In the Supreme Court of Pennsylvania

No. 16 MAP 2011

MESIVTAH EITZ CHAIM OF BOBOV INC.,

Appellant,

v.

PIKE COUNTY BOARD OF ASSESSMENT APPEALS,

Appellee,

DELAWARE VALLEY SCHOOL DISTRICT and
DELAWARE TOWNSHIP,

Intervenors.

BRIEF FOR APPELLANT

On Allowance of Appeal from the Judgment of the Commonwealth Court of Pennsylvania at No. 2343 C.D. 2008 filed December 29, 2009, Affirming the Judgment of the Court of Common Pleas of Pike County, Pennsylvania, No. 1095–1997 Civil, entered September 11, 2008

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I. STATEMENT OF JURISDICTION

On December 29, 2009, the Commonwealth Court of Pennsylvania issued its ruling on the appeal that appellant Mesivtah Eitz Chaim of Bobov ("Camp Mesivtah") had taken from the ruling of the Court of Common Pleas of Pike County, Pennsylvania. The Commonwealth Court's opinion and order are attached hereto as Exhibit A. The trial court's opinion and order are attached hereto as Exhibit B.

On January 28, 2010, Camp Mesivtah filed a timely petition for allowance of appeal in this Court. On February 9, 2011, this Court issued an order granting allowance of appeal limited to the first question presented in Camp Mesivtah's petition. This Court possesses jurisdiction pursuant to 42 Pa. Cons. Stat. Ann. §724(a).

II. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In *Community Options, Inc.* v. *Board of Property Assessment*, 571 Pa. 672, 813 A.2d 680 (2002), this Court explained that "[t]he question of whether an entity is a 'purely public charity' is a mixed question of law and fact on which the trial court's decision is binding absent an abuse of discretion or lack of supporting evidence." *Id.* at 677, 813 A.2d at 683.

The question on which this Court has granted review in this case presents a pure question of law. With respect to questions of law, this Court's scope of review is plenary and the standard of review is *de novo*. *See Castellani* v. *Scranton Times, L.P.*, 598 Pa. 283, 293, 956 A.2d 937, 943 (2008).

III. THE ORDER IN QUESTION

The Commonwealth Court's order dated December 29, 2009 states, in full:

> AND NOW, this 29th day of December, 2009, the order of the Court of Common Pleas of Pike County in the above–captioned matter is hereby AFFIRMED.

/s/
BONNIE BRIGANCE LEADBETTER,
President Judge

See Exhibit A hereto.

IV. STATEMENT OF THE QUESTION PRESENTED

On February 9, 2011, this Court granted review limited to the following question:

> Whether the Pennsylvania Legislature's enactment of criteria in Act 55 for determining if an organization qualifies as a "purely public charity" under Pennsylvania's Constitution is deserving of deference in deciding whether an organization qualifies as "a purely public charity" under Pennsylvania's Constitution, or has the test provided in *Hospital Utilization Project v. Commonwealth*, 487 A.2d 1306 (Pa. 1985), occupied the constitutional field, leaving no room for legislative influence and input?

Mesivtah Eitz Chaim of Bobov Inc. v. *Pike County Bd. of Assessment Appeals*, 13 A.3d 463 (Pa. 2011) (order).

V. STATEMENT OF THE CASE

Mesivtah Eitz Chaim of Bobov is a nonprofit religious entity that operates a religious summer camp on a 60–acre parcel of land located in Delaware Township, Pike County, Pennsylvania. Exhibit B at 1. Camp Mesivtah sought an exemption from taxation from the Pike County Board of Assessment for all county, township, and school taxes pertaining to that parcel of real property because Camp Mesivtah qualifies and has qualified at all relevant times as a purely public charity under Pennsylvania law. Exhibit B at 1.

The Board of Assessment denied the request for exemption, which caused Camp Mesivtah to seek a hearing *de novo* in the Court of Common Pleas of Pike County, Pennsylvania. R.6a–8a. Delaware Valley School District and Delaware Township intervened.

