THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 2013-0455

BILL DUNCAN, THOMAS CHASE, CHARLES RHOADES, REBECCA EMERSON-BROWN, THE REV. HOMER GODDARD, RABBI JOSHUA SEGAL, THE REV. RICHARD STUART, RUTH STUART, and LRS TECHNOLOGY SERVICES, LLC,
Plaintiffs-Respondents,

vs.

STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION, and NEW HAMPSHIRE DEPARTMENT OF EDUCATION,
Defendants-Appellants

&

NETWORK FOR EDUCATIONAL OPPORTUNITY, SHALIMAR ENCARNACION, and HEIDI AND GEOFFREY BOFFITTO,
Intervenor-Defendants/Appellants

BRIEF OF *AMICI CURIAE* ALLIANCE DEFENDING FREEDOM, CORNERSTONE POLICY RESEARCH, AND LIBERTY INSTITUTE

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INTEREST OF THE *AMICI*

Alliance Defending Freedom ("ADF") is a non-profit public interest organization devoted to defending, protecting, and advocating religious freedom—goals it pursues by providing strategic planning, training, and funding to attorneys and organizations seeking to protect religious civil liberties. ADF has been directly or indirectly involved in over 500 legal matters involving religious expression, including at the United States Supreme Court, the federal and state courts across the country, as well as in tribunals around the world. For well over a decade, ADF has advocated for the equal treatment of religious individuals and institutions under law, and has also defended governments against overbroad application of the Establishment Clause of the First Amendment.

ADF has also specifically been involved in litigation involving school vouchers and tax credit programs such as the one at issue in this case. ADF was heavily involved in a similar Arizona case that was litigated for eleven years, *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); it represented the Arizona Christian School Tuition Organization as a Defendant-Intervenor. This case therefore significantly concerns ADF because it implicates the right of states to enact tax credit scholarship programs to provide educational choice, even where some beneficiaries of the program are families who choose to use the funds they receive from the scholarship organizations for their child to attend a religious school.

Cornerstone Policy Research ("CPR") is a non-profit organization whose mission is to strengthen and defend New Hampshire families by educating and equipping its citizens and advocating for God-ordained institutions throughout the state. CPR advances this mission by researching and educating, producing policy reports, promoting responsible citizenship, and promoting unity among pro-family groups. The right to religious liberty is among the most

important of the traditional, foundational principles of New Hampshire, and of this great Nation, CPR seeks to defend and preserve.

Liberty Institute is a non-profit, public interest law firm dedicated to the preservation of America's religious liberty. Liberty Institute provides pro bono legal advice and representation to churches and religious schools that are discriminated against because of their religious viewpoints.

The outcome of this case and its application of Part 1, Article 6 and Part 2, Article 83 of the New Hampshire Constitution to religious schools are important to Liberty Institute because these will have an important precedential effect on the extent to which churches and religious schools that Liberty Institute advises may participate in neutral benefit programs.

ARGUMENT

Plaintiffs have challenged New Hampshire's newly enacted Education Tax Credit Program under two provisions of the state constitution: N.H. Const. pt. 1, art. 6 (hereinafter "Article 6"), which states that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination"; and N.H. Const. pt. 2, art. 83 (hereinafter "Article 83"), which provides that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." It is impossible for the Program to violate these provisions, among other reasons, given their historical meaning and interpretation. New Hampshire has historically supported religious schools, both as private institutions and as publicly funded institutions, notwithstanding these constitutional requirements. No New Hampshire court has ever interpreted these provisions to mean that religious schools are ineligible to participate in neutral aid programs such as this one, especially

one that does *not* directly involve taxpayer funds. Thus, Plaintiffs' claims under these provisions must fail as a matter of law.

I. New Hampshire's History Indicates that Direct Aid to Sectarian Public Schools Does Not Offend Part I, Article 6 of the New Hampshire Constitution.

The framers of New Hampshire's Constitution, as well as the state government for many years afterward, saw no apparent contradiction between Article 6's "compelled support" clause and using public money to fund religion in schools.

Shortly after the outbreak of the Revolutionary War, New Hampshire declared itself a free and independent state, and on January 5, 1776, the provincial congress of New Hampshire adopted what was probably the first written constitution of any of the original thirteen states.[1] That constitution was quite basic, and the need for revision was recognized in a few years. A constitutional convention was called in 1779 and in 1781. The proposed constitution drafted in 1781 was eventually ratified by the people in 1784. That revision contained the "Declaration of the Rights of People of New Hampshire," and included Article 6, which read as follows:

> As morality and piety, rightly grounded on evangelical 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 by the institution of the public worship of the Deity and of public instruction in morality and religion; therefore to promote these important purposes, the people of this state have a right to impower, and do hereby fully impower the Legislature to authorize from time to time, the several towns, parishes, bodies corporate or religious societies within this State to make adequate provision at their own expence, for the support and maintenance of public Protestant teachers of piety, religion, and morality.
>
> Provided notwithstanding, [t]hat the several towns, parishes, bodies corporate or religious societies, shall at times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no

[1] Charles B. Kinney, Jr., *Church and State: The Struggle For Separation in New Hampshire, 1630-1900* 119 (1955).

> person of any one particular religious sect or denomination, shall ever be compelled to pay toward the support of the teacher or teachers of another persuasion, sect, or denomination.
>
> And every denomination of [C]hristians demeaning themselves quietly and as good subjects of the State, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.
>
> And nothing herein shall be understood to affect any former contracts made for the support of the ministry, but all such contracts shall remain and be in the same state as if this Constitution had not been made.[2]

The original version of Article 6 therefore contained the same language as the present version, but also made clear that the state would continue to support the ministry as it had done prior to ratification of the constitution, that the people of the state believed that the teaching of religion in the schools was important and wished to allow for that, and that the teachers themselves should be religious. The status quo of established evangelical Protestantism was not altered by the new constitution, and was furthered by the fact that the 1784 constitution also required holders of elected office to be Protestant Christians.[3] This action was quite different than that taken in 1788 at the Federal Constitutional convention, where the convention voted that "Congress shall make no laws touching religion or to infringe the rights of Conscience," which was submitted with other resolutions for consideration by Congress at its initial session.[4]

The 1784 constitution required that the legislature consider constitutional revisions every seven years. Thus, in 1791, the first of these subsequent constitutional conventions was held. One of the first topics of discussion and debate was Article 6, but a proposal to eliminate it was defeated overwhelmingly. A revision was agreed upon to spell out the process for someone to

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[2] *Id.* at 123-24.
[3] *Id.*
[4] *Id.* at 126.

become released from supporting the local church and ministry, but this was rejected soundly by the people, as was a proposed revision eliminating the religious requirements for office.[5] Once again, the convention and the populace assumed that people should support religion, and saw no apparent contradiction between that and the "compelled support" clause of Article 6.[6]

Subsequent revisions were consistent with this. In 1850-1851, the constitutional convention proposed rewording Article 6 by replacing the first clause, "As morality and piety, rightly grounded on evangelical principles," with "As morality and piety, rightly grounded on the principles of the Bible," because it was thought that the language would be more acceptable to the small but growing numbers of Roman Catholics and non-evangelical Protestants in the state.[7] Similarly, a proposal was also made to drop the "Protestant" from the original, "public Protestant teachers," and to replace "every denomination of Christians" with "every religious denomination."[8] These changes, however, were all rejected by the people and Article 6 remained as originally written. It is thought that people continued to do this against the recommendations of the convention due to the growing fear among the people of the rising numbers of Catholics in the state. This coincides with the anti-Catholic Nativist and Know-Nothing movements spreading nationwide in the 1850s.[9] At the constitutional convention in 1876, Article 6 was again addressed, but a resolution to simplify Article 6 failed to pass, and the people rejected the convention's proposed change of eliminating the word "Protestant" in the Bill of Rights.[10] The people did, however, finally eliminate the religious test for public office.[11]

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[5] *Id.* at 128.
[6] *Id.* at 127.
[7] *Id.* at 130.
[8] *Id.*
[9] *Id.* at 133.
[10] *Id.* at 136.
[11] *Id.* at 137.

Article 6, in fact, remained as ratified in 1784, despite efforts at some subsequent conventions to revisit the issue, until 1968—nearly two hundred years. In 1968, the current language of Article 6 was ratified and became law.

What does this history indicate? That read in context, Article 6 cannot be interpreted to prohibit state aid to religious schools. Reading Article 6 as a whole shows that for nearly two hundred years, the people of New Hampshire viewed religion as both a benefit to, and a necessary part of, education. It is clear that it contemplated religion as an integral part of public life and education in New Hampshire. Article 6 eliminated the establishment of a state religion, in terms of a specific Protestant denomination, and therefore did not require individuals to contribute toward the denominational church or school. But that was not accomplished through secularizing public schools—it simply made the schools more generically Protestant.

To further examine Article 6 and its meaning, one must also look at the history of the public schools during this period. In 1789, the legislature first empowered the government to tax inhabitants for school purposes, placing the selection of teachers into the hands of the clergy.[12] For thirty years, the schools remained largely Congregationalist, despite Article 6 and increasing sectarianism.[13] In 1808, the legislature broadened the educational responsibilities of the tax-funded schools, and continued to require that teachers be qualified by members of the clergy.[14] At this point, it still would have been quite difficult for a non-Congregationalist to secure an appointment as a teacher.[15] In 1827, the legislature passed the School Act, which prohibited school committees from purchasing or using books in the schools which favored any particular

[12] *Id.* at 152.
[13] *Id.*
[14] *Id.* at 153.
[15] *Id.*

sect.[16] The Act still required teachers to be certified for "good moral character," which at this time could be read to mean the reflection of Protestant beliefs and values, but teachers were no longer required to be certified by the clergy.[17] Again, this change was not meant to excise religion from the schools—it was meant to make the schools more generically Protestant and therefore palatable to the growing numbers of Methodists, Baptists, Quakers, Episcopalians, and others who now inhabited New Hampshire. For instance, there was no contradiction seen between the School Act's prohibition on sectarian textbooks and the use of the Protestant Bible in the schools, which was required.[18] For the rest of the nineteenth century, the public schools in New Hampshire remained unabashedly Christian, and clearly Protestant in orientation.

Even after the 1968 revision to Article 6, religion was still permitted to permeate the public schools under New Hampshire law, with no apparent contradiction seen by either the legislature or the Supreme Court with Article 6. In 1967, the justices of the Supreme Court opined on the legality of a proposed state law that would allow Bible reading and the Lord's Prayer as part of morning exercises in public schools, and require the installation of plaques containing the national motto, "In God We Trust," in every public educational institution and classroom. *Opinion of the Justices,* 228 A.2d 161 (N.H. 1967).[19] The members of the Supreme Court surmised that the morning exercise provisions of the proposed law would likely violate the First Amendment of the Federal Constitution, but pointed to no New Hampshire law that it could violate, even though that was part of the question being asked. *Id.* The members of the Court again opined on a proposed 1973 law which allowed the recitation of the Lord's Prayer in public elementary schools, but once again failed to point out any state provision that the proposed law

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[16] *Id.* at 154.
[17] *Id.* at 154-55.
[18] *Id.* at 169.
[19] *See* Part III, *infra*, for discussion of the precedential value of advisory opinions.

would violate. *Opinion of the Justices,* 113 N.H. 297 (N.H. 1973). The legislature passed that law, and it is still on the books. N.H. Rev. Stat. Ann. §194:15a (2013).

The merits of whether publicly funded schools should teach religion, and whether it comports with the First Amendment of the United States Constitution, are different questions altogether, and have not been raised by Plaintiffs in this lawsuit. As to the question of whether Article 6 prohibits a tax credit scholarship program like the one at issue, given that citizens of New Hampshire had been compelled to support religion in *public* schools for 200 years notwithstanding Article 6, it is illogical to conclude that Article 6 provides any bar to the state enacting a neutral program like this one to tax credits to private businesses for voluntarily donating to scholarship organizations, which in turn select families to receive scholarships, which in turn select the private school for which they will use the scholarship money to attend. Given the history and context of Article 6 alone, Plaintiffs' claim under this constitutional provision must fail.

II. Even After Passage of New Hampshire's Blaine Amendment, Part II, Article 83 of the New Hampshire Constitution, the State Continued to Directly Aid Religious Schools.

In December 1875, James Blaine, a Congressman from Maine, introduced a proposed amendment to the Federal Constitution that would come to bear his name:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 556 (2003).

The Blaine Amendment was narrowly defeated and never became part of the Federal Constitution, but more than 30 states have some version of it in their own state constitutions today, some on their own initiative, and others because Congress required it of territories seeking statehood. *Id.* at 573. During the 1876 constitutional convention in New Hampshire, a proposed amendment was made to Article 83 of the constitution, inserting the clause, "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."[20]

The reasoning behind this amendment was clear. In New Hampshire, as was happening in the rest of the country, the population of Roman Catholics was growing from a tiny and insignificant minority to a more powerful and numerous one. In 1835, there were only 720 Catholics in the entire state of New Hampshire.[21] By 1880, there were almost 350,000.[22] This was concerning to the Protestant majority, to say the least.

Aside from their numbers alone, Protestants were also concerned because Catholics had begun arguing that as taxpayers themselves, their schools should be funded with tax dollars as well instead of forcing Catholic parents to contribute monetarily to the Protestant public schools their children did not attend. *Id.* at 560. They were also starting to oppose the religious practices and doctrines being taught in the public schools because of the conflict with their own beliefs.[23] Some Protestants were suspicious of the Catholics' refusal to attend the public schools, which they saw as foundational to the formation of upstanding citizens.[24]

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[20] *Id.* at 137.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 163-64.
[24] *Id.* at 166-67.

The motivation behind the federal Blaine Amendment, and undoubtedly behind New Hampshire's own version, was twofold:

> First, there was a high degree of hostility towards the teaching and practice of the Roman Catholic Church, and correspondingly there existed a strong desire to ensure that Catholics would be precluded from using the resources of the government to support their parochial schools and other religious institutions. Second, there was an almost imperative desire on the part of the proponents of the Blaine Amendment to protect generic Protestant religiosity in the common schools and the public square.

Id. at 602.

Thus, similar to Article 6, the people's understanding of Article 83 was not to strip religion from education or protect taxpayers from funding religion in the schools—it was to preserve the Protestant character of the educational system. It appears to be contradictory for supporters of the state or federal Blaine Amendment to be concerned about money falling into "sectarian" hands while at the same time seeking to ensure that taxpayer money continued to fund religion in the schools, but one must also recognize that the word "sectarian" had a different meaning in those days. As Justice Thomas pointed out in *Mitchell v. Helms*, in the 1870s, it was an "open secret that 'sectarian' was code for 'Catholic.'" 530 U.S. 793, 828 (2000). Again, Protestants in New Hampshire saw no conflict between the School Act's prohibition on purchasing "sectarian" books for use in the public schools and the mandated use of the Protestant Bible for devotion and instruction.[25] In short, Protestants believed that public schools were "non-sectarian" not because they were secular, but rather because they were generically Protestant. Against this history and context, Article 83 cannot be read to prohibit the state from enacting a program like the one at issue here. Far from ushering in a strict separation of religion,

[25] *Id.* at 169.

education, and taxpayer funds, one of its very purposes was to preserve the unquestionably religious nature of the taxpayer-funded schools.

III. No Courts in New Hampshire Have Ever Authoritatively Interpreted Either Part I, Article 6 or Part II, Article 83 to Prohibit the Participation of Religious Groups in Neutral Aid Programs.

No courts in New Hampshire have ever interpreted either constitutional provision at issue here to prohibit the participation of religious groups in neutral aid programs like this one. The only opinions located that analyze these provisions are advisory opinions, which are of little precedential import and do not support the Plaintiffs' claims.

The New Hampshire Supreme Court, unlike the United States Supreme Court, is permitted to give advisory opinions under N.H. Const. pt. 2, art. 74. An opinion of the justices does not amount to a judicial decision. *In re School-Law Manual,* 63 N.H. 574 (1885); *see also Opinion of the Justices,* 79 A. 490 (N.H. 1911). Opinions of justices are merely advisory opinions on the constitutionality of proposed legislation, and they are not entitled to weight equal to that given judicial decisions following full adversary process. *Schoff v. City of Somersworth,* 630 A.2d 783 (N.H. 1993). This is because in giving an opinion on a question propounded to them by the legislature, the justices are not acting as a court, but as the individual Supreme Court justices in an advisory capacity only. *Piper v. Meredith,* 251 A.2d 328, 329, (N.H. 1969); *see also Opinion of the Court,* 60 N.H. 585 (1881); *Opinion of the Justices,* 73 N.H. 625 (1906); *Opinion of the Justices*, 79 A. 490 (N.H. 1911); *Opinion of the Justices (Appointment of Chief Justice of the Supreme Court),* 842 A.2d 816 (N.H. 2003). As a result, an opinion of the justices on proposed legislation is not binding upon the court in case the proposed legislation should become law and a case should arise requiring its construction. *Opinion of the Justices,* 25 N.H. 537 (1852).

In 1955, the Supreme Court justices were asked to advise the legislature on the constitutionality, in light of Article 83, of a proposed law making state aid available to all hospitals—including religious hospitals—that offered nursing training. *Opinion of the Justices,* 113 A.2d 114 (N.H. 1955). The justices opined that the measure complied with Article 83. Noting that other constitutional provisions, including Article 6, which they said "provide[d] for the encouragement of instruction in religion," were of longer standing in the constitution than Article 83, they stated that they believed that what "was intended to be forbidden by the amendment of 1877 [Article 83] was support of a particular sect or denomination by the state, at the expense of taxpayers of other denominations or no denomination. It was not intended that members of a denomination be deprived of public benefits because of their beliefs." *Id.* at 116. While the justices' opinion as to what was meant to be proscribed by Article 83 is questionable, given the historical evidence that shows that Article 83 was intended to *further* taxpayer support of Protestant schools and institutions (and also depends on what is meant by the term "sect" or "denomination," as discussed *supra*), it is noteworthy that they believed at minimum that Article 83 was no bar to allowing religious institutions to become eligible for neutral aid programs.

In 1967, the justices were asked to give their opinions on the constitutionality of a proposed statutory amendment that would allow for the distribution of revenue received from sweepstakes races to public school districts and non-public schools, including religious schools. *Opinion of the Justices*, 233 A.2d 832 (N.H. 1967). Four of the justices thought that the law would be unconstitutional, but only under the First Amendment of the United States Constitution—they did not address Article 83, even though they were asked to. *Id.* at 833-37. One justice did address Article 83 in a separate statement, stating that it was his opinion that the proposed amendment did not violate Article 83 because the program had a public purpose

(furthering education), and because the sweepstakes money was not properly viewed as "money raised by taxation." *Id.* at 838. He also believed that the proposed law did not violate the First Amendment because it had a secular purpose and did not, as a primary effect, advance religion. *Id.*

Two years later, the Senate asked the justices to give their opinion on the constitutionality of a proposed bill authorizing school boards to furnish pupils in both public and non-public schools with school physicians, nurses, testing, and other necessary services, and a proposed bill authorizing cities and towns to grant a tax exemption of $50.00 per year on the residential real estate of any person having at least one child attending a nonpublic school. *Opinion of the Justices,* 258 A.2d 343 (N.H. 1969). With respect to the services bill, the justices stated that their analysis was guided by the reasoning of the 1967 opinion discussed above, which they said concluded that direct aid to sectarian education is prohibited by "both constitutions." *Id.* at 345. But, as pointed out above, in 1967, only one justice considered the state constitution in his opinion and the other four did not. They merely stated their belief, as the justices had in 1955, that Article 83 "was intended to prohibit support for sectarian education but was not intended to deprive members of a religious denomination of public benefits because of their beliefs." *Id.* at 346.

With respect to the tax exemption provision, the justices' analysis is cursory and unclear at best. While stating that they were using the test set forth in *Abington School District v. Schempp*, 374 U.S. 203 (1963), as their guide, they did not go on to apply it to the tax exemption provision. As in 1967, they also notably did not analyze the provision under Article 83. The test from *Schempp* mentioned by the justices was that the Establishment Clause of the First Amendment required that there be a "secular legislative purpose and a primary effect that neither

advances nor inhibits religion." *Id.* at 222. The justices concluded that the proposed legislation would produce "unconstitutional discrimination," but did not explain how or why, and did not apply the *Schempp* test.

There was also no recognition of the secular legislative purpose of the program, which would likely be to reimburse the parents of students who did not attend public schools a portion of funds paid by them to support schools which their children did not attend, not to provide any specific aid to "sectarian" schools. There was also no discussion of whether the primary purpose of the law would be to advance religion. Again, given the information about the proposed law, this is doubtful. The linchpin of the justices' opinion appears to be the statement that "it would make available to the parents funds which they could contribute directly to the nonpublic school, including parochial schools, without restricting the aid to secular education. While the amount of $50.00 may seem small, yet if the principle were upheld, the amount could be increased to a point whereby it could be used as a means of fully supporting such schools." 258 A.2d at 346. But this statement is directly at odds with a principle from *Brooks v. Franconia School District*, 61 A. 127 (N.H. 1905), a binding decision, cited by the justices in 1955: "If some denomination incidentally derives some benefit through the release of other funds for other uses, this result is immaterial." *Opinion of the Justices*, 113 A.2d at 116. Furthermore, the speculation that the funds could be increased at some point in the future to "fully support such schools" is unfounded and was improper, given that the justices are restricted from giving opinions on anything but the questions placed before them. N.H. Const. pt. 2, art. 74 does not authorize advisory opinions on questions which the body asking the advice has determined not to consider. *In re School-Law Manual,* 63 N.H. 574. Thus, the 1969 advisory opinion can hardly be considered as persuasive guidance, let alone binding authority, on the outcome of the questions at issue in this case.

Finally, in 1992, the justices were asked to assess, under Article 6, a proposed law that allowed a parent to send a child to a state approved school, which included religious schools, and required the local school district to pay up to 75% of the tuition for the school. *Opinion of the Justices (Choice in Education)*, 616 A.2d 478 (1992). The analysis there is even more cursory and is not instructive to this matter at all.

The justices cite an 1803 case for the principle that the New Hampshire Constitution "recognizes the fundamental separation between church and state," but as the rest of this brief has made clear, what was meant by that phraseology in 1803 was quite different than what it has come to mean in common parlance today. *Id.* at 480. The justices' assertion otherwise, therefore, is easily rebutted. Indeed, in *Warde v. City of Manchester*, decided 73 years later in 1876, the Supreme Court noted that "[n]otwithstanding by the policy of our fathers, as expressed in their bill of rights, Art. 6, the protestant religion is regarded with peculiar favor, still every denomination of Christians, demeaning themselves quietly and as good subjects of the state, is declared to be equally under the protection of the law." 56 N.H. 508 (1876). The famous case of *Hale v. Everett*, 53 N.H. 9 (1868), decided *after* ratification of Article 83 and which upheld the denial of a pulpit to a minister who confessed he did not believe in Christianity, illustrated that despite the New Hampshire Constitution and the Toleration Act of 1819, which eliminated the town-supported church, church and state in New Hampshire were *not* "irrevocably separated."[26] Instead, "[c]ourt decision after court decision reaffirmed the idea that New Hampshire was a Christian state. Indeed, there were many suggestions that the interpretation was even narrower, that New Hampshire was a Protestant stronghold."[27]

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[26] Kinney, *supra* note 1, at 117.
[27] *Id.*

Other than the pronouncement that the New Hampshire Constitution had somehow created clear separation between church and state, despite historical evidence to the contrary, the justices merely went on to cite the 1969 and 1955 opinions discussed here, and simply conclude that the proposed law "violates the plain meaning of part I, article 6." *Opinion of the Justices*, 616 A.2d at 480. That is the extent of the justices' analysis, and it provides no guidance for the present case, especially in light of its historical inaccuracy.

As there is no binding case law which has interpreted either Article 6 or Article 83 in such a way that would render the program at issue in this case at odds with them, Plaintiffs' claims must fail, as the program is clearly compatible with the historical understanding and consistent meaning of these provisions.

IV. New Hampshire Has a Long Tradition of Granting Tax Exemptions and Other Benefits to Religious Schools.

Aside from New Hampshire's lengthy history of providing taxpayer money directly for the teaching of religion in schools, notwithstanding its constitution, the state also has an extensive history of granting tax exemptions directly to religious institutions. Tax exemptions for churches, religious schools, and religious organizations predate the Republic. At least one commentator asserts that there is no historical starting point for examining church tax exemptions, because there is "no time before which churches were taxed and in which we can seek the reason for exemption." John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 Cumb. L. Rev. 521, 522 (1992) (citation omitted). Taxes and church tax exemptions have always co-existed and "tax exemption of church property is probably as ancient as taxation itself." *Id.* One of the earliest known examples of tax exemption for houses of worship dates back to 2800 B.C. in Ancient Sumeria. *Id.* Indeed, as the United States Supreme Court noted in *Walz v. Tax Commission of the City of New York*, "[f]ew concepts

are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times." 397 U.S. 664, 676 (1970). All 50 states have provided places of worship with tax exemptions, most of them by constitutional guarantees. *Id.*

New Hampshire is no exception. N.H. Rev. Stat. Ann. §72:23 (2013) grants tax-exempt status to "houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect," as well as all "buildings and structures of schools, seminaries of learning, colleges, academies and universities organized, incorporated or legally doing business in this state."

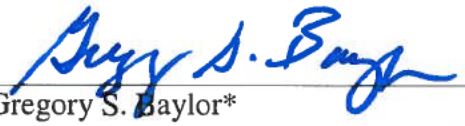
Exempting churches from taxation is undoubtedly a more direct and tangible benefit to religion than the attenuated link between state and religious schools in the program at issue here. Given that such tax exemptions have existed for centuries without running afoul of the state constitution or the federal Establishment Clause, it is inconceivable that a tax credit program like the one at issue here, which does not give tax credits directly to religious schools, could be inconsistent with Article 6 or Article 83.

CONCLUSION

Historical evidence shows that neither the framers nor the populace who ratified Article 6 and Article 83 believed that either provision required strict separation of church and state—or state and religious education—much less the exclusion of religious groups or individuals from neutral aid programs such as the one at issue in the present case. Article 6 was understood to perpetuate the strong Protestant religious influence in the public schools, and Article 83, borne of anti-Catholic animus, was understood to preserve that influence as well. Neither provision was ever seen as a means to excise religious influence from even the taxpayer-funded schools.

Moreover, the judiciary has never interpreted these provisions in such a way. It is difficult to see how it could have, given the long history of direct tax exemptions for religious organizations, a far more direct form of "aid" than the Education Tax Credit Program. The merits of whether the provisions *should* allow publicly funded schools to teach religion, and whether that comports with the First Amendment of the United States Constitution, are different questions altogether, and have not been raised by Plaintiffs in this lawsuit. Given the context that history provides for these two constitutional provisions, it is plain that the program is not unconstitutional under either one, and consequently, Plaintiffs' claims must fail.

Respectfully submitted,



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*Verified Applications for Pro Hac Vice Admission have been filed.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2013, I sent the foregoing document to the Clerk of the New Hampshire Supreme Court via overnight delivery at the following address:

New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Courtesy copies will go to counsel for all parties on November 13, 2013.

On the same day, I sent notification via e-mail of such filing to the counsel for the Defendants:

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Also on the same day, I sent notification via e-mail of such filing to the Plaintiffs' counsel:

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And also on the same date, I caused the same document to be served upon counsel for *Amicus Curiae,* by emailing:

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