IN THE SUPERIOR COURT FOR STRAFFORD COUNTY, NEW HAMPSHIRE

BILL DUNCAN, THOMAS CHASE, CHARLES RHOADES, REBECCA EMERSON-BROWN, THE REV. HOMER GODDARD, RABBI JOSHUA SEGAL, THE REV. RICHARD STUART, and RUTH STUART, Plaintiffs, vs. STATE OF NEW HAMPSHIRE, Defendant, NETWORK FOR EDUCATIONAL OPPORTUNITY, SHALIMAR ENCARNACION, GEOFFREY BOFFITTO, and HEIDI BOFFITTO, Intervenor-Defendants.	)	CIVIL ACTION 219-2013-cv-11

AMICUS BRIEF OF CONCORD CHRISTIAN ACADEMY, GRACE CHRISTIAN SCHOOL, ROMAN CATHOLIC BISHOP OF MANCHESTER, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AND NATIONAL ASSOCIATION OF EVANGELICALS

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Amici Concord Christian Academy; Grace Christian School; the Roman Catholic Bishop of Manchester, a corporation sole; the Association of Christian Schools International; and the National Association of Evangelicals, by and through their undersigned counsel, respectfully submit this amicus brief. Amici have obtained consent of all parties for the filing of this brief, and amici's assented to motion for leave to file this brief is pending before the Court.

PRELIMINARY STATEMENT

The New Hampshire General Court enacted a facially neutral statute designed to increase educational choices for New Hampshire families. This goal is good in itself, and also reasonably calculated to improve the overall quality of education in New Hampshire by means of competition. The record is absolutely devoid of any evidence of improper purpose by the legislature to "favor" or "sponsor" religion: its goal was that families be free to choose between real options.

No doubt many families will choose to use the scholarships offered under the program to offset in part the tuition costs of religiously affiliated schools. If so, it is neither the State's business nor its statutory policy to inquire into or penalize that choice. Further, if this program indirectly and as a result of free parental choices in some measure strengthens religiously affiliated schools, this is entirely consistent with New Hampshire's long tradition of "benevolent neutrality" towards religious institutions and schools, which have since the early days of the State benefited from property tax exemption. In return, religious motivations and religious bodies have been a key engine of educational expansion, diversity and excellence throughout New Hampshire's history, being responsible for the founding of innumerable schools and colleges throughout the Granite State.

Amici file this brief because these Plaintiffs' complaint reflects a very different spirit—a spirit of active animus against earnest religion, of distaste for the very existence of schools that teach within a religiously shaped context. The *sole* basis for Plaintiffs' attack on the New Hampshire Education Tax Credit Program ("Program") is that some parents may use scholarships to send their children to schools that are "too religious". Plaintiffs appear to be—and apparently hope that the Court will be—disturbed that schools founded by religious groups actually teach the faith they believe (*see, e.g.*, Second Am. Compl. ("SAC") ¶¶ 97-104; Pls.' Mem. of Law in Supp. of Petition for Prelim. Inj. ("PI Br.") 7; *id.* Ex. 31 (cataloguing "Evidence of Religiosity" at religiously affiliated schools)) and "requir[e] students to engage in prayer and worship" (PI Br. 24; *see also* SAC ¶¶ 109-11). Plaintiffs are indignant—and hope the Court will be indignant—that religiously affiliated schools teach morality consistent with the historic teachings of their faiths. (SAC ¶¶ 99-104, 124-25; PI Br. 7-8.) They detail—as though it were a problem—that religiously affiliated schools understand science within a deistic, faith framework (PI Br. 8; SAC ¶¶ 102-04)—as did Kepler, Newton, and innumerable other scientists up to the present.[1] Finally, Plaintiffs think it odd or troubling that schools founded to present a coherently

[1] *See, e.g.*, JOHANNES KEPLER, ASTRONOMIA NOVA (1609) (describing Copernican theory) ("Let him not only extol the bounty of God in the preservation of living creatures of all kinds by the strength and stability of the earth, but let him acknowledge the wisdom of the Creator in its motion, so abtruse, so admirable."), *reprinted in* SCIENCE AND RELIGION: A HISTORICAL INTRODUCTION 101 (Gary B. Ferngren ed. 2002) ("SCIENCE AND RELIGION"); SCIENCE AND RELIGION 155 (quoting Sir Isaac Newton) ("'This most bountiful system of the sun, planets, and comets,' he argued, 'could only proceed from the counsel and dominion of an intelligent and powerful Being.'"); ABRAHAM PAIS, 'SUBTLE IS THE LORD...': THE SCIENCE AND THE LIFE OF ALBERT EINSTEIN 319 (1982) (quoting letter of Albert Einstein) ("[A] legitimate conflict between science and religion cannot exist. . . . Science without religion is lame, religion without science is blind."). Prominent Christian scientists living today include Dr. Francis Collins (formerly head of the Human Genome Project and now director of the National Institutes of Health), Dr. William Phillips (1997 Nobel Prize in Physics), Dr. Martin Nowak (Harvard Professor of Evolutionary Biology and Mathematics and Director of the Program for Evolutionary Dynamics at Harvard), Dr. Owen Gingerich (Harvard Professor Emeritus of Astronomy and History of Science), Dr. Charles Townes (winner of both the Nobel Prize in Physics and the Templeton Prize, awarded by the John Templeton Foundation for contributions to spirituality), and the Rev. Sir John Polkinghorne (Cambridge

religious view of life and the world insist on hiring faculty that share that view and that vision. (SAC ¶¶ 112-13, 121-24; PI Br. 9.)

Plaintiffs find all this "indefensible". (PI Br. 24.) They invite this Court to probe these allegations and—for these sins—ask the Court to shut down the entire Program, or at least to prohibit parents from using Program scholarships at any school that is "permeate[d]" by "religious teachings and activities" (*id.* at 35; *see* SAC ¶ 167)—that is, any school that is "too religious".

This antireligious mindset and these requested remedies have no place in New Hampshire's history or in its Constitution. Even to undertake the suggested inquiry into the beliefs and teachings of religiously affiliated schools such as certain of amici would unconstitutionally impinge on the free exercise of religion of such schools and the families that make up these schools. To grant the requested relief would unconstitutionally penalize and discriminate against religious rights guaranteed under the Free Exercise and Equal Protection clauses of the Federal Constitution.

The New Hampshire Constitution requires none of this. As the State and intervenors will no doubt detail, Plaintiffs have no standing to bring this action; the Education Tax Credit Program involves a decision by the State *not* to take certain private property as tax revenues, rather than an expenditure of tax revenues; and the Program rests entirely on voluntary contributions of private funds to private scholarship organizations, not compelled support by anyone.

These facts should be adequate and decisive. Amici, however, submit this brief to make the further point that the inquiry and relief requested by Plaintiffs threaten to lead this

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University Professor Emeritus of Mathematical Physics, Anglican priest, and President of Queens' College, Cambridge).

Court into a direct and severe violation of the constitutional rights of Amici Schools and the families that wish to use scholarship funds to send their children to religiously affiliated schools.

