THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2013-0455

Bill Duncan *et a*.

v.

State of New Hampshire *et a*.

RULE 7 APPEAL FROM THE
STAFFORD COUNTY SUPERIOR COURT

BRIEF OF THE CATO INSTITUTE, ANDREW J. COULSON, AND JASON M. BEDRICK AS *AMICI CURIAE* SUPPORTING DEFENDANTS AND INTERVENORS

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INTEREST OF *AMICI CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Andrew J. Coulson directs the Cato Institute's Center for Educational Freedom and is author of *Market Education: The Unknown History* (Transaction Books, 1999), a comparative review of school systems from classical Greece to modern America, England, Canada, and Japan. He has also produced the most comprehensive worldwide review of the statistical research comparing alternative school systems (*Journal of School Choice*, Vol. 3, No. 1, 2009). Coulson has written extensively about education tax credit programs for many years.

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This case is of central concern to *amici* because the freedom of choice in education would be seriously injured if this lawsuit succeeds and it affects a broad range of educational tax credits and deductions at the state and national level.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred by not construing the 1877 amendment to Part II, Article 83 of the New Hampshire Constitution—prohibiting the use of "money raised by taxation" at sectarian schools—based on its original understanding, which was that it applied only to actual tax revenues.

2. Whether the trial court erred in deeming the money exempted from taxation under the Education Tax Credit program a government expenditure within the scope of Part II, Article 83, thereby applying the type of tax expenditure analysis rejected by the U.S. Supreme Court and other state supreme courts.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

(text set forth in addendum)

N.H. Const. pt. I, art. 6

N.H. Const. pt. II, art. 83

RSA 72:23, V

RSA 77-A:4, XII

RSA 77-G:2

RSA 77-G:3

2102 N.H. Laws ch. 287:1, 1-II

STATEMENT OF THE CASE

Plaintiffs raised a number of constitutional challenges to RSA 77-G (the "Education Tax Credit program" or "the program") in the trial court. More particularly, Plaintiffs argued that the program violated Part I, Article 6's language that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination"; Part II, Article 83's language 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"; and Part I, Articles 10 and 12, and Part II, Articles 5 and 6. The trial court based its decision exclusively on Part II, Article 83.

The purpose of the Education Tax Credit program is to provide parents with meaningful choices in exercising "their basic right to educate their children as they see fit," to better allow "all children . . . the opportunity to receive a high quality education," and to improve the overall quality of education in New Hampshire by "promoting healthy competition." 2012 N.H. Laws ch. 287:1, I-II. The program works as follows: Businesses-taxpayers can receive a credit against their business profits tax and/or business enterprise tax of 85 percent of the donations made to "scholarship organizations" ("SOs"), up to a maximum of $400,000.00. The SOs use these donations to provide scholarships to "eligible students." These scholarships must have an average value of $2,500.00 and are to be used to defray the students' cost of tuition at the "qualified school" of their choice. Qualified schools include nonpublic schools, public schools outside of the students' district, and homeschooling.

The law caps the amount of credits at $3.4 million in the first year, so donations made after the cap is reached are not tax deductible. As a frame of reference, for the 2011-2012 school year the New Hampshire Department of Education's website reports state spending on elementary and secondary education was $2.8 billion. *State Average Cost Per Pupil and Total*

Expenditures 2011-2012, *http://www.education.nh.gov/data/documents/ave_pupil11_12.pdf*. So the maximum credits available under the program during its first year represent approximately 0.1% of state spending on elementary and secondary education.

Despite the program's lack of any government expenditures, the trial court ruled that the program "must be deemed to be violative of the No-Aid Clause of Part II, Article 83 of the New Hampshire Constitution" because "[t]he program has been shown to have 'money raised by taxation' inevitably go toward educational expenses at nonpublic 'religious' schools without restriction regarding how the money may be used." *Duncan v. New Hampshire*, No. 219-2012-CV-00121 (N.H. Super. Ct. 2013), *infra*, at 40. The trial court ruled that the program was severable as to these "religious schools," and that the program could otherwise continue. *Id.* at 41-42.

What the trial court refers to as "the No-Aid Clause of Part II, Article 83" was an 1877 amendment to Part II, Article 83.

SUMMARY OF THE ARGUMENT

This appeal requires this Court to interpret the 1877 amendment to Part II, Article 83 of the New Hampshire Constitution. How that amendment is to be interpreted is settled. This Court has consistently said that the words of a constitutional provision are to be given the meaning they must be presumed to have had to the electorate when the vote was cast, *see, e.g., Bd. of Trustees of N.H. Judicial Retirement Plan v. Sec'y of State*, 161 N.H. 49, 53 (2010) (quoting *N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r*, 133 N.H. 17, 21 (1990)). Stated more succinctly, the 1877 amendment means what it was originally understood to mean.

