

IN THE SUPERIOR COURT FOR STRAFFORD COUNTY, NEW HAMPSHIRE

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,)

CIVIL ACTION 219-2013-CV11

Plaintiffs,)

vs.)

STATE OF NEW HAMPSHIRE;)
NEW HAMPSHIRE DEPARTMENT)
OF REVENUE ADMINISTRATION;)
NEW HAMPSHIRE DEPARTMENT)
OF EDUCATION,)

Defendants.)

SECOND AMENDED COMPLAINT

Plaintiffs Bill Duncan (Box 760, 12 Cranfield St., New Castle, NH 03854), Thomas Chase (4 Decato Drive, Lee, NH 03861), Charles Rhoades (4 Austin Drive, Dover, NH 03820), Rebecca Emerson-Brown (34 Woodbury Ave., Portsmouth, NH 03801), The Rev. Homer Goddard (220 Cushing Road, Newmarket, NH 03857), Rabbi Joshua Segal (10 Onset Road, Box 408, Bennington, NH 03442), The Rev. Richard Stuart (677 Squam Lake Road, Sandwich, NH 03227), Ruth Stuart (677 Squam Lake Road, Sandwich, NH 03227), and LRS Technology Services, LLC (Box 760, 12 Cranfield St., New Castle, NH 03854) complain against defendants State of New Hampshire (represented by Richard W. Head, Associate Attorney General, New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301), New Hampshire

Department of Revenue Administration (109 Pleasant Street, P.O. Box 457, Concord, NH 03302-0457), and New Hampshire Department of Education (101 Pleasant Street Concord, NH 03301-3860) as follows:

Introduction

1. Under an Education Tax Credit program (RSA Ch. 77-G; “the Tax Credit Program” or “the Program”) recently enacted by the New Hampshire legislature, businesses will receive tax credits against the state business taxes they owe equal to 85 percent of the amounts they donate to “scholarship organizations.” The scholarship organizations, in turn, will use the funds to award scholarships to elementary- and secondary-school students, including those attending religious schools.
2. Because approximately two-thirds of New Hampshire’s private-school students attend religious schools, and because program scholarships will cover a much greater percentage of tuition at religious schools than at non-religious schools — which typically have much higher tuition rates — the Program will primarily benefit religious schools. And religious schools will be free to use Program funds for any purpose, including religious indoctrination and proselytization. Moreover, schools that discriminate based on religion in admissions or employment will be eligible to receive Program funds.
3. Of course, religious schools are entitled to teach their beliefs and serve or employ those who share their beliefs. But, under the New Hampshire Constitution — in order that religious liberty may thrive and that neither religion nor government may have any undue influence upon each other — tax funds cannot support such religious endeavors.
4. The Tax Credit Program specifically violates two church-state provisions of the New Hampshire Constitution: Part I, Article 6, which states that “no person shall ever be compelled to

pay towards the support of the schools of any sect or denomination”; and Part II, Article 83, which provides that “no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.” The New Hampshire Supreme Court has strictly interpreted these provisions, prohibiting any diversion of tax funds that could be used to support religious activities of religious educational institutions. Indeed, in *Opinion of the Justices*, 109 N.H. 578 (1969), the Supreme Court struck down a materially indistinguishable program, which would have provided a \$50 tax credit to property owners with children attending private schools. The Tax Credit Program also violates Articles 10 and 12 of Part I and Articles 5 and 6 of Part II of the New Hampshire Constitution: together, these constitutional provisions require that taxation be uniform, equal, proportional, and non-discriminatory, and they prohibit tax exemptions and benefits that do not serve a public purpose.

5. Accordingly, the plaintiffs — New Hampshire taxpayers who object to the Tax Credit Program — seek a declaratory judgment holding that the Program is unconstitutional, and a preliminary and a permanent injunction prohibiting implementation of the Program.

Jurisdiction and Venue

6. This Court has jurisdiction over this case pursuant to RSA 491:22, which was amended effective January 1, 2013 to provide that “[t]he taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district,” and that “therefore, any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief . . . when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.” 2012 N.H. Laws Ch. 262.

7. Venue is proper in this County because plaintiffs Thomas Chase and Charles Rhoades reside within this County.

Parties

Plaintiffs¹

Bill Duncan

8. Plaintiff Bill Duncan resides in Rockingham County.

9. Plaintiff Duncan is the founder of Defending New Hampshire Public Education and Advancing New Hampshire Public Education, organizations that advocate for public education in New Hampshire. He is a businessman who has started several small businesses, as well as a non-profit economic development group that aids small businesses and low-income people. He is a former officer in the U.S. Navy and served a tour in Vietnam. He has also served on the Durham Town Council.

