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Brief Amicus Curiae of the Honorable Margaret W. Hassan Governor of the State of New Hampshire in Support of the Plaintiffs/Cross-Appellants

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STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE No. 2013-0455

BILL DUNCAN, et al.

v.

STATE OF NEW HAMPSHIRE, et al.

RULE 7 MANDATORY APPEAL FROM A JUDGMENT OF THE
STRAFFORD COUNTY SUPERIOR COURT

**BRIEF *AMICUS CURIAE* OF THE
HONORABLE MARGARET W. HASSAN
GOVERNOR OF THE STATE OF NEW HAMPSHIRE
IN SUPPORT OF THE PLAINTIFFS/CROSS-APPELLANTS**

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January 13, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RELEVANT CONSTITUTIONAL PROVISIONS 1

STATEMENT OF INTEREST OF AMICUS 2

STATEMENT OF THE CASE..... 3

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Notwithstanding Permissive Federal Precedent Interpreting the Federal Establishment Clause, the New Hampshire Constitution Clearly Prohibits the Use of Public Funds to Subsidize Student Scholarships to Religious, Non-public Schools. 6

II. The Superior Court Correctly Concluded That the Monies Made Available to Schools Through RSA § 77-G are Monies “Raised by Taxation” Within the Meaning of Article 83. 9

III. RSA § 77-G Downshifts Education Expenses to Local Property Taxpayers and Undermines the State’s Ability to Meet Its Other Obligations in Coming Years. 12

CONCLUSION..... 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

<u>Canaan v. District</u> , 74 N.H. 517 (1908)	10
<u>Eyers Woolen Co. v. Town of Gilsum</u> , 84 N.H. 1, 146 A. 511 (1929).....	11
<u>Morrison v. Manchester</u> , 58 N.H. 538, 1879 WL 4100 (1879)	10
<u>Muzzy v. Wilkins</u> , Smith (N.H.) 1 (1803)	16
<u>Opinion of the Justices</u> , 109 N.H. 578 (1969).....	11
<u>State v. Ball</u> , 124 N.H. 226 (1983)	8
<u>State v. U.S. & Canada Express Co.</u> , 60 N.H. 219, 1880 WL 10588 (1880)	10

Statutes

N.H. REV. STAT. ANN. § 77-A	10
N.H. REV. STAT. ANN. § 77-E	10
N.H. REV. STAT. ANN. § 77-G	passim
N.H. REV. STAT. ANN. § 77-G:2.....	13
N.H. REV. STAT. ANN. § 77-G:4.....	14
N.H. REV. STAT. ANN. § 77-G:8.....	13
N.H. REV. STAT. ANN. § 9:2	11
N.H. REV. STAT. ANN. § 9:3	10

Constitutional Provisions

N.H. CONST. part I, art. 6.....	2, 7, 9
N.H. CONST. part II, art. 41	2, 9
N.H. Const. part II, art. 83.....	passim

RELEVANT CONSTITUTIONAL PROVISIONS

New Hampshire Constitution, Part I, Article 6:

As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And 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.

New Hampshire Constitution, Part II, Article 83:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: *Provided, nevertheless*, 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. Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

STATEMENT OF INTEREST OF AMICUS

Governor Margaret Hassan has served as Governor of the State of New Hampshire since January 3, 2013. As Governor, she is responsible for protecting the many rights and immunities enshrined in the New Hampshire Constitution. She also is responsible for enforcing its many obligations and limitations on government. Among these is an obligation to ensure that revenues generated through the taxation of New Hampshire citizens be put to constitutionally appropriate uses.

The New Hampshire Constitution explicitly prohibits the use of “money raised by taxation”—i.e. public funds—for the benefit of “the schools or institutions of any religious sect or denomination,” N.H. CONST. part II, art. 83 (“Article 83”); see also N.H. CONST. part I, art. 6 (“Article 6”) (affirming that “no person shall ever be compelled to pay towards the support of the schools of any sect or denomination”). In the Governor’s view, the superior court correctly concluded that the education tax credit program enacted under N.H. REV. STAT. ANN. (“RSA”) § 77-G violates this prohibition. Consistent with her responsibilities under the New Hampshire Constitution, and in the best traditions of previously elected leaders, the Governor files this amicus brief to explain her position on this important constitutional ruling and to urge this Court to affirm it. See N.H. CONST. part II, art. 41 (“Article 41”).