Thus, the trial court correctly construed the meaning of the 1877 amendment only if the amendment's scope was originally understood to extend beyond Catholic schools *and* only if the phrase "money raised by taxation" was originally understood to include not just tax revenues, but also the tax exemptions that existed in 1877. While *amici* agree with the Intervener-Defendants that the trial court erred in denying that the 1877 amendment was specifically directed at and limited to Catholic schools, this brief will focus on the second question.[1]

Amici begin this brief by showing that the trial court erred in failing to interpret the phrase "money raised by taxation" based on its original understanding, which was that the amendment applied only to tax revenues and not to extant tax exemptions to Catholic schools. We then show that the trial court erred in interpreting certain *Opinions of the Justices* as precedent for using "tax expenditure analysis" to interpret the phrase "money raised by taxation." Finally, we illustrate why this Court should not apply tax expenditure analysis in this case.

ARGUMENT

I. THE ORIGINAL UNDERSTANDING OF THE 1877 AMENDMENT TO PART II, ARTICLE 83 WAS THAT IT APPLIED ONLY TO TAX REVENUES

A. The Trial Court Failed to Consider the Original Understanding of the Phrase "Money Raised by Taxation" in the 1877 Amendment to Part II, Article 83.

When interpreting a constitutional provision, this Court looks to its purpose and intent in the context of its wording. *Board of Trustees of the New Hampshire Judicial Retirement Plan v. Secretary of State*, *supra,* 161 N.H. at 53 (citing *Warburton v. Thomas,* 136 N.H. 383, 386-87 (1992)). The words of the constitutional provision are given the meaning they must be presumed

[1] *Amici* also agree with the Intervener-Defendants that the trial court's application of Part II, Article 83 in this case violates the First and Fourteenth Amendments of the U.S. Constitution.

to have had to the electorate when the vote was cast. *Id.* (quoting *N.H. Munic. Trust Workers' Comp. Fund v. Flynn, Comm'r,* 133 N.H. 17, 21 (1990)).

Part II, Article 83 was amended, in 1877, by adding the language that is italicized:

> 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*.

While the trial court considered the parties' arguments whether the 1877 Amendment to Part II, Article 83 was directed specifically at Catholics, *see Duncan v. New Hampshire*, *infra*, at 55-59, it did not consider an equally dispositive question: whether the 1877 Amendment, which involves "money raised by taxation," was understood to apply to the extant property tax exemptions for Catholic schools, *see Warde v. Manchester*, 56 N.H. 508 (1876) (upholding property tax exemption to Catholic girls school). In other words, even if, as the trial court incorrectly concluded, the 1877 Amendment was not specifically directed at Catholics, it still should not be construed as applicable to this case if the voters did not understand the 1877 Amendment to apply to the extant property tax exemptions for Catholic schools.

The trial court's assertion that the phrase "money raised by taxation" should reflect "our State's liberal cognizance of taxpayer injury," and eschew any "overly-formalistic and unrealistic concept of public expenditures," *Duncan v. New Hampshire*, *infra*, at 51 (citing *Clapp v. Jaffrey*, 97 N.H. 456, 461 (1952)), clearly does not apply this Court's established canons for interpreting

the New Hampshire Constitution. Under the trial court's approach the meaning of Part II, Article 83 could be changed by legislation modifying the state's standing requirements. Indeed, it is only the recent legislative modification of that statute in response to this Court's decision in *Baer v. New Hampshire Department of Education*, 160 N.H. 727, 730 (2010), where this Court overruled *Clapp* and various other "liberal cognizance of taxpayer injury" cases, that allows plaintiffs to assert that they have standing to bring this case.

The trial court's interpretation of the 1877 amendment to Part II, Article 83 cannot stand because all of the historical evidence indicates that the amendment was not understood to apply to the extant property tax exemptions for Catholic schools and other religious institutions, but rather applied only to tax revenues.

B. The Original Understanding of the Phrase "Money Raised by Taxation" in the 1877 Amendment to Part II, Article 83 Was That It Meant Tax Revenues.

1. Background: *Warde v. Manchester*

The year before the voters amended Part II, Article 83, this Court decided *Warde v. Manchester*, 56 N.H. 508 (1876). *Warde* involved the constitutionality of a property-tax abatement for a Catholic girls school in Manchester. It is unclear whether this Court upheld the abatement because it did not violate Part I, Article 6 or because Part II, Article 83's duty to cherish seminaries trumped Part I, Article 6. But what is important is that this Court, just one year before Part II, Article 83 was amended, found property-tax abatements for Catholic schools constitutional.

If the amendment had been understood to encompass a wider swath of the tax universe than tax revenues, we would have seen the City of Manchester subsequently deny the Catholic girls school's property-tax exemption, and other municipalities similarly deny exemptions to

their Catholic schools. Indeed, under the trial court's construction of the 1877 amendment, we would have seen Protestant schools lose their property-tax exemptions as well. As discussed by the Intervener-Defendants in their brief, in 1877 there were numerous private colleges and academies of various Protestant denominations, such as Dartmouth College, Phillips Exeter, Atkinson, Chesterfield, Gilmanton, Haverhill, Kimball Union, and Pembroke Academies.