10. Plaintiff Duncan pays a number of different kinds of taxes to the State of New Hampshire, including property taxes (on real estate that he owns), interest and dividend taxes, communications service taxes (on phone service that he uses), electricity consumption taxes (on electricity that he consumes), meals and rental taxes (on meals that he eats at restaurants), and gasoline taxes.

11. Plaintiff Duncan is also the sole owner and president of plaintiff LRS Technology Services, LLC, which has paid and continues to pay business enterprise taxes or business profits taxes to the State of New Hampshire, as discussed below in paragraphs 38 to 40.

¹ Affidavits from all of the plaintiffs supporting the statements in this section were submitted as Exhibit 2 to Plaintiffs' Petition for Preliminary Injunction, except that an affidavit concerning plaintiff LRS Technology Services, LLC is submitted herewith.

12. Plaintiff Duncan objects to the Tax Credit Program because it will divert state tax dollars to support religious schools and harm New Hampshire's public education system.

Thomas Chase

13. Plaintiff Thomas Chase resides in Strafford County.

14. Plaintiff Chase has lived in and owned a home in Strafford County for the last ten years. He works as an electrical engineer. He has two children who attend public school in Strafford County.

15. Plaintiff Chase pays a number of different kinds of taxes to the State of New Hampshire, including property taxes (on the home he owns), communications service taxes (on phone and internet service that he uses), electricity consumption taxes (on electricity that he consumes), meals and rental taxes (on meals that he eats at restaurants), and gasoline taxes.

16. Plaintiff Chase objects to the Tax Credit Program because it will divert tax funds for the support and sponsorship of religious institutions, because it violates the provisions of the New Hampshire Constitution that guarantee a separation between church and state, and because it is equivalent to direct government spending to support religious schools.

Charles Rhoades

17. Plaintiff Charles Rhoades resides in Strafford County.

18. Plaintiff Rhoades has lived in and owned a home in Strafford County for the last 28 years. He has worked as an educator for more than thirty years. He currently teaches part-time at a Rockingham County public school and at a private college. He previously served as an adjunct professor at the University of New Hampshire for eighteen years.

19. Plaintiff Rhoades pays a number of different kinds of taxes to the State of New Hampshire, including property taxes (on the home he owns), communications service taxes (on

phone and internet service that he uses), electricity consumption taxes (on electricity that he consumes), meals and rental taxes (on meals that he eats at restaurants), and gasoline taxes.

20. Plaintiff Rhoades objects to the Tax Credit Program because the Program will reduce funding for public education in New Hampshire, which has already suffered significant budget cuts in recent years; because the Program violates the separation of church and state, in which he strongly believes; because he opposes the use of public funds to pay for the advancement of sectarian teachings or to entities that discriminate; and because he believes that religious and other private schools should be privately financed.

Rebecca Emerson-Brown

21. Plaintiff Rebecca Emerson-Brown resides in Rockingham County.

22. Plaintiff Emerson-Brown is a student at the University of New Hampshire. She served for four years on the School Board of Portsmouth, New Hampshire. She has a child who attends a Portsmouth public school. In November 2012, she was elected to the New Hampshire House of Representatives.

23. Plaintiff Emerson-Brown pays a number of different kinds of taxes to the State of New Hampshire, including property taxes (on real estate that she owns), communications service taxes (on phone and internet service that she uses), electricity consumption taxes (on electricity that she consumes), meals and rental taxes (on meals that she eats at restaurants), and gasoline taxes.

24. Plaintiff Emerson-Brown objects to the Tax Credit Program because it violates the separation of church and state and will divert tax funds to support religious groups of which she is not a member.

The Rev. Homer Goddard

25. Plaintiff Homer Goddard resides in Rockingham County.

26. Plaintiff Goddard is a retired Unitarian Universalist minister. He served as a Unitarian Universalist minister for three decades.

27. Plaintiff Goddard pays a number of different kinds of taxes to the State of New Hampshire, including property taxes (on real estate that he owns), communications service taxes (on phone service that he uses), electricity consumption taxes (on electricity that he consumes), meals and rental taxes (on meals that he eats at restaurants), and gasoline taxes.

28. Plaintiff Goddard objects to the Tax Credit Program because he objects to the diversion of public funds for the support of religious institutions.

