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

BRIEF FOR PLAINTIFFS-RESPONDENTS / CROSS-APPELLANTS

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Question Presented by the State's and Intervenors' Appeal

Did the superior court correctly rule that the Education Tax Credit program ("the Program") established by RSA Ch. 77-G violates the command in Part II, Article 83 of the New Hampshire Constitution 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," where the Program uses New Hampshire's tax system to fund religious schools? *See* Joint App. ("JA") at 23–24; Superior Ct. Op. ("OP") at 40.

Questions Presented by the Plaintiffs' Cross-Appeal

1. Did the superior court err by holding that RSA Ch. 77-G is severable and that the Program may continue to be implemented insofar as the Program funds scholarships that are not used at religious schools? *See* Plaintiffs' Appendix ("PA") at 2060–64, 2078, 2082; OP40–42.

2. Does the Program also violate Part I, Article 6 of the New Hampshire Constitution, which provides that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination" and 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"? *See* JA23; PA2049–59, 2074–76, 2081.

3. Does the Program additionally violate Articles 10 and 12 of Part I and Articles 5 and 6 of Part II of the New Hampshire Constitution, which, together, require that taxation be uniform, equal, proportional, and non-discriminatory and prohibit tax exemptions and benefits that do not serve a public purpose? *See* JA24; PA2065–69, 2077–78, 2081–82.

STATEMENT OF THE CASE AND FACTS

I. How the Program works.

The Education Tax Credit Program, codified as RSA Ch. 77-G ("the Tax Credit Statute" or "the Statute"), was enacted on June 27, 2012, when the General Court overrode a veto by then-Governor John Lynch. 2012 N.H. Laws Ch. 287; PA72. Implementation of the Program commenced on January 1, 2013. 2012 N.H. Laws § 287:5. Under the Program, businesses are to receive tax credits for donations to "scholarship organizations" that award scholarships to elementary- and secondary-school students, including those attending private religious schools.

The tax credit. New Hampshire businesses that make donations to scholarship organizations are entitled to a tax credit against the business profits and business enterprise taxes they owe equal to 85 percent of their donations. RSA 77-G:3. Because of interactions with federal tax law, however, a typical large profitable business bears only about four percent of the cost of a donation. PA1155, 1165; *see also* PA1588. The Department of Revenue Administration ("DRA") can award a maximum of $3.4 million in Program tax credits for 2013 and $5.1 million in Program tax credits for 2014. RSA 77-G:4, I. Starting in 2015, however, the maximum amount of tax credits that can be awarded annually under the Program must increase by 25 percent each year, if certain conditions specified in the Statute are met. *See* RSA 77-G:4, II–III. At that rate of growth, the Program would receive more than $30 million in tax-credit funding per year in 2022 and more than $300 million in 2033. PA54.

Scholarship organizations. Scholarship organizations participating in the Program may use Program funds to 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. The scholarship organizations must be 501(c)(3) non-profit organizations, must meet certain other requirements, and must be approved by the DRA.

See RSA 77-G:1, XVII(d); 77-G:5, I, II(a). The average value of all scholarships awarded by a scholarship organization (excluding scholarships for home education) was not to exceed $2,500 in 2013 (this cap will be annually adjusted for inflation). RSA 77-G:2, I(b).

The only two scholarship organizations approved under the Program thus far — intervenor Network for Educational Opportunity ("the NEO") and their supporting *amicus curiae* Concord Christian Academy Giving and Going Alliance (PA1375, 1593, 2030–31) — plan to pay scholarships directly to private schools, rather than to parents or students. PA1357–58, 2019. Scholarship organizations will decide which students receive scholarships, with knowledge of where the students plan to use the scholarships. *See* PA1352–57, 1977–2007; RSA 77-G:5, I. The scholarship organizations' decisions about who receives scholarships will be constrained by certain requirements in the Statute about how scholarships should be distributed. *See* RSA 77-G:1, VIII; RSA 77-G:2, I(b), I(d); RSA 77-G:5, I(b), I(i); PA1353–56.

Impact on public schools and taxpayers. Full implementation of the Program would substantially reduce state funding to public schools. During the Program's first two years, scholarship organizations must award at least 70 percent of their scholarships to students who attend public schools or receive Program scholarships in the prior year. *See* RSA 77-G:2, I(b). Similarly, for each of the subsequent thirteen Program years, scholarship organizations must award a certain (annually declining) percentage of their scholarships to students who attend public schools or receive Program scholarships in the prior Program year. *See id.*

When students who receive Program scholarships withdraw from a public-school district, the State's "adequate education grant" funding to that school district will be reduced by a statutorily determined amount for each student. *See* RSA 77-G:1, VIII(a)(1); 77-G:7, I. Although "stabilization grants" will be given to school districts that lose more than one fourth of

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

Full implementation of the Program would also cause taxes on New Hampshire residents to be raised or cause services by New Hampshire governmental bodies to be reduced. The New Hampshire Department of Education ("NHDOE") projected that the Program would create total net fiscal losses to New Hampshire governments of $3.54 million, $5.26 million, and $6.60 million in its first, second, and third years, respectively. *See* PA1377, 1384; *see also* PA79, 1388–89. (The NHDOE further projected that although the Program would create slight net fiscal gains at the state level in its first two years, these gains would be offset by much greater net fiscal losses at the local level, and by its third year the Program would result in net fiscal losses at both the state and local levels. *See* PA1377, 1384; *see also* PA1388–89.)

Lack of oversight of funded schools. The Program permits very little substantive state oversight of the private schools that accept students who receive scholarships. The Tax Credit Statute states that, except where "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; *see also* 2012 N.H. Laws § 287:1, II(a). Nothing in the Statute restricts schools from using Program scholarship funds directly for religious instruction or worship. Nor does the Statute prohibit schools from requiring students who receive Program scholarships to take part in religious activities.

What is more, the Statute has no provisions barring participating schools from discriminating based on religion in admissions or employment. Indeed, 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 bar scholarship organizations from awarding scholarships that can only be used at a

particular group of schools (OP4) — such as schools of a particular denomination — or even more directly discriminating based on religion among students in awarding scholarships.[1]

II. New Hampshire private schools.

Primacy of religious schools. Approximately three fifths of New Hampshire's private general-education schools are religious schools, operated by or affiliated with a religious institution. PA127, 1095–96, 1207–19, 1242; *see also* OP7, 9. Approximately two thirds of students enrolled in New Hampshire private general-education schools (and approximately three fifths of students enrolled in all New Hampshire private schools) attend religious schools. PA150, 1098–99, 1104, 1232–33, 1251, 1284; *see also* OP8–9. The average cost of education at New Hampshire general-education non-religious schools is twice to thrice the average cost of education at New Hampshire general-education religious schools. PA59, 138, 150, 1099–1101, 1252–56; *see also* OP8–9.[2]

As the average size of Program scholarships is capped at $2,500 (*see* RSA 77-G:2, I(b)), Program scholarships would typically pay for a much greater percentage of educational expenses at religious schools than at non-religious schools. PA1102. Thus, for many parents, Program scholarships would be sufficient to enable them to afford tuition at a religious school, but insufficient to enable them to afford a secular private-school education. *Id.*

At the time the record closed, the NEO was the only scholarship organization that had become operational. PA1375, 1593, 1979, 2017, 2019–21, 2030–31. As of April 18, 2013 (the last date for which record evidence is available), 419 of the NEO's scholarship applicants

[1] There appears to be no federal or state statute prohibiting educational institutions from discriminating based on religion in admissions, or scholarship organizations from doing the same when awarding scholarships. Moreover, religious institutions are exempted from federal and state statutes that otherwise prohibit discrimination in employment based on religion. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2); RSA 354-A:18.

[2] The disparity is greater if special-education schools are included. PA1106, 1298.

preferred to attend religious schools, 106 preferred to attend private secular schools, 148 preferred to use scholarships for homeschooling, 20 preferred to attend out-of-state schools, only three preferred to attend out-of-district public schools, and five had not given a preference. PA2009; OP9–10. If Program scholarships are distributed similarly to the distribution of that applicant pool, 74 percent of Program funds would go to religious schools.[3]

Likewise, the vast majority of students participating in school-voucher and tuition tax-credit programs around the country attend religious schools, because religious private schools substantially outnumber non-religious private schools and are less expensive. PA1111–15. For all these reasons — as confirmed by uncontradicted expert testimony presented by the plaintiffs — if the Program is fully implemented, it is likely that a substantial majority of Program scholarships will be awarded to students attending religious schools, and that an even greater majority of Program funds will go to religious schools. *See* PA1094–95, 1109; *see also* OP9.

New Hampshire religious schools. Religion permeates the curricula and activities of New Hampshire religious schools. *See* PA151–94, 222–1048, 1313–47, 1594–1959; OP8. Many of New Hampshire's religious schools describe themselves as "ministries" of a church. PA151–76. New Hampshire religious schools not only present classes focused on religious doctrine, but also often integrate their religious teachings into classes about secular subjects. *See* PA151–94, 222–1048, 1594–1959. Indeed, some New Hampshire religious schools use curricular materials produced by religious publishers that present students with teachings, such

[3] The Tax Credit Program permits scholarships for homeschooling to be only one quarter of the maximum average scholarship size under the Program. RSA 77-G:1, VI. And the Program does not permit scholarships to be used at out-of-state schools. *See* RSA 77-G:1, IX; RSA 77-G:2, I(a); RSA 193-A:1. The projection that 74 percent of Program funds would go to religious schools was accordingly calculated by dividing the 419 religious-school applicants by 565, which is the sum of the 419 religious-school applicants, the 106 secular private-school applicants, one quarter of the 148 homeschool applicants (37) to reflect the one-quarter scholarship size, and the three public-school applicants.

as creationism, that appear to be contrary to state educational standards and accepted scientific and academic understandings. *See* PA1110–11; *see also* PA402, 1604–05, 1740–41, 1780, 1789, 1863, 1889, 1891, 1944, 1947; *compare* PA1327–28, 1334–39, 1347 *with K-12 Science Literacy New Hampshire Curriculum Framework* 13, 40, 66, 70, 78–79, 83, 89–90 (2006), *available at* www.education.nh.gov/instruction/curriculum/science/documents/framework.pdf.