On August 26, 2008, the trial court held a hearing at which Camp Mesivtah introduced the testimony of three witnesses and seven exhibits. R.21a–116a. None of the other parties introduced any witnesses or exhibits. At the hearing, Rabbi Baruch Horowitz testified that he was the dean of the Bobov rabbinical college and a member of the Mesivtah Eitz Chaim congregation, which he described as "one of the largest [Jewish communities] in Boro Park, which is an area in Brooklyn." R.28a–29a. Rabbi Horowitz testified that "[e]verything that Mesivtah Eitz Chaim does, to my knowledge, in many areas is everything is strictly charitable, nothing else." R.30a.

He testified that, during the annual eight–week program at the camp in Pike County, "the focus definitely is [to] further advance studies of religion" and that "[t]he students achieve in these two months what they work six months in the city" to achieve. R.32a. "They get up at 4 o'clock in the morning some of them are up very, very late at night marathon studying and learning, as well as a few hour break during the day to swim, play ball, recreation, but it's basically [an] integral part of the school, the community and the synagogue, everything that's done all year long, sort of review and be done during these two months and we all come home better and ready to go on for the next year and that's what the purpose of the camp is as I see it." R.32a–33a.

At the hearing, Rabbi Mordechai Geller, who serves as director of Camp Mesivtah, testified that all of Camp Mesivtah's earnings and the donations it receives are applied toward Camp Mesivtah's charitable operations. R.39a, 42a. Rabbi Geller further testified that Camp Mesivtah advances and promotes religion and is operated as a religious ministry. R.45a–46a. He testified that "when you go up to the camp and you come into the study hall, you can see all the teachers teaching the students religion, teaching them how to become Rabbis." R.46a.

With regard to Camp Mesivtah's dining facilities, Rabbi Geller testified that the camp's food program is open to the general public, and that no one has ever been turned away due to race, religion, or gender. R.48a–49a. Rabbi Geller further testified that the cost of operating the food program exceeded the amount of money received from governmental sources as grants. R.49a.

Camp Mesivtah introduced into evidence a document showing that in 1996, the cost of operating the camp totaled more than $600,000 and that tuition received from campers totaled less than $220,000. R.52a, 124a. Rabbi Geller also testified that, during the years 2005 through 2008, the camp's expenses also exceeded the amount received in tuition. R.53a. And he testified that between 2005 and 2007, Mesivtah provided uncompensated goods and services that exceeded five percent of the institution's cost of providing goods and services. R.55a.

On cross–examination, Rabbi Geller testified that religious instruction commences at 6 a.m. most mornings and that it often continues until nighttime, with an afternoon break for recreational activities. R.63a–64a. He testified that those who attend the camp come not only from the Bobov community located in Brooklyn, New York, but also from Canada; upstate New York; Long Island, New York; and Israel. R.67a–68a. He also testified that sometimes local residents from Pike County come to the camp to participate in religious prayer or to attend classes. R.68a–69a, 85a–87a.

Rabbi Geller testified that Camp Mesivtah is open each year for an eight–week period from the end of June until the end of August. R.59a, 87a. He also testified, however, that Camp Mesivtah would make its facilities available to be used by others on request during the rest of the year. R.85a–87a.

With regard to the camp's finances, in 2005 the expenses per camper totaled $1,930, and yet the maximum tuition rate was only $1,800. R.15a. Mesivtah thus gratuitously provided each camper with at least $130 in services. In 2005, Mesivtah

provided 79% of campers (130 of 165) with financial assistance to cover tuition. R.15a. The smallest award was $300, while the largest award covered the entire cost of tuition to attend the camp. R.56a–57a.

On September 11, 2008, the Court of Common Pleas of Pike County ruled that Mesivtah did not qualify as a "purely public charity" under Article VIII, §2 of the Pennsylvania Constitution and thus did not qualify for the real estate tax exemption at issue. *See* Exhibit B.

The trial court's decision contains the following Findings of Fact:

> 2. Mesivtah is recognized as a tax exempt organization under federal regulations.
>
> * * *
>
> 5. The camp program is primarily educational but the camp has significant recreational facilities and the program provides recreational activities to campers.
>
> 6. The educational program of the camp consists of classes and lectures on the Orthodox Jewish religion.
>
> * * *
>
> 12. In particular, Mesivtah submitted profit and loss statements for several years showing that over an approximate ten year period that:
>
> a. Mesivtah did not make a profit;
>
> b. it contributed a significant percentage of service to campers;
>
> c. payments received from the campers were insufficient to offset all of the costs of the summer camp;
>
> d. significant capital improvements at the camp were required during that period.