INTEREST OF AMICI

Amicus Concord Christian Academy ("CCA") is an independent nondenominational Christian school located in Concord, New Hampshire. (Affidavit of Dean Whiteway ¶ 1, attached hereto as Exhibit 1.) CCA was founded in 1974 and provides a community-oriented education for students in pre-Kindergarten through 12th grade. (*Id.* ¶¶ 5-6.) CCA currently has an enrollment of approximately 200 students. (*Id.* ¶ 6.) Among the students enrolled at CCA, approximately 66 of them are in high school grade levels (9th through 12th grade). (*Id.*) Amicus Grace Christian School ("GCS") is an independent nondenominational Christian school located in Bedford, New Hampshire. (Affidavit of Nancy Busch ¶ 1, attached hereto as Exhibit 2.) GCS was founded in 1978 and offers small classroom instruction for students in Kindergarten through 6th grade. (*Id.* ¶ 6.) Currently, 27 students are enrolled at GCS. (*Id.*)

Amicus Roman Catholic Bishop of Manchester, a corporation sole, owns and operates all of the Diocesan elementary and secondary schools in the Diocese of Manchester, which comprises geographically the entire State of New Hampshire. Diocesan schools are uniquely Catholic schools, although they are open to students of all faiths. The Diocese oversees 20 elementary and three secondary schools located throughout the State of New Hampshire; all of the secondary schools and approximately half of the elementary schools are accredited by the New England Association of Schools and Colleges. Diocesan schools employ 484 lay persons and 11 persons in religious vocations in professional staff positions. All teachers employed at Diocesan schools are certified by the State of New Hampshire or are in the process of receiving

such certification. All Diocesan schools are either approved or conditionally approved by the New Hampshire Department of Education pursuant to N.H. Code of Administrative Rules Chapter Ed 400 ("Approval of Nonpublic Schools"), RSA 186:11(XXIX) and RSA 21-N:9(II). More than 4,800 students are currently enrolled in Diocesan schools. CCA, GCS and the Diocesan elementary and secondary schools in New Hampshire are referred to collectively as "Amici Schools".

The Association of Christian Schools International ("ACSI") is a nonprofit, nondenominational religious association providing support services to more than 3,800 Christian preschools, elementary and secondary schools in the United States. One hundred and five post-secondary institutions are members of ACSI. ACSI also serves more than 22,000 schools outside the United States. ACSI has 14 member schools in New Hampshire, with a combined enrollment of 2,107 students. ACSI's services include helping students and member schools participate in school choice initiatives, like New Hampshire's Education Tax Credit Program.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical societies, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as a collective voice of evangelical churches and other religious ministries. NAE is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be maintained in this case.

BACKGROUND OF AMICI SCHOOLS

Amici Schools were founded by faith communities that shared and were indeed defined by a common faith, and believed that teaching that faith to the next generation is one of

the most important moral obligations of parents.[2] (*See* Whiteway Aff. ¶ 22; Busch Aff. ¶¶ 6, 18; Affidavit of Wendy Maney ¶ 18, attached to Whiteway Aff. as Ex. D.) Because of their faith convictions, Amici Schools offer an educational choice that is meaningfully different from that provided by New Hampshire public schools. (*See* Whiteway Aff. ¶ 22; Busch Aff. ¶ 23.) Amici Schools do indeed each teach the Christian faith as an integral part of their instructional programs. Consistent with this, CCA and GCS, for example, require students to attend chapel services and do teach science (and all subjects) within a framework of faith in an active God and inspired scripture. (Whiteway Aff. ¶¶ 23-26; Busch Aff. ¶¶ 20, 22.) As an essential means of accomplishing their goals of promoting these beliefs, GCS and CCA do indeed hire as teachers only those who, in addition to having outstanding qualifications,[3] agree with the definitional beliefs of the school as set out in publicly available "statements of faith".[4]

Amici Schools offer meaningfully different educational choices in other ways as well. For example, class sizes at GCS average six to ten students per classroom (Busch Aff. ¶

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[2] "Train up a child in the way he should go: and when he is old, he will not depart from it." *Proverbs* 22:6 (King James). "Fix these words of mine in your hearts and minds; tie them as symbols on your hands and bind them on your foreheads. Teach them to your children, talking about them when you sit at home and when you walk along the road, when you lie down and when you get up." *Deuteronomy* 11:18-19 (NIV).

[3] For example, at CCA, high school teachers generally have at least ten years of teaching experience, and each must earn a master's degree (or be working towards one) in the subject that he or she teaches. Whiteway Aff. ¶ 13. At GCS, every teacher has at least an undergraduate degree and at least ten years of experience as teachers (several have over 20 years of experience). Busch Aff. ¶ 9.

[4] CCA views its teachers as "the living curriculum" and the primary means by which the school pursues its education and faith mission. Whiteway Aff. ¶ 24. CCA relies on its teachers not just to teach atoms and molecules, but to teach children to see Christ in the world around them. *Id.* Accordingly, all CCA teachers must—in addition to demonstrating strong academic credentials—attest to CCA's mission and statement of faith. *Id.* GCS likewise views its ability to hire Christian teachers that share its values as essential to its mission of providing rigorous and well-rounded education and to foster in its students a relationship with God. Busch Aff. ¶ 24. GCS believes that having Christian teachers is necessary for GCS to maintain its identity and fulfill its educational mission. *Id.* For this reason, GCS and CCA require their teachers to be professing Christians. Whiteway Aff. ¶ 24; Busch Aff. ¶ 24.

11), and at CCA, 14 students per classroom (Whiteway Aff. ¶ 15)—much smaller than can be found in public schools. Because of the small class sizes, teachers at CCA and GCS are able to give more individualized attention and one-on-one instruction to each student, compared to public school education. (Whiteway Aff. ¶ 14; Busch Aff. ¶¶ 11-12; Maney Aff. ¶¶ 8, 13, 21; Affidavit of Abi Cyr ¶¶ 11, 16, attached to Busch Aff. as Ex. A.) In contrast to most public schools, where parents generally must initiate contact with school staff, CCA and GCS teachers take the initiative to contact parents and propose meetings when a student has specific difficulties. (Whiteway Aff. ¶ 14; Busch Aff. ¶ 12; Maney Aff. ¶ 22; Cyr Aff. ¶¶ 11, 16.) CCA and GCS teachers are also readily accessible via phone or e-mail and dedicate a significant amount of time per week offering extra-help sessions and individualized support. (Whiteway Aff. ¶ 14; Busch Aff. ¶ 12; Maney Aff. ¶¶ 21-22; Cyr Aff. ¶¶ 11, 16.)

By objective standards, students of the Amici Schools perform better academically than their peers at area public schools. For example, on standardized tests, students at CCA and GCS outperform the national average as well as the New Hampshire public school average by significant margins.[5] Rather than detract from the academic experience in any way, Amici Schools' religious viewpoints add to the educational experience by providing a philosophical basis for understanding academic subjects.[6] Parents also may choose one of the Amici Schools because they provide a rich academic experience that better prepares students to

[5] Average SAT scores for CCA students substantially exceed both the national average and averages for New Hampshire public schools. For example, in the 2010-2011 school year, the CCA average SAT score was 1894, compared to an average score of 1500 nationally and 1559 at New Hampshire public schools. In the 2011-2012 school year, the CCA average SAT Score was 1679, compared to an average score of 1498 nationally and 1556 at New Hampshire public schools. Whiteway Aff. ¶ 28. Average standardized test scores for GCS students in the last five years have been significantly above the national average, often in the 80th or 90th percentiles in certain subjects. Busch Aff. ¶¶ 14-16.

[6] *See* Busch Aff. ¶ 20 ("We believe . . . academic success[] [is] best nurtured not by separating the spiritual from the academic, but by using both as complements to each other. With this approach, we seek to reveal the truth in Christ that underlies mathematics, science and the entire universe around us.").

take the next academic step. For example, CCA offers a wide range of "dual credit" courses, where high school students may experience college-level instruction and obtain university course credit by taking qualifying courses at CCA. (Whiteway Aff. ¶ 11.) This not only provides greater intellectual challenges to students, but can enable them to go on to complete bachelors' degrees in as little as two and a half years, greatly reducing college costs to these New Hampshire families and lightening the debt load that burdens so many college graduates today. (*Id.* ¶ 12.) CCA offers more qualified dual credit courses than any other school in New Hampshire, public or private. (*Id.* ¶ 11.)