Most of New Hampshire's religious schools require students to take part in religious activities, such as Bible classes, worship services, and classroom prayer. *See* PA177–94, 222–1048, 1594–1959. Moreover, most of New Hampshire's religious schools discriminate on the basis of religion in admissions or employment. *See* PA200, 206, 222–1048. And some of those schools require their students or faculty to adhere to religion-based codes of conduct, including ones that prohibit homosexual behavior. *See* PA177–206, 330–31, 520, 526.[4]

III. Proceedings below.

This challenge to the Program was filed on January 9, 2013. The plaintiffs are eight individual New Hampshire taxpayers and one New Hampshire corporation that pays the state business enterprise or business profits taxes. PA9–18, 1087. After a final hearing, the superior court held — in a comprehensive 45-page opinion — that the Program violates Part II, Article 83 of the New Hampshire Constitution. OP40. The superior court declined to rule on the plaintiffs' arguments that the Program also violates (i) Article I, Part 6 of the State Constitution, and (ii) Articles 10 and 12 of Part I and Articles 5 and 6 of Part II. *Id.* The superior court further held that the Tax Credit Statute is severable, and that the Program may continue to be implemented insofar as the Program funds scholarships that are not used at religious schools. OP40–42.

[4] Religious organizations appear to be exempted from a state law that otherwise bans discrimination in employment based on sexual orientation (RSA 354-A:7), so long as such discrimination is "calculated by such organization[s] to promote the religious principles for which [they are] established or maintained" (RSA 354-A:18).

SUMMARY OF ARGUMENT

The Tax Credit Program violates both Article 83 of Part II — as the superior court held in its thorough 45-page opinion — and Article 6 of Part I of the New Hampshire Constitution. In an unbroken line of decisions, this Court has made clear that these two articles strictly prohibit the diversion of tax payments — including through tax-credit programs and other such creative schemes — to sectarian education. Under the Court's decisions, no tax payments at all may be diverted to religious schools unless the funds are restricted to non-religious uses, but the Program has no such restriction. That a state program primarily benefits religious schools, as this Program would, bolsters a conclusion that the program is unconstitutional. And if recipients of tax aid discriminate based on religion, as New Hampshire's religious schools do, that further weighs against the constitutionality of a program.

The appellants' principal defense — that Program funds are not "money raised by taxation" for purposes of Article 83 — fails under five separate perspectives: case law, text, history, economics, and practice. First, this Court has already ruled that a property-tax credit that aided religious schools violated Article 83. Second, the Program plainly uses the state tax system to raise money for religious schools, and therefore runs afoul of Article 83's specific language. Third, the history of Article 83 shows that it was intended to prevent diversion of any funding from public schools to religious schools, and the Program does exactly that. Fourth, economists have long recognized that tax credits serve the same functions as direct governmental spending. Fifth, Program funds are treated like state funds in practice, as they are subjected to significant state oversight (notwithstanding that schools may use them to support religious instruction and discrimination) and must often be paid by businesses into the state treasury before a business can reclaim them and obtain the tax credit. Moreover, the Program provides

"compelled . . . support" to religious schools in violation of Article 6 by requiring local taxpayers to bear the burden of its diversion of funding from public schools to religious ones.

A similar analysis defeats the appellants' arguments that the Program should be upheld on the grounds that (i) Program funds pass through several hands before reaching religious schools, (ii) parents choose where to educate their children, and (iii) children are purportedly the principal beneficiaries of the Program. This Court has already declared unconstitutional a school-voucher program under which all these things were no less true. The end result of the Program is still that money is to be taken away from the state treasury and diverted to religious schools that are free to use the funds for religious education, contrary to both the plain text and the historical intent of the State Constitution. This Court has long held that the state must not be permitted to circumvent the State Constitution by doing indirectly what it cannot do directly.

The appellants' other defenses to the Article 83 and Article 6 claims fare no better. The plaintiffs clearly have standing under the plain language of the state declaratory-judgment statute, and the intervenors' questioning of that statute's constitutionality is wholly without support. Striking down the Program does not put in question the constitutionality of property-tax exemptions for religious institutions, for such exemptions have been upheld by courts on the grounds that they (i) merely reflect an effort by the government to avoid burdening religious exercise (as opposed to a purposeful scheme to affirmatively redirect tax dollars from one use to another), (ii) are part of a broad system of tax exemptions for non-profit institutions, and (iii) have a long historical pedigree. Federal Establishment Clause law is not relevant to interpretation of the State Constitution's religion clauses, as this Court has long construed the State Constitution independently, in light of its unique language and history. And the intervenors' contentions that the State Constitution somehow violates the U.S. Constitution are

based on a misreading of history and are foreclosed by Supreme Court and First Circuit precedent.

In addition to the State Constitution's religion clauses, the Program violates Articles 10 and 12 of Part I and Articles 5 and 6 of Part II of the State 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. By creating a tax benefit that will support sectarian education — which is *not* a public purpose under this Court's case law — the Tax Credit Program runs afoul of these principles.

Finally, the superior court erred by ruling that the Tax Credit Statute is severable and that the Program may proceed insofar as it funds non-religious schools. Severance is improper when it is unclear — as is the case here — whether the legislature would have enacted a statute without the offending provision. Much of the support for the Program came from religious schools. Key goals of the Program are frustrated when religious schools cannot receive funding. And the General Court carefully designed the details of the Program, such as the $2,500 cap on average scholarship amounts, to operate in an environment where most private-school students enroll in religious schools that are much less expensive than secular private schools.

ARGUMENT

I. The plaintiffs have standing as New Hampshire taxpayers to challenge the Program.

The state declaratory-judgment statute, RSA 491:22, grants New Hampshire taxpayers broad rights to challenge unconstitutional conduct by New Hampshire governmental bodies. It provides, in relevant part:

> The 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; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section 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.

The statute was amended in June 2012 to abrogate this Court's decision in *Baer v. New Hampshire Department of Education*, 160 N.H. 727 (2010), which had narrowed taxpayer standing in New Hampshire. *See* 2012 N.H. Laws Ch. 262; PA109. As the superior court correctly held (OP17), the plaintiffs easily meet the statute's requirements, as they (i) pay various kinds of taxes to the State (PA9–18; PA1087) and (ii) allege that the State cannot lawfully implement the Program.

The State concedes that plaintiff LRS Technology Services, LLC has standing, but argues that the eight individual plaintiffs lack standing, because LRS is the only plaintiff that pays business enterprise or business profits taxes. State Br. at 8–12. As the State agrees that there is at least one plaintiff with standing, the Court need not address this argument. *See, e.g.*, *Citizens for a Competitive Mass. v. Sec'y*, 594 N.E.2d 855, 856 n.6 (Mass. 1992). In any event, the State's position that the declaratory-judgment statute grants standing only to "those who are subject to the tax at issue" (State Br. at 12) is contrary to the plain language of the statute. The State incorrectly reads the term "taxing district" in the statute as referring to a particular kind of tax. In fact, the term "taxing district" means a geographic area, and the State itself is a "taxing

district." *See Sirrell v. State*, 146 N.H. 364, 371 (2001) ("the State was the relevant taxing district"); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 470 (1997) ("the taxing district is the State"); *Black's Law Dictionary* 545 (9th ed. 2009) (a "taxing district" is "[a] district — constituting the whole state, a county, a city, or other smaller unit — throughout which a particular tax or assessment is ratably apportioned and levied on the district's inhabitants"). Moreover, the statute gives "*any* taxpayer in the jurisdiction of the taxing district" the right to sue. RSA 491:22 (emphasis added). As the superior court correctly explained, "the use of the word 'any' broadly contemplates standing for all taxpayers of the taxing district, not just those paying the particular tax or taxes implicated in the program or action to be challenged." OP18.

The intervenors conceded at the final hearing that the declaratory-judgment statute grants all of the plaintiffs standing. Tr. at 123. They contend, however, that the statute violates the State Constitution. Int. Br. at 3–5. As an initial matter, the intervenors waived their arguments that the statute violates Article 74 of Part II and Article 37 of Part I, because they did not explain these arguments in their appellate brief but instead merely referenced their superior-court briefing. *See, e.g.*, *McNair v. McNair*, 151 N.H. 343, 352 (2004); *State v. Blackmer*, 149 N.H. 47, 49 (2003). To the extent the Court considers these arguments, the plaintiffs respectfully ask that, in the interests of fairness, the Court refer to the plaintiffs' lower-court briefing and the superior court's opinion for a full response. *See* PA2088–96; OP18–20. The plaintiffs further provide the following summary response:

First, Part II, Article 4 of the New Hampshire Constitution gives the legislature broad power to create courts and to invest them with expansive jurisdiction:

> The general court . . . 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* . . . .

(Emphasis added.) Second, this Court's narrowing of taxpayer standing in *Baer*, 160 N.H. 727, was based solely on statutory-construction grounds, not constitutional ones. Third, granting the plaintiffs standing does not violate Article 74 of Part II, which gives the legislature and governor authority to seek advisory opinions before legislation is enacted or implemented (*see Op. of the Justices (Appointment of Chief Justice of the Supreme Court)*, 150 N.H. 355, 356–57 (2003)), because this is a fully litigated case challenging a Program that has been implemented. Fourth, the declaratory-judgment statute is consistent with the separation-of-powers principle of Article 37 of Part I, as the "traditional function conferred on the judiciary" is "interpretation of our State constitution and of statutes relative to the executive and legislative branches of our government." *O'Neil v. Thomson*, 114 N.H. 155, 159 (1974). Finally, even if there were some constitutional basis to require the plaintiffs to show some additional harm, the plaintiffs can do so because the Program will harm all the plaintiffs as taxpayers by imposing net fiscal losses on New Hampshire governments (*see* PA1377, 1384, 1388–89) and will further harm certain plaintiffs who have children in or teach in the public schools (*see* PA11–14) by taking state funding away from the public schools (*see* RSA 77-G:7, I).

The intervenors also waived their argument that Article 41 of Part II nullifies the statute, because they did not make it below and they cursorily (in three sentences, *see* Int. Br. at 3–4) briefed it here. *See, e.g.*, *Blackmer*, 149 N.H. at 48–49. In any event, Article 41 merely gives the Governor exclusive authority "to decide *the State's* interest in litigation." *See Op. of the Justices (Requiring Attorney Gen. to Join Lawsuit)*, 162 N.H. 160, 170 (2011) (emphasis added). The intervenors' contention that Article 41 means that the Governor is the only person in the state who has the right to enforce the State Constitution in court would have the absurd result of

taking away the right to sue not just from taxpayers but from *any* state resident harmed by a violation of the Constitution.

Finally, neither *Clapp v. Town of Jaffrey*, 97 N.H. 456 (1952), nor *Sherburne v. City of Portsmouth*, 72 N.H. 539 (1904), holds that taxpayers can only have standing to challenge administrative actions. *Clapp* simply does not support the proposition, and *Sherburne* merely explained that an injunction by a court must lie against an administrative official, not a legislative body. *See* 72 N.H. at 540–41. This Court subsequently upheld the right of taxpayers to challenge the constitutionality of a state statute. *See Seabrook Citizens for Def. of Home Rule v. Yankee Greyhound Racing, Inc.*, 123 N.H. 103, 108 (1983).

