Mergers Violate Chapter II, Sections 5 and 6 of the Vermont Constitution, and Implementing Laws, Which Vest Only the Legislature with Authority to Constitute Towns, Borroughs, Cities, and Counties

288. Appellants incorporate paragraphs 1 through 287 above and further allege as follows:

289. Chapter II, Section 5 of the Vermont Constitution states: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."

290. The power to "constitute towns, borroughs, cities and counties" is vested in the Legislature. Vermont Constitution, Chapter II, Section 6.

291. Under Vermont law a town constitutes a school district. 16 V.S.A. § 421.

292. "The charters that govern all of Vermont's municipal subdivisions require the approval of the General Assembly in order to take effect." Special Preface, 24 V.S.A. app. at xix (2008); *see also* 17 V.S.A. § 2645(d) (noting that charter amendments "shall become effective upon affirmative enactment of the proposal, either as proposed or as amended by the general assembly").

293. Under the State Board's interpretation of Act 46 purportedly allowing the Board to

forcibly merge school districts, forced mergers are in violation of the Vermont Constitution, which does not allow the Legislature to delegate the power to form and dissolve municipal governments to an unelected agency of the Executive Branch.

294. The powers to create or dissolve municipalities, and to distribute debt and to compel the conveyance of property, to the extent they do not violate other constitutional provisions and are not otherwise statutorily vested in the electorate, are properly reserved to and exercised by the Legislature, not an unelected Board of the Executive Branch.

295. Act 46 and Act 49 must be interpreted so as to be consistent with the Vermont Constitution.

296. Act 46 and Act 49 repeatedly refer to the Board's actions as a "state-wide *plan*." This indicates legislative intent that, at minimum, to the extent the State Board "plans" to forcibly merge districts, legislative approval is required.

297. Although Act 46 and Act 49 also refer to the Board's state-wide plan as an "order," this at most creates ambiguity as to what the Legislature intended, and the Court should interpret this ambiguity consistent with the Vermont Constitution and consistent with existing statutory schemes.

298. Appellants seek a declaration that the Board's Order forcing mergers and its means of executing forced mergers violate Chapter II, Sections 5 and 6 of the Vermont Constitution, and implementing laws, which vest only the Legislature with authority to constitute Towns, Borroughs, Cities, and Counties.

299. Appellants seek a preliminary and permanent injunction against any action by Defendants to merge school districts absent Legislative action.

THIRD CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

The Board's Order Forcing Mergers and Its Means of Executing Forced Mergers Redistributes Debts and Assets in a Way that Violates Vermont Law, 16 V.S.A. §§ 706(d) and (f); 24 V.SA. §§ 1755 and 1786(a); the Vermont Constitution, Chapter I, Article 7 and Article 9, and Chapter II, Section 6; and the U.S. Constitution, Amendment 5 and Amendment XIV, Section 1.

300. Appellants incorporate paragraphs 1 through 299 above and further allege as follows:

301. The State Board's plan seeks to compel municipalities to absorb the debt of other municipalities and to convey long-held assets to other municipalities for one dollar via "Default Articles of Agreement" and to dissolve statutorily created municipal governments and vest power over those dissolved governments in newly created regional municipalities without the affirmative votes required by statute and the U.S and Vermont Constitutions.

302. For example, East Montpelier carries a bond debt of approximately $7 million, Berlin has approximately $4 million in bonded debt, and Middlesex also has approximately $4 million in bonded debt. Calais and Worcester, on the other hand, carry no debt. Under the Board's plan to merge the school districts in these five towns, the taxpayers of Calais and Worcester will now have to begin paying a proportional share of this combined $15 million in bonded debt, even though the voters of Calais and Worcester never agreed to take on any of that debt.

303. East Montpelier, Middlesex, and Berlin voters were able to carefully weigh and study incurring this debt and to vote on incurring this debt after such consideration. Calais and Worcester, on the other hand, will incur this obligation with none of those opportunities, being denied even the fundamental right to vote, by virtue of the imposition of this debt by the State Board.