For these reasons and others, some parents consider Amici Schools (or other religiously affiliated schools) to be a better educational choice for their children, and send their children to such schools at substantial financial sacrifice.[7] Some families choose public school for some of their children, and Amici Schools or other religiously affiliated schools for others of their children.[8]

With tuitions above $30,000 per child,[9] New Hampshire's elite private schools are the preserve of a privileged few. By contrast, and as an essential part of their mission to provide

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[7] Maney Aff. ¶ 25; Whiteway Aff. ¶ 34; Busch Aff. ¶ 33; *see also* Aff. of Shalimar Encarnacion in Supp. of Pet. to Intervene ("Encarnacion Aff.") ¶¶ 3-5; Aff. of Geoffrey and Heidi Boffitto in Supp. of Pet. to Intervene ("Boffitto Aff.") ¶¶ 5-6.

[8] For example, Abigail Cyr, a Christian pastor and a Grace Christian School parent, found that her youngest two children struggled in the large classes at the public school and required extra, small-group or individualized attention, and chose to send them to Grace Christian School where each has excelled. Cyr Aff. ¶¶ 7-15. Her elder two children remain enrolled in public school and are doing well in that environment. *Id.* ¶ 7.

[9] For example, day tuition for the 2013-2014 school year at Proctor Academy is $31,400 per year, *see* Proctor Admissions, Tuition, Fees, Financial Aid, www.proctoracademy.org/podium/default.aspx?t=115833 (last visited Apr. 2, 2013), $31,500 at the New Hampton School, *see* New Hampton School, Tuition, http://www.newhampton.org/tuition (last visited Apr. 2, 2013), and $30,740 at Brewster Academy, *see* Brewster Academy, Tuition, http://www.brewsteracademy.org/Paymentplans (last visited Apr. 2, 2013).

a meaningful religiously based educational choice even to middle class and working families in New Hampshire, Amici Schools and many other religiously affiliated schools go to great lengths to keep costs and tuitions low consistent with delivering a quality education—typically in the neighborhood of $10,000 or less.[10] Nevertheless, even this is a serious burden for most families (who, of course, must also pay the property taxes that fund public schools), and for many it is simply impossible. To the extent their modest resources allow, Amici Schools offer financial aid, but a real choice in education still remains unaffordable for many families. (Whiteway Aff. ¶¶ 33-34; Busch Aff. ¶¶ 34-36; Encarnacion Aff. ¶¶ 3-5; Boffitto Aff. ¶¶ 5-6.)

In order to qualify for participation in the Education Tax Credit Program, all schools must be approved by the New Hampshire Department of Education;[11] Amici Schools have received that approval.[12] (*See* Whiteway Aff. ¶ 32; Busch Aff. ¶ 32.)

ARGUMENT

I. WHAT PLAINTIFFS TAR AS A "PROBLEM" IS IN FACT THE EXERCISE OF BASIC AND FAVORED LIBERTIES.

At the outset, amici wish to state clearly and emphatically that that which Plaintiffs would have this Court treat as suspect—the exercise of core liberties that are protected zealously by both the U.S. and New Hampshire constitutions—is in fact a positive good.

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[10] Tuition at GCS is $3,300 per year for Kindergarten and $5,250 per year for the Elementary School. Busch Aff. ¶ 33. Tuition at CCA is $8,800 a year for elementary school level students, $9,500 a year for middle school level students, and $10,100 a year for high school level students. Whiteway Aff. ¶ 33.

[11] *See* RSA 77-G:1 ¶ IX (incorporating, for purposes of Education Tax Credit Program, definition of "nonpublic school" in RSA 193-A:1); RSA 193-A:1 ¶ III (defining "nonpublic school" as "a nonpublic school approved pursuant to rules adopted by the state board of education and administered by the department of education").

[12] *See* N.H. Dep't of Educ., New Hampshire Approved Nonpublic Schools, *available at* http://www.education.nh.gov/program/school_approval/documents/2011approvednpslist06292011.pdf (last visited Apr. 2, 2013).

Plaintiffs are purportedly concerned because religiously "permeated" schools have specific and coherent beliefs about ultimate truth and the meaning of human existence ("religion"), and actually teach those beliefs to those who wish and choose to attend those schools.

The United States Supreme Court has recently observed that belief "in or about a deity or an ultimate reality", including "a belief that there is no deity and no ultimate reality", is likely inherent in *any* intellectual inquiry or discussion of more substance than "making . . . peanut butter cookies". *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 837 (1995). It scarcely needs to be said that, given human nature and the diversity of experience, beliefs and perspectives about and shaped by questions of "ultimate reality" will differ widely. As John Locke stated, "the various and contrary choices that men make in the world . . . argue that . . . the same thing is not good to every man alike. This variety of pursuit shows that every one does not place his happiness in the same thing, or choose the same way to it." JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 173 (London, T. Tegg & Son, 1836).

Freedom of *conscience*—the freedom to adhere to one's own beliefs as to what is "good" free from government coercion or penalty—is one of our foundational and most zealously guarded freedoms.[13] The freedom and right of parents "to direct the upbringing and education of children" is equally foundational.[14] "The fundamental theory of liberty upon which

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[13] *See generally* WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE (1670), *in* THE POLITICAL WRITINGS OF WILLIAM PENN 91, 96 (Andrew R. Murray ed., Liberty Fund 2002) ("[The] imposition, restraint, and persecution, upon persons for exercising such a liberty of conscience as is before expressed, and so circumstantiated, be not to impeach the honour of God, the meekness of the Christian religion, the authority of Scripture, the privilege of nature, the principles of common reason, the well being of government, and apprehensions of the greatest personages of former and latter ages.").

[14] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests

all governments in this Union repose", the Supreme Court has written, "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

Courts throughout our history have also understood that inseparable from any effective freedom of conscience is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends". *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added); *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church of N. Am.*, 344 U.S. 94, 114 (1952) ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned." (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872))).

Joining together with like-minded individuals requires asking people whether they share your beliefs, associating with those who do, and declining to associate—for this particular effort—with those who do not. "Freedom of association would prove an empty guarantee if

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recognized by this Court."); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (holding that state compulsory education law violated free exercise rights of Amish parents who objected to formal secondary education on religious grounds); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (striking down state law forbidding teaching of modern languages other than English as violating a teacher's "right thus to teach and the right of parents to engage him so to instruct their children"); *In re Kurowski*, 161 N.H. 578, 588 (2011) ("The United States Constitution protects the fundamental right of parents to make decisions concerning the custody, care and control of their children, including a child's education and religious upbringing."); *In the Matter of Jeffrey G. & Janette P.*, 153 N.H. 200, 203 (2006) ("The right of biological and adoptive parents to raise and care for their children is a fundamental liberty interest protected by Part I, Article 2 of the New Hampshire Constitution."); *Appeal of Denise Peirce & Christopher Rice (N.H. Bd. of Educ.)*, 122 N.H. 762, 768 (1982) (Douglas and Brock, JJ., specially concurring) ("[A]t common law the parents' authority over the education of their children was unquestionably a natural right . . . .").

associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (holding that California's blanket primary violates a political party's First Amendment right of association) (citation omitted). "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647, 648 (2000) (quoting *Jaycees*, 468 U.S. at 623). The selection of teachers is doubly important and protected, combining as it does freedom of association with the transmission of beliefs and value systems to children.[15] Yet it is exactly this intentional "joining together" for expressive and religious purposes that Plaintiffs attempt to smear as "discriminat[ion] based on religion". (PI Br. 24.)

