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.

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.

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PLAINTIFFS-RESPONDENTS/CROSS-APPELLANTS' MOTION FOR REHEARING OR RECONSIDERATION

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Introduction

Pursuant to Supreme Court Rule 22, the plaintiffs respectfully move for rehearing or reconsideration. The Court's opinion striking down RSA 491:22 conflicts with the text and intent of the State Constitution—which, as shown by constitutional convention records, broadly permits the legislature to define the jurisdiction of the courts. The opinion also contradicts many of the Court's own decisions, including a line of cases upholding taxpayer standing that dates back to 1850. Further, the opinion directly contradicts testimony the judiciary's own general counsel gave to the Senate in 2012 on the constitutionality of the amendment to RSA 491:22. And the opinion is contrary to this State's long tradition of providing broad access to the courts to prevent encroachment on constitutional guarantees by other branches of government. Accordingly, the plaintiffs respectfully request that the Court reconsider its decision, uphold RSA 491:22, and strike down the Tax Credit Program. Alternatively, the plaintiffs request rehearing on the constitutionality of RSA 491:22—an issue (i) which the intervenors addressed in only two pages of their opening brief, and (ii) which the Attorney General, who has an obligation to defend the constitutionality of the statute, has not briefed yet.

I. The Court's opinion is contrary to constitutional text and intent.

The plaintiffs do not dispute that the state courts have no authority to hear cases where no injury has been inflicted or threatened to a right defined by the common law or statute. But the text and intent of Articles 4 and 72-a of Part II of the State Constitution make clear that the legislature has broad authority to define the jurisdiction of the courts, just as the legislature did when it amended RSA 491:22 to give courts jurisdiction to hear taxpayer suits (solely under the declaratory judgment statute). Nothing in the text or intent of Article 74—which merely authorizes this Court to issue advisory opinions upon request of the legislature or governor and council—limits that broad legislative power.

A. The Court's opinion contradicts the text and intent of Articles 4 and 72-a of Part II, which permit the legislature to broadly define the jurisdiction of the courts.

The Court only cites a single case, *Harvey v. Harvey*, 73 N.H. 106, 107 (1904), for the proposition that Article 74 prohibits the legislature from statutorily defining an injury or right to sue that is not recognized under the common law. *See* slip op. at 12. The Court erred by relying on that case—which was not cited by any party—because it is no longer valid due to a subsequent constitutional amendment (as well as contrary later case law, *see infra* § II(A)).

In 1966, Part II of the State Constitution was amended by adding Article 72-a, which reads, "The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2." New Hampshire Government, *State Constitution: Judiciary Power*, http://www.nh.gov/constitution/judicial.html. The constitutional-convention report that recommended this amendment explained that its purpose was to prevent the legislature from abolishing the courts and recreating them with new judges for political reasons, which the legislature had done five times in the prior century. *Report to the Fifteenth Constitutional Convention by the Commission to Study the State Constitution* 17–18 (1963) (excerpts provided in appendix hereto ("Reh'g App.") at 19–20); *accord* State of New Hampshire, *Convention to Revise the Constitution ("1964 Convention Journal")* 75–76 (1964) (Reh'g App. 22–23). The report noted, however, that "[u]nder the amendment recommended . . . the legislature would still have authority to increase the size and *define the jurisdiction* of our two higher courts." *Report* 18 (Reh'g App. 20) (emphasis added); *accord id.* at 8 (Reh'g App. 18) ("the legislature would still have authority to determine the size and jurisdiction of each court so long as their basic characters are not altered").

Consistently with the framers' intent of broadly allowing the legislature to define the

jurisdiction of the courts, the 1966 amendment also added the language "(except as otherwise provided by Article 72-a of Part 2)" to Article 4 of Part II, so that it now reads:

> The general court *(except as otherwise provided by Article 72-a of Part 2)* shall forever have *full power and authority to erect and constitute judicatories and courts of record*, or other courts, to beholden, in the name of the state, *for the hearing, trying, and determining*, *all manner* of crimes, offenses, *pleas, processes, plaints, action, causes, matters and things whatsoever* arising or happening within this state, or between or concerning persons inhabiting or residing, or brought, within the same, whether the same be criminal or civil, or whether the crimes be capital, or not capital, and whether the said pleas be real, personal or mixed, and for the awarding and issuing execution thereon.