II. The Program violates Part II, Article 83 and Part I, Article 6 of the State Constitution.

Part II, Article 83 of the New Hampshire Constitution guarantees, in its No-Aid Clause, 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." Similarly, Part I, Article 6 provides that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination." This article further states, "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."

In an unbroken line of decisions, this Court has made clear that these two articles strictly prohibit the diversion of tax funds or other public dollars — including through tax-credit programs and other creative schemes — to sectarian education. The Court's decisions establish that no tax aid may be given to religious schools unless the aid is restricted to non-religious uses. That a state program primarily benefits religious schools bolsters a conclusion that the program is unconstitutional. And if recipients of state aid discriminate based on religion, this further weighs against the constitutionality of a program.

The Program runs afoul of all these principles. Indeed, in a materially indistinguishable case, *Opinion of the Justices*, 109 N.H. 578 (1969) ("*The Property Tax Credit Case*"), this Court struck down a property-tax credit for families with children in private schools.

A. This Court has consistently construed Part II, Article 83 and Part I, Article 6 to prohibit diversion of tax funds for the support of religious activity.

The Nursing Education Case. The first of four decisions by this Court concerning aid to religious education is *Opinion of the Justices*, 99 N.H. 519 (1955) ("*The Nursing Education Case*"). In that case, the Court considered whether a proposed statute authorizing grants to hospitals that offered training in professional nursing would violate Part II, Article 83 as applied to religiously affiliated hospitals. *See id.* at 519–20.

The Court reviewed the history of Article 83's No-Aid Clause, noting that when the clause was added at an 1876 constitutional convention, its sponsor "stated that it was designed 'to prevent * * * the appropriation of any money raised by taxation for purposes of sectarian education.'" *Id.* at 521 (quoting *Journal, 1876 Convention* 124 (1877)) (omission in opinion). The Court concluded that "Article 83 is purposeful and meaningful and is intended to prevent the use of public funds for sectarian or denominational purposes." 99 N.H. at 521.

The Court determined that, under Article 83, "it is necessary to look at the objectives and methods proposed by a statute in order to determine its validity." *Id.* at 522. The Court then held that the proposed legislation did not violate Article 83. *Id.* Central to this ruling were "express limitations" in the bill providing that "the public funds will not be applied to sectarian uses" and prohibiting aid to any hospital "which imposes any religious or other unreasonable discrimination in the enrollment of student nurses." *Id.* at 520, 522. Thus, religious hospitals eligible for grants under the legislation were "merely . . . conduit[s] for the expenditure of public

funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes." *Id.* at 522.

The Sweepstakes Case. The next relevant case was *Opinion of the Justices*, 108 N.H. 268 (1967) ("*The Sweepstakes Case*"). There, the Court struck down a statute that would have distributed state sweepstakes revenue to both public and private schools, including religious schools. *Id.* at 271, 274. The Court noted, "it is common knowledge that parochial schools predominate among the nonpublic schools." *Id.* at 271. The Court continued, "[p]arochial schools as that term is generally understood in this state are an integral part of a religious organization and an important purpose of these schools is to advance the aims and purposes of the Church and its ministry through religious education as part of the regular program of instruction." *Id.* Thus, explained the Court, "any financial aid to the schools is of necessity therefore aid to the Church and to the teaching of religion." *Id.* at 271–72. The Court emphasized that "the use of the funds" was "not limited to secular education." *Id.* at 273. The Court further observed that "[i]t cannot seriously be questioned that the proceeds from the sweepstakes are public funds." *Id.* at 272–73. For these reasons, the Court ruled that the sweepstakes statute violated the U.S. Constitution, and found it unnecessary to specifically discuss the New Hampshire Constitution. *See id.* at 271, 274.

Two years later, however, the Court concluded that the sweepstakes statute also violated the State Constitution, in *The Property Tax Credit Case*, 109 N.H. 578. In that decision, the Court stated, "[t]he statute . . . considered [in *The Sweepstakes Case*] provided for direct and unrestricted grants to nonpublic schools which would be predominantly parochial schools providing sectarian instruction as well as secular education." 109 N.H. at 580. The Court added, "[s]ince the grants were direct and unrestricted and not limited to secular education, it was the

opinion of the majority that [the sweepstakes statute] would give direct aid to sectarian education which is prohibited by *both* constitutions." *Id.* (emphasis added).

***The Property Tax Credit Case*.** As the intervenors conceded at the final hearing (Tr. at 106, 111), *The Property Tax Credit Case* is materially indistinguishable from the case at bar. Indeed, there this Court struck down — under Part II, Article 83 — a tax-credit program that benefitted religious schools to a far *lesser* extent than the Program at issue here would. The legislation challenged there would have authorized local governments to "grant a tax exemption of $50.00 per year on the residential real estate of any person having at least one child attending a nonpublic school." 109 N.H. at 579. While the Court used the term "tax exemption" in its opinion, the bill at issue would have in fact provided a $50 tax *credit* to the benefitted property owners, as it would have simply reduced by $50 the property-tax bill of each owner with at least one child enrolled in a private school. *See* PA106.

The Court emphasized that "[o]ur state Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations." 109 N.H. at 581. The Court declared that private education "may be supported by tax money" only "if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination." *Id.* The Court held that the property-tax-credit bill would violate Article 83 because the bill "would make available to the parents funds which they could contribute directly to the nonpublic school, including parochial schools, without restricting the aid to secular education." *Id.* "While the amount of $50.00 may seem small, yet if the principle were upheld, the amount could be increased to a point whereby it could be used as a means of fully supporting such schools," added the Court. *Id.* at 581–82.[5]

[5] Consistently with this reasoning, the Court also struck down a bill that would have allowed school districts to furnish transportation for pupils attending private schools outside district

Choice in Education. Most recently, in *Opinion of the Justices (Choice in Education)*, 136 N.H. 357 (1992), this Court invalidated a proposed school-voucher program. That program would have allowed parents dissatisfied with their child's education to enroll the child in "any other state approved school," including religious schools; the school district where the child resided would then have been required to pay part of the new school's tuition. *Id.* at 358.

The Court pronounced, "[o]ur constitution . . . recognizes the fundamental separation between church and state." *Id.* at 359. Quoting *Muzzy v. Wilkins*, Smith (N.H.) 1, 9 (1803), the Court stated:

> "[Our constitution] wholly detaches religion, as such, from the civil State. By the mixture of civil and spiritual powers, both become polluted. The civil uses religion for an engine of State to support tyranny, and the spiritual becomes invested with the sword of the civil magistrate to persecute. Under our Constitution there is no such union, no such mixture."

136 N.H. at 359 (alteration in original).

The Court ruled that the proposed voucher program "violate[d] the plain meaning of part I, article 6" of the State Constitution. The Court emphasized that "[n]o safeguards exist[ed] to prevent the application of public funds to sectarian uses." *Id.* Payments by school districts under the voucher program would have "constitute[d] an unrestricted application of public money to sectarian schools." *Id.* The Court also noted that "sectarian schools" are "a class appearing to predominate among the nonpublic schools." *Id.*

B. Under this Court's decisions, the Tax Credit Program is indefensible.

The Program cannot be reconciled with this Court's decisions and clearly violates Article 83 of Part II and Article 6 of Part I of the State Constitution. The Program would divert tax

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boundaries, while upholding (in whole or in part) several bills that would have provided private schools aid that was secular in nature and limited to secular uses. *Id.* at 582–83.

funds to religious schools without restricting the funds to secular uses, would primarily benefit religious schools, and would allow tax funds to go to schools that discriminate based on religion.

Just like the bills held unconstitutional in *The Sweepstakes Case*, 108 N.H. at 273–74, *The Property Tax Credit Case*, 109 N.H. at 581, and *Choice in Education*, 136 N.H. at 359, the Program does not restrict the use of taxpayer funds to secular activities. On the contrary, the Tax Credit Statute provides that "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.

And the record here confirms this Court's understanding in *The Sweepstakes Case*, 108 N.H. at 271, that New Hampshire religious schools "are an integral part of a religious organization" that "advance the aims and purposes of the Church and its ministry through religious education as part of the regular program of instruction." Today, New Hampshire's religious schools continue to be ministries of churches, integrating religion throughout their classes and activities, and requiring students to engage in prayer and worship. *See* PA151–94, 222–1048, 1594–1959. The Program would, therefore, provide substantial aid to religious education, as in *The Sweepstakes Case*, 108 N.H. at 271–74, *The Property Tax Credit Case*, 109 N.H. at 581–82, and *Choice in Education*, 136 N.H. at 359.

Indeed, the Program would aid religious schools to a far greater extent than did the tax credit struck down in *The Property Tax Credit Case*. There, the benefit was limited to *$50 per family* with children in religious schools. 109 N.H. at 579. Here, the average scholarship award can be *$2,500 per student*. RSA 77-G:2, I(b).

In addition, the record in this case confirms what this Court found to be "common knowledge" in *The Sweepstakes Case*, 108 N.H. at 271, and *Choice in Education*, 136 N.H. at 359 — that religious schools "predominate among the nonpublic schools." Religious schools

account for approximately three fifths of private, general-education schools in the state; they enroll approximately two thirds of all general-education private-school students; they charge less than half of what secular schools charge on average; and most applicants for Program scholarships indicated that they intended to enroll in religious schools. *See supra* at 5–6. Thus, if the Program is fully implemented, it is likely that a substantial majority of Program scholarships and funds will go to religious schools. *See* PA1094–95, 1109.

What is more, unlike in *The Nursing Education Case*, 99 N.H. at 520, where religiously affiliated hospitals receiving nurse-training aid were barred from discriminating on the basis of religion in enrollment, schools that discriminate in admissions based on religion are eligible for Program scholarships. PA195–200. Such schools also have religious tests for employment (PA201–06), and nothing prohibits scholarship organizations from applying religious preferences in awarding scholarships. Therefore, the Program violates the command in Part I, Article 6 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."

C. Program funds are "money raised by taxation" governed by Article 83.

The appellants' lead argument is that Program funds should not be considered "money raised by taxation" for purposes of Article 83. *See* State Br. at 13–20; Int. Br. at 5–10. This contention fails under five separate perspectives: case law, text, history, economics, and practice.