It is, we submit, a premise of our history and law that freedom to believe, worship, and advocate in accordance with one's conscience—and the freedom to associate with others for all these purposes—is good *per se*.[16] That should be enough, but it is not all; our

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[15] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (holding that the First Amendment precludes governmental review of hiring and firing decisions affecting "called" teachers at a religious school); *see also id.* at 713 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."); N.H. CONST. Part I, art. 6 ("As morality and piety . . . will give the best and greatest security to government, . . . and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both.").

[16] *See* N.H. CONST. Part I, art. 4 ("Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience."); A DECLARATION OF RIGHTS, AND PLAN OF GOVERNMENT FOR THE STATE OF NEW HAMPSHIRE (1779) (providing that "The future Legislature of this State, shall make no Laws to infringe the Rights of Conscience, or any other of the natural, unalienable Rights of Men, or contrary to the laws of GOD, or against the Protestant Religion."), *reprinted in* JAMES F. COLBY, MANUAL OF THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE 83, 84 (1902); *see also, e.g.*, CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (July 15, 1663) (granting charter to founders of Rhode Island "to hold forth a livelie experiment, that a most flourishing civil state may stand and best bee

founders and our law have also seen great *pragmatic* value in the existence of a multiplicity of groups who believe different things.

James Madison argued in The Federalist No. 51 that the existence of disparate and disagreeing communities is itself a structural safeguard of liberty, writing that the "security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects." THE FEDERALIST No. 51, at 351-52 (James Madison) (Jacob E. Cooke ed., 1961). He returned to the theme at the Virginia ratifying convention, arguing that the "multiplicity of sects which pervades America . . . is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (J. Elliot ed. 1836) (June 12, 1788). This is a very different spirit from that which would prefer to steer all children into public schools in order to ensure uniformity of experience. One is reminded of the contrast between the early colonial vision of William Penn's Pennsylvania colony, which was founded by Quakers but extended religious freedom to—and thus attracted—diverse and distinct

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maintained, . . . with a full libertie in religious concernements"), *reprinted in* VI THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3211, 3212 (Francis Newton Thorpe ed. 1909) (hereinafter "Thorpe"); VIRGINIA DECLARATION OF RIGHTS § XVI (June 12, 1776) ("That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience"), *reprinted in* VII Thorpe, at 3812, 3814; PENN. CONST. of 1776, A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania, art. II ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience; . . . [a]nd that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship."), *reprinted in* V Thorpe, at 3081, 3082; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

religious communities,[17] and that of the early Massachusetts colony, which sought and enforced religious uniformity based on the belief that "Polipiety [a variety of sects] is the greatest impiety in the world."[18] Happily, William Penn's vision prevailed in the American tradition. Happily, that tradition has firmly rejected any goal of "standardiz[ing our] children". *Pierce*, 268 U.S. at 535.

Further, diverse belief communities that actually teach what they believe are essential to a vibrant marketplace of ideas, and "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee". *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). This is not just high-sounding theory; the empirical evidence of the extraordinary creative power of real diversity in education—and religious diversity in particular—is all around us, in New Hampshire and beyond. It is well known that it was religious denominations and religious conviction that launched leading schools and colleges around this country.[19] If we confine ourselves to New Hampshire, the story is the same.[20]

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[17] See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1425 (1990). William Penn, far ahead of his age, was the author of the widely read work *The Great Case of Liberty of Conscience*, published in 1670.

[18] The quote is from Nathaniel Ward, a well-known Massachusetts Puritan Minister and author of the first code of laws established in New England. *See generally* McConnell, *supra* note 17, at 1423 (alteration in original); *see also* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 313-23, 352-53 (1996) (elaborating on the Puritan pursuit of uniformity).

[19] *See* THE CHRISTIAN COLLEGE: A HISTORY OF PROTESTANT HIGHER EDUCATION IN AMERICA 40 (Baker Academic, 2d ed. 2006) (describing the religious affiliations of the early higher educational institutions in this country, including Harvard, Yale, Princeton and Dartmouth); NEW ENGLAND'S FIRST FRUITS, AN ACCOUNT OF THE FOUNDATION OF THE COLLEGES AT CAMBRIDGE IN NEW ENGLAND (1640), *reprinted in* SAMUEL ELLIOT MORISON, THE FOUNDING OF HARVARD COLLEGE (1936) 420, 432 ("After God had carried us safe to New England, and we had . . . rear'd convenient places for Gods worship, and setled the Civill Government: One of the next things we longed for, and looked after was to advance *Learning* and perpetuate it to Posterity; dreading to leave an illiterate Ministery to the Churches . . . it

New Hampshire's neutral Education Tax Credit Program will tap into this engine of educational innovation, both through the actual delivery of education by religiously affiliated schools, and through the competitive spur such schools can provide to improve public schools.[21] Plaintiffs, in sharp contrast, would prefer to handicap the competition of ideas and educational quality from religiously affiliated schools rather than meet it. They would prefer to turn off this tap of innovation. They could just possibly see some room for a parental choice program—so long as all the choices are more or less the same; so long as the meaningful choices presented by

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pleased God to stir up the heart of Mr. *Harvard* (a godly Gentleman, and a lover of Learning . . .) to give the one-halfe of his Estate . . . towards the erecting of a Colledge . . . ."); An Act for Liberty To Erect a Collegiate School (Oct. 9, 1701) (legislation granting charter to "well disposed, and Publick spirited Persons . . . [with] Zeal for upholding & Propogating of the Christian Protestant Religion . . . [to] endow[] & order[] a Collegiate School . . . wherein Youth may be instructed in the Arts & Sciences who thorough the blessing of Almighty God may be fitted for Publick employment both in Church & Civil State", what would become Yale University), *available at* http://www.yale.edu/secretary/Charter_Legislation.pdf.

[20] *See, e.g.*, LAURENCE CROSBIE, THE PHILLIPS EXETER ACADEMY, A HISTORY 32-34 (1924); Charter of Dartmouth College (1769), *available at* www.dartmouth.edu/~trustees/docs/charter-2010.pdf (providing for founding of Dartmouth College by Eleazer Wheelock, a Congregational minister); Holderness School, History & Mission, http://www.holderness.org/mission_history (last visited Apr. 2, 2013) (noting that Holderness School was "[f]ounded in 1879 by members of the Episcopal General Convention"); The White Mountain School, Celebrating 125 Years, http://www.whitemountain.org/125th (last visited Apr. 2, 2013) (noting that White Mountain School was founded as an Episcopal school for girls).

[21] *See* An Act Establishing an Education Credit Against the Business Profits Tax, H.B. 1607-FN-Local, 2012 Sess. (N.H. 2012) ¶ 1(II)(a), (d) ("The purpose of this act is to[] . . . [a]llow maximum freedom to parents and independent schools to respond to and, without governmental control, provide for the educational needs of children . . . [and] [i]mprove the quality of education in this state, both *by expanding educational opportunities for children and by creating incentives for schools to achieve excellence.*"); *id.* ¶ 1(I)(b), (d) ("The general court finds that[] . . . [e]xpanding 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 . . . [and] [e]xpanding 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."); N.H. Permanent Sen. Journal (May 2, 2012) (statement of Sen. Forsythe) (stating that the program would "*produce competition*" with public school districts); *id.* (statement of Sen. Luther) ("In the college level, you have competition: you don't have that on a funding basis in primary and secondary, and that's why I absolutely support this bill."). (Emphases added.)

schools that are "permeated" by "religious teachings" (PI Br. at 34-35) are stricken from the menu. Choice without choices; "any color you want, as long as it is black".