STATEMENT OF THE CASE

On January 9, 2013, eight New Hampshire residents and a New Hampshire business entity challenged the constitutionality of the tax credit program enacted pursuant to RSA § 77-G in an action seeking injunctive and declaratory relief. The State and four intervenors (three individuals and a New Hampshire non-profit business entity) defended.

In an order dated June 17, 2013, the superior court (Lewis, J.) held that the program violates Article 83 insofar as it permits organizations authorized to receive donations subsidized by the tax credit to use those donations to fund student scholarships to religious, non-public schools. Order at 40. In so ruling, the court concluded, over the defendants' objections, that the plaintiffs had standing to press their claims. Id. at 14-20. The court also concluded, over objections by the plaintiffs and the defendant-intervenors, that the program could continue to operate constitutionally so long as the revenue it generates is not used to fund student scholarships to religious, non-public schools. Id. at 40-44. The State and defendant-intervenors have filed timely appeals, and the plaintiffs have filed a timely cross-appeal.

STATEMENT OF FACTS

The Governor adopts and incorporates by reference the Statement of Facts set forth in the answering brief of the plaintiffs/cross-appellants.

SUMMARY OF ARGUMENT

The Governor confines her argument in this amicus brief to whether the superior court correctly concluded that the education tax credit program enacted under RSA § 77-G violates Article 83 insofar as it permits organizations authorized to receive donations subsidized by the credit to use those donations to fund student scholarships to religious, non-public schools. In the Governor's view, the superior court's finding of unconstitutionality was correct.

In its text, structure, and history (including its interpretive history), the New Hampshire Constitution significantly differs from the First Amendment's Establishment Clause with respect to the question whether revenue generated through taxation—i.e., public funds—may be used to subsidize student scholarships to religious, non-public schools. Accordingly, more permissive federal court precedents interpreting the Establishment Clause should have little bearing on this question. Under the New Hampshire Constitution, the answer to the question is “no”; public funds may not be used to subsidize student scholarships to religious, non-public schools. Public financial support of religious schools would not only violate the constitutional rights of New Hampshire taxpayers who do not wish their tax dollars to subsidize the operation of such schools, but it also would necessitate additional public regulation of the affairs of religious schools.

Either way, the result would be a dangerous state entanglement in religion that is inconsistent with New Hampshire's Constitution and traditions.

The question therefore becomes whether the superior court correctly concluded that revenue raised and appropriated through the tax credit program enacted pursuant to RSA § 77-G constitutes "money raised by taxation" within the meaning of Article 83. The superior court's conclusion was correct. The monies made available to schools through RSA § 77-G are monies raised by taxation. The legislature has appropriated a portion of New Hampshire's tax dollars to pay for scholarships to religious schools through the tax credit program. Any other conclusion would require this Court to bless a formalistic and functionally meaningless distinction between tax dollars appropriated directly by the State, and tax dollars directed to religious schools through the tax credit program legislation. Such a crabbed reading of the Article 83 guarantee would jeopardize both the hallowed underpinnings of religious tolerance and freedom, and the prohibition against entanglement made sacred by our New Hampshire Constitution. This Court should not vindicate a formalism that would enable an easy end-run around a basic constitutional limit on the power of the State with respect to taxpayer funds.

Finally, the violation of Article 83 occasioned by RSA § 77-G is no mere technical breach of the wall of separation between church and state. The Governor views tax incentives as appropriate tools of public policy when

revenues are allocated to constitutional uses. Moreover, nothing prevented individuals or businesses from contributing to private religious schools of choice—and from enjoying the federal tax benefits of such contributions—before RSA § 77-G was adopted, and nothing prevents them from doing so now. Yet § 77-G creates a vehicle by which substantial sums of public revenue raised through the taxation of New Hampshire citizens would be diverted to religious, non-public institutions. Such a financially imprudent diversion of scarce tax dollars would undermine the State’s ability to meet its other obligations in the coming years, including the provision of an adequate education for all New Hampshire children; providing New Hampshire’s civil and criminal justice systems with adequate resources to ensure the delivery of justice in New Hampshire; and maintaining the health, safety and well-being of New Hampshire’s citizens.