Case law. In *The Property Tax Credit Case*, 109 N.H. at 579, 581–82, this Court struck down under Article 83 a property-tax credit that aided religious schools. Indeed, for more than a century, this Court has treated tax benefits as equivalent to direct governmental spending. "'It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation.'" *Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1, 10 (1929) (quoting *Town of Canaan v. Enfield Vill. Fire Dist.*, 74 N.H. 517, 537 (1908) (Parsons, C.J., concurring)). A tax

exemption is "in law and in fact, as much a subsidy . . . as if it were a subsidy in form and in name." *Morrison v. Manchester*, 58 N.H. 538, 550 (1879). "Tax exemption has been adopted as a method of expending public money." *State v. U.S. & Canada Express Co.*, 60 N.H. 219, 260 (1880). *Accord Op. of the Justices*, 106 N.H. 180, 185 (1965) (relieving a corporation of the payment of taxes would "in effect constitut[e] an indirect loan or gift of public money"); *see also Op. of the Justices to the Senate*, 514 N.E.2d 353, 355 (Mass. 1987) (striking down under Massachusetts Constitution tax deduction benefitting private schools; explaining, "that the expenditure here takes the form of a tax deduction rather than a direct payment out of the Commonwealth's treasury does not alter the result, for it has been recognized that the tax subsidies or tax expenditures of this sort are the practical equivalent of direct government grants").

Contrary to what the State contends (State Br. at 17), these cases do not rest solely on the premise that a tax benefit shifts tax burdens to someone else, and they do not require the plaintiffs to show that the Program will impose burdens on nonparticipating taxpayers. Rather, this Court has explained that a tax benefit can serve the same function that a direct expenditure does: "Substance rather than form is the test. . . . [B]y whatever means the result is accomplished, it is the result that is of controlling importance. A special tax exemption is one form of appropriating public money." *Eyers Woolen*, 84 N.H. at 10. In any event, the State itself has projected that full implementation of the Program would inflict multi-million-dollar net fiscal losses upon New Hampshire governments (*see* PA1377, 1384, 1388–89), meaning that it would cause taxes on New Hampshire residents to be raised or cause services by New Hampshire governmental bodies to be reduced.

The State argues (State Br. at 16) that this Court treated a tax exemption differently from direct spending in *Opinion of the Justices (Municipal Tax Exemptions for Industrial*

Construction), 142 N.H. 95 (1997). There, the Court ruled that a bill allowing towns to adopt a limited property-tax exemption for new industrial construction did not violate a constitutional prohibition on "gifts" to for-profit corporations. *Id.* at 100. But the Court's decision did not rest on the fact that the bill's means was a tax benefit. Rather, the Court explained that the tax exemption did not constitute a "gift" because the bill advanced the public purpose of economic development and required all corporations in a town to be treated equally. *See id.* at 100–01. As the superior court noted, this opinion "in no way precludes a finding that a tax credit could constitute 'public funds' in another context such as the one here." OP23. Indeed, the opinion cited with approval *Eyers Woolen*, 84 N.H. 1, which recognized the equivalence of tax benefits and direct spending. *Mun. Tax Exemptions*, 142 N.H. at 101.

Text. Article 83's plain language proscribes the Program. The article 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." (Emphasis added.) The Program uses New Hampshire's tax system to raise funding for private, primarily religious, schools. *Without the state tax system, the Program simply could not exist.*

Treating Program funds as "money raised by taxation" does not render "all taxpayer income . . . as belonging to the State." *Cf.* State Br. at 14. Program donations do not come from funds that businesses are free to spend however they want. Businesses must either pay the funds as taxes or contribute them to scholarship organizations. In other words, the legislature has attempted to utilize the tax system to direct to religious schools tax dollars that the State has a pre-existing right to collect, with the businesses serving as mere conduits in the scheme. As the superior court explained:

> The taxpayers' interests are not lessened . . . by the fact that the funds used for the program initiate from private organizations. All public funds originate from private

> sources. . . . A taxpayer's concern arises when a large portion of the donated funds are, as here, realized very much through a tax credit.

OP25.

Historical intent. At the 1876 constitutional convention that added the No-Aid Clause to Article 83, the Clause's sponsor, Marshall Hall, explained:

> It is designed to prevent, in this state, the appropriation of any money raised by taxation for purposes of sectarian education. I think it is plain that the framers of our Constitution intended to provide for a system of public education, and that they intended that that system should be supported by money raised and paid by the people of the state, to be applied to schools for the purpose of educating all the people. And I think it is certain, too, that had they supposed that in any coming time money would stand in danger of being diverted from that purpose, they would have made some provision against it.

PA1529. Delegate Hall added: "I submit there are no questions that can come before this convention that are more practical or of more vital importance than those which concern our public schools, and looking to their protection against all assaults." *Id.*

The Program does exactly what Article 83's No-Aid Clause was designed to prevent. It takes tax funding away from the public schools — reducing state aid to local school districts for each public-school student who participates in the Program (RSA 77-G:7, I) — and diverts that money to religious schools.

The appellants argue that Article 83's No-Aid Clause was intended to prohibit only direct appropriations to religious schools, not tax benefits such as tax credits. State Br. at 19–20; Int. Br. at 5–7. But the record of the constitutional convention provides no support for such a narrow reading. To the contrary, the No-Aid Clause was intended to prevent "*any* money raised by taxation" from being "diverted" toward "sectarian education," and to protect the public schools "against *all* assaults." PA1529 (emphasis added). Moreover, contemporaneous cases, such as this Court's 1880 decision in *U.S. & Canada Express*, 60 N.H. at 260, recognized that tax benefits had "been adopted as a method of expending public money." *Accord Morrison*, 58 N.H.

at 550; *see also Eyers Woolen*, 84 N.H. at 10 ("'exemptions from taxation are practically equivalent to a direct appropriation'" (quoting *Canaan*, 74 N.H. at 537 (Parsons, C.J., concurring))). Reading Article 83 as governing only direct spending would be contrary to rulings by this Court that the government cannot circumvent prohibitions in the State Constitution by "do[ing] indirectly that which it cannot do directly." *See Burrows v. City of Keene*, 121 N.H. 590, 597 (1981); *accord State v. Akers*, 119 N.H. 161, 164 (1979) (when "the net effect of [a] statute" "'does not seem to be in accordance with the spirit of our Constitution'" "the result is forbidden" (quoting *Op. of the Justices*, 25 N.H. 537, 542 (1852))).

Economics. The plaintiffs presented uncontradicted expert testimony that economists would view the Program as "functionally equivalent to a direct legislative appropriation for private-school scholarships." PA1154. The plaintiffs' tax and fiscal policy expert explained that public-finance economists use the term "tax expenditure" to describe "a tax program or statutory provision that serves the same functions as direct governmental spending in furtherance of a specific legislative policy." *Id.* Economists have long recognized this concept and "the underlying equivalence between tax expenditures and direct governmental spending." *Id.*

Federal and state budget agencies have widely adopted the "tax expenditure" concept. *Id.* Forty-six states, including New Hampshire, produce reports detailing their tax expenditures. PA1154, 1160. The DRA has a statutory obligation to publish such a "Tax Expenditure Report" annually. RSA 77-A:5-a. Each of these DRA reports states that "[t]he legislature 'expends' funds in two ways; (1) via actual appropriations (expenditures), and (2) by foregoing the collection of taxes that it has the statutory authority to collect." *See, e.g.*, Department of Revenue Administration, *State of New Hampshire 2012 Tax Expenditure Report* 1 (2013), *available at* http://www.revenue.nh.gov/publications/reports/documents/2012TaxExpenditureReport.pdf.

The plaintiffs' expert noted that the Program is "a paradigmatic tax expenditure." PA1161. The Program "will support a particular activity that the legislature desires to aid (private-school education) by directing tax dollars to a particular group (primarily private schools)." *Id.* "The legislature could have accomplished the same result through direct appropriations to scholarship organizations or private schools." *Id.* "Like a direct expenditure," the Program "directly reduces public funds available for other purposes." *Id.* "And like a direct expenditure program, the legislature has specified the amount of funds that can be expended for the program each year." PA1161–62. Moreover, under state law, the Program is expressly enumerated among the tax provisions that the DRA must analyze in its yearly tax-expenditure reports. PA1162; *see* RSA 77-A:5-a; RSA 77-A:5, XV; RSA 77-E:3-d.

Practice. Program funds are subjected to significant state-imposed control and are thus treated like state funds in practice. Businesses can only obtain a tax credit if the credit's amount does not exceed ten percent of the maximum aggregate credits annually allowed under the Tax Credit Statute, and only if that maximum has not been exhausted by other businesses. RSA 77-G:3; RSA 77-G:4; RSA 77-G:5, II(b). Businesses must make their donations within sixty days of approval of their tax-credit applications. RSA 77-G:5, II(c). The donations may be made only to scholarship organizations that meet certain requirements and are approved by the State. *See* RSA 77-G:1, XVII; RSA 77-G:5, I, II(a).

The Statute limits scholarship amounts, as well as which students are eligible to receive scholarships. *See* RSA 77-G:1, VIII; RSA 77-G:2, I; RSA 77-G:3; RSA 77-G:5, I(b), I(i). Scholarship organizations must inform the State of each current public-school student awarded a scholarship, and the State must verify that each such student meets the Statute's requirements. *See* RSA 77-G:1, VIII(a); RSA 77-G:5, II(e). Scholarship organizations may not use more than

ten percent of their donations on administrative expenses, must maintain separate accounts for specified kinds of funds, and must return any unused donations. RSA 77-G:5, I(f), I(h), II(f).

Scholarship organizations must submit very detailed reports to the State on their use of Program funds, and the State must review the reports to ensure that the rules described above have been followed. *See* RSA 77-G:1, XIX; RSA 77-G:5, II(g). Scholarship organizations are further required to conduct specified surveys for the State of parents whose children receive scholarships. *See* RSA 77-G:1, XVI, XIX(k); 77-G:8, II. Schools using Program funds must also provide records, including "[r]eceipts for all specific, reimbursed educational expenses," for each student receiving a scholarship. RSA 77-G:1, XIII. The State must investigate any complaint alleging that a scholarship organization, private school, or business violated Program rules, including by auditing scholarship organizations "in response to any reasonable complaints made." RSA 77-G:6, I(b)–(c). In sum, the Statute effectively treats scholarship organizations, private schools, and businesses as contractors implementing a government program.