As Massachusetts' colonial history reminds us, the desire to establish uniformity is not a new voice in the American tradition, but it is not our better voice, and it is not the voice enshrined in our constitutions. On the contrary, our constitutional tradition so strongly recognizes the benefits to society of strong and diverse religious communities, organizations and schools that it finds ample room to encourage them through policies that have long been called "benevolent neutrality":

> "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."

Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970) (upholding the constitutionality of tax exemptions to religious organizations). The federal government, New Hampshire, and every other state provide tax exemptions for places of worship. *Id.* at 676 ("All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax."); *see* RSA 72:23(III) (New Hampshire property tax exemption for houses of worship). Both the federal government and New Hampshire likewise provide tax exemptions for religious organizations, including religiously affiliated schools. *Walz*, 397 U.S. at 672-80 (upholding property tax exemptions for religious organizations); RSA 72:23(III), (V) (New Hampshire real estate and personal property tax exemptions, including exemptions for property held by religious organizations used for religious purposes and for charitable organizations used for those organizations' purposes); RSA 72:23-l (defining "charitable" organizations to include

organizations that advance the "spiritual" well-being of the general public); *Warde v. Manchester*, 56 N.H. 508 (1876) (recognizing that religiously affiliated schools are exempted by statute from taxation).

Of course, Americans have not always followed their better lights; the nativist "pervasive hostility to the Catholic Church" behind the so-called "Blaine Amendments" adopted by many states shortly after the Civil War has been well documented,[22] and makes up what the Supreme Court recently called "a shameful pedigree that we do not hesitate to disavow". *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion). Historically, the clause of Part II, article 83 of the New Hampshire Constitution on which Plaintiffs' claim is based (*see* SAC ¶¶ 149-50), adopted in 1877, is a child of that movement.[23] But as a practical matter, in more recent generations state courts have consistently found it possible to construe the "Blaine Amendment" provisions in their respective constitutions so as to gracefully avoid any discriminatory application. Specifically, as the defendants and intervenors will no doubt detail,

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[22] *See Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion) ("Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (acknowledging that Protestant efforts to maintain religious dominance in public schools "played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children"); *In re Navy Chaplaincy*, 697 F.3d 1171, 1177 (D.C. Cir. 2012); 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, 556-76 (2003) (reviewing history of proposed federal Blaine Amendment and state amendments); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42-43 (1992) (discussing state provisions barring use of public funds for sectarian institutions as a reaction by Protestants to rise of Catholic education and increasing public support for Catholic schools at state level).

[23] The proposed federal Blaine Amendment was passed by the House in August 1876, but the Amendment fell short of the two-thirds vote of the Senate needed to send it to the states for ratification later that year. *See* Green, *supra* note 22, at 38. The next year, New Hampshire adopted its state Blaine Amendment.

several states have upheld neutral "school choice" or assistance programs as constitutional under Blaine Amendments containing language similar to that in the New Hampshire constitution.[24]

Against this history, it is disconcerting to see Plaintiffs reverting to the themes of 1877 and putting Catholic parochial schools squarely in the crosshairs,[25] while expanding their hostility to encompass all schools that take religion seriously. This direction is not only disappointing and unnecessary; if followed it will distort Part II, article 83 to conflict with the federal constitutional rights of Amici Schools and the parents who choose those schools.

The other provision of the New Hampshire Constitution relied on by Plaintiffs—Part I, article 6—also shares an unfortunate pedigree. Between its adoption in 1784 and its amendment in 1968, this provision very frankly provided for the preferential and discriminatory *establishment* of Protestant Christian religion, empowering the legislature to "authorize towns . . . to make adequate provision . . . for the support and maintenance of public Protestant teachers . . . ." The provision and laws implementing it "supported the Congregational establishment", SUSAN E. MARSHAL, THE NEW HAMPSHIRE CONSTITUTION 53 (Oxford Univ. Press 2011), and the provision was, over time, rightly decried as "discriminating against Jews and Catholics", Henry

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[24] *See, e.g., Ala. Educ. Ass'n v. James*, 373 So. 2d 1076, 1081 (Ala. 1979); *Kotterman v. Killian*, 972 P.2d 606, 616-21 (Ariz. 1999); *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 519-22 & n.10 (Cal. 1974); *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1081-86 (Colo. 1982); *Council for Secular Humanism, Inc. v. McNeil*, 44 So.3d 112, 122-23 (Fla. Dist. Ct. App. 1st Dist. 2010); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. 2001); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 2001); *Meredith v. Pence*, No. 49S00-1203-PL-172, 2013 WL 1213385 (Ind. Mar. 26, 2013); *Neal v. Fiscal Ct., Jefferson Cnty.*, 986 S.W.2d 907, 910-13 (Ky. 1999); *Ams. United v. Rogers*, 538 S.W.2d 711, 718-22 (Mo. 1976); *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 793 (N.Y. 1967); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999); *Springfield Sch. Dist., Del. Cnty. v. Dep't of Educ.*, 397 A.2d 1154, 1170-71 (Pa. 1979); *S.D. High Sch. Interscholastic Activities Ass'n v. St. Mary's Inter-Parochial High Sch. of Salem*, 141 N.W.2d 477, 480-81 (S.D. 1966); *Jackson v. Benson*, 578 N.W.2d 602, 620-28 (Wis. 1998).

[25] *See* SAC ¶¶ 84 (detailing that 44 percent of New Hampshire Christian schools are Catholic); 100 (detailing "Catholic identity" of particular school); 111 (describing mandatory religious activities at particular Catholic school); 119 (describing preferential treatment of Catholics in admissions at certain Catholic schools); 122 (describing profession of faith undertaken by faculty and staff at particular Catholic school).

S. Drinker, *Some Observations on the Four Freedoms of the First Amendment*, 37 B.U. L. REV. 1, 55 n.30 (1957); *see also Warde v. Manchester*, 56 N.H. 508, at *2 (1876) (noting that "the protestant religion is regarded with peculiar favor" in the text of this provision). A rather thorough amendment in 1968 transformed the provision into one that is facially neutral. It would be ironic—and, as discussed below, would precipitate a needless clash with federal constitutional rights—if an aggressive interpretation were permitted to take Part I, article 6 back to its original purpose and effect of disadvantaging Catholic schools (and now other religiously affiliated schools) compared to a preferred orthodoxy of the public schools—now a secular orthodoxy.

II. PLAINTIFFS ASK THIS COURT TO ENGAGE IN AN "OFFENSIVE" INQUIRY INTO THE TEACHING OF RELIGIOUSLY AFFILIATED SCHOOLS THAT WOULD ITSELF VIOLATE FEDERAL CONSTITUTIONAL RIGHTS.

It is not the historic Episcopalian affiliation of some of New Hampshire's venerable private schools that Plaintiffs highlight as the reason the Education Tax Credit Program should be stricken; it is the fact that some parents will choose to use these scholarships at schools that—to use Plaintiffs' preferred prejudicial terms—are engaged in "religious indoctrination", "proselytization", and "discriminat[ion] based on religion". (PI Br. 1) They entitle an entire section of their brief "The Central Role of Religion" (PI Br. 7), submit a 25-page table of "Evidence of Religiosity" (PI Br. Ex. 31) and a separate exhibit on "Religious Requirements" (PI Br. Ex. 32), and complain that "religious instruction is so pervasive that it influences the religious schools' treatment of secular subjects" (PI Br. 8). Their preliminary injunction papers cite "evidence" that some religiously affiliated schools teach six-day creationism, others condemn abortion and extra-marital sex (*id.*), while one "encourag[es] students to consider challenging questions from a Biblical perspective" (PI Br. Ex. 31 p. 3) and another pursues "an educational philosophy built on God's love for us all" (*id.* at p. 1).

