IN THE SUPERIOR COURT FOR STRAFFORD COUNTY, NEW HAMPSHIRE

BILL DUNCAN, et al., Plaintiffs, vs. STATE OF NEW HAMPSHIRE, et al., Defendants, and NETWORK FOR EDUCATIONAL OPPORTUNITY, et al., Intervenor-Defendants.	)	CIVIL ACTION 219-2013-CV11

PLAINTIFFS' PRETRIAL REPLY MEMORANDUM

TABLE OF CONTENTS

Introduction

The main argument of the State and the intervenors is that the Education Tax Credit Program should be upheld because its funding is obtained through a tax credit and passes through several hands before reaching religious schools. The New Hampshire Supreme Court's decisions have rejected such reasoning, however, striking down school-aid programs with exactly these features. No matter what route the money follows, the Education Tax Credit Program will ultimately result in the diversion of tax payments from the state treasury to religious educational institutions, in violation of the plain text and intent of the New Hampshire Constitution's church-state clauses.

The remaining arguments advanced by the Program's defenders are equally unavailing. For example, the arguments about standing ignore the plain text of New Hampshire's amended declaratory-judgment statute. The plaintiffs challenge the Program both facially and as applied, and they satisfy the standards for both kinds of challenges. The New Hampshire Supreme Court has not tied its interpretation of the State Constitution's church-state clauses to federal case law, but has instead interpreted the clauses based on their unique language and history. And the proposition that the U.S. Constitution prohibits application of the New Hampshire Constitution to strike down the Program is based on arguments that have been rejected by the U.S. Supreme Court and the First Circuit.

Together with the plaintiffs' opening and supplemental memoranda of law in support of their petition for a preliminary injunction (filed January 9 and 24, 2013), this reply memorandum sets forth the plaintiffs' legal arguments and summarizes their evidence for the final hearing. The plaintiffs strive not to repeat arguments or facts set forth in their earlier briefing, except where appropriate for context or summation. The offers of proof and documentary exhibits that

the plaintiffs intend to submit as evidence at the final hearing consist of Exhibits 1 through 40 filed by the plaintiffs on January 9, 2013 with their Petition for Preliminary Injunction; Exhibit 41 filed on February 2, 2013 with their Motion for Leave to File Second Amended Complaint; and Exhibits 42 through 97 filed herewith. Exhibits 1, 2, 41, 42, 44, 46, 63, 64, 66, 72, and 97 are offers of proof of testimony; the rest are documentary exhibits.

Based on this argument and evidence, the plaintiffs respectfully ask the Court to issue a decree declaring the Program unconstitutional and permanently and immediately enjoining its implementation.

I. The plaintiffs have standing to challenge the Tax Credit Program.

The plaintiffs plainly have standing under New Hampshire's recently amended declaratory-judgment statute, which 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*.

RSA 491:22 (emphasis added).

Yet the State argues that all of the plaintiffs except LRS Technology Services, LLC, lack standing because they do not pay business profits or enterprise taxes and therefore are not part of the applicable "taxing district." State Br. at 5–8. The term "taxing district," however, refers not to a particular kind of tax, but rather to the geographical area from which a unit of government draws taxes: New Hampshire case law makes clear that the State of New Hampshire is itself a "taxing district." *See Sirrell v. State*, 146 N.H. 364, 371 (2001) ("Because the taxes were raised to fulfill a State purpose, we determined the State was the relevant taxing district"); *Claremont*

Sch. Dist. v. Governor, 142 N.H. 462, 470 (1997) ("[T]he taxing district is the State."); *Opinion of the Justices*, 101 N.H. 549, 554 (1958) (State Constitution's requirement of a uniform valuation and rate in each taxing district means that "a state tax must be uniform throughout the state, a county tax throughout the county, a town tax throughout the town").

Moreover, nothing in the text of the statute supports the State's suggestion that only taxpayers who pay the particular tax at issue can challenge the applicable conduct. To the contrary, the statute permits "*any* taxpayer in the jurisdiction of the taxing district" to challenge *any* "conduct that is unlawful or unauthorized" of "the taxing district or any agency or authority thereof." RSA 491:22. Indeed, since the statute gives all taxpayers of a taxing district the right to challenge governmental conduct that is not funded by or cannot be traced to *any* particular tax at all, it would make no sense to construe the statute more narrowly when a particular tax *is* involved by limiting standing only to those taxpayers who pay the particular tax.

Because RSA 491:22 is unambiguous, the State's reliance on legislative history in its standing arguments is improper: as the State itself says in its own brief, "[a]bsent an ambiguity [courts] will not look beyond the language of the statute to discern legislative intent." *See* State Br. at 4 (quoting *State v. Etienne*, 163 N.H. 57, 72 (2011)). Nor does that legislative history support the State's arguments that the statute was intended solely to allow challenges to the use of a particular tax by the taxpayers who pay it. The State is correct that RSA 491:22 was passed to overturn the New Hampshire Supreme Court's rulings in *Baer v. New Hampshire Department of Education*, 160 N.H. 727 (2010), and *Avery v. New Hampshire Department of Education*, 162 N.H. 604 (2011). *See* Ex. 26 at 2. But in both of those cases, the plaintiffs were *not* challenging the government's use of a particular tax; they were challenging administrative actions by the State Department of Education.

The State speculates that recognizing the plaintiffs' standing under the declaratory-judgment statute might give non-residents who pay taxes while occasionally passing through New Hampshire the right to sue. That hypothetical is not at issue in this litigation, however, as all of the plaintiffs are longtime New Hampshire residents who regularly pay a wide variety of taxes to the state. *See* Ex. 2. In any event, the State's proposed limitations on the statute would not preclude a hypothetical visitor from challenging the use of the particular taxes they paid during their visit.

Finally, the intervenors' arguments against standing simply ignore the plain text of the declaratory-judgment statute and instead rely on inapplicable federal case law that construed only the scope of federal jurisdiction under the federal Constitution. *See* Int. Br. at 3–5; Int. Supp. Br. at 8–9.