> 13. In addition to the financial information, Petitioner provided testimony indicating that the camp provides education to teenage boys in the Jewish faith and as an introduction for some rabbinical studies.
>
> 14. Further, Petitioner provided evidence indicating that the camp program is related to the Bobov community in New York which community is a fairly large Orthodox Jewish community with a base in New York City with some members located elsewhere in the world.

Exhibit B at 1–3.

The trial court, in its ruling, expressly found that Camp Mesivtah satisfied three of the five criteria that the Supreme Court of Pennsylvania determined were necessary to qualify as a purely public charity under Article VIII, §2 of the Pennsylvania Constitution in *Hospital Utilization Project* v. *Commonwealth*, 507 Pa. 1, 21–22, 487 A.2d 1306, 1317 (1985). Specifically, the trial court found that Camp Mesivtah (1) advances a charitable purpose; (2) donates or renders gratuitously a substantial portion of its services; and (5) operates entirely free from profit motives. Exhibit B at 4.

However, the trial court found that Camp Mesivtah did not satisfy the remaining two criteria, because the camp did not establish to the trial court's satisfaction that it (3) benefits a substantial and indefinite class of persons who are legitimate subjects of charity or (4) relieves the government of some of its burden. Exhibit B at 4.

On the issue of whether Camp Mesivtah benefits a substantial and indefinite class of persons who are legitimate subjects of charity, Camp Mesivtah introduced evidence that it routinely offers free or discounted camp tuition to individuals who

are unable to afford the usual cost to attend. R.15a, 56a–57a. Moreover, the camp opens its recreational and food service facilities free of charge to local residents of Pike County who desire to partake in what the camp's facilities and dining operations have to offer. R.48a–49a, 85a–87a.

On the issue of whether Camp Mesivtah relieves the government of some of its burden, Camp Mesivtah argued in the trial court that it satisfied at least four of the six alternate ways in which an organization can establish that it "relieve[s] the government of some of its burden" that General Assembly set forth in Act 55. *See* 10 Pa. Stat. Ann. §375(f).

Camp Mesivtah filed a timely notice of appeal from the trial court's ruling on October 3, 2008. R.159a. On December 29, 2009, after briefing and oral argument, the Commonwealth Court of Pennsylvania issued its ruling on Camp Mesivtah's appeal. *See* Exhibit A. The Commonwealth Court first ruled that Camp Mesivtah additionally satisfied the third prong of the so–called "*HUP* test" because Camp Mesivtah benefits a substantial and indefinite class of persons who are legitimate subjects of charities. *See* Exhibit A at 6–7. Thus, in the aftermath of the Commonwealth Court's ruling, Camp Mesivtah has satisfied four of the five prongs of the *HUP* test.

The Commonwealth Court then turned to review the trial court's ruling that Camp Mesivtah did not satisfy the fourth prong of the *HUP* test, which requires an organization to show that it "relieves the government of some of its burden." In the course of its discussion of that issue, the Commonwealth Court explained:

> Mesivtah also asserts that because it satisfies four of the six criteria set forth in Section 5(f) of the Charity Act, 10 P.S. §375(f), the camp relieves the government of some of its burden. Although the constitutional test for determining whether an entity qualifies as a purely public charity and the statutory test as set forth in the Charity Act are very similar, our Supreme Court has not held that the two tests are the same. Rather the Supreme Court has stated that an entity must first satisfy the constitutional test set forth in *HUP*, prior to satisfying the mandates set forth in Section 5 of the Charity Act, 10 P.S. § 375. *See Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals*, 591 Pa. 436, 463, 919 A.2d 206, 222 (2007); *Community Options, Inc.*, 571 Pa. at 680, 813 A.2d at 685.[3]
>
> [3] Further, our Supreme Court is not obligated to defer to the General Assembly's judgment concerning the proper interpretation of constitutional terms as the "ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary…." *Alliance Home*, 591 Pa. at 464 n. 9, 919 A.2d at