None of these "religious schools" lost their property-tax exemptions, however. *See Trustees of Phillips Exeter Acad. v. Exeter*, 90 N.H. 472 (1940); *Sisters of Mercy v. Town of Hooksett*, 93 N.H. 301 (1945); *see also Appeal of Emissaries of Divine Light*, 140 N.H. 552 (1995). Clearly, the understanding of the voters who passed the 1877 amendment was that it only applied to tax revenues.

2. The Constitutional Convention

This Court considers a delegate's statements in determining the meaning of an amendment if they interpret the amendment's language "in accordance with its plain and common meaning while being reflective of its known purpose or object." *Bd. of Trustees of N.H. Judicial Retirement Plan v. Sec'y of State*, 161 N.H. at 55 (citation omitted). The statements made regarding the No-Aid Clause confirm that the understanding of the voters who passed the amendment as evidenced by their actions was that the amendment only applied to tax revenues.

Delegate Hall, who was from Manchester, the site of the *Warde* case, made the following remarks in introducing the amendment:

> I think the object of this amendment will be apparent to every member of the committee. 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. I do not propose now, Mr. Chairman, to offer any argument to show the necessity of this amendment at the present time. It is enough to say, Mr. Chairman, that the causes which in other states have operated to give millions of the people's money to sectarian schools and institutions are operating here. Twenty-two states in this Union have seen the necessity, or the wisdom, of adopting similar amendments to their Constitutions. I think it would be wise for the state of New Hampshire to anticipate that danger, and at this time to put the provision I have suggested into her Constitution. It has been said here, Mr. Chairman, that we should offer no amendments that are not simple and practicable. 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. I do not know, sir, that the wording of this amendment which I have offered is the best, or that the place in which I propose to put it is the best; but I would like to have the committee adopt it, that it may go before the suitable committee and receive further consideration.

Journal of Constitutional Convention, 124-25 (June 10, 1964).

Hall clearly was referring only to tax revenues. He stated the amendment's purpose was to prevent the "appropriation" of any money raised by taxation and that he wanted to prevent the "diversion" of any tax money "paid by the people of the state." As discussed by the Intervener-Defendants in their brief, this is exactly what Hall had accomplished in Manchester just a few years earlier, ending the municipal practice of paying the salaries of Catholic school administrators and teachers at 12 schools.

Subsequent colloquy confirms that the delegates understood and intended that the amendment only applied to tax revenues. Delegate Smith from Peterborough sought to clarify Hall's text by referring specifically to "public revenue" in the following proposed amendment:

> By substituting in place thereof, the following: "No public property, and no public revenue of the state or any municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institutions, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds or tenets shall be read or taught in any school or institution, supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair the rights of property already vested."

Id. at 126.

Hall's rejoinder was that Smith's proposed amendment did not change Hall's original amendment in any way. In other words, Hall's amendment only applied to tax revenues:

> I believe that any amendment which we may propose touching on this question, should be in the fewest words and of the simplest character. I cannot see that the amendment offered by the gentlemen from Peterborough changes the force of the amendment which I offered in any way, or improves it. I think you will find, upon examination, that that which I offered covers the whole ground. There is no necessity of referring to the question of the Bible, or of property. It simply provides that, hereafter, no money raised by taxation shall ever be applied to sectarian schools, and it seems to me that it does it in simple and straightforward language, such as the people can all understand.
>
> Upon the question being stated, the amendment to the amendment was rejected.
>
> Whereupon the amendment of Mr. Hall of Manchester was adopted.

Id. at 127-28.

In sum, all of the historical evidence indicates that the voters who amended Part II, Article 83 in 1877 did not understand the amendment to apply to the extant tax exemptions to Catholic schools, but rather the extent of the amendment's scope was tax revenues.

II. THE TRIAL COURT ERRED BY APPLYING TAX EXPENDITURE ANALYSIS TO THIS CASE

A. Tax Expenditure Analysis

The trial court ruled that business donations to SOs are "'public funds' or 'money raised by taxation,'" under Part I, Article 6 and Part II, Article 83, to the extent that the donations qualify for the Education Tax Credit. *Duncan v. New Hampshire*, *infra* at 52. The trial court reasoned as follows:

> Contrary to the State's assertion that "the government has not set aside revenue for a specific purpose" it appears to the Court that is exactly what the legislature has done. Money that would otherwise be flowing to the government is diverted for the very specific purpose of providing scholarships to students.

Id. at 53 (citation omitted).

This reasoning reflects "tax expenditure analysis," which was defined by Professor Peter D. Enrich of Northeastern University School of Law, as "a tax program or statutory provision that serves the same functions as direct governmental spending in furtherance of a specific legislative policy."[2] The trial court asserted that in applying tax expenditure analysis it was not employing a novel mode of constitutional review, but rather that this Court has employed tax expenditure analysis in cases analogous to this case. *Duncan v. New Hampshire*, *infra*, at 53. This Court, however, has not employed tax expenditure analysis to determine whether a statute violates either Part I, Article 6 or Part II, Article 83.

B. This Court Has Not Applied Tax Expenditure Analysis to Determine Whether a Statute Violates Either Part I, Article 6 or Part II, Article 83.

The trial court largely relied on two advisory opinions—*Opinion of the Justices,* 106 N.H. 180 (1965) (hereinafter "*1965 Opinion of the Justices*"), and *Opinion of the Justices*, 109 N.H. 578 (1969) (hereinafter "*1969 Opinion of the Justices*")—for its conclusion that education tax credits are "public funds," or "money raised by taxation." This reliance is misplaced.

To begin with, *1965 Opinion of the Justices* involved neither Part I, Article 6 nor Part II, Article 83. This Court was deciding whether legislation under which a corporation could gift an "industrial facility" to the state or a political subdivision and then lease the facility exempt from property taxes, violated the constitutional prohibition against "any town to loan or give its money or credit *directly or indirectly* for the benefit of any corporation." 106 N.H. at 183 (quoting N.H. Const., pt. 11, art. 5) (emphasis added). Thus the decision did not discuss a tax exemption and the "directly and indirectly" language the question was decided on has no parallel in Article 83.

[2] *Expert Report of Professor Peter D. Enrich* (*Plaintiff's Exhibit 44*) at 1.

The trial court cites the *1965 Opinion of the Justices* to support its tacit adoption of tax expenditure theory, arguing that the case supports the proposition "that 'relieving' entities from paying certain taxes may indeed qualify as a form of public funds for private purposes." *Duncan v. New Hampshire*, *infra*, at 50. Although language in *1965 Opinion of the Justices* may resemble tax expenditure theory, 106 N.H. at 185 ("In such a case the lessee, as compared with other industries within the taxing district, might be relieved of payment of its just share of the public expense and so indirectly receive the benefit of money which the town or county would otherwise receive from taxes."), the decision merely reflects this Court's well-established case law regarding special exemptions.

New Hampshire courts have often analyzed tax exemptions for individuals or privileged groups as an expenditure of public funds in ensuring that exemption from taxation, just like the imposition of taxation, satisfies the constitutional command "that taxation be just, uniform, equal, and proportional." *Smith v. N.H. Dep't of Revenue Admin*., 141 N.H. 681, 686, (1997); *see also State v. U.S. & Canada Express Co.*, 60 N.H. 219, 252 (1880) ("To the extent of its inequality, a disproportional division of public expense is an uncompensated and unauthorized transfer of private property, for a private purpose, from those who bear more than their shares of the common burden to those who bear less than their shares.") (quoting *Morrison v. Manchester*, 58 N.H. 538, 550 (1879)); and *Opinion of the Justices*, 88 N.H. 484, 489 (1936) ("As a corollary to the prohibition against taxation to aid a private purpose, legislation resulting in or leading to taxation therefor is also invalid. The legislature may not exercise or delegate its taxing power for private benefit through the indirect expedient of an exemption.") (citations omitted); and *Opinion of the Justices (Current Use Reimbursement Program)*, 137 N.H. 270, 275 (1993) ("If there is a just reason for the classification of taxable property, and the proposed selection is not arbitrarily

made or for the sole purpose of preferring some taxpayers to others it will be upheld.") (citations and quotations omitted). However, this approach is specifically limited to special exemptions.

General exemptions, on the other hand, which are "an exercise of the power of classification" given to the legislature, have never been subject to this "public funds" analysis. *See Opinion of the Justices*, 95 N.H. 548, 501 (1949) ("If the proposed bill is a general exemption from property taxes . . . there is no question as to its validity.") General exemptions, unlike special exemptions, are constitutional because they fall under the "legislature['s] broad power to declare property to be taxable or non-taxable based upon a classification of the property's kind or use, but not based upon a classification of the property's owner." *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. at 686 (1997); *see also Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1, 16 (1929) ("[T]he constitution confers legislative power to select the objects for taxation by a process of reasonable classification. Such classification 'is a part of the state policy of taxation.'") (quoting *Opinion of the Justices*, 82 N.H. 561, 572 (1927)).

While this Court's case law does at times discuss special exemptions in terms of "public funds," these cases do not establish that this Court views all exemptions as "public funds." To the contrary, the reason these tax exemptions are "public funds" is that they are personal and not general exemptions. *See Morrison v. Manchester*, 58 N.H. 538, 550 (1879) ("Such non-payment is, in effect, a compulsory payment of money, by those who bear their shares of the common burden, to the privileged person who does not bear his share. It is, in law and in fact, as much a subsidy, paid by the former to the latter, as if it were a subsidy in form and in name."); *State v. U.S. & Canada Express Co.*, 60 N.H. 219, 251 (1880) ("If one contributes more than his share, some other one necessarily contributes less than his share; and if one pays less than his share,

somebody else necessarily pays more than his. Each one's payment of his share is not merely his constitutional duty; it is the constitutional right of his neighbors.") (citations omitted).

The Education Tax Credit program is manifestly a general exemption. The program is "part of the state policy of taxation," *Eyers Woolen Co*., *supra*, 84 N.H. at 8, available to every business. And whereas "[a] special exemption is a favor granted to a particular party," *id.*, the program forbids donors from receiving indirect benefits by earmarking funds: "No business organization or business enterprise shall direct, assign, or restrict any contribution to a scholarship organization for the use of a particular student or nonpublic school." RSA 77-G:3.

Only *1969 Opinion of the Justices* involves either Part I, Article 6 or Part II, Article 83, but it was not decided under these provisions. While the opinion does discuss Part II, Article 83, this Court declared Senate Bill 319 unconstitutional not because the exemption constituted "money raised by taxation," but because the exemption was based on a characteristic of the taxpayer, not the property: "permitting a $50 tax exemption on residential real estate to be granted to persons having one or more children attending a nonpublic school would produce *unconstitutional discrimination*." 109 N.H. at 581 (emphasis added).

This Court would not have used the term "unconstitutional discrimination" if it had been deciding the question based upon Part II, Article 83. The use of the term indicates that the provision was found unconstitutional because it was a special exemption that inappropriately selected taxable property based on the characteristics of the property owner. *See*, e.g, *Opinion of the Justices (Current Use Reimbursement Program)*, 137 N.H. at 275.

The advisory opinion most pertinent to this case is *Opinion of the Justices*, 142 N.H. 95 (1997). There, this Court was asked to opine on the constitutionality of a bill "provid[ing] . . . a new construction property tax exemption for industrial uses," which would "be a specified

percentage of the increase in assessed value attributable to construction of new structures, and additions, renovations or improvements to existing structures." *Id.* at 96, 97. This Court held that the exemption was constitutional because it was a general and not a special exemption:

> The bill before us provides for a tax exemption, not the expenditure of public funds for private purposes. The primary object of the bill is not to aid and benefit private persons for private ends, but, rather, to benefit the public at large by increasing the resources of the State and its taxable property through the establishment of new industries. *Cf. Eyers Woolen Co*., 84 N.H. at 16-17, 146 A. at 519 (particular law applicable to one party only in his private capacity cannot be classified as general exemption).

142 N.H. at 101.

The Education Tax Credit program is every bit as much a general exemption as the exemption in the 1997 *Opinion of the Justices*. The availability of both is determined by the type and use of the taxable property, not any characteristic of the taxpayer, while the program's purpose involves "[p]romot[ing] the general welfare by expanding educational opportunities for children," 2012 N.H. Laws ch. 287:1, II(b), a duty mandated by Part II, Article 83 and thus as legitimate a purpose as the purpose of promoting economic growth.

C. This Court Should Not Apply Tax Expenditure Analysis Here.

1. Tax Expenditure Analysis: Controversy and Implications

The trial court's holding that the program's tax credits constitute "money raised by taxation," relies heavily upon the "tax expenditure analysis" of Professor Peter D. Enrich of the Northeastern University School of Law, who defines a "tax expenditure" as "a tax program or statutory provision that serves the same functions as direct governmental spending in furtherance of a specific legislative policy."[3]

According to Enrich, the concept dates back to a speech given by Professor Stanley Surrey of Harvard Law School in 1967. An academic concept that appeared 90 years after the

[3] *Expert Report of Professor Peter D. Enrich* (*Plaintiff's Exhibit 44*) at 1.

1877 amendment obviously would not have informed the voters' understanding of the amendment. This is reason enough to eschew tax expenditure analysis.

But even if one were inclined to regard tax expenditure analysis as a legitimate method of interpreting constitutional provisions that predate the concept, there is still the problem that there are different approaches to tax expenditure analysis. One of the earliest and foremost critics of the concept, Professor Boris I. Bittker of Yale Law School, wrote in 1969 that tax expenditure analysis necessarily entails the drawing of "debatable lines" such that "every man can create his own set of 'tax expenditures,' but it will be no more than his collection of disparities between the income tax law as it is, and as he thinks it ought to be." Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 Nat'l Tax J. 244, 260 (1969).

The malleability of tax expenditure analysis is illustrated by the lack of agreement between the proponents of tax expenditure analysis on standards for determining which tax provisions should be classified as expenditures and which should not. As Professor Edward A. Zelinsky of the Yeshiva University Cardozo School of Law explains:

> The quandaries of defining tax expenditures arise not simply at the margins, but rather at the very core of the concept. We thus find adherents of tax expenditure analysis still debating among themselves how to define tax expenditures—nearly two generations after the concept was introduced.

Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 Yale L.J. Online 25, 28 (2011), http://yalelawjournal.org/2011/05/26/.html.

Adopting the trial court's tax expenditure analysis would have consequences reaching far beyond this case. Professor Enrich's report states that tax expenditure analysis applies not just to tax credits, but to deductions, and exemptions as well.[4] This, of course, would render

[4] *Expert Report of Professor Peter D. Enrich* (*Plaintiff's Exhibit 44*) at 3, 6.

unconstitutional New Hampshire's longstanding property tax exemptions for charitable organizations that happen to be religious, RSA 72:23, V, and the business profits tax deduction for contributions to charitable organizations that happen to be religious, RSA 77-A:4, XII, because these exemptions and deductions would constitute "money raised by taxation."

Such sweeping change to New Hampshire's tax policy should come from the political branches, not the judiciary, and the political branches expressly rejected tax expenditure analysis when establishing the Education Tax Credit program. "Credits provided under this chapter shall not be deemed taxes paid for the purposes of RSA 77-A:5, X." RSA 77-G:3.

The trial court noted the attempt by the dissent in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (hereinafter "*Killian*") to confine the application of tax expenditure analysis as the plaintiffs seek to do here. *Killian* involved a challenge to Arizona's education tax credit law, which provided tax credits up to $500.00 to individual taxpayers who donated to scholarship organizations that funded students attending nonpublic schools. Arizona has two provisions in its constitution similar to Part II, Article 83:

> The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

Ariz. Const. art. II, § 12.

> No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

Ariz. Const. art. IX, § 10.

The *Killian* plaintiffs also used tax expenditure analysis to argue that tax credits were an "appropriation of public money made in aid of [a] private or sectarian school" in violation of the state constitution. Arizona's supreme court unequivocally rejected this argument:

> [N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

Killian, 972 P.2d at 618.

The dissent attempted to distinguish between education tax credits and so-called "neutral deductions," like property tax exemptions for charitable organizations and tax deductions for donations to charitable organizations:

> [The education tax credit law] is a direct government subsidy limited to supporting the very causes the state's constitution forbids the government to support. Unlike neutral deductions, the credit is not the state's passive approval of taxpayers' general support of charitable institutions. Thus, there is no philanthropy here, no neutrality, and no limitation to secular use.

Id. at 642-43 (Feldman, J., joined by Moeller, J., dissenting). But what the *Killian* dissenters raise is the proverbial distinction without a difference, one that would not support confining tax expenditure theory to just the tax credits at issue in this case.

The so-called "neutral deductions" are no more limited to secular uses than the credits in the Education Tax Credit program. In both instances, the State encourages private philanthropy for a public purpose through the use of tax reductions while remaining neutral among the providers of the charitable or educational service, secular or religious. If anything, the so-called "neutral deductions" are less neutral than the education tax credits. The latter are limited to businesses funding scholarship recipients who may or may not attend a religious school, while

the former can be claimed for donations *directly* to houses of worship and religious schools or, in the case of property tax exemptions, by the religious organizations themselves.

Moreover, New Hampshire's education tax credit law differs from Arizona's in two key aspects. First, while Arizona's education tax credit is worth 100 percent of qualified donations, A.R.S. § 43-1089:A, the New Hampshire education tax credit is worth only 85 percent.[5] RSA 77-G:3. A New Hampshire business that donates to a scholarship organization therefore spends more money than it would have had it chosen not to donate. In other words, there is still "philanthropy here." Second, while the Arizona scholarships may only be redeemed at a private school, A.R.S. § 43-1089:E, New Hampshire scholarships recipients may also use them at out-of-district public schools or to cover certain qualified homeschooling expenses. RSA 77-G:2. Despite the more limited nature of the Arizona program, that state's supreme court rejected the notion that the program's funds were "limited to supporting the very causes the state's constitution forbids the government to support" because the scholarships served a secular public purpose and recipients could use them at any number of schools. *Killian*, 972 P.2d at 642.

To the extent that the plaintiffs argue that this Court need not extend tax analysis expenditure any further than the circumstances of this case, such a request calls for the type of outcome-oriented judging that this Court eschews. The only basis for such line-drawing is to reach the result that plaintiffs seek in this case—ending the Education Tax Credit program without ending the property tax exemption and charitable deductions. There is no non-political rule of decision that would result in such a determination. That is, there is no neutral legal principle under which the Education Tax Credit program is unconstitutional, but the same schools that cannot benefit from the Education Tax Credit program can constitutionally be

[5] Plaintiffs argue that after taking other deductions, some corporate donors may pay as little as 4 percent more than their original tax liability, but concede that they always pay more than their original tax liability.

exempted from paying property taxes. Nor is there any neutral legal principle under which charitable donations that could benefit these schools would remain constitutional.

2. The U.S. Supreme Court Has Unequivocally Rejected Tax Expenditure Analysis.

The U.S. Supreme Court unequivocally rejected "tax expenditure analysis" in *Arizona Christian School Tuition Org. v. Winn*, 131 S.Ct. 1436, 1448 (2011) (hereinafter "*Winn*"). *Winn* involved a challenge on Establishment Clause grounds to the same education tax credit law as was challenged in *Killian.* The majority held that the petitioners did not have standing because they "challenge[d] a tax credit as opposed to a governmental expenditure." 131 S.Ct. at 1437.

The U.S. Supreme Court recognized in *Winn* what the trial court failed to recognize here, that there is a crucial legal distinction between tax credits and government expenditures notwithstanding their economic similarity from the point of view of public economists:

> It is easy to see that tax credits and governmental expenditures can have similar economic consequences . . . . Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. . . . When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. . . . And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

Id. at 1447.

Stated more succinctly, economic equivalence does not imply legal equivalence. The Education Tax Program's tax credits do not implicate plaintiffs in supporting the religious activities that they oppose, as would appropriations. In the words of the *Winn* Court, the trial court's tax expenditure analysis improperly "assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. . . . Private bank accounts cannot be equated with the . . . State Treasury." *Id*. at 1448.

By contrast, the trial court quoted the *dissent* in *Winn* to support the idea that there are no substantive differences between so-called "targeted tax breaks" and government expenditures:

> Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.

Id. at 1450 (Kagan, J., dissenting). The *Winn* dissent later states that a "targeted tax break" is "otherwise called a 'tax expenditure,'" *Id*. at 1452, which the dissent defines in a footnote as "monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment." *Id*. at 1452 n.1. This definition, which the majority rejected, is simply a variation on the *Killian* dissent's attempt to distinguish tax credits from "neutral deductions," and fails for the same reasons. The beneficiaries of the education tax credit program (low-income families) are no more "particular" than the beneficiaries of the property tax exemptions for charitable organizations or deductions for contributions to such organizations. Indeed, the *Winn* dissent itself concedes the equivalence, noting that "'[w]hen the Government grants exemptions or allows deductions' to some, we have observed, 'all taxpayers are affected; the very fact of the exemption or deduction . . . means that other taxpayers can be said to be indirect and vicarious 'donors.'" *Id*. at 1457 (citing *Bob Jones Univ. v. United States*, 461 U. S. 574, 591 (1983)).

In other words, the education tax credit program is not "targeted" to any "particular" individuals or organizations—and to the extent that it is, then so are other longstanding tax breaks for charitable organizations and their donors.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court.

Respectfully submitted,

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COMPLIANCES

I hereby certify that every question presented for review in this brief was presented in appellants' notices of appeal or was contained within the questions presented in appellants' notices of appeal. I hereby certify that the decision appealed is in writing and is reproduced beginning after the addendum. I hereby certify that at the request of counsel for the parties to this case copies of this brief were emailed on the date below to counsel for parties of this case.

November 12, 2013

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ADDENDUM

Constitutions

Ariz. Const. art. II, § 12

> Section 12. The liberty of conscience secured by the provisions of this constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

Ariz. Const. art. IX, § 10

> Section 10. No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

N.H. Const. pt. I, art. 6

> 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 t he 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 a ny one sect, denomination or persuasion to another shall ever be established.

N.H. Const. pt. II, art. 83

> 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 t he 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.

Statutes

A.R.S. § 43-1089

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to section 43-401, subsection G during the taxable year to a school tuition organization that is certified pursuant to chapter 16 of this title at the time of donation. Except as provided by subsection C of this section, the amount of the credit shall not exceed:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. One thousand dollars in any taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

C. For each taxable year beginning on or after January 1, the department shall adjust the dollar amounts prescribed by subsection A, paragraphs 1 and 2 of this section according to the average annual change in the metropolitan Phoenix consumer price index published by the United States bureau of labor statistics, except that the dollar amounts shall not be revised downward below the amounts allowed in the prior taxable year. The revised dollar amounts shall be raised to the nearest whole dollar.

D. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

E. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

F. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer or if the taxpayer designates a student beneficiary as a condition of the taxpayer's contribution to the school tuition organization. The tax credit is not allowed if the taxpayer, with the intent to benefit the taxpayer's dependent, agrees with one or more other taxpayers to designate each taxpayer's contribution to the school tuition organization for the direct benefit of the other taxpayer's dependent.

G. For the purposes of this section, a contribution, for which a credit is claimed, that is made on or before the fifteenth day of the fourth month following the close of the taxable year may be applied to either the current or preceding taxable year and is considered to have been made on the last day of that taxable year.

RSA 72:23, V

V. The buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established.

RSA 77-A:4, XII.

XII. In the case of a business organization which makes qualified charitable contributions as defined in RSA 77-A:1, IX, or qualified research contributions as defined in RSA 77-A:1, X, the gross business profits of the organization shall be adjusted by:

(a) Adding to gross business profits the amount deducted under section 170 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX in arriving at federal taxable income; and

(b) Deducting from gross business profits an amount equal to the sum of the taxpayer's basis in the contributed property plus 50 percent of the unrealized appreciation, or twice the basis of the property, whichever is less.

RSA 77-G:2.

I. (a) An eligible student may receive a scholarship to attend (1) a nonpublic school, except when the student has been placed by the local school district through the special education process; or (2) a public school located outside of the school district in which the student resides and for which the public school is not eligible to receive an adequate education grant payment for the student in the current fiscal year, in an amount not to exceed the tuition cost of the public or nonpublic school. A home education student may also receive a scholarship to cover educational expenses. A student shall not receive a scholarship from more than one scholarship organization.

(b) The average value of all scholarships awarded by a scholarship organization, excluding eligible students who received scholarships for educational expenses related to home education only, shall not exceed $2,500. Beginning in the second year of the program, the commissioner of the department of revenue administration shall annually adjust this amount based on the average change in the Consumer Price Index for All Urban Consumers, Northeast Region, using the "services less medical care services'' special aggregate index, as published by the Bureau of Labor Statistics, United States Department of Labor. The average change shall be calculated using the calendar year ending 12 months prior to the beginning of program year. In each of the first and second program years, a scholarship organization shall award a minimum of 70 percent of all scholarships issued to eligible students as defined in RSA 77-G:1, VIII(a)(1) and (2) and, notwithstanding RSA 193-E:5, shall notify the department of education of the unique pupil identifier and date of birth for each of these students granted a scholarship by July 15. The required minimum percentage of all scholarships issued by a scholarship organization to eligible students as defined in RSA 77-G:1, VIII(a)(1) and (2) shall be reduced by 5 percent each program year for years 3 through 15 of the program, and, at the beginning of the sixteenth program year and every program year thereafter, there shall be no required minimum percentage of scholarships.

(c) The minimum value of a scholarship granted to a student receiving special education programs or services pursuant to RSA 186-C shall be 175 percent of the maximum average scholarship size as defined in subparagraph (b).

(d) At least 40 percent of the scholarships awarded by the scholarship organization to eligible students as defined in RSA 77-G:1, VIII(a)(1) and (2) shall be awarded to students who qualified for the federal free and reduced-price meal program in the final year they were in public school.

(e) A student shall reapply each year for a scholarship.

II. Scholarship organizations may meet the percentage requirements of subparagraphs I(b) and (d) if, pursuant to a mutual agreement, the organizations aggregate their scholarship data and the aggregated data shows compliance with the percentage requirements.

RSA 77-G:3.

7-G:3 Contributions to Scholarship Organizations. – For each contribution made to a scholarship organization, a business organization or business enterprise may claim a credit equal to 85 percent of the contribution against the business profits tax due pursuant to RSA 77-A, or against the business enterprise tax due pursuant to RSA 77-E, or apportioned against both provided the total credit granted against both shall not exceed the maximum education tax credit allowed. Credits provided under this chapter shall not be deemed taxes paid for the purposes of RSA 77-A:5, X. The department of revenue administration shall not grant the credit without a scholarship receipt. No business organization or business enterprise shall direct, assign, or restrict any contribution to a scholarship organization for the use of a particular student or nonpublic school. No business organization or business

enterprise shall receive more than 10 percent of the aggregate amount of tax credits permitted in RSA 77-G:4.

2102 N.H. Laws ch. 287:1, 1-II

I. The general court finds that:

(a) It has the inherent power to determine subjects of taxation for general or particular public purposes.

(b) Expanding educational opportunities and improving the quality of educational services within the state are valid public purposes that the general court may cherish using its sovereign power to determine subjects of taxation and exemptions from taxation.

(c) Ensuring that all parents, regardless of means, may exercise and enjoy their basic right to educate their children as they see fit is a valid public purpose that the general court may promote using its sovereign power to determine subjects of taxation and exemptions from taxation.

(d) Expanding educational opportunities and thereby promoting healthy competition is critical to improving the quality of education in the state and ensuring that all children have the opportunity to receive a high quality education.

II. The purpose of this act is to:

(a) Allow maximum freedom to parents and nonpublic schools to respond to and, without governmental control, provide for the educational needs of children, and this act shall be liberally construed to achieve that purpose.

(b) Promote the general welfare by expanding educational opportunities for children.

(c) Enable children in this state to achieve a higher level of excellence in their education.

(d) Improve the quality of education in this state, both by expanding educational opportunities for children and by creating incentives for schools to achieve excellence