Rabbi Joshua Segal

29. Plaintiff Joshua Segal resides in Hillsborough County.

30. For the past thirty years, plaintiff Segal served as Rabbi of Congregation Betenu in Amherst, New Hampshire. In December 2012, he became Rabbi Emeritus of this congregation.

31. Plaintiff Segal pays a number of different kinds of taxes to the State of New Hampshire, including property taxes (on real estate that he owns), interest and dividend taxes, communications service taxes (on phone service that he uses), electricity consumption taxes (on electricity that he consumes), meals and rental taxes (on meals that he eats at restaurants), and gasoline taxes.

32. Plaintiff Segal objects to the Tax Credit Program because he does not believe that the state should support — by diversion of taxes or otherwise — religious education, through which religious schools seek to inculcate their religious teachings.

The Rev. Richard Stuart and Ruth Stuart

33. Plaintiffs Richard and Ruth Stuart are residents of Carroll County.

34. Plaintiff Richard Stuart is an ordained pastor in the United Church of Christ. He has been a minister since 1969. He has ministered to congregations in Laconia and Portsmouth, New Hampshire, as well as Sydney, Australia. He also served as a member of the New Hampshire House of Representatives from 2008 to 2010.

35. Plaintiff Ruth Stuart is a retired high-school librarian. She worked as a librarian for 28 years in various New Hampshire public schools.

36. The Stuarts pay a number of different kinds of taxes to the State of New Hampshire, including property taxes (on real estate that they own), interest and dividend taxes, communications service taxes (on phone service that they use), electricity consumption taxes (on electricity that they consume), meals and rental taxes (on meals that they eat at restaurants), and gasoline taxes.

37. The Stuarts object to the Tax Credit Program because it will divert tax funds to religious and other private schools, because it violates the provisions of the New Hampshire Constitution that require a separation of church and state, and because it will undermine New Hampshire's public education system.

LRS Technology Services, LLC

38. Plaintiff LRS Technology Services, LLC (hereinafter, "LRS") is a limited liability corporation that was incorporated in New Hampshire in 2005. LRS provides computer consulting services.

39. LRS has paid and continues to pay business enterprise taxes or business profits taxes to the State of New Hampshire. For instance, LRS paid \$4,240 in business enterprise taxes to the State of New Hampshire for the 2011 tax year. LRS anticipates that LRS will have paid a similar amount in business enterprise taxes to the State of New Hampshire for the 2012 tax year

and that LRS will likewise pay a similar amount in business enterprise taxes to the State of New Hampshire for the 2013 tax year.

40. LRS objects to the Tax Credit Program because the Program diverts state taxes to support religious schools and harms public education.

Defendants

41. The defendants are the State of New Hampshire, the New Hampshire Department of Revenue Administration, and the New Hampshire Department of Education.

42. The Department of Revenue Administration is required by RSA 77-G:3 through RSA 77-G:6 to take certain actions to implement the Tax Credit Program, and has already taken various steps to implement the Program, as described in detail in paragraphs 72 through 76 below.

43. The Department of Education is required by RSA 77-G:7 and RSA 77-G:8 to take certain actions to implement the Tax Credit Program, including implementing the Program provisions described in paragraphs 59 and 60 below.

44. If the Tax Credit Program is not declared unconstitutional and enjoined, the defendants will further implement the Program.

Factual Allegations²

The Education Tax Credit Program

45. The Education Tax Credit program (“the Tax Credit Program” or “the Program”) is codified as Chapter 77-G of the New Hampshire Revised Statutes Annotated (“the Tax Credit Statute” or “the Statute”).

² All citations to exhibits in this section are to the exhibits submitted with Plaintiffs’ Petition for Preliminary Injunction.

46. The Tax Credit Statute was enacted on June 27, 2012, when both houses of the General Court passed the measure by a two-thirds supermajority, overriding a veto by then-Governor John Lynch. 2012 N.H. Laws Ch. 287.

Program Scholarships

47. Under the Tax Credit Program, “scholarship organizations” may award scholarships to primary- and secondary-school students to attend nonpublic schools, as well as to attend public schools outside of their home districts or to defray the cost of home schooling. RSA 77-G:2.

48. Scholarship organizations participating in the Program must be exempt from federal taxation pursuant to section 501(c)(3) of the Internal Revenue Code and must be approved by the New Hampshire Department of Revenue Administration. *See* RSA 77-G:1, XVII(a); 77-G:5.

49. The average value of all scholarships awarded by a scholarship organization (excluding eligible students who receive scholarships for education expenses relating to home education) may not exceed \$2,500 in 2013. RSA 77-G:2, I(b).

