THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2013-0455

BILL DUNCAN, THOMAS CHASE, CHARLES RHOADES, REBECCA EMERSON-BROWN, THE REV. HOMER GODDARD, RABBI JOSHUA SEGAL, THE REV. RICHARD STUART, RUTH STUART, and LRS TECHNOLOGY SERVICES, LLC,
Plaintiffs-respondents / cross-appellants,

vs.

THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION, and NEW HAMPSHIRE DEPARTMENT OF EDUCATION,
Defendants-appellants / cross-respondents,

and

NETWORK FOR EDUCATIONAL OPPORTUNITY, SHALIMAR ENCARNACION, and HEIDI AND GEOFFREY BOFFITTO,
Intervenor-defendants-appellants / cross-respondents.

MANDATORY APPEAL PURSUANT TO RULE 7(1)(A)
FROM THE STRAFFORD COUNTY SUPERIOR COURT

REPLY BRIEF (CONCERNING ISSUES RAISED ON CROSS-APPEAL)
FOR PLAINTIFFS-RESPONDENTS / CROSS-APPELLANTS

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

Part I, Article 6 1

Part I, Articles 10 and 12; Part II, Articles 5 and 6 1

Severability 2

ARGUMENT 3

I. The Program violates Part I, Article 6 of the State Constitution 3

Impact on local taxpayers 3

State's reliance on federal cases 3

Choice in Education 4

Aid to discrimination 5

II. The Program violates Articles 10 and 12 of Part I and Articles 5 and 6 of Part II (the tax-equality clauses) of the State Constitution 6

Program's advancement of non-public purposes 6

Independence of tax-equality claims 7

III. The Tax Credit Statute is not severable 8

CONCLUSION 9

STATEMENT CONCERNING ORAL ARGUMENT 9

CERTIFICATION OF SERVICE 10

TABLE OF AUTHORITIES

Cases

Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011) 4

Austin v. State Tax Comm'n, 114 N.H. 137 (1974) 4

Balke v. City of Manchester, 150 N.H. 69 (2003) 9

Burrows v. City of Keene, 121 N.H. 590 (1981) 5

Brown v. City of Concord, 56 N.H. 375 (1876) 5

Claremont School District v. Governor, 144 N.H. 210 (1999) 7

Eltra Corp. v. Town of Hopkinton, 119 N.H. 907 (1979) 6

Eyers Woolen Co. v. Town of Gilsum, 84 N.H. 1 (1929) 5

Faulkner v. City of Keene, 85 N.H. 147 (1931) 4

Felder v. City of Portsmouth, 114 N.H. 573 (1974) 6, 7

Heath v. Sears, Roebuck & Co., 123 N.H. 512 (1983) 8

In re Certain Scholarship Funds, 133 N.H. 227 (1990) 5, 7

In re Opinion of the Justices, 95 N.H. 548 (1949) 7

In re Opinion of the Justices, 131 N.H. 640 (1989) 7

N. Country Envtl. Servs. v. State, 157 N.H. 15 (2008) 6

Opinion of the Justices (Choice in Education), 136 N.H. 357 (1992) 1, 4, 5

Opinion of the Justices, 109 N.H. 578 (1969) ("*The Property Tax Credit Case*") 7

Opinion of the Justices (Sch. Fin.), 142 N.H. 892 (1998) 6, 7

Opinion of the Justices, 99 N.H. 528 (1955) 7

Opinion of the Justices, 103 N.H. 281 (1961) 5

Opinion of the Justices, 113 N.H. 87 (1973) 6

Town of Hampton v. Hampton Beach Improvement Co., 107 N.H. 89 (1966) 6

Constitutional Provisions

New Hampshire Constitution Part I, Article 6 . . . . *passim*

New Hampshire Constitution Part I, Article 10 . . . . 1, 6, 7, 9

New Hampshire Constitution Part I, Article 12 . . . . 1, 6, 7, 9

New Hampshire Constitution Part II, Article 5 . . . . 1, 6, 7, 9

New Hampshire Constitution Part II, Article 6 . . . . 1, 6, 7, 9

Statutes

RSA 77-G:1 . . . . 4, 6, 9

RSA 77-G:7 3

RSA 198:38 3

RSA 198:40-a 3

Session Laws and Bills

2012 N.H. Laws § 287 8

SB 419-FN (1992) 4

Other Authorities

Sharon K. Russo, *Vouchers for Religious Schools: The Death of Public Education?*, 13 S. Cal. Interdisc. L.J. 49 (2003) 3

