STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. 23-CV-04963

THE OFFICE OF THE AUDITOR OF ACCOUNTS, in its official capacity, and DOUGLAS R. HOFFER, as a citizen of the State of Vermont, Plaintiffs	)
v.	)
THE OFFICE OF THE ATTORNEY GENERAL and CHARITY R. CLARK, in her official capacity as the Attorney General of the State of Vermont, Defendants	)

OPPOSITION TO MOTION TO DISMISS
AND CROSS MOTION FOR SUMMARY JUDGMENT

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Plaintiffs oppose the Attorney General's Motion to Dismiss and move for summary judgment pursuant to Vermont Rule of Civil Procedure 56. In support, Plaintiffs state:

Preliminary Statement

The Auditor raises a simple question: does Title 3, Section 159 require the Attorney General to answer two questions of law? The answer is simple as well. Section 159 unambiguously requires the Attorney General to answer when State officials request written opinions on questions of law. Moreover, the Auditor's constitutional power to audit requires the Attorney General to provide the same written opinion.

The Attorney General incorrectly argues that the Court cannot consider the issue because only the Attorney General has the power to decide which intragovernmental disputes are worthy of resolution. The Attorney General's position is inconsistent with another portion of the text of

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Section 159. More importantly, the Attorney General's attempt to claim the judicial power as its own interferes with the Judiciary's peaceful resolution of disputes that lies at the heart of our Constitutional government.

Facts

The Auditor of Accounts is responsible for conducting audits of State programs, including tax increment financing (TIF) districts. The TIF audits test a district's compliance with statues and regulations. Often, the meaning of the statutes and regulations is clear. On occasion, there is ambiguity or inconsistency. In such cases, auditors must seek guidance from appropriate legal authorities. Until recently, the Auditor has relied on the Attorney General for assistance.

On September 27, 2023, the Auditor of Accounts and the Vermont Economic Progress Council ("VEPC") requested that the Attorney General answer three questions of law:

1. Do bond premiums fall under the definition of financing in 24 V.S.A. § 1891(7)?

2. Are municipalities required to obtain authorization from the Vermont Economic Progress Council (VEPC) and municipal voters for the aggregate bond proceeds (principal and premium) that will be used to pay for public infrastructure improvements of a tax increment financing (TIF) district?

3. If statute and relevant rules are not conclusive on questions 1 and 2, does VEPC have authority under 32 V.S.A. § 5404a(j)(1) to address these issues within the TIF Rules?

Statement of Facts ("SOF") ¶¶ 8, 28; Hoffer Ex. 1.

On November 1, 2023, the Attorney General responded to these questions by stating "we decline to opine on the interpretation of provisions in title 24 requested above." SOF ¶¶ 9, 29; Hoffer Ex. 2.

On November 13, 2023, the Auditor followed up as a courtesy to the Attorney General to give the Attorney General an opportunity to reconsider the Auditor's original request. In addition, the Auditor of Accounts sought permission to retain counsel to pursue litigation to resolve definitively the Attorney General's duties under 3 V.S.A. § 159. SOF ¶¶ 10, 30; Hoffer Ex. 3.

On November 21, 2023, the Attorney General responded that "your first two questions concerning potential future adherence with municipal law by the City of Burlington are more appropriately resolved by the City, ACCD, and VEPC – not by the Attorney General." Thus, the Attorney General has not answered the first two questions that the Auditor of Accounts requested from the Attorney General. SOF ¶¶ 11, 31; Hoffer Ex. 4.

The November 21 letter also details the Attorney General's assertion that it alone can determine when one State Officer may bring a lawsuit against another State official. For example, the Attorney General claims that "you lack authority to unilaterally initiate litigation on behalf of or against the state." Hoffer Ex. 4 at 2. The Attorney General also stated that "I do not and will not condone your attempt to initiate litigation against me or my office, and I view such actions as contrary to law." Hoffer Ex. 4 at 7. The Attorney General took the position that "we do not concede you have the legal authority to initiate litigation against the state, it officers, or agencies without the Attorney General's Office." Hoffer Ex. 4 at 7. The Office takes the position that Defendants "would be remiss regarding their duties – particularly the obligations regarding 'general supervision of matters and actions in favor of the State and of those instituted by or against State Officers,' 3 V.S.A. § 159 – if they did not seek dismissal of unsanctioned litigation against the State and its officers by an unauthorized State officer in these circumstances." The Attorney General seeks to be the only authority for determining whether all

State Officers may bring litigation against the State or other Officers. *See* Mot. to Dismiss at 14-17. The Attorney General seeks the authority even though the Office acknowledges that is has a "potential" conflict of interest. Hoffer Ex. 4 at 7; SOF ¶ 32.

The Attorney General's current stance on Section 159 is a reversal of the previous policy of the Office of the Attorney General. Over 12 years, the Auditor of Accounts has requested answers to questions of law in over 30 particular cases. These requests have covered a wide variety of topics, including other questions concerning tax increment financing, capital projects, oversight of VITL, calculations of equalized pupil calculations, etc.. *See* SOF ¶ 7.

Vermont Standards for Constitutional Interpretation

When interpreting the Vermont Constitution, the Vermont Supreme Court has endorsed several factors to aid in that construction: (1) the text of the Vermont provision; (2) the historical meaning of the Vermont provision; (3) the structure of the Vermont Constitution; (4) the interpretation given to other relevant sister state Constitutions; and (5) economic and sociological factors. *See State v. Jewett*, 146 Vt. 221, 223-229 (1985) (outlining approaches for Vermont Constitutional interpretation). "We have found an understanding of the constitutional provision's historical context to be a most helpful tool for determining the meaning of the provision, and we have often relied on that context to illuminate the meaning of our Constitution." *State v. Hance*, 2006 VT 97, ¶ 10.

Standards for Resolving Rule 12(b)(6) Motions to Dismiss

Vermont has an exceedingly low pleading standard. Courts should not dismiss a case unless "it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle the plaintiff to relief." *Bock v. Gold*, 2008 VT 81, ¶ 4 (*citing Union Mut. Fire*

Ins. Co. v. Joerg, 2003 VT 27, ¶ 4 (2003)). "Put another way, the threshold a plaintiff must cross in order to meet our notice-pleading standard is 'exceedingly low.'" *Id.*; *see also* V.R.C.P. 8 ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. . ."). As the Reporter's Notes state:

> The new rule, which applies to all affirmative pleadings, omits the requirement of the former statute that 'the facts relied upon' be pleaded, requiring instead 'a short and plain statement of the claim showing that the pleader is entitled to relief,' language closer to that of former Chancery Rule 3. The new language emphasizes that the rules do not require a specific and detailed statement of the facts which constitute a cause of action, but simply a statement clear enough 'to give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.'

V.R.C.P. 8 (*quoting Conley v. Gibson*, 355 U.S. 41 (1957)).

A motion to dismiss for failure to state a claim is "not favored and rarely granted." *Ass'n of Haystack Prop. Owners v. Sprague*, 145 Vt. 443, 446-47 (1985). "When reviewing the disposition of a Rule 12(b)(6) motion to dismiss, this Court assumes that all factual allegations pleaded in the complaint are true. We accept as true all reasonable inferences that may be derived from plaintiff's pleadings and assume that all contravening assertions in defendant's pleadings are false." *Richards v. Town of Norwich*, 169 Vt. 44, 48-49 (1999) (*citing Amiot v. Ames*, 166 Vt. 288, 291 (1997)). Likewise, on a Rule 12(b)(1) motion to dismiss for lack of standing, the Court accepts as true the allegations in the complaint. *See Brod v. Agency of Natural Resources*, 2007 VT 87, ¶ 2. "Moreover, courts should be especially reluctant to dismiss on the basis of pleadings when the asserted theory of liability is novel or extreme." *Association of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 447 (1985). "The legal theory of a

case should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." *Id.*

Standards for Resolving Rule 12(b)(1) Motions to Dismiss

In resolving a Rule 12(b)(1) motion, the Court may rely on evidence outside the complaint. "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court, as it did here, may refer to evidence outside the pleadings." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000) (citation omitted).[1] "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* (citation omitted). The Vermont Supreme Court has cited the *Makarova*. *Conley v. Crisafulli*, 2010 VT 38, ¶ 3. The Court may examine facts when determining its subject matter jurisdiction.

I. THE AUDITOR HAS STANDING TO SUE IN THIS COURT.

The Attorney General takes the position that only it can decide when an Officer of the State of Vermont can raise serious questions of Constitutional importance. A plain reading of the statute on which the Attorney General relies shows that this is incorrect. The Attorney General's broad reading creates Constitutional violations of the highest degree. In the words of the Vermont Supreme Court, the Constitutional principles infringed "are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty, and the equal and permanent security of rights." *Staniford v. Barry*, 1 Aik. 314 (Vt. 1825).

[1] If the Court deems it inappropriate to rely on the Declaration of Douglas R. Hoffer, Plaintiffs seek leave to amend to add those facts to the Complaint.

A. The Plain Meaning Of The Statute Supports Giving The Auditor Of Accounts The Authority To Pursue Litigation On Behalf Of The Auditor.

When interpreting statutes, Vermont courts often use standard canons of construction. The Vermont Supreme Court relies on the plain meaning of words to determine the interpretation of a statute. *Doyle v. City of Burlington Police Department*, 2019 VT 66, ¶ 5. Moreover, the Court will interpret statutes to avoid absurd or irrational results. *Heisse v. State*, 143 Vt. 87, 89 (1983). Finally, Courts interpret statutes to avoid significant constitutional issues. *State v. Berard*, 2019 VT 65, ¶ 16 ("We generally construe statutes to avoid constitutional difficulties, if possible.") (citation omitted).

Disputes between State Officers are special. Because they are disputes between parts of government, they do not involve the "State" as a unitary whole. The General Assembly never meant to strip the judiciary of its essential role of resolving disputes between State Officers when the General Assembly created the Office of the Attorney General. Each of the statutory sections cited by the Attorney General do not take away the power of State Officers to sue on important issues of State Constitutional law.

First, each of the statutory sections refers to the "State" as a unitary whole showing that the General Assembly never meant to legislate in the area of disputes between parts of the government:

- "The Attorney General may represent **the State** in all civil and criminal matters as at common law and as allowed by statute." 3 V.S.A. § 152 (emphasis added).
- "The Attorney General shall appear for **the State** in the preparation and trial of all prosecutions for homicide and civil or criminal causes in which the State is a party or is interested when, in his or her judgment, the interests of the State so require." 3 V.S.A. § 157 (emphasis added).
- "[The Attorney General] shall have general supervision of matters and actions in favor of **the State** and of those instituted by or against State officers wherein interests of the State are involved and may settle such matters and actions as the interests of the State require." 3 V.S.A. § 159 (emphasis added).

Furthermore, while Section 159 refers to "State officers," it does so only in the context of the "interests of the State." The disputes about the Constitutional duties of "State officers" do not involve the "the State" as a unitary whole. In fact, having courts decide these issues protects the "interests of the State:"

> It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.

Federalist No. 51; *see* Paul S. Gilles and D. Gregory Sanford, Records of the Council of Censors 60 (Offset House, Essex Vt. 1991) (discussing the importance of separation of powers in connection with the 1786 amendments). Sections 152, 157, and 159 apply when the interest of the State are in harmony. When there is a dispute between "State officers," Sections 152, 157, and 159 have no application.

Second, as a trio of statutes, Sections 152, 157, and 159 involve different powers. Section 152 involves "representing" in Court. Because the statute uses the term "may," the statute does not require that the Attorney General "represent" the "State" in every case.[2] *Town of Calais v. County Road Com'rs*, 173 Vt. 620, 621 (2002). Section 157 requires "appearance" when the "State" is a party. Section 159 provides for the Attorney General's "general supervision" of actions "instituted by or against State officers wherein interests of the State are

[2] Any statute using "shall" to require that the Attorney General represent the state in every case would be unconstitutional because it would usurp the power of the State's Attorneys to appear on behalf of the State. *See Office of State's Attorney Windsor County v. Office of Attorney General*, 138 Vt. 10, 13 (1979).

involved." The presence of "State officers" in Section 159, but not in Sections 152 and 157, means that "representation" or "appearance" by the Attorney General is not required for State officers. Moreover, Section 159 only involves "general supervision." "General supervision" does not involve actually "appearing" for or "representing" the State officers. Otherwise, the words of the trio of sections would be mere surplusage, which courts strain to avoid when interpreting statutes. "It is of course essential to harmonize a statute by construing its constituent parts to form a consistent whole, attend every provision significance and meaning." *Town of Calais*, 173 Vt. at 621.

In this particular case, Section 159's "general supervision" cannot involve making important decisions about the litigation because the Attorney General is in a conflicted position as a party to the litigation. *See* Section I(F); *State v. Berard*, 2019 VT 65, ¶ 16 ("We generally construe statutes to avoid constitutional difficulties, if possible.")

Third, to avoid absurd results, the Court should interpret the statute to allow Constitutional Officers to sue other Officers and to prevent the Attorney General from having unilateral authority over cases involving State Officers. This particular case illustrates the danger of giving the Attorney General the type of power the Office wants. Here, the Auditor of Accounts believes that the law requires the Attorney General to provide the legal opinions that the Auditor seeks. The Attorney General's claimed authority prevents this Court from ever deciding the meaning of these statutes, simultaneously frustrating the powers of the General Assembly, the Governor, the Auditor of Accounts, and this Court. If the Court adopts the Attorney General's interpretation, then the Attorney General could bar suits raising clearly unconstitutional acts. The General Assembly did not intend that outcome when it authorized the Attorney General to represent the "State." Instead, the Court should embrace a reading of the

statute that allows Constitutional Officers to continue to exercise their duties to challenge actions that they believe are illegal.

B. The Vermont Supreme Court Has Determined That Constitutional Officials Have The Authority To Sue And Be Sued And The Power To Retain Their Own Counsel.

The Auditor's interpretation of Sections 152, 157, and 159 is consistent with a long history of the judiciary deciding disputes involving Vermont State Officers. Long ago, the Vermont Supreme Court determined that Constitutional Officers have the authority to sue. *Dean v. Bates*, 36 Vt. 387, 395 (1886). That case involved two consolidated cases. In the second case, the Secretary of State, Dean, sued to collect on a bond issued for the faithful performance of the Treasurer. In reaching its conclusion, the Court noted the Constitutional significance of the case: "The first constitutional provision in respect to the treasurer's bond required that officer to give 'sufficient security to the secretary of state, in behalf of the general assembly.' (Sec. 27 of the constitution, C.S. p. 39.)" *Id.* at 391. The Court also took note of the Constitutional oath that officers of the State took. After tracing the constitutional and statutory provisions, the Court concluded that the Secretary of State had authority to sue in his own right. "We find no difficulty in adopting the conclusion that the Secretary of State had the capacity of suing, ***as an incident and in the right of his office***, upon the official bond of the Treasurer, and that this capacity passed with his office to his successor." *Id.* at 395 (emphasis added). At the time that the Court made its decision, the Secretary of State had no express power to sue. Revised Laws of Vermont 1880 Sections 154-163 (Tuttle & Co. Rutland 1881). The emphasized language shows that the Court granted to Constitutional officers the implied "capacity of suing."

The Vermont Supreme Court has resolved other lawsuits involving officers of the government against other officers of the government. For example, in *Grout v. Gates*, the Secretary of State sued the Auditor of Accounts. 97 Vt. 434, 450, 124 A. 76, 81 (1924). In

Gates, the Court stated that the Office of Auditor of Accounts "is a constitutional officer, elected biennially by the freemen of the state upon the same ticket as is the Governor, the lieutenant governor, the secretary of state and the treasurer." *Id.* Like the Court in *OneCare*, the *Gates* Court noted that some of the powers of the auditor were statutory. Notwithstanding this observation, the Court also held that: "[t]he importance and difficulty of the questions here involved are such that the complainant was justified in bringing this action, and the defendant was equally justified in defending it. We therefore assume that the expenses on both sides, including counsel fees, will be, as they should, paid by the state." *Id.* at 454, 124 A. at 82. In other words, the Secretary of State had the implied power to sue and the Auditor had the implied power to be sued. At the time, the Secretary of State had no express statutory authority to sue. General Laws of Vermont 1917 Section 367-381 (Free Press Printing Co.: Burlington, Vermont 1918). The Auditor of Accounts also had no express statutory power to be sued. *See id.* Section 571-588. Both had the implied authority to hire their own counsel to defend their actions and to pay counsel.

By this time, the General Assembly had passed the predecessor to Section 159. Thus, in 1924, the Attorney General had the same powers that are currently outlined in Section 159. *See id.* Section 390. Because the powers of the Secretary of State and the Auditor of Accounts did not exist in statute, it must have been an implied Constitutional power as a Constitutional Officer. Moreover, the predecessor to Section 159 did not bar the powers of Constitutional Officers to be litigants in their own right. Both before and after Section 159, the Vermont Supreme Court held that Vermont Constitutional Officers had the implied Constitutional power to sue and be sued.

In *Parker v. Anderson*, the Attorney General sued the Auditor of Accounts. 112 Vt. 371, 373 (1942). In that case, the Court issued mandamus to the Auditor of Accounts to make payment in some cases, but denied the relief in other cases. *Id*; *see also Scott v. Gates*, 99 Vt. 335 (1926)(city judge versus auditor of accounts); *Peck v. Powell*, 62 Vt. 296 (1890) (city judge versus auditor of accounts). These cases all recognized – either expressly or implicitly – the importance of allowing State Officers to sue each other when questions arise about actions taken in good faith in their official capacities.

C. Vermont's Constitution Grants The Auditor Of Accounts The Express Power To Audit And The Implied Power To Sue.

The Auditor of Accounts has the express power to "audit" and the implied power to obtain the information it needs to audit. The implied power to obtain the information it needs to audit includes the power to obtain legal interpretations from the Attorney General, *infra* at 33, and the power to sue to obtain that interpretation.

1. Vermont's System Of Checks And Balances Supports The Power To Audit And Its Related Power To Sue.

Vermont's Constitution is a system of checks and balances. *See* Vt. Const. Chapter II, Section 5. Checks and balances are important to our Constitutional form of government. *Staniford v. Barry*, 1 Aik. 314 (Vt. 1825); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This structure of Vermont's Constitution supports the power to audit governmental records. Historically speaking, a strong system of check and balances was not an original feature of Vermont's 1777 Constitution. The stronger version of the system of checks and balances emerged with the 1786 amendments to Vermont Constitution. Hon. Robert A. Mello, Moses Robinson and the Founding of Vermont 221-23 ("Robinson").

Like other checks and balances, the Constitutional power to "audit" emerged with the 1786 amendments. The text of the Constitution creates the express power to audit. "The

Treasurer's accounts shall be annually ***audited***, and a fair state thereof laid before the General Assembly." Vt. Const. Chap II, Section 26 (emphasis added). The meaning of "audit" had much the same meaning as it does today. In 1832, Noah Webster defined "audit" as "to examine and adjust an account." Noah Webster, American Dictionary of the English Language (White Gallaher and White: New York 1832). Immediately before the Vermont Constitution, an "Auditor" was "an Officer of the King, or some other Great Person, who examines yearly the Accounts of all Under-Officers, and makes up a General Book, which shows the Difference between their Receipts and Charge, and their several Allowances; commonly called Allocations . . ." Giles Jacob, A New Law Dictionary (8th Ed. Woodfall & Strahan, London 1762).

History supports a strong power to "audit." The Constitutional power to "audit" arose from a real and early controversy within the Republic of Vermont prior to its admission to the Union. Ira Allen held multiple offices in the Republic of Vermont, including Surveyor General and Treasurer. Moses Robinson at 209.[3] Allen's political opponents thought that Allen had taken advantage of his official positions and public funds to enrich himself. "[Issac] Tichenor was especially distrustful of Ira Allen who Tichenor believed had used his official position to enrich himself at state expense." Robinson at 209. On June 8, 1785, Ira Allen reported on his more recent efforts in Canada to negotiate a treaty of commerce between the Republic of Vermont and Great Britain. *Id.* "After Allen finished his report, Tichenor demanded that Allen submit 'at the opening of the House tomorrow morning' an account of his expenses and activities on his trade mission to Canada and as surveyor general." *Id.* In response to the debate on

[3] One of the important changes was to prevent a single person holding more than one office at the same time. Vt Const. Chap. II, Section 54.

Allen's records, the General Assembly granted Allen's request for an audit of his records, but ordered that it go back to the founding of the Republic of Vermont. *Id.* at 210.

The history of Vermont's early audit legislation shows that the people needed a constitutional amendment to make audit legislation constitutional. In the February 1784 Session, a report was made to the General Assembly, which said "II. That the Auditors be called upon, to know whether they have completed a settlement with the Treasurer and others." Journal of the Proceedings of the General Assembly of the State of Vermont at 8 (Hough & Spooner 1784). "By Order, Ira Allen, Chairman," it was "Ordered, That Mr. E. Robinson be requested to call on the Auditor of accounts, and request them to make report to this House, agreeable to the 2d article in the arrangement." *Id.* The Governor and the Executive Council held that this law or some other early law about auditing was unconstitutional.[4] Records of the Governor and Council of the State of Vermont Volume III at 42 (Montpelier: Steam Press of J & J.M. Poland 1875) ("An act empowering Auditors &c. being received and read, the Council are of Opinion that such Act is unnecessary and unconstitutional.")

The Council of Censors[5] determined the people should amend the Vermont Constitution to include an express power to "audit." Referencing the Allen affair, the Council said in part: "And we are all so unhappy, that, being destitute of a complete state of the public accounts from the auditors, (which we have repeatedly requested of them) it is out of our power to make further enquiries in what manner the public monies have been disposed of. Nor ought this Council here

[4] Although it sounds foreign to the ears of the modern lawyer, the governor, the Governor's Council, and the House of Representatives heard appeals from the Superior Court. *See* "History of the Supreme Court," https://www.vermontjudiciary.org/supreme-court (last accessed January 15, 2024).

[5] The Council of Censors is different from the Executive Council. *See infra* at 17-18.

to omit noticing that the General Assemblies, previous to February, 1784, are, in the idea of this Council, highly censurable for omitting to enact laws adequate to compel the annual liquidation of public accounts; and that the Council are not free from blame for the appointment, and continuance of persons in office of great public trust, who did not keep regular books: by which means (we conclude, from the information of those auditors who have taken an active part in the business) several public accounts of a very important nature, can never be properly adjusted; and the *defaulters of unaccounted thousands* will probably reserve them for their families." *See* Paul S. Gilles and D. Gregory Sanford, Records of the Council of Censors 72-73 (Offset House, Essex Vt. 1991). They also proposed as Chapter II, Section 25 the provision that is today Section 26. *Id.* at 53.

After the people amended the Constitution, the General Assembly passed a new law setting forth the powers of the Auditor. After the Constitutional amendment, the Governor and the Council deemed the law constitutional on March 3, 1787. Records of the Governor and Council of the State of Vermont Volume III at 134. ("An Act relating to auditors and actions of accounts was read & Concurred.") It appears the General Assembly then expanded the law in October 1797.

In the October 1797 act detailing the auditor's powers, the General Assembly described the position as "Auditor against the State." Laws of the State of Vermont, Chapter LXXXVII, No.1 (Randolph: Sereno Wright 1808). The 1797 law also contained the power to audit private individuals if necessary to address the finances of the State. From the beginning, the Auditor acted as a check to the rest of the government. The early history of auditing shows that Vermont intentionally created a strong express power to "audit."

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The express power to "audit" gives rise to the implied power to sue or be sued. The Vermont Supreme Court has recognized that certain implied powers can arise from the text of the Constitution. In another case involving the auditor, the Vermont Supreme Court discussed implied powers more directly. In *State Highway Bd v. Gates*, the Court said: "Because of the similarity of the restrictions upon delegation of legislative authority implied in Article I, section 1, and Article 1, section 8 of the federal Constitution, Const art. I, §§ 1,8 and those implied in the Vermont Constitution, the United States Supreme Court cases bearing upon this question are much in point." 110 Vt. 67, 76, 1 A.2d 825, 829 (1938). In that case, the Supreme Court recognized the implied power of the Vermont General Assembly to delegate certain tasks to administrative agencies. The Vermont Supreme Court has recognized implied or inherent powers in other contexts. *O'Rourke v. Lunde*, 2014 VT 88, ¶ 23 (holding that Superior Court could appoint a receiver as part of its inherent powers); *Lawson v. Brown's Home Day Care Center, Inc.*, 2004 VT 61, ¶ 14 (holding that trial court has inherent power to sanction an attorney for misconduct when bad faith present); *Hutchinson v. Pratt*, 11 Vt. 402, 422 (1839) (discussion of implied powers). In the federal sphere, the United States Supreme Court has outlined the doctrines of implied and inherent powers. *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819); *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

One of the implied powers is the power to sue and be sued to protect the other powers set forth in the Constitution. As *Grout v. Gates* recognized, the Auditor also has the power to hire independent counsel to pursue and protect its powers.[6] As discussed more fully below, the

[6] Bulletin 17.10 does not apply when the Constitutional power to hire counsel is present. It also does not apply because both the Secretary of Administration and the Attorney General have no authority over the Auditor of Accounts. They are not Constitutional Officers. In

General Assembly has made the Attorney General available to the Auditor of Account to provide legal opinions necessary to do the work the Auditor needs to audit. *Infra* at 33-38. The Vermont Constitution gives the Auditor of Accounts the power to insist that the Attorney General do its job.

History also explains the need to have the courts to settle disputes between government officials. The dispute over auditing of the Treasurer's accounts continued without resolution for some years. Allen's frustration about obtaining a resolution led him to challenge Tichenor to a duel. J. Kevin Graffagnino, "Revolution and Empire on the Northern Frontier: Ira Allen of Vermont, 1751-1814 at 297 in Doctoral Dissertations 1896-February 2014; *see also* Mark Bushnell, "Then again: When Politicos Settled Scores with a Duel." Vtdigger.org (October 30, 2016). The duel demonstrates why we should provide the courts as an avenue to resolve disputes between governmental officials. Festering disputes are not good for anyone. The courts should resolve the disputes so that everyone can go back to doing their jobs. Rather than settle disputes with pistols in duels, government officials should accept that courts are the proper forum to settle their disputes.

2. Making The Election Of The Auditor Of Accounts A Constitutionally Elected Office Reinforced The Multi-Leader Executive.

The checks and balances of Vermont's Constitution have another layer in that the Vermont Constitution divides the executive power among different executive offices. From its beginning, the Vermont Constitution divided the power of the executive. The 1777 Vermont Constitution divided the executive power between the Governor and the Supreme Executive

addition, the Bulletin is addressed to State Agency Heads. The Auditor of Accounts is not an Agency Head – it is an independently elected State Officer. Finally, the Bulletin provides no basis for understanding under what authority either the Secretary or the Attorney General acts. If the Court needs further briefing, the Auditor is happy to provide it.

Council. "The supreme executive power shall be vested in a Governor and Council." 1777 Vermont Constitution, Chapter II, section 3. "The Supreme Executive Council of this State, shall consist of a Governor, Lieutenant-Governor, and twelve persons, chosen" as described in Chapter II, section 17 of the Vermont Constitution. In addition to the Supreme Executive Council, the 1777 Vermont Constitution created a "Council of Censors." 1777 Vermont Constitution, Chapter II, Section 44. The people chose the Council of Censors "whose duty it shall be to enquire whether the legislative and executive branches of government have performed their duty as guardians of the people; or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution." *Id.* The people elected the Council of Censors to protect the freedom of the people: "In order that the freedom of this Commonwealth may be preserved inviolate, forever, there shall be chosen, by ballot, by the freemen of this State, on the last Wednesday in March, in the year one thousand seven hundred and eighty-five, and on the last Wednesday of March, in every seven years thereafter, thirteen persons, who shall be chosen in the same manner the council is chosen." *Id.*

The division of executive power changed over time. Three significant developments occurred in 1870. First, the people determined that they should directly elected a number of new Constitutional offices, including the Treasurer. *See* Paul S. Gilles and D. Gregory Sanford, Records of the Council of Censors 699-701 (Offset House, Essex Vt. 1991). Second, the people changed the process of amending the Constitution to create more popular control over the process. *Id.* Finally, the people abolished the Council of Censors in favor of the new method of amending the Constitution. *Id.*

The Constitutional revolution to more popular control over the divided executive offices continued. In the 1882 Amendment to the Vermont Constitution, the Secretary of State and the

Auditor of Accounts became offices that the people directly elected. *See* Vt. Const. Chapter II, Section 43.

The decision to divide executive power is a choice. The choice to divide executive power makes sense when one considers historical and current examples of overzealous executives depriving the people of their rights. *Compare, e.g.* Tom Holland, Rubicon: The Last Years of the Roman Republic (Anchor Books 2003) (narrative description of the events leading to the fall of the Roman Republic and the ascendency of Emperor Augustus) *with* Mary Beard, Emperor of Rome (2023) (describing the autocratic behavior of the Emperors of Rome); *see also* Anna Keay, The Restless Republic: Britain without a Crown (Williams Collins 2022)[7]. Empowering the Auditor to protect its Constitutional role benefits democracy by preserving Vermont's unique system of checks and balances.

3. The Importance Of Auditing Has Not Lessened With Time.

Economic and social factors support a broad reading of the Constitutional power to audit. Auditing continues to play an essential role in our lives. The State of Vermont has recognized the continuing importance of auditing to the State of Vermont. *See* Compl. in *Pieciak v. Crowe, LLP*, No. 5:21-cv-273 No.6 (Dec. 6, 2021) (mentioning derivations of "audit" 198 times). Auditing has played a central role in significant cases touching all aspects of the economy. *See e.g., Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

[7] The framers of Vermont's Constitution were well aware of the dangers posed by the events of Roman history. *See, e.g.* Narrative of Col. Ethan Allen's Captivity ix (Thomas & Thomas: Walpole, NH, 1807)

D. The Auditor's Power To Audit Is Consistent With The People's Rights To Obtain Information Under Vermont's Constitution.

Governmental auditing provides an independent view of the facts of a particular governmental action, especially those involving the expenditure of taxpayer funds. Auditing is consistent with other provisions of Vermont's Constitution that favor providing information to the people. Vermont's constitutional provisions create a democratic system where governmental action occurs, the press and the people disseminate information about the action, the public reflects on the action, the public instructs and petitions its representatives, and, based on their public performance, the people elect their representatives. This system of government breaks down when the government hides information from public view. Governmental action becomes less legitimate when elected officials act without public input.

The treatment that the Framers of the Vermont Constitution received from an unaccountable government led them to adopt several provisions of the Vermont Constitution designed to ensure that government officials remained accountable to the people. Chapter I, Section 4 of the 1777 Constitution read: "That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." Chapter I, Section 5 of the 1777 Constitution read: "That all power being originally inherent in, and consequently, derived from, the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." Those provisions remain in the current version of Vermont's Constitution. *See* Vt. Const. Chapter I, Sections 5 and 6.

Chapter I, Article 13 establishes protection for the freedom of speech and freedom of press: "That the people have a right to freedom of speech, and of writing and publishing their

sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained."

In *Wolfe v. VTDigger*, the Superior Court concluded that Constitutional privileges protect the publication of four articles that Vermont Digger published. 22-CV-1294 (Vt. Super Ct., Rutland Division August 8, 2022). The Court held that:

> All of the articles in question are related to issues of public concern by reporting on official police reports and criminal proceedings related to those reports. *Cornelius v. Chronicle*, 2019 VT 4. Vermont has long recognized a privilege to comment on court proceedings and police reports. *See, e.g., Lancour v. Herald & Globe Ass'n*, 111 Vt. 371, 383 (1941). Here, the relevant articles were about public safety, law enforcement activity, potential criminal activity, and arrest reports. Nothing in the complaint as made more definite by Wolfe's later filings raise any issue that the reporting here was not protected as in the exercise of the defendant's constitutional rights. *Cornelius v. The Chronicle, Inc.*, 2019 VT 4, ¶ 10.