304. Allowing one group to vote on a debt but denying that right to a neighboring group violates the Common Benefits clause of the Vermont Constitution and the Equal Protection Clause of the United States Constitution. *Kramer v. Union Free School District* No. 15, 395 U.S. 621 (1969).

305. Under Vermont law no municipality can incur liability for bonded debt without the consent of the voters. 24 V.S.A. §§ 1755 and 1786(a).

306. Nothing in Act 46 or Act 49 or any other statute empowers the Board to impose one municipality's debts or bond obligations on other municipalities without an electorate vote. On the contrary, the process that is set out by statute specifically contemplates that transfers of property or debt by school districts be predicated on an affirmative vote. *See* 16 V.S.A. §§ 706(a)-(o), 562(7) (entitled "Powers of the electorate" grants electorate power to sell or otherwise dispose of school building and site), & 562(9) (electorate authorizes school board to borrow by issuing bonds or notes).

307. The Vermont General Assembly never authorized the Board or the Agency to ignore the requirement that the transfer of debt or property be done by consent of the voters or to exercise such a power by fiat. On the contrary, it is axiomatic that neither an agency nor a board has any powers unless they are explicitly granted by the Legislature.

308. Further, Act 46 Section 5(c)(4), as amended by Act 49 at Section 7, acknowledges "greatly differing levels of indebtedness among member districts" as grounds for establishing the impracticability of a merger and the need for an alternative governance structure.

309. The Courts have long recognized that confiscation of property by one government entity from another government entity constitutes a taking. *See United States v. Town of Nahant*, 153 F. 520, 521 (1st Cir. 1907).

310. By compelling the conveyance of a municipality's real estate for the price of one dollar the Board is engaging in an unlawful "takings" under both the Vermont Constitution (Chapter I, Article 9) and the U.S. Constitution (Amendment V).

311. Money cannot be exacted by power of eminent domain under any circumstances. *See Burnett v. Sacramento*, 12 Cal. 76, 83 (1859); *People v. Mayor of Brooklyn*, 4 N.Y. 419, 424 (1859) ("[L]ands may be taken by the right of eminent domain, but money may not.).

312. Many districts the Board is merging have capital funds that would be taken. For example, the town school district of Calais currently has a capital fund of $192,615. *See* Washington Central Supervisory Union December 5, 2018 Packet at 27 (available at https://drive.google.com/file/d/1RS2vOXsnFP6O47OGJRdZFPqpCYMoeZlI/view).

313. Appellants seek a declaration that the Board's Order forcing mergers and its means of executing forced mergers redistributes debts and assets in a way that violates Vermont Law, 16 V.S.A. §§ 706(d) and (f); 24 V.SA. §§ 1755 and 1786(a); the Vermont Constitution, Chapter I, Article 7 and Article 9, and Chapter II, Section 6; and the U.S. Constitution, Amendment 5 and Amendment XIV, Section 1.

314. Appellants seek a declaration that Defendants cannot lawfully transfer a school district's assets, capital funds, or debts without an electorate vote.

315. Appellants seek a preliminary and permanent injunction against any action by Defendants to transfer a school district's assets, capital funds, or debts without an electorate vote.

FOURTH CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

The Board's Order Forcing Mergers and Its Means of Executing Forced Mergers, Including the Setting of Different Standards for Small School Grants for Forcibly Merged Districts, Constitute Disparate Financial Treatment of Schools, Taxpayers, and Students in Violation of the Common Benefits Clause, Chapter I, Article 7, of the Vermont Constitution, and of the Equal Protection Clause, XIVth Amendment, of the U.S. Constitution

316. Appellants incorporate paragraphs 1 through 315 above and further allege as follows:

317. If they are receiving a small schools grant now, under the Board's plan, districts that have merged voluntarily will receive their small schools grants in perpetuity, for as long as they remain open. It will be renamed a merger support grant. Act 46, Sec. 6(b)(2).