SUMMARY OF ARGUMENT[1]

Part I, Article 6. The Education Tax Credit Program violates Part I, Article 6 of the New Hampshire Constitution because it delivers tax payments to religious schools at the expense of local taxpayers. Contrary to the intervenors' contention, the State's own fiscal analysis shows that the Program would harm local school districts and their taxpayers, not save them money. As in its opening brief, the State errs by relying on federal cases in opposing the Part I, Article 6 claim, for this Court interprets the church-state provisions of the State Constitution independently. As with other opinions of this Court that they have questioned, the intervenors are unable to distinguish or to justify overruling the Court's decision in *Opinion of the Justices (Choice in Education)*, 136 N.H. 357 (1992), which relied on Part I, Article 6 to strike down a school-voucher program. Finally, notwithstanding the State's contention that it should not be held responsible for discriminatory characteristics of schools or scholarship organizations that participate in the Program, the Program violates the anti-discrimination clause of Part I, Article 6 because it supports religious discrimination.

Part I, Articles 10 and 12; Part II, Articles 5 and 6. The Program violates the tax-equality clauses of the State Constitution because it creates a tax benefit that supports sectarian education, which is not a public purpose under this Court's case law. A tax benefit is unconstitutional under the tax-equality clauses if it actually serves an impermissible purpose or function, even where — as the State claims was the case here — the legislature enacted the benefit with a benign motive. Moreover, contrary to what the intervenors contend, the plaintiffs' claims under the tax-equality clauses are not dependent on their claims under the New Hampshire Constitution's church-state clauses; the Program would violate the tax-equality

[1] Per the plaintiffs' understanding of New Hampshire appellate practice, this reply brief is limited to the issues raised in the plaintiffs' cross-appeal and does not address the issues raised in the defendants' appeals.

clauses even if the Court were to conclude that Program funds are not “money raised by taxation” under Article 83 of Part II or “compelled . . . support” under Article 6 of Part I.

Severability. The intervenors argue that, if this Court holds that the Program unconstitutionally supports religious schools, the Court should allow the Program to continue to operate insofar as it funds homeschooling and out-of-district public schools. But such revision of the Program would not be permissible under this Court’s severability jurisprudence, as it is far from clear that the legislature would have enacted such a dramatically different version of the Program if it knew that religious schools could not be funded.

ARGUMENT

I. The Program violates Part I, Article 6 of the State Constitution.

Impact on local taxpayers. The plaintiffs explained in their opening brief (at 27–28) that the Program would result in "compelled . . . support of the schools of [a] sect or denomination" in violation of Article 6 of Part I because the Program would divert to religious schools tax funds earmarked for public school districts, and local taxpayers would have to pay higher taxes to compensate. The intervenors contend that the Program would not harm public schools or burden local taxpayers, because the average amount that New Hampshire public schools spend on students per capita is higher than the average size of Program scholarships. *See* Int. Ans. Br. at 4–5. But the State's own analysis of the Program's fiscal impact projects that, for each current public-school student who receives a Program scholarship and switches to a private school, school districts would lose state aid in the amount of $4,170, while saving only $500, for a net loss of $3,670. PA1380, 1384; *see also* Pls.' Opening Br. at 4; Br. *Amicus Curiae* of N.H. Sch. Adm'rs Ass'n & N.H. Sch. Bds. Ass'n at 11–12. The State's analysis explains that the Program would draw only a small number of students away from each grade at each school, leaving public schools unable to meaningfully reduce the fixed operating costs that primarily make up their budgets. *See* PA1380; *see also* Sharon K. Russo, *Vouchers for Religious Schools: The Death of Public Education?*, 13 S. Cal. Interdisc. L.J. 49, 74 (2003). The analysis further points out that, if the Program did not exist, many of the students projected to receive Program scholarships would switch from public to private schools anyway, but local school districts would *not* lose state adequacy aid for those students. PA1380; *see also* RSA 77-G:7, I; RSA 198:38, IV; RSA 198:40-a.