1964 Convention Journal 277–78, 318–19 (Reh'g App. 24–25, 37–38) (emphasis added).

Thus, at least since 1966, the *only* limit on the legislature's broad power to confer jurisdiction on courts—i.e., to entitle courts to hear "all manner" of "pleas, processes, plaints, action[s], causes, matters and things whatsoever"—has been Article 72-a. Nothing in Article 72-a supports a conclusion that RSA 491:22 is unconstitutional. And the Court erred by relying on Article 74 to support that conclusion—because Article 74 is *not* referenced in Article 4 as a limit on the legislature's extensive power to grant jurisdiction to courts. The Court's nullification of legislatively-conferred jurisdiction is also contrary to what voters understood to be a purpose of the 1966 amendments to Part II: guaranteeing "[t]he independence and integrity of the[] courts" so that they can "protect our individual liberties and rights . . . to provide a check and balance on the powers of the legislature and the executive department." *Voters' Guide to Proposed Amendments to Constitution of the State of New Hampshire* 1–2 (1966) (Reh'g App. 41–42). The amendment to RSA 491:22 was passed to allow courts to do exactly that. *See* PA109.

B. The text and intent of Part II, Article 74 do not support the Court's opinion.

What is more, neither the text nor the history of Article 74 support the Court's use of it to strike down the amended RSA 491:22. Article 74 states only, "Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the

supreme court upon important questions of law and upon solemn occasions." It says nothing about the legislature's authority to confer rights upon taxpayers or anyone else to sue. Even if Article 74 could be read by implication as prohibiting anyone other than the legislature and the governor/council from doing what it authorizes them to do, RSA 491:22 grants no one—including taxpayers—any such power. A request for an Article 74 advisory opinion is made directly to this Court, without the creation of a record, typically without full briefing, and typically concerning proposed legislation. *See, e.g.*, *Op. of the Justices (App't of Chief Justice)*, 150 N.H. 355, 356 (2003). RSA 491:22 permits taxpayers to do something quite different: challenge enacted legislation, through a lawsuit in the superior court—where they must develop a record and present full briefing—and then present full briefing and argument in any appeal.

Article 74 was initially adopted in 1784 and was amended in 1792 to change the word "president" to "governor." *See State Constitution*, http://www.nh.gov/constitution/judicial.html. The conventions that produced the 1784 constitution kept no contemporaneous records (*see* Susan Marshall, *History of the New Hampshire Constitution* 13 n.39 (2011)), and those from 1792 shed little light on the issues at hand. Article 74 was next amended in 1958 by changing "superior court" to "supreme court," to reflect a change in the name of the state's highest court. *See id.*; Robert B. Dishman, *A New Constitution for New Hampshire?* 62, 65 (1956) (Reh'g App. 9, 12). The constitutional convention records show that the 1958 amendment was agreed on without any controversy or substantive discussion, and that it was framed as a ministerial change to a clause that simply allowed the issuance of advisory opinions. *See* State of New Hampshire, *Convention to Revise the Constitution* 159, 215, 218–19 (1956) (Reh'g App. 2–3, 6–7).

Significantly, by 1958, this Court had been recognizing the rights of taxpayers to challenge illegal state and local governmental conduct—regardless of whether they could show any injury other than one to their right to have their government act lawfully—for more than 100

years, including in cases that were then recent. *See N.H. Wholesale Beverage Ass'n v. N.H. State Liquor Comm'n*, 100 N.H. 5, 6 (1955); *Clapp v. Town of Jaffrey*, 97 N.H. 456, 460–61 (1952); *Conway v. N.H. Water Res. Bd.*, 89 N.H. 346, 347–48 (1938); *Clough v. Verette*, 79 N.H. 356, 358 (1920); *Blood v. Manchester Elec. Light Co.*, 68 N.H. 340, 340–41 (1895); *Brown v. Concord*, 56 N.H. 375, 380, 383–84 (1876); *Greenland v. Weeks*, 49 N.H. 472, 480 (1870); *Gates v. Hancock*, 45 N.H. 528, 528–30 (1864); *Merrill v. Plainfield*, 45 N.H. 126, 133–34 (1863); *Brown v. Marsh*, 21 N.H. 81, 84, 92–93 (1850). (Both cases cited in *Baer v. New Hampshire Department of Education*, 160 N.H. 727, 730 (2010), for the proposition that there was a contrary line of authority, were decided in 2001 or later.)