One could go on at great length, and Plaintiffs do. No doubt various of these "charges" are true as to some of the schools included in Plaintiffs' blacklist of religiously affiliated schools, and not of others. The point, however, is that if this Court follows Plaintiffs' path into the inquisition into the beliefs and teaching philosophies of "religious schools" that forms the heart of Plaintiffs' case, it will *already* have wandered into an entanglement with matters of religion that is flatly *prohibited* by the Federal Constitution.

Plaintiffs' theories and strategy are essentially a carbon copy of arguments recently asserted by the ACLU and Americans United for Separation of Church and State in Colorado against a similar tax credit scholarship program invoking that state's similar "Blaine Amendment". At the request of the plaintiffs in that case, the trial court "scrutiniz[ed] the nature of the education provided by certain participating private schools and the degree to which those schools 'infuse religious teachings into the curriculum'". *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 11-CA-1856 & 1157, --- P.3d ----, 2013 WL 791140, at *14 (Col. App. Feb. 28, 2013). The Colorado Court of Appeals, however, found that even by entering into this inquiry—the same inquiry that Plaintiffs urge on this Court—the trial court violated the First Amendment:

> "[T]he inquiry in which the district court engaged—into the degree to which religious tenets and beliefs are included in participating private schools' educational programs—is no longer constitutionally permissible. . . . [T]he United States Supreme Court has made clear that, in assessing facially neutral student aid laws, a court may not inquire into the extent to which religious teaching pervades a particular institution's curriculum. Doing so violates the First Amendment."

Id.

The Colorado Court of Appeals was correct. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), the Supreme Court struck a school aid statute that *required* an inquiry as to whether teaching activities at private schools involved "religious content", on the grounds that this inquiry would itself amount to "excessive state involvement in religious affairs", in violation

of the First Amendment's Establishment Clause. *Id.* at 133. Conversely, in *Mitchell v. Helms*, the plurality opinion upheld a facially neutral school assistance program[26] against an Establishment Clause challenge while refusing to engage in an "inquiry into the recipient's religious views" and whether certain recipient schools were "pervasively sectarian". Such an inquiry, it warned, "is not only unnecessary but also *offensive*" and "profoundly troubling". 530 U.S. at 828 (emphasis added).[27] Confronted with a scholarship program that by statute excluded schools that were "pervasively sectarian" or "tend[ed] to indoctrinate or proselytize", the Tenth Circuit recently struck the exclusion as violating the First Amendment because, among other reasons, it called for an "unconstitutionally intrusive scrutiny of religious belief and practice", *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1250-51 (10th Cir. 2008), noting that "Such inquiries have long been condemned by the Supreme Court", *id.* at 1262.[28]

In short, Plaintiffs' Exhibits 31 and 32, which tabulate "Evidence of Religiosity" and "Religious Requirements", stand as "Exhibit A" of the fact that Plaintiffs are attempting to lead this Court into an inquiry and mode of analysis which itself violates the Federal Constitution.

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[26] The state and federal programs at issue in *Mitchell* provided educational materials to both public and private schools without regard to religious affiliation. *See Mitchell*, 530 U.S. at 802.

[27] While Justices O'Connor and Breyer did not join the four-justice plurality opinion, they voted to uphold the challenged statutes on somewhat different grounds that also did not require any inquiry into what recipient schools believed or taught, or whether they were "pervasively sectarian". *See Mitchell*, 530 U.S. at 836-37 (O'Connor, J., concurring in the judgment).

[28] The New Hampshire Supreme Court has, in a different context, disapproved of judicial inquiry into religious beliefs even as they may affect "scientific" teaching. Holding that New Hampshire's free exercise rights shielded Mary Baker Eddy's bequest to Christian Scientists from attack, the Court condemned any judicial inquiry into the teachings of that group as "a dangerous fallacy" that "destroys all religious liberty", emphasizing that "The truth of [the testator's] science or religion is not to be determined by the court. As a religion, she had the right to believe and teach it. If the scientific principles she believed in run counter to the general belief of the time, she had equal right to believe and teach them." *Glover v. Baker*, 83 A. 916, 932, 934, 76 N.H. 393 (1912).

Plaintiffs' requested relief only makes the "entanglement" problem worse. Plaintiffs request, in the alternative, an injunction "prohibiting the defendants from implementing the Tax Credit Program insofar as the Program permits Program scholarships to be awarded to students attending religious schools". (SAC ¶ 167.) But what constitutes a "religious school" is a rather deep question. No doubt New Hampshire schools include a spectrum from those with a denominational affiliation and history but negligible distinctive religious content today, to schools that aim for a comprehensively religious environment. And the question is even wider than this spectrum. Consider the Pine Hills Waldorf School, which did not make Plaintiffs' hit-list of "religious schools". (*See* PI Br. Exs. 31, 32.) This school claims to teach from an "Anthroposophical" perspective and declares that "Waldorf Schools do not subscribe to any particular religion and they are regularly attended by children from the full spectrum of religious backgrounds."[29] Yet the Pine Hills Waldorf School admits to being "'religious' . . . in a higher sense of the word", and that "The historical festivals of the major religions . . . are practiced in the classroom and at school assemblies".[30] Is this "too religious"? And digging still deeper, the Supreme Court has observed that the subject matter of religion—that is, "ultimate reality"—also sweeps in "Plato, Spinoza and Descartes", as well as the teachings of those such as Karl Marx and Jean-Paul Sartre who promote an affirmative "belief that there is no deity and no ultimate reality". *Rosenberger*, 515 U.S. at 836-37.

Drawing a sharp line between the religious and the irreligious for purposes of Program eligibility would be impossible. Any *attempt* to draw such a line to implement an injunction denying scholarships "to students attending religious schools" would embroil this

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[29] Pine Hill Waldorf School, Frequently asked questions, http://www.pinehill.org/FAQ (last visited Apr. 2, 2013), attached hereto as Exhibit 3.

[30] *Id.*

Court on an ongoing basis in an inquiry that is "unnecessary", "offensive", and a violation of the First Amendment, *Mitchell*, 530 U.S. at 828—even before we come to the constitutionality of the actual denial of scholarships.

III. THE EXCLUSION OF STUDENTS ATTENDING RELIGIOUSLY AFFILIATED SCHOOLS FROM NEW HAMPSHIRE'S FACIALLY NEUTRAL PROGRAM WOULD VIOLATE THE FEDERAL CONSTITUTION.

A. The New Hampshire Education Tax Credit Program Is Indisputably *Permissible* Under the Federal Constitution.

The neutral and non-discriminatory New Hampshire Education Tax Credit Program is certainly *permissible* under the Federal Constitution. Plaintiffs do not contend otherwise, and with good reason. In the last twenty years, the United States Supreme Court has decided no fewer than six cases involving First Amendment challenges to facially neutral programs that provided some sort of assistance to private schools or students attending them without carving out "religious schools". In all six cases the programs were found to be permissible:

- *Mueller v. Allen*, 463 U.S. 388 (1983), the Court approved a Minnesota program granting tax deductions to parents for various educational expenses, including private school tuition costs.
- In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court approved a Washington state vocational rehabilitation assistance program to a handicapped student studying at a religious school to become a pastor.
- In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court approved a federal program that permitted sign language interpreters to assist deaf children enrolled in private schools, including religiously affiliated schools.
- In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court upheld the use of federal funds to pay public school employees who provided instruction in private schools, including religiously affiliated schools.

- In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court approved federal and state programs that provided educational materials to both public and private schools, including religiously affiliated schools.