State's reliance on federal cases. The State cites federal case law in opposing the plaintiffs' claim under Part I, Article 6, focusing principally on the U.S. Supreme Court's 5–4

decision in *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011). *See* State Ans. Br. at 5–6. As explained in the plaintiffs' opening brief (at 32–34), however, federal cases are inapposite because this Court independently interprets the church-state provisions of the New Hampshire Constitution, based on their specific language and history. Moreover, *Winn* did not reach the merits of a federal church-state controversy; it addressed only issues of standing, relying on a body of federal jurisdictional law that is far more restrictive than New Hampshire's. *See Faulkner v. City of Keene*, 85 N.H. 147, 150–52 (1931) (rejecting federal law concerning jurisdiction; holding that the only state constitutional limits on what authority the state legislature can grant to state courts are (i) that judges must be "unprejudiced" and (ii) that "all interested parties" must be given "notice and an opportunity to be heard before any decree affecting their rights is made"); *see also Austin v. State Tax Comm'n*, 114 N.H. 137, 138–39 (1974) (New Hampshire has "policy of providing accessibility to the courts for the settlement of grievances and for challenging the use of power by government"), *rev'd on other grounds*, 420 U.S. 656 (1975).

Choice in Education. The Program cannot survive under this Court's ruling in *Opinion of the Justices (Choice in Education)*, 136 N.H. 357 (1992), which struck down a proposed school-voucher program under Part I, Article 6. The intervenors attempt to distinguish *Choice in Education* on the ground that the program at issue there provided for "institutional aid that benefitted the receiving schools as institutions," not "payments made to defray parents' tuition costs." Int. Ans. Br. at 29. But, in fact, the *Choice in Education* program did provide for the payment of tax funds for tuition at religious schools (*see* 136 N.H. at 358; SB 419-FN (1992), *available at* http://www.gencourt.state.nh.us/legislation/1992/SB0419.html), just as the Program here does (*see* RSA 77-G:1, VI, XIII; PA1357–58, 2019).

The intervenors alternatively contend that *Choice in Education* was wrongly decided because the school-voucher program there purportedly aided students, not religious schools. *See* Int. Ans. Br. at 29–30. But under this Court's jurisprudence, "[s]ubstance rather than form is the test" (*Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1, 10 (1929)), and the State cannot constitutionally "do indirectly that which it cannot do directly" (*Burrows v. City of Keene*, 121 N.H. 590, 597 (1981); *accord Op. of the Justices*, 103 N.H. 281, 282 (1961); *Brown v. City of Concord*, 56 N.H. 375, 379 (1876)). Therefore, the Court was correct in concluding in *Choice in Education* that payment of tax funds toward private-school students' tuition plainly "would constitute an unrestricted application of public money to sectarian schools." 136 N.H. at 359.

Aid to discrimination. The State argues that it does not matter that the Program permits scholarship organizations to discriminate based on religion in awarding scholarships and schools to so discriminate in admissions and employment, contending that such "discriminatory acts do not render the Program itself discriminatory." State Ans. Br. at 6–7. It is no more constitutional for the State to support discriminatory practices, however, than it is for the State to engage in such practices itself. In *In re Certain Scholarship Funds*, 133 N.H. 227, 230–34 (1990), this Court voided the discriminatory provisions of a private scholarship trust that limited scholarships to Protestant boys whom the local public-school principal was charged with selecting, because administration of the trust by public-school officials (as well as reformation of the trust by a court to appoint a private administrator) would constitute state support of religious and sex discrimination. Similarly, by diverting tax funds toward the support of religious discrimination — making some tax dollars available only to persons who hold particular religious beliefs — the Program violates the command in Article 6 of Part I that "every person, denomination or sect

shall be equally under the protection of the law; and no subordination of any one sect, denomination, or persuasion to another shall ever be established."[2]

II. The Program violates Articles 10 and 12 of Part I and Articles 5 and 6 of Part II (the tax-equality clauses) of the State Constitution.