The delegates and voters who adopted the 1958 amendment thus could not have understood Article 74 as barring taxpayer suits. They reenacted Article 74 at a time when taxpayers' rights to challenge unlawful governmental conduct had been long accepted without question. If anyone in 1958 had thought that Article 74 limited taxpayer lawsuits, surely there would have been a great deal of debate before it was readopted with but a single word changed.

C. The text and intent of Part II, Article 41 do not support the Court's opinion.

The Court also errs in drawing on Part II, Article 41 for support for its ruling. *See* slip. op. at 11–12. It was 1966 when Article 41 was amended to add the portion the Court relies on:

> The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state.

See State Constitution, http://www.nh.gov/constitution/governor.html; *compare* Founding.com, *N.H. Const. of 1792*, http://www.founding.com/founders_library/pageID.2375/default.asp.

The purpose of this amendment was to "clarify and reinforce the executive powers of the governor." *Voters' Guide* 4 (Reh'g App. 44); *1964 Convention Journal* 309 (Reh'g App. 36);

see also id. at 286–92, 301–02, 342 (Reh'g App. 26–34, 39). But a convention delegate who served on the committee that proposed the amendment explained that while previous proposals

> strengthening the hand of the governor ha[d] been voted down . . . [b]ecause they took authority—they took privileges from some other organization or group and gave to the governor . . . this Convention in its wisdom has not seen fit to do that . . . this [amendment] gives the Governor some Constitutional authority without detracting from the Legislature, from the governor's council, *from the people or from anybody*.

1964 Convention Journal 291 (Reh'g App. 31) (emphasis added). Thus, the 1966 amendment to Article 41 cannot be construed as abolishing taxpayer rights to sue that had by then been recognized by this Court for over a century, and that continued to be affirmed by it in decisions issued in the years and decades thereafter. *See Seabrook Citizens for Def. of Home Rule v. Yankee Greyhound Racing, Inc.*, 123 N.H. 103, 108 (1983); *Grinnell v. State*, 121 N.H. 823, 825 (1981); *Chwalek v. Dover Sch. Comm.*, 120 N.H. 864, 865 (1980); *Gutoski v. Town of Winchester*, 114 N.H. 414, 415 (1974); *Green v. Shaw*, 114 N.H. 289, 291–92 (1974); *O'Neil v. Thomson*, 114 N.H. 155, 157–59 (1974); cases cited *supra* at 5.

II. The Court's opinion is contrary to its prior decisions.

A. The Court's opinion contradicts prior rulings that recognized broad legislative authority to enhance the Court's jurisdiction.

The one case the Court cites for the proposition that the State Constitution can prohibit the legislature from statutorily defining an injury or right to sue that is not recognized under the common law—*Harvey*, 73 N.H. at 107 (*see* slip op. at 12)—was also rejected by *Faulkner v. City of Keene*, 85 N.H. 147, 150 (1931). *Faulkner* stated that *Harvey*'s "implications that the Constitution forbids granting such jurisdiction, and that if the question were decided the decree would be merely advisory, do not appear to be tenable." *Id.* The Court explained:

> The advice-giving power of the court is limited by the Constitution, by virtue of the provisions that all interested parties are entitled to be heard, and by unprejudiced judges. Where there is adequate provision for notice and hearing, and those adversely interested are brought before the court, these constitutional limitations do not apply. . . . Beyond

> this there is no constitutional limitation upon the stage of the controversy at which the courts may be appealed to by the contending parties.

Id. at 150–51. RSA 491:22 and the proceedings in this case plainly comply with these rules.