II. The plaintiffs properly challenge the Program both facially and as applied.

Contrary to the arguments of the State and the intervenors (State Br. at 2, 4; Int. Br. at 1–3), the plaintiffs meet the standard for a facial challenge to a statute, as "no set of circumstances" exists under which the Program would be carried out in a constitutional manner if its implementation proceeds. *See State v. Hollenbeck*, 164 N.H. 154, 158 (2012) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). It would be ludicrous to imagine that no Program scholarships would be used for religious education, as the Program does not prohibit such use, and most New Hampshire private schools are religious. Indeed, the New Hampshire Supreme Court has on three occasions declared unconstitutional programs that would have diverted tax funds to private-school education, without waiting for implementation of the programs to commence, for the programs did not prohibit the funds from serving religious schooling. *See Opinion of the Justices (Choice in Education)*, 136 N.H. 357, 359 (1992); *Opinion of the Justices*

("The Property Tax Credit Case"), 109 N.H. 578, 581–82 (1969), and *Opinion of the Justices ("The Sweepstakes Case")*, 108 N.H. 268, 273, 275 (1967).

In any event, the plaintiffs not only challenge the Program on its face, but also in its application. The plaintiffs have asked the Court to declare the Program facially unconstitutional or, in the alternative, to enjoin it "insofar as the Program permits Program scholarships to be awarded to students attending religious schools" (or further to issue "such other relief as may be just"). Second Am. Compl. ¶¶ 162–69. The implementation of the Program is well under way and only supports the plaintiffs' arguments that it is unconstitutional. The Department of Revenue Administration has thus far approved two scholarship organizations, the Network for Educational Opportunity ("NEO") and the Concord Christian Academy Giving and Going Alliance ("CCAGGA"). *See* Ex. 66 at 20–21; Ex. 68 at 2; Ex 91. The NEO has received approximately $120,000 in donations under the Program. *See* Ex. 63 at 39–40. Over 450 students had submitted scholarship applications to the NEO as of March 14. *See* Ex. 53. 80% of the students who marked a school preference in those applications indicated that they wish to attend a religious school. *See* Ex. 54. The NEO intends to commence awarding scholarships as early as June 15. Ex. 63 at 17; Ex. 64 ¶ 10. As of this writing, the Concord Christian Academy Giving and Going Alliance (which was just approved) has not received any donations or scholarship applications (*see* Ex. 66 at 20–22; Ex. 68 at 2), but from its name alone one would expect a greater proportion of its applicants than the NEO's to be interested in religious education.[1] Thus, without injunctive relief, the Program will soon divert tax payments primarily to religious schools.

[1] The plaintiffs are deposing a representative of the CCAGGA on April 22, after the due date for this brief, and plan to inform the Court at or before the final hearing of any relevant information obtained through that deposition.

III. That the Program uses a tax credit to fund religious schools is no defense.

A. The New Hampshire Supreme Court has already held that using tax credits to funnel money to religious education is unconstitutional.

The lead argument on the merits made by the State and the intervenors is that the Program does not violate the State Constitution because the funding mechanism is a tax credit, rather than direct governmental payments. This argument is foreclosed by the New Hampshire Supreme Court's decisions. In *The Property Tax Credit Case*, 109 N.H. at 579, 581–82, the Supreme Court struck down under Part II, Article 83 of the State Constitution a property-tax credit that aided religious schools. In fact, long before then, the New Hampshire Supreme Court began to treat tax benefits as equivalent to direct appropriations. *See* Pls.' Mem. in Supp. Pet. for Prel. Inj. at 29.

B. Diversion of tax payments from public to religious education contravenes the text and purpose of the New Hampshire Constitution.

Considering what the Program actually does, it plainly violates both the text and the intent of the no-aid clause of Part II, Article 83 of the New Hampshire Constitution, which states 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." Contrary to the language of Article 83, the Program uses New Hampshire's tax system to raise funding for the use of private, primarily religious, schools.

Furthermore, in addition to aiding religious education, the Program reduces funding to public schooling — cutting state "adequate education grant" funding to local school districts for each public-school student who participates in the Program (RSA 77-G:1, VIII(a)(1); 77-G:7, I) — in violation of the principal purpose of Article 83's no-aid clause: to protect public schools

and to prevent the diversion of funds away from them. The sponsor of the constitutional amendment that added this clause, 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.

Ex. 84 at 124. 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 was intended to prevent.

C. Economists and governments, including New Hampshire's, recognize that tax credits serve the same functions as direct spending.

Economic analysis further confirms the irrelevance of the Program's use of tax credits as the mechanism of funding religious schools. As explained in the report of Professor Peter Enrich, an expert in tax and fiscal policy, the Program "is functionally equivalent to a direct legislative appropriation for private-school scholarships." Ex. 44 at 1. 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.* "This concept, and the underlying equivalence between tax expenditures and direct governmental spending, has been recognized by public finance economists and analysts for at least half a century." *Id.* "The concept has been widely adopted by both federal and state budget and fiscal agencies and legislative bodies." *Id.* Forty-six states, including New Hampshire, "produce reports detailing their tax expenditures, in connection with their budgetary processes." *Id.* at 1, 7.

Professor Enrich explains that the Program is "a paradigmatic tax expenditure." *Id.* at 8. 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." *Id.* at 8–9. "Furthermore, under New Hampshire law, the Education Tax Credit is expressly included among the tax provisions that the Department of Revenue must analyze in its annual tax-expenditure reports." *Id.* at 9; *see* RSA 77-A:5-a; RSA 77-A:5, XV; RSA 77-E:3-d.

The State contends that if the Tax Credit Program is viewed as similar to direct spending, then "all taxpayer income could be viewed as belonging to the State because it is potentially subject to taxation by the legislature." State Br. at 10. But the State of New Hampshire has much more than a "potential" claim on the business income that funds the Tax Credit Program; the State has a pre-existing, legal right to that income under the statutes that establish the business profits and business enterprise taxes, RSA 77-A and 77-E. The Education Tax Credit is a tax expenditure because it represents a deviation from this statutory baseline. *See* Ex. 44 at 3, 8; Department of Revenue Administration, *State of New Hampshire 2012 Tax Expenditure Report* 1 (2013) (noting that the State "expends" taxpayer money by "foregoing the collection of taxes that it has the statutory authority to collect.").

Indeed, the director of the NEO acknowledged at deposition that some scholarship applicants to the NEO view the Program as a state-funded scholarship program. She was "dismay[ed]" that, in an electronic form parents must submit to an NEO contractor to apply for

program scholarships, the contractor instructed that parents should *not* check "state-sponsored scholarship or voucher program." She was concerned that these instructions would confuse parents who might think of the Program as a state-sponsored scholarship or voucher program. Ex. 63 at 65; Ex. 65 at 1.