Id. affirmed on other grounds Wolfe v. VTDigger, 2023 VT 50, ¶ 16. The Court then held that "the speech he complains of is constitutionally protected by Vermont statute, the Vermont Constitution, and the United States Constitution." *Id.*

Chapter I, Article 8 gives voters the right to elect officers. Chapter I, Article 7 guarantees to the people the power "to reform and alter the government." Finally, Chapter I, Article 20 completes the information cycle because that Article 20 provides the important right to instruct our representatives: "That the people have a right to assemble together to consult for their common good—to instruct their Representatives—and to apply to the Legislature for redress of grievances, by address, petition or remonstrance." It also conveys an absolute privilege when people are engaged in the exercise of that right. *Harris v. Huntington*, 2 Tyler 129, 139-40 (1802). *Harris* involved a defamation claim by a Justice of the Peace for statements made about his peacefulness. *Id.* at 134. The Vermont Supreme Court held that Chapter I, Article 20 of the

Vermont Constitution provided an absolute privilege from defamation liability for statements made to the General Assembly. *Id.* at 143. Historically, the newspapers of the day published the claims and counterclaims of Ira Allen and Isaac Tichenor as the Auditors of Accounts were conducting the audit. James Benjamin Wilber, Ira Allen: Founder of Vermont 473-504. The news reports likely led to Allen's declining popularity in the state.

The Auditor's power to "audit" is consistent with all these rights. The General Assembly and the Governor have recognized the importance of auditing to providing independent information to the people by incorporating the Government Accountability Office standards into Vermont law. *See infra* at 35-37. In particular, Section 1.05 provides that "[g]overnment auditing is essential in providing accountability to legislatures, oversight bodies, those charged with governance, ***and the public.*** GAGAS engagements provide an independent, objective, nonpartisan assessment of the stewardship, performance, or cost of government policies, programs, or operations, depending on the type and scope of the engagement." Section 1.05 of the Yellow Book (emphasis added). The current understanding of the purpose of audit is the same as the original purpose of auditing at the time of the adoption of the 1786 Amendments. Auditing exists to provide the people with important information about the actions of their representatives and how those representatives use the people's money.

E. The Attorney General's Interpretation Of Sections 152, 157, And 159 Usurps The Judicial Power.

The Courts have the power to adjudicate important disputes between state officers and to say who is a proper party before the Court. The Attorney General cannot claim that power for the Office. "The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution; that is, 'the right to determine actual controversies arising between adverse litigants, duly instituted in

courts of proper jurisdiction.'" *In re Constitutionality of House Bill 88*, 115 Vt. 524, 529 (1949). Chapter II, Section 4 states that "the judicial power of the State shall be vested in a unified judicial system which shall be composed of a Supreme Court, a Superior Court, and such other subordinate courts as the General Assembly may from time to time ordain and establish." Chapter II, Section 5 protects that "Judicial Power" from interference from the General Assembly. *See Burton v. Town of Salisbury,* 173 Vt. 177, 182 (2001) ("Such legislation violates the constitutional principle of separation of powers."); *Bates v. Kimball*, 2 D.Chip. 77, 86 (Vt. 1824) ("For, the constitution has expressly forbidden the exercise, by one department, of powers properly belonging to others; and what the constitution has forbidden, no statute of the Legislature can authorize.") The Vermont Supreme Court recently reaffirmed the constitutional basis of Vermont's standing doctrine. *Ferry v. Montpelier*, 2023 VT 4, ¶¶ 11, 15.

The power of the judiciary to decide disputes is especially important when there are disputes between State officers. "In nearly every appeal that concerns the exercise of government power, the judicial review itself implies a mode of dispute resolution in which the Court acts as final arbiter, though the Court itself is one of the pillars of the very tripartite system of government which may have given rise to the dispute." *In re Hill*, 149 Vt. 431, 438 (1988). *Hill* involved disputes between the prosecuting authorities and various judicial officials. *See id.* at 432. The Attorney General's interpretation of Sections 152, 157, and 159 grants the Office veto power over all cases by state officers. If that is a correct reading of the statutes, then the General Assembly has unconstitutionally restricted the power of the State's judiciary by granting the Attorney General the power to deny access to the Courts.

F. The Attorney General's Reading Of The Statutes Violate Other Constitutional Guarantees.

In this particular case, the Attorney General cannot make the decision about whether litigation against the Office of the Attorney General or the Attorney General is worth pursuing or not. Vermont law recognizes that people who have bias cannot make decisions about their own cases. "We hold, therefore, that under our constitutional provision, bias or prejudice on the part of a judge, existing to such an extent that an impartial hearing cannot be had, will disqualify him, and, if objection is properly made, result in his recusation. The Constitution, in this respect, is self-executing, and is of full effect, whether or not the Legislature has acted with reference to its subject-matter." *Leonard v. Wilcox*, 101 Vt. 195, 214 (1928) *relying on* Chapter II, Section 28; *see also Auger v. Auger*, 149 Vt. 559, 561 (1988). Here, the Attorney General cannot make the biased decision of whether litigation should proceed against the Attorney General or the Office of the Attorney General.

The decision of the Attorney General also deprived the Auditor of Accounts access to the Courts, another right protected by the Vermont Constitution. "Free and uninhibited access to the courts is 'an important right of all citizens' enshrined in the Vermont Constitution." *Weinstein v. Leonard*, 2015 VT 136, ¶ 24 (2015) *citing Jacobsen v. Garzo*, 149 Vt. 205, 208 (1988). That right "is recognized by our fundamental law. Vt. Const. ch. I, art. 4." *Garzo*, 149 Vt. at 208. The Attorney General's use of Section 159 to attempt to block the Auditor's suit violates Vt. Const. Chap. I, art. 4.

G. Under The Judiciary's Traditional Standing Inquiry, Both Auditor And Citizen Hoffer Have Standing To Pursue This Litigation.

Vermont Constitutional Officers raising Vermont Constitutional issues pose special standing concerns. *See Ferry v. City of Montpelier*, 2023 VT 4, ¶¶19-21. The Vermont Supreme Court has sustained officer standing on multiple occasions. It did so without reference

to the federal standing requirements. In *Grant v. Gates*, the Secretary of State sued the Auditor of Accounts. Without reference to complicated standing theories, the Court approved of the practice: "[T]he importance and difficulty of the questions here involved are such that the complainant was justified in bring this action, and the defendant was equally justified in defending it." 97 Vt. 434, ___, 124 A. 76, 82 (1924). In *City of Montpelier v. Gates*, 106 Vt. 116, 125, 170 A. 473, 476 (1934), the Court held that the Auditor had the authority to question the constitutionality of certain expenditures: "It is argued that these defendants, for lack of interest in the result, cannot question the constitutionality of the act. There has been some conflict in the decisions on this question. But it has come to be quite generally held – upon sound legal principles we think – that where, as here, the officer involved is not a ministerial officer of subordinate authority, but one who will, under his oath of office, violate his duty or otherwise render himself liable by the performance of the act enjoined upon him by the statute in question, if invalid, he is sufficiently interested to enable him to raise the question of the validity of the statute in a mandamus proceeding to compel him to comply therewith." *See also* Vt. Const. Chap. II Section 56. The Court concluded: "Upon the plainest legal principles, they have the right to raise the Constitutional questions here presented." The Court reached the same conclusion in *Dean v. Bates* when the Secretary of State sued on a bond that the Treasurer was constitutionally obligated to provide: "We find no difficulty in adopting the conclusion that the Secretary of State had the capacity of suing, ***as an incident and in the right of his office***, upon the official bond of the Treasurer, and that this capacity passed with his office to his successor." 36 Vt. at 395 (emphasis added)."

These decisions alone are sufficient to establish the Auditor's standing. Nevertheless, federal standing analysis also supports the Auditor's standing in this case. To establish standing

under the federal constitution, plaintiffs must show (1) injury in fact, (2) causation, and (3) redressability. *Brod,* 2007 VT 87, ¶ 9. Here, Plaintiffs can establish standing.

First, as far as injury in fact, the Auditor of Accounts is suffering several types of injury that are consistent with the federal concept of injury in fact. The Office of Auditor of Accounts suffers "institutional injury." *See Arizona State Legislature v. Independent Redistricting Comm'n*, 576 U.S. 787, 802 (2015); *see also Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (noting the special status that a sovereign state has in standing analysis). Neither Plaintiff can do their job properly without obtaining the legal advice that they seek from the Attorney General. SOF ¶¶14-19; *infra* at 35-37.

Federal courts have recognized that governmental officers have standing to pursue litigation. In *Loment v. O'Neill*, the D.C. Circuit Court of Appeals held that the Sheriff of Orange County, Vermont had standing to challenge certain firearms regulations under the Tenth Amendment of the United States Constitution. The D.C. Circuit rejected the argument that the "chief law enforcement officers have standing only if they are authorized by state law to act on behalf of the State." 285 F.3d 9, 13 (D.C. Cir. 2002). The D.C. Circuit rejected the precise argument that the Attorney General makes here.

Other courts have held that standing exists for other state officers. The Eighth Circuit held that a state senator had standing to challenge a state constitutional amendment instructing state officials to seek federal term limits. *Miller v. Moore*, 169 F.3d 1119, 1122 (8th Cir. 1999). The Court held that the senator had standing because the Amendment "would seriously jeopardize his chances of reelection and threaten his political career and livelihood." *Id.* The Arizona State Legislature had standing to challenge the process by which Arizona handled redistricting. *Arizona State Legislature v. Independent Redistricting Comm'n*, 576 U.S. 787, 802

(2015). The Court emphasized that the Legislature had standing because it suffered "an institutional injury . . ." *Id.* Like the Arizona State Legislature, the Auditor is suffering institutional injury because it cannot complete its audits consistent with its constitutional, statutory, and professional duties. *See* SOF ¶¶ 22-24. The Auditor believes that pursuing this action is consistent with the duties required by his constitutionally required oath of office. *City of Montpelier v. Gates*, 106 Vt. 116, 125, 170 A. 473, 476 (1934).

In addition, the Auditor as a person suffers damage to his reputation and political career. *Meese v. Keene*, 481 U.S. 465, 475 (1987); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003).

The Auditor is also suffering informational injury. Section 159 grants the Auditor the right to certain information like a "written opinion." By failing to provide that information, the Attorney General is creating informational injury to the Auditor of Accounts. *Federal Election Com'n v. Akins*, 524 U.S. 11, 21 (1998); *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982). In this case, the information injury takes two forms. First, the Auditor in its institutional capacity needs the information to complete its audits. Second, Douglas Hoffer in his citizen capacity is deprived of the information that would be present in a full and complete audit. The Vermont Supreme Court has recognized that a citizen has standing to sue Constitutional Officers to obtain information. *Clement v. Graham,* 78 Vt. 290, 318, 330, 63 A. 146, (1906) ("For this purpose, under reasonable rules and regulations, to inspect the public records and public documents there kept is a right which rests with the citizens and taxpayers of the state.") Both the Office of the Auditor of Accounts and Doug Hoffer in his citizen and taxpayer capacity have standing because of the information injury to them.

Second, the Attorney General's refusal to provide that opinion is what is causing injury to Plaintiffs. Third, the Court can redress that injury by issuing a declaration that the Attorney General must issue the opinion to the Auditor of Accounts. *See Foretich*, 351 F.3d at 1214 ("A declaratory judgment that the government's actions were unlawful will consequently provide meaningful relief."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992).

H. This Court Is Free To Recognize The Auditor's Power To "Audit" Based On Chapter II, Section 26.

The *OneCare* case provides the best example of why the Auditor of Accounts should have the authority to choose and hire its own independent counsel. During the briefing, OneCare made the argument that the Auditor's powers were solely statutory. Exhibit 1 at 4. Apparently not recognizing the significance of the argument, the Office of the Attorney General let the argument pass largely unchallenged. Exhibit 2. It likely matters little to the Attorney General whether the power of the Auditor is statutory or constitutional. It matters a lot to the Auditor.

There are strong arguments for the Auditor's Constitutional power to "audit." *Supra* at 12-22. Of course, a court can act only on the arguments presented to it. The Office of the Attorney General denied the Vermont Supreme Court the benefit of full and complete briefing on the powers of the Auditor of Accounts, which was one of the central issues in the case: "In sum, neither the OneCare-DVHA contract nor the statutes governing the Auditor's authority give the Auditor the right to access OneCare's accounting records." *Vermont State Auditor v. OneCare Accountable Care Organization, LLC*, 2022 VT 29, ¶ 26.[8] In the course of the opinion, the Court determined that: "The Vermont Constitution provides for the election of an Auditor of

[8] The Vermont Supreme Court has recognized the importance of complete briefing when Constitutional questions arise. *Jewett*, 146 Vt. at 229. By pointing out these facts, the Auditor does not intend to impugn any particular individual. Being a lawyer is hard. Nevertheless, the net effect is that the Vermont Supreme Court reached the wrong conclusion.

Accounts, see Vt. Const. ch. II, §§ 43, 48, but does not vest that position with any specific powers. The scope of the Auditor's authority is instead defined by the Legislature." *Id.* ¶ 18. Based on the arguments contained in this brief, the statement is likely overbroad or simply incorrect as a matter of law.

Given the limited arguments presented to the Supreme Court, the scope of *OneCare* is narrow. The Court did not purport to address whether the Auditor had the authority to sue. It did not address the numerous cases where Vermont State Officers brought their own lawsuits using their own counsel. In fact, the Court had no issue with the case being brought in the name of the "Vermont State Auditor." Moreover, while the Court addressed Chapter II, Sections 43 and 48, the Court did not address Chapter II, Section 26, the history behind the provision or other related tools of Constitutional construction. Because the Vermont Supreme Court did not address these issues, this Court is free to do so in the first instance.

II. PLAINTIFFS HAVE STATED A CLAIM UNDER THE DECLARATORY RELIEF ACT.

The Court should grant judgment on the two declaratory judgment counts. The Court should proceed to the mandamus issues only if the Attorney General ignores this Court's Declaration. *See* 12 V.S.A. § 4718.

The Declaratory Judgment Act was a procedural innovation designed to give Courts more freedom to define the rights of the parties. One of the proponents of the innovation in the United States described it in optimistic terms.[9] "In early times the basis for jurisdiction is the existence

[9] Many have recognized the importance of Professors Borchard and Sunderland to the wide spread adoption of declaratory relief in the United States. *See* Wright *et al.*, Federal Practice and Procedure § 2752 n. 4.

and the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential." Edson Sunderland, "A Modern Evolution in Remedial Rights – The Declaratory Judgment," 16 Mich. L. Rev. 69, 69 (1917). "This is respect for law. If the parties to the action desire to obey the law, a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the State in the faces of the litigants." *Id.*

Vermont recognizes the procedural flexibility of the Declaratory Judgments Act. "The Declaratory Judgments Act is a remedial statute entitled to a liberal construction to effectuate its salutary purpose." *Neal v. Brockway*, 136 Vt. 119, 121 (1978). The existence of another adequate remedy is not a bar to a declaratory judgment where an actual controversy exists. *Id.* "The purpose of a declaratory judgment is to provide a declaration of rights, status, and other legal relations to the parties to an actual or justiciable controversy." *Negotiations Cmte.* of *Caledonia Central Supervisory Union v. Caledonia Central Ed. Assoc.* 2018 VT 18, ¶ 9. Because the Civil Division is a court of general jurisdiction, it has presumptive jurisdiction over Declaratory Judgment Proceedings. *Id.*; *Maier v. Maier*, 2021 VT 88, ¶ 35. That jurisdiction is broad. 4 V.S.A. § 31 grants the Civil Division "original and exclusive jurisdiction of all original civil actions" unless given to another specialized Division of the Superior Court. *See also Burlington School Dist. v. Provost,* 2019 VT 87, ¶ 16. The Civil Division also has original, concurrent jurisdiction of proceedings in certiorari, mandamus . . ." 4 V.S.A. § 31(3). The processors to the Civil Division have exercised jurisdiction over several cases where the duties of a State Officer were in doubt. *See infra* at 41-42. The Civil Division also a residual jurisdiction if

no other court has jurisdiction. 4 V.S.A. § 31(5). The Civil Division's jurisdiction is broad enough to cover the issues in this case.

The Declaratory Judgment Act allows parties within the Court's jurisdiction to petition the Court for declaratory relief at an early stage of the proceedings. *Burlington School Dist. v. Provost*, 2019 VT 87, ¶ 14. In fact, the Vermont Supreme Court has entered judgment for a party on appeal after it won reversal of the trial court's dismissal of a declaratory judgment claim. *Negotiations Cmte.* of *Caledonia Central Supervisory Union v. Caledonia Central Ed. Assoc*. 2018 VT 18, ¶ 11. The requirements to maintain a claim under the Declaratory Relief Act are not stringent. There must be an actual controversy. *Burlington School Dist. v. Provost*, 2019 VT 87, ¶ 14. The Plaintiff must also show that declaratory relief would serve to clarify the legal relations of the parties and provide them certainty regarding the controversy between them. *Id*. ¶ 15. The Vermont Supreme Court reversed the dismissal of a Declaratory Judgment Action when the Civil Division had jurisdiction and the matter was ripe. *Caledonia Central Ed. Assoc*. 2018 VT 18, ¶ 11.

Here, the Auditor has alleged all the prerequisites for an action for declaratory relief. There is an actual controversy between the parties. Compl. ¶ 7-10, 15, 26. A declaratory judgment from this Court would clarify the legal relations of the parties. *Id*. ¶ 17, 28. It would also provide certainty regarding the controversy between the Auditor and the Attorney General. *Id.* ¶ 18, 29.

Despite what the Attorney General says in its brief before the Court, the Attorney General agrees that there is an actual controversy between the parties. Hoffer Ex. 4 at 1. The Attorney General outlines three areas of disagreement between the parties: "a) we do not concede any cause of action you may assert entitles you to a court-ordered Attorney General

opinion. *See e.g.*, 3 V.S.A. §§ 152, 153, 157, 159; (b) we do not concede any cause of action you may assert entitles you to a court-ordered Attorney General opinion, particularly one related to actions or potential actions of a local entity; and (c) we do not concede the statute you rely on, 3 V.S.A. § 159, governs requests for legal opinions regarding the actions of third-party entities that are subject to performance audits." *Id.* As this brief shows, the Auditor disagrees with each of the Attorney General's assertions. Moreover, the Auditor insists that it has the legal right to require that the Attorney General perform its duty under 3 V.S.A. § 159. Thus, live controversies exist between the parties. In addition, the Auditor and the Attorney General disagree that the Auditor has the power to assert its own claims in Court and to hire its own counsel.

Nor is the Auditor seeking an advisory opinion. The Vermont Supreme has decided numerous cases where it defined official duties. *Infra* at 41-42. The Court clearly thought that it had the jurisdiction in all these cases to decide them and that it was issuing binding decisions.

The Attorney General raises three arguments in support of dismissing the Auditor's claims for a declaratory judgment: (1) the Auditor in its official capacity lacks standing; (2) Douglas Hoffer in his capacity as a citizen lacks standing; and (3) the Auditor in its official capacity lacks a legally cognizable injury. The Auditor has addressed these standing issues in depth in Section I.

III. THE COURT SHOULD ENTER A JUDGMENT DECLARING THAT THE ATTORNEY GENERAL MUST RESPOND TO THE TWO QUESTIONS OF LAW.

The Auditor has the express Constitutional power to audit that includes the implied power to sue and be sued. *Supra* at 10-22. The express power to audit also includes the power to seek legal opinions from state officials. The Auditor also has the statutory authority and the

Attorney General has the statutory obligation to respond substantively to the Auditor's questions of law.

A. The Auditor's Constitutional Power To Audit Includes The Power To Obtain A Legal Opinion From State Officials.

History again shows that the power to audit included the power to obtain interpretation of the law from governmental officials. *State v. Hance,* 2007 VT 357, ¶ 10. ("We have found an understanding of the constitutional provision's historical context to be a most helpful tool for determining the meaning of the provision, and we have often relied on that context to illuminate the meaning of our Constitution.") In the process of settling Ira Allen's accounts with the Auditor, the Governor and the Council provided interpretations on Vermont law on whether State must reimburse whether certain expenses: "The laws, ***as construed by the Governor and the Council,*** allow me nothing for my time and expense in attending the Governor and the Council for settlement, for advertising the same in the papers . . . ." James Benjamin Wilber, Ira Allen: Founder of Vermont, 1751-1814 (Boston and New York: Houghton Mifflin Co. 1928) 488(emphasis added). This historical context shows that the Auditor has relied on Executive branch opinions about Vermont state law since the early days of Vermont.

B. The General Assembly Has Unambiguously Required The Attorney General To Provide Written Opinions To Vermont Officers Upon Request.

The Auditor has the Constitutional power to "audit." While the Court could rest a decision against the Attorney General on that basis, the Court need not reach that issue because the statutes empower the Auditor to seek answers to questions of law from the Attorney General.

1. 3 V.S.A. §159 Requires The Attorney General To Answer The Questions Of Law That The Auditor Requested.

The General Assembly has used unambiguous language to describe the Attorney General's obligation to provide legal opinions to Vermont state officials: "The Attorney General

shall advise the elective and appointive State officers on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested." 3 V.S.A. § 159.

In its November 1, 2023 letter the Attorney General admitted that the Auditor of Accounts "requested" an "opinion" on "questions of law." "We understand you have ***requested*** an Attorney General opinion relating to three ***questions*** regarding ***tax increment financing***." Hoffer Ex. 2 at 1 (emphasis added). The Attorney General also conceded that the request was pursuant to the official duties of the Auditor: "We further understand the inquiry by the Auditor's Office is pursuant to the Auditor's statutory charge to conduct performance audits of TIF districts and include review of a municipality's 'adherence to relevant statutes and rules adopted by the Vermont Economic Progress Council.'" Hoffer Ex. 2 at 1 *quoting* 32 V.S.A. 5404a(1). The Attorney General also concedes that the Auditor is an elected officer of the State of Vermont. Mot to Dismiss at 14.

Given these concessions, the duty described in Section 159 is mandatory. *State v. Hemingway*, 2014 VT 48, ¶ 11("the imperative 'shall' indicates that the provision is mandatory"); *In re Green*, 2006 VT 88, ¶ 2 (holding that "shall" describes a mandatory duty). The Attorney General has no discretion about ***whether*** to issue an opinion.

2. Other Sections Of The Vermont Statutes Support The Auditor's Power To Ask The Attorney General To Provide The Attorney General's Opinion On Vermont Law.

In addition to the unambiguous language of Section 159, the General Assembly has provided the Auditor specific authorization and required the Auditor to request the Attorney General's legal opinion because of the duties of an auditor. Under 32 V.S.A. § 163(a)(C), the "Auditor of Accounts shall . . . annually perform or contract for . . . at his or her discretion, governmental audits as defined by the governmental auditing standards issued by the U.S. Governmental Accountability Office (GAO) of every department, institution, and agency of the

State . . ." The standards promulgated by the GAO are commonly referred to as "GAGAS" and are collected in a publication called the "Yellow Book."

The Yellow Book, and, by incorporation, Vermont statutes explain the need for government auditing as an essential part of the information that the people need to make decisions about their elected officials. *See Dept. of Auditor Gen. v. State Employees' Retirement Sys.*, 860 A.2d 206, 210 (2004) (using GAGAS standards to define Constitutional power to audit). "As reflected in applicable laws, regulations, agreements, and standards, management and officials of government programs are responsible for providing reliable, useful, and timely information for transparency and accountability of these programs and their operations." Section 1.03 of the Yellow Book. Of course, government officials are not always forthcoming. As a result, "[g]overnment auditing is essential in providing accountability to legislatures, oversight bodies, those charged with governance, and the public. GAGAS engagements provide an independent, objective, nonpartisan assessment of the stewardship, performance, or cost of government policies, programs, or operations, depending on the type and scope of the engagement." Section 1.05 of the Yellow Book.

The specific statute that deals with tax increment financing specifies the type of audit the Auditor of Accounts should perform. 32 V.S.A. § 5404a(l) requires that "the State Auditor of Accounts shall conduct performance audits of all tax increment financing districts." "Audits conducted pursuant to this subsection shall include a review of a municipality's adherence to relevant statutes and rules adopted by the Vermont Economic Progress Council pursuant to subjection j of this section." *Id.*

The Yellow Book, and, by incorporation, Vermont statutes define what a "performance audit" is. Section 1.21 states that "[p]erfomance audits provide objective analysis, findings, and

conclusions to assist management and those charged with governance and oversight with, among other things, improving program performance and operations, reducing costs, facilitating decision making by parties responsible for overseeing or initiating corrective action, and contributing to public accountability."

GAGAS requires that auditors be both independent and competent to perform the work required. GAGAS Section 3.18 requires that "[i]n all matters relating to the GAGAS engagement, auditors and audit organizations must be independent from an audited entity." Similarly, Section 3.19 requires that "Auditors and audit organizations should avoid situations that could lead reasonable and informed third parties to conclude that the auditors and audit organizations are not independent and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the engagement and reporting on the work."

Section 4.02 of GAGAS requires that "[t]he audit organization's management must assign auditors to conduct the engagement who before beginning work on the engagement collectively possess the competence needed to address the engagement objectives and perform their work in accordance with GAGAS." When an auditor does not have the competence necessary to perform a particular tasks GAGAS requires that the audit team have other qualified individuals provide that assistance. Section 4.12 requires that the "engagement team should determine that specialists assisting the engagement team on a GAGAS engagement are qualified and competent in their areas of specialization."

GAGAS provides a method for complying with the competency requirements when the outside specialist needed is a lawyer. Under Section 8.69, "Auditors may consult with their legal counsel to (1) determine those laws and regulations that are significant to audit objectives, (2) design tests of compliance with provisions of laws and regulations, and (3) evaluate the results of

those tests." Section 8.69 explains that "Government programs are subject to many provisions of laws, regulations, contracts, and grant agreements."

To maintain the public's faith in the auditor's independence and to avoid an appearance of partisan behavior that Section 1.05 discourages, the Auditor of Accounts determined that he should follow the procedure outlined in Vermont law for obtaining a legal opinion. *See* SOF ¶¶ 14-19. The opinion of a state official charged with providing opinions in the normal course of its business is the one that is likely to appear and be most independent. *Id.* Having the Auditor retain independent counsel creates the appearance that the Auditor is attempting to influence the outcome of the audit. That would create issues under Section 3.18 and 3.19 of the Yellow Book. That procedure is 3 V.S.A. § 159. Under Section 4.12 of the Yellow Book, the decision of what specialist to seek belongs to the Auditor.

3. The Attorney General's Characterization Of Its "Opinion" As Advice Does Not Excuse Its Failure To Answer "Questions Of Law."

The Attorney General incorrectly resorts to the rhetorical device of characterizing the issue as an "appeal of legal advice." Mot to Dismiss at 1. The Attorney General argues that "Plaintiffs seek to use Rule 75 and Vermont's Declaratory Judgments Act to compel legal advice from the Attorney General pursuant to 3 V.S.A. § 159. Mot to Dismiss at 3; *see also id.* at 5 ("A client seeks to appeal legal advice he dislikes.")

The Auditor is not seeking legal "advice" in the rhetorical sense that the Attorney General invokes. In the language of Section 159, the Auditor is seeking a "written opinion" on two "questions of law" that the Auditor "requested." "Opinions" answer "questions of law" "requested" by "State Officers." The Attorney General has not answered these questions. Instead, it has explained why it should not have to answer these questions. Undifferentiated

"advice" that fails to answer the "questions of law" "requested" by "State Officers" does not fulfill the duty that the Attorney General has.

The Vermont Supreme Court has described the status of Attorney General "opinions" under Vermont law. "The opinions of the Attorney General are, however, merely advisory opinions for the benefit of state officers." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 206 (2000). "They have no binding effect in this Court." *Id.* Despite this holding, the Supreme Court indicated in its choice of parentheticals that "reasoned opinion should be accorded respectful consideration" and the "court will follow them if they are persuasive." *Id.* Thus, the opinion occupies some quasi-official status.

Okemo Mountain shows why the Attorney General should not be concerned about third parties. The "opinion" of Section 159 is "for the benefit of state officers." Municipal officials are not "state officers." Moreover, because opinions do not have the force of law, third parties have no legitimate avenue to appeal them.

The Attorney General correctly notes that the legal opinions it creates are not like private legal advice. Mot. to Dismiss at 4-5 n. 4. The Auditor has been transparent about the legal opinions that it has received from the Attorney General. The Attorney General has also published its opinions publicly. Attorney General Opinions | Office of the Vermont Attorney General https://ago.vermont.gov/about-attorney-generals-office/attorney-general-opinions (last accessed January 15, 2024). The public nature of these opinions shows that they are not "advice" in the rhetorical sense that the Attorney uses the words in its argument. The Auditor is not appealling the advice; it wants the Attorney General to answer two questions of law.

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IV. THE AUDITOR HAS STATED A CLAIM FOR MANDAMUS AND UNDER RULE 75.

The pleading requirements for an action under Rule 75 are minimal. *Alger v. Department of Labor & Industry*, 2006 VT 116, ¶12. In reversing the dismissal of a claim for mandamus, the Vermont Supreme Court reiterated its long-standing rule that a motion to dismiss is not favored and rarely granted. *Id.* The Court noted that this "is especially true when the asserted theory of liability is novel or extreme, as such cases should be explored in the light of facts as developed by the evidence, and generally, not dismiss before trial because of the mere novelty of the allegations." *Id.* (cleaned up). The Court noted that Rule 75 relaxed the formal requirements for bringing a claim for mandamus: "To the extent Rule 75 alters the requirements of mandamus, it relaxes its formal requirements—for instance, by eliminating responsive pleading requirements at the discretion of the court, and by allowing amendment to permit a defective Rule 75 claim to be brought as an ordinary civil action." *Id.* ¶ 13. "In the context of a motion to dismiss, though, we need to consider only two broad preliminary questions to determine whether plaintiffs' complaint is sufficient to survive dismissal and allow further factual development: (1) whether there is some minimum standard of conduct with which the Department must comply; and (2) whether plaintiffs' complaint alleges that the Department has failed to comply with that standard." *Id.* ¶ 20. Plaintiffs have alleged precisely this. "Section 159 sets a minimum standard of conduct with which the Attorney General must comply. The Attorney General has refused to comply with its duty and the minimum standard established by Section 159. The Attorney General's refusal to act is so arbitrary that it can be characterized as the nonperformance of its duties." Compl. ¶ 13.

"A Rule 75 complaint must contain a concise statement of the grounds upon which the plaintiff contends the plaintiff is entitled to relief and shall demand the relief to which the plaintiff believes the plaintiff to be entitled." *Richards v. Town of Norwich*, 169 Vt. 44, 49

(1999) (citation omitted). "A complaint need not provide a detailed statement of facts that constitute a cause of action, but must be sufficiently clear to enable the defendant to respond." *Id.* "The sufficiency of a complaint depends on whether it provides fair notice of the claim and the grounds upon which it rests." *Id.*

Here, the Complaint has a concise statement of the grounds upon which the Auditor claims that it is entitled to relief. First, the Auditor notes that it is a Constitutional Officer under Vermont's Constitution. Compl. ¶ 3. Second, the Auditor notes the statute that requires the Attorney General to provide written opinions to elective State officers on questions of law when requested. Compl. ¶ 7. Section 159 is not complex. It simply commands the Attorney General to provide the opinions. Third, the Complaint has provided the Attorney General more than enough information to provide fair notice of the claim. The Attorney General was not at all confused when it attached its 10 pages of excuses explaining its failure to perform its mandatory statutory duty. The Vermont Supreme Court does not require the Auditor to allege any more.