What is more, in *Wheeler ex rel. Boulanger v. Morin*, 93 N.H. 40 (1943), the Court held that the legislature has extremely broad power to grant authority to New Hampshire courts. There, the Court expressly rejected the proposition that judicial power under the State Constitution was intended by its framers to be limited to "the determination of controversies between litigants." *Id.* at 45. The Court explained that, when the State Constitution was adopted in 1784, state courts had wide-ranging powers, including counting votes and breaking ties in elections, regulating prices, licensing merchants, and fixing tolls. *Id.* at 44–45. The Court noted that throughout the subsequent century and a half, courts had been granted extensive supervisory powers over county financial affairs, including approving proposed expenditures, raising revenues, determining tax amounts, and approving borrowing. *Id.* at 47–49. The Court therefore concluded that there was no basis in the State Constitution for invalidating a statute that charged the superior court with the duty of appointing fiscal officers for a county. *Id.* at 41, 49.

Similarly, in *Wyman v. Gregory*, 101 N.H. 171, 176, 178 (1957), the Court noted that, unlike the U.S. Constitution, the State Constitution does not limit "the function of our Courts . . . to 'cases' and 'controversies.'" The Court added that state statutes gave courts powers to appoint county auditors, determine audit frequency, and appoint election inspectors. *Id.* at 176–77.

In sum, given the broad functions that *Wheeler* and *Wyman* held the legislature could constitutionally assign to courts—including the authority to oversee governmental taxing and spending—the State Constitution cannot prohibit the legislature from giving courts the right to adjudicate taxpayer lawsuits that challenge such taxing and spending. *Wheeler* and *Wyman* also made clear that nothing in the State Constitution creates "case or controversy" requirements

similar to those restricting standing under Article III of the U.S. Constitution. The Court's opinion errs in adopting the opposite conclusions. *See* slip op. at 10, 12.

Recently, in *Babiarz v. Town of Grafton*, 155 N.H. 757 (2007), the Court confirmed that the legislature *does* have authority to grant taxpayers the right to sue. *Babiarz* held that a voter had no standing to challenge the results of an election, because he was not granted that right by a statute governing election disputes. *Id.* at 759–60. The Court explained that the "legislature could easily have conferred the right to challenge a recount in superior court upon either '*taxpayers*,' 'voters,' 'candidates,' or 'electors,'" but chose not to do so. *Id.* (emphasis added).

Babiarz is consistent with this Court's recent cases, in which the Court has shown great deference to legislative determinations of who has standing to sue. Earlier this year, the Court acknowledged, "We are not free to ignore the relevant standing distinctions that the legislature has crafted." *O'Brien v. N.H. Democratic Party*, 89 A.3d 1202, 1206 (N.H. 2014). Likewise, the Court's recent cases have repeatedly stated, "In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law [under which suit is brought] was designed to protect." *Id.* at 1204; *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008); *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000). The Court's opinion is contrary to this practice of deference to the legislature's constitutional authority to define the scope of court jurisdiction.

Further, the Court's opinion is directly contrary to testimony the judiciary's own general counsel, Howard Zibel, provided in a pre-enactment hearing on the amendment to RSA 491:22:

> [I]t is clear that the policy here [taxpayer standing in declaratory judgment actions] is a matter for the legislature. You will hear at times me say something is not a matter for the legislature on separation of powers grounds. This is not one of them. The Court made the decision two years ago [in *Baer*]. You have it in front of you. And it is not a constitutionally-based decision. And you clearly have the authority to overrule this decision by this bill if you so choose. [It's] not a question.

Audio recording of Senate hearing on HB1510, April 19, 2012, www.gencourt.state.nh.us/senateaudio/committees/2012/Judiciary/HB1510-FN_04192012.asx, at 10:30.