The fact that this litigation has reduced Program donations (*see* Ex. 63 at 41–43) is also irrelevant. That the amount expended on the Program each year can vary based on how much businesses donate does not render the Program materially different from direct spending. *Cf.* Int. Supp. Br. at 18. The cost of many entitlement programs is also uncertain and can vary based on how many people are eligible and apply for benefits. And like many direct spending programs, the Program has a ceiling on how much in tax credits can be allowed annually. RSA 77-G:4, II.

D. Although the State cannot rescue the Program by showing that it will save taxpayers money, the State's own fiscal analyses show that it will do exactly the opposite.

The State and the intervenors argue that the Program will save money for New Hampshire taxpayers, and that this weighs in favor of upholding the Program. *See* State Br. at 15; Int. Br. at 4. This argument is legally irrelevant to the plaintiffs' claim under Article 83, however. If the State enacted legislation providing direct subsidies to religious schools, the legislation would be a plain violation of Article 83 even if it saved the State money by reducing state public-school spending more than the amount of the subsidies.

The State apparently contends that the Program's fiscal impact is relevant because, according to the State, the cases cited by the plaintiffs that recognized the similarities between tax credits and direct government spending "rest[ed] solely on the premise that others must take up the exempted taxpayer's share of the common burden." State Br. at 14 (citing *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1, 8–10 (1929)). But such burden-shifting is not the only reason that the New Hampshire Supreme Court has recognized the parallels between tax benefits and direct

spending. The Court has also noted that a tax benefit accomplishes the same purpose as a direct expenditure: "[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. Moreover, in *The Property Tax Credit Case*, 109 N.H. at 581–82, the New Hampshire Supreme Court struck down a tax credit that would have benefitted religious schools, without considering whether it would save the government money (which the credit might well have done had it induced enough parents to transfer their children from public to private schools).

In any event, the Program will *not* save New Hampshire taxpayers money, but will instead impose greater burdens on them, causing other taxes to be raised or services to be cut. A fiscal analysis provided to the General Court by the New Hampshire Department of Education shows that, when state and local governments are considered together, the Program will impose a significant net loss on New Hampshire taxpayers. Ex. 69 at 1; Ex. 70; *accord* Ex. 71 at 3–4. Specifically, the Department of Education projects that, in its first two years, at the state level, the Program is expected to save the State a small amount of money because the amount of tax-revenue lost is expected to be slightly lower than the amount by which the State reduces its funding of local school districts. Ex. 69 at 1; Ex. 70; *accord* Ex. 71 at 3–4. But this reduction in state funding will impose revenue losses on local school districts that are much greater than the amounts the Program enables local school districts to save, and the net losses the Program imposes on local school districts will be much greater than the net savings at the state level. Ex. 69 at 1; Ex. 70; *accord* Ex. 71 at 3–4. The principal reason for this is that a large portion of each school district's budget is composed of fixed costs that must be spent to run the daily operations of a school regardless of how many students attend the school. Students who move from public

schools to private schools as a result of school-voucher and tuition tax-credit programs are typically scattered among numerous schools and grades, such that only a small number of students leave each grade in each school, and schools are typically unable to cut teachers or staff or otherwise significantly reduce variable costs in response. *See* Ex. 69 at 4.

In addition, even if it were proper to consider the state level in isolation, the Department of Education projects that, starting with the Program's third year of operation, the Program will cause the State to lose more revenue than it saves in spending. Ex. 69 at 1; *accord* Ex. 71 at 3–4. That is because during the first two years of the Program, scholarship organizations must award at least 70% of scholarships to students who previously attended public school, but beginning with the third year of the Program, this minimum will be reduced by five percent annually. *See* RSA 77-G:2, I(b). Thus, after the Program's second year, the savings to the State from reducing adequacy payments to local school districts will continuously decline, causing the Program to progressively inflict greater and greater net fiscal losses on the State as time passes.

If it is relevant at all, the fact that the Program will impose a net overall loss on New Hampshire taxpayers from its inception, and upon the state government starting by its third year, can only support the plaintiffs' claims under 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." Because the Program will cause New Hampshire taxpayers to either pay more in taxes or receive less in services, the taxpayers will, in contravention of that clause, "be compelled to pay towards the support of the schools of [a] sect or denomination."

E. Striking down the Program would not put in question the constitutionality of state property-tax exemptions for religious schools.

Contrary to the arguments of the State and the intervenors (*see* State Br. at 28; Int. Br. at 25–26), overturning the Program would not impact the constitutionality of property-tax

exemptions for religious schools. Property-tax exemptions differ in at least six ways from the Education Tax Credit Program.

First, New Hampshire's property-tax exemptions for religious schools are part of a broad set of property-tax exemptions, which benefit a wide range of institutions and support an equally expansive range of activities. The statute that exempts from taxation the property of religious schools also exempts the property of all charitable and non-profit organizations; property owned by the State of New Hampshire or by any New Hampshire city, town, school district, or village district; property owned and used by any county for governmental purposes, including hospitals, court houses, registry buildings, and correctional facilities; houses of public worship, parish houses, church parsonages occupied by pastors, convents, and monasteries; and property owned by schools, seminaries of learning, colleges, academies, and universities. *See* RSA 72:23. Because the statute broadly benefits a wide range of both secular and religious entities, it does not "advance religion." *Appeal of Emissaries of Divine Light*, 140 N.H. 552, 558 (1995). By contrast, the Tax Credit Program will narrowly advance one particular activity: private, primarily religious, education.

Second, the property-tax exemptions are a refusal to tax property at all. The Tax Credit Program, on the other hand, is a manipulation of existing taxes to narrowly advance a particular legislative purpose. Under the Program, a business can reduce its tax liability *only* by making contributions to state-approved scholarship organizations. The Program does not give the business freedom to do whatever it would like with its taxable income. The business must pay the business taxes it owes directly to the State, or may divert at least some of those taxes to the scholarship organizations the State wants to fund.

Third, the property-tax exemptions are based on the day-to-day functions of the property owners. The Tax Credit Program, on the other hand, permits a tax credit for acts by a business that have nothing to do with the business's regular functions. Instead, the Program merely uses businesses as conduits to funnel money to private schools in an effort to circumvent the New Hampshire Constitution.

Fourth, property-tax exemptions for religious institutions are well-established in American history, as described in detail on pages 16 to 17 of the amicus brief of the Alliance Defending Freedom. According to one scholar, there is "no time before which churches were taxed and in which we can seek the reason for the exemption." John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 Cumb. L. Rev. 521, 522 (1992) (citation omitted). By contrast, the Education Tax Credit Program was first enacted by the General Court last year. Nationally, such tuition tax-credit programs are novel schemes that were first adopted by the Arizona legislature in 1997. *See* Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. Times, May 22, 2012, at A1.