The sixth and most recent case, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), concerned an Ohio voucher program that provided tuition aid for students who chose to attend private schools. Where the voucher money went depended solely upon where individual parents chose to enroll their children. *See id.* at 643-48. The Supreme Court rejected the Establishment Clause challenge in unequivocal terms on the basis that the "program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*", as a result of which any actual or perceived advancement of a religious mission or message "is reasonably attributable to the individual recipient, not to the government". *Id.* at 652-53. The Court explained the attributes of the Ohio program that factored into its decision:

> "... [T]he Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion."

Id. at 653.[31]

The *Zelman* decision highlighted and continued a critical theme in the Supreme Court's Establishment Clause and Free Exercise jurisprudence: the principle of "private choice".

[31] The Court also rejected the notion that a school choice program could be rendered unconstitutional merely because the vast majority of parents receiving aid under such a program made the independent decision to enroll their children in sectarian schools. *Id.* at 658 ("We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. . . . The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

As the four-justice plurality explained and Justice O'Connor emphasized in *Mitchell*, when funds flow to a religious school "only because of independent decisions made by numerous individuals", then "no reasonable observer is likely to draw from the facts an inference that the State itself is endorsing a religious practice or belief". 530 U.S. at 843 (O'Connor, J., concurring) (quotation marks and alterations omitted); *see also id.* at 810-13 (plurality opinion) (because allocation is entirely directed by "private choice", the program cannot be viewed as "sponsoring or subsidizing religion" or conferring any "imprimatur of state approval . . . on any religion, or on religion generally" (quotation marks omitted)).[32]

Given this precedent, the neutral New Hampshire Program is an even easier case, as it involves private—not public—funds; private—not public—scholarship organizations; and allocation solely directed by parental choice. There is, under the precedents reviewed above, no possibility that this Program—including scholarship grants to students attending religiously affiliated schools—could reasonably be perceived as the State "sponsoring," "endorsing", "conferring an imprimatur of state approval on", or otherwise "establishing" any particular religion, or religion generally.

The remaining question is whether it would nevertheless be *permissible* for New Hampshire—whether by statute or by state constitutional provision—to do what Plaintiffs say the New Hampshire Constitution requires: to *exclude* from the benefits of this otherwise neutral program *only* "students attending religious schools", and thus indirectly to deny benefits *only* to "religious schools" (SAC ¶ 167). The answer is an emphatic "No".

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[32] *See also, e.g., Agostini*, 521 U.S. at 226 (summarizing cases in which Supreme Court upheld neutral aid programs that included religiously affiliated schools as under such programs "any money that ultimately went to religious institutions did so only as a result of the genuinely independent and private choices of individuals" and thus "could not be attributed to state decisionmaking" (quotation marks, alteration, and citations omitted)).

To be sure, there is some "play in the joints" at least between what the Free Exercise and Equal Protection Clauses require, and what the Establishment Clause prohibits. But the Supreme Court has specifically identified this "play in the joints" as serving the ends of "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference". *Walz*, 397 U.S. at 669. Of course, the Supreme Court has also said that establishment concerns may sometimes limit what free exercise would otherwise allow.[33] But here, where under a consistent line of Supreme Court precedent there is no issue at all of "establishment" within the meaning of federal constitutional jurisprudence, the free exercise and equal protection rights of parents, students, and the religiously affiliated schools such as Amici Schools stand unimpaired. The exclusion requested by Plaintiffs would violate those rights.

We have already noted that a program that purported to exclude children who attend "religious schools" would embroil the state in unconstitutional "entanglement" with questions of religious definition and degree in violation of the Establishment Clause. (*See supra* Section II.) That is just the beginning. Such an exclusion would also violate the free exercise and equal protection rights of students, families, and affected schools such as Amici Schools under the Federal Constitution.

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[33] *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."); *Hosanna-Tabor*, 132 S. Ct. at 702 ("We have said that these two Clauses often exert conflicting pressures, and that there can be internal tension between the Establishment Clause and the Free Exercise Clause." (alteration, citation, and internal quotation marks omitted)). *But see* Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331 (2006) (arguing that, since the Free Exercise and Establishment Clauses are *limitations* on government power, they cannot conflict if interpreted according to their original intent).

B. Plaintiffs' Proffered Construction of the New Hampshire Constitution Would Result in Discrimination Against Religion in Violation of Free Exercise Rights.

The Free Exercise Clause generally requires government action to be neutral with respect to religion and of general applicability. In the realm of assistance related to education, the Supreme Court has held that the clause forbids "exclud[ing] . . . members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation". *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (approving reimbursement of parents for the cost of busing their children to religiously affiliated schools). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court stated that "the minimum requirement of neutrality is that a law not discriminate on its face". 508 U.S. at 533. The Court noted that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context". *Id.*

Plaintiffs ask this Court to read the New Hampshire Constitution to mandate an exclusion from the Program's benefits solely of students whose parents select "religious schools", and for no other reason than that the schools are religious. This is almost definitionally an exclusion criterion *without* a "secular meaning", and no other exclusion criterion is offered.

For this reason, the Tenth Circuit recently struck Colorado's exclusion of "pervasively sectarian" schools from a postsecondary aid program as unconstitutional under the Free Exercise Clause, holding that, in choosing "among otherwise eligible institutions, [the state] must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices". *Colo. Christian Univ.*, 534 F.3d at 1266; *see also Taxpayers for Public Educ.*, 2013 WL 791140, at *15 (quoting same). To hold otherwise would "violate[] that equality that ought to be the basis of every law". *See Colo. Christian Univ.*, 534 F.3d at 1257 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS

ASSESSMENTS ¶ 4 (1785)) (internal quotation marks omitted). The Eighth Circuit likewise followed these principles to hold that denying special education services only to students at religious elementary and high schools would violate free exercise rights, as doing so would impose a disability on students "because of the religious nature" of the schools their parents had chosen for them. *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998).

The "disability" threatened here is real and serious. Financially stretched families will (if they persevere in sending their children to a "religious school") be subjected to hardships that a scholarship could have spared them. Some will, as a practical matter, be denied all meaningful choice in education, which a scholarship would have made possible, solely because they would have chosen to use such a scholarship at a religiously affiliated school. Only by way of example, affiant Abigail Cyr explains that due to her financial situation, the availability of scholarships under the Program could mean the difference between keeping two of her children in Grace Christian School where they have thrived, or having them return to a public school that did not meet their educational needs. (*See* Cyr Aff. ¶¶ 22-23.) There are many other families who would similarly benefit from scholarships offered pursuant to the Program, and who would suffer if they were denied scholarships because of their choice of a religiously affiliated school.[34]

[34] *See* Busch. Aff. ¶ 38 ("I have personally spoken with several families who, despite public school not meeting their children's educational needs, absent funds from the Program, would not have the financial means to send their children to Grace Christian School."); Whiteway Aff. ¶ 34 (describing recent instances of families not receiving sufficient financial aid to enroll their children at CCA, and stating that the Program would increase accessibility to CCA and other private schools); *see also* Encarnacion Aff. ¶ 4 ("There is a nearby private Christian school, Mt. Zion Christian School, that can meet [my childrens'] needs. But my husband and I cannot afford the tuition without the assistance of a scholarship from the Network for Educational Opportunity", a qualified scholarship organization under the Program); Boffitto Aff. ¶ 7 ("Unless we receive financial assistance from the Network for Educational Opportunity ('NEO'), we will not be able to afford [to send any of our children] to private school next year.").

But the point is obvious; denial of a scholarship worth potentially thousands of dollars[35] will be a significant burden or penalty to many otherwise qualified recipients who would use the scholarships at religiously affiliated schools.