V. ABSENT A DECLARATORY JUDGMENT, THE COURT SHOULD ENTER A WRIT OF MANDAMUS ORDERING THE ATTORNEY GENERAL TO ANSWER THE FIRST TWO QUESTIONS THAT THE AUDITOR POSED.

Rule 75 recognizes that a plaintiff may obtain relief under Rule 75 if that plaintiff could obtain relief under one of the ancient common law writs like mandamus or certiorari. The Vermont Supreme Court has permitted appeals "under Rule 75 so long as review would have been available under any one of the extraordinary writs, such as mandamus, scire facias, prohibition, quo warranto, and certiorari." *Vermont State Employee's Ass'n, Inc. v. Vermont*

Criminal Justice Training Council, 167 Vt. 191, 195 (1997). Here, the writs of mandamus and certiorari are available to review the Attorney General's refusal to perform its duties.[10]

The Vermont Supreme Court has often issued writs of mandamus against Vermont governmental officials. *See, e.g., Peck v. Powell*, 62 Vt. 296 (1890) (writ of mandamus issued to auditor of accounts based on statutory duty to audit accounts that arise out of the prosecution of a crime); *Fay v. Barber*, 72 Vt. 55 (1899) (issuing some writs of mandamus to the auditor and denying requests for other writs of mandamus requested by justice of the peace); *Clement v. Graham*, 78 Vt. 290 (1906)(issuing writs of mandamus to the Auditor of Accounts to allow petitioners access to certain vouchers on file with the Auditor); *Grout v. Gates*, 97 Vt. 434 (1924); *City of Burlington v. Mayor of City of Burlington*, 98 Vt. 388 (1925) (issuing writ of mandamus to Mayor of Burlington to sign bonds for construction of school building on the Edmunds property); *Scott v. Gates*, 99 Vt. 335 (1926); *City of Montpelier v. Gates*, 106 Vt. 116 (1934); *State Highway Bd. v. Gates*, 110 Vt. 67 (1938); *Parker v. Anderson*, 112 Vt. 371 (1942); *Button's Estate v. Anderson*, 112 Vt. 531 (1942); *Eastern Advertising, Inc. v. Cooley*, 126 Vt. 221, 223 (1967) (mandamus issued to the Secretary of State to issue a permit for a billboard); *Monti v. State*, 151 Vt. 609 (1989) (granting petition for extraordinary relief against Superior Court Judge O'Dea); *Roy v. Farr*, 128 Vt. 30, 37-38 (1969) (issuing writ of mandamus to the Richmond Board of Health to enforce orders about open sewers); *Blake v. Betit*, 129 Vt. 145, 151 (1971) (issuing writ of mandamus to Commissioner of Social Welfare to make retroactive payments to plaintiff); *Petition of Fairchild*, 159 Vt. 125 (1992) (granting writ of mandamus to zoning official to enforce zoning rules).

[10] Plaintiffs' initial assessment is that the writ of mandamus is the correct analogy under Rule 75. Depending on the rulings of the Court, certiorari may be more appropriate. In that event, Plaintiffs seek leave to amend their complaint to assert such a claim. V. R. Civ. P. 15.

The Vermont Supreme Court has issued writs of mandamus in circumstances that go far beyond the black law recitations of when mandamus is warranted. Rather than reinvigorating the tired recitation of the formulas for ancient writs, the sum of these cases and the trend over the years is that the Vermont Supreme Court orders government officials to perform their duties when the obligation is clear enough. For example, the Vermont Supreme Court issued a writ of mandamus to the Auditor of Accounts to allow a private citizen to review vouchers on file as public records. *Clement v. Graham*, 78 Vt. 290, 63 A. 146 (1906). The Court reviewed the duties as set out in statute. *Id.* at 151-52. Not finding the duty in the statute, the Court held that the "right in respect to vouchers, files, papers, and records *is impliedly recognized* by the act of 1904." *Id.* at 153. Notwithstanding that the duty was only implied, the Court nonetheless issued the writ to the Auditor to allow the inspection. *Id.* at 158-59.

The Court has also issued mandamus when the statute authorizing the official to act makes plain that the official has discretionary power. *Roy v. Farr*, 128 Vt. 30 (1969). In *Roy*, the Court issued a writ of mandamus to the Richmond Board of Health. The Court entered that order even though statute clearly gave discretion to the government. Rejecting the defendants' argument that their duty was discretionary, the Court reasoned: "This required a determination based on his inquiry that the condition was detrimental to public health and created an unhealthful condition. It was at this point that the judgment and discretionary action came into play and was exercised. After the decision was made to issue the order of removal there remained only the action of the board to have the condition removed upon non-compliance with the order. This required neither an inquiry of fact nor exercise of judgment or discretion. Each had already been exercised." *Id.* at 35.

Moreover, the Court has recognized that a mandamus may issue even though there is discretion involved with how to carry out a duty. "The administrative officer has no discretion ***as to whether to enforce*** the bylaws in this case; the officer must do so." *Petition of Fairchild*, 159 Vt. 125, 130 (1992) (emphasis added).

Maple Run Unified School Dist. v. Vermont Human Rights Comm'n, 2023 VT 63 makes the same point. The Court noted that "we agree with the District that 'shall be dismissed' in §4554(b) requires the Commission to dismiss each complaint that it determines does not state a *prima facia* case of discrimination based on peer to peer harassment." *Id.* ¶ 15. Where the Court found that mandamus was not warranted was in an attempt to overrule the Human Rights Commission's decision that a prima facia case exists. "The Commission had no affirmative duty to agree with the District's argument; it merely had an affirmative duty imposed by § 4554(a) to determine whether the complaint stated a prima facia case before accepting it for investigation." *Id.* ¶ 17. The District in *Maple Run* was not trying to get the Commission to do its job – it disagreed with the Commission's actions after it had done its job.

The opposite is true here. The Auditor is not seeking to appeal advice given. It is challenging the Attorney General's failure to give an opinion in the first place. Specifically, the Attorney General has failed to answer two "questions of law" that the Auditor "requested" that the Attorney General answer. *See* 3 V.S.A. § 159. The Attorney General has a mandatory nondiscretionary duty to do its job – issue a responsive written opinion. The Auditor only cares that the Attorney General give a responsive answer; the Auditor has no interest in the particular result that the Attorney General reaches. The Attorney General's failure to even begin the process qualifies as a "practical refusal to perform a certain and clear legal duty." *See Maple Run Unified School Dist.*, 2023 VT 63, ¶ 11.

The Attorney General also attempts to avoid its duties by citing to 32 V.S.A. § 5404a, but "a decision which rests solely on the construction of a statute does not involve that exercise of judgment which the law contemplates." *State v. Howard*, 83 Vt. 6, 74 A. 392, 395 (1909); *Eastern Advertising, Inc. v. Cooley*, 126 Vt. 221, 222 (1967) ("A decision of a public officer resting solely on the construction of a statute does not involve such an exercise of judgment as will bar mandamus.") In other words, legal interpretation of a statute does not bar an action for mandamus. Thus the job of interpreting 32 V.S.A. § 5404a, or 3 V.S.A § 159, will not bar the issuance of a write of mandamus.

Moreover, Section 5404a is consistent with 3 V.S.A. § 159 – not contradictory. *See* Mot. to Dismiss at 11-12. The Attorney General points to Section 5404a(j) in an attempt to excuse its failure to comply with its duties. Solely focusing on Section 5404a(j) ignores entirely the Auditor's obligation to conduct a performance audit under Section 5404a(l). Section 5404a(l) requires the Auditor to conduct a "review of a municipality's adherence to relevant statutes and rules adopted by the Vermont Economic Progress Council pursuant to subjection j of this section." The General Assembly expected the Officers of the State to work together to ensure that municipalities used the people's money wisely when the General Assembly granted them a tax break. All provisions of a statute should be read together to help rather than hinder the Auditor in the performance of its duty under Section 5404a(l). *See Town of Calais*, 173 Vt. at 621.

Section 5404a(j) provides no excuse for the Attorney General not to meet its duties to the Auditor under Section 159. First, none of these subsections of Section 5404a(j) discusses the Auditor of Accounts. Second, Section 5404a(j) outlines roles for creating law, not providing opinions and, under subsection(j), the Attorney General has no obligation to provide either.

Section 5404a(j)(1) gives the Vermont Economic Progress Council the "authority to adopt rules in accordance" with Vermont's Administrative Procedures Act. Section 5404a(j)(2) gives the Secretary of Commerce and Community Development the authority "to issue decisions to a municipality on questions and inquiries concerning the administration of tax increment financing districts. . ." Section 5404a(j)(3) provides the Secretary of Commerce and Community Development the power to request that the Treasurer "bill the municipality for the total identified underpayment" when the Secretary finds "noncompliance and that noncompliance has resulted in the improper reduction in the amount due the Education Fund. . ." Section 5404a(j)(4) grants the Secretary the power to "refer the matter to the Office of the Attorney General with a recommendation that an appropriate civil action be initiated."

The only conflict that the Attorney General even hints at is a possible future conflict with the Secretary's referral power to the Attorney General for possible civil enforcement. But the Secretary's referral power under Section 5404a(j)(4) does not change anything about the Attorney General's power to bring civil actions. That power appears in 3 V.S.A. § 157. Section 5404a(j)(4) does not require the Attorney General to do anything. Section 5404a(j)(4) only grants the Secretary a power to suggest that to the Attorney General that a civil action is appropriate. Additionally, providing an opinion on questions of law should be consistent with the decision about whether to bring a civil action. All attorneys have obligations under Rule of Civil Procedure 11 to present "claims, defenses, and other legal contentions [that] are warranted by existing law or by a nonfrivolous argument for the extension. . ." Vt. R. Civ. P. 11(b). Answering the Auditor's two "questions of law" should be consistent with the Attorney General's obligations under Rule 11, which requires the Attorney General to research the law

prior to bringing legal claims. Thus, the work done under Section 159 would also have to be done under Rule 11 and the result of that legal research should be the same.

Subsections (j) and (l) of Section 5404a work together to detect non-compliance with TIF requests. In making a determination of whether a municipality is not in compliance with TIF requirements, the Secretary receives input from several state wide offices. Subsection 5404a(j)(2)(A) grants the Secretary the authority to issue decisions based on the Auditor's report from Section 5404a(l). Subsection 5404a(j)(2)(B) authorizes the Vermont Economic Progress Council to provide recommendations to the Secretary "in consultation with" state wide officers, "the Commissioner of Taxes, the Attorney General, and the State Treasurer." Sections 5404a(j) & (l) envision that the Officers work together to provide the Secretary with the best information possible. The Attorney General's refusal to provide an opinion undermines that cooperation and the purposes of Section 5404a.

The Attorney General provides three additional reasons why it has no duty: (1) "there are no formal opinions about whether a local actor has complied with Vermont's tax increment financing laws;" (2) the Attorney General's Office has recently provided informal legal advice to Plaintiff Auditor and the Vermont Economic Progress Council regarding the latter's scope of rulemaking authority," and (3) the Attorney General's Office does not construe 3 V.S.A. § 159 to require an Attorney General opinion in all performance audits of third parties." *See* Motion to Dismiss at 10. None of these points affects the legal analysis that this Court must perform.

First, the Auditor is seeking an answer to two questions the Auditor asked. It needs the answer to provide a complete performance audit. The Auditor does not care whether the opinion is formal or informal. The Auditor never asked the Attorney General whether any particular third party complied with the law. It asked the Attorney General two questions of law. The

Auditor is charged under Section 5404a(l) with making its assessment of the municipalities compliance after it receives the opinion of the Attorney General. It is not asking the Attorney General to make that assessment.

Second, the fact that the Attorney General may have answered the third question does not relieve the Attorney General of the obligation to answer the first two questions. Because the undisputed facts show that the Auditor "requested" answers to these "questions of law," the Auditor triggered the Attorney General's obligation under Section 159. The Attorney General cannot avoid its obligations by pointing to a potential answer to the third question.

Third, the Attorney General's "interpretation" of its obligations of Section 159 holds no weight in a judicial evaluation of its duties. *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 206 (2000). Moreover, the General Assembly did not charge the Attorney General with the power to interpret Section 159 like it has done with various administrative agencies. *See* 3 V.S.A. § 159. No deference is due.

The Attorney General argues the canon of construction that the more specific statute controls, 32 V.S.A. § 5404a, over the more general statute, Section 159. *See* Mot. to Dismiss at 11-12 *citing In re Construction & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 19. That canon of construction is only applicable when there is a conflict between the two statutes. Here, there is no conflict between 3 V.S.A. § 159 and 32 V.S.A. § 5404a.

The Attorney General is apparently asking the Court to take judicial notice of a letter that the Office attaches to its Motion to Dismiss as Exhibit A. The Auditor has no objection to taking notice that the Auditor and the Attorney General sent and received correspondence. However, it is not clear exactly what part of Exhibit A the Attorney General is asking the Court to notice. The proponent must identify what they want the Court to take notice of under Fed. R. Evid.

201(d). *See United States v. Husein*, 478 F.3d 318, 337 (6th Cir. 2007) ("The government in the present case, however, has offered us nothing but a vague reference to 'westlaw.com.' Although the relevant information might well be available in one of Westlaw's many online databases, that fact alone, without any guidance from the government as to where in Westlaw one might locate the information, hardly fulfills the mandate of Rule 201(d).") It would not be appropriate to take notice of certain facts. For example, the Attorney General may be attempting to rely on statements like: "Specifically, they have resulted in repeated request for reconsideration and meetings with the Attorney General's Office by a municipality." Ex. A. at 5. The Auditor is not aware of the facts surrounding these meetings and requests that Attorney General has entertained. Without that knowledge, it does not even know whether it disputes these facts. The Court cannot take judicial notice when there is a dispute over the facts about which a party asks the Court to notice. "To start with, Rule 201(b) requires that a fact sought to be judicially noticed not be 'subject to reasonable dispute.'" *Id. quoting* Fed. R. Evid. 201(b). The Court cannot take judicial notice because the Attorney General has not supplied the Court or the Auditor with the necessary information.

VI. THE ATTORNEY GENERAL HAS NO INDEPENDENT CONSTITUTIONAL AUTHORITY THAT COULD SERVE AS A BASIS TO CONTEST THE AUTHORITY OF THE GENERAL ASSEMBLY AND THE GOVERNOR.

The Attorney General is *not* a Constitutional Office. *See McLaughlin v. State*, 161 Vt. 492, 498 n. 4 (1994). The only attorneys mentioned in Vermont's Constitution are State's Attorneys who represent particular geographic areas within the State. The General Assembly and the Governor created the Office of the Attorney General by enacting a statute. 3 V.S.A. chapter 7. The fact that the Attorney General is not a Constitutional Officer means that its authority is solely a creature of statute. Without its own Constitutional authority, the Attorney

General must follow Section 159 and cannot dispute the Auditor's efforts to have the Court interpret Section 159.

Dated: January 24, 2024

/s/ Matthew B. Byrne

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IN THE SUPREME COURT OF THE STATE OF VERMONT

SUPREME COURT DOCKET NO. 21-AP-271

THE VERMONT STATE AUDITOR, DOUGLAS R. HOFFER,
Plaintiff/Appellant

v.

ONECARE ACCOUNTABLE CARE ORGANIZATION, LLC,
d/b/a ONECARE VERMONT,
Defendant/Appellee

Appeal from
Vermont Superior Court
Civil Division, Washington Unit
Docket No. 21-CV-00174

APPELLEE'S BRIEF

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EXHIBIT
1

STATEMENT OF THE ISSUES

1. Whether the Superior Court properly held that the Auditor does not have statutory authority to demand records from or conduct an audit of a private business providing services to a State agency pursuant to a contract. *See infra* pp. 4-10.

2. Whether the Superior Court properly held that the "functional equivalence test" has no application to this case, which does not involve a request by the Auditor under the Public Records Act. *See infra* pp. 6-10.

3. Whether the Superior Court properly held that, under the unambiguous terms of the contract between DVHA and OneCare, the Auditor is not authorized to demand OneCare's payroll records. *See infra* pp. 10-16.

4. Whether dismissal of the Auditor's Complaint may be affirmed on alternative grounds not addressed by the Superior Court; namely, that the Auditor lacks standing to bring this claim against OneCare because he has not suffered injury in fact to a legally protected interest. *See infra* pp. 18-22.

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STATEMENT OF THE CASE

This case arises out of a demand for information made to Appellee OneCare Accountable Care Organization, LLC, d/b/a OneCare Vermont by Appellant, Vermont State Auditor Douglas R. Hoffer. Despite the fact that the Auditor's purview is clearly defined by statute and limited to State departments, institutions, and agencies, he has undertaken a multi-year campaign to obtain payroll records from OneCare because of his baseless claim that he needs—and is entitled—to know exactly how much OneCare pays each of its employees.

OneCare is an Accountable Care Organization ("ACO") that aims to improve healthcare outcomes for Vermont residents while stabilizing healthcare costs. It is a private business organized as a limited liability company operated in furtherance of its member's tax-exempt purpose and was recognized by the Internal Revenue Service as a 501(c)(3) organization in 2021.

OneCare has been operating in Vermont since 2013 and has participated in Vermont's All-Payer Model since its inception in 2017. As a Vermont ACO, OneCare is subject to extensive regulation and oversight by the Green Mountain Care Board, whose statutorily delegated authority includes oversight of ACO governance, operations, and budgets.

In 2020, the Auditor audited the Vermont Agency of Human Services, the Vermont Department of Health Access ("DVHA"), and the Green Mountain Care Board, with a focus on OneCare and Vermont's All-Payer Model. At the conclusion of the audit of relevant state agencies and entities, the Auditor continued his focus on OneCare. In March and April, 2020, the Auditor made an escalating series of demands of OneCare, ultimately asserting that he was entitled to records identifying every OneCare employee (by job title) and each individual's salary and benefits. Consistent with its legal obligations and in the interest of cooperation, OneCare directed the

Auditor to salary information included in its annual budget submissions, and agreed to provide a copy of the salary information required by IRS form 990.

Dissatisfied, the Auditor initiated this suit. He claimed that OneCare breached its contract with DVHA by declining to provide him with the information demanded. The Auditor advanced two primary theories as the source of his purported authority to obtain the information in dispute. First, he invoked his constitutional and statutory authority as Auditor. Second, he asserted that he is entitled to the documents under the terms of the contract between OneCare and DVHA. OneCare moved to dismiss the Complaint under V.R.C.P. 12(b)(1) because, in the absence of injury to a legally cognizable interest, the Auditor lacked standing to bring his claim against OneCare.

In its motion to dismiss, OneCare argued that Vermont law does not grant the Auditor power to audit or demand records from a private contractor like OneCare. Although the Constitution of the State of Vermont recognizes the role of Auditor of Accounts, it does not enumerate any powers associated with that role. Instead, the Auditor's authority is defined by statute. Pursuant to 32 V.S.A. §§ 163 and 167, that authority is restricted to "departments, institutions, and agencies of the State." There is nothing in the statutory language that states or in any way suggests that the Auditor may audit or demand records from a private business providing services to the State pursuant to a contract. Indeed, the Auditor himself publicly acknowledged, prior to initiating this litigation, that his statutory authority is subject to "limitations for entities that are not part of state government."

OneCare further argued that the Auditor cannot rely on the contract between OneCare and DVHA to support his demands. The contract states that "authorized representatives or agents of the State" may access records produced or acquired by the contractor in the performance of the agreement, as well as the contractor's accounting records. The contract does not identify the Auditor as an "authorized representative or agent" with a right to such access, and he has failed to identify any cognizable source of his asserted

authority. Likewise, the Auditor fails to adduce any support whatsoever for his argument that he is an intended third-party beneficiary of the contract between OneCare and DVHA. Although he now argues for the first time in this appeal that, alternatively, the contract language is ambiguous and therefore presents a question for the jury, the Auditor failed to present this claim to the trial court and therefore it has not been preserved for review.

In opposing the Motion to Dismiss, the Auditor advanced a subsidiary argument that OneCare should be deemed the "functional equivalent" of a State entity. This theory imports the concept of "functional equivalence" from Public Records Act jurisprudence, despite the fact that this Court has not adopted it as the law of Vermont. The Auditor contended that OneCare would qualify as the "functional equivalent" of a State entity under the Public Records Act, and therefore should also be treated as the "functional equivalent" of the types of State entities which are subject to the Auditor's statutory authority. On appeal, the Auditor has shifted this argument slightly to accommodate this Court's recent Public Records Act decisions, arguing that OneCare instead should be deemed an "instrumentality" of the State or part of a State "institution."

The Superior Court granted the motion to dismiss. Rather than engaging in an analysis of constitutional standing, the Court instead construed the motion as seeking dismissal for failure to state a claim under V.R.C.P. 12(b)(6). The court rejected the Auditor's assertion that his statutory authority extends to private companies when they contract with the State. It then declined to analyze the functional equivalence test, finding no support for its application in the absence of a public records request and noting the Vermont Supreme Court's recent decisions rejecting the test even in the public records context. Finally, the Court concluded that because the Auditor failed to demonstrate a basis for his claimed authority to demand OneCare's payroll records, there was no breach of contract. The Superior Court entered judgment dismissing the Complaint with prejudice, and the Auditor filed this appeal.

ARGUMENT

In this case, the Auditor attempts to reach beyond the clearly established boundaries of his statutory authority. With his sights trained on OneCare ever since his previous audit of several State entities focused on Vermont's All-Payer Model for healthcare, the Auditor insists that he is entitled to obtain payroll records reflecting the salaries of all OneCare employees for Financial Year 2020. Every justification the Auditor has offered in support of both his need for the payroll information and his purported authority to obtain it is critically flawed. There is simply nothing in the plain language of the statutes that establish the powers of the office of the Auditor, nor in the unambiguous terms of the contract between OneCare and DVHA that supports the Auditor's claim of authority to audit OneCare. Nor can any of the Auditor's attenuated subsidiary theories—which invoke the "functional equivalence" test from the public records doctrine of other jurisdictions, as well as a misreading of federal Medicaid regulations and an unpreserved argument regarding contractual ambiguity—succeed in shoring up his baseless claims. As the trial court correctly concluded in granting OneCare's Motion to Dismiss, "[b]ecause" the Auditor "has no authority for [his] demands, there can be no breach of contract[.]" AV-16. This Court should affirm.

I. The Auditor Does Not Have Statutory Authority to Demand OneCare's Records.

A. The Auditor's Jurisdiction Is Limited to Departments, Institutions, and Agencies of the State.

The Vermont Constitution recognizes the role of Auditor of Accounts, but does not enumerate the associated powers of the office. *See* Vt. Const. ch. II, § 43. Instead, the specifics of the Auditor's duties and accompanying rights are defined by statute. Pursuant to 32 V.S.A. § 163(1)(C), the Auditor has the authority to audit "every department, institution, and agency of the State" on an annual basis. In the exercise of this authority, the Auditor may

examine "all the records, accounts, books, papers, reports, and returns . . . of all departments, institutions, and agencies of the State." 32 V.S.A. § 167(a). These statutes clearly demarcate the limits of the Auditor's power: his authority extends exclusively to "departments, institutions, and agencies of the State," and no further.

In the face of the statutory provisions expressly limiting his jurisdiction to State bodies, with no authority over private parties, the Auditor insists—without textual support—that he has the power to demand records from OneCare, as though repeating it will make it true. Yet no plausible reading of the statutes supports this claim. The Court's duty in interpreting statutory language is to "discern and implement the intent of the Legislature." *Severson v. City of Burlington*, 2019 VT 41, ¶ 11, 210 Vt. 365, 215 A.3d 102, 106 (quoting *Patnode v. Urette*, 2015 VT 70, ¶ 7, 199 Vt. 306, 124 A.3d 430). "If the statute is unambiguous and its words have plain meaning," the Court must "accept the statute's plain meaning as the intent of the Legislature and [its] inquiry proceeds no further." *Doyle v. City of Burlington Police Dep't*, 2019 VT 66, ¶ 5, 211 Vt. 10, 219 A.3d 326 (citation omitted). The Court applies a "nondeferential and plenary standard of review" to questions of statutory interpretation. *Vermont Human Rights Comm'n v. Agency of Transportation*, 2012 VT 88, ¶ 7, 192 Vt. 552, 60 A.3d 702.

Here, the statues that govern the Auditor's role unambiguously identify the entities within his jurisdiction, which is confined to State agencies, departments, and institutions. There is no hint or suggestion that the Legislature intended the Auditor's reach to sweep beyond State government. On the contrary, the Legislature has repeatedly rejected the Auditor's efforts to pass a statutory amendment that would grant him the exact authority over OneCare that he claims to already possess in filing this suit (despite his previous public acknowledgement that his authority is subject to "limitations for entities that are not part of state government"). AV-245; *see infra* Section III. As such, the Court is "constrained not to rewrite the statute" in the manner invited by the Auditor, and there is no ground to conclude that he

has the statutory authority to audit OneCare. *Lecours v. Nationwide Mut. Ins. Co.*, 163 Vt. 157, 161, 657 A.2d 177, 180 (1995); *Sawyer v. Spaulding*, 2008 VT 63, ¶ 16, 184 Vt. 545, 955 A.2d 532 ("We will not expand the statute beyond its terms.").

B. The Functional Equivalence Analysis Does Not Apply.

In tacit recognition of the fact that OneCare is not a "department, institution, [or] agency of the State" subject to his authority, the Auditor alternatively argues that the Court should deem OneCare the "functional equivalent" of a State agency or instrumentality to bring it within his jurisdiction, transposing legal analysis used by the Superior Court in certain Public Records Act ("PRA") cases. *See* App't Br. at 14-18. This argument is inapt on multiple fronts.

First, there is no dispute that this is not a PRA case; the Auditor never requested OneCare's data under that statute, and the information he seeks would be exempt from disclosure under the PRA even if it applied to OneCare. *See* AV-15-16; *see also* 1 V.S.A. § 317(c)(7) (exempting from disclosure under the PRA "information in any files relating to personal finances"). Moreover, this Court has declined to adopt the functional equivalence test even in the public records context. *See McVeigh v. Vt. Sch. Bds. Ass'n*, 2021 VT 86, ¶ 21, 266 A.3d 763 ("We now clarify what we implicitly suggested in *Human Rights Defense Center*[:] there is no general 'functional-equivalency' concept contained in the PRA."). Instead, a nongovernmental entity must qualify as one of the "limited list of traditional, well-established forms in which government chooses to organize itself" identified in the PRA to be subject to the Act's requirements. *Id.*

In *McVeigh*, the Court found that the Vermont School Boards Association did not qualify as an "instrumentality" of the State because it did not have "delegated responsibility for performing a uniquely governmental function" even though it is "involved in aspects of public education, the provision of which is a fundamental governmental obligation." *Id.* ¶ 24. The

same logic holds true with respect to OneCare. Contrary to the Auditor's assertion that OneCare "performs a traditional government function" simply because its business has a nexus to the provision of healthcare, App't Br. at 14-15, OneCare is a not-for-profit private entity that provides services to its members and to the State pursuant to contractual arrangements. Unlike other private entities that have been found subject to the PRA, there is no statutory mandate that the State do business with OneCare, or vice versa. *See McVeigh*, 2021 VT 86, at ¶ 25 ("Nor has the VSBA been tasked by the Legislature with performing a governmental role"); *see also* AV-58-63 (*Whitaker v. Vt. Info. Tech. Leaders, Inc.*, No. 781-12-15 Wncv, 2016 WL 8260068, at *3 (Vt. Super. Oct. 28, 2016) (describing 2008 legislation "requiring the state to . . . 'enter into an agreement with'" with VITL, which "may have reflected a view that VITL was more of an instrumentality of the state than an independent contractor")).

Crucially, even if OneCare could be characterized as an "instrumentality" of the State for purposes of the PRA, the trial court correctly observed that "[t]he statutes empowering the Auditor do not extend to instrumentalities." AV-16. The Auditor's functional equivalence argument thus asks the Court to export its current PRA analysis and apply it under a different statute that does not include the relevant key language. Although the Auditor attempts to sidestep this problem by asserting that "OneCare should be treated as a public *agency*" (rather than an "instrumentality"), *see* App't Br. at 15 (emphasis added), this Court has only held that a private entity may be treated as a public agency for PRA purposes where it first qualified as an instrumentality of the State. *See Human Rights Defense Ctr. v. Correct Care Sols., LLC*, 2021 VT 63, ¶ 13, 263 A.3d 1260 ("We do not consider whether Wellpath was the 'functional equivalent' of a public agency because we conclude that it was an 'instrumentality' of the DOC during the contract period. . . . Therefore it <u>was</u> a 'public agency" as that term is defined in the PRA.").[1]

[1] In making this argument, the Auditor makes another unwarranted change in terminology, asserting that his "statutory authority . . . extends to '**public**

Nor is there any merit to the Auditor's cursory assertion that OneCare is part of an "institution" comprised of "Vermont Medicaid and the administrative apparatus that drive[s] it." App't Br. at 18. Even assuming for argument's sake that Vermont Medicaid—a federally-funded healthcare program administered by DVHA—is properly characterized as an "institution of the State," the Auditor fails to offer any support at all for the outlandish suggestion that a private business becomes "part of" the State any time it contracts to provide services to such a program. His allusions to "federal and state oversight" associated with Medicaid are also off-base, as explained below. *See id.; infra* Section II.A., pp. 14-16.

As for the Auditor's policy-based arguments and high-minded assertions regarding his role in pursuing governmental transparency and accountability, he fails to reconcile his interest in reviewing OneCare's budget and spending with the statutory scheme that confers that same responsibility, along with broader oversight of ACOs like OneCare, to the Green Mountain Care Board.[2] As the Auditor himself concedes, OneCare "is certified by and closely overseen by the GMCB[,] . . . including not only

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agenc[ies],' as does the PRA." App't Br. at 17 (emphasis added). The statutes, however, limit the Auditor's jurisdiction to "agencies . . . *of the State*," 32 V.S.A. §§ 163, 167 (emphasis added), and do not use the term "public"—which might arguably be subject to a broader reading, and which appears in the PRA.

[2] In addition, the Auditor's claims regarding alleged "inconsistencies" in OneCare's budget submissions not only depend on faulty logic to arrive at willfully inaccurate conclusions, but also obscure the fact that the budget he seeks to investigate—a proposed budget for FY 2020 that allocated $11.8 million to salary expenses—***was never implemented***. *See* AV-25 for a brief discussion of the "inconsistencies" cited by the Auditor; *see also* App't Br. at 3 n.1 (acknowledging the proposed FY 2020 budget in question was revised before approval). These circumstances further undermine the Auditor's policy arguments.

budget matters, but also how it functions and operates[.]" App't Br. at 14 (citations omitted). Indeed, the GMCB is required by statute to ensure that OneCare, like any other ACO operating in Vermont, maintains "governance, leadership, and [a] management structure" that are "transparent." 18 V.S.A. § 9382(a)(1). It is also responsible for "reviewing, modifying, and approving the budgets of ACOs with 10,000 or more attributed lives in Vermont," which includes OneCare. *Id.* § 9382(b)(1). This budgetary oversight expressly includes a duty to review and approve OneCare's administrative costs. 18 V.S.A. § 9382(b)(1)(M); *see also* Green Mountain Care Board Admin. Rule 5.000 § 5.403(a)(3) (requiring that ACOs annually submit financial information covering, among other items, "administrative costs, including wage and salary data"). Juxtaposed with this comprehensive legislative allocation of responsibility—and the fact that the GMCB has never seen a need for the information the Auditor seeks or found the "inconsistencies" he asserts—the Auditor's drumbeat that he must be entitled to OneCare's payroll records to evaluate the success of the ACO model in Vermont rings hollow.