Fifth, property-tax exemptions do not render ownership of property virtually costless to the benefitted owners. An organization whose property is exempt from taxation must still purchase the property and pay for the cost of maintaining it, and such expenses can be quite substantial. By contrast, under the Tax Credit Program, a business bears only a very small percentage of the cost of a donation to a scholarship organization. While the nominal amount of the tax credit is 85 percent, because of interactions with federal tax law, a typical large profitable business will bear only about 4 percent of the cost of a donation, as explained by Professor Enrich. *See* Ex. 44 at 2, 12. Well aware of this, the NEO advertises the very low true cost of Program donations to businesses in its promotional materials. *See* Ex. 89 at 1.

Finally, New Hampshire's annual tax-expenditure reports do not cover property-tax exemptions. *See State of New Hampshire 2012 Tax Expenditure Report, supra*; RSA 77-A:5-a. But, as noted above, the reports must cover the Tax Credit Program. *See* RSA 77-A:5-a; 77-A:5, XV; 77-E:3-d.[2]

IV. That the General Court came up with an elaborate scheme to funnel funding to religious schools is no defense.

The State and the intervenors argue that the Program should be upheld on the grounds that Program funds pass through several hands before arriving at religious schools, parents choose where to educate their children, and children are purportedly the principal beneficiaries of the Program. State. Br. at 17–20; Int. Supp. Br. at 3. But all those things were no less true with respect to the school-voucher program the New Hampshire Supreme 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 government treasury and would arrive at religious schools that were free to use the funds for religious education. *See Choice in Education*, 136 N.H. at 359; *The Property Tax Credit Case*, 109 N.H. at 581–82. For similar reasons, other state courts construing similar state constitutional provisions have rejected similar arguments in striking down school-voucher and analogous programs. *See, e.g., Cain v. Horne*,

[2] New Hampshire has no state income tax, and so no charitable income-tax deductions are put into question by the plaintiffs' challenge to the constitutionality of the Program. Still, charitable deductions are distinguishable from the Education Tax Credit for many of the same reasons as property-tax exemptions. Charitable deductions support a wide range of groups and activities, instead of being permitted only to support a singular purpose. First included as part of the federal tax code in 1917, they have a much longer historical pedigree than tuition tax credits. *See* Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 Neb. L. Rev. 1056, 1061 (2003). What is more, a taxpayer still bears most of the cost of a charitable contribution even with the tax deduction, while businesses can bear as little as four percent of the cost of a donation under the Program. Ex. 44 at 12.

202 P.3d 1178, 1184–85 (Ariz. 2009); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 562–63 (Vt. 1999); *Cal. Teachers Ass'n v. Riles*, 29 Cal.3d 794, 807 (1981); *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533, 537 (Or. 1961).

Here, too, the Program will take funding away from the state treasury and deliver it to religious schools that will be free to use the funds for religious education. Indeed, Program funds will flow primarily to religious schools. The report of the plaintiffs' education expert Dr. David Berliner, along with evidence obtained in discovery, strongly buttresses the evidence the plaintiffs submitted with their opening filing on this point. First, Dr. Berliner's report confirms that "religious schools predominate among New Hampshire's nonpublic schools, both in terms of enrollment and in terms of the raw number of schools." Ex. 42 at 5. Second, Dr. Berliner confirms that "religious schools in New Hampshire are significantly cheaper than secular schools." *Id.* Third, Dr. Berliner concludes, "given that most New Hampshire private-school students enroll in religious schools, and that religious schools are cheaper than non-religious schools . . . it is quite likely that scholarship recipients under the Program would use scholarships primarily to attend religious schools." *Id.*

Fourth, data produced in discovery from the NEO (the only scholarship organization that has received scholarship applications thus far) shows that 80 percent of the students whose parents marked a school preference in their scholarship applications indicated that they want to attend a religious school. *Id.* at 14; Ex. 54. Fifth, both Dr. Berliner and school records produced in discovery by the New Hampshire Department of Education confirm "that many of New Hampshire's religious schools are deeply permeated by religion, and that Program scholarship money would therefore support religious education." Ex. 42 at 6; Ex. 92; Ex. 93. Finally, Dr.

Berliner reports that, in school-voucher and tuition tax-credit programs that have been enacted in other states, program funds have primarily been used at religious schools as well. Ex. 42 at 6.

The intervenors quibble with some of Dr. Berliner's assertions, arguing that "New Hampshire's marketplace contains a much lower proportion [of religious schools] than other states." *See* Int. Supp. Br. at 15.[3] As Dr. Berliner points out in his report, however, religious schools constitute only 53.6% of schools participating in the District of Columbia's voucher program, yet accept 80% of voucher students. *See* Ex. 42 at 23–24. Dr. Berliner explains that religious schools enroll a disproportionately high share of voucher students because religious schools are much cheaper than secular ones on average, and because the amount of each voucher is limited, two things that are also true with respect to New Hampshire's Education Tax Credit Program. Ex. 42 at 23–24.

The intervenors further argue that New Hampshire's program is different from those of other states because students can also use Program scholarships at out-of-district public schools or for homeschooling. But the data produced on school preferences of scholarship applicants by the NEO does not show a single student who wants to use a Program scholarship at a public school. Ex. 53; Ex. 54. And while that data also fails to identify any students who plan to use scholarships for homeschooling, Dr. Berliner estimates based on the expected tuition information set forth in the data that up to 11 percent of the scholarship applicants may be interested in homeschooling. Ex. 42 at 19–20. Even if that is the case, however, such homeschoolers would receive only about 3 percent of the Program funds, because the Program allows scholarships for

[3] An analysis performed by the intervenors reports that New Hampshire has a slightly lower percentage of religious schools than shown by the data summarized in Dr. Berliner's report. But the intervenors' analysis merely reprocessed data kept by a national body as of 2010, while Dr. Berliner examined current, New-Hampshire-specific data obtained from the New Hampshire Department of Education and New Hampshire schools. *Compare* Int. Supp. Br. Ex. 4 *with* Pls.' Ex. 42 at 6–8.

homeschoolers to be only one quarter of the maximum average size of other scholarships. *See* Ex. 42 at 20; RSA 77-G:1, VI. Moreover, some homeschooling curricula are religious themselves. *See* Ex. 42 at 20; Ex. 61; HSLDA Br. at 8, 11. Ultimately, despite their quibbles, the intervenors concede that they "will not be surprised" if it turns out that a majority of Program students use scholarships to attend religious schools. Int. Supp. Br. at 14.