What is more, Program funds must often be paid into the state treasury as taxes before businesses can reclaim them and obtain a tax credit. Businesses may make donations to scholarship organizations as early as January of a program year, and must do so by July 15. *See* RSA 77-G:5, II(b)–(c); PA2033–34. But businesses cannot obtain a Program tax credit until they receive a "scholarship receipt" from a scholarship organization documenting how their donation was used. RSA 77-G:3; RSA 77-G:5, II(f); PA2035. Scholarship organizations are not required to issue the scholarship receipts until December 1 of the program year. RSA 77-G:5, II(f); PA2034–35, 2037–38. Most businesses are required to pay estimated taxes approximately every three months, and when they calculate these payments, they are *not* permitted to claim a tax credit for a Program donation they have already made if they have not — as will often be the case — yet gotten a scholarship receipt. *See* RSA 77-A:7; RSA 77-E:6; PA2041–42. In

addition, a business can designate any date in the calendar year as the end of its tax year, and must file its tax return within three and one-half months of that date. RSA 77-A:6, I; 77-E:5, I; PA2038. If the business's return for the tax year in which it made a donation is due before it gets its scholarship receipt, the business must pay 85 percent of the donated amount as taxes and must amend its return after obtaining the scholarship receipt to get the money back. PA2038–41.

The State's case is not helped (*cf.* State Br. at 14) by RSA 77-G:3's statement, "Credits provided under this chapter shall not be deemed taxes paid *for the purposes of RSA 77-A:5, X.*" (Emphasis added.) RSA 77-A:5, X provides a tax credit against the business profits tax for business enterprise taxes paid. RSA 77-G:3 thus merely ensures that businesses cannot double-count a Program donation to obtain a tax credit twice (once against the business enterprise tax and a second time against the business profits tax). *See* PA83. The Statute does not purport to state that Program tax credits "shall not be deemed taxes paid" for *any* purpose. And even if the legislature had attempted to do so, it could not evade Article 83 merely by proclaiming that Program funds should not be viewed as tax funds. *See, e.g.*, *Eyers Woolen*, 84 N.H. at 10 ("Substance rather than form is the test.").

D. The Program compels support of religious schools, contrary to Part I, Article 6.

The Program also runs afoul of the command in Article 6 of Part I that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination." The intervenors contend that Article 6 is inapplicable because donations by businesses under the Program are voluntary. Int. Br. at 14. The NHDOE, however, has projected that full implementation of the Program would impose multi-million-dollar fiscal losses on local school districts, due to the reductions in state aid to public schools that the Program mandates. PA1377, 1380, 1384, 1388–89; *see also* PA79. And these losses are projected to be many times greater than the slight savings that the Program is projected to create, during its first two years, at the

state level (starting with the third year, there would be losses at both the state and local levels). PA1377, 1380, 1388–89.

Thus, as a result of the Program, local taxpayers will either have to pay higher taxes to receive the same quality of public education, or they will have to suffer cuts to the educational services their public schools provide. Either way, the Program will compel local taxpayers to support religious schools by funding such schools at those taxpayers' expense.

E. That the Program uses businesses, scholarship organizations, and parents to funnel funds to religious schools does not render it constitutional.

The appellants argue that the Program should be upheld on the grounds that Program funds pass through several hands before reaching religious schools, parents choose where to educate their children, and children are purportedly the principal beneficiaries of the Program. State. Br. at 20–22; Int. Br. at 10–15. Like the appellants' argument that Program funds are not "money raised by taxation," this contention fails upon examination of case law, text, history, and practice.

Case law. The appellants' "several hands," "parental choice," and "child benefit" characterizations of the Program were no less applicable to the school-voucher program this Court struck down in *Choice in Education*, 136 N.H. 357, and the tax-credit program that the Court struck down in *The Property Tax Credit Case*, 109 N.H. 578. In those cases, it made no difference to the Court what the mechanism for funneling funds to religious schools was. Rather, the Court focused on what the end result would be: money would be taken away from the governmental treasury and would be diverted to religious schools that were free to use the funds for religious education. *See Choice in Educ.*, 136 N.H. at 359; *The Prop. Tax Credit Case*, 109 N.H. at 581–82. The Court's conclusions comported with the general principle that the State cannot constitutionally "do indirectly that which it cannot do directly." *See Burrows*, 121 N.H.

at 597; *accord Akers*, 119 N.H. at 164. As the superior court noted, "[a] taxpayer's interest is . . . not dependent on the number of hands the money passes through." OP25. For much the same reasons, many other state courts construing similar state constitutional provisions have rejected similar arguments in striking down school-voucher and analogous programs. *See, e.g.*, *Bloom v. Sch. Comm.*, 379 N.E.2d 578, 581–82 (Mass. 1978); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563 (Vt. 1999).[6]

Text. Article 83 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." (Emphasis added.) Its text thus prohibits not only direct "grant[s]" of tax funds to religious schools, but "apply[ing]" tax funds in any manner, "ever," for "the use" of such schools. The Program would plainly enable tax funds to be "applied" for "the use" of religious schools.

Similarly, Article 6 of Part I provides that "no person shall *ever* be compelled to pay *towards the support* of the schools of any sect or denomination." (Emphasis added.) As discussed above, the Program would divert funds from public schools, "towards the support" of religious schools, at the expense of local taxpayers.

Historical intent. As noted earlier, the framers of Article 83's No-Aid Clause broadly intended it to prevent "*any* money raised by taxation" from being "diverted" toward "sectarian education" and to protect the public schools "against *all* assaults." PA1529 (emphasis added). It

[6] *See also, e.g.*, *Sheldon Jackson Coll. v. State*, 599 P.2d 127, 130–32 (Alaska 1979); *Cain v. Horne*, 202 P.3d 1178, 1183–85 (Ariz. 2009); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 960–64 (Cal. 1981); *Op. of the Justices*, 216 A.2d 668, 670–71 (Del. 1966); *Bush v. Holmes*, 886 So. 2d 340, 352–53 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Spears v. Honda*, 449 P.2d 130, 133–38 (Haw. 1968); *Epeldi v. Engelking*, 488 P.2d 860, 865–66 (Idaho 1971); *Fannin v. Williams*, 655 S.W.2d 480, 482–84 (Ky. 1983); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 556–57 (Neb. 1974); *Gurney v. Ferguson*, 122 P.2d 1002, 1003–04 (Okla. 1941); *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533, 539–42 (Or. 1961); *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971); *In re Certification of a Question of Law (Elbe v. Yankton Indep. Sch. Dist. No. 63-3)*, 372 N.W.2d 113, 117 (S.D. 1985); *Almond v. Day*, 89 S.E.2d 851, 856–57 (Va. 1955).

therefore cannot be reasonably argued (*cf.* Int. Br. at 11) that the framers only wanted to stop direct payments from the state treasury to religious schools, and that they would have had no objections to tax funding reaching such schools through a more circuitous route.

Moreover, Article 6 of Part I was amended in 1968 to delete an archaic provision that had allowed municipalities to fund "public Protestant teachers of piety, religion, and morality." PA104, 1197. Thus, with the passage of that amendment, Article 6 was intended to prevent *any* tax funding of religious education.

Practice. The appellants' "child benefit" and "many hands" arguments are further undermined by the fact that the scholarship organizations approved under the Program pay scholarships directly to private schools, rather than to private-school parents or students. PA1357–58, 2019. And the appellants' "parental choice" argument is undermined by the fact that scholarship organizations ultimately decide which students receive scholarships, with knowledge of where the students plan to use the scholarships. PA1352–57, 1977–2007. In addition, the scholarship organizations' decisions about who receives scholarships are constrained by certain requirements in the Statute about how scholarships should be distributed. *See* RSA 77-G:1, VIII; RSA 77-G:2, I(b), I(d); RSA 77-G:5, I(b), I(i); PA1353–56. In the end, scholarship organizations and Program rules, not parents, determine how Program funding is allocated.

F. Striking down the Program does not put in question the constitutionality of state property-tax exemptions for religious institutions.

Contrary to the appellants' arguments (*see* State Br. at 30; Int. Br. at 7–8), overturning the Program would not impact the constitutionality of property-tax exemptions for religious institutions. Such exemptions differ from the Program in at least five ways.

First, courts have upheld such exemptions on the grounds that the state is "simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). The Program does not merely lift a burden. Instead, it would purposefully use the state tax system to direct funds away from one function — public education — to another, by providing affirmative aid to religious schools through a complex scheme involving significant governmental controls. As the superior court explained, "[m]oney that would otherwise be flowing to the government is diverted for the very specific purpose of providing scholarships to students." OP26.

Second, the state's exemptions for property of religious institutions are part of a broad body of property-tax exemptions for charitable and non-profit organizations, educational institutions, and governmental bodies. *See* RSA 72:23. Because these exemptions are granted to a wide variety of non-religious entities, courts have held that they do not "advance religion." *See, e.g., Appeal of Emissaries of Divine Light*, 140 N.H. 552, 558 (1995). By contrast, the Program would principally benefit religious schools.

Third, a property-tax exemption typically represents only a small portion of the cost of owning and maintaining property, as purchasing the property and paying off a mortgage normally costs far more. For this reason, as well as the religion-neutral scope of state property-tax exemptions, the exemptions for property of religious institutions surely do not give anyone an incentive to form a religious entity. The Program, however, gives businesses great incentives to make donations that would primarily aid religious schools, because businesses ultimately bear as little as four percent of the cost of a donation. PA1155, 1165; *see also* PA1588.

Fourth, courts have emphasized that religious institutions have generally been exempted from property taxes throughout American history. *See, e.g., Walz*, 397 U.S. at 676–78. The Massachusetts Supreme Court accordingly concluded, in striking down a tax deduction which

aided religious schools, that its ruling did not affect the constitutionality of state property-tax exemptions covering such schools. *See Op. of the Justices*, 514 N.E.2d at 355 n.5. In contrast, tuition tax-credit programs such as the one here are novel schemes that appear to have originated in 1997. *See* Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. Times, May 22, 2012, at A1.

Fifth, New Hampshire's annual tax-expenditure reports do not cover property-tax exemptions. *See State of New Hampshire 2012 Tax Expenditure Report*; RSA 77-A:5-a. But, as noted above, the reports must cover the Program. *See* RSA 77-A:5-a; 77-A:5, XV; 77-E:3-d.

Tax deductions for contributions to charities are distinguishable for similar reasons. They cover a wide spectrum of non-profit institutions. *See* I.R.C. § 170(c); RSA 77-A:1, III. Charities have great freedom as to how they can allocate contributions, in contrast to the many rules and restrictions the Program imposes on businesses and scholarship organizations. *See supra* at 25–26. Taxpayers bear most of the cost of a charitable contribution. *See* I.R.C. §§ 1, 11, 170. And New Hampshire's annual tax-expenditure reports do not discuss the deductions. *See State of New Hampshire 2012 Tax Expenditure Report*; RSA 77-A:5-a.