318. Schools that applied for an alternative governance structure (AGS) that was granted or schools that applied for an AGS that was denied and as a result are now being merged by the Board's plan are subject to an entirely different set of "metrics." Act 46, Sec. 20.

319. The students in schools with voluntary mergers receive substantially more favorable financial treatment than the students in schools with forced mergers though all schools followed a proper path as designated by Act 46 and 49.

320. The result is that students in some of Vermont's richest school communities receive financial support that is denied to some of Vermont's poorest school communities. For instance, a district with only 21% free and reduced lunch (Westford) gets a small schools grant in perpetuity, but a school with 84% free and reduced lunch (Lowell) can be denied a small schools grant. This disparate impact harms schools that have high poverty rates. Two-thirds of schools receiving small schools grants have free and reduced lunch rates that are above the statewide average. Further, in the Addison Central District, merger is leading to that district being granted in excess of an additional million dollars regardless of need, while schools like Lowell are left losing a small schools grant that makes up a crucial 8% of Lowell's entire budget.

321. Similarly, the tax incentives given to voluntary mergers for five years, but denied to the mergers imposed by the Board's order, leave students with substantially disparate financial support for no reason except that one merger was voluntary and the other followed an application

for a Section 9 Alternative Governance Structure. Act 46, Section 7. Thus, the districts that invested the most time and prepared proposals for alternatives as being the "best models" pursuant to Section 5, or that demonstrated excellent results with Section 9 proposals, are actually punished for their efforts. When both followed exact paths set out by statute and when voluntary mergers are presumed by the Legislature to be the beneficiaries of new efficiencies, there can be no rational basis for such extensive disparate treatment. In fact, *Brigham, supra,* sets the bar substantially higher than a rational basis test.

322. For instance, the City of Montpelier and the Town of Roxbury voluntarily merged, and the students in these towns received the benefit of millions of dollars in tax incentives that allowed these schools to provide additional programs to students without increasing taxes. Students in the neighboring towns of Barre, Barre Town, Berlin, Calais, East Montpelier, Middlesex, and Worcester, on the other hand, are being forcibly merged and denied the millions of dollars in tax incentives that Montpelier and Roxbury received. Notably, all of these towns have lower average incomes than the average income or residents of the City of Montpelier. Yet, the students in these towns are being denied the programs and opportunities that students in Montpelier are receiving as a result of the incentives Montpelier received for voluntarily merging.

323. This inequity is compounded by the fact that all of these funds come out of the State Education Fund. Thus, those districts who are forced into mergers have to contribute to the incentives and grants provided to voluntary mergers regardless of whether the districts in those voluntary mergers have any need for these funds.

324. The Vermont Supreme Court held in *Brigham* declared that the distribution of school funding — "a resource as precious as educational opportunity" — "may not have as its

determining force the mere fortuity of a child's residence." *Brigham v. State*, 166 Vt. 246, 265, 692 A.2d 384 (1997). Yet that is precisely what is occurring here by denying tens of millions of dollars in funding — small-school grants and incentives that voluntarily merged districts receive — based on "the mere fortuity of a child's residence" in a district that is being forced into merger.

325. Just as "[c]hildren who live in property-poor districts and children who live in property-rich districts should be afforded a substantially equal opportunity to have access to similar educational revenues," *Brigham*, 166 Vt. at 255, children who live in force-merged districts, like Barre, Barre Town, Berlin, Calais, East Montpelier, Middlesex, and Worcester, should have equal access to the educational revenues provided to their neighboring students in voluntarily should have equal access to the educational revenues provided to voluntarily merged districts.

326. Without substantial justification, this disparate treatment violates the Common Benefits Clause of Chapter I, Article 7 of the Vermont Constitution and the Equal Protection Clause of the XIVth Amendment of the United States Constitution.