The State's and intervenors' "child benefit" and "many hands" arguments are further undermined by the fact that the NEO plans to pay scholarships directly to private schools, rather than to private-school parents or students. Ex. 63 at 15–16. And their "parental choice" argument is undermined by the fact that scholarship organizations will ultimately decide which parents receive scholarships, with knowledge of where parents plan to use the scholarships. Ex. 63 at 10–15. It is the scholarship organizations and not the parents who will in the end determine how Program funding is distributed.

V. The State and intervenors err in relying on federal jurisprudence instead of New Hampshire case law.

The State and the intervenors go far astray by relying on federal case law instead of the opinions of the New Hampshire Supreme Court. *See* State Br. at 22–25; Int. Br. at 27–31; Int. Supp. Br. at 32. They first argue that this Court should disregard the Opinions of the Justices under which the Program is plainly unconstitutional, because those rulings are merely "advisory opinions." Int. Br. at 26–27. While 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)), they still carry considerable weight. The Supreme Court frequently cites Opinions of the Justices as authority. *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).

The State's and intervenors' contentions that the Court should follow federal instead of New Hampshire decisions fly in the face of the New Hampshire Supreme Court's rulings. The New Hampshire Supreme Court has often interpreted the 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). Citing *Lincoln v. Page*, 109 N.H. 30, 31 (1968), the intervenors argue that the New Hampshire Supreme Court "has 'attempted conscientiously and faithfully to follow and apply the rulings and the rationale' of the U.S. Supreme Court in the First Amendment area." Int. Br. at 26. But that case involved only claims under the U.S. Constitution, not the New Hampshire one.

The New Hampshire Constitution has much more specific and stricter language than does the U.S. Constitution with respect to tax funding of religious institutions. Therefore, the New Hampshire Supreme Court has relied principally on the State Constitution's specific language and history in its rulings on state constitutional challenges to tax aid to religious groups. *See Choice in Education*, 136 N.H. at 358–59; *The Property Tax Credit Case*, 109 N.H. at 580–82; *Opinion of the Justices ("The Nursing Education Case")*, 99 N.H. 519, 521–22 (1955).

The State and the intervenors try to make much of the point that, in the earlier two of these decisions, issued in 1955 and 1969, the Court also gave some consideration to federal precedent. It made sense for the Court to do so then, however, only because during that era, the U.S. Supreme Court had generally interpreted the federal Establishment Clause as stringently limiting public funding of religious entities, in a manner mostly consistent with the strict language and history 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). But by the 1990s the U.S. Supreme Court — less constrained by specific constitutional text — was no longer giving the federal Establishment Clause a strict reading similar to that called for by the text of more specific state constitutional clauses such as New Hampshire's. *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, by the 1990s, it no longer made sense for the New Hampshire Supreme Court to consider federal case law in state constitutional challenges to public funding of religion. So the Court did not mention federal case law at all when it invalidated a school-voucher program under the State Constitution in *Choice in Education*, 136 N.H. 357, in 1992. Indeed, the program there would likely have withstood a challenge under the federal Establishment Clause under the reasoning of the U.S. Supreme Court's preceding decisions in *Witters* and *Mueller*. What is more, even in 1969, when the U.S. Supreme Court was interpreting the U.S. Constitution far less permissively, the New Hampshire Supreme Court invalidated a bill that would have authorized local school boards to furnish transportation for students attending nonpublic schools outside the district, even though such aid would likely have been constitutional under then-existing federal precedents. *Compare The Property Tax Credit Case*, 109 N.H. at 582, *with Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). As the U.S. Supreme Court's interpretation of the federal Establishment Clause has diverged far from the restrictions required by the text and history of

the New Hampshire Constitution's church-state provisions, it would make no sense for New Hampshire courts to consider recent federal precedent in deciding this case.[4]

VI. The State's and intervenors' out-of-state decisions are inapposite.

The State and intervenors rely on decisions of two other states that have upheld tax-credit programs for private-school education: *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App. 2009); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001); and *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001). But in those cases, unlike in New Hampshire, there was no evidence of a constitutional history that supported strict limitations against diversion of tax funds to religious schools, the states lacked case law interpreting their constitutions in such a manner, and 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*, __ N.E.2d __, No. 49200-1203-PL-172, 2013 WL 1213385 (Ind. Mar. 26, 2013), where the Indiana Supreme Court held that its state constitutional provisions, which are quite unlike New Hampshire's, permit direct public funding of religious schools. And *Tax Equity Alliance*

[4] 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. Cases interpreting the federal Constitution from that era invalidated tax-credit programs that aided religious education. For example, in *Nyquist*, 413 U.S. at 789–94, the U.S. Supreme 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. In a companion case, *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 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).

for Massachusetts v. Commissioner of Revenue, 516 N.E.2d 152 (Mass. 1987), did not even address the constitutionality of aid to religious schools.

VII. The U.S. Constitution does not prohibit enforcement of the New Hampshire Constitution.

A. The no-aid clause of Article 83 was neither motivated by discriminatory animus nor operates that way today.

The intervenors and their *amici* argue that the U.S. Constitution prohibits enforcement of the New Hampshire Constitution to stop the Program. Much of their argument is based on the assertion that Article 83 of Part II of the State Constitution was principally motivated by anti-Catholic animus. That contention is neither factually accurate nor legally relevant.

Dr. Charles Clark, a University of New Hampshire Professor of History Emeritus who has taught both New Hampshire history and American religious history, rebuts the intervenors' historical claims in his expert report. Ex. 46. As Dr. Clark shows in detail, New Hampshire's Constitution and laws have evolved over the past two centuries toward greater separation of church and state. *Id.* at 2–14. While Dr. Clark does 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 explains that this does not mean "that the goal of or motivation behind the [no-aid] amendment was to suppress Catholicism in order to advance Protestantism." *Id.* at 16–17.

To the contrary, "the records of the [constitutional] convention" in 1876 that proposed the amendment "show that the amendment's purpose was simply the protection of the public school system and prevention of diversion of tax funds away from it." *Id.* at 17. "The lack of any such predominant invidious animus," writes Dr. Clark, is "evinced by the fact that the [1876] convention proposed two other amendments that would have removed from the state constitution

provisions that discriminated in favor of Protestants and against Catholics." *Id.* at 17–18. 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 the Bill of Rights. *Id.* at 18. 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 amendment to the amendment that would have protected Bible reading in the public schools." *Id.* at 17. For these reasons, Dr. Clark concludes 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." *Id.* at 18.