G. The appellants err in relying on federal and other states' cases instead of this Court's rulings.

The superior court correctly rejected (OP38) the appellants' contention that this Court should follow federal church-state decisions instead of its own (State Br. at 13, 23–30; Int. Br. at 12–14). This Court has often interpreted various provisions of the State Constitution — based on their unique language and history — to provide greater protection for the rights of state citizens than do related provisions of the U.S. Constitution. *See, e.g.*, *State v. Goss*, 150 N.H. 46, 49 (2003); *State v. Ball*, 124 N.H. 226, 231–33 (1983); *State v. Settle*, 122 N.H. 214, 217–18 (1982); *State v. Hogg*, 118 N.H. 262, 264–67 (1978). With respect to tax funding of religious

institutions, the State Constitution has much more specific and stricter language than does the federal one. Therefore, this Court has relied principally on the State Constitution's particular language and history in its rulings on state constitutional challenges to tax aid to religious groups. *See Choice in Educ.*, 136 N.H. at 358–59; *The Prop. Tax Credit Case*, 109 N.H. at 580–82; *The Nursing Educ. Case*, 99 N.H. at 521–22.[7] Likewise, many other state courts have interpreted similar state constitutional provisions to restrict state support of religious schools to a greater extent than the U.S. Constitution does. *See, e.g.*, *Op. of the Justices*, 514 N.E.2d at 354 n.4; *Bloom*, 379 N.E.2d at 583–85; *Chittenden*, 738 A.2d at 563.[8]

The appellants try to make much of the point that, in its three pre-1980 rulings on aid to religious institutions, this Court gave some consideration to federal precedent. But, during that era, federal decisions were of some value to this Court only because the U.S. Supreme Court had then generally interpreted the federal Establishment Clause as stringently limiting public funding

[7] That this Court's rulings on aid to religion were Opinions of the Justices does not help the appellants. *Cf.* Int. Br. at 12 n.16. Although Opinions of the Justices "may not be entitled to weight equal to that given judicial decisions following full adversary process" (*Schoff v. City of Somersworth*, 137 N.H. 583, 586 (1993)), "in practice they appear to be relied upon as authority as fully as decisions in litigated cases" (*In re Op. of the Justices*, 80 N.H. 595, 606 (1921)). *See, e.g.*, *City of Concord v. State*, 164 N.H. 130, 137–38 (2012); *Fischer v. Superintendent*, 163 N.H. 515, 518–19 (2012); *In re Martin*, 160 N.H. 645, 649–50 (2010); *Monier v. Gallen*, 120 N.H. 333, 336–40 (1980). "'[T]heir persuasive value'" is heightened when "'the circumstances under which they were rendered show finality of judgment.'" *Op. of the Justices*, 95 N.H. 540, 542 (1949) (quoting *In re Op. of the Justices*, 84 N.H. 559, 583 (1930)). This Court's Opinions of the Justices on aid to religion all were rendered after the Court received briefing from interested groups and took a significant time to deliberate, and the Opinions have consistently interpreted the State Constitution to strictly prohibit tax aid to religious education. *See Choice in Educ.*, 136 N.H. at 357–58, 360; *The Prop. Tax Credit Case*, 109 N.H. at 578–79, 583; *The Sweepstakes Case*, 108 N.H. at 268, 278–79; *The Nursing Educ. Case*, 99 N.H. at 519–20, 523; *see also* OP39 (noting that the opinions "have been sustained over time (the earlier ones being cited and discussed in later opinions, with the line of opinions going from 1955 to 1992)").

[8] *See also, e.g.*, *Cain*, 202 P.3d at 1181–83; *Riles*, 632 P.2d at 964; *Op. of the Justices*, 216 A.2d at 671; *Bush*, 886 So. 2d at 357–61; *Epeldi*, 488 P.2d at 865–66; *Fannin*, 655 S.W.2d at 483–84; *Paster v. Tussey*, 512 S.W.2d 97, 101–04 (Mo. 1974); *Gaffney*, 220 N.W.2d at 553–55; *Dickman*, 366 P.2d at 537; *Elbe*, 372 N.W.2d at 116–18; *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121–22 (Wash. 1989).

of religious entities, in a manner mostly consistent with the strict language and historical intent of the New Hampshire Constitution. *See, e.g.*, *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). By the 1990s, however, the U.S. Supreme Court — less constrained by specific constitutional text — had moved away from interpreting the federal Establishment Clause in that manner. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 688–95 (2002) (Souter, J., dissenting) (explaining in detail, while strongly disagreeing with, the evolution of U.S. Supreme Court Establishment Clause jurisprudence). Thus, when this Court invalidated a school-voucher program under the State Constitution in its 1992 decision *Choice in Education*, 136 N.H. 357, the Court did not mention federal case law at all, for it no longer made sense to consider it. Current federal case law is, therefore, not instructive or relevant.[9]

The appellants also rely on decisions of two other states that have upheld tax-credit programs for private-school education: *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App. 2009); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct.

[9] If any jurisprudence interpreting the federal Establishment Clause should be considered for its persuasive value, it is case law from the earlier era when the U.S. Supreme Court interpreted the Clause in a manner similar to what is called for by the text of the New Hampshire Constitution. Two Supreme Court cases from that era invalidated tax-credit programs that aided religious education. In *Nyquist*, 413 U.S. at 789–94, the Court struck down a New York statute that provided income-tax benefits that had the "effect . . . of a tax credit" to parents of children in private schools. And in *Grit v. Wolman*, 413 U.S. 901 (1973), *aff'g mem. Kosydar v. Wolman*, 353 F. Supp. 744, 750, 762 (S.D. Ohio 1972) (three-judge court), the Court summarily invalidated a program that provided tax credits to parents who enrolled children in private schools, out-of-district public schools, home instruction programs, and certain other educational options — a program strikingly like the one at issue here. *See also Minn. Civil Liberties Union v. State*, 224 N.W.2d 344, 345, 354 (Minn. 1974) (invalidating under federal constitution statute providing tax credits to families with children in private schools).

2001); and *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001). But in those cases, the constitutional language differed from New Hampshire's, and — unlike in New Hampshire — (i) there was no evidence of a constitutional history that supported strict limitations against diversion of tax funds to religious schools, (ii) the states lacked case law interpreting their constitutions in such a manner, and (iii) there was no state case law that had acknowledged the equivalence between tax benefits and direct spending. Even less apposite is the ruling upholding a school-voucher program in *Meredith v. Pence*, 984 N.E.2d 1213, 1225–26, 1230 (Ind. 2013), where the Indiana Supreme Court held that its state constitutional provisions, which are substantially different from New Hampshire's, permit direct public funding of religious schools.

H. Part II, Article 83 and Part I, Article 6 do not violate the U.S. Constitution.

1. Article 83's No-Aid Clause was neither motivated by discriminatory animus nor operates that way today.

The intervenors' assertion that Article 83's No-Aid Clause was principally motivated by anti-Catholic animus (Int. Br. at 15–25) is neither factually accurate nor legally relevant. The plaintiffs presented expert testimony rebutting this allegation from Dr. Charles Clark, a University of New Hampshire Professor of History Emeritus who has taught both New Hampshire history and American religious history. PA1178–98. While Dr. Clark did not dispute that Article 83's No-Aid Clause was "prompted by worries over whether public schools might be at risk of losing tax money from its diversion into the Catholic school system," he explained that this did not mean "that the goal of or motivation behind the [No-Aid] amendment was to suppress Catholicism in order to advance Protestantism." PA1194–95.

"The lack of any such predominant invidious animus," testified Dr. Clark, was "evinced by the fact that" the 1876 convention which proposed the No-Aid Clause also "proposed two other amendments that would have removed from the state constitution provisions that

discriminated in favor of Protestants and against Catholics." PA1195–96. The first of these proposals struck a provision that had required certain public office-holders to be Protestant; the second would have removed a pro-Protestant provision from Article 6 of Part I. PA1196. Both of these amendments were approved by a large majority of New Hampshire voters: the first proposal was ratified, while the second one barely fell short of the two thirds necessary for ratification. *Id.* "And further undermining the . . . contention that the amendment to Article 83 was intended to ensure Protestant supremacy over state-funded education is the fact that the convention rejected a proposed [addition] to the amendment that would have protected Bible reading in the public schools." PA1195. For these reasons, Dr. Clark concluded that "neither a majority of the distinguished people who attended the convention, nor a majority of the voting citizens of the state at the time, supported any sort of discrimination in favor of Protestants against Catholics." PA1196. "Rather, the records of the convention show that the [No-Aid] amendment's purpose was simply the protection of the public school system and prevention of diversion of tax funds away from it." PA1195.

The superior court correctly credited Dr. Clark's testimony over the views of the intervenors' expert Dr. Charles Glenn, finding, "as Prof. Clark concludes . . . a discernible major purpose of the No-Aid Clause, when enacted, was to promote and sustain public schools, which, over time, were losing their Protestant orientation." OP31. Dr. Glenn — the principal source for the intervenors' historical contentions (Int. Br. at 15 n.19) — has no degree in history (PA1392; JA235), is an outspoken supporter of public funding for private-school education (PA1400–30, 1470–71, 1476–1517, 1584–86), and agreed to serve as an expert in this case partly because the engagement provided an opportunity to challenge state constitutional provisions that serve as barriers to such funding (PA1417–18, 1421). As documented in detail in his deposition, Dr. Glenn's conclusions were often contradicted by the sources he cited. *See* PA1433–35, 1439–41,

1445–46, 1449–70. For example, Charles B. Kinney, Jr.'s book *The Struggle for Separation in New Hampshire 1630–1900* (1955) — the work Dr. Glenn cited most often for his references to New Hampshire history (JA274–322) — substantially contradicts Dr. Glenn's suggestions that Protestant religious education played a significant role in New Hampshire public schools during the second half of the nineteenth century. *See* PA1453–63; 1549–54, 1562.

Even if anti-Catholic animus did play some role in the adoption of Article 83, any remaining vestiges of religious discrimination were eliminated from the State Constitution in 1968, when Article 6 of Part I was extensively amended to remove language that had favored Christians generally and Protestants specifically. PA1197. The commission that proposed the amendment explained that it was intended "to purge the[] constitution of the last traces of religious discrimination." PA104. Since then, Article 6 has provided, in relevant part, that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination," "[a]nd 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." Thus, since at least 1968, Articles 6 and 83 together have prohibited both any diversion of tax funding to religious schools and any religious discrimination. Article 83 does not serve any anti-Catholic function today, regardless of whether it ever did. Indeed, only fifteen percent of Program scholarship applicants indicated that they wanted to attend a Catholic school. PA2010.