The superior court’s order should be affirmed.

ARGUMENT

I. Notwithstanding Permissive Federal Precedent Interpreting the Federal Establishment Clause, the New Hampshire Constitution Clearly Prohibits the Use of Public Funds to Subsidize Student Scholarships to Religious, Non-public Schools.

In relevant part, the First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” The quoted text constitutes the entirety of the federal Constitution’s religion

clauses—i.e., its Establishment and Free Exercise Clauses. The federal Constitution makes no mention of public funding for religious schools or institutions. Thus, federal Establishment Clause precedent setting limits on what legislatures may do in connection with directing public funds to religious schools and institutions has developed over time as a species of constitutional common law, unmoored from the federal Constitution’s less-than-illuminating text.

The text of the New Hampshire Constitution is far more specific on this issue. Indeed, two separate provisions explicitly express an unwillingness on the part of New Hampshire citizens to see public funds directed to religious schools or institutions. Article 6, titled “Morality and Piety,” states:

As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And 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.

N.H. CONST. part 1, art. 6 (emphasis supplied).

Moreover, Article 83, titled “Encouragement of Literature, Etc.” in relevant part states:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, 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.

N.H. CONST. part. II, art. 83 (emphasis supplied).

Given the profound textual differences between the federal and state constitutions, it is evident that permissive federal court precedents interpreting the Establishment Clause should have little bearing on this Court's analysis of the principal question raised by these cross-appeals. The text of the New Hampshire Constitution makes it plain that public subsidies raised through the taxation of New Hampshire citizens cannot be used to defray the costs of attending religious, non-public schools. Significantly, this constitutional prohibition protects both secular and religious interests. Obviously, it protects the rights of those who do not want their tax dollars to subsidize religious education. But by foreclosing an entanglement that surely would bring additional public oversight and regulation, it also safeguards the liberty of religious schools and institutions themselves.

Many provisions of the New Hampshire Constitution are more protective of constitutional liberty than corresponding provisions in the United States Constitution. See State v. Ball, 124 N.H. 226, 232-33 (1983) (collecting examples). This Court must accord such provisions their proper scope and breadth as a matter of New Hampshire constitutional law. Indeed, the Court has forcefully stated that to do otherwise would constitute a failure to safeguard the federalism that is so cherished by the New Hampshire citizenry. See id. at 231. Articles 6 and 83 of the New Hampshire Constitution are far more protective of constitutional liberty than the Establishment Clause of the United States Constitution. The Court should recognize them as such.

II. The Superior Court Correctly Concluded That the Monies Made Available to Schools Through RSA § 77-G are Monies “Raised by Taxation” Within the Meaning of Article 83.

The superior court ruled that RSA § 77-G effectively appropriates “public funds,” or “money raised by taxation,” when it grants tax credits to offset business donations to approved scholarship organizations. Order at 26. The Governor—who is constitutionally responsible for the “faithful execution of the laws,” Article 41—strongly endorses the superior court’s well-reasoned ruling. This Court should affirm that providing tax credits against the business profits and business enterprise taxes constitutes an expenditure of “money raised by taxation” pursuant to Article 83.

The program enacted by RSA § 77-G permits businesses to pay a portion of their due and owing taxes—i.e., the “public funds” for which they are legally responsible—to a legislatively approved entity for a legislatively desired purpose instead of paying those taxes directly to the State. Either way, the funds in question are “public funds” that may be used only for specific, state-designated purposes. Under no circumstances are these funds available to the donor businesses for private uses.

By statute, the state budgeting process involves projecting the “expenditure needs of the government” and identifying “the means through which such expenditures will be financed,” RSA § 9:3, I(a), including “estimated revenues . . . on the basis of existing laws,” RSA § 9:3, I(c). Existing laws include the business profits tax, RSA § 77-A, and the business enterprise tax, RSA § 77-E. The General Court passed these laws, and the then-sitting Governors signed them into law, in order to raise revenues to meet the State’s obligations in a responsible manner.