50. In subsequent years, this \$2,500 cap will be raised to reflect inflation. *Id.*

The Tax Credit

51. New Hampshire businesses that make donations to scholarship organizations will be entitled to a tax credit against the business profits and business enterprise taxes they owe equal to 85 percent of their donations, subject to certain limitations set forth in the Statute. RSA 77-G:3.

52. The Department of Revenue Administration will award a maximum of \$3.4 million in Program tax credits in 2013 and \$5.1 million in Program tax credits in 2014. RSA 77-G:4, I.

53. Starting in 2015, the maximum amount of tax credits that can be awarded annually under the Program will increase by 25 percent each year, provided that (a) the total amount of donations used for scholarships in the prior Program year is more than 80 percent of that year’s

maximum awardable amount of tax credits, and (b) the Community Development Finance Authority issues a certain certification detailed in the Statute concerning receipt of sufficient contributions or contribution offers. RSA 77-G:4, II–III.

54. If the maximum amount of tax credits that can be awarded annually under the Program does increase by 25 percent each year starting in 2015, that maximum amount will exceed \$30 million in 2022 and \$300 million in 2033. Ex. 8.

Impact on Public Schools

55. Implementation of the Tax Credit Program will reduce state funding to public schools.

56. For the 2013–14 school-year, scholarship organizations must award at least 70 percent of their scholarships to students who are currently (in the 2012–13 school-year) attending public schools. *See* RSA 77-G:2, I(b).

57. For the 2014–15 school-year, scholarship organizations must award at least 70 percent of their scholarships to students who attend public schools or receive program scholarships in the 2013–14 school-year. *See id.*

58. For each of the subsequent thirteen program years, scholarship organizations must award a certain percentage of their scholarships to students who attend public schools or receive program scholarships in the prior program year. *See id.*

59. When students who receive Program scholarships withdraw from a public-school district, the state’s “adequate education grant” funding to that school district — which is based on the number of pupils attending district schools — will be correspondingly reduced. *See* RSA 77-G:1, VIII(a)(1); 77-G:7, I.

60. Although “stabilization grants” will be given to public-school districts that lose more than one-fourth of one percent of their state funding as a result of the Program, each grant will only

cover the amount lost in excess of that one-fourth of one percent, and each grant will only last for four years. *See* RSA 77-G:8, I.

Lack of Oversight of Funded Schools

61. The Tax Credit Program provides for virtually no state oversight of the nonpublic schools that accept students who receive scholarships.

62. The Tax Credit Statute states, “[e]xcept as provided in this chapter, or otherwise provided in law, no state department, agency, or board shall regulate the educational program of a receiving nonpublic school or home education program that accepts students pursuant to this chapter.” RSA 77-G:9, II.

63. The Act through which the Statute was enacted states that one of the purposes of the Statute is to “[a]llow maximum freedom to parents and nonpublic schools to respond to and, without governmental control, provide for the educational needs of children, and this act shall be liberally construed to achieve that purpose.” 2012 N.H. Laws § 287:1, II(a).

64. Nothing in the Tax Credit Statute restricts schools from using Program scholarship funds for religious instruction or worship.

65. The Statute does not prohibit schools from requiring students who receive Program scholarships to participate in religious activities.

66. The Statute has no provisions prohibiting schools receiving Program funds from teaching religion-based doctrines, such as creationism, in science or mathematics classes.

67. The Statute has no provisions prohibiting schools that enroll students receiving Program scholarships from discriminating based on religion in admissions or employment.

68. Although the Statute prohibits scholarship organizations from “restrict[ing] or reserv[ing] scholarships for use at a single nonpublic school . . . or . . . for a specific student or a specific

person” (RSA 77-G:5, I(b)), it does not prohibit scholarship organizations from awarding scholarships that can only be used at a particular group of schools — such as schools of a particular denomination.

69. Indeed, the Statute does not prohibit scholarship organizations from directly discriminating based on religion among students in awarding scholarships.

Imminence of Program Implementation

70. Program funds may be used to award scholarships within the first few weeks or months of 2013.

71. The first program year of the Program began on January 1, 2013. 2012 N.H. Laws § 287:5.

72. The Department of Revenue Administration has already adopted regulations and forms to implement the Program. Exs. 3–5.

73. Nonprofits seeking approval as scholarship organizations may submit an application with the Department of Revenue Administration starting on January 1, 2013, and the Department must grant or deny each application within thirty days of receipt. RSA 77-G:5, II(a).