Program's advancement of non-public purposes. The plaintiffs explained in their opening brief (at 43) that, because tax exemptions and benefits "necessarily result in a disproportionate tax burden on the remaining property in the taxing district" (*Op. of the Justices (Sch. Fin.)*, 142 N.H. 892, 900 (1998)), they must "advance[] a public purpose" (*N. Country Envtl. Servs. v. State*, 157 N.H. 15, 26 (2008)) to be constitutional under the State Constitution's tax-equality clauses. The State argues that this Court, in applying this test, cannot look beyond the purposes expressed by the legislature. *See* State Ans. Br. at 13–17. This Court's cases, however, require tax benefits to actually — not just hypothetically — advance or serve public purposes. *See N. Country*, 157 N.H. at 26 (tax exemptions must "advance[] a public purpose" and "confer[] a public benefit"); *Eltra Corp. v. Town of Hopkinton*, 119 N.H. 907, 912 (1979) (tax exemptions must "serve[] the general welfare"); *Felder v. City of Portsmouth*, 114 N.H. 573, 577 (1974) (tax exemptions must "reasonably promote[] a useful purpose of a public nature"); *Op. of the Justices*, 113 N.H. 87, 89 (1973) (tax benefits "must reasonably promote some proper object of public welfare or interest"); *Town of Hampton v. Hampton Beach Improvement Co.*, 107 N.H. 89, 100 (1966) (to determine whether tax benefit associated with lease of town property is constitutional, "[t]he test to be applied is whether the lease over its entire term will be

[2] The State points out that the Program prohibits scholarship organizations from violating existing anti-discrimination laws. *See* State Ans. Br. at 7 n.1 (citing RSA 77-G:1, XVII(b)). As explained in the plaintiffs' opening brief (at 5 n.1), however, no existing law prohibits scholarship organizations from discriminating based on religion in awarding scholarships. Nor does any existing law prohibit religious schools from discriminating in admissions or employment based on creed. *See id.*; *see also* Br. of Anti-Defamation League as *Amicus Curiae* at 4–8.

primarily of benefit to private parties or whether it will serve mainly proper public purposes"); *see also Sch. Fin.*, 142 N.H. at 900; *In re Op. of the Justices*, 131 N.H. 640, 643 (1989); *In re Op. of the Justices*, 95 N.H. 548, 550 (1949).

For instance, in *Claremont School District v. Governor*, 144 N.H. 210, 216–17 (1999), the Court struck down a tax benefit despite finding that the legislature had professed a legitimate justification for the law. The Court explained that "'[i]t is the essential characteristics of the bill which must determine its validity, rather than its declared purpose,'" for "[l]egislative declarations . . . 'have no magical quality to make valid that which is invalid.'" *Id.* at 214–15 (quoting *Op. of the Justices*, 99 N.H. 528, 530 (1955)). The Court concluded that while the tax benefit did provide permissible aid to some taxpayers, it mainly helped taxpayers who were not in need of assistance, and it therefore "'serve[d] no useful purpose of a public nature'" and "fail[ed] to serve the general welfare." 144 N.H. at 216 (quoting *Felder*, 114 N.H. at 577).

Similarly, although the Program here supports some educational options that the State can constitutionally aid, it principally "support[s] sectarian education[,] which is not a public purpose" under this Court's ruling in *Opinion of the Justices*, 109 N.H. 578, 582 (1969) ("*The Property Tax Credit Case*"). The Program, therefore, cannot be meaningfully distinguished from the $50 property-tax credit for families with children in private schools that the Court found to be violative of Article 12 of Part I and Article 5 of Part II (in addition to Article 83 of Part II) in *The Property Tax Credit Case*. *See id.* at 579, 581–82. What is more, the Program supports religious discrimination, which is against the "public policy" of this State. *See Scholarship Funds*, 133 N.H. at 232.

Independence of tax-equality claims. The intervenors argue that the plaintiffs' claims under Articles 10 and 12 of Part I and Articles 5 and 6 of Part II are "totally dependent on and derivative of their claims that the [P]rogram violates Article 83 [of Part II]." Int. Ans. Br. at 3.

That is not so. Even if the Court were to conclude that Program funds are not "money raised by taxation" under Article 83 of Part II or "compelled . . . support" under Article 6 of Part I, the Program would still violate the tax-equality clauses because it creates a tax benefit that supports the non-public purposes of sectarian education and religious discrimination.

III. The Tax Credit Statute is not severable.

The intervenors argue that, if this Court upholds the superior court's ruling that the Program unconstitutionally supports religious schools, the Court should allow the Program to continue to operate insofar as it funds homeschooling and out-of-district public schools. *See* Int. Ans. Br. at 31. But such drastic revision of the Program would not be permissible under this Court's severability jurisprudence, for reasons similar to those set forth in the plaintiffs' opening brief (at 45–48) with respect to the severance ruling issued by the superior court.