To find that the funds generated by these tax credits are not “money raised by taxation” would require the indulgence of a meaningless formalism that ignores New Hampshire’s long-standing tradition of treating tax credits and exemptions as equivalent to tax expenditures. See Morrison v. Manchester, 58 N.H. 538, 1879 WL 4100, *14 (1879) (declaring that a tax “exemption is an expenditure of public money”); State v. U.S. & Canada Express Co., 60 N.H. 219, 1880 WL 10588, *36 (1880) (“The generation by

whom the constitution was adopted understood the state could pay a sum of money to an individual, for a public purpose, by exempting him from the payment of the same amount of tax.”); Canaan v. District, 74 N.H. 517, 537 (1908) (declaring that “all exemptions from taxation are practically equivalent to a direct appropriation”); Eyers Woolen Co. v. Town of Gilsum, 84 N.H. 1, 146 A. 511, 516 (1929) (“A special tax exemption is one form of appropriating public money.”); Opinion of the Justices, 109 N.H. 578, 579, 581-82 (1969) (finding bill that would allow \$50.00 property tax credit to parents of children attending a nonpublic school unconstitutional because it constituted public funds that could be contributed to non-secular schools). Indeed, the Governor is aware of no New Hampshire case law suggesting that tax credits are anything other than the expenditure of public funds.

This longstanding treatment of tax credits as expenditures of public funds recognizes the reality that state government relies on revenues generated through taxation to fulfill its duties and obligations. In discharging her obligation to prepare balanced biennial state budgets pursuant to RSA § 9:2, the Governor must account for all legally obligated expenditures, including those that will be accomplished through tax credits. A legislative act that directs public funds away from the State for a designated state-directed purpose is functionally indistinguishable from a legislative expenditure of funds already in the State’s treasury. Both use publicly designated funds to accomplish a state-directed purpose, and both

constitute the expenditure of “public funds” or “money raised by taxation.” Pursuant to the program enacted by RSA § 77-G, money that would otherwise be flowing directly to the State is diverted for the very specific and direct purpose of providing scholarships to students at non-public schools, including religious schools.

The Court should not vindicate a formalism that would enable an easy end-run around a basic constitutional limit on the power of the State with respect to taxpayer funds. It should affirm the superior court’s conclusion that the tax credits authorized by RSA § 77-G are monies “raised by taxation” within the meaning of Article 83.

III. RSA § 77-G Downshifts Education Expenses to Local Property Taxpayers and Undermines the State’s Ability to Meet Its Other Obligations in Coming Years.

As set forth above, RSA § 77-G fails constitutional scrutiny under Article 83 insofar as it functions to channel tax dollars to scholarships that benefit religious schools. Moreover, this constitutional violation is no mere technical breach of the wall of separation between church and state. While the Governor applauds the creative use of tax incentives as appropriate tools of public policy when revenues are allocated to constitutional uses, RSA § 77-G would divert substantial sums of public revenue to religious schools. The effect would be to place even greater burdens on local property taxpayers and to undermine the State’s ability to meet its other obligations, such as the provision of an adequate education to all New Hampshire children; providing

New Hampshire's civil and criminal justice systems with adequate resources to ensure the delivery of justice in New Hampshire; and maintaining the safety and well-being of New Hampshire's citizens.

The Governor has a duty to be fiscally responsible; she must ensure the efficient and proper use of tax dollars for legitimate public purposes. RSA § 77-G would greatly undermine this task. If permitted to go into full effect, it would result in multi-million-dollar losses to local school districts. Such losses would be a consequence of the reductions in state adequacy aid to public schools that the program mandates. See New Hampshire Department of Education Projections, Plaintiffs' Appendix at 1377, 1380, 1384, 1388–89; see also id. at 79. These losses to local districts would be many times greater than the initial, modest savings the program might generate at the state level, see id. at 1377, 1380, 1388–89, and will accrue over at least 16 years, see RSA § 77-G:2, I(b).