74. As of January 4, 2013, the Department had already approved one scholarship organization, the Network for Educational Opportunity. Ex. 6.

75. Likewise, businesses that plan to make contributions to scholarship organizations may submit tax-credit applications on or after January 1, and the Department must grant or deny these applications within thirty days of receiving them. RSA 77-G:5, II(b).

76. As of January 4, 2013, the Department had already approved \$85,850 in tax credits. Ex. 7.

77. Businesses may make donations to scholarship organizations as soon as their tax-credit applications are approved, and must do so within sixty days of approval. RSA 77-G:5, II(c).

78. Scholarship organizations may issue scholarships as soon as the donations are received. See RSA 77-G:5, II(d)–(g).

New Hampshire Religious Schools

Primacy of Religious Schools

79. According to the New Hampshire Department of Education, there are 116 approved private general-education schools in New Hampshire. Ex. 35 at 10.

80. (While there are also 38 approved private special-education schools in New Hampshire, those schools enroll only 6.5 percent of all students attending New Hampshire nonpublic schools. *Id.*)

81. Approximately three-fifths of New Hampshire’s private general-education schools are religious schools, operated by or affiliated with a religious institution. Ex. 28 at 7.

82. Specifically, 71 (61.2 percent) of New Hampshire’s 116 private general-education schools are religious schools. *Id.*

83. All but one of these 71 religious schools are associated with denominations of Christianity. *Id.* at 8.

84. Of the 70 Christian schools, 31 schools (44 percent) are Roman Catholic, 20 are unspecified “Christian,” seven are Baptist, four are Episcopalian, four are Seventh-Day Adventist, and four are affiliated with other Christian denominations. *Id.*

85. Approximately two-thirds of students enrolled in New Hampshire private general-education schools attend religious schools. Ex. 30 at 11.

86. Specifically, approximately 11,212 students attend New Hampshire private general-education religious schools, and approximately 5,670 attend New Hampshire private general-education secular schools. *Id.*

Tuition Disparities Between Religious and Non-Religious Schools

87. The average cost of an education at private religious schools in New Hampshire is significantly less than the average cost of an education at private non-religious New Hampshire schools.

88. For all grade levels, both primary and secondary, the average cost of education (the average cost data presented in this section includes tuition and various other costs, such as registration fees and living expenses) at New Hampshire general-education non-religious schools is more than twice the average cost of education at New Hampshire general-education religious schools. Ex. 29 at 9.

89. Specifically, for all grade levels, the average cost of education at New Hampshire general-education non-religious schools is approximately \$21,578 per year, while the average cost of education is approximately \$8,948 per year at New Hampshire's general-education religious schools. *Id.*

90. At New Hampshire nonpublic general-education schools that enroll primary-level students (grades K–8), the average cost of education in a secular school is approximately twice the average cost of education in a religious school. *Id.*

91. Specifically, at New Hampshire nonpublic general-education schools that enroll primary-level students (grades K–8), the average cost of education in a secular school is approximately \$11,905 per year, while the average cost of education in a religious school is approximately \$5,469 per year. *Id.*

92. At New Hampshire nonpublic general-education schools that enroll high-school-level students (grades 9–12), the average cost of education in a secular school is approximately two and one-half times greater than the average cost of education in a religious school. Ex. 30 at 11.

93. Specifically, at New Hampshire nonpublic general-education schools that enroll high-school-level students (grades 9–12), the average cost of education in a secular school is approximately \$32,745 per year, while the average cost of education in a religious school is approximately \$12,436 per year. *Id.*

94. As the average size of Program scholarships is capped at \$2,500 (in 2013 dollars, *see* RSA 77:G-2, I(b)), Program scholarships will typically pay for a much greater percentage of educational expenses at religious schools than at non-religious schools.

95. Thus, for many parents, Program scholarships will be sufficient to enable them to afford to send their children to religious schools, but will not be enough to enable them to afford a non-religious private-school education.

96. The vast majority of students participating in school-voucher programs around the country attend religious schools, because religious private schools substantially outnumber non-religious private schools and are cheaper.

Central Role of Religion

97. Religion permeates the curricula and activities of many religious schools in New Hampshire. *See* Ex. 31.

98. New Hampshire religious schools often teach religion-based doctrines. *See* Exs. 31–32.

99. Religion's central role is often illustrated by the schools' mission and vision statements, statements of faiths, and other declarations about their purposes and beliefs. *See id.*

100. According to Mount Royal Academy, a high school in Sunapee, “Catholic identity . . . is the most defining characteristic of our school community. Our Catholic identity influences how we teach, how we coach, how we play, and how we pray.” Ex. 37 at 350.