327. Even the State Board of Education has recommended that the General Assembly revisit this subject to address the lack of clarity regarding applicable standards. *See* Attachment F.

328. Appellants seek a declaration that Defendants cannot lawfully deny substantially equal educational funds to schools and students based on whether or not their boards voluntarily merged pursuant to Section 6 or 7 of Act 46 or submitted alternative governance structure proposals under Section 9 of Act 46.

329. Appellants seek a preliminary and permanent injunction against any action by

Defendants to deny substantially equal educational funds on this basis.

FIFTH CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

The Board's Order Forcing Mergers and Its Means of Executing Forced Mergers Failed to Provide Any Due Process to the Forcibly Merged Districts, in Violation of Chapter I, Article 4 of the Vermont Constitution, and of the Due Process Clause of the XIVth Amendment of the U.S. Constitution

330. Appellants incorporate paragraphs 1 through 329 above and further allege as follows:

331. For all the reasons noted above, the Board's process failed to provide any due process to the districts being forcibly merged, and did not come anywhere near providing the due process that is required under the Vermont and U.S. Constitutions.

332. As noted above, the Board never established any yardstick, standard, or measure for evaluating whether a Section 9 proposal meets the goals of Section 2.

333. In the process of forcibly merging school boards and districts, the State Board of Education is confiscating carefully managed reserve accounts, transferring millions of dollars of debt onto communities that have never had the opportunity to consider or to vote on that debt, conveying some communities' most precious pieces of real estate, and removing what has been a cornerstone of the Vermont democratic tradition of local school governance.

334. This radical restructuring of local governance has been done by an unelected Board that has met once or twice a month for the last few months, a Board with almost no budget, working almost for the entire time with no independent counsel. It is a Board where most members have full-time jobs. They did not take the time to engage with each of the affected local communities, who are most familiar with how merger will affect their school and their children, to discern why these communities oppose these mergers.

334. Act 46, Section 40, which goes into effect July 1, 2020, and amends 16 V.S.A. § 165, allows the State Board to forcibly merge two districts to address educational deficiencies, but only if that is the least restrictive measure and only after affording contested-case like procedures to the affected districts — far greater due process than what was allowed here. In other words, the school districts with failing schools, which require immediate action to address educational deficiencies, are afforded *more* due process protections than what the State Board provided to the successful school districts who oppose forced mergers here.

335. Appellants seek a declaration that the Board's Order forcing mergers and its means of executing forced mergers failed to provide any due process to the forcibly merged districts, in violation of Chapter I, Article 4 of the Vermont Constitution, and of the Due Process Clause of the XIVth Amendment of the U.S. Constitution.

336. Appellants also seek a preliminary and permanent injunction against any action by Defendants to effectuate the Board's Order.

SIXTH CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

The Board's Order Forcing Mergers and Its Means of Executing Forced Mergers Violate Chapter II, Article 68 of the Vermont Constitution

337. Appellants incorporate paragraphs 1 through 336 above and further allege as follows:

338. The history of Chapter II, Article 68 of the Vermont Constitution is revealing. From its inception in 1777, the primogenitor of Article 68, then Section XL of the Vermont Constitution, required "a school or schools shall be established in each town."

339. As our Constitution evolved, that same requirement was repeated in the 1786

revisions and again in the 1793 revisions.[7]

340. The language of the Constitution was clearly understood. The expectation was that "a competent number of schools ought to be maintained in *each* town." However, with the growing availability of motorized transportation, some towns wanted to operate schools jointly and in 1954 the State amended the Constitution to allow for that with the consent of the Legislature. The 1954 amendment read: "a competent number of schools ought to be maintained in each town or by towns jointly with the consent of the General Assembly for the convenient instruction of youth."[8]

341. As towns that had once operated a school chose to tuition students to neighboring schools or to schools that their parents chose, the issue of constitutionality arose again.