Moreover, these losses are unlikely to fall evenly across the State. Given the nature of the program, school districts in which religious schools are located will likely be more significantly affected by student transfers and the consequent loss of adequacy funding. RSA § 77-G does not take into any account whatsoever the inability of school districts that will be most harmed to make up their losses through additional local property taxation. Although the tax credit program provides for stabilization grants in RSA § 77-G:8, such grants do not sufficiently offset losses in adequacy funding. See RSA 77-G:8,

I. Moreover, the stabilization grants must be funded somehow, and there is no mechanism to raise additional monies to fund such grants (which will undoubtedly require additional taxpayer dollars). While the program is projected to last more than 16 years, the partial hold-harmless grants to school districts last no more than four years. Compare RSA § 77-G:2, I(b) with RSA § 77-G:8, I. Thus, a school district whose second grader transfers away as a result of the program loses the adequacy funding associated with that child when she reaches sixth grade. RSA § 77-G:8, I. This loss is hardly offset by cost savings achieved from the departure of a single student from a class of, say, 20. Application of RSA § 77-G over time would negatively impact local public schools and taxpayers.

Moreover, the burden on New Hampshire taxpayers resulting from the diversion of tax dollars would be substantial. New Hampshire has a unique and carefully guarded taxing scheme. The education tax credit program would permit the diversion of \$3.4 million in taxes in 2013 and \$5.1 million in 2014, with the opportunity for the total to escalate in future years pursuant to RSA § 77-G:4, II-III. If certain conditions are met, the State could experience a diversion of more than \$30 million in taxes by 2022 and more than \$300 million by 2033. See Plaintiffs' Appendix at 54. Permitting such a diversion of scarce taxpayer resources would undermine the State's ability to discharge its fiscal responsibilities.

Nothing prevented individuals or businesses from contributing to

private religious schools of choice—and from enjoying the federal tax benefits of such contributions—before RSA § 77-G was adopted, and nothing prevents them from doing so now. In fact, private donations enable such schools to offer scholarships directly to students who would otherwise not be able to afford the education. But public funds cannot and should not be put to the same use.

The Governor treasures the diversity of private schools in our state, and fully appreciates their contributions to tolerance and learning. But the decision to contribute to a private religious school is a personal decision. It should not be supported by the State's tax structure, and it should not have the effect of diverting scarce taxpayer dollars from crucial public needs. The superior court's finding that RSA § 77-G violates Article 83 should be affirmed.

CONCLUSION

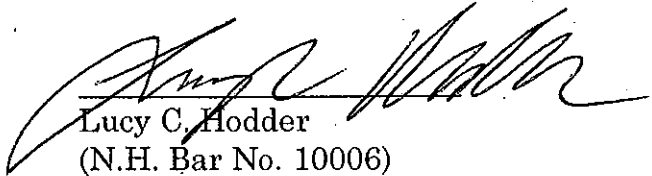
More than two centuries ago, this Court recognized:

[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.

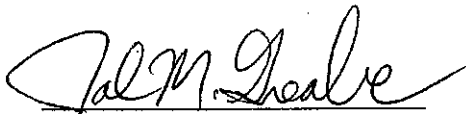
Muzzy v. Wilkins, Smith (N.H.) 1, 9 (1803) (citations omitted). The tax credit program enacted by RSA § 77-G fails to honor this foundational principle of New Hampshire constitutional law. The superior court understood this and correctly held that the Program violates Part II, Article 83 of the New Hampshire Constitution.

Respectfully submitted,

Counsel for the Governor,



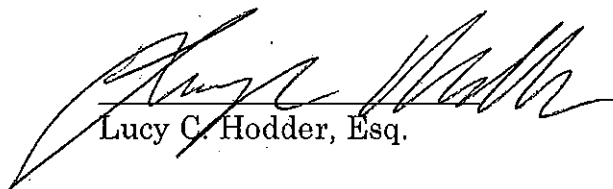
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CERTIFICATE OF SERVICE

I hereby certify that two true and exact copies of the foregoing have been served upon counsel for the parties in this matter, Richard W. Head, Esq., for the State of New Hampshire, and Richard D. Komer, Esq. and Michael J. Tierney, Esq., counsel for the Intervenors, this 13th day of January, 2014 by U.S. Mail, postage prepaid. I further certify that a true and exact electronic copy of the foregoing has been served upon counsel for all parties and *amici*, by PDF e-mail this 13th day of January, 2014.



Lucy C. Hodder, Esq.