The Court should not credit the contrary views of the intervenors' expert, Dr. Charles Glenn. Dr. Glenn has no degree in history and instead is a professor at the Boston University School of Education. Ex. 72 at 11; Glenn CV (Int. Supp. Br. Ex. 1) at 1. From a policy standpoint, Dr. Glenn is a very strong supporter of school-choice programs, such as school voucher and tuition tax-credit programs, as well as other programs that provide public funding for private-school education. Ex. 72 at 22–28, 98–99. He has advocated extensively in favor of such programs both in published writings and through public speeches. Ex. 72 at 28–46; Exs. 73–80. He is also associated with a number of organizations that promote such programs. Ex. 72 at 46–53; Exs. 80–82, 88.

Dr. Glenn has opined as an expert in three other cases, in Massachusetts, South Dakota, and Colorado, that state constitutional provisions were motivated by anti-Catholic animus. Ex.

72 at 14–19. He agreed to serve as an expert in the Colorado case and in this case in part because he viewed the engagements as opportunities to challenge state constitutional provisions that serve as barriers to public funding of private education. Ex. 72 at 40–41, 44.

Most of Dr. Glenn's report covers events in other states and countries and has little to do with New Hampshire. To the extent that the report does address New Hampshire specifically, the sources Dr. Glenn cites contradict his conclusions. For example, Dr. Glenn cites on page 14 of his report an anti-Catholic statement that he says was made at the 1876 constitutional convention. But the source Dr. Glenn cites discloses that this statement was in fact made at the 1851 convention, which did not propose Article 83's no-aid clause. *See* Ex. 72 at 71–72; Ex. 85 at 132.

That same source — Charles B. Kinney Jr.'s book *The Struggle for Separation in New Hampshire 1630–1900* (1955) — is the work Dr. Glenn cites most often for his references to New Hampshire history. Kinney's book substantially contradicts (*see* Ex. 72 at 79–89; Ex. 85 at 158–63, 171) Dr. Glenn's suggestions that Protestant religious education played a significant role in New Hampshire public schools during the second half of the 19th century (and even Dr. Glenn's report itself falls far short of supporting the intervenors' unsubstantiated claim that in 1876 New Hampshire's public schools were "pervasively religious institutions," Int. Supp. Br. at 30). Kinney notes that when New Hampshire's State Board of Education prescribed an official list of textbooks to be used in state schools, the Bible was the only religious book on that list, and the law authorizing the creation of that list was repealed in 1859. Ex. 85 at 159–60. He explains that New Hampshire school officials of that era "continually deplored the lack of religious teaching in the schools" and "bemoaned the fact that many of the teachers failed to even read the Bible." Ex. 85 at 158. Kinney writes that the public schools "failed miserably in having Bible

reading and the repetition of the Lord's Prayer," and that by the 1880s, "the public schools of [the] day were charged with being 'hotbeds of agnosticism and atheism.'" Ex. 85 at 163, 171.

Dr. Glenn states on page 1 of his report, "it has been suggested that the provision forbidding public funding to religious schools was added [in 1876] to ensure that, in the future, Catholics in public office would not be able to use their position to provide such funding." Dr. Glenn neglects to mention that Kinney, even though he wrote, "This reasoning may well have been that of some of the delegates," further wrote, "Yet such an approach was not necessarily the only one . . . . The delegates may have reasoned along quite different lines. Some of them may have been striving to get the state out of religious affairs . . . fear[ing] bickering over school funds would have the same disastrous results for community harmony as the pastor's tax had had at the beginning of the century. The concept of separating church and state had a real appeal for some of the delegates." Ex. 85 at 138–39.

Dr. Glenn also suggests in his report that the 1876 convention voted to abolish New Hampshire's religious test for holding public office only because the New Hampshire Supreme Court had referred to that test as a dead letter in *Hale v. Everett*, 53 N.H. 9, 130 (1868). Glenn Report at 1; Ex. 72 at 57–59. He glosses over the fact that *Hale* had merely observed that the religious test had never been enforced. *See* 53 N.H. at 130. Other tensions between Dr. Glenn's report and the sources he cites are further discussed in his deposition. *See* Ex. 72 at 75–79, 90–98.

Dr. Glenn depicts the enactment of Article 83's no-aid clause as part of a nationwide anti-Catholic movement that had as its focal point a failed effort to amend the U.S. Constitution to forbid sectarian schools from receiving public funds. This view, too, is contradicted by other academics. Many scholars recognize that the supporters of the so-called "Blaine Amendment"

were motivated in large part by a sincere desire "to institutionalize and constitutionalize a principled non-sectarian model for separation of church and state." *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 68 (2002). The debate over the Blaine Amendment "had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with Catholic animus." *See* Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First. Amend. L. Rev. 107, 113–14 (2003). And of the 38 states that adopted constitutional provisions prohibiting public funding of religious schools, 17 states (45%) drafted those provisions before the debate over the federal Blaine Amendment. *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 327–28. In addition, the language and terms of the state no-aid provisions often differed from the language of the federal Blaine Amendment. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 68–70 (2005). The notion that every state that passed a no-aid provision did so "in some sort of fit of either ideological or cynical anti-Catholicism . . . cannot easily explain the sustained power and geographical breadth of the movement's reach." Feldman, *supra*, at 111.

Even if anti-Catholic animus did play some role in the adoption of Article 83, any remaining vestiges of religious discrimination were purged from the State Constitution in 1968. That year, Article 6 of the State Constitution's Bill of Rights was extensively amended to remove language that had favored Christians generally and Protestants specifically. Ex. 46 at 19. Since then, Article 6 has read, in relevant part, "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination," "[a]nd every person shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall

ever be established." Ex. 46 at 19. The convention that proposed the amendment explained that it was intended "to purge the[] constitution of the last traces of religious discrimination." Ex. 24 at 3.

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 now serve any religiously discriminatory function, regardless of whether it ever did. And the State Constitution will work no religious discrimination in this case if it blocks the Program. Less than 20 percent of students who marked a preference for attending religious schools in their applications to the NEO indicated that they wanted to attend a Catholic school. Ex. 94 at 2.