101. At Cornerstone Christian Academy, a K–8 school in Epsom, the “purpose” of the school is “to be an extension of the Christian home and church . . . and thus to provide a continuity of training for Christian young people.” *Id.* at 158.

102. At Community Bible Academy in Berlin, “[a]ll subject matter is presented in light of the Scripture with a Biblical view of God and guiding principles to equip the student for life.” *Id.* at 128.

103. The “purpose” of Calvary Christian School in Plymouth is “to provide Christian education by integrating Biblical principles throughout the curriculum.” *Id.* at 78.

104. Dublin Christian Academy promulgates a “Statement of Faith” that professes that “the Genesis account of creation is to be accepted literally and not allegorically or figuratively”; that “all animal and plant life were made directly by God in six literal, twenty-four hour periods”; and that “any form of homosexuality, lesbianism, bisexuality, bestiality, incest, fornication, adultery, and pornography are sinful perversions of God’s gift of sex.” Ex. 37 at 179–80. This Statement of Faith also condemns all forms of abortion, including for pregnancies caused by rape or incest. *Id.* at 181.

Ministries of Churches

105. Many of New Hampshire’s private religious schools are, or describe themselves as, “ministries” of a parish or church. *See* Ex. 31.

106. Laconia Christian School “has been a significant ministry of Laconia Christian Fellowship Church for more than 30 years.” Ex. 37 at 315.

107. The Lighthouse Christian Academy in Rochester is “a ministry of the Harvest of Praise Church of God.” *Id.* at 336.

108. At Tabernacle Christian School in Litchfield, the “principal, teachers and other staff are employed in a ministry” of Tabernacle Baptist Church. *Id.* at 713.

Mandatory Religious Activities

109. Most of New Hampshire’s religious schools require students to take part in various religious activities, such as Bible classes, worship services, and classroom prayer. *See* Ex. 32.

110. At Salem Christian School, “[a]ll grades incorporate Biblical principles in all subjects and also have regular Bible study classes” every day of the week except for Wednesday, which is when the weekly “chapel service” is held. Ex. 37 at 489.

111. The Infant Jesus School, a Catholic elementary school in Nashua, requires all students, “regardless of the[ir] religious affiliation,” to “participate in all liturgies, classroom prayer, and other aspects of the spiritual life of the school. The teaching of Religion is a content subject in which all students must participate.” *Id.* at 285.

Religious Discrimination

112. Most of New Hampshire’s religious schools discriminate on the basis of religion, either in hiring employees or in admitting prospective students. *See* Ex. 33 at 5; Ex. 34 at 6.

113. At least fourteen religious schools in New Hampshire discriminate on the basis of religion in hiring employees. Ex. 34 at 6.

114. At least 38 New Hampshire religious schools (53.5 percent of New Hampshire religious general-education schools) treat students differently based on religious affiliation in their admissions processes. Ex. 33 at 5.

115. Some New Hampshire religious schools simply do not accept students of a different religious affiliation. *See* Ex. 33.

116. At Nashua Christian Academy, students seeking admission to the high school must submit “a written essay of their Christian testimony” as part of their application. Ex. 37 at 400–01.

117. Students applying to the high school at Trinity Christian School in Concord must “have at least one parent who has a profession of faith in Christ and is an active attendee of a gospel preaching church.” *Id.* at 763–64.

118. Some New Hampshire religious schools give admissions preferences to students of a particular denomination and admit students of other faiths only if space remains. *See* Ex. 33.

119. According to the Catholic Diocese of Manchester, non-Catholic students may be considered for admission to regional or parish Catholic schools in New Hampshire only “on a space available basis, after all Catholic students have been considered.” Ex. 39 at 2.

120. Some New Hampshire religious schools charge lower tuition rates to students who belong to the school’s denomination or parish than to non-member students. *See, e.g.,* Ex. 37 at 84, 568; *see generally* Ex. 33.

121. Some New Hampshire religious schools hire only members of a particular religious denomination. *See* Ex. 34.

122. At Holy Family Academy, a Catholic school in Manchester for grades seven through twelve, the members of the Board of Trustees, faculty, and staff must “make a profession of faith and sign an oath of fidelity to the Roman Catholic Church.” Ex. 37 at 270.