It is far from clear "whether the legislature would have enacted" (*see, e.g.*, *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 531 (1983)) the dramatically different version of the Program proposed by the intervenors. Only three of the 701 applicants for Program scholarships (as of the record's close) desired to attend an out-of-district public school (PA2009), so the intervenors' revised program would effectively be a program to subsidize home education. While much of the lobbying for the Program came from representatives of religious schools (*see* PA88–89, 92–93, 95–100), there is no evidence that supporters of homeschooling lobbied for the Program (*see* PA55–100). A program principally benefitting home education would not be consistent with Program supporters' professed goals of helping lower-income parents afford private-school education and promoting parents' ability to choose different educational options. *See* 2012 N.H. Laws §§ 287:1, I(c)–(d); PA66, 75, 84–90. And even if the legislature would have been willing to pass a program mainly aiding homeschooling, the details of the program may well have been quite different — for example, the legislature may not have limited home-

education scholarships to one quarter of the maximum average size of other scholarships. *See* RSA 77-G:1, VI.

Adopting the intervenors' proposed form of severance would be tantamount to "rewrit[ing] the statute," but "that is the province of the legislature." *See, e.g.*, *Balke v. City of Manchester*, 150 N.H. 69, 73 (2003). In addition, even if the intervenors' proposed remedy were permissible under this Court's severability jurisprudence, it would not cure the Program's constitutional infirmities because some homeschooling curricula and organizations are themselves religious. *See* PA1109, 1304–12, 2071–72.[3]

CONCLUSION

The Tax Credit Program would support religious education and discrimination at the expense of local taxpayers and their public schools. Therefore, in addition to (or as an alternative to) affirming the superior court's ruling that the Program violates Article 83 of Part II, this Court should hold that the Program violates (i) Article 6 of Part I, and (ii) Articles 10 and 12 of Part I and Articles 5 and 6 of Part II. The Court should also reverse the superior court's ruling that the Tax Credit Statute is severable and should strike down the entire Program. Finally, the plaintiffs respectfully ask the Court to clarify whether they should initially seek appellate attorney's fees from it or from the superior court.

STATEMENT CONCERNING ORAL ARGUMENT

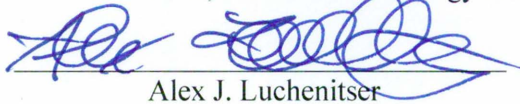
In the interests of fairness, the plaintiffs respectfully seek an amount of oral-argument time equal to whatever time the Court grants to the State and the intervenors together (i.e., thirty

[3] The intervenors' comment that the plaintiffs proposed as alternative relief the same remedy that the superior court ordered (Int. Ans. Br. at 4 n.4) is irrelevant. The plaintiffs proposed the alternative relief only as a backup (JA25–26) to be considered if the superior court rejected their arguments (PA2060–64, 2078, 2082) concerning severability.

minutes for the plaintiffs if the State's and the intervenors' requests for fifteen minutes each are granted). Oral argument will be presented by attorney Alex J. Luchenitser.

* * * * *

Respectfully submitted on behalf of plaintiffs Bill Duncan, Thomas Chase, Charles Rhoades, Rebecca-Emerson Brown, Rev. Homer Goddard, Rabbi Joshua Segal, Rev. Richard Stuart, Ruth Stuart, and LRS Technology Services, LLC, by attorney Alex J. Luchenitser.



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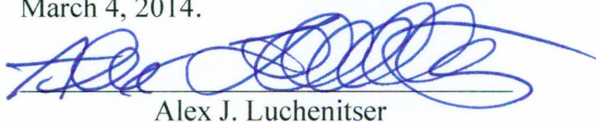
CERTIFICATION OF SERVICE

I hereby certify that I caused to be served two copies per party of this brief on counsel for all parties in this case, in compliance with Supreme Court Rule 26, by sending the brief via first-class mail, or delivering it by hand, on or before March 4, 2014, to Richard Head (counsel for the State) and Richard Komer and Michael Tierney (counsel for the intervenors). I also served a copy of this brief by e-mail, by agreement, on counsel for all parties in this case, on or before March 4, 2014.



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Date: March 3, 2014