For these reasons, *Hunter v. Underwood*, 471 U.S. 222 (1985), where the Supreme Court struck down a state constitutional provision on the grounds that it was racially discriminatory, does not support invalidation of Article 83. The provision in *Hunter* was indisputably passed to discriminate against African-Americans, and had that effect throughout its history and during the time when the case was decided. *Id.* at 227, 229, 233. For similar reasons, other state courts have rejected arguments that the no-aid clauses of their state constitutions violate the federal Constitution as a result of an anti-Catholic origin. *See Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681–82 (Ky. 2010); *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).

B. The religion clauses of the New Hampshire Constitution do not violate the U.S. Constitution for any other reason.

More broadly, the intervenors and their *amici* argue that the New Hampshire Constitution's prohibitions against tax funding of religious schools violate the Free Exercise, Equal Protection, and Free Speech Clauses of the U.S. Constitution because the New Hampshire prohibitions discriminate against religious institutions. Int. Supp. Br. at 34–38. But the U.S.

Supreme Court, the First Circuit, and other courts have repeatedly rejected arguments that the U.S. Constitution compels government 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 upheld the constitutionality of a state law that prohibited university students from using state scholarship funds to pursue a degree in devotional theology. *Id.* at 715. The Court explained that the law did not burden religious students' free-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 Free Exercise Clause and the Equal Protection Clause do not require government bodies to subsidize religious institutions equally to secular institutions. *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* and earlier precedents to reject federal constitutional challenges against state constitutional provisions or laws that allow public funding of secular but not religious private education. In *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 353–57 (1st Cir. 2004), the First Circuit rejected arguments that a state violated the U.S. Constitution by establishing a program that provided for funding of secular but not religious private schools. In *Wirzburger v. Galvin*, 412 F.3d 271, 280–85 (1st Cir. 2005), the

Circuit upheld against federal constitutional challenge a prohibition in the Massachusetts Constitution on the use of the initiative process to repeal a constitutional provision restricting public aid to religious organizations. And in *Gary S. v. Manchester School District*, 374 F.3d 15, 21–23 (1st Cir. 2004), the Circuit ruled that a school district was not obligated to provide disabled children at private schools with special-education benefits equal to those given to such children 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 v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007); *Pennybacker*, 308 S.W.3d at 673, 679–81; *Anderson v. Town of Durham*, 895 A.2d 944, 958–61 (Me. 2006); *Bush*, 886 So. 2d at 343–44, 357–66; *Chittenden*, 738 A.2d at 546–47, 563.[5]

The intervenors and their amici also suggest that this Court cannot enforce the New Hampshire Constitution, because to do so it must analyze whether New Hampshire private schools are religious or teach religion, and the U.S. Constitution purportedly prohibits such inquiries. Int. Supp. Br. at 33–34. In fact, the U.S. Supreme Court and other federal courts routinely examine whether institutions are religious to determine whether the institutions qualify for constitutionally mandated or statutory exemptions for religious organizations from employment discrimination laws. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694, 699 (2012); *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 227–29 (3d Cir. 2007); *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 977–78 (D. Mass. 1983). U.S. Supreme Court precedent also *requires* federal courts to analyze whether religious institutions are engaging in religious indoctrination to determine whether

[5] Even if the intervenors' "discrimination" argument did have any merit, it would only support the plaintiffs' point that the Court should strike down the entire Program instead of issuing a narrower remedy that would prohibit only funding of religious schools.

government funding of the institutions violates the federal Establishment Clause. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (four-Justice plurality); *id.* at 840, 845 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 219; *Glassman v. Arlington Cnty.*, 628 F.3d 140, 148 (4th Cir. 2010); *Am. Atheists v. Detroit Downtown Dev. Auth.*, 567 F.3d 278, 291 (6th Cir. 2009); *Ams. United for Sep. of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 424–25 (8th Cir. 2007).

In any event, there is no need for the Court to make any sort of intrusive inquiry into the religious operations of individual schools. The New Hampshire Constitution and the decisions interpreting it only require the Court to determine whether the Program will provide funding to religious institutions that can be used for religious education. The plaintiffs submitted voluminous evidence with their initial filing — supplemented by substantial additional evidence with this filing — that makes plain and indisputable that religious schools in New Hampshire present religious curricula, mandate religious activities, and often discriminate on the basis of religion in admissions or hiring. *See* Exs. 27–37, 62, 92–93. Based on a general review of this evidence, the Court can simply confirm these commonly known facts without going any further.

The cases cited by the intervenors and their *amici* in support of their federal argument are inapposite or bad law. In *Colorado Christian University v. Weaver ("CCU")*, 534 F.3d 1245, 1258, 1261 (10th Cir. 2008), the statute in question discriminated among different kinds of religious institutions and required state officials to undertake very intrusive inquiries into the religious operations of individual religious institutions. Moreover, dictum in *CCU* appears to be in tension with the rulings of the First Circuit in cases such as *Eulitt*, 386 F.3d 344, and following such dictum could put New Hampshire courts in conflict with the governing federal circuit and subject State of New Hampshire officials to conflicting legal rules. *Taxpayers for*

Public Education v. Douglas County School District, No. 11CA1856, 2013 WL 791140 (Colo. Ct. App. Feb. 28, 2013), a divided intermediate state appellate decision where a petition for certiorari to the state supreme court is pending, likewise appears to be in tension with U.S. Supreme Court and First Circuit precedents.

The plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, is not controlling because it did not garner a majority, and none of the other Justices agreed with the plurality's proposed legal rules. In *New York v. Cathedral Academy*, 434 U.S. 125, 132–33 (1977), the Court struck down a statute that required reimbursement of religious schools for expenses incurred in performing certain state-mandated services, in part because determining which services were secular and thus reimbursable would have required state officials to engage in extremely detailed and intrusive audits, for each school, of the religiosity of each curricular item and activity for which reimbursement was sought. And *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), concerned the provision of state services to disabled students instead of cash that went into the coffers of religious schools, did not involve any state constitutional interest, and predated the U.S. Supreme Court's decision in *Locke*, 540 U.S. 712.

For reasons similar to those applicable to the federal constitutional arguments, nothing in the New Hampshire Constitution precludes invalidation of the Program. *Cf.* Int. Br. at 32; Int. Supp. Br. at 36 n.36. The free-exercise clause of Article 5 of Part I merely prohibits the State from affirmatively interfering in religious practice; it does not require the State to subsidize religious activities. Likewise, the equal protection clause of Article 6 of Part I merely prohibits discrimination *among* religious groups. *Warde v. Manchester*, 56 N.H. 508 (1876), cited by the intervenors, only held that a city could not discriminate between different religious groups in granting tax exemptions, and in any event predated the enactment of Article 83's no-aid clause.