B. The Court's opinion contradicts its prior taxpayer-standing cases.

For at least a century and a half, this Court continuously recognized the right of taxpayers to challenge unconstitutional state and local governmental conduct, including in situations where the taxpayers suffered no financial injury. *See, e.g.*, *Green*, 114 N.H. at 292; *Clapp*, 97 N.H. at 460–61; *Conway*, 89 N.H. at 347–48; cases cited *supra at* 5–6. The Court's opinion asserts that none of these cases addressed whether the State Constitution bars such suits. Slip op. at 8. But given that the Court can raise the issue of standing *sua sponte* (*see id.*), this Court should not lightly assume that its predecessors did not consider the issue. Moreover, even where "constitutionality . . . has never been contested," "[t]he meaning of the Constitution 'is settled by the continuous and uninterrupted interpretation placed upon it for over' one hundred and fifty years." *Wheeler*, 93 N.H. at 49 (quoting *Canaan v. Enfield Vill. Fire Dist.*, 74 N.H. 517, 540 (1908)). Taxpayer suits having been allowed for so long, "it is now too late" to claim that the State Constitution prohibits them. *See Wheeler*, 93 N.H. at 49.

It is one thing to reject taxpayer standing on the grounds that it has not been statutorily authorized, as did *Baer*, 160 N.H. at 730–31. It is quite another to hold, in the face of 150 years of contrary practice, that the State Constitution prohibits such standing. Indeed, the Court's opinion effectively holds that, for 150 years, this Court's predecessors violated the Constitution.

Finally, in *Austin v. State Tax Comm'n*, 114 N.H. 137, 138–39 (1974), *rev'd on other grounds*, 420 U.S. 656 (1975), the Court granted standing to a group of *out-of-state* taxpayers despite their inability to show financial harm. The Court explained that it has a "policy of providing accessibility to the courts for the settlement of grievances and for challenging the use of power by government." This Court's opinion represents a dramatic reversal of that policy.

III. Relief requested.

The plaintiffs respectfully request that the Court withdraw its opinion, uphold RSA 491:22, and strike down the Program on the merits. Even if the Court continues to believe that RSA 491:22 could be unconstitutional as applied in some circumstances, the Court should hold that this is not such a case, given that this case challenges the use of the tax system, for funding of religious instruction, under the State Constitution, presenting a matter of substantial public importance—core considerations supporting decisions of many other states allowing taxpayer suits. *See, e.g.*, *Saratoga Cnty. Chamber of Commerce v. Pataki*, 798 N.E.2d 1047, 1053 (N.Y. 2003); *Gregory v. Shurtleff*, 299 P.3d 1098, 1105–06 (Utah 2013).

Alternatively, the plaintiffs request that the Court withdraw its opinion and order full briefing (and argument, if desired) under Rule 22(4) on the constitutionality of RSA 491:22, or remand the issue to the superior court to enable development of a full record and possible fact-finding on the relevant constitutional history. The plaintiffs have not had an opportunity to fully address the grounds upon which the Court decided this case. The intervenors did not appear to take their standing argument seriously in their opening brief, devoting a scant two pages to it (3–5). They then devoted seven pages to it in their answering brief (6–13), but the plaintiffs could not respond in their cross-appellants' reply, because they understood that brief to be limited to the plaintiffs' issues on cross-appeal. Moreover, the Attorney General, who has a duty to defend the constitutionality of state statutes, did not brief the issue, and instead conceded that one of the plaintiffs has standing. The Court's opinion then substantially relied on at least eight cases not cited by any party: *State v. Kelly*, 159 N.H. 390 (2009); *Petition of Pub. Serv. Co. of N.H.*, 125 N.H. 595 (1984); *State v. McPhail*, 116 N.H. 440 (1976); *Clark v. Clark*, 116 N.H. 255 (1976); *Harvey*, 73 N.H. 106; *In re School-Law Manual*, 63 N.H. 574 (1885); *Merrill v. Sherburne*, 1 N.H. 199 (1818); and *Watson v. Fox*, 44 A.130 (R.I. 2012).

Respectfully submitted,

By: _____ Date: September 8, 2014
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Counsel for plaintiffs-respondents / cross-appellants.

CERTIFICATION OF SERVICE

I hereby certify that on September 8, 2014, I caused to be served by first-class mail copies of this motion and a notice of filing on opposing counsel (Richard Head, counsel for the State; and Richard Komer and Michael Tierney, counsel for the intervenors) and on the clerk of the court (Strafford County Superior Court) from which this appeal or transfer was taken. The same day, I also served a copy of this motion by e-mail, by agreement, on counsel for all parties in this case.

_____ Date: September 8, 2014
Alex J. Luchenitser