Furthermore, the Auditor's claim—in essence, that higher salaries paid to OneCare employees result in higher costs to Vermont taxpayers—reveals a fundamental misunderstanding of the financial terms of OneCare's agreement with DVHA. Under the 2020 agreement, OneCare received an administrative fee on a per-member, per-month basis, 50% of which was in turn passed on to providers in the network. *See* AV-475, AV-382 (establishing fixed per-member, per-month fee in 2020 and 2021 contract amendments). This fee, which had been set at the same per-member, per-month level since OneCare and DVHA first entered into a risk sharing agreement in 2017, was the only portion of the contract amount associated with administrative expenses and did not vary based on OneCare's operating costs. AV-254. The other contract funds OneCare received were pass-through payments to healthcare providers for services rendered to Medicaid beneficiaries and performance-based payments that accrue only if savings are achieved. *Id.* There was thus no genuine risk that OneCare's staff

compensation could yield an inefficient or ineffective use of the State funds it receives under the DVHA contract.

Ultimately, the Court need not analyze in detail whether OneCare could qualify as an agency or instrumentality of the State, as it has done in the PRA context, because this is not a PRA case. Nor does the Court have to determine whether public policy supports the Auditor's reading of the statutes. The Court need only review the plain terms of the statutes that create—and delimit—his authority. Even a cursory review of those statutes reveals that such authority does not extend to nongovernmental organizations, like OneCare, that contract to do business with the State. As the trial court correctly concluded, the statutes "do not authorize the demands [the Auditor] has made in this case," and thus provide no support for his claim against OneCare. AV-16.

II. The Auditor Does Not Have the Right to Demand OneCare's Records Pursuant to the DVHA Contract.

A. The Unambiguous Terms of the DVHA Contract Do Not Grant the Auditor Authority to Obtain OneCare's Payroll Data.

Confronted with the inescapable fact that OneCare is not a State entity subject to his statutory jurisdiction, the Auditor asserts that OneCare is separately required to provide the records he seeks pursuant to the terms of its contract with DVHA. He first argues that the contract language unambiguously supports his claim, then pivots to arguing the contract is ambiguous and the trial court erred in reaching a contrary conclusion. While the Auditor is entitled to advance alternative arguments, both of these theories are without merit.

The crux of the Auditor's contractual argument is essentially the same as his statutory argument. He asserts that "[n]o person is more clearly an authorized representative of the State for purposes of reviewing accounting

records than the State Auditor," and therefore he must be entitled to review OneCare's payroll data. App't Br. at 9. The logical fallacy is evident: in blithely claiming that he is an "authorized representative of the State" under the contract by virtue of his State power, the Auditor apparently hopes the Court will ignore the fact that his authority, by statute, does not extend to private entities like OneCare.

Contracts, like statutes, are to be interpreted according to "the plain meaning of" their unambiguous terms, which represent the intent of the parties. *State v. Prison Health Servs., Inc.*, 2013 VT 119, ¶ 9, 195 Vt. 360, 88 A.3d 414. "Ambiguity arises where the language at issue can be 'reasonably or fairly susceptible of different constructions,'" and its presence or absence is question of law. *Chamberlain v. Metro. Prop. & Cas. Ins. Co.*, 171 Vt. 513, 514-15, 756 A.2d 1246, 1248 (2000) (quoting *Northern Sec. Ins. Co. v. Hatch*, 165 Vt. 383, 386, 683 A.2d 392, 395 (1996)). Similarly, "[w]hether a party is an intended beneficiary, and thus has a right to enforce the contract, 'is based on the original contracting parties' intention'" as evidenced by the terms of the agreement. *Sutton v. Vt. Reg'l Ctr.*, 2019 VT 71A, ¶ 64, 212 Vt. 612, 238 A.3d 608 (quoting *Hemond v. Frontier Commc'ns of Am., Inc.*, 2015 VT 67, ¶ 20, 199 Vt. 272, 123 A.3d 1176). The trial court's interpretation of an unambiguous contract is a question of law subject to *de novo* review. *See Dep't of Corrs. v. Matrix Health Systems, P.C.*, 2008 VT 32, ¶ 11, 183 Vt. 348, 950 A.2d 1201 (citing *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 16, 739 A.2d 1212, 1216 (1999)).

As the Auditor himself argued below and reaffirms here, "[t]here is nothing ambiguous" about the terms of the contract between DVHA and OneCare. App't Br. at 7; AV-185. The relevant provisions, as set forth in full in the trial court's opinion, provide that "[a]uthorized representatives or agents of [the] State of Vermont and the federal government shall have access to" OneCare's "accounting records . . . for purposes of review, analysis, inspection, or reproduction." AV-13-14 (quoting Attachment A to Contract #32318 Amendment 4, at § 2.7). Section 2.7 thereafter states that OneCare must provide accounting records "within ten (10) days of receiving a written

request *from DVHA* for specified records." *Id.* at 14 (emphasis added). *Id.* According to the Auditor, he qualifies as an "authorized representative of the State," and is therefore a third-party beneficiary of the contract between DVHA and OneCare. App't Br. at 9.

Here lies the fundamental flaw in the Auditor's contract argument: he insists that "[n]o person is more clearly an authorized representative of the State for purposes of reviewing accounting records than the State Auditor," yet he fails to proffer any competent support for that claim beyond his own *ipse dixit*. App't Br. at 9. He does not, and cannot, identify other language in the contract, or any other source, conferring authority on him to represent the State in auditing OneCare as a private contractor under the agreement—because there is none. Instead, he cites the very same statutes that expressly limit his authority to State departments, institutions, and agencies. *See id.* (citing 32 V.S.A. § 163(1)(C)). This claim is implausible in the statutory interpretation context, and it is an equally implausible reading of the contract between OneCare and DVHA. There are other State entities—namely, the GMCB and DVHA—that *are* authorized, by statute and contract respectively, to obtain and review OneCare's accounting records. *See* 18 V.S.A. § 9832 (authorizing the GMCB to review OneCare's budget and finances); AV-420 (authorizing DVHA to request financial records and information from OneCare).[3] In the absence of any analogous grant of power to the Auditor, there is no basis to conclude that DVHA and OneCare intended to expand his jurisdiction or include him as a third-party beneficiary to the contract. *See* AV-15 ("Moreover, nothing in the contract

[3] Contrary to the Auditor's contention, OneCare does not assert that "authorized representatives or agents" of the State within the meaning of the DVHA contract refers only to DVHA employees. *See* App't Br. at 7. There is no dispute that, under the plain language of the contract and as noted by the trial court, the contract accords specific rights to DVHA but also "more generally provides" that authorized representatives of the State and federal government may access OneCare's accounting records. AV-14.

specifically says that the Auditor is so authorized or otherwise refers to the Auditor at all.").[4]

As part of his claim of authority to demand OneCare's payroll data under the DVHA contract, the Auditor argues that the data in question constitutes "accounting records." This claim is likewise inconsistent with the plain meaning of the contract terms. Puzzlingly, the Auditor attempts to support his argument about the meaning of "accounting records" by quoting a definition for "payroll" that does not contain the term "accounting." *See* App't Br. at 8. His reading also ignores the terms of § 2.7, which require OneCare to "maintain" and make available "financial records *pertaining to the contract*, including all claims records[.]" AV-420 (emphasis added). The Auditor fails to identify any provision in the contract that addresses how OneCare employees are to be compensated, fatally undermining the connection he seeks to conjure between the DVHA agreement and the payroll data he characterizes as "accounting records pertaining to the Contract."

Moreover, the full text of § 2.7, which is entitled "Financial Stability and Accounting," clarifies that OneCare may be required to provide accounting records for the specific purpose of confirming its financial condition:

> DVHA may make an examination of the affairs of [OneCare] as often as it deems prudent. The focus of the examination will be to ensure that [OneCare] is not subject to adverse actions which in DVHA's determination have the potential to impact [OneCare]'s ability to meet its responsibilities with respect to its use of the

[4] Although the Auditor denies that his interpretation of the term "authorized State representative" would effectively confer authority on any employee or agent of the State, *see* App't Br. at 10, he posits a sweeping view of his own "authority" that would extend not only to OneCare, but also to "other private persons and entities doing contract-related business with the State." *Id.* at 8. This view openly conflicts with the statutes that establish the scope of Auditor's role and authority over State entities.

> payments received from DVHA and [OneCare]'s compliance with the terms and conditions of any financial risk transfer agreement.

AV-420. The Auditor's claim that he may demand OneCare's payroll data to probe nebulous matters that are unrelated to OneCare's financial condition and ability to meet its contractual obligations is simply wrong and entirely inconsistent with the contract language. *See Matrix Health Sys., P.C.*, 2008 VT 32, at ¶ 12 ("[W]e must consider the contract as a whole and give effect to every part contained therein to arrive at a consistent, harmonious meaning, if possible." (citation omitted)).

The other contract provision cited by the Auditor does not fill this logical gap. Paragraph 13 of the Standard State Provisions for Contracts and Grants, which are incorporated into the contract between DVHA and OneCare, uses similar language to § 2.7 in providing that OneCare must maintain "all records pertaining to performance under this agreement" and provide them to "authorized representatives of the State or Federal Government" upon request. AV-487. According to the Auditor, "[p]erformance, in turn, includes accounting records, such as payroll." App't Br. at 9. But this conclusion again depends on the inscrutable link the Auditor attempts, and fails, to forge between "payroll" and "accounting records." Nothing in Paragraph 13 provides support for interpreting "accounting records pertaining to the contract" to include employees' W-2 and 1099 forms. And, even assuming *arguendo* that payroll records could be considered "accounting records" or "records pertaining to performance under" the DVHA contract, these questions are collateral at best because the Auditor is not an authorized representative of the State with a contractual right to obtain those records.

In a last-ditch grasp at support for his contractual argument, the Auditor turns to federal Medicaid regulations and asserts that OneCare "agreed to be subject to audit by 'authorized representatives or agents of the State of Vermont' because by law that is the State of Vermont's obligation to the Social Security Administration and CMS." App't Br. at 12. Yet again,

this argument relies on a misreading of the underlying law. The regulation cited by the Auditor requires the following:

> All contracts must provide that the State, CMS, the Office of the Inspector General, the Comptroller General, and their designees may, at any time, inspect and audit any records or documents of the MCO, PIHP, PAHP, PCCM or PCCM entity, or its subcontractors, and may, at any time, inspect the premises, physical facilities, and equipment where Medicaid-related activities or work is conducted. The right to audit under this section exists for 10 years from the final date of the contract period or from the date of completion of any audit, whichever is later.

42 C.F.R. § 483.3(h). Applying a broad, generalized reading of the term "State," the Auditor contends that § 483.3(h) means the State of Vermont—and therefore he, as State Auditor—*must* have the power to audit OneCare under the terms of the DVHA contract.

The Auditor's interpretation is erroneous because he overlooks the specific definition of "State" that applies to the regulations he cites. "State," as used in Part 438, means "the Single State agency as specified in § 431.10 of this chapter." 42 C.F.R. § 483.2. Section 431.10, in turn, provides that the "Medicaid agency is the single State agency for the Medicaid program." 42 C.F.R. § 431.10(a)(2). For Vermont, the Agency of Human Services is the single State agency for the Medicaid program, and therefore is the only party indicated by the use of "State" in 42 C.F.R. § 483.3(h). This reading is corroborated by the Attorney General's certification of AHS as Vermont's single State agency for Medicaid, as required by the regulations. *See* § 431.10(b) (requiring the State to identify the single State agency and "[i]nclude a certification by the State Attorney General, citing the legal authority for the single State agency to . . . administer or supervise the administration of the plan"); Attorney General's Certification, Oct. 23, 2013, https://humanservices.vermont.gov/sites/ahsnew/files/documents/MedicaidPolicy/MedicaidStatePlan/Att%201.1-A.pdf. Accordingly, AHS is the only State entity that *must* have the authority (along with its designees) to inspect or

audit OneCare's records under 42 C.F.R. § 483.3(h), and any argument by the Auditor to a different effect is grounded in misinterpretation.

In short, the Auditor's arguments regarding his purported statutory and contractual authority fail at every turn. His convoluted interpretations are belied by the plain, unambiguous terms of the applicable statutes and contract provisions, while his policy and regulatory arguments depend on distortion and distraction. The trial court correctly concluded that the Auditor "has no authority for" his demands of OneCare, and thus "there can be no breach of contract[.]" AV-16.

B. The Auditor's Alternative Argument That the DVHA Contract Is Ambiguous Was Not Preserved For Appeal.

Despite having argued below and in this appeal that there is "nothing ambiguous" about the terms of the contract between OneCare and DVHA, the Auditor now asserts—for the first time—that the contract language is "at a minimum" ambiguous as to who is an "authorized representative or agent of the State." *Compare* App't Br. at 7, AV-185 *with* App't Br. at 12. While the Auditor had the right and opportunity to make alternative arguments before the trial court, he failed to advance this theory of contractual ambiguity at any point during the proceedings below. As a result, the argument was not preserved, and cannot be considered as part of this appeal.

Preserving an issue for appeal requires a party to "present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." *State v. Ben-Mont Corp.*, 163 Vt. 53, 61, 652 A.2d 1004, 1009 (1994). Conversely, "[c]ontentions not raised or fairly presented to the trial court are not preserved for appeal." *Bull v. Pinkham Eng'g Assocs.*, 170 Vt. 450, 459, 752 A.2d 26, 33 (2000).

In this case, the Auditor did not bring any argument regarding purported ambiguity to the trial court's attention. To the contrary, he has repeatedly stated that there is "nothing ambiguous" about the contract,

including the clause containing the phrase "authorized representatives or agents of the State[.]" App't Br. at 7; AV-185. In opposing the Motion to Dismiss, he asserted that the contract "language is clear" and "it is also obvious that the Auditor is an authorized representative of the State."[5] AV-189. At oral argument on the Motion to Dismiss, the words "ambiguous" and "unambiguous" were never used. *See generally* 10/12/2021-TR. Instead, counsel for the Auditor stated "the language is very clear and there could be no mistake as to what this means" immediately before quoting § 2.7 of the DVHA contract, and then stated again: "the language is crystal clear." 10/12/2021-TR-14:9-20; *see also id.* at 15:2-5 (" . . . for OneCare to turn around and say no, we never agreed to that when the language is crystal clear in this contract at Section 2.7 is just . . . ridiculous, Your Honor, right?").

Thus, the record demonstrates that the Auditor *never* argued, prior to this appeal, that "authorized representatives or agents of the State," as used in the DVHA contract, is ambiguous and must be interpreted by a jury. The trial court therefore had no fair opportunity to consider and rule on this issue, rendering it unpreserved for appeal. *See Will v. Mill Condo. Owners' Ass'n*, 2004 VT 22, ¶ 4, 176 Vt. 380, 848 A.2d 336 ("Appellant did not raise this argument in her initial complaint, her amended complaint, or in her memorandum in opposition to defendants' motion for summary judgment. Therefore, she has waived her right to raise this argument on appeal.").

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[5] The only point in all of the previous proceedings at which the Auditor even acknowledged the possibility of ambiguity was to assert in his opposition brief that "even if 'records pertaining to performance' was ambiguous," he would still be entitled to OneCare's payroll records under the contract. AV-188. This argument regarding an entirely different contractual term cannot be said to have clearly and fairly presented to the trial court the Auditor's present argument that "authorized representatives or agents of the State" is ambiguous. *See Manning v. Schultz*, 2014 VT 22, ¶ 5, 196 Vt. 38, 93 A.3d 566 ("As we have frequently cautioned, an objection on one ground does not preserve an appeal on other grounds." (brackets, quotation marks and citation omitted)).

"[A]bsent any indication the argument was raised below, the matter" of whether the phrase "authorized representative or agent of the State" as used in the DVHA contract is ambiguous "is not before [this Court] on appeal." *New England P'ship, Inc. v. Rutland City Sch. Dist.*, 173 Vt. 69, 73, 786 A.2d 408, 412-13 (2001) (noting that "[t]he trial court's decision makes no reference to whether there was an issue as to the ambiguity of the language NEPI now challenges" and ruling the question was not preserved for appeal).

III. Dismissal of the Complaint Was Proper Because the Auditor Has Not Suffered an Injury in Fact and Lacks Standing to Pursue His Claim.

In its Motion to Dismiss, OneCare asked the trial court to dismiss the Auditor's Complaint for lack of standing under V.R.C.P. 12(b)(1). The trial court declined to apply Rule 12(b)(1), observing that standing principles "are applied in cases against the government to help moderate the separation of powers among the branches" and finding that in this case, "ordinary cause of action principles are sufficient." AV-13. While the trial court was correct in ruling that Auditor does not have a cause of action for breach of contract, this Court may affirm dismissal of the Complaint on the alternative ground that the Auditor has not suffered injury in fact sufficient to give rise to constitutional standing.

Vermont applies standing requirements derived from Article III of the United States Constitution, which demand that to pursue a claim, a plaintiff must be able to show: "(1) injury in fact, (2) causation, and (3) redressability." *Baird v. City of Burlington*, 2016 VT 6, ¶ 13, 201 Vt. 112, 136 A.3d 223 (internal quotation marks and citations omitted). Correspondingly, a plaintiff who cannot show any "particular injury that is attributable to the defendant has no standing to bring a suit." *Id.* Standing is considered a component of subject matter jurisdiction; therefore, "[a] plaintiff must allege facts sufficient to confer standing on the face of the complaint" or dismissal is required. *Severson v. City of Burlington*, 2019 VT 41, ¶ 9, 210 Vt. 365, 215 A.3d 102 (citations omitted). A motion to dismiss for lack of standing thus

falls within the scope of V.R.C.P. 12(b)(1). *See In re Guardianship of C.H.*, 2018 VT 76, ¶ 6, 208 Vt. 55, 194 A.3d 1174. On a Rule 12(b)(1) motion, unlike a motion to dismiss for failure to state a claim, "[a] court may consider evidence outside the pleadings[.]" *Conley v. Crisafulli*, 2010 VT 38, ¶ 3, 188 Vt. 11, 999 A.2d 677 (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). As with other issues of subject matter jurisdiction, this Court's review of a standing question is *de novo*. *See Baird*, 2016 VT 6, at ¶¶ 11-12 (explaining that review of standing challenge is generally *de novo* absent unusual circumstances in which facts are fully developed by the trial court).

An "injury in fact" for constitutional standing is "the invasion of a legally protected interest." *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341, 693 A.2d 1045, 1048 (1997) (quoting *Aderand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)). This Court has recognized that a government official had a legally protected interest in performing his lawful duties, which confers on him standing to challenge actions that "diminish[] or interfere[] with" the "specific powers unique to [his] function." *Turner v. Shumlin*, 2017 VT 2, ¶ 13, 204 Vt. 78, 163 A.3d 1173 (citation omitted). *Turner* held that a legislator had standing to challenge actions that infringed his right to vote in a constitutionally sound appointment process as part of to the Vermont Senate's duty to provide advice and consent under the Vermont Constitution. *See id.*, 2017 VT 2 at ¶¶ 16-17. This case presents a converse fact pattern: rather than seeking to protect a lawfully granted right or duty, the Auditor seeks to obtain the Judiciary's imprimatur on asserted authority to which he has no legal entitlement.[6]

The fact that the Auditor does not lawfully possess the authority he seeks to assert over OneCare is inescapable and renders his claim of standing

[6] *Morrow v. Bentley*, 261 So.3d 278, 286 (Ala. 2017), is informative with respect to a state auditor's standing to sue (or lack thereof) based on his statutory authority. In *Morrow*, the state auditor and a state legislator sued to challenge a government expenditure, in part based on the auditor's argument that his role entailed "unique standing to protect the State . . . and

to sue untenable. The Auditor himself has publicly acknowledged that, while his statutory authority "to ask for and be given anything [he] need[s] to do an audit of state government" is "very clear and unambiguous," "***there are limitations for entities that are not part of state government***[.]" AV-245. The context of that statement is also telling: it was made during a 2019 interview the Auditor gave regarding proposed legislation that would have required any Vermont ACO to "make available to the Office of the Auditor of Accounts all records," along with the records of "any affiliated entity," pursuant to the Auditor's discretionary request. *See id.*; *see also* AV-237-238 (H. 181). The 2019 bill failed to advance out of committee, as did two similar bills introduced in 2020 and 2021, *see* AV-231-35, as well as an amendment proposed in 2021 that would have granted the Auditor discretion to review "all records" of OneCare. *Compare* AV-226 *with* AV-217-219.

As the Auditor's public comments and history of failed attempts to secure the very right he asserts in this case through legislative channels amply demonstrate, he simply does not possess the right to audit OneCare, or to demand its payroll records, under current Vermont law. Moreover, the Auditor now asks this Court to enact through judicial interpretation a policy change that has been repeatedly rejected by the Legislature. Against this backdrop, there can be no genuine dispute that the Auditor has not suffered

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its citizens from . . . unconstitutional and illegal disbursements of state funds." *Id.* (internal quotation marks omitted). The Alabama Supreme Court disagreed, noting there was no allegation that the expenditure in question "interfered with or infringed upon" the auditor's "statutory and constitutional duties of auditing *certain State records*[.]" *Id.* (emphasis added). So too here, where the Auditor's professed "duties to ensure that Vermont tax dollars to support the Medicaid program are being appropriately utilized by OneCare in an effective and efficient manner" find no basis in his statutory power to audit departments, institutions, and agencies of the State. App't Br. at 4.

injury in fact to a lawfully protected interest as required to give him standing to pursue his claim against OneCare.

The Auditor's lack of standing is further confirmed by the subsidiary principles of prudential standing, "self-imposed judicial limits" including "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Hinesburg Sand & Gravel Co., Inc.*, 166 Vt. at 341, 693 A.2d at 1048. The zone of interests test asks whether, based on "the substance of plaintiff's claim," the interest he asserts is "arguably within the *zone of interests* to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 342, 693 A.2d at 1048. In this case, the answer is an unequivocal "no." The statutes that grant the Auditor legal authority to obtain records and audit state entities in no way establish, nor even arguably suggest, that his purview extends to nongovernmental private businesses that provide services to the State. His claim thus falls squarely outside the zone of interests protected by the statutes he invokes, depriving him of standing to pursue his Complaint.

Although the trial court concluded that this dispute does not implicate standing principles because it does not involve a claim *against* the government, the separation of powers considerations that animate standing doctrine are at play here. Standing promotes "the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena." *Parker v. Town of Milton*, 169 Vt. 74, 77, 726 A.2d 477, 480 (1998). As this Court noted in *Turner*, "separation of powers and the limited role of the judiciary compel particular scrutiny in determining whether there is an injury in fact." 2017 VT 2 at ¶ 12.

While these considerations may arise most often in "litigation asserting the illegality of governmental action," this case unquestionably concerns an attempted government "action [that] goes beyond the limits of statutory authorization[.]" 13A Wright & Miller et al., Federal Practice & Procedure

§ 3531 (3d ed.). Here, the role of the parties is reversed from the typical standing case in which a private party challenges an action by a government official. Nonetheless, the separation of power concerns are manifest: the Auditor attempts to exercise authority that he has not been granted by the Legislature, and seeks to harness the power of the Judiciary in furtherance of that maneuver. Rather than granting the Auditor's request to alter the clear limits of his statutory jurisdiction through judicial interpretation, the Court should defer to the Legislature's judgment. Absent a right to audit OneCare grounded in Vermont law, the Auditor does not have a legally protected interest in obtaining the payroll data at the center of this case, and therefore has not suffered an injury in fact for standing purposes.

CONCLUSION

In asking the Court to reverse the trial court's decision and force OneCare to produce payroll records so that the Auditor can probe proposed administrative spending under an outdated version of OneCare's FY 2020 budget, the Auditor is arrogating authority well beyond the power conferred on him by Vermont law. Put simply, there is no statutory basis for the Auditor's claim of authority over OneCare, and the unambiguous terms of the contract for services between OneCare and DVHA do not designate the Auditor as an authorized representative of the State entitled to request the ACO's accounting records. There is similarly no basis to extrapolate the concept of functional equivalence between a contractor and a public agency or instrumentality of the State from Public Records Act doctrine and apply it in this breach of contract dispute. And while the trial court was satisfied that the Auditor's claim lacked all merit under V.R.C.P. 12(b)(6), the Auditor's lack of standing to sue provides an additional ground for dismissal. Accordingly, OneCare respectfully submits that the Court should affirm in full the trial court's dismissal with prejudice of the Auditor's Complaint.

Dated at Burlington, Vermont this 4th day of March, 2022.

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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

Pursuant to V.R.A.P. 32(a)(4)(D), I hereby certify that the foregoing brief contains 7,581 words, exclusive of the content identified in V.R.A.P. 32(a)(4)(C). In so certifying, I have used and relied on the Microsoft Word word count tool.

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IN THE SUPREME COURT OF THE STATE OF VERMONT

Docket No. 21-AP-271

THE VERMONT STATE AUDITOR, DOUGLAS R. HOFFER,
Plaintiff—Appellant,

v.

ONECARE ACCOUNTABLE CARE ORGANIZATION, LLC,
d/b/a ONECARE VERMONT,
Defendant—Appellee,

On Appeal from the Vermont Superior Court
Civil Division, Washington Unit
Docket No. 21-CV-00174

APPELLANT THE VERMONT STATE AUDITOR'S BRIEF

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STATEMENT OF THE ISSUES

1. The Vermont State Auditor seeks basic accounting records from OneCare, an Accountable Care Organization, which in 2020 had a $328 million contract with the State of Vermont's Agency of Human Services to administer the State's Medicaid program in Vermont. The contract states that OneCare must provide its records for inspection by "any authorized representative of the State or Federal Government." Given this language, did the trial court err in interpreting the contract to not allow the Auditor to inspect OneCare's records?

2. Assuming *arguendo* that OneCare's contract did not unambiguously allow the Auditor to inspect OneCare's accounting records. Did the trial court, in the context of a V.R.C.P. 12(b)(6) motion, err in failing to determine that a factual dispute existed as to the terms of the contract, thereby requiring discovery before any dismissal?

3. Per 32 V.S.A. §§ 163 and 167, the Auditor has the power to audit "every department, institution, and agency of the State…" Given the public nature of OneCare's function, did the trial court err in determining that OneCare is not an agency of the State for purposes of the Auditor's statutory authority?

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STATEMENT OF THE CASE

Vermont has adopted a statewide health-care payment and delivery system referred to as the All-Payer ACO Model. 18 V.S.A. § 9551. This model relies on private-sector health care providers voluntarily working together as part of what is called an Accountable Care Organization (ACO). *Id*., § 9571. The goal of the model is to reduce health care spending and improve health care quality and outcomes.

Appellee OneCare is the only ACO in Vermont. OneCare was founded by the University of Vermont Medical Center and Dartmouth-Hitchcock Health, and its participants include the State of Vermont, private insurers, all but one of Vermont's hospitals and more than 100 additional participating providers. AV-514. In 2020, the year for which the Auditor has requested certain records, OneCare administered $1.2 billion in State, Federal and insurer payments to hospitals and providers. AV-319-20.

Under Vermont's Medicaid waiver, the Agency of Human Services (AHS) is the state agency responsible for ensuring that Medicaid services are delivered in accordance with federal statutes and the waiver agreement. *See generally* 33 V.S.A. § 1901(a)(1) *Administration of program* ("The Secretary of Human Services or designee shall take appropriate action, including making of rules, required to administer a medical assistance program under Title XIX (Medicaid) and Title XXI (SCHIP) of the Social Security Act" (internal footnotes omitted)); 1 AV App. 1. AHS delegates most of its Medicaid responsibilities to the Department of Vermont Health Access (DVHA). *See generally* 1 AV App. 17.

DVHA, in turn, contracts with Defendant OneCare to administer a portion of Vermont's Medicaid program through OneCare's All-Payer ACO Model. Thus OneCare, by contract, has undertaken AHS's statutory responsibility to administer a portion of Vermont's Medicaid program.

As enabled by statute, Vermont's All-Payer ACO Model is currently in a five-year "test" involving the federal government, State of Vermont, and the private sector. *See generally* 18 V.S.A. § 9551; 1 AV App. 244 (*Vermont All-Payer Account Care Organization Model Agreement* (Oct. 27, 2016)); 1 AV App. 307 (Douglas R. Hoffer, Rpt. of the Vt. State Auditor: *Vermont's All-Payer Accountable Care Organization Model*, Rpt. No. 20-02 at 16 (Jun. 26, 2020)). This test is to determine whether a health care network using similar risk-based contracts among payers can improve the value of health care for Vermonters. *See* 1 AV App. 244. As such, oversight and assessment of the costs and benefits of this new-to-Vermont ACO model is critically important to the State

of Vermont. The State needs to properly evaluate, among other things, whether or not any cost savings in the implementation of this ACO model outweigh the extra costs inherent in operating a distinct entity, OneCare, to administer this ACO model for the delivery of Medicaid benefits.

To that end, DVHA's contract with OneCare contains multiple provisions throughout the document that are specifically designed to aid in the State's efforts of oversight and assessment of OneCare's five-year ACO Model test.

The contract year at issue in this matter, OneCare's 2020 contract with DVHA, provides, among other things:

> Records Available for Audit**:** *The Party shall maintain all records pertaining to performance under this agreement*. "Records" means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired by the Party in the performance of this agreement. Records produced or acquired in a machine readable electronic format shall be maintained in that format. *The records described shall be made available* at reasonable times during the period of the Agreement and for three years thereafter or for any period required by law for inspection *by any authorized representatives of the State* or Federal Government. If any litigation, claim, or audit is started before the expiration of the three-year period, the records have been resolved.

AV-487.

The "Specifications of Work to be Performed" sections, which address contract performance by OneCare, in turn, state that:

> Authorized representatives or *agents of the State* and the federal government *shall have access to the Contractor's accounting records and the accounting records* of its subcontractors upon reasonable notice and at reasonable times during the performance and/or retention period of the Contract for purposes of review, analysis, inspection, audit and/or reproduction.

AV-420 (emphasis added).

Analysis of OneCare's operating costs are central to any assessment of overall cost savings promised by the ACO model. To that end, OneCare is obligated by law to provide an annual budget to the Green Mountain Care Board (GMCB) for approval, *see* 18 V.S.A. § 9382(b)(1) ("The Green Mountain Care Board shall adopt rules pursuant to 3 V.S.A. chapter 25 to establish standards and processes for reviewing, modifying, and approving the budgets of ACOs with 10,000 or more attributed lives in Vermont.") and by contract to provide the same to DVHA. AV-420. This dispute arose in part because

OneCare's submissions to the GMCB raised questions by the Auditor, and its responses to the Auditor's repeated inquiries were insufficient.

For fiscal year 2020, OneCare's budget approval filings identified a significant increase in its payroll. The year before, FY 2019, OneCare submitted a budget identifying $8.87 million in salary and benefits. AV-278-79.