Hunter v. Underwood, 471 U.S. 222, 227, 229, 233 (1985), *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534–36 (1993), and *Romer v. Evans*, 517 U.S. 620, 627–30, 634 (1996), are all inapplicable (*cf.* Int. Br. at 25, 33), for all the constitutional clauses and laws struck down in those cases were clearly passed to discriminate against a particular minority *and* continued to discriminate against that minority at the time the cases were decided. For

similar reasons, other state courts have rejected arguments that the no-aid clauses of their state constitutions violate the U.S. Constitution due to an allegedly anti-Catholic origin. *See Bush v. Holmes*, 886 So. 2d 340, 351 n.9 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681–82 (Ky. 2010).

2. Part II, Article 83 and Part I, Article 6 do not violate the U.S. Constitution by "discriminating against religion."

The intervenors contend that the State Constitution's prohibitions against tax funding of religious schools violate the Free Exercise, Free Speech, Equal Protection, and Establishment Clauses of the U.S. Constitution by "[d]iscriminat[ing]" against religious institutions. Int. Br. at 25–26, 28–33. But the U.S. Supreme Court, the First Circuit, and other courts have repeatedly rejected arguments that the U.S. Constitution compels governmental bodies to fund religious education if they choose to fund public education or secular private education.

The leading case is *Locke v. Davey*, 540 U.S. 712 (2004). There, the Supreme Court held that a state law barring university students from using state scholarship funds to pursue a degree in theology did not violate the Free Exercise, Free Speech, Equal Protection, or Establishment Clauses. *Id.* at 715, 720 n.3, 725 n.10. The Court explained that the law did not burden religious students' religious-exercise or other constitutional rights, as "[t]he State ha[d] merely chosen not to fund a distinct category of instruction" and the students were not prohibited from undertaking theological study. *Id.* at 721. The Court also noted that the law was motivated by a "historic and substantial state interest" in ensuring that religious education is supported by private money instead of tax dollars. *Id.* at 721–23, 725. *Locke*'s outcome was consistent with a series of earlier Supreme Court decisions holding that the U.S. Constitution does not require governmental bodies to subsidize religious schools equally to secular ones. *See Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g mem.*, 364 F. Supp. 376 (W.D. Mo. 1973); *Sloan*, 413

U.S. at 834; *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971).

The First Circuit has consistently applied *Locke* to reject federal constitutional challenges against state constitutional clauses or laws that allow public funding of secular but not religious private education. *See Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 353–57 (1st Cir. 2004) (state did not violate U.S. Constitution by establishing program that provided for funding of secular but not religious private schools); *see also Wirzburger v. Galvin*, 412 F.3d 271, 280–85 (1st Cir. 2005) (upholding against federal constitutional challenge prohibition in Massachusetts Constitution on use of initiative process to repeal constitutional clause restricting public aid to religious organizations); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21–23 (1st Cir. 2004) (school district was not obligated to provide disabled children at private schools with special-education benefits equal to those given at public schools). Other circuits and state courts have rejected similar arguments as well. *See, e.g.*, *Bowman v. United States*, 564 F.3d 765, 772, 774 (6th Cir. 2008); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007); *Bush*, 886 So. 2d at 343–44, 357–66; *Pennybacker*, 308 S.W.3d at 673, 679–81; *Anderson v. Town of Durham*, 895 A.2d 944, 958–61 (Me. 2006); *Chittenden*, 738 A.2d at 546–47, 563.

These precedents foreclose the intervenors' "discrimination" argument. The framers of the State Constitution merely chose "not to fund a distinct category of instruction," while leaving private citizens free to receive such instruction without state assistance. *See Locke*, 540 U.S. at 721. The state constitutional provisions are supported by "historic and substantial state interest[s]" in avoiding tax aid to religion and protecting the public schools. *See id.* at 725; PA1180–81, 1187, 1191, 1195–96, 1545.[10]

[10] The intervenors also argue that the equal-protection clause of Part I, Article 6 of the State Constitution prohibits the State from denying funding to religious schools. Int. Br. at 32 n.47.

3. The Establishment Clause does not bar the State from determining whether schools are religious.

The intervenors further argue that the superior court's order violates the Establishment Clause by requiring the State to determine which schools are religious. Int. Br. at 27–28. But the U.S. Constitution does not prohibit courts from inquiring about *whether* something *is* religious; courts must only avoid analyzing whether religious beliefs are valid, or dissecting their content in a manner that impermissibly entangles the courts in theological questions. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10 (1976); *United States v. Seeger*, 380 U.S. 163, 184–85 (1965); *see also Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). Accordingly, federal courts routinely examine whether institutions are religious to determine whether they qualify for exemptions for religious organizations from employment laws. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–31 (3d Cir. 2007); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 399–401, 405 (1st Cir. 1985) (separate opinions representing entire *en banc* court). What is more, this Court has held that the U.S. Constitution permits the State to determine which portions of a religious institution's property are used for religious purposes and therefore qualify for exemption from tax. *See Appeal of Liberty Assembly of God*, 163 N.H. 622, 631–32 (2012); *Emissaries of Divine Light*, 140 N.H. at 558–59.

Any inquiry needed to implement the superior court's order would be even simpler and less intrusive. As shown by extensive record evidence, religious schools typically make their

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But that clause only prohibits discrimination *among* religious groups. It states, "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." The intervenors' argument would render meaningless the language in Part II, Article 83 and Part I, Article 6 that bans tax aid to religious schools.

religiosity crystal clear on their websites and in documents they submit to the NHDOE. *See* PA151–94, 246–1048, 1594–1959. Thus, even before this lawsuit was filed, the NHDOE had already compiled and posted on its website a list that identifies which New Hampshire private schools are religious. *See* PA223–45. The intervenors contend that there are two schools, Mont Blanc Academy and New England Classical Academy, that are difficult to classify. Int. Br. at 27. But both the State and the plaintiffs have categorized these schools as non-religious (PA126, 233–34), and the intervenors appear to agree (*see* Int. Br. at 27).

The cases cited by the intervenors in support of their "improper inquiry" argument are inapposite. The statute struck down in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1258, 1261 (10th Cir. 2008), discriminated among different kinds of religious institutions and required state officials to undertake very intrusive inquiries into the religious operations of individual institutions. Similarly, the statute struck down in *New York v. Cathedral Academy*, 434 U.S. 125, 132–33 (1977), would have required state officials to engage in extremely detailed and intrusive audits of the religiosity of numerous specific curricular items and activities of numerous religious schools. And the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), is not controlling because it did not garner a majority, and none of the other Justices agreed with the plurality's proposed legal rules. *See, e.g., DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 418–19 (2d Cir. 2001).

III. 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.

This Court may also strike down the Program on the grounds that it violates Articles 10 and 12 of Part I and Articles 5 and 6 of Part II of the State 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.

By creating a tax benefit that will support sectarian education — which is *not* a public purpose under this Court's case law — the Program runs afoul of these principles.

A. The tax-equality clauses of the State Constitution impose strict requirements of uniformity and proportionality on all taxes enacted by the legislature, while prohibiting tax benefits that do not serve a public purpose.

The New Hampshire Constitution contains four central provisions limiting the scope of the legislature's power to levy taxes.

First, Part I, Article 10 provides that "[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." This clause prohibits the State from "discriminat[ing] against [taxpayers] by subjecting [them] to taxes not imposed on others of the same class" (*see N. Country Envtl. Servs. v. State*, 157 N.H. 15, 25 (2008)), as well as "taxation to aid a private purpose" (*In re Op. of the Justices*, 88 N.H. 484, 489 (1937)).

Second, under Part I, Article 12, "[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 . . . ." This provision "literally imposes a requirement of proportionality of a taxpayer's portion of the public expense, 'according to the amount of his taxable estate,' and requires that similarly situated taxpayers be treated the same." *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 686 (1997) (quoting *Op. of the Court*, 4 N.H. 565, 568 (1829)).

Third, Part II, Article 5 empowers the state legislature to "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within" the state. This provision requires that "'all taxes be proportionate and reasonable, . . . equal in valuation and uniform in rate, and just.'" *Op. of the Justices*, 131 N.H. 640, 642 (1989) (quoting *Op. of the Justices*, 117 N.H. 749, 755 (1977)).

Fourth, Part II, Article 6 authorizes the legislature to raise revenue by taxing "polls, estates, and other classes of property." This article "'grants the legislature broad power to declare property to be taxable or non-taxable based upon a classification of the property's kind or use, but not based upon a classification of the property's owner.'" *N. Country*, 157 N.H. at 19 (quoting *Smith*, 141 N.H. at 686).

Together, these provisions "work in conjunction to ensure the fairness of any scheme of taxation" enacted by the General Court. *See Smith*, 141 N.H. at 685; *see also In re Town of Rindge*, 158 N.H. 21, 26 (2008); *N. Country*, 157 N.H. at 19–20, 25–26. This Court has

> "consistently interpreted the constitutional provisions relating to the taxing power to require that a tax imposed by the legislature against a distinct class of property be at a uniform rate. A tax must be in proportion to the actual value of the property subject to tax, and it must operate in a reasonable manner."

Smith, 141 N.H. at 687 (quoting *Johnson & Porter Realty Co. v. Comm'r of Rev. Admin.*, 122 N.H. 696, 698 (1982)).

Tax exemptions and other tax benefits trigger scrutiny under these constitutional principles because they "necessarily result in a disproportionate tax burden on the remaining property in the taxing district." *See Op. of the Justices (Sch. Fin.)*, 142 N.H. 892, 900 (1998). This Court has thus held that tax exemptions and benefits must advance a "public purpose" to be constitutional. *N. Country*, 157 N.H. at 26; *In re Op. of the Justices*, 95 N.H. 548, 550 (1949); *accord, e.g.*, *Rindge*, 158 N.H. at 26; *Felder v. City of Portsmouth*, 114 N.H. 573, 577–79 (1974). "The Legislature may not exercise or delegate its taxing power for private benefit through the indirect expedient of an exemption." *In re Op. of the Justices*, 88 N.H. at 489.

B. The Program violates the tax-equality clauses of the State Constitution because it serves the non-public purpose of supporting sectarian education.

The Program triggers scrutiny under Articles 10 and 12 of Part I and Articles 5 and 6 of Part II because it discriminates among New Hampshire taxpayers, contrary to the requirements

of uniformity and proportionality. Businesses that contribute to scholarship organizations see a reduction in their business profits or business enterprise taxes equal to 85 percent of the amounts they donate, while businesses that elect not to make contributions must pay the taxes in full.

And the purpose advanced by the Program is not a public one. In *The Property Tax Credit Case*, 109 N.H. at 579, 581–82, this Court concluded that a $50 property-tax credit for families with children in private schools violated not only Article 83 of Part II but also Article 12 of Part I and Article 5 of Part II. The Court explained that the tax credit would "produce unconstitutional discrimination" and would "support sectarian education[,] which is not a public purpose." *See id.* at 581–82. If fully implemented, the Program likewise would plainly support sectarian education, as it permits use of Program funds for religious instruction. RSA 77-G:9, II.