123. Some of New Hampshire’s religious schools require their employees and students to affirm religion-based doctrines as a condition of their continued employment or attendance. *See* Exs. 32–34.

124. The “Community Life Statement” of Jesse Remington High School in Candia contains a section “renounc[ing] . . . sexual immorality such as premarital intercourse, adultery and homosexual behavior.” Ex. 37 at 298. All school employees and board members must be in “complete agreement” with the Community Life Statement; if they disagree, they “may be asked to separate from Jesse Remington High School.” *Id.* at 304. Students or families who take “public issue” with the Community Life Statement may also be asked to leave the school. *Id.*

125. Christian Bible Church Academy in Nashua requires its students to sign a “Student Pledge of Christian Conduct,” in which the students “reaffirm that [they are] born-again Christian[s] striving to live [their lives] according to the Bible,” and promise that they will “faithfully and consistently attend the services of the Bible believing church which [their] family attends.” *Id.* at 108–09.

Legislative History of the Tax Credit Program

Awareness That Religious Schools Would Be Principal Beneficiaries

126. The legislative history of the bill through which the Tax Credit Program was enacted (“the Tax Credit Bill” or “the Bill”) demonstrates that members of the General Court were aware that the Program would principally benefit religious schools.

127. The committees considering the Tax Credit Bill were lobbied by religious organizations that supported the measure because it would benefit Christian schools. *See* Exs. 14–16.

128. The Senate Education Committee received a letter about the Bill from the Granite State Christian Schools Association that stated, “[t]he main benefit of this proposed legislation

consists of a reduced cost burden on the public schools of all New Hampshire municipalities, as options are made more viable for some families desiring Christian school alternatives to public education.” Ex. 14.

129. The letter added that the Bill would “bring some degree of much-appreciated relief to the many Christian school families now required to bear a double cost burden for their children’s educations” and thanked the committee members “for your support of the many New Hampshire families choosing a Christian school alternative to public education.” *Id.*

130. A letter to the Senate Education Committee from Tri-City Christian Academy in Somersworth stated that the Tax Credit Bill “would benefit mostly families of very modest means, who have chosen a faith-based school for their children.” Ex. 15.

131. Members of the General Court also were aware of the substantial tuition disparity between religious and non-religious schools.

132. Before the Tax Credit Bill was introduced in the General Court, the Committee to Study the Implementation of an Education Tax Credit Plan in New Hampshire, composed of members of both legislative houses, researched the average cost of a private education in New Hampshire. Ex. 9 at 3.

133. This committee reported that the cost of a “Secular Elementary” education was \$15,745, whereas a “Religious Elementary” education cost only \$5,228. *Id.* at 4.

134. The committee further reported that the cost of a “Religious Secondary” education was estimated to be \$7,664, while the cost of a “Secular Secondary” education was \$24,711, and the cost of a “Boarding” education was \$47,092. *Id.*

Awareness of the Program's Constitutional Flaws

135. Members of the General Court were on notice that the Tax Credit Program would be vulnerable to constitutional challenge.

136. The minority of the House Ways and Means Committee issued a report disapproving the Tax Credit Bill, in part because the minority was concerned that the Program conflicted with the New Hampshire Constitution. Ex. 12.

137. Citing Part I, Article 6 and Part II, Article 83 of the New Hampshire Constitution, the minority report concluded that a legal challenge to the Tax Credit Program could succeed. *Id.* at 2.

138. The minority report referenced three *Opinions of the Justices* issued by the New Hampshire Supreme Court — 108 N.H. 268 (1967), 109 N.H. 578 (1969), and 136 N.H. 357 (1992) — noting that they “could be used as precedents in cases against this legislation.” Ex. 12 at 2.

139. The 1969 case was particularly on point, according to the report, because it “dealt specifically with tax credits.” *Id.*

140. The Senate Education Committee was also alerted to the constitutional problems with the Tax Credit Bill when it held a public hearing on February 14, 2012. *See* Ex. 13.

141. Claire Ebel, the Executive Director of the New Hampshire Civil Liberties Union, spoke in opposition to the bill, citing constitutional clauses and opinions of the New Hampshire Supreme Court that were also cited in the minority report discussed above. *Id.* at 10–11.

142. Ebel urged the Senate to seek an advisory opinion from the New Hampshire Supreme Court on the constitutionality of the Bill prior to enacting the legislation. *Id.* at 10.

143. The General Court did not seek such an opinion.

Count One: Violation of Part I, Article 6 of the New Hampshire Constitution

144. Plaintiffs re-allege and incorporate by reference all of the preceding paragraphs in this complaint.

145. Part I, Article 6 of the New Hampshire Constitution provides, in relevant part, “no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.”