Per OneCare's 2021 budget submission, its actual 2019 salary and benefits expense was $8.23 million. *See* AV-322-323. Yet, for its initial FY 2020 budget submission, OneCare increased its 2020 salary and benefits budget to $11.8 million—almost 50% higher than its 2019 actual expense. AV-278-79.[1]

On March 12, 2020, the Auditor's office sent OneCare two emails requesting an explanation for this increase, along with documents establishing payroll for FY 2020. *See* AV-270-76. After OneCare failed to respond to either email, the Auditor's office emailed another request on March 19, 2020. This time, OneCare responded on March 30, 2020, via email, stating:

> This increase in the proposed budget is due to repatriating positions that were split with the Adirondack ACO in 2019, converting a legal services contract to an employed position, annualizing positions that were scheduled mid-year hires in 2019, and regular annual comp increases for all staff filling vacancies.

Id.

But this response did not include the requested documents. Furthermore, this explanation failed to resolve apparent inconsistencies with OneCare's prior payroll filings with the GMCB. OneCare's FY 2020 Salary Table, submitted to the GMCB on October 18, 2019, showed a total payroll of 63 employees with approximately $6 million in salary and benefits, based upon 2018 W2s. *See* AV-268. The same document identifies 61 employees having an average salary of $69,681 (excepting the CEO and one other executive position). *Id.*

Yet, OneCare's subsequent filing identifying the compensation of key employees, which is based upon the format of a Form 990 disclosure, shows 12 employees earning approximately $2,627,049. AV-265-66. Assuming there are 49 remaining employees from the 63 previously identified in the 2020 budget filing and approximately $1,044,184

[1] Due to COVID this figure was adjusted down to $8.35 million. *See* AV-319-20. And the 2021 budget request was $9.82 million. *See* AV-322-32.

in fringe benefits set forth in the same filing, this would result in an average compensation package of $165,415.69 for the remaining employees assuming a then budget of $11.8 million. Even accounting for a reasonable amount of fringe benefits, this figure is significantly higher than the average salary of $69,681 previously identified.

These inconsistencies raise questions about the accuracy of data provided by OneCare regarding its payroll and benefits, which underlie the payments made by DVHA to support OneCare's operating costs. The existence of serious questions like these make it difficult or impossible to determine whether or not the State's investment in the ACO Model administered by OneCare is actually resulting in cost savings.

Given these inconsistencies and failure to comply, on April 1, 2020, the Auditor himself then sent an email to OneCare's CEO. *See* AV-270-76. In this email, the Auditor not only outlined the deficiencies with OneCare's earlier response, he also included some of the applicable contract language supporting his office's request.

The next day, April 2, 2020, OneCare's CEO responded, claiming she could not address the Auditor's request until after the COVID crisis subsided. *Id.* In support, she stated that her staff's energies were needed elsewhere and that they could discuss the details of the Auditor's request after the crisis.

The Auditor replied via email on April 3, 2020, highlighting that he only needed the requested records—which already existed. *Id.* Thus, he noted there would be no additional work for OneCare to comply with his request.

Almost a month-and-a-half later on May 15, 2020, OneCare's CEO responded. *Id.* In an email she indicated that to the extent salary information would be available, it would be submitted to the GMCB in due course. The Auditor and the public would then have access to those filings. Outside of those filings, the CEO claimed that the requested salary information was exempt from Vermont's Public Records Act (even though the Auditor had not requested the records under the Act).

As a result of OneCare's failure to provide responsive records, the Auditor brought this action for breach of contract and specific performance to obtain the requested records. The Auditor needs these records to perform his duties to ensure that Vermont tax dollars to support the Medicaid program are being appropriately utilized by OneCare in an effective and efficient manner. They are also needed to aid in the overall determination as to whether OneCare's administration of the ACO model is resulting in cost savings for Vermont's Medicaid program.

OneCare then moved to dismiss under V.R.C.P. 12(b)(1), arguing the Auditor lacked standing. OneCare contended that neither the terms of its contract nor the Auditor's statutory authority gave him the right to inspect OneCare's records. Thus, OneCare maintained that the Auditor could not show the requisite injury in fact.

The Auditor opposed OneCare's motion, averring that he had the authority to inspect the records under both the contract as well as his statutory authority. With respect to the contract, the Auditor argued it was a third-party beneficiary, and thus suffered injury when OneCare failed to honor its contractual duties. And since he had the statutory authority to request the records, OneCare's interference with that authority also gave rise to injury in fact.

After oral argument, the trial court granted OneCare's motion to dismiss. At the outset, the trial court noted that OneCare framed its motion as one of standing. But given that the 12(b)(1) standard had no utility under the circumstances, the trial court instead ruled that OneCare's motion fell under 12(b)(6).

The court then held that neither OneCare's contract nor the Auditor's statutory authority gave the Auditor the right to inspect the accounting records. Further, the trial court rejected the comparison to public record disclosure laws.

Finally, the trial court entered final judgment in OneCare's favor. The Auditor timely appealed.

STANDARD OF REVIEW

The Auditor appeals the trial court's ruling on OneCare's motion to dismiss that he does not have a right under OneCare's contract to inspect OneCare's accounting records. This Court reviews motions to dismiss "without deference, applying the same standard as the trial court." *Montague v. Hundred Acre Homestead, LLC,* 2019 VT 16, ¶ 10, 209 Vt. 514, 208 A.3d 609. On a motion to dismiss, the court must assume that the facts pleaded in the complaint are true and make all reasonable inferences in the plaintiff's favor. *Id*. Only when it is beyond a doubt that there exist no facts or circumstances that would entitle the plaintiff to relief, should a court grant a motion to dismiss for failure to state a claim. *Id.* Given this low threshold for the plaintiff, "motions to dismiss for failure to state a claim are disfavored and should be rarely granted." *Id*. (quoting *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 959 A.2d 990 (mem.) (internal

quotations omitted)). Applying this deferential standard, and for the reasons set forth below, the trial court's decision dismissing the Auditor's claims should be reversed.

SUMMARY OF THE ARGUMENT

OneCare argues that the Auditor's claim for the account records fails because as a private entity OneCare maintains it is not subject to the Auditor's authority. Further, OneCare reads its contract with the State as not entitling the Auditor to the requested data. But per the plain terms of the contract the Auditor is entitled to the requested records. Moreover, even if the contract were ambiguous as to whether the Auditor has the right to the accounting records, then in the context of a V.R.C.P. 12(b)(6) motion, any dispute as to the meaning of the contract terms should have been resolved in the Auditor's favor. Finally, the Auditor has the power to audit "every department, institution, and agency of the State." Given the public nature of OneCare's function, OneCare is an agency and/or institution of the State for purposes of the Auditor's statutory authority and subject to his audit authority.

ARGUMENT

1. OneCare is obligated by contract to give the Auditor the requested records and data.

The clear and unambiguous language of the OneCare contract requires production of the requested records and data to the Auditor. In interpreting contracts, Vermont courts "give effect to the intent of the parties as that intent is expressed in their writing." *Tanzer v. MyWebGrocer, Inc*., 2019 VT 124, ¶ 17, 209 Vt. 244, 203 A.3d 1186 (quoting *Hamelin v. Simpson Paper (Vt.) Co*., 167 Vt. 17, 702 A.2d 86 (1997)). When the "contract language is clear, the intent of the parties is taken to be what the agreement declares." *Id.* Or, in other words, "if the written instrument is unambiguous on its face, its meaning must be determined by reference to the words used in the documents itself only." *Ferrill v. No. Amer. Hunting Retriever Ass'n, Inc.,* 173 Vt. 587, 590, 795 A.2d 1208, 1211 (2002) (citing *Isbrandtsen v. No. Branch Corp*., 150 Vt. 575, 578, 556 A.2d 81, 83-84 (1988)).

A. The contract gives authorized agents of the State the right to request accounting records.

In this case, the contract, at Attachment A *Specifications of Work to be Performed*, Section 2.7 provides that:

> Authorized representatives or agents of the State and the federal government shall have access to the Contractor's accounting records and the accounting records of its subcontractors upon reasonable notice and at reasonable times during the performance and/or retention period of the Contract for purposes of review, analysis, inspection, audit and/or reproduction.

See AV-419-20. There is nothing ambiguous about this language. Authorized agents for the State of Vermont, such as the Auditor, have a right to OneCare's accounting records.

OneCare claims that "[a]uthorized representative or agents" must refer to only DVHA agents. But this reading is too narrow.

First, if it were limited to just agents of DVHA it would have so stated. There are too many examples to cite where the contract calls out DVHA as the specific applicable agency. Thus, it is not as if the contract uses "State of Vermont" as a general placeholder. Instead, as is plain from the language, the clause empowers any "[a]uthorized representative or agent of the State" to request the accounting records.

Second, OneCare ignores the import of the paragraph that immediately follows. This paragraph states, in part, that:

> DVHA *and other* state and federal agencies and their respective authorized representatives or agents shall have access to all accounting and financial records of any individual, partnership, firm or corporation insofar as they relate to transactions with any department, board, commission, institution or other state or federal agency connected with the Contract.

Id. (emphasis added). This clause would not make any sense if we accepted OneCare's reading and limited the prior paragraph to just representatives and agents of DVHA. Why would the contract specifically call out "other" agencies if DVHA was the only authorized agent or representative? Avoiding such an interpretation is consistent with this Court's precedent to avoid an interpretation that renders any contract language surplusage. *Northern Sec. Ins. Co. v. Mitec Electronics, Ltd.*, 2008 VT 96, ¶ 24 184 Vt. 303 (2008) (citing *Isbrandtsen v. N. Branch Corp*., 150 Vt. 575, 580, 556 A.2d 81, 85 (1988) (noting that we strive to give effect to all material parts of contracts)); *see also Town of Lyndon v. Burnett's Contracting Co*., 138 Vt. 102, 106, 413 A.2d 1204, 1206 (1980); *In re Stacey,* 138 Vt. 68, 72, 411 A.2d 1359, 1361–62 (1980).

Further, as stated, this provision grants access to OneCare's accounting or financial records for any authorized representative or agent of the State (which, as discussed *infra* at § 1(C), includes the Office of the Vermont State Auditor) to the extent they relate to the business done with other public entities regarding the contract. In other words, under the contract, a state agent (again, including one from the Auditor's Office) can access the financial records of any third-party private corporation doing business with the state in connection with this contract.

Yet, OneCare—who is a party to this contract—claims that those same state agents cannot see its financial records. Such a scenario is implausible. Rather, read together the more reasonable interpretation of these two clauses is that DVHA and agents and representatives of *other* state agencies, e.g., the Office of the Vermont State Auditor, are entitled to the accounting records of both OneCare and other private persons and entities doing contract-related business with the state. These accounting records also include OneCare's payroll related to the contract with the State of Vermont.

B. "Accounting records" includes payroll records.

It is axiomatic that "accounting records" includes payroll records. AV-419-20 (OneCare Contract No. 32318, Amend. No. 4, 2020 Ext. at Attach. A, § 2.7). *See also Payroll*, BLACK'S LAW DICTIONARY (11th Ed. 2019) ("…a business's financial records of employees' wages, bonuses, taxes, and net pay."). So, a request for access to payroll records thus falls within the four corners of the clear and unambiguous language that "[a]uthorized representatives or agents of the State and the federal government shall have access to the Contractor's accounting records." AV-419-20.

Moreover, the Auditor's right to these records is reinforced by the State's "Standard Provisions for Contracts and Grants," at Attachment C. AV-485. Here, the contract states, among other things, that OneCare "shall maintain all records pertaining to performance under this agreement" and that these records "shall be made available at reasonable times…for inspection by any authorized representatives of the State or Federal Government." AV-487. This language alone should be read as extending the Auditor's authority under 32 V.S.A. § 167 to OneCare's records as an authorized representative of the State.

This language is also certain in its terms. Agents for the State of Vermont, such as the Auditor, shall have the ability to obtain records related to the performance of the agreement. *Id*.

Performance, in turn, includes accounting records, such as payroll. This reading of performance is mandated by the terms of Attachment A, *Specifications of Work to be Performed*. As noted above, within that Attachment the contract identifies the disclosure of accounting records as an explicit duty of OneCare. AV-419-20. This duty is thus part of OneCare's performance responsibilities under this contract with the State. And since it is a term of OneCare's performance, OneCare is further obligated by the terms of Attachment C to provide the State access to these records.

C. The Auditor is an authorized agent for purposes of the contract.

The Auditor, as a constitutional officer elected for the purpose of performing audits, is an authorized representative or agent under the OneCare contract and is a third-party beneficiary of the contract. Contracting parties "may agree to create obligations to a third party, which the third party may enforce against the promisor—the party obligated to perform for the third party—if the promisor breaches." *See Sutton v. Vermont Reg'l Ctr*., 2019 VT 71A, ¶ 64, 238 A.3d 608, 632 (citing *Restatement (Second) of Contracts* § 302(1)(b) ("[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.")). As with the contract proper, whether a party is an intended beneficiary, and thus has a right to enforce the contract, "'is based on the original contracting parties' intention,'" as seen in the language of the contract. *Id*. (quoting *Hemond v. Frontier Commc'ns of Am., Inc*., 2015 VT 67, ¶20, 199 Vt. 272, 123 A.3d 1176).

No person is more clearly an authorized representative of the State for purposes of reviewing accounting records than the State Auditor. The Vermont State Auditor is a constitutional officer, elected biennially by the citizens of Vermont. Per 32 V.S.A. §§ 163 & 167, the Auditor is empowered to, among other things, annually perform an audit of the basic financial statements of the State of Vermont. Additionally, the Auditor can, at his discretion, perform an audit "of every department, institution, and agency of the State." 32 V.S.A. § 163(1)(C). Thus, the Auditor is both an "authorized representative of the State" and an "agent of the State" for purposes of these contract provisions.

OneCare makes the erroneous argument that the Auditor contends that *any* state employee is entitled to request the records. But that is not the case. Rather, the Auditor's claim is he—a constitutional officer of the state, statutorily empowered to audit the workings of our government—is an authorized representative or agent for purposes of the contract.

Given the Auditor's constitutional and statutory role within state government, he is an intended beneficiary—perhaps the most obvious intended beneficiary—of the contractual provision giving authorized agents of the State access to OneCare's accounting records. AV-419-20. The trial court erred in ruling that the Auditor did not have the authority under the contract to inspect the records and dismissing the Auditor's complaint.

D. The clear and unambiguous language authorizing the Auditor to obtain OneCare's financial records is required by the regulatory framework that governs ACOs and OneCare.

For year 2020, OneCare was responsible for administering more than $321 million of the State's Medicaid program. The Auditor's authority to obtain the payroll records as provided in Attachments A and C is both consistent with and mandated by a broader regulatory framework that imposes obligations upon the State of Vermont to audit the ACO, OneCare, to comport with federal law. OneCare's efforts to thwart the Auditor's contractual and statutory authority, if successful, would run afoul of the State of Vermont's obligations to administer the Medicaid program in compliance with federal law as well as its contract with CMS.

The State of Vermont administers and delivers Medicaid health care services pursuant to Title XIX of the Social Security Act, Section 1902(a); 42 U.S.C. §§ 1396(a), Grants to State for Medical Assistance Program. For over 15 years, the State of Vermont has obtained waivers to implement "demonstration projects" for the administration of Medicaid health care services. These waivers are granted under Section 1115 of the Social Security Act. 42 U.S.C. § 1315(a)(1), (2)(A). There have been three waiver extensions since 2005. The current version of the waiver led to the creation of the All-Payer ACO Model here in Vermont. 1 AV App. 1. As enabled by statute and reflected in the Vermont All-Payer Accountable Care Organization Model Agreement executed between CMS and the State of Vermont ("ACO Model Agreement"), the purpose of the ACO Model is a demonstration project to determine whether a health care network using

similar risk-based contracts among payers can improve the value of health care for Vermont. *See* 18 V.S.A. § 9551; 1 AV App. 244. The ACO Model Agreement states in pertinent part:

> CMS is the agency within the U.S. Department of Health and Human Services ("HHS") that is charged with administering the Medicare and Medicaid programs. CMS is implementing the Vermont All-Payer ACO Model ("Model") under Section 1115A of the Social Security Act ("the Act"), which authorizes CMS, through its Center for Medicare and Medicaid Innovation, to test innovative payment and service delivery models that are expected to reduce Medicare, Medicaid, or Children's Health Insurance Program expenditures while maintaining or improving the quality of beneficiaries' care.
>
> […]
>
> Through the Vermont All-Payer ACO Model, CMS's purpose is to test whether the health of, and care delivery for, Vermont residents improve and healthcare expenditures for beneficiaries across payers . . . decrease . . . .

1 AV App. 244. The Waiver, which gave rise to the ACO All Payer Model, requires compliance with 42 C.F.R. § 438. 1 AV App. 13. Per these regulations, the Model shall be considered a "non-risk pre-paid inpatient health plan" (PIHP), and shall comply with all "program integrity and audit requirements applicable to a PIHP under § 438(h):

> *All contracts must provide that the State*, CMS, the Office of the Inspector General, the Comptroller General, *and their designees may, at any time, inspect and audit any records or documents of the MCO, PIHP, PAHP, PCCM or PCCM entity, or its subcontractors,* and may, at any time, inspect the premises, physical facilities, and equipment where Medicaid-related activities or work is conducted. The right to audit under this section exists for 10 years from the final date of the contract period or from the date of completion of any audit, whichever is later.

42 C.F.R. § 438.3(h) (emphasis added). The language contained in § 2.7 of the contract, below, satisfies the mandate in § 438.3(h) above, at least with respect to OneCare's accounting records:

> Authorized representatives or agents of the State of Vermont and the federal government shall have access to Contractor's accounting records and the accounting records of its subcontractors upon reasonable notice and at reasonable times during the performance and/or retention period of the Contract for purposes of review, analysis, inspection, audit and/or reproduction.

AV-420.

To be clear, the accounting records audit and inspection clause contained in § 2.7 is there because it *has* to be. The State of Vermont is obligated by law and contract to comply with all applicable Federal Medicaid Statutes and Regulations. And OneCare agreed to be subject to audit by "authorized representatives or agents of the State of Vermont" because by law that is the State of Vermont's obligation to the Social Security Administration and CMS.

2. The trial court erred in granting a dismissal without first allowing discovery and extrinsic evidence regarding the contract.

In general, interpreting contracts presents a question of law for the reviewing court. But where there is ambiguity in the terms of a contract, the factfinder must examine extrinsic evidence to determine the contract's meaning. *B&C Management Vermont, Inc. v. John*, 2015 VT 61, ¶ 11, 199 Vt. 202, 122 A.3d 511. Then the meaning of the contract becomes a mixed question of law and fact. As a result, at the motion to dismiss stage, a court may dismiss a breach of contract claim only if the terms of the contract are unambiguous. *Orchard Hill Master Fund Ltd. v. SBA Communications Corp*., 830 F.2d 152, 156 (2d Cir. 2016). In other words, the court should resolve any contractual ambiguities in favor of the plaintiff. *Luitpold Pharmaceuticals, Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 86 (2d Cir. 2015).

A contract is ambiguous when the language "in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable." *B&C Management*, 2015 VT 61, ¶ 11, 199 Vt. 202, 122 A.3d 511.

In this case, assuming *arguendo* that OneCare's contract does not unambiguously give the Auditor the right to inspect the accounting records—at a minimum the contract is ambiguous on this issue.

As discussed above, the contract states that "[a]uthorized representatives or agents of the State and the federal government" shall have access to OneCare's accounting records. "[A]uthorized representatives or agents" is not defined by the contract. Thus,

marshalling rules of contract interpretation, both parties offer reasonable readings[2] of the contract that support their respective claims regarding whether the Auditor is an "authorized representative or agent."

But the trial court overlooked these interpretations. Instead, the court only noted that the contract did not "define the scope of who may be 'authorized' to access the referenced records," or otherwise state whether the Auditor was authorized. AV-15. At this point, the trial court should have recognized that it found the contract to be ambiguous.

And given that the trial court believed the contract was ambiguous regarding who qualifies as authorized, it should have then denied the motion to dismiss and permitted discovery on extrinsic evidence to determine the contract's meaning.

3. The Auditor has the statutory authority to obtain the OneCare data.

The Auditor's lawful duties are described by statute at 32 V.S.A. §§ 163 and 167.[3] Under § 167(1)(C), the Auditor has the power to audit "every department, institution, and agency of the State…" Indeed, the Auditor is the only entity within the whole of Vermont's state government that can conduct independent audits. And per § 167(a), for the purpose of these audits, "all the records, accounts, books, papers, reports, and returns in all formats of all departments, institutions, and agencies of the State…shall be made available to the Auditor…."

Given the function, funding, regulation, and origin of OneCare, it should be treated as an agency or institution for purposes of the Auditor's audit authority under § 167 and its language "agencies of the State." This Court, recently interpreting functionally identical language in the Public Records Act, to wit: "agency…of the State,"

---

[2] The Auditor is taking the position that OneCare offered a reasonable interpretation of the contract wherein the Auditor is not an authorized representative or agent only for the purposes of arguing in the alternative that if the Court does not agree that the contract unambiguously gives him the power to inspect the requested records then the contract is ambiguous and granting the motion to dismiss without the aid of discovery and extrinsic evidence was premature and in error on the trial court's part.

[3] Government officials have legally protected interests in performing their lawful duties. *Turner v. Shumlin*, 2017 VT 2, ¶ 13, 204 Vt. 78, 163 A. 3d 1173. Thus, those officials also have standing to challenge actions that diminish or interfere with that performance.

held that private entities can be considered an "agency of the State" for disclosure laws. For the same reasons the Court did so in that case, the Court here in interpreting 32 V.S.A. § 167 should treat OneCare as an entity subject to the Auditor's statutorily mandated audit authority**.**

A. Given the nature of OneCare's function, it should be treated as a public agency under the Auditor's statutory audit powers.

While OneCare may have been founded as a private entity, it is so embroiled in state government that it cannot be called a simple government contractor. OneCare's role as an ACO was both created and defined by statute (*see generally* 18 V.S.A. §§ 9551 All-Payer Model and Accountable Care Organizations; *see also* § 9571 Definitions); it is certified by and closely overseen by the GMCB—including not only budget matters (§ 9382(b)(1)); but also how it functions and operates (*see generally* § 9382 Oversight of accountable care organizations); how its governing body conducts its meetings and the public's access to the same are defined by statute (*see* § 9572 Meetings of an accountable care organization's governing body; § 9572(d)(1); *see also* § 9382(d) (regarding public access to ACO filings required by GMCB)). Furthermore, although OneCare as an individual entity was not created by statute, it would not have existed without state involvement and would cease to exist without that same involvement.

Finally, there can be no dispute that OneCare performs a traditional governmental function.

As one Superior Court Judge observed, "governmental assumption of responsibility and involvement in healthcare and healthcare funding has grown in recent years." AV-61-62 (*Whitaker* v. *Vermont Information Technology Leaders, Inc*., No. 781-12-15, 2016 WL 8260068, at *5 (Vt. Super. Ct. Oct. 28, 2016)). The state's creation and implementation of the ACO-model, here, is only a further step in that direction.

Moreover, as part of the ACO-model, OneCare runs a program whereby participating health care providers are paid by Medicaid and coordinate care. 18 V.S.A. § 9551 *All-Payer Model*. Indeed, OneCare administers this ACO model for the delivery of Medicaid benefits to an estimated 103,196 Vermonters. *See* AV-39-42. Medicaid, unlike traditional healthcare, has always been a governmental function. Thus, notwithstanding OneCare's other heavy involvement with the State—looking to the cornerstone of the analysis alone—that OneCare is accountable for a significant portion of Vermont's

Medicaid program compels a finding that OneCare should be treated as a public agency here.

Public policy concerns also favor treating OneCare as a public agency for purposes of the Auditor's authority. As this Court recently noted in *Human Rights Defense Center v. Correct Care Solutions*, the goal of open government was foundational to our republic. 2021 VT 63, ¶22, --- Vt. ---, --- A.3d ---. As the Court observed, quoting John Adams:

> Liberty cannot be preserved without a general knowledge among the people, who have a right ... and a desire to know; but besides this, they have a right, an independent right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers.

Id. (quoting J. Adams, *A Dissertation on Canon and Feudal Law* (1765)). The mission of the Auditor's office is to hold state government accountable. *See generally*, *About the State Auditor's Office, Office of the State of Vermont Auditor* (https://auditor.vermont.gov/about-us) [last visited July 7, 2021]. In accordance with this goal, the Legislature gave the Auditor the power to annually perform government audits of "every department, institution, and agency of the State." 32 V.S.A. § 163(1)(C).

Furthermore, the Auditor is to report his findings, in general, to the Legislature, the Governor, and the subject department, institution, or agency. *See* § 163(4)(A)(i). And on top of those disclosures, the audit reports are to be made public. § 163(4)(A)(ii). Thus, these disclosure laws, in addition to the Auditor's underlying audit-power are in line with our State Constitution's governmental accountability principle. *See Hum. Rts. Def. Ctr*. 2021 VT 63, ¶ 12.

Then, if these tenets of the Auditor's authority were not enough, the legislation surrounding OneCare also calls for the sort of transparency and accountability promoted by the functional-equivalence test. Of some of the more salient provisions: 18 V.S.A. § 9382(a)(1) requires the GMCB to ensure that the ACO's governance, leadership, and management structure is, among other things, transparent; § 9382(d) directs that all information an ACO must file in accordance with § 9382's dictates (or its implementing regulations) must be made available to the public on request; and under § 9572(b) meetings of an ACO's governing body must, in general, be public, giving members of the public opportunity to comment, and the recordings and minutes shall also be publicly posted.

Lastly, in addition to these statutory requirements, the terms of OneCare's contract with the state also contain numerous clauses underscoring the extent to which transparency and accountability are fundamental to this arrangement. *See* AV-419-20, 423-24 (OneCare Contract No. 32318, Amend. No. 4, 2020 Ext. at Attch. A, §§ 2.7, 2.13; AV-409 (*id.* at Amend. & Restat. at § 8); AV-489 (*id*. at Attch. C, § 31); AV-402, 403-04, 405 (*id*. at Attach. F, §§ 3.1, 6, 9.2).

Considering the above, there is significant overlap in the policy concerns behind the impetus for extending the Public Records Act (PRA) to cover some private entities and in determining the reach of the Auditor's authority with respect to an ACO. OneCare does not merely operate as a traditional private government contractor. As a result, this Court should construe the Auditor's authority under 32 V.S.A § 167 to permit the audit of OneCare.

B. There is precedent for treating private entities as public agencies for purposes of transparency and disclosure.

In *Human Rights Defense Center*, this Court held that where the state contracts with a private entity to discharge the entirety of a fundamental and uniquely governmental function, that entity is a public agency within the meaning of the PRA. 2021 VT 63, ¶ 21. The defendant in that case, Correct Care Solutions, under a state contract assumed responsibility for providing medical care to every person in state custody in Vermont. The plaintiff, the Human Rights Defense Center (HRDC), via the PRA requested from Correct Care any records relating to legal actions and settlements arising from that care. Correct Care refused to provide the records citing its status as a private contractor. HRDC then sued, but the trial court found for Correct Care.

On appeal, the *Human Rights Defense Center* Court began by noting that per the PRA any person can copy any public record of a "public agency." *Id*. ¶ 10. This term, public agency, in turn, was defined as including "any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State." *Id.* Then citing, among other things, the plain meaning of the term "instrumentality," the relationship between Correct Care and the State, and the fundamentally governmental nature of Correct Care's responsibility—the *Human Rights Defense Center* Court held that Correct Care was an instrumentality of the DOC and thus a public agency under the PRA. *Id*. ¶ 14.

The Court explained that the question of whether the function performed by Correct Care is fundamentally governmental in nature is important—because allowing a governmental agency to insulate records relating to its performance by delegating those responsibilities to a private entity would defeat the purpose of the PRA. *Id.* ¶ 17.

In ruling that Correct Care was an instrumentality, the *Human Rights Defense Center* Court declined to consider whether the entity might be the "functional equivalent" of a public agency. *Id*. ¶ 13. Under the functional equivalency test, courts consider four nonexclusive factors: (1) whether, and to what extent, the entity performs a governmental or public function; (2) the level of government funding of the entity; (3) the extent of government involvement with, regulation of, or control over the entity; and (4) whether the entity was created by the government. *Id*. ¶ 6. The Court conceded that other courts were applying the functional equivalency test. *Id*. ¶ 13. But the Court observed that these courts applied the test on "the recognition that 'any general definition' of the term 'agency' is 'of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done.'" *Id*. (quoting *Washington Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir. 1974)). Whereas the Vermont PRA's definition of "public agency" was not so general as to have limited utility under the circumstances. So, the Court saw no need to use the test in lieu of the plain meanings of "instrumentality" and "public agency."

Presently, the Auditor's statutory authority to audit records extends to "public agenc[ies]," as does the PRA. Yet unlike the PRA, the audit statute does not separately define what a public agency is.

In this regard, the PRA's reference to "public agency" is "of only limited utility." Moreover, this is a case of "a court confronted with one of the myriad organizational arrangements for getting the business of the government done."

Thus, unlike in *Human Rights Defense Center*, here there is reason to look beyond the plain meaning of "public agency." As a result, an analysis akin to the functional equivalency test provides the relevant guide for determining whether the Auditor's statutory powers extend to OneCare. Indeed, after *Human Rights Defense Center*, in *McVeigh v. Vermont School Boards Ass'n*, 2021 VT 86, ¶ 23, --- Vt. ---, --- A.3d ---, this Court iterated that while it declines to adopt any particular test, "[a]s *Human Rights Defense Center instructs*…the nature of the function carried out by the private entity must be a primary focus of the analysis." And here for the same reasons discussed at §

3.A. above—as well as the public policy concerns espoused by the *Human Resources Defense* Court and one of the founding fathers—this primary focus (as well as the lesser factors of the functional equivalency test) support treating OneCare as a public agency for purposes of the audit authority.

C. Even if OneCare does not qualify as an agency, it is nevertheless part of an institution and thus still subject to the audit power.

As noted above, the Auditor's statutory authority is not limited to just agencies. It also encompasses institutions. 32 V.S.A. § 163(1)(C). Again, as with agency, the audit statutes do not define institution. One common definition of institution is "an organization that exists to serve a public purpose such as education or support for people who need help." *Institution*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/institution (last visited January 19, 2021).

Vermont Medicaid and the administrative apparatus that drive it are an institution. OneCare, though a new partner, in taking the State contract to administer part of Vermont's Medicaid program linked itself to that institution. In so partnering, OneCare has- (and must accept that is has-) obligated itself to comply with both the federal and state oversight that is part and parcel with becoming a Medicaid partner. Part of that oversight (as already made clear in Attachment C) is that OneCare is subject to the Auditor's audit authority as an institution. And so, even if OneCare is not an agency (whether by strict definition or employing a functional-equivalency-type analysis) it nonetheless is part of an institution and open to audit.

CONCLUSION

In sum, the trial court erred in dismissing the Auditor's complaint for several reasons.

First, under the plain terms of the contract, the Auditor is entitled to the requested accounting records from OneCare. Not only do the unambiguous terms of the contract authorize the Auditor's request, the larger context of OneCare's distinctly governmental role in administering part of Vermont's federally approved Medicaid plan also supports this reading.

Second, even if the contract was ambiguous, then the trial court erred in deciding the matter on a V.R.C.P. 12(b)(6) motion. Instead, the court should have denied the

motion to dismiss and let the matter proceed with discovery so that the fact finder could hear extrinsic evidence regarding the contract.

And third, the trial court erred in ruling that the Auditor lacked the statutory authority to request the accounting records. Given the unique governmental role OneCare plays it should be treated as a public agency and/or institution and subject to the audit statutes.

WHEREFORE, Appellant, the Vermont State Auditor requests that the lower court's dismissal order and resulting entry of judgment be reversed.

DATED at Montpelier, Vermont this 24th day of January, 2022

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CERTIFICATE OF WORD-COUNT COMPLIANCE

I, Andrew C. Boxer, counsel of record for the Appellant, the Vermont State Auditor do hereby certify that pursuant rule V.R.A.P. 32 (A)(i) that Appellant's Brief contains 7,120 words exclusive of the Statement of Issues, Table of Contents, Table of Authorities, signature blocks, and Certificates of Word-Count Compliance and Virus Scan.

The word-count provided herein has been calculated by the Microsoft Word processing software.

Dated at Springfield, Vermont, this 24th day of January 2022,

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CERTIFICATE OF VIRUS SCAN

I, Andrew C. Boxer, counsel for counsel of record for the Appellant, the Vermont State Auditor, hereby certify pursuant to V.R.A.P. 32(b)(4), that on January 24th, 2022, Malware Secure Anywhere Endpoint Protection Version 9.0.28.48 software was used to scan the electronic PDF file versions of Appellants' Brief and Printed Case submitted to the Court via Email, and that no virus was detected.

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IN THE SUPREME COURT OF THE STATE OF VERMONT

Docket No. 21-AP-271

THE VERMONT STATE AUDITOR, DOUGLAS R. HOFFER,
Plaintiff—Appellant,

v.

ONECARE ACCOUNTABLE CARE ORGANIZATION, LLC,
d/b/a ONECARE VERMONT,
Defendant—Appellee,

On Appeal from the Vermont Superior Court
Civil Division, Washington Unit
Docket No. 21-CV-00174

APPELLANT THE VERMONT STATE AUDITOR'S REPLY BRIEF

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INTRODUCTION

This appeal concerns whether OneCare, a statutorily defined Accountable Care Organization, that administered more than $321 million of the State's Medicaid program in 2020, is subject to the Vermont State Auditor's audit power, whether by or contract statute. This disagreement over the Auditor's authority stems from the Auditor's request for OneCare's payroll records.

The Auditor requested the records after OneCare's budget revealed there would be a 50% increase in salary expenditures. AV-278-279. The request was made pursuant to sections 2.7 and Attachment C of the Contract:

In response to his request, OneCare provided some records. But these disclosures revealed inconsistencies in OneCare's salary disclosures. Appellant's Br. at 3-4.

Given these inconsistencies and failure to comply the Auditor himself then sent an email to OneCare's CEO. *See* AV-270-76. In this email, the Auditor not only outlined the deficiencies with OneCare's earlier response, he also included some of the applicable contract language supporting his office's request.

OneCare's CEO responded, claiming she could not address the Auditor's request until after the COVID crisis subsided. *Id.* In support, she stated that her staff's energies were needed elsewhere and that they could discuss the details of the Auditor's request after the crisis.

The Auditor replied highlighting that he only needed the requested records—which already existed: "Indeed, what I requested is something that your organization (or a vendor) produces every time you pay those 61 employees. That is, payroll is a routine task and the records we seek already exist…." *Id.* Thus, he noted there would be no additional work for OneCare to comply with his request.

Almost a month-and-a-half later OneCare's CEO responded. *Id.* She indicated that to the extent salary information would be available, it would be submitted to the Green Mountain Care Board (GMCB) in due course. The Auditor and the public would then have access to those filings. Outside of those filings (limited to a handful of top executives), the CEO claimed that the requested salary information was exempt from Vermont's Public Records Act (even though the Auditor had not requested the records under the Act).

OneCare never produced the requested payroll records to the Auditor.

In its brief, OneCare argues that the Auditor's claim for the accounting records fails because as a private entity OneCare maintains it is not subject to the Auditor's authority. Further, OneCare reads its contract with the State as not entitling the Auditor to the requested data. Additionally, OneCare avers that the Auditor lacks standing.

OneCare is wrong on all counts. First, OneCare's claim that the contract does not give the Auditor the right to the records fails because its argument relies on language that's not in the contract. Second, the Auditor's statutory authority supports access to OneCare's accounting records. Third, OneCare errs in asserting that the issue of the contract language's ambiguity was not preserved on appeal. Fourth, OneCare misapprehends the comparison to the Public Records Act cases. And fifth, OneCare's standing arguments are incorrect.

The importance of the issues presented by this case cannot be overstated.

Today governments cannot operate without the aid of countless contractors. These private entities provide a variety of professional services—and with attendant costs. The State of Vermont spent over $1 billion on service contracts in fiscal year 2020 alone. *FY2020 Executed Contracts for Service*, VERMONT.GOV, https://data.vermont.gov/Finance/FY2020-Executed-Contracts-for-Service/wzbv-3teb/data. And if we are to believe OneCare, all this money and outsourcing is beyond the reach of our State's independent constitutional accountability office.

If the Vermont State Auditor cannot access the records of an entity that has partnered with the State to administer the State's Medicaid program, then what does that say about our overriding goal of accountable government. *See* Vt. Const. ch. 1, art. 6 ("that all power being originally inherent in and consequently derived from the people…and at all times, in a legal way, accountable to them").

ARGUMENT

1. OneCare erroneously reads language into the contract that the auditor is not entitled to accounting records.

Section 2.7 of OneCare's contract provides that "[a]uthorized representatives or agents of the State and the federal government shall have access to the Contractor's accounting records and the accounting records of its subcontractors." AV-419-20. OneCare erroneously asserts that for the Auditor to be an authorized representative for the purpose of § 2.7, he needs express statutory authority or a specific reference to his position in the contract. Appellee's Br. at 12-13. Here OneCare cites § 2.7's specific

reference to DVHA and 32 V.S.A. §163(1)(C). There are multiple problems with this argument including that OneCare is reading language into the contract that does not exist and conflating other provisions to wrongfully conclude that only DVHA or the GMCB can seek the requested records.

First, OneCare is reading language into § 2.7 that is not there. Ignoring the contract's broad language giving authorized representatives or agents of the State access to OneCare's accounting records, OneCare suggests that the Auditor would only be entitled to the records if the Auditor were specifically authorized by statute to audit OneCare's records. But the contract contains no such limitation. OneCare is impermissibly inserting additional language that's just not there. *See Downtown Barre Development v. C&S Wholesale Grocers*, 2004 VT 47, ¶ 9, 177 Vt. 70, 857 A.2d 263 ("We may not insert terms into an agreement by implication unless the implication arises from the language employed or is indispensable to effectuate the intention of the parties").

OneCare mischaracterizes the contract language to impermissibly conflate the Auditor's statutory authority and his rights under the contract. In its brief, OneCare suggests that the Auditor contends that 32 V.S.A. §§ 163, 167 form the basis for him being an authorized representative for purposes of the contract. Appellee's Br. at 12. This claim is inaccurate. Rather the contract, specifically § 2.7 and Attachment C provides an independent basis for the Auditor to request the records.

And the Auditor is the epitome of authorized representative for purposes of reviewing OneCare's accounting records. Put differently, short of the Governor, who else other than the Auditor would so obviously qualify as an *authorized representative or agent of the State* for present purposes? The Auditor has come forward in this case as Vermont's Constitutional State Auditor to request these records. OneCare is in no position to contend otherwise. It would be both anomalous and against public policy indeed for OneCare, clinging to its private entity status here, to be able to tell the State who its authorized representative is.

Second, OneCare lumps clauses from two separate paragraphs together to give the impression that only DVHA can request accounting records under § 2.7. Appellee's Br. at 11-12 (lumping § 2.7's general grant of authority to authorized representatives or agents with the section's specific requirements regarding a request for records from DVHA). If OneCare wishes to mesh clauses, it should also include the following sentence that gives "DVHA and other state and federal agencies and their respective authorized

representatives and agents" access to the accounting and financial records of any third-party private corporation doing business with the state in connection with the contract. AV-419-420. Again, this subsequent clause does not limit itself to just DVHA and it extends access to even as-of-yet unidentified third-parties—revealing the breadth and importance of the disclosure requirements inherent in the contract, contrary to OneCare's arguments.

The Auditor's *raison d'etre* is to audit accounting, financial, and other records pertaining to the business of state government and perform his constitutional audit duty. *See Williams v. State Legislature of State of Idaho*, 722 P.2d 465, 466 (Idaho 1986) (recognizing constitutional authority of state auditor to perform post audits). Thus, there is no reason for the Auditor to have a grant of power with specific reference to OneCare, DVHA, or GMCB.

Finally, perhaps recognizing that the contract does indeed give the Auditor the right to the records, OneCare also tries to claim there is no need for him to have the records anymore. Appellee's Br. at 13-14. But OneCare's arguments why it should evade audit are both concerning and unconvincing.

Here OneCare argues that there is nothing in the contract linking how much it pays its employees with its overall financial stability and ability to perform under the contract. But this argument is hollow. What OneCare allocates for salaries—including a planned increase over 50%—could impact its larger financial picture and its performance. AV-278-279.

Furthermore, the allocation for salaries for positions such as marketing, which are unrelated to its contractual obligations involving the delivery of health care services is important for the integrity and accountability of the ACO.

Additionally, as discussed in detail in the Auditor's principal brief, OneCare is a "test" to see whether a health care network using risk-based contracts among payers can improve the value of health care for Vermonters. 18 V.S.A. § 9551; 1 AV App. 244, 307. It strains credulity for OneCare to claim that substantial changes in finances and then inconsistent explanations for those changes could not be viewed as impacting its financial condition—or its ability to implement the "test." To use OneCare's term, there is nothing "nebulous" about the Auditor wishing to understand why Vermont's only ACO intended to give itself a collective raise of over 50% and then, when asked about it, could not provide a clear explanation about the distribution of that raise among its employees.

2. The auditor's statutory audit powers support access to OneCare's accounting records.

OneCare maintains that the Auditor's statutory authority, as expressed in 32 V.S.A. §§ 163, 167 is unambiguous and precludes access to One Care's accounting records. This is because OneCare is allegedly not an agency, department or institution of the State of Vermont. Appellee's Br. at 5-6. This overly narrow construction should be rejected because it is inconsistent with the express language of the authorizing statute and would lead to absurd results. *See TD Banknorth, NA v. Department of Taxes*, 2008 VT 120, ¶ 32, 185 Vt. 45, 967A.2d 1148.

First, the duties of the Auditor are broad. 32 V.S.A § 163 does not limit pre-existing or common law duties. It expressly provides that "*in addition* to any other duties prescribed by law, the Auditor of Accounts shall…audit every department institution, and agency of the state…(emphasis added)" Moreover, nothing within the authorizing statutes limits the ability of the State of Vermont to contract and expressly authorize its agents, such as the Auditor, to access OneCare's accounting records.

Second, the statute does not define "agency." Thus, it is appropriate for the Court to look beyond the plain meaning to discern the legislative intent behind the statute." *See In re Guardianship of C.H.*, 2018 VT 76, ¶ 6, 208 Vt. 55, 194 A.3d 1174.

Agency as set forth in 32 V.S.A. §§ 163, 167 cannot be so narrow as to preclude the Auditor's ability to seek accounting records expressly identified in a contract and necessary to achieve accountability for a program that is central to the State of Vermont's obligations to provide Medicaid services. To do so would otherwise lead to absurd results. *State v. Lohr*, 2020 VT 41, ¶ 7, 212 Vt. 289, 236 A.3d 1277 (explaining that the Court avoids interpretations that lead to absurd results). The Auditor is constitutionally and statutorily empowered to ensure the accountability of the expenditure of state funds, i.e., that they occur in a lawful and appropriate manner. *See Williams, supra*; 32 V.S.A. § 163(2) (statutory authority to conduct post audit reviews).

The impetus to examine more than just the words of the audit authority statute is even greater here than in *Human Rights Defense Center*. In that case, the statutory term at issue, "public agency," was defined by the statute. 2021 VT 63, ¶¶ 10, 13, 263 A.3d 1260, 1264, 1264-65. Yet given the important policy issues at play, the Court still felt it necessary to examine the legislative intent in the broader context of the important role disclosure plays. 2021 VT 63, ¶¶ 11, 14, 263 A.3d 1260, 1264, 1265. Here, where "agency" is not even defined in terms of the audit powers, the grounds for looking

beyond the language to ensure accountability are even stronger. This need for accountability is especially vital where OneCare is responsible for administering hundreds of millions of dollars in Medicaid benefits to over 100,000 Vermonters. *Infra* at p. 9.

OneCare persists by claiming that some public comments made by the Auditor as well as a lack of legislative action on a proposed bill support its claim. Appellee's Br. at 5, 19-20. But these too are meritless.

OneCare argues that since the Legislature has not passed a bill proposed by the Auditor that would grant him explicit statutory authority over OneCare, the Legislature must not have intended for the audit authority to reach private entities like OneCare. This argument rests on too slender a reed. There could be any number of reasons why the Legislature did not pass the proposed bill.[1]

Among those reasons might be that the Legislature already interprets the statutes, or the standard provisions of the contract, to give the Auditor the authority to audit entities like OneCare. Indeed, this explanation is more likely given the accepted practice of the Auditor to use Attachment C to obtain accounting records from private entities to review their performance. The Auditor has used his authority on at least seven occasions to request and receive accounting records from private entities. *See Office of the Vermont State Auditor: Performance Audits*, AUDITOR.VERMONT.GOV, https://auditor.vermont.gov/reports/performance-audits: Rpt. No. 19-05 (new hires, job specifications, explanations of exceptions); Rpt. No. 18-05 (timesheet and payroll data); Rpt. No. 16-07 (financial transaction data); Rpt. No. 16-06 (status reports to performance under the contract); Rpt. No. 15-05 (documentation supporting performance reports); Rpt. No. 14-05 (documentation supporting claims); Rpt. 13-06 (detailed financial reports for salaries and benefits, off-site services, and pharmacy supplies; timesheet and payroll data).

OneCare does not stop there, though; it also contends that since the Auditor once publicly expressed that his authority is limited with regards to nongovernmental actors, that too must mean that the statutes do not reach OneCare. First, while there may be

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[1] Indeed, the legislature never even voted on the proposed legislation.Vermont General Assembly, 2019-2020 Session, H.181, LEGISLATURE.VERMONT.GOV.

general limits to the Auditor's statutory authority to access records of entities that are not part of State government, that does not mean that the Auditor is not an authorized representative or agent of the State under either § 2.7 or Attachment C of the contract. Second, these public remarks are immaterial for present purposes. The Auditor is not a judge issuing holdings on statutory authority, nor was he acting as an attorney issuing a legal opinion. While he is no doubt familiar with his authority, he is by no means an arbiter of the extent of his constitutional or statutory authority.

3. There was no need to preserve the argument that the contract was ambiguous, and even if there was—it has been preserved.

In his principal brief, the Auditor argues that the clear and unambiguous language of the OneCare contract requires production of the requested records and data. In the alternative, the Auditor contends that based on the lower court's motion to dismiss ruling, the lower court should have decided that the contract is ambiguous, denied dismissal, and ordered discovery to commence so that it could hear extrinsic evidence on the contract's purpose.

OneCare now claims that this alternative argument cannot be raised on appeal since the Auditor argued that the contract was unambiguous before the lower court. Appellee's Br. at 16-18. The problem with OneCare's claim is that the Auditor's alternative argument arises from the lower court's ruling.

OneCare's Motion to Dismiss was based on 12(b)(1) lack of subject matter jurisdiction for lack of standing. Standing is jurisdictional in nature, and consequently, standing is a threshold issue that must be addressed before the merits of the case are judicially resolved. *Severson v. City of Burlington*, 210 Vt. 365 (2019). The Auditor asserted in response that he had standing by virtue of the authority granted him by statute and the terms of the contract. The issues briefed and argued before the trial court were those related to a 12(b)(1) motion, not a 12(b)(6) motion.

After the parties had briefed and argued the 12(b)(1) motion, the Court *sua sponte* converted the motion to one based on 12(b)(6) failure to state a claim, which necessarily requires examination of a set of facts pursuant to standards necessarily implicated by 12(b)(6).

The Auditor contends that the trial court in considering the matter under 12(b)(6), which was not the relief sought briefed or argued, improperly applied the applicable standard relating to contract interpretation. In its dismissal ruling, the trial court quoted

the relevant parts of the contract, including the clause stating that "Authorized representatives or agents of State of Vermont and the federal government shall have access to Contractor's accounting records." AV-13-15. But the court then went on to note that the contract did not "define the scope of who may be 'authorized' to access the referenced records," or otherwise state whether the Auditor was authorized. AV-15. Then without further comment the lower court went on to consider other possible sources of authority.

As the Auditor's opening brief observed, the lower court failed to employ the correct standard of review. First, in considering a 12(b)(1) motion, the Court should have considered whether the Auditor had "allege[d] facts sufficient to confer standing on the face of the complaint." *Parker v. Town of Milton*, 169 Vt. 74, 76, 726 A.2d 477, 479 (1998). After failing to apply this standard correctly, and having converted the motion to 12(b)(6), the lower court should have resolved any contractual ambiguities in the Auditor's favor. *Luitpold Pharmaceuticals, Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 86 (2d Cir. 2015). The trial court failed to apply that standard.

The Auditor's argument only came about because of an error by the lower court on a matter of law. And as a result, it is not inappropriate for the Court to take it up here. *See Sigler v. Town of Norwich*, 174 Vt. 129, 130, 807 A.2d 442, 444 (2002) ("We exercise plenary review in determining whether the trial court's conclusions of law are consistent with applicable law").

Finally, OneCare's arguments are disingenuous in suggesting that the meaning of the contract language was not argued below. That issue was front and center before the lower court and the question of who was an authorized representative or agent was debated at oral argument. *See e.g.*, MTD Hr'g Tr. 15:17-25. In other words, there is no question that the trial court was considering the meaning of the contract language and any possible ambiguity. *See In re Entergy Nuclear Vermont Yankee, LLC*, 2007 VT 103, ¶ 9, 182 Vt. 340, 345, 939 A.2d 504, 508 ("the rule is to ensure that the original forum is given an opportunity to rule on an issue prior to our review."). And thus, there is no concern that the issue was not preserved.

4. The Auditor does not contend that the functional equivalence test applies; rather, given OneCare's role and function, the policy reasons behind that test call for interpreting the Auditor's independent power as reaching OneCare.

OneCare argues that the PRA cases do not apply because this is not a PRA case and that in any event, the policy reasons behind the PRA cases should not apply here. Appellee's Br. at 6-10.

OneCare is correct that this is not a PRA case. But OneCare mischaracterizes the Auditor's argument in suggesting that the Auditor seeks to impose the functional equivalence test discussed in those cases. Instead, the Auditor argues that for the same reasons this Court found that the PRA can apply to private entities in that context, the audit statute should also apply.

OneCare also tries to claim that if the reasoning behind extending the PRA's reach also applied here, it would not apply to an entity like OneCare. Here, OneCare makes a dubious comparison between itself and the Vermont School Boards Association this Court found was not subject to the PRA in *McVeigh v. Vermont Sch. Brd.'s Ass'n*, 2021 VT 86, ¶ 24, --- Vt. ---, 266 A.3d 763. Appellee's Br. at 6-7. This analogy, however, is inapt.

Again, as noted above and discussed in the Auditor's principal brief, OneCare would not exist in its current form without either the State or Federal government. A private company with a registered name of OneCare, calling itself an ACO, could exist. But without our Legislature's imprimatur, OneCare would not function as an ACO (18 V.S.A §§ 9551; 9571) and it would not administer the delivery of Medicaid benefits to over 100,000 Vermonters, or the 321 million in Medicaid dollars. AV-38, 278-79. Nor would OneCare be overseen by DVHA or GMCB, or be subject to stringent public access requirements. (18 V.S.A. §§ 9382(b)(1); 9382(d); 9572; 9572(d)(1). In other words, OneCare is nothing like VSBA—whose only link to a governmental service, i.e. education, was to offer support to school boards through advocacy, training, and information. *McVeigh*, 2021 VT 86, ¶ 24.

Next, OneCare suggests that it is so closely overseen by the GMCB that there is no room for the Auditor. Appellee's Br. at 8-9. Besides the incongruity with its claim that it is a mere private entity with low level government ties, it is immaterial that GMCB oversees OneCare for purposes of the Auditor's role. It does not follow that because GMCB is granted statutory oversight, the Auditor cannot exercise audit authority over OneCare. For example, that the Agency of Human Services is responsible for DVHA,

does not mean that the Auditor could not audit DVHA. The purpose of having a constitutionally mandated Auditor is so that there is an independent entity within our government that can perform these audits outside the same agency or department that is the subject of the audit.

Additionally, the Auditor's role as the only independent audit entity in our government belies OneCare's next claim that since GMCB did not look into OneCare's planned salary increases, we should all pack our bags and go home. *See* Appellee's Br. at 9. That the GMCB did not investigate the planned 50% salary increase or the potential misallocation of administrative resources to functions unrelated to the delivery of health care services, while the Auditor wished to, only highlights the importance of the Auditor's role.

Under OneCare's arguments, state agencies and departments, intentionally or not, could hide the business of state government and administration by contracting their duties out to private entities. To wit, there's no dispute that the Auditor could request these records from AHS or DVHA if they had them. But if we accept OneCare's position, the Auditor's ability to see these records is contingent on AHS or DVHA first electing to exercise this oversight over their own subcontracted partners.

This situation is untenable in a democracy. As John Adams warned, liberty cannot be preserved without the people having a right to know the conduct of their rulers. *Human Rights Defense Center*, 2021 VT 63, ¶22 (quoting J. Adams, *A Dissertation on Canon and Feudal Law* (1765)).

The Auditor's role to ensure accountability is no less important to the proper functioning of our democracy. Fortunately, our Constitution and Legislature gave our state an independent auditor that could operate across the government. And, whether by design or not, that puts the Auditor in the best place to examine and review—even where other government entities do not or cannot.

Finally, OneCare also confuses the Auditor's reference to the regulatory framework governing ACOs. OneCare claims that 42 C.F.R. § 438.3(h) (requiring that certain Medicaid contracts must give the State the right to inspect and audit) applies to AHS only and not the Auditor. OneCare misses the point. The Auditor is not relying on § 438.3(h) as the source of his authority. Rather, the Auditor cites this regulation to show that it is no accident that the contract places such great emphasis on disclosure, transparency, and accountability with audit and document retention and disclosure requirements in the contract. Nothing within the regulatory scheme says AHS is the

exclusive entity to conduct audits. From § 438.3(h) up to Vermont's Waiver Authority (*see generally Ctrs. for Medicare & Medicaid Srvcs. Waiver Authority, No. 11-W-00194/1*, HUMANSERVICES.VERMONT.GOV ; *Vermont All-Payer Account Care Organization Model Agreement*, GMCBOARD.VERMONT.GOV), the business of administering Medicaid is regulated and controlled to a degree that it should not surprise anyone that the terms of the State's contract with OneCare would subject OneCare to audit by the State Auditor.

5. OneCare's standing arguments are incorrect.

OneCare dedicates a significant part of its brief to arguing that the Auditor lacks standing for his claims. Appellee's Br. at 18-22. But this effort is for naught.

If the Auditor's statutory authority entitles him to the requested records, there is no question that the Auditor was injured when OneCare refused to provide them. *Turner v. Shumlin*, 2017 VT 2, ¶ 13, 204 Vt. 78, 163 A. 3d 1173 (recognizing that government official has a legally protected interest in performing their lawful duties). Alternatively, if OneCare is obligated to provide the records to the Auditor under the contract, then the Auditor has standing as a third-party beneficiary. *See Sutton v. Vermont Reg'l Ctr*., 2019 VT 71A, ¶ 64, 238 A.3d 608, 632 (citing *Restatement (Second) of Contracts* § 302(1)(b) ("[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.")).

OneCare cites an Alabama Supreme Court ruling, *Morrow v. Bentley*, 261 So. 3d 278 (Al. 2017) as nominal support for its claim that the Auditor lacks standing. Appellee's Br. at 19-20, n. 6. But the circumstances of *Morrow* are too inapposite to be of any value here. In *Morrow* the Alabama auditor challenged a government expenditure. Thus, the Alabama court held the auditor had not suffered an injury-in-fact and lacked standing because challenging government expenditures was not one of the auditor's constitutional or statutory powers. But as the *Morrow* Court noted, and as is the case in Vermont, the auditor does have the power to audit. It is this power that the Auditor contends that OneCare has interfered with—not a government expenditure. And as result, OneCare's reliance on *Morrow* is misplaced.

CONCLUSION

Per the contract, the Auditor is entitled to the requested records from OneCare. Or, at a minimum, based on the trial court's analysis, the contract is ambiguous and the court should have permitted discovery on extrinsic evidence regarding the contract's meaning.

In sum, OneCare has failed to rebut the Auditor's arguments that the trial court erred in dismissing the Auditor's complaint. And as a result, the Auditor requests that the lower court's dismissal order and resulting entry of judgment be reversed.

DATED at Montpelier, Vermont this 4th day of April, 2022

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CERTIFICATE OF WORD-COUNT COMPLIANCE

I, Andrew C. Boxer, counsel of record for the Appellant, the Vermont State Auditor do hereby certify that pursuant rule V.R.A.P. 32 (A)(i) that Appellant's Reply Brief contains 4,468 words exclusive of the Statement of Issues, Table of Contents, Table of Authorities, signature blocks, and Certificates of Word-Count Compliance and Virus Scan.

The word-count provided herein has been calculated by the Microsoft Word processing software.

Dated at Springfield, Vermont, this 4th day of April 2022,

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CERTIFICATE OF VIRUS SCAN

I, Andrew C. Boxer, counsel for counsel of record for the Appellant, the Vermont State Auditor, hereby certify pursuant to V.R.A.P. 32(b)(4), that on April 4, 2022, Malware Secure Anywhere Endpoint Protection Version 9.0.28.48 software was used to scan the electronic PDF file versions of Appellants' Reply Brief submitted to the Court via Email, and that no virus was detected.

Dated at Springfield, Vermont, this 4th day of April 2022,

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STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
CHITTENDEN UNIT — Docket No. 23-CV-04963

THE OFFICE OF THE AUDITOR OF ACCOUNTS, in its official capacity, and DOUGLAS R. HOFFER, as a citizen of the State of Vermont, Plaintiffs	)
v.	)
THE OFFICE OF THE ATTORNEY GENERAL and CHARITY R. CLARK, in her official capacity as the Attorney General of the State of Vermont, Defendants	)

STATEMENT OF FACTS

Pursuant to Vermont Rule of Civil Procedure 56, Plaintiffs submit the following statement of facts. Plaintiffs take the position that only paragraphs 8 to 11 and 28 to 34 are material to the dispute, but have included additional facts to provide background and context to the dispute.

Facts

1. Under 32 V.S.A. § 163(a)(C), the "Auditor of Accounts shall . . . annually perform or contract for . . . at his or her discretion, governmental audits as defined by the governmental auditing standards issued by the U.S. Governmental Accountability Office (GAO) of every department, institution, and agency of the State . . ." The standards promulgated by the GAO are commonly referred to as "GAGAS" and are collected in a publication called the "Yellow Book." Comptroller General of the United States, Yellow Book, (2018 Edition with 2021 Technical

Update) available at: Yellow Book | U.S. GAO, https://www.gao.gov/yellowbook (last accessed January 22, 2024); *see also* Hoffer Decl. ¶ 1.

2. Section 1.21 states that "[p]erfomance audits provide objective analysis, findings, and conclusions to assist management and those charged with governance and oversight with, among other things, improving program performance and operations, reducing costs, facilitating decision making by parties responsible for overseeing or initiating corrective action, and contributing to public accountability." *Id.* ¶ 2

3. GAGAS requires that auditors be both independent and competent to perform the work required. GAGAS Section 3.18 requires that "[i]n all matters relating to the GAGAS engagement, auditors and audit organizations must be independent from an audited entity." Similarly, Section 3.19 requires that "Auditors and audit organizations should avoid situations that could lead reasonable and informed third parties to conclude that the auditors and audit organizations are not independent and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the engagement and reporting on the work." *Id.* ¶ 3.

4. Section 4.02 of GAGAS requires that "[t]he audit organization's management must assign auditors to conduct the engagement who before beginning work on the engagement collectively possess the competence needed to address the engagement objectives and perform their work in accordance with GAGAS." When an auditor does not have the competence necessary to perform a particular tasks GAGAS requires that the audit team have other qualified individuals provide that assistance. Section 4.12 requires that the "engagement team should determine that specialists assisting the engagement team on a GAGAS engagement are qualified and competent in their areas of specialization." *Id.* ¶ 4.

5. GAGAS provides a method for complying with the competency requirements when the outside specialist needed is a lawyer. Under Section 8.69, "Auditors may consult with their legal counsel to (1) determine those laws and regulations that are significant to audit objectives, (2) design tests of compliance with provisions of laws and regulations, and (3) evaluate the results of those tests." Section 8.69 explains that "Government programs are subject to many provisions of laws, regulations, contracts, and grant agreements." *Id.* ¶ 5.

6. In February 2023, the Office of the Attorney General informed the Office of Auditor of Accounts that it would no longer provide opinions to the Office of Auditor of Accounts. Both Douglas Hoffer and Timothy Ashe attended that meeting. Hoffer Decl. ¶ 6.

7. The Attorney General's current stance on Section 159 is a reversal of the previous policy of the Office of the Attorney General. Over 12 years, the Auditor of Accounts has requested answers to questions of law in over 30 particular cases. These requests have covered a wide variety of topics, including other questions concerning tax increment financing, capital projects, oversight of VITL, calculations of equalized pupil calculations, etc. *Id.* ¶ 7.

8. Attached as Exhibit 1 to the Hoffer Declaration is a true and correct copy of a September 27, 2023 letter that the Office of Auditor of Accounts and the Vermont Economic Progress Council sent to the Office of the Attorney General. Hoffer Decl. ¶ 8.

9. Attached as Exhibit 2 to the Hoffer Declaration is a true and correct copy of November 1, 2023 letter that the Office of the Attorney General sent to the Office of Auditor of Accounts. *Id.* ¶ 9.

10. Attached as Exhibit 3 to the Hoffer Declaration is a true and correct copy of a November 13, 2023 memorandum that Hoffer sent to the Office of the Attorney General. *Id.* ¶ 10.

11. Attached as Exhibit 4 to the Hoffer Declaration is a true and correct copy of November 21, 2023 letter that the Office of the Attorney General sent to the Office of Auditor of Accounts. *Id.* ¶ 11.

12. The Attorney General's actions have deprived Hoffer and his office of the information that they are entitled under 3 V.S.A. § 159. *Id.* ¶ 12.

13. On January 12, 2024, the Office of Auditor of Accounts issued a report entitled the City of Burlington Downtown Tax Increment Financing District. *Id.* ¶ 13.

14. The report is incomplete in that it does not benefit from answers to two questions that the Office of Auditor of Accounts asked the Attorney General. Those questions are: (1) Do bond premiums fall under the definition of financing in 24 V.S.A. § 1891(7)? and (2) Are municipalities required to obtain authorization from the Vermont Economic Progress Council (VEPC) and municipal voters for the aggregate bond proceeds (principal and premium) that will be used to pay for public infrastructure improvements of a tax increment financing (TIF) district? *Id.* ¶ 14.

15. Depending on the answers to those questions, the Office of Auditor of Accounts and Hoffer would have either reached different conclusions or been more firm in the conclusions that they did reach. *Id.* ¶ 15.

16. Both the Office and Hoffer take pride in producing a professional work product that accurately meets the objectives of the audits that they plan. Detailed factual investigation and analysis form the basis of their work. They allow the facts and their analysis of the facts to serve as the basis for their conclusions. They do not allow their personal or political views to drive their conclusions. *Id.* ¶ 16.

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17. The audit reports that they prepare and publish are subject to peer review by other governmental auditing organizations. Their audits have consistently passed this peer review process. *Id.* ¶ 17.

18. Both the Office and Hoffer cannot do their job properly without obtaining the legal advice that the Office of the Auditor of Accounts seeks from the Office of the Attorney General. *Id.* ¶ 18.

19. In Hoffer's judgment, both the Office and Hoffer cannot maintain the appearance of independence without obtaining a legal opinion through the ordinary course of obtaining legal opinions for state Officers under Vermont law. In his judgment, that procedure is set forth in 3 V.S.A § 159. *Id.* ¶ 19.

20. The Mayor of the City of Burlington has attacked The Office's and Hoffer's independence because they do not have the opinion of the Office of the Attorney General. The Mayor put out a press release saying that: "The headline finding of this audit is bogus and reflects Auditor Doug Hoffer's longstanding campaign against the State's TIF program." Patrick Crowley "State auditor finds 'substantial mistakes' in Burlington's tax increment financing." January 16, 2024, https://vtdigger.org/2024/01/16/state-auditor-finds-substantial-mistakes-in-burlingtons-tax-increment-financing/. *Id.* ¶ 20.

21. The Mayor's statement attributes partisan motivation when it is the purpose of that audit to test compliance of a program with the law. *Id.* ¶ 21.

22. The Office of Auditor of Accounts has a reputation for independence with Vermont voters. When governmental officials attack the independence of the Office, the people lose trust in the Office to provide an independent review of the various issues that the Auditor is charged with reviewing. *Id.* ¶ 22.

23. In addition, an attack on Hoffer damages his professional reputation as an auditor and his relationship with the voters causing them to question whether they should vote for him in the next election. *Id.* ¶ 23.

24. The Mayor's attack has damaged and will continue to damage his reputation and relationship with voters, who are in charge of voting for the Auditor of Accounts. The Mayor's attack also does damage to the institution of the Office of Auditor of Accounts because it makes it appear partisan and not independent. *Id.* ¶ 24.

25. There remains one audit of the City's Downtown TIF district. The Office and Hoffer still need the Attorney General's opinion to resolve the issues left open in the audit report. *Id.* ¶ 25.

26. Both the Office and Hoffer are also damaged because both the Office and Hoffer have not received information to which they are entitled under Section 159. They both have an informational interest in the opinion that the Attorney General must provide to them. *Id.* ¶ 26.

27. As a citizen, Hoffer believes that he is entitled to a complete audit report and the information that it would provide. *Id.* ¶ 27.

28. On September 27, 2023, the Auditor of Accounts and the Vermont Economic Progress Council ("VEPC") requested that the Attorney General answer three questions of law:

> 1. Do bond premiums fall under the definition of financing in 24 V.S.A. § 1891(7)?
>
> 2. Are municipalities required to obtain authorization from the Vermont Economic Progress Council (VEPC) and municipal voters for the aggregate bond proceeds (principal and premium) that will be used to pay for public infrastructure improvements of a tax increment financing (TIF) district?
>
> 3. If statute and relevant rules are not conclusive on questions 1 and 2, does VEPC have authority under 32 V.S.A. § 5404a(j)(1) to address these issues within the TIF Rules?

Hoffer Ex. 1 at 1.

29. On November 1, 2023, the Attorney General responded to these questions by stating "we decline to opine on the interpretation of provisions in title 24 requested above." Hoffer Ex. 2. at 2.

30. On November 13, 2023, the Auditor followed up as a courtesy to the Attorney General to give the Attorney General an opportunity to reconsider the Auditor's original request. In addition, the Auditor of Accounts sought permission to retain counsel to pursue litigation to resolve definitively the Attorney General's duties under 3 V.S.A. § 159. Hoffer Ex. 3.

31. On November 21, 2023, the Attorney General responded that "your first two questions concerning potential future adherence with municipal law by the City of Burlington are more appropriately resolved by the City, ACCD, and VEPC – not by the Attorney General." Thus, the Attorney General has not answered the first two questions that the Auditor of Accounts requested from the Attorney General. Hoffer Ex. 4.

32. The November 21 letter also details the Attorney General's assertion that it alone can determine when one State Officer may bring a lawsuit against another State official. For example, the Attorney General claims that "you lack authority to unilaterally initiate litigation on behalf of or against the state." Hoffer Ex. 4 at 2. The Attorney General also stated that "I do not and will not condone your attempt to initiate litigation against me or my office, and I view such actions as contrary to law." Hoffer Ex. 4 at 7. The Attorney General took the position that "we do not concede you have the legal authority to initiate litigation against the state, it officers, or agencies without the Attorney General's Office." Hoffer Ex. 4 at 7.. The Office takes the position that Defendants "would be remiss regarding their duties – particularly the obligations regarding 'general supervision of matters and actions in favor of the State and of those instituted

by or against State Officers,' 3 V.S.A. § 159 – if they did not seek dismissal of unsanctioned litigation against the State and its officers by an unauthorized State officer in these circumstances." The Attorney General seeks to be the only authority for determining whether all State Officers may bring litigation against the State or other Officers. *See* Mot. to Dismiss at 14-17. The Attorney General seeks the authority even though the Office acknowledges that is has a "potential" conflict of interest. Hoffer Ex. 4 at 7.

33. The Attorney General agrees that there is an actual controversy between the parties. Hoffer Ex. 4 at 1. The Attorney General outlines three areas of disagreement between the parties: "a) we do not concede any cause of action you may assert entitles you to a court-ordered Attorney General opinion. *See e.g.*, 3 V.S.A. §§ 152, 153, 157, 159; (b) we do not concede any cause of action you may assert entitles you to a court-ordered Attorney General opinion, particularly one related to actions or potential actions of a local entity; and (c) we do not concede the statute you rely on, 3 V.S.A. § 159, governs requests for legal opinions regarding the actions of third-party entities that are subject to performance audits." *Id.* As this brief shows, the Auditor disagrees with each of the Attorney General's assertions. Moreover, the Auditor insists that it has the legal right to require that the Attorney General perform its duty under 3 V.S.A. § 159.

34. In its November 1, 2023 letter the Attorney General admitted that the Auditor of Accounts "requested" an "opinion" on "questions of law." "We understand you have ***requested*** an Attorney General opinion relating to three ***questions*** regarding ***tax increment financing***." Hoffer Ex. 2 at 1 (emphasis added). The Attorney General also conceded that the request was pursuant to the official duties of the Auditor: "We further understand the inquiry by the Auditor's Office is pursuant to the Auditor's statutory charge to conduct performance audits of

TIF districts and include review of a municipality's 'adherence to relevant statutes and rules adopted by the Vermont Economic Progress Council.'" Hoffer Ex. 2 at 1 *quoting* 32 V.S.A. 5404a(1). The Attorney General also concedes that the Auditor is an elected officer of the State of Vermont. Mot to Dismiss at 14.

Dated: January 24, 2024

/s/ Matthew B. Byrne

Matthew B. Byrne, Esq.
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STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
CHITTENDEN UNIT — Docket No. 23-CV-04963

THE OFFICE OF THE AUDITOR OF ACCOUNTS, in its official capacity, and DOUGLAS R. HOFFER, as a citizen of the State of Vermont, Plaintiffs	)
v.	)
THE OFFICE OF THE ATTORNEY GENERAL and CHARITY R. CLARK, in her official capacity as the Attorney General of the State of Vermont, Defendants	)

DECLARATION OF DOUGLAS R. HOFFER

Douglas R. Hoffer hereby declares:

1. Under 32 V.S.A. § 163(a)(C), the "Auditor of Accounts shall . . . annually perform or contract for . . . at his or her discretion, governmental audits as defined by the governmental auditing standards issued by the U.S. Governmental Accountability Office (GAO) of every department, institution, and agency of the State . . ." The standards promulgated by the GAO are commonly referred to as "GAGAS" and are collected in a publication called the "Yellow Book."

2. Section 1.21 states that "[p]erfomance audits provide objective analysis, findings, and conclusions to assist management and those charged with governance and oversight with, among other things, improving program performance and operations, reducing costs, facilitating decision making by parties responsible for overseeing or initiating corrective action, and contributing to public accountability."

3. GAGAS requires that auditors be both independent and competent to perform the work required. GAGAS Section 3.18 requires that "[i]n all matters relating to the GAGAS engagement, auditors and audit organizations must be independent from an audited entity." Similarly, Section 3.19 requires that "Auditors and audit organizations should avoid situations that could lead reasonable and informed third parties to conclude that the auditors and audit organizations are not independent and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the engagement and reporting on the work."

4. Section 4.02 of GAGAS requires that "[t]he audit organization's management must assign auditors to conduct the engagement who before beginning work on the engagement collectively possess the competence needed to address the engagement objectives and perform their work in accordance with GAGAS." When an auditor does not have the competence necessary to perform a particular tasks GAGAS requires that the audit team have other qualified individuals provide that assistance. Section 4.12 requires that the "engagement team should determine that specialists assisting the engagement team on a GAGAS engagement are qualified and competent in their areas of specialization."

5. GAGAS provides a method for complying with the competency requirements when the outside specialist needed is a lawyer. Under Section 8.69, "Auditors may consult with their legal counsel to (1) determine those laws and regulations that are significant to audit objectives, (2) design tests of compliance with provisions of laws and regulations, and (3) evaluate the results of those tests." Section 8.69 explains that "Government programs are subject to many provisions of laws, regulations, contracts, and grant agreements."

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6. In February 2023, the Office of the Attorney General informed the Office of Auditor of Accounts that it would no longer provide opinions to the Office of Auditor of Accounts. Both Douglas Hoffer and Timothy Ashe attended that meeting.

7. The Attorney General's current stance on Section 159 is a reversal of the previous policy of the Office of the Attorney General. Over 12 years, the Auditor of Accounts has requested answers to questions of law in over 30 particular cases. These requests have covered a wide variety of topics, including other questions concerning tax increment financing, capital projects, oversight of VITL, calculations of equalized pupil calculations, etc.

8. Attached as Exhibit 1 is a true and correct copy of a September 27, 2023 letter that the Office of Auditor of Accounts and the Vermont Economic Progress Council sent to the Office of the Attorney General.

9. Attached as Exhibit 2 is a true and correct copy of November 1, 2023 letter sent from the Office of the Attorney General to the Office of Auditor of Accounts.

10. Attached as Exhibit 3 is a true and correct copy of a November 13, 2023 memorandum that I sent to the Office of the Attorney General.

11. Attached as Exhibit 4 is a true and correct copy of November 21, 2023 letter sent from the Office of the Attorney General to the Office of Auditor of Accounts.

12. The Attorney General's actions have deprived me and my office of the information that we are entitled under 3 V.S.A. § 159.

13. On January 12, 2024, the Office of Auditor of Accounts issued a report entitled the City of Burlington Downtown Tax Increment Financing District.

14. The report is incomplete in that it does not benefit from answers to two questions that the Office of Auditor of Accounts asked the Attorney General. Those questions are: (1) Do

bond premiums fall under the definition of financing in 24 V.S.A. § 1891(7)? and (2) Are municipalities required to obtain authorization from the Vermont Economic Progress Council (VEPC) and municipal voters for the aggregate bond proceeds (principal and premium) that will be used to pay for public infrastructure improvements of a tax increment financing (TIF) district?

15. Depending on the answers to those questions, the Office of Auditor of Accounts and I would have either reached different conclusions or been more firm in the conclusions that we did reach.

16. Both the Office and I take pride in producing a professional work product that accurately meets the objectives of the audits that we plan. Detailed factual investigation and analysis form the basis of our work. We allow the facts and our analysis of the facts to serve as the basis for our conclusions. We do not allow our personal or political views to drive our conclusions.

17. The audit reports that we prepare and publish are subject to peer review by other governmental auditing organizations. Our audits have consistently passed this peer review process.

18. Both the Office and I cannot do our job properly without obtaining the legal advice that the Office of the Auditor of Accounts seeks from the Office of the Attorney General.

19. In my judgment, both the Office and I cannot maintain the appearance of independence without obtaining a legal opinion through the ordinary course of obtaining legal opinions for state Officers under Vermont law. In my judgment, that procedure is set forth in 3 V.S.A § 159.

20. The Mayor of the City of Burlington has attacked The Office's and my independence because I do not have the opinion of the Office of the Attorney General. The

Mayor put out a press release saying that: "The headline finding of this audit is bogus and reflects Auditor Doug Hoffer's longstanding campaign against the State's TIF program." Patrick Crowley "State auditor finds 'substantial mistakes' in Burlington's tax increment financing." January 16, 2024, https://vtdigger.org/2024/01/16/state-auditor-finds-substantial-mistakes-in-burlingtons-tax-increment-financing/.

21. The Mayor's statement attributes partisan motivation when it is the purpose of that audit to test compliance of a program with the law.

22. The Office of Auditor of Accounts has a reputation for independence with Vermont voters. When governmental officials attack the independence of the Office, the people lose trust in the Office to provide an independent review of the various issues that the Auditor is charged with reviewing.

23. In addition, an attack on me damages my professional reputation as an auditor and my relationship with the voters causing them to question whether they should vote for me in the next election.

24. The Mayor's attack has damaged and will continue to damage my reputation and relationship with voters, who are in charge of voting for the Auditor of Accounts. The Mayor's attack also does damage to the institution of the Office of Auditor of Accounts because it makes us appear partisan and not independent.

25. There remains one audit of the City's Downtown TIF district. The Office and I still need the Attorney General's opinion to resolve the issues left open in the audit report.

26. Both the Office and I are also damaged because both the Office and I have not received information to which we are entitled under Section 159. We both have an informational interest in the opinion that the Attorney General must provide to us.

27. As a citizen, I believe I am entitled to a complete audit report and the information that it would provide.

I declare that the above statements are true and accurate to the best of my knowledge and belief. I understand that if the above statements are false, I will be subject to the penalty of perjury, or other sanctions in the discretion of the court.

Dated: January 19, 2024

Douglas R. Hoffer

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STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. 23-CV-04963

THE OFFICE OF THE AUDITOR OF ACCOUNTS, in its official capacity, and DOUGLAS R. HOFFER, as a citizen of the State of Vermont, Plaintiffs	)
v.	)
THE OFFICE OF THE ATTORNEY GENERAL and CHARITY R. CLARK, in her official capacity as the Attorney General of the State of Vermont, Defendants	)

INDEX OF EXHIBITS TO
DECLARATION OF DOUGLAS R. HOFFER

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3	November 13, 2023 Memo to Attorney General	1
4	November 21, 2023 Letter from Attorney General to Auditor	7

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VERMONT

Agency of Commerce and Community Development
Department of Economic Development
Vermont Economic Progress Council
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One National Life Drive
Montpelier, VT 05620-0501
accd.vermont.gov

DOUGLAS R. HOFFER
STATE AUDITOR

STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

To: Robert McDougall, Deputy Attorney General
Sarah London, Chief Assistant Attorney General

From: Tanya Morehouse, State Auditor's Office (SAO)
Abbie Sherman, Executive Director, Vermont Economic Progress Council (VEPC)

Re: Burlington Downtown TIF District – VEPC and municipal voter authorization for financing improvements

Date: September 27, 2023

SAO and VEPC staff request advice on the following questions:

1. Do bond premiums fall under the definition of financing in 24 V.S.A. §1891(7)?

2. Are municipalities required to obtain authorization from VEPC and municipal voters for the aggregate bond proceeds (principal and premium) which will be used to pay for public infrastructure improvements of a tax increment financing (TIF) district?

3. If statute and the Adopted TIF Rule are not conclusive on question 1 and 2, does VEPC have authority under 32 V.S.A. §5404a(j)(1) to address these issues within the TIF Rules?

We've identified additional provisions of Titles 24 and 32 of Vermont Statutes Annotated and sections of the TIF Rules as relevant to the questions and listed them below.

24 V.S.A. §1894(d) addresses VEPC approval of the tax increment financing plan.
32 V.S.A. §5404a(f) and (h) addresses VEPC approval of the use of tax increment to repay the financing of improvements and related costs.
TIF Rule sections 300, 603, 607, 718, 800, 803, 804, 1003.1, 1003.2.2, 1003.3.3

Background

Authorization to Finance Improvements and City of Burlington's Bond and Other Debt Issuances

VEPC and municipal voters authorized $35.9 million of financing for public infrastructure improvements in the Downtown TIF district.

EXHIBIT
1

Through August 2022, the City of Burlington issued three general obligation (GO) bonds for financing improvements in the Downtown TIF District. Aggregate bond proceeds totaled $40,462,364, comprised of $35,090,000 principal and $5,372,364 premium. See Table 1 for details.

Table 1: Aggregate GO Bond Proceeds

GO Bond Principal and Premiums, 2017-2022			
GO bond series	**Principal**	**Premium**	**Aggregate Bond Proceeds**
Series 2017D	$3,400,000	$525,290	$3,925,290
Series 2018D	1,570,000	174,887	1,744,887
Series 2022B	30,120,000	4,672,187	34,792,187
	$35,090,000	$5,372,364	$40,462,364

Under generally accepted accounting principles, a bond premium is recorded as a liability which has the effect of increasing the face value of the bond payable. Thus, premium is a component of the debt incurred to pay for improvements in a TIF district. In the case of Burlington, this means that at issuance, the total bond payable in the City's financial statements was $40,462,364, inclusive of the bond premium, versus the $35.9 million of financing for improvements authorized by VEPC and municipal voters.

The City also issued two interfund loans of $134,653 and $250,000, in 2016 and 2018, respectively. Thus, the City's total debt issuances provided $40,847,017 (aggregate bond proceeds plus interfund loans) to invest in public infrastructure improvements for the Downtown TIF District.

Bond Pricing and Information Provided to VEPC and Municipal Voters Regarding Anticipated Cost of 2022 GO Bond

Municipal bond financing is complex. Interest rates, length of repayment period, call date, and other bond terms impact the fair value of a bond and thus, the proceeds an issuer will receive upon issuing bonds.[1] According to an October 2021 article in the Government Finance Review Journal, a bond that sells at a high premium suggests the issuer could have raised the same amount of money but with less debt service.[2]

If the City had structured its bonds with different terms, such as a lower interest rate, the premium received would have been lower. Further, had the City issued bonds at a lower interest rate, debt service (principal plus interest) would be less.

The anticipated interest costs disclosed to VEPC in November 2021 via the City's substantial change request (SCR) for increased borrowing authority and to municipal voters in January 2022 prior to a public vote on increased borrowing authority was much lower than interest costs for the actual bond issued in August 2022. See Table 2.

[1] Call date is the day on which a bond issuer has the right to redeem a callable bond prior to the stated maturity date.

[2] See Attachment 1 for article.

Table 2: Principal and Interest Disclosed Compared to Actual Bond Principal and Interest

Bond	SCR Submitted to VEPC 11/2021	Disclosed to Municipal Voters	Actual 2022 GO Bond Terms	Increase (Decrease) Between Public Notice and Actual
Principal	$30,500,000	$30,500,000	$30,120,000	($380,000)
Interest	$3,994,389	$4,000,000	$11,844,433	$7,844,433

SAO has requested information from the City on the bond pricing for the 2022 GO bond in order to understand what caused the interest cost to increase $7.8 million.

City of Burlington's Legal Counsel Memo

SAO raised several questions with the City regarding bond premiums and the City's legal counsel provided a response. We've attached the memo for your consideration. See Attachment 2.

PERSPECTIVE

Twos Are the New Fives

BY JUSTIN MARLOWE

There's a subtle but seismic shift happening in the municipal bond market. States and localities should be aware of it and its consequences.

First, a quick "bond math" refresher. Let's say a city issues a ten-year $5,000 municipal bond with a semi-annual 2.5 percent coupon. This bond requires the city to make interest payments of $62.50 twice a year, and then pay back the $5,000 at the end of year ten. If an investor buys that bond for 100 percent of its face value, or at "par," they will receive those coupon payments and the $5,000 when the bond matures. They could also pay more than 100 percent—a "premium"—if they think the bond is a particularly attractive investment or pay less than 100 percent—buy it at a "discount"—if it's less attractive. Keep in mind that most municipal bond coupon payments are exempt from federal income taxes and often from state and local income taxes.

When issuers set coupons on their bonds they go through a "Goldilocks" exercise. A bond that sells at a high premium suggests the issuer could have raised the same amount of money but with less debt service. Extreme premiums are also unattractive to some investors because they don't produce noticeable cash inflows until close to the bond's maturity. By contrast, if the bond sells at a discount, the issuer might not raise all the money it needs. Discount bonds also have unique tax implications—for example, the "de minimis" rule—that makes them

unattractive for many issuers. For these reasons, an issuer's goal is to sell the bonds at a slight premium. That suggests the coupons were, just like Goldilocks' porridge, not too hot and not too cold.

For more than a decade, five percent, known as "fives," was the Goldilocks coupon rate. Fives were considerably higher than the taxable equivalent coupons on U.S. Treasuries and corporate bonds. This made them appealing to big institutional investors like mutual funds, which liked their value relative to other potential bond investments. High coupons also appeal to individual investors who care about future cash flow. In an environment where interest rates and income tax rates are both expected to rise, as has been the case for about the last decade, it helps to have more tax-free cash flow from coupons to reinvest at higher interest rates later. Fives did that trick without pricing at too high a premium.

Fives also worked for issuers' long-term debt management plans. Many state and local debt managers have professed that "fives always save a lot of interest." This is because they've tended to price at such large premiums that refinancing later, even at higher market interest rates, would still produce premium pricing. This flexibility is invaluable to government debt managers. Consider also that premium bonds generate more money to invest in projects. If an issuer expects to raise a million dollars with a bond, but the bond prices at 110 percent, then they've actually raised $1.1 million. That's why it's no surprise that more than half of all new-issue munis with maturities of longer than eight years were fives, and most of the major municipal bond market indices are derived from the prices and yields of fives.

Now it seems the golden era of fives is over. To illustrate, let's compare trends in coupons on new-issue munis during two time periods: January to June 2019 and January to June 2021. According to data from Ipreo, 34 percent of all new ten-year maturities in the first half of 2019 were fives, while fours and threes comprised 18 percent and 23 percent, respectively. By the first half of 2021, fives were only 17 percent of new issues, and fours and threes were both 17 percent. In fact, twos were the new leading category, at 21 percent of new issuance.

As expected, lower coupons have also meant lower prices. In the first half of 2019 the median price on a new ten-year maturity was 111.53 percent. In the first half of 2021, this median price had dropped to 106.33 percent. Keep in mind also that the share of new munis issued with default insurance held steady at about 23 percent across these two time periods. There's also no evidence that issuers are selling bonds with shorter call periods. About 35 percent sold with ten-year calls across both periods, along with nine- and eight-year calls at about 18 percent of total issuance, each. In other words, these changes in prices are due in large part to lower coupons.

So, what does the demise of fives mean for future state and local debt management? Two key considerations come to mind right away.

One is that lower coupons open the door to creative uses of taxable munis. In the first half of 2019, less than five percent of all new issue ten-year bonds were taxable. In the first half of 2021 it was just short of 18 percent. Much of this surge was for taxable refundings. When rates are low overall, and the spread between taxable and tax-exempt rates narrows, then the tax advantage of tax-exempt munis erodes quickly. At the same time, investors that don't benefit from the tax exemption can buy taxable munis and take down a much better rate of return than Treasuries or corporates. As long as low rates, tight spreads, and lower muni coupons persist, taxable issuance has real advantages.

For more than a decade, five percent, known as "fives," was the Goldilocks coupon rate.

A second implication is that the era of easy refunding might also have come to an end. With interest rates and tax rates expected to rise, issuers can no longer count on guaranteed savings from refundings. "Scoop and toss" refinancings that save money by extending the maturity of existing debt will become much more difficult to execute. High premiums on new issues, often used to finance smaller maintenance and other projects at the margin, will become scarcer. Debt managers hoping to squeeze out a few additional dollars for capital projects by shaving off a few basis points on the next debt issue might be a thing of the past.

Issuers should start planning now for a world where twos are the new fives.

Justin Marlowe *is a research professor at the University of Chicago, Harris School of Public Policy, and a fellow of the National Academy of Public Administration.*

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THOMAS MELLONI
tmelloni@pfclaw.com

August 23, 2023

Tanya Morehouse
State of Vermont
132 State Street
Montpelier, Vermont 05602

Re: City of Burlington - Downtown Tax Increment Financing District

Dear Tanya Morehouse:

I understand that you raised several questions with respect to the issuance by the City of Burlington (the "City") of its Downtown Tax Increment Financing District ("Downtown TIF District") bonds. As bond counsel for the City of Burlington, I thought it would be helpful to give some general information with respect to issuance of such bonds, some of the financial reasons why an issuer would issue bonds at a premium and the legal support and authorization for issuance of such tax increment general obligation bonds.

Inquiry

Specifically, you asked (i) whether Vermont state law (32 V.S.A. § 5404a or Title 24, Chapter 53, Subchapter 5 of the Vermont Statutes Annotated) or the TIF District Rule restrict the use of bond premiums to paying for the TIF district improvement(s) that the bond was issued to finance; (ii) whether the 2017 Series D, 2019 Series D, and 2022 Series D[1] GO bond covenants restrict the use of premiums to paying for the TIF district improvement(s) that each GO bond was issued to finance; (iii) whether state law (32 V.S.A. § 5404a or Title 24, Chapter 53, Subchapter 5 of the Vermont Statutes Annotated) or the TIF District Rule require that bond premiums be included in the tax increment financing plan, subject to approval by the Vermont Economic Progress Counsel (VEPC); (iv) whether bond premiums used to pay for TIF district improvements are subject to a vote by the legal voters of a municipality, and (v) whether the education and municipal tax increment may be used to pay for debt service on bonds that were issued at a premium.

In addressing these questions, we believe it is important to give some general background information and context as to issuance of or sale of bonds at a premium.

[1] The Bonds issued were designated Series 2017D Bonds, Series 2018D Bonds and Series 2022B Bonds, respectively.

Background

The City issued its downtown tax increment financing bonds in several series. The City received voter authorization on two occasions for indebtedness to finance improvements that serve a public purpose and fulfill the purpose of its Downtown TIF District as provided under applicable law. Each ballot item and the related warning and public notice described the wide range of projects that serve the Downtown TIF District and for which debt was to be incurred.

The first voter authorization occurred at the annual meeting of the City held on March 3, 2015 (the "2015 Voter Authorization") when the voters approved issuance of bonds or notes in a principal amount not to exceed $10,000,000 for Downtown TIF improvements, which included Main Street Streetscape Upgrades, St. Paul Street Streetscape Upgrades, Brownfields Remediation at Brown's Court, Marketplace Garage Improvements and Repair, and related costs.

The second authorization was received at the annual meeting of the City held on March 1, 2022 (the "2022 Voter Authorization") when the City voters authorized pledging of the credit of the City for bonds or notes in a principal amount not to exceed $25,920,000 for funding one or more public improvements and related costs attributable to projects serving the Downtown TIF District, specifically for the Main Street Streetscape Upgrades in the six blocks between South Union Street and Battery Street inclusive of all intersections, including streetscape, stormwater, utility, lighting and transportation upgrades; and also payment of or reimbursement for TIF eligible related costs.

As part of the public notices published prior to each vote, the City provided estimates of costs for the improvements intended to be financed by the voter authorized indebtedness, clearly designating these as budget estimates and not as a "not to exceed" limit to the amount of indebtedness that the City could issue. In particular, the public notice preceding the March 1, 2022 annual meeting further informed voters that due to inflation, the estimated costs would likely be higher than what was currently budgeted.

Bond Issuances

The following bonds were issued to finance improvements with respect to the Downtown TIF:

- Series 2017D issued December 20, 2017 in the original principal amount of $3,400,000;
- Series 2018D issued November 28, 2018 in the original principal amount of $1,570,000; and
- Series 2022B issued August 31, 2022 in the original principal amount of $30,120,000.

The total voter authorization received from both the 2015 Voter Authorization and the 2022 Voter Authorization was for a principal amount of up to $35,920,000.

In the ballot questions presented to and approved by voters at the annual meetings, the voters approved an aggregate principal amount of bonds or notes. In the public notices published prior

to the annual meetings, the voters were clearly informed that, upon voter approval, the City Council would have the power to determine how to sell and issue its bonds or notes, whether in competitive sale, a negotiated sale or through the Vermont Bond Bank. Voters were also informed that the terms of repayment would not exceed twenty years and the interest rate of any bonds or notes would be determined based upon market condition at the time such debt was incurred.

At the time that the City published the public notices, the City did not indicate a maximum interest rate or the specific manner of sale of the proposed indebtedness other than describing the City's historical process for selling its bonds either through a negotiated offering or through a competitive bid process, all of which would need to be subsequently authorized by the City Council.

The Series 2017D Bonds and the Series 2018D Bonds were issued through negotiated sales with selected underwriting firms. At the time the Series 2017D and 2018D bond issuances, the City's credit rating was Moody's "A2." At the time of the issuance of the Series 2022B Bonds, the City's credit rating was Moody's "Aa3" and the Series 2022B Bonds were sold in a competitive bid process of sale, with the winning bidder acting as an underwriter.

In each issuance, the bonds issued for the Downtown TIF District were issued and sold along with other City of Burlington General Obligation Bonds. By combining the offerings of these bonds in a single transaction, the City saved transaction costs, such as rating agency fees, bond counsel fees and financial advisor fees, thereby benefitting the Education Fund and the City's General Fund. It should also be noted that through steps undertaken by the City Administration and City Council the City's credit rating improved from A2 in 2017 to Aa3, resulting in additional interest savings as a higher rated issuer.

Market Conditions – Premium Bonds

Investors, particularly during a historic low interest rate environment, typically seek a higher interest rate or coupon rate for their bonds. This is particularly important when financial markets indicate a movement to higher interest rates. If an investor purchases a bond at a then-current low interest rate, when the interest rate environment changes and interest rates go up, the principal value of their bond could decrease significantly. If the interest rate is higher, however, the principal value of their bond will stay at or above par and, if the bond was issued as a tax-exempt obligation, the investor will continue to receive the benefit of being able to exclude interest paid on the bond from such investor's gross income for federal income tax purposes. Over the last several years with the low interest rate environment, it was fairly customary in the municipal market for issuers, not only the City of Burlington, to issue bonds with a 4 or 5 % coupon rate in exchange for a premium in addition to the principal amount of bonds being issued.

None of the public notices nor the warning nor the ballot questions presented to the voters at either the 2015 or 2022 annual meetings prohibited or restricted the issuance of bonds at a premium. Moreover, 24 V.S.A. § 1898, the general statute authorizing the issuance or incurrence of financing for TIF improvements, expressly provides that the bonds issued for any particular TIF district shall be "sold at not less than par." This indicates that bonds may be sold above par. In addition to soliciting and obtaining competitive rates in the sale of the bonds, the City did sell its bonds at a

premium. The premium is treated as proceeds of the financing. Accordingly, the premium component of the sale proceeds is expected to be used for the TIF improvement projects that were the subject of the 2015 and 2022 Voter Approvals.

Further, with the current inflationary environment, issuance of the bonds at a premium allowed the City to capture its capital needs more accurately. The time between the 2022 Voter Approval and the issuance of the Series 2022B Bonds in August 2022 was a highly inflationary economy. Even in the time between the 2015 Voter Approval and the bond issuances at the end of 2017 and late in 2018, inflation resulted in increased capital costs. As discussed in the next section, by issuing the Series 2017D, Series 2018D, and Series 2022B Bonds at a premium, the City was able to ensure sufficient proceeds to cover its capital costs for the Downtown TIF District.

Capital Costs

While the proposed improvements were well planned and developed by the City's team, as with any large major construction project, particularly one such as complicated as the relocation and improvement of the so-called "ravine sewer" authorized by voters in the 2022 Voter Authorization, change orders and resulting cost increases are likely necessary. The public notices published in connection with the 2015 and 2022 Voter Approvals indicated the costs of improvements provided in such notices were estimates and could be increased as a result of inflation.

The premium from the sale of the Series 2017D, Series 2018D, and Series 2022B Bonds are expected to be used for project costs for the Downtown TIF District. Many of the improvements that will serve the Downtown TIF District will take several years to complete and it is likely, under the current inflationary environment, capital costs will increase. As indicated, the ravine sewer is one that presents significant challenges as it will require some substantial construction in the downtown core of the City of Burlington. Also, as a general matter, complex construction projects like the improvements to the Downtown TIF District will require time to complete final engineering design and construction. Given the uncertainty of the economy moving forward, the bond premium received from the sale of the Series 2017D, Series 2018D, and Series 2022B Bonds will allow the City to protect against any increases in capital costs.

Summary Response

As to the specific questions:

1. Does Vermont state law (32 V.S.A. § 5404a or Title 24, Chapter 53, Subchapter 5 of the Vermont Statutes Annotated) or the TIF District Rule restrict the use of bond premiums to paying for the TIF district improvement(s)?

The creation, implementation, administration, and operation of TIF districts in Vermont is primarily governed by the statutes located at 32 V.S.A. § 5404a, Title 24, Chapter 53, Subchapter 5 (the "TIF Statutes") and the Tax Increment Financing Districts Adopted Rule, adopted by the Vermont Economic Progress Council (VEPC) on May 6, 2015 (the "TIF Rule"). The TIF Statutes and TIF Rule provide that bonds may be used to finance improvements with a TIF district and may

be issued at "not less than par." Since the bonds are issued for the purpose of financing improvements to a TIF district, as authorized by the voters, the premium, like the principal amount of the bonds issued, should be used for the same purpose—that is, the improvements that serve the TIF district and were the subject of the voter authorization.

Furthermore, while the issuance of premium bonds may result in a higher interest rate for the bonds, determining the interest rates of bonds issued for TIF district improvements is wholly within the authority of a municipality's legislative body. As discussed above in the section titled "*Market Conditions – Premium Bonds,*" premium bonds are typically issued at a higher interest rate in which the interest rate ensures that the principal value of the bonds remains at or above the par value of the bonds. Section 1898(d) of the TIF Statute expressly authorizes the legislative body to set the terms and interest rates for the financing of improvements for the TIF district. As set forth in 24 V.S.A. § 1898(d), bonds issued for financing improvements within the TIF district "shall be authorized by resolution or ordinance of the local governing body and may be payable upon demand or mature at such time or times, bear interest at such rate or rates, be in such denomination or denominations, be in registered form, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium or payment, at such place or places, and be subject to such terms of redemption, such other characteristics, as may be provided by such resolution." Neither the TIF Statute nor the TIF Rule impose any limit on the interest rate.

2. *Do the Series 2017D, Series 2018D, and Series 2022B bond covenants restrict the use of premiums to paying for the TIF district improvement(s) that each bond was issued to finance?*

The Series 2017D, Series 2018D and Series 2022B Bonds provide that proceeds of the bonds (which includes principal and premium) shall be used in a matter consistent with the Internal Revenue Code for tax-exempt bonds and to finance the capital costs of the improvements authorized the 2015 Voter Authorization and 2022 Voter Authorization, respectively.

Additionally, at the time, the aggregate bond proceeds, which includes the premium received from the sale of the bonds, was reasonably expected by the City to be spent on such improvements. In the tax certificates accompanying the issuance of each of the Series 2017D, Series 2018D, and Series 2022B Bonds, the City provided an estimate of amounts to be spent and projects to be financed by the respective series of bonds. Each of the estimated uses for the Series 2017D, Series 2018D, and Series 2022B Bonds includes bond premium. For the Series 2017D Bonds, the principal amount of the Bonds was $1,570,000, while the estimated use of bond proceeds attached to the tax certificate estimated uses totaling $1,700,000. For the Series 2017D, the principal amount and estimated uses were $3,400,000 and $3,925,289.75 respectively, and for the Series 2022B Bonds, the principal amount and estimated uses were $30,120,000 and $34,400,000 respectively. It is clear that at the time the bonds were issued, the City contemplated utilizing bond premium for the costs of the improvements to the Downtown TIF District.

TM auditor note: Per F1-D-7.1a, $1,700,000 is net of underwriter's discount and other issuance costs.

TM auditor note: Per F1-D-5.1a, $3,845,701 is net of underwriter's discount and other issuance costs.

TM auditor note: Per F1-D-9.1a, $34,381,971 is net of underwriter's discount and other issuance costs.

3. *Does state law (32 V.S.A. § 5404a or Title 24, Chapter 53, Subchapter 5 of the Vermont Statutes Annotated) or the TIF District Rule require that bond premiums be included in the tax increment financing plan, subject to approval by VEPC?*

I am not aware of any requirement that use of premium from the sale of bonds needs to be specifically identified in a tax increment financing plan. The financing plan has generally identified the principal amount of expected bonds and estimated project costs. More importantly, the financing plan is a plan, based upon good faith projections and estimates. In many instances, firm committed construction contracts were not yet in place at the time the financing plan was submitted. Engineering and design work still needs to be completed for many of the improvements to the Downtown TIF District. Moreover, if any interest rate was identified in the financing plan, it is a projected rate based upon the then-existing market conditions, with the expectation and understanding that changes in economic conditions may result in changes in interest rates as well as project costs. Issuance of bonds at a premium is not always forecast or planned, as it may be a market-driven determination as to the then-existing need for capital financing and estimates of investor demand.

4. Are bond premiums used to pay for TIF district improvements subject to a vote by the legal voters of a municipality?

General principals of municipal governance provide that a while a proposition to incur indebtedness for a particular purpose may be submitted to the voters, it is the responsibility of the proper municipal body to then provide the mode of creating the indebtedness, payment of interest, and other matters relating to the actual incurrence of the indebtedness. Accordingly, if there is no statutory requirement for a municipality to submit terms like the rate of interest or the maturity of the indebtedness to the voters, the municipality may issue such bonds with such terms even though not specifically authorized by voters. Additionally, there is ordinarily no imperative duty on the part of municipal officers to borrow money as authorized by the voters—while the voters authorize the incurrence of indebtedness, the actual issuance of indebtedness is left to the determination of the municipality's governing body.

Under the 2015 and 2022 Voter Approvals, the City's voters approved the issuance of bonds in a total principal amount not to exceed a particular amount. The City was not required by the TIF Statute or TIF Rule to specify an interest rate in the ballot question or the warning. Nor does generally applicable Vermont state law require that voters approve an interest rate in connection with the authorization of indebtedness. General state law on indebtedness provides that unless a maximum interest rate is submitted to the voters by the municipality, the interest rate is to be approved by the legislative body. See 24 V.S.A. § 1759(a)(1). In the materials submitted to the voters, including the public notices published prior to the meetings, voters were expressly informed that the City Council had the power to authorize the issuance of bonds, and that the interest rate would be subject to market conditions at the time the bonds were issued. When the Series 2017D, Series 2018D, and Series 2022B Bonds were issued, the City Council then set a maximum total interest cost in its resolutions approving the issuance of the Bonds.

Furthermore, under the TIF Statute, indebtedness may be retired over any period authorized by the legislative body, which could defer principal payments until at or near maturity (i.e., a balloon payment). Accordingly, if a municipality selects a longer period within which to repay the bonded debt, it will, over the longer life of the debt, pay more in interest. That is permissible under the

law. The City, in its financing, selected a shorter period of time within which to pay its bonded TIF indebtedness, which was less than the twenty years indicated in its public notices. If it would be permissible for the City to pay a greater total amount of interest due to a longer term, then it can be inferred that the City would be permitted to pay a higher interest rate in exchange for bond premium.

5. Whether the education and municipal tax increment may be used to pay for debt service on bonds that were issued at a premium.

Yes, the education and municipal tax increment may be pledged and used to pay debt incurred for financing improvements and related costs, including bonds issued at a premium. See 24 V.S.A. § 1896(d). Amounts of tax increment that exceed the amounts needed to pay for the financing of improvements may also be retained and used for future financing payments or even prepayment of the principal and interest on the financing. See 24 V.S.A. § 1900.

Financing is defined as the debt incurred, including principal, interest and any fees or charges related directly to that debt. The tax increment may be used to repay the financing whatever the debt is incurred and issued with a premium or whether it is issued at par, and whether it is issued for a short term or for a longer term. *See* 24 V.S.A. § 1894(2) and 24 V.S.A. § 1898(d), which expressly gives a municipality the authority to determine the repayment schedule of the bonds and the interest rate at which bonds may be issued.

In this regard, the City issued its Series 2017D, Series 2018D and Series 2022B Bonds to mature at approximately the same time period as when its ability to retain the increment would otherwise end. The City could have selected a longer period but chose instead to repay the bonds on a more accelerated schedule, thereby reducing total interest cost. Additionally, as the City issued its bonds directly to the public through an underwriter or competitive bid process, it retained the ability to refund the bonds in order to reduce debt service.

Accordingly, given that there is nothing in the TIF Statute or TIF Rule prohibiting the issuance of bonds at a premium and considering the TIF Statute expressly permits the use of TIF increment for the payment of financing, the education and municipal increment is available and may be used to pay the debt service on financing regardless of whether the bonds were sold at par or premium and regardless of the maturity schedule selected by the legislative body. See 24 V.S.A. §§ 1894(a)(2), 1898(d) and 1900.

I hope the foregoing is helpful as you consider the issuance and use of the premium received from the sale of the bonds indicated above. The TIF Statute and TIF Rule allow the premium received from the sale of bonds may be applied for the purposes of furthering the improvements to the Downtown TIF District as approved by the voters.

I would be happy to follow up with additional information if needed to assist as you continue your review.

Sincerely,

PAUL FRANK + COLLINS P.C.

Thomas Melloni

TRM:srm

8928637_3:12576-00009

CHARITY R. CLARK
ATTORNEY GENERAL

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OFFICE OF THE ATTORNEY GENERAL
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November 1, 2023

Tanya Morehouse
Chief Auditor, State Auditor's Office
Via email: tanya.morehouse@vermont.gov

Abbie Sherman
Executive Director, Vermont Economic Progress Council
Via email: abbie.sherman@vermont.gov

cc: John Kessler, General Counsel, Agency of Commerce and Community Development
john.kessler@vermont.gov

Dear Tanya and Abbie,

I hope you both are doing well and thank you again for meeting over the last few weeks. We understand you have requested an Attorney General opinion related to three questions regarding tax increment financing below:

1. Do bond premiums fall under the definition of financing in 24 V.S.A. § 1891(7)?
2. Are municipalities required to obtain authorization from the Vermont Economic Progress Council (VEPC) and municipal voters for the aggregate bond proceeds (principal and premium) that will be used to pay for public infrastructure improvements of a tax increment financing (TIF) district?
3. If statute and relevant rules are not conclusive on questions 1 and 2, does VEPC have authority under 32 V.S.A. § 5404a(j)(1) to address these issues within the TIF Rules?

We understand the questions relate to potential uses of bond premiums to pay for public infrastructure for a TIF district, specifically the City of Burlington's Downtown TIF District. We further understand the inquiry by the Auditor's Office is pursuant to the Auditor's statutory charge to conduct performance audits of TIF districts and include review of a municipality's "adherence to relevant statues and rules adopted by the Vermont Economic Progress Council." 32 V.S.A. § 5404a(l).

EXHIBIT
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We also understand the following:

a. The Auditor's Office has posed certain questions to counsel for the City of Burlington and received an approximately eight-page written response. Letter from Thomas Melloni, Esq. to Tanya Morehouse, August 23, 2023.

b. VEPC's existing rules related to TIF districts provide detail regarding the definition of "financing" that is "in addition to the meaning provided in 24 V.S.A. § 1891(7)." VEPC Rule 300 (definition of "financing").

c. VEPC's TIF rules further provide detail regarding "Oversight, Monitoring, Non-compliance Enforcement, and Audits." VEPC Rule 1100. Specifically, the rules provide a process through which a municipality can receive an informal written response to an inquiry posed to VEPC before the start of any formal process to issue a Secretary of Commerce and Community Development decision pursuant to 32 V.S.A. § 5404a(j)(2) ("Authority to issue decisions.") VEPC Rule 1102.

d. VEPC is currently engaged in the above informal process for inquiries related to the City of Burlington's Waterfront TIF District.

As discussed, the Attorney General's Office has been assessing our role in this context. As you know, there is evolving interplay of informal advising and guidance, formal and informal decision-making, rulemaking, and interactive processes involving notice and a hearing between and among the AGO, State Auditor, ACCD, VEPC, other state stakeholders, and municipalities on questions and inquiries concerning the administration of TIF districts, statutes, rules, and noncompliance. *See, e.g.,* 32 V.S.A. § 5404a(j)(1)-(5).

For reasons previously discussed, we decline to opine on the interpretation of provisions in title 24 requested above. We understand this may not be your desired result. We also hope you can understand our position, and we appreciate the complexity of administering and auditing Vermont's Tax Increment Financing program.

That said, we hope the below information regarding rulemaking is helpful to you. We recognize that VEPC historically receives legal advice from the general counsel and/or staff attorney(s) of ACCD. If a VEPC rule were challenged in court, however, it is likely the AGO would handle defense of the rule and/or VEPC. *See, e.g.,* 3 V.S.A. § 152.

As you know, VEPC's TIF-related rulemaking authority is in 32 V.S.A. § 5404a.

> Authority to adopt rules. The Vermont Economic Progress Council is hereby granted authority to adopt rules in accordance with 3 V.S.A. chapter 25 for the purpose of providing clarification and detail for administering the provisions of 24 V.S.A. chapter 53, subchapter 5 and the tax increment financing district provisions of this section.

32 V.S.A. § 5404a(j)(1).

We view the above language as conferring broad authority to VEPC. Agencies have the rulemaking authority delegated to them by statute. *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 36. The Vermont Supreme Courts looks to the plain meaning of statutory language in interpreting the scope of an agency's rulemaking authority. *Id*. ¶ 37.

Based on information provided to date, it does not appear that VEPC's potential rulemaking related to your third question would contradict any existing statute, including VEPC's rulemaking authority above.

Again, we hope the above information is helpful to you. As always, we are happy to discuss.

Sincerely,

Sarah E.B. London
Chief Assistant Attorney General

DOUGLAS R. HOFFER
STATE AUDITOR

STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

To: Charity Clark, Vermont Attorney General

Re: 3 V.S.A. § 159

Date: 13 November 2023

Cc: Sarah London, Chief Assistant Attorney General

As you know, the State Auditor's Office has requested and received informal opinions from the AGO on numerous occasions over the years. Such opinions are necessary to perform the duties of the Office when we encounter inconsistency or ambiguity in statutes related to the subject of a GAGAS audit. Your predecessors have been very helpful and complied with 3 V.S.A. § 159.

> "*The Attorney General shall advise the elective and appointive State officers on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested*." (emphasis added)

In response to a recent request for an opinion, a November 1 letter from your Chief Assistant AG noted that your office "decline[s] to opine on the interpretation of provisions in title 24." You have previously stated that your policy is not to provide opinions to my office going forward. Yet, your office has never given us a substantive reason for why you interpret 3 V.S.A. § 159 differently from your predecessors.

I write today to ask that you reconsider your decision, return to the status quo, and agree to meet your obligations under 3 V.S.A. § 159. If not, I will have no choice but to seek the intervention of the courts. I would prefer to avoid litigation but am ready to proceed if necessary. I have already selected an attorney and am preparing to send the contract request to the Secretary of Administration.

I look forward to your response.

EXHIBIT
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05609-1001

November 21, 2023

Douglas R. Hoffer, State Auditor
132 State Street
Montpelier, VT 05633-5101

By E-Mail to Doug.Hoffer@vermont.gov

Dear Auditor Hoffer:

I have received your recent communications concerning your request for opinions from the Attorney General. These include correspondence threatening to sue me based on your incorrect position that my Office has violated 3 V.S.A. § 159 ("Opinions; state matters and actions"). Specifically, you appear to believe we have violated the statute by declining to provide you with legal analysis to your satisfaction on two of three recent questions related to tax increment financing (TIF). I have also received your correspondence requesting my approval of a potential contract with a private lawyer to represent you in court.

I will address both certain elements of your threatened litigation and your contract questions below. I strongly disapprove of your threat to bring unprecedented litigation against the Attorney General. I also believe your legal theory is meritless. Specifically, among other arguments: (a) we do not concede you have the authority to initiate litigation against a state entity or officer without the Attorney General's Office, *see, e.g.*, 3 V.S.A. §§ 152, 153, 157, 159; (b) we do not concede any cause of action you may assert entitles you to a court-ordered Attorney General opinion, particularly one related to actions or potential actions of a local entity; and (c) we do not concede the statute you rely on, 3 V.S.A. § 159, governs requests for legal opinions regarding the actions of third-party entities that are subject to performance audits.

As repeatedly offered in meetings and correspondence with you and your staff, we remain willing to help you find attorneys appropriate for your performance audits of TIF districts under 32 V.S.A. § 5404a. We are also willing to further explain our legal opinion contained in this letter, including your lack of authority to initiate litigation against me or the State, if such a meeting is helpful to you.

EXHIBIT
4

Below I will first address certain elements of your threatened lawsuit. I will then address your correspondence concerning contracts. The information below is in addition to other defenses and claims that may apply.

Your Threatened Suit Against the Attorney General:

Your threat to litigate your view of how I fulfill my legal responsibilities to the State of Vermont is unfortunate. In my opinion, it is also highly ill-advised. Apart from being legally unsound, it will result in unnecessary expense to Vermont taxpayers, unnecessary burden on our legal system, and will be unproductive. I believe you will be unsuccessful and will unnecessarily waste taxpayer dollars.

First, you lack authority to unilaterally initiate litigation on behalf of or against the State. As recognized by the Vermont Supreme Court, "[t]he main charter of the Attorney General's authority, [3 V.S.A.] § 152, authorizes the Attorney General to 'represent the state.'" *McLaughlin v. State*, 161 Vt. 492, 498 (1994). "Since the State must act through its various agencies, departments and instrumentalities, that authority is meaningful only if it encompasses those component parts." Your office, like mine, is a "component part" of state government. I am charged with, among other duties, "general supervision of matters and actions in favor of the State and of those instituted by or against State officers wherein interests of the State are involved." 3 V.S.A. § 159. I may also "settle such matters and actions as the interests of the State require." *Id.* These duties are in the very statute you allege I have violated. They are similar to other provisions in Chapter 7 of Title 3, including but not limited to § 152, § 153, and § 157. I do not and will not condone your attempt to initiate litigation against me or my office, and I view such actions as contrary to law.

Second, we have repeatedly provided you with our interpretation of relevant TIF law and our recommendation for obtaining legal resources to meet your needs. I will reiterate that advice here.

Your recent communication appears to rest on several mistaken understandings. For example, you state that I have initiated a policy "not to provide opinions to [the Auditor's Office] going forward." There is no such policy. Indeed, you and the Vermont Economic Progress Council (VEPC) very recently received an informal opinion and advice from Chief Assistant Attorney General Sarah London regarding VEPC's rulemaking authority in response to your recent request.

As previously explained, formal opinions of the Attorney General and the Attorney General's Office are rare. They are published and available to the public on our website. As explained there and consistent with longstanding interpretation of 3 V.S.A. § 159 by the Attorney General's Office:

> The Attorney General's Office prepares only a limited number of Attorney General Opinions, when so requested by the Governor's

> Office, a state agency, or the Legislature. The office does not normally issue opinions at the request of persons outside state government, except in those rare instances where the opinion may resolve a major dispute or uncertainty in the law and where large numbers of people may be affected.

https://ago.vermont.gov/about-attorney-generals-office/attorney-general-opinions.

As we explained to you in a meeting on February 24, 2023, and in a follow-up email from Chief Assistant Attorney General London sent on February 27, 2023: we have complied, and will continue to comply, with 3 V.S.A. § 159, which requires the Attorney General to "advise the elective and appointive State officers on questions of law relating to their official duties."

Chief Assistant Attorney General London has provided you a guidance document that includes the longstanding interpretation of 3 V.S.A. § 159 by our office. That document reiterates that formal legal opinions are rare and will ordinarily be provided to elected and appointed executive branch officials on matters regarding performance of their official duties, and to legislators only upon inquiry relating to legislative business. That document also notes that "AG Opinions are only opinions and do not create, negate or affect legal rights or entitlements."

In contrast to formal (published) Attorney General opinions, informal opinions and legal advice by the Attorney General's Office to state entities are common. As previously explained to you, informal opinions, like formal opinions, typically relate to the performance of an officer's or agency's official duties. They do not typically relate to the actions of a non-state entity or third-party.

Your most recent request included three questions. The first two questions essentially ask whether the City of Burlington's potential use of bond premiums to pay for TIF district improvements will comply with provisions in Title 24 and VEPC rules. We understand that portion of your request was made as part of your role related to auditing TIF districts according to the below statute:

> The State Auditor of Accounts shall conduct performance audits of all tax increment financing districts. The cost of conducting each audit shall be considered a "related cost" as defined in 24 V.S.A. § 1891(6) and shall be billed back to the municipality pursuant to subsection 168(b) of this title. Audits conducted pursuant to this subsection shall include a review of a municipality's adherence to relevant statutes and rules adopted by the Vermont Economic Progress Council pursuant to subsection (j) of this section, an assessment of record keeping related to revenues and expenditures, and a validation of the portion of the tax increment retained by the municipality and used for debt repayment and the portion directed to the Education Fund.

32 V.S.A. § 5404a(l). The third question posed related to VEPC's rulemaking authority.

The section of TIF law titled "Authority to issue decisions" states:

> (2) Authority to issue decisions.
>
> (A) The Secretary of Commerce and Community Development, after reasonable notice to a municipality and an opportunity for a hearing, is authorized to issue decisions to a municipality on questions and inquiries concerning the administration of tax increment financing districts, statutes, rules, noncompliance with 24 V.S.A. chapter 53, subchapter 5, and any instances of noncompliance identified in audit reports conducted pursuant to subsection (l) of this section.

32 V.S.A. § 5404a(j)(2)(A).

The above decision process must follow a recommendation from VEPC. 32 V.S.A. § 5404a(j)(2)(B). VEPC's recommendation follows consultation with various stakeholders, including the Attorney General's Office. *Id.* In addition, by rule, VEPC provides for an informal guidance process to TIF districts and municipalities. *See, e.g.,* VEPC TIF Rule 1101 ("Council staff will also provide an efficient system for municipal communications regarding District statute, rules and compliance questions."); VEPC TIF Rule 1102 & 1103 (describing conferral process for questions of non-compliance and stating: "Council staff will review the issue with the municipality and the municipality will have a reasonable opportunity to submit documentation in support of its position.").[1]

Notably, the unusual volume of informal opinions and advice regarding your performance audits of TIF districts has placed the Attorney General's Office in an unusual position, and one not clearly contemplated by TIF law governing state entities.[2] Between 2011 and 2022, you received approximately twenty informal memorandum opinions from members of the Attorney General's Office, including Chief Assistant Attorney General London, in response to questions from your office as to whether TIF districts and municipalities have complied (or will comply) with Title 24 and TIF-related law.

These informal opinions are distinct in that they concern the actions or planned actions of a *municipal entity* – not a state agency, officer holder, or the Legislature. They are also distinct in that they are provided to you, but their

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[1] VEPC's TIF Rules are available at: https://accd.vermont.gov/community-development/funding-incentives/tif (TIF District Rule, Adopted May 6, 2015).

[2] We have explained our interpretation of these statutes to you and your office in several meetings and forms of correspondence over the past months. Your representation that we have not explained our position is, at best, perplexing. The irony of your insistence on legal advice while not accepting advice you disagree with is not lost.

guidance squarely relates to the statutorily required functions of the Agency of Commerce and Community Development and the Vermont Economic Progress Council. These two entities, by law, largely administer Vermont's TIF program. *See, e.g.,* 32 V.S.A. §§ 3325, 5404a; Title 24, Chapter 53, Subchapter 5.

Recently, these informal opinions have resulted in a series of actions and responses unique to the TIF context. Specifically, they have resulted in repeated requests for reconsideration and meetings with the Attorney General's Office by a municipality. They have resulted in a request by VEPC and ACCD staff to hear from them before the Attorney General's Office issues such opinions. At least one informal opinion has resulted in debate over its inclusion in VEPC's rules. Finally, the approximately 20 informal TIF-related opinions far exceed advisory opinions related to TIFs contemplated by the Legislature. AGO staff have now provided more guidance related to TIF provisions, including those in Title 24 governing municipal entities, than any other known entity.

At this time, the primary source of advice regarding TIF law governing municipalities does not align with the statutes and rules above. While we have and will continue to advise state entities and officers regarding their official duties, we do not construe 3 V.S.A. § 159 as requiring an Attorney General opinion regarding the actions (or potential actions) of a third-party as part of your performance audits. This opinion is informed by review of several provisions of law, including those below.

- Vermont law imbues VEPC with the authority to adopt rules "for the purpose of providing clarification and detail for administering the provisions of 24 V.S.A. chapter 53, subchapter 5 and the tax increment financing district provisions of this section." 32 V.S.A. § 5404a(j)(1);
- The Secretary of ACCD "*is authorized to issue decisions to a municipality on questions and inquiries concerning the administration of tax increment financing districts, statutes, rules, noncompliance with 24 V.S.A. chapter 53, subchapter 5, and any instances of noncompliance identified in audit reports conducted pursuant to subsection (l) of this section*." 32 V.S.A. § 5404a(j)(2)(A) (emphasis added);
- VEPC shall prepare recommendations for the Secretary prior to the issuance of a decision. As appropriate, the *Council may prepare such recommendations in consultation with* the Commissioner of Taxes, *the Attorney General*, and the State Treasurer. 32 V.S.A. § 5404a(j)(2)(B) (emphasis added);
- If the Secretary of ACCD "issues a decision under subdivision (2) of this subsection that includes a finding of noncompliance and that noncompliance has resulted in the improper reduction in the amount due the Education Fund, the Secretary, unless and until he or she is satisfied that there is no longer any such failure to comply, shall request that the State Treasurer bill the municipality for the total identified underpayment." 32 V.S.A. § 5404a(j)(3);

- In cases of noncompliance, the Secretary of ACCD "[i]n lieu of or in addition to any action authorized in subdivision (3) of this subsection (j) … may refer the matter to the Office of the Attorney General with a recommendation that an appropriate civil action be initiated." 32 V.S.A. § 5404a(j)(4).

Finally, in addition to the above, there is a process for informal advice to municipalities regarding compliance with TIF law provided by VEPC's rules, described above. We understand that informal advisory process is currently underway with respect to the City of Burlington following your recent performance audit of one of its TIF districts.

Based on the foregoing, our interpretation of the statutory roles of the various state actors in the above processes is that your first two questions concerning potential future adherence with municipal law by the City of Burlington are more appropriately resolved by the City, ACCD, and VEPC – not by the Attorney General. Regarding the third question posed regarding VEPC's rulemaking authority, Chief Assistant Attorney General London provided you with an informal opinion and advice.

We have repeatedly encouraged you to hire contract counsel to advise you on Title 24 and other provisions of TIF-related law in connection with your performance audits of TIF districts. This is both because of: (a) the statutes and circumstances described above, and (b) our typical practice and policy of not advising on issues of municipal law. With your statutory bill-back authority, noted above, your office may bill back the cost of such services to the TIF district, minimizing the cost of such services to the State and state taxpayers. We have previously provided you and your office with a list of Vermont attorneys with whom you might consider contracting for legal services.

Your Contract Questions:

In addition to your correspondence threatening me with a lawsuit, you also wrote to seek my office's approval of a potential contract for legal counsel as part of that anticipated lawsuit against me. Specifically, you asked my office to waive:

(a) Bulletin 17.10's requirement that "state agencies must obtain the written approval of the Attorney General before employing private legal counsel;" and
(b) a standard element of state legal services contracts stating that a vendor "will not represent anyone in a matter, proceeding, or lawsuit against the State of Vermont or any of its Agencies or instrumentalities."

You additionally state your position that 3 V.S.A. § 342, which requires Attorney General certification of all contracts valued at $25,000 or more, does not apply.

In these unusual circumstances, and out of respect for your position as an elected statewide officer, I will waive Bulletin 17.10's requirement of Attorney General approval to the extent you seek legal services to *advise you* regarding a potential claim against me. Of course, by so doing, I am in no way waiving the legal requirement, described in the Bulletin, that "unless a special statute provides otherwise, the Attorney General is required to appear for the State in all civil actions in which the State is a party and must exercise 'general supervision' of the State's legal matters." Because you seek legal advice about bringing a lawsuit adverse to the State or a state agency (my office), we can agree that your legal contract for advice need not include the standard language of having no matters adverse to the State.

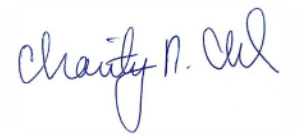
Again, as explained above, we do not concede you have the legal authority to initiate litigation against the State, its officers, or agencies without the Attorney General's Office.

Regarding the certification required under 3 V.S.A. § 342, if the maximum payable on your legal services contract is less than $25,000, I agree the statute does not apply. If the maximum payable is expected to exceed $25,000, my office will be happy to work with you to find an appropriate process to comply with the statute. I would be remiss, however, not to reiterate my belief that this would represent a wasteful and cavalier use of public funds.

As you know, under Bulletin 3.5, my office is required to review as to form all state contracts valued at $25,000 or more. We recognize the potential conflict or appearance of a conflict regarding Attorney General's Office review as to form in these unusual circumstances. Again, if the maximum value of your legal services contract is expected to exceed $25,000, we can make arrangements to screen the reviewing Assistant Attorney General from involvement in any subsequent litigation you attempt to bring against me.

In closing, I wish for Vermont to be a model for how good government can work, and I am proud that it usually is such a model. I value the historic relationships of our respective offices and I would like us to move past this dispute. I hope you will reconsider your approach.

Sincerely,



Charity R. Clark
Attorney General

STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
CHITTENDEN UNIT — Docket No. 23-CV-04963

THE OFFICE OF THE AUDITOR OF ACCOUNTS, in its official capacity, and DOUGLAS R. HOFFER, as a tax payer of the State of Vermont, Plaintiffs	)
v.	)
THE OFFICE OF THE ATTORNEY GENERAL and CHARITY R. CLARK, in her official capacity as the Attorney General of the State of Vermont, Defendants	)

CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Plaintiff, certify that, on January 24, 2024, I caused to be served Plaintiffs' Opposition to Defendants' Motion to Dismiss and Cross Motion for Summary Judgment, Statement of Facts, and Declaration of Douglas R. Hoffer on the counsel of record as follows:

Via E-Mail

Sarah E.B. London, Esq.
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Dated: January 24, 2024

/s/ Matthew B. Byrne
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