VIII. The Tax Credit Program also violates the taxing clauses of the New Hampshire Constitution.

In response to the plaintiffs' supplemental claim that the Tax Credit Program runs afoul of the State Constitution's various tax-equality clauses — Articles 10 and 12 of Part I and Articles 5 and 6 of Part II — the State argued that the Program passes muster under these clauses because the General Court had non-religious purposes for enacting the Program. State Br. at 35–36. But to determine whether a tax credit meets muster under these clauses, the question is not just whether it had a benign motive, but whether it actually "advance[s] a public purpose." *See N. Country Envtl. Servs. v. State*, 157 N.H. 15, 26 (2008); *In re Opinion of the Justices*, 95 N.H. 548, 550 (1949). And in *The Property Tax Credit Case*, 109 N.H. at 581–82, the New Hampshire Supreme Court determined that "support [of] sectarian education" "is not a public purpose" with respect to the tax-equality clauses.

Moreover, the Program fails to serve a public purpose not only because it would fund religious education, but also because it would fund inadequate education. A number of New Hampshire's religious schools use materials published by the religious publishers Bob Jones University Press and A Beka Book, which present students with teachings that appear to be contrary to state educational standards and accepted scientific and historical understandings. *See* Ex. 42 at 21–22; *compare* Ex. 62 *with K-12 Science Literacy New Hampshire Curriculum Framework* (2006), at 13, 40, 66, 70, 78–79, 83, 89–90, *available at* www.education.nh.gov/instruction/curriculum/science/documents/framework.pdf; *see also* Deanna Pan, *14 Wacky 'Facts' Kids Will Learn in Louisiana's Voucher Schools*, Mother Jones (Aug. 7, 2012), http://www.motherjones.com/blue-marble/2012/07/photos-evangelical-curricula-louisiana-tax-dollars; Rachel Tabachnick, *Vouchers/Tax Credits Funding Creationism*,

Revisionist History, Hostility Toward Other Religions, Talk to Action (May 25, 2012, 8:41 AM), http://www.talk2action.org/story/2011/5/25/84149/9275.

IX. Relief requested.

The intervenors suggest that instead of enjoining the whole Program, the Court could allow the Program to operate insofar as it funds out-of-district public schools and homeschooling. Int. Br. at 36. But limiting the relief in such a manner would not be proper, for it would constitute a drastic rewrite of the statute, and there is no reason to believe that the General Court would have enacted such a dramatically different program. *See Balke v. City of Manchester*, 150 N.H. 69, 73 (2003); *Claremont Sch. Dist. v. Governor (Statewide Property Tax Phase-In)*, 144 N.H. 210, 217–18 (1999). Moreover homeschooling is often itself religious. *See* Ex. 61.

For the foregoing reasons, the plaintiffs respectfully ask the Court to issue a decree declaring the Program unconstitutional in its entirety, and permanently enjoining the defendants from taking any action to implement the Program, including approving any Program scholarship-organization applications, approving Program tax-credit applications, allowing or awarding any Program tax credits, or reducing any state adequacy payments to local school districts. As the NEO plans to start awarding scholarships as early as June 15 (Ex. 63 at 17; Ex. 64 ¶ 10), the injunction should be made effective immediately upon the issuance of the decree, notwithstanding the pendency of any appeal or time to appeal.

Respectfully submitted,

By: _____ Date: April 18, 2013
Alex J. Luchenitser

Ayesha N. Khan (member, D.C. Bar; appearing *pro hac vice*)
Alex J. Luchenitser* (member, D.C. Bar; appearing *pro hac vice*)
*Lead counsel
Randall Maas (member, Massachusetts Bar; supervised by Luchenitser; appearing *pro hac vice*)
Americans United for Separation of Church and State
1301 K St. NW, Suite 850E
Washington, DC 20005
Phone: (202) 466-3234 ext. 207
Fax: (202) 898-0955
khan@au.org
luchenitser@au.org
maas@au.org

Barbara R. Keshen (NH Bar No. 1361)
New Hampshire Civil Liberties Union
18 Low Avenue
Concord, NH 03301
Phone: (603) 224-5591
barbara@nhclu.org

Daniel Mach (member, D.C. Bar; appearing *pro hac vice*)
Heather L. Weaver (member, D.C. Bar; appearing *pro hac vice*)
ACLU Foundation Program on Freedom of Religion and Belief
915 15th Street, NW, Suite 600
Washington, DC 20005
Phone: (202) 675-2330
Fax: (202) 546-0738
dmach@aclu.org
hweaver@aclu.org

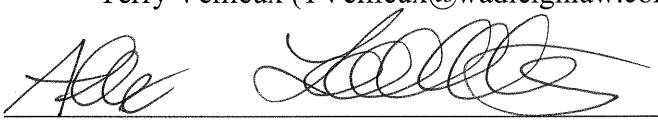
CERTIFICATE OF SERVICE

I hereby certify that, on or before April 18, 2013, I caused to be served copies of the foregoing Reply Memorandum, supporting exhibits 42–97, and Proposed Final Decree by e-mailing:

Richard Head (Richard.Head@doj.nh.gov)
Mary Ann Dempsey (MaryAnn.Dempsey@doj.nh.gov)
Francis C. Fredericks, Jr. (Francis.FredericksJr@doj.nh.gov)
Patrick J. Queenan (Patrick.Queenan@doj.nh.gov)
Jane Watt (Jane.Watt@doj.nh.gov)

On or before the same date, I caused copies of the same documents to be served upon counsel for intervenor-defendants Network for Educational Opportunity, et al., by e-mailing:

Dick Komer (rkomer@ij.org)
Tim Keller (TKeller@ij.org)
Kyndra Griffin (KGriffin@ij.org)
Eugene Van Loan (evan@wadleighlaw.com)
Michael Tierney (MTierney@wadleighlaw.com)
Terry Veilleux (TVeilleux@wadleighlaw.com)



Alex J. Luchenitser (member, D.C. Bar; appearing *pro hac vice*)
Americans United for Separation of Church and State
1301 K St. NW, Suite 850E
Washington, DC 20005
Phone: (202) 466-3234 ext. 207
Fax: (202) 898-0955
luchenitser@au.org