146. Part I, Article 6 further provides, in relevant part, “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.”

147. The Tax Credit Program violates Part I, Article 6 because, *inter alia*, (1) the Program will divert tax funds to religious schools, (2) the Program places no restrictions on how those funds may be used by the religious schools, (3) the Program will aid religious schools that discriminate based on religion in admissions or employment, (4) the Program will have the effect of primarily benefitting religious schools, and (5) the legislature passed the Program with a purpose of primarily benefitting religious schools.

Count Two: Violation of Part II, Article 83 of the New Hampshire Constitution

148. Plaintiffs re-allege and incorporate by reference all of the preceding paragraphs in this complaint.

149. Part II, Article 83 of the New Hampshire Constitution provides, in relevant part, that “no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.”

150. The Tax Credit Program violates Part II, Article 83 because, *inter alia*, (1) the Program will divert tax funds to religious schools, (2) the Program places no restrictions on how those funds may be used by the religious schools, (3) the Program will have the effect of primarily

benefitting religious schools, and (4) the legislature passed the Program with a purpose of primarily benefitting religious schools.

**Count Three: Violation of Articles 10 and 12 of Part I
and Articles 5 and 6 of Part II of the New Hampshire Constitution**

151. Plaintiffs re-allege and incorporate by reference all of the preceding paragraphs in this complaint.

152. Part I, Article 10 of the New Hampshire Constitution provides, in relevant part, “[g]overnment [is] instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men.”

153. Part I, Article 12 of the New Hampshire Constitution provides, in relevant part, “[e]very member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection”

154. Part II, Article 5 of the New Hampshire Constitution, in relevant part, empowers the General Court to “impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within” the state.

155. Part II, Article 6 of the New Hampshire Constitution, in relevant part, authorizes the General Court to raise revenue by taxing “polls, estates, and other classes of property.”

156. Together, these constitutional provisions require that taxation be uniform, equal, proportional, and non-discriminatory.

157. Under these constitutional provisions, a tax exemption or benefit is only constitutional if it serves a public purpose.

158. The Tax Credit Program violates the requirements of uniformity, equality, proportionality, and non-discrimination in taxation because businesses that contribute to scholarship organizations will see a reduction in their business profits taxes or business enterprise taxes equal to 85 percent of the amounts they donate, while businesses that elect not to make contributions will be obligated to pay the taxes in full.

159. The Tax Credit Program will support sectarian education and religious discrimination, which are not public purposes.

160. For these reasons, the Tax Credit Program violates Articles 10 and 12 of Part I and Articles 5 and 6 of Part II of the New Hampshire Constitution.

Request for Relief

161. And thereupon the plaintiffs pray that this Honorable Court issue the relief described below.

Declaratory Judgment

162. The plaintiffs respectfully request a declaratory judgment declaring that the Tax Credit Statute, RSA Chapter 77-G, is unconstitutional and invalid on its face.

163. In the alternative, if the Court determines that the plaintiffs are not entitled to such declaratory relief, the plaintiffs respectfully request a declaratory judgment declaring that the Tax Credit Statute, RSA Chapter 77-G, is unconstitutional and invalid on its face, to the extent that it permits Program scholarships to be awarded to students attending religious schools.

Injunction

164. If the Tax Credit Program is implemented, the plaintiffs will suffer irreparable harm to their rights and interests as taxpayers in the preservation of an orderly and lawful state government.

165. The plaintiffs have no adequate remedy at law.

166. Therefore, the plaintiffs respectfully request a preliminary injunction and a permanent injunction prohibiting the defendants from implementing the Tax Credit Program.

167. In the alternative, if the Court determines that the plaintiffs are not entitled to such injunctive relief, the plaintiffs respectfully request a preliminary injunction and a permanent injunction prohibiting the defendants from implementing the Tax Credit Program insofar as the Program permits Program scholarships to be awarded to students attending religious schools.

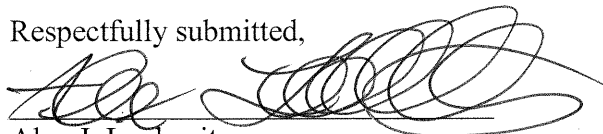
Attorneys' Fees and Expenses

168. The plaintiffs respectfully request an award of attorney's fees and expenses.

Other Relief

169. The plaintiffs additionally request such other relief as may be just.

Respectfully submitted,



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