342. The then-Commissioner of Education claimed that the practice violated the Constitution's requirement for maintaining a school in each town and threatened to withhold State aid. At the same time, many of the receiving schools did not want to form joint districts and thereby surrender control of their school.

343. Thus, in 1960, Article 44 (which became Article 68 when it passed in 1964) was proposed replacing the "joint" operating requirement with this language: "a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." *See* Attachment G (*Transcript of the Public Hearing of the Vermont Constitutional Revision Commission,* held May 6, 1960 in the Senate Chamber).

344. The entire purpose of the language of Article 68 was to protect a town's ability to maintain local governance even when partnering with other towns. The General Assembly never

[7] *See generally* Zoracki, Seth, *Vermont Traditions of Education and the Vermont Constitution*, Albany Law Review, Vol. 69, page 581 (2006).

[8] Burlington Free Press, March 3, 1954, page 1, *Issues at Town Meeting Today*.

assumed the authority to compel the involuntary dissolution of school boards.

345. Appellants seek a declaration that the Board's Order forcing mergers and its means of executing forced mergers violates Chapter II, Article 68 of the Vermont Constitution.

346. Appellants also seek a preliminary and permanent injunction against any action by Defendants to effectuate the Board's Order.

PRAYER FOR RELIEF

For these reasons, Plaintiff-Appellants respectfully pray that this Court:

1. Vacate the Vermont State Board of Education's November 30, 2018 Order;
2. Grant Appellants Declaratory Relief that:
    - The Board's Order violates the plain language of Act 46, Act 49, 16 V.S.A. § 706n, 16 V.S.A. § 721(b), and other applicable statutes, is contrary to legislative intent, is arbitrary and capricious, and fails to follow the Board's own rules;
    - The Board's Order violates Chapter II, Sections 5 and 6 of the Vermont Constitution, and implementing laws, which vest only the Legislature with authority to constitute Towns, Borroughs, Cities, and Counties;
    - The Board's Order forcing mergers and its means of executing forced mergers redistributes debts and assets in a way that violates Vermont Law, 16 V.S.A. §§ 706(d) and (f); 24 V.SA. §§ 1755 and 1786(a); the Vermont Constitution, Chapter I, Article 7 and Article 9, and Chapter II, Section 6; and the U.S. Constitution, Amendment 5 and Amendment XIV, Section 1;
    - Defendants cannot lawfully transfer a school district's assets, capital funds, or debts without an electorate vote;
    - Defendants cannot lawfully deny substantially equal educational funds to schools and

students based on whether or not their boards voluntarily merged pursuant to Section 6 or 7 of Act 46 or submitted alternative governance structure proposals under Section 9 of Act 46;

- The Board's Order forcing mergers and its means of executing forced mergers failed to provide any due process to the forcibly merged districts, in violation of Chapter I, Article 4 of the Vermont Constitution, and of the Due Process Clause of the XIVth Amendment of the U.S. Constitution;
- The Board's Order forcing mergers and its means of executing forced mergers violates Chapter II, Article 68 of the Vermont Constitution;

3. Pursuant to, and for the reasons stated in, the Motion for a Preliminary Injunction and Stay filed in conjunction with this action, stay the Board's Order and any and all forced mergers pending a ruling on the merits of this appeal and the affirmative claims;

4. For the reasons stated in the Motion, grant a preliminary injunction pending a ruling on the merits of this appeal and the affirmative claims, enjoining Defendants from taking any action based on the Board's Order that is designed to, or has the effect of, creating new union school districts and conferring municipal power on them or dissolving town school districts, and further enjoining any action by Defendants to effectuate the Board's Order;

5. Grant a permanent injunction, enjoining Defendants from taking any action based on the Board's Order that is designed to, or has the effect of, creating new union school districts and conferring municipal power on them or dissolving town school districts, and further enjoining any action by Defendants to effectuate the Board's Order; and

6. Grant Appellants costs and any other relief this Court may deem just and equitable.

Dated: December 20, 2018 Montpelier, Vermont

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