Three aspects of the Program bolster the conclusion that it does not serve a public purpose. First, if fully implemented, the Program would *primarily* benefit religious schools. *See* PA1094–95, 1109. Second, some New Hampshire religious schools use curricular materials produced by religious publishers that present students with teachings, such as creationism, that appear to be contrary to state educational standards and accepted scientific and academic understandings. *See supra* at 6–7. Third, the Program allows funding of schools that discriminate based on creed in admissions and employment, and it also permits scholarship organizations to so discriminate in awarding scholarships. *See supra* at 4–5, 7. Religious discrimination is against the "public policy" of this state, as reflected in Articles 2 and 6 of Part I of the State Constitution. *See In re Certain Scholarship Funds*, 133 N.H. 227, 232–33 (1990) (affirming superior court's decision to strike, from charitable scholarship trust, provision that limited scholarships to Protestant boys).

IV. The Tax Credit Statute is not severable.

The superior court erred by ruling (OP40–42) that the Tax Credit Statute is severable and that the Program can proceed insofar as it funds non-religious schools. When it is unclear whether the legislature would have enacted a statute without its unconstitutional portions, the entire statute must fall. Here, it is far from clear whether the General Court would have passed the Program if it knew that religious schools could not be funded. Much of the support for the Program came from religious schools. Key goals of the Program are frustrated when religious schools cannot receive funding. And the General Court carefully designed the details of the Program to operate in an environment where most private-school students enroll in religious schools that are much less expensive than secular private schools.

This Court does not sever unconstitutional portions of a statute and allow the rest to remain in force when the Court is "not sure whether the legislature would have enacted [the valid provisions] in the absence of all of the unconstitutional provisions." *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 531 (1983); *accord Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 218 (1999); *Carson v. Maurer*, 120 N.H. 925, 945–46 (1980), *overruled on other grounds by Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748 (2007); *Woolf v. Fuller*, 87 N.H. 64, 69 (1934). For severance to be appropriate, the "primary legislative purpose" of a statute must be preserved. *See Associated Press v. State*, 153 N.H. 120, 142 (2005); *accord State v. Rollins-Ercolino*, 149 N.H. 336, 343 (2003); *Claremont*, 144 N.H. at 218; *Coffey v. Bresnahan*, 127 N.H. 687, 691 (1986). When provisions "central to the legislature's purpose in enacting [a] statute" are unconstitutional, and "[t]he fundamental structure of the statute ha[s] been affected, the entire [statute] must be deemed invalid." *Antoniou v. Kenick*, 124 N.H. 606, 609 (1984).

Severance must not "give[] a statute meaning the legislature did not intend, either by addition or subtraction from its terms." *Claremont*, 144 N.H. at 218. Where "'the

unconstitutional provisions . . . are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure,'" severance is not proper. *Associated Press*, 153 N.H. at 141 (quoting *Claremont*, 144 N.H. at 217).

Although the Statute has a severability clause (RSA 77-G:10), such a clause cannot justify severance when it is not appropriate under the foregoing legal principles. For instance, in *Opinion of the Justices*, 106 N.H. 202, 206 (1965), this Court struck down the entirety of a proposed business-tax bill, notwithstanding the presence of a severability clause, because "fundamental provisions of [the] bill [were] unconstitutional" and "[v]ital objectives in the entire scheme of taxation implicit" in the bill could not "be carried out." *Accord Ferretti v. Jackson*, 88 N.H. 296, 305 (1936); *see also In re Op. of the Justices*, 88 N.H. at 491.

In accordance with these principles, in *The Sweepstakes Case*, 108 N.H. 268, this Court declared entirely void a law that would have awarded certain sweepstakes revenues to public schools, secular private schools, and religious schools, rejecting an argument that the statute was severable and could be implemented insofar as it aided nonreligious schools. The Court explained, "[s]ince parochial and other religiously oriented schools appear to predominate among the nonpublic schools . . . the major part of the scheme cannot be carried into effect because of the constitutional prohibition" against aid to religious schools, rendering it "impossible for us to determine whether the Legislature would have enacted any part of the [law]." *Id.* at 274–75. *See also Choice in Educ.*, 136 N.H. at 359 (after deciding that proposed school-voucher bill was unconstitutional because it would have aided religious schools, Court refused to offer legislature opinion on issue that could only have been relevant if program were limited to secular private schools, explaining that religious schools "appear[] to predominate among the nonpublic

schools" and "we cannot determine whether the legislature would have continued interest in the legislation if this group were excluded from the program").

Similarly, here it is far from clear whether the General Court would have passed the Program if it were limited to non-religious schools. The legislature plainly understood that the Program would aid religious schools (*see, e.g.*, PA84) and could not have been ignorant of the fact that most New Hampshire private-school students attend religious schools (*e.g.*, PA1098–99). Much of the support for the Program came from religious schools, whose representatives lobbied the legislature to pass the Program. *See* PA88–89, 92–93, 95–100.

Legislators supporting the Program claimed that their principal goals were to help lower-income parents afford private-school education and to promote parents' ability to choose different educational options. *See* 2012 N.H. Laws §§ 287:1, I(c)–(d); PA66, 75, 84–90. Eliminating religious schools from the Program plainly frustrates the latter purported goal. As for the former, the legislature reviewed a study showing that secular private schools are three times as expensive as religious private schools, annually costing on average $15,745 at the elementary level and $24,711 at the secondary level. PA59. Since the Program caps the average scholarship amount at $2,500 (RSA 77-G:2, I(b)), it is unlikely that Program scholarships would provide enough aid to enable lower-income parents to afford secular private schools.

Thus, even if the legislature would have passed some version of the Program if it knew that religious schools could not take part, it is quite improbable that the details of the Program would have been the same. The legislature carefully considered what the cap on scholarship amounts should be and relevant data. *See* PA58–59, 75, 85, 88. Surely the legislature would not have set the cap at $2,500 if religious schools were ineligible, given how expensive secular private schools are. For the same reason, it does not seem likely that the legislature would have set the same income-based allocation requirements for Program scholarships (*see* RSA 77-G:1,

VIII(b); RSA 77-G:2, I(d)), which it also determined after careful analysis (*see* PA61, 68, 82–83, 86), if the Program were limited to non-religious schools.

In addition, the legislature believed (wrongly) that the use of tax credits to fund the Program would help the Program survive any constitutional challenge. *See* PA57, 84. If the legislature had realized that the Program could only fund secular schools, it may well have utilized a simpler funding mechanism, such as giving vouchers directly to parents.

Because it is not clear "whether the legislature would have enacted" the Program "in the absence of all of [its] unconstitutional provisions" (*Heath*, 123 N.H. at 531), because provisions "central to the legislature's purpose in enacting the statute" are unconstitutional, and because "[t]he fundamental structure of the statute ha[s] been affected," "the entire [Program] must be deemed invalid" (*Antoniou*, 124 N.H. at 609). The Court should "leave . . . to the legislature" the question whether to enact a new version of the Program limited to non-religious schools. *See Heath*, 123 N.H. at 531.[11]

ATTORNEY'S FEES AND COSTS

If the plaintiffs prevail, they intend to seek attorney's fees based on the "substantial benefit" doctrine, which allows fees for prevailing plaintiffs in constitutional cases that benefit the public. *See, e.g., N.H. Motor Transp. Ass'n v. State*, 150 N.H. 762, 770 (2004); *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 595–98 (1999). As the superior court deferred ruling on the plaintiffs' request for trial-level fees and costs (*see* JA26) until after the resolution of this appeal (OP45), the plaintiffs respectfully ask this Court to clarify whether they should seek their appellate fees from this Court or from the superior court. The plaintiffs suggest that it would be more efficient for the superior court to rule on trial-level and appellate fees together in the first

[11] If this Court were concerned about whether there might be some merit (there is not) to the intervenors' arguments that allowing the Program to fund secular but not religious schools violates the U.S. Constitution, this would further weigh against severance.

instance (or to at least determine their amount); vesting fee proceedings in the superior court could also promote settlement of the fee issue.[12]

CONCLUSION

For the foregoing reasons, this Court should reject the legislature's naked attempt to circumvent the text, purpose, and spirit of the New Hampshire Constitution by using intermediaries to funnel tax funds to religious schools. The Court should affirm the superior court's ruling that the Tax Credit Program violates Article 83 of Part II. Additionally or alternatively, the 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.

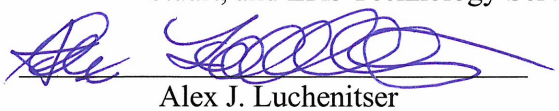
[12] New Hampshire appears to lack binding case law on whether a superior court has authority to award appellate fees where, as would be the case here, fees are sought on a ground other than frivolousness or bad faith. *Compare Cheshire Toyota/Volvo, Inc. v. O'Sullivan*, 132 N.H. 168, 169 (1989) (superior court awarded appellate fees), *and Porter v. City of Manchester*, No. 01-C-0521, 2005 WL 6139788 (N.H. Super. Aug. 11, 2005) (holding that superior court has authority to award appellate fees), *with Appeal of Silk*, 156 N.H. 539, 540, 544 (2007) (this Court awarded appellate fees), *and Baer*, 160 N.H. at 732 (holding that this Court has exclusive authority to award appellate fees if the fees are sought on the ground that the appeal was "'frivolous or in bad faith'" (quoting *LaMontagne Builders v. Brooks*, 154 N.H. 252, 259 (2006))). Barring contrary guidance from this Court, the plaintiffs will seek any appellate costs directly from this Court, because *LaMontagne Builders*, 154 N.H. at 258, holds that this Court has exclusively authority to award appellate costs. Further, the plaintiffs' understanding is that the "substantial benefit" doctrine allows them to obtain fees only from the State, and that the case law permits them to obtain costs only from the intervenors. *See Claremont*, 144 N.H. at 591, 595, 598.

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 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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Date: January 10, 2014

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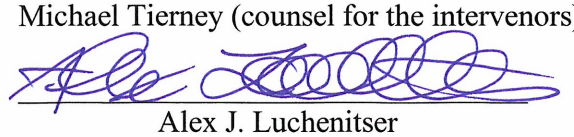
CERTIFICATION OF SERVICE

I hereby certify that I caused to be served two copies per party of this brief and the accompanying appendix volumes on counsel for all parties in this case, in compliance with Supreme Court Rule 26, by sending the brief and appendix via commercial carrier for delivery on or before January 13, 2013, to Richard Head (counsel for the State) and Richard Komer and Michael Tierney (counsel for the intervenors).



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Date: January 10, 2014