The First Circuit's decision in *Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344 (1st Cir. 2004) does not dictate a different conclusion. That decision approved Maine's long-standing educational system that permits districts—at their discretion—to provide the state-mandated free education to residents by contracting to send students to other districts or to private schools, but excluding "sectarian" schools. Quite different from the factual setting here—and from the facts decisive in the precedents reviewed in Section III.A above—that case involved direct payments, from the state treasury, to private schools. *Id.* at 346. Further, this payment was not based solely (or even primarily) on independent parental choice. Instead, the statute granted wide discretion *to districts* as to whether to send students to private school, and if so, who and how many, all subject to a case-by-case decision *by the district Superintendent*. *Id.* at 346-47. In short, a decision for the state to pay the tuition for students to attend religiously affiliated schools in the factual setting as described by the First Circuit would implicate Establishment Clause concerns totally absent here. On the facts before this Court, the precedents discussed above are unambiguous.[36]

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[35] Under the Program at its inception, the average value of scholarships awarded by Scholarship Organizations can be as high as $2,500. *See* RSA 77-G:2(I)(b).

[36] We are also obliged to note that the *Eulitt* decision, which is not binding on this Court, *see Evans v. Thompson*, 518 F.3d 1, 8 (1st Cir. 2008) ("State courts are not bound by the dictates of the *lower* federal courts . . . ."), so seriously mishandles important Supreme Court precedents that its reasoning is not instructive. In particular, the First Circuit misread *Locke v. Davey*, 540 U.S. 712 (2004), by interpreting it as "confirm[ing] that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity". *Eulitt*, 386 F.3d at 354. On the contrary, *Locke* said no such thing. *See Colo. Christian Univ.*, 534 F.3d at 1256 n.4 ("*Eulitt* went well beyond the holding in *Locke*."). *Locke* did not change the fact that "the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of

C. Plaintiffs' Proffered Construction of the New Hampshire Constitution Would Result in Discrimination Against Religion in Violation of Equal Protection Rights.

Plaintiffs urge a construction of New Hampshire's Constitution that would *require* the State to treat families who choose religiously affiliated schools differently than those who choose unaffiliated schools, making it "more difficult for [the former] group of citizens than for all others to seek aid from the government". *Romer v. Evans*, 517 U.S. 620, 633 (1996). The Equal Protection Clause of the Fourteenth Amendment prohibits classifications drawn upon "inherently suspect" distinctions, and religion is such a suspect category. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) (stating that "Religion is a suspect classification" and reasoning hypothetically that a claim that Jewish but not Muslim inmates received religious accommodations for meals would violate the Equal Protection Clause). This prohibition is enforced with particular care when a restriction or exclusion is "born of animosity" towards an affected group, *Romer*, 517 U.S. at 634, as New Hampshire's 1877 "Blaine Amendment" (now at Part II, art. 83) unfortunately was (*see supra* Section II). *See Hunter v. Underwood*, 471 U.S. 222, 231-33 (1985) (striking down facially neutral state constitutional provision disenfranchising persons convicted of certain crimes because it was originally enacted with motivation to perpetuate racial discrimination and had racially discriminatory impact). The courts in *Colorado Christian* and *Wedl* struck down the benefit exclusions as unconstitutional

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religious institutions and their students from otherwise neutral and generally available government support". *Id.* at 1255 (interpreting *Locke*). Instead, noting that "the Promise scholarship Program goes a long way toward *including* religion in its benefits", 540 U.S. at 724 (emphasis added), the Supreme Court in *Locke* held only that states may refrain from "funding religious instruction that will prepare students *for the ministry*", *id.* at 719, and its analysis was specific to that narrow and unusual question. The Court emphasized that "the *only* interest at issue here is the State's interest in not funding the religious training of clergy", *id.* at 722 n.5 (emphasis added), and noted that state-funded training and "support [of] church leaders" has historically been seen as "one of the hallmarks of an 'established' religion", *id.* at 722. Of course, these issues are not in play here.

because, in addition to violating free exercise rights (*see supra* Section III.B), they unlawfully discriminated on the basis of religion in violation of equal protection rights. *See Wedl*, 155 F.3d at 996-97 (citing *Romer* as support for the proposition that the government may not discriminate based on religion and holding that Minnesota's denial of special education benefits to students at religiously affiliated schools constituted "Government discrimination based on religion"); *Colo. Christian Univ.*, 534 F.3d at 1257-58, 1266-67 (holding that Colorado statute expressly discriminated on the basis of religion without a compelling justification).

Indeed, the proposed exclusion would violate equal protection rights guaranteed under New Hampshire's Constitution as well. Part I, article 6 of the New Hampshire Constitution provides in relevant part that "every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established". N.H. CONST. Pt. I, art. 6. As early as 1876, the New Hampshire Supreme Court made clear that this provision prohibits discrimination against religiously affiliated schools on the basis of the religious content of their teaching in determining eligibility for a neutral benefit provided by the government. The City of Manchester had attempted to levy a tax on lots owned and used by a Roman Catholic school despite a general tax exemption available to religiously affiliated schools "without distinction of sect, [or] denomination". *Warde v. Manchester*, 56 N.H. 508, at *2 (1876). The Court determined that Article 6's grant of "equal[] protection" precluded discriminating among schools on the basis of the religious views inculcated:

> "So long as people behave themselves in a peaceable and orderly manner, the doors to intellectual culture, enjoyment, and progress stand wide open. It is none of our business, in such a case, whether the lady superior of the sisters of mercy upholds the dogmas of the Romish church, or inculcates the doctrine of universal salvation after the most liberal sort of protestantism. It would be a reproach to us if it were otherwise, and, happily, under the law it cannot be."

Id. at *3.

CONCLUSION

The New Hampshire Constitution has its own history and jurisprudence, and is an authority separate from the Federal Constitution. It is, however, subordinate to the Federal Constitution. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); *Opinion of the Justices (Voting Age in Primary Elections II)*, 158 N.H. 661, 671 (2009) (analyzing whether a provision of the New Hampshire Constitution was in "conflict" with provisions of the Federal Constitution, in which case there would be "need to yield to the Federal Constitution under the Supremacy Clause"). Happily, as reviewed above, the New Hampshire Constitution as a whole breathes the same spirit and points to the same conclusion as does the Federal Constitution. Certainly, this Court should follow the example of other state courts and—so far as possible—construe the New Hampshire Constitution to avoid any clash between the two.[37] Given that the carefully crafted statute challenged here cannot violate the actual language of the provisions on which Plaintiffs rely, this Court should not expand either of those provisions in a manner that would create what would be a needless and readily avoidable constitutional train wreck.

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[37] *See, e.g., Taxpayers for Pub. Educ.*, 2013 WL 791140, at *15 n.17 ("We do not hold, of course, that any of the provisions of the Colorado Constitution here at issue violate the Religion Clauses of the First Amendment. We do hold that they must be applied in a way that does not violate the Religion Clauses."); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (holding first that a neutral tuition tax credit program was permissible under the Establishment Clause, then interpreting the "religion clauses" of Arizona's Constitution as not prohibiting the program); *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998) (holding first that neutral school voucher program was permissible under the Establishment Clause, stating that the Court must "interpret and apply the benefits clause of art. I, § 18 [of Wisconsin's Constitution] in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment", then interpreting Wisconsin's Constitution as not prohibiting the program).

For the reasons set forth above, this Court should deny Plaintiffs' request for injunctive relief and enter judgment against Plaintiffs on all counts.

Respectfully submitted,

Concord Christian Academy,
Grace Christian School,
Roman Catholic Bishop of Manchester,
Association of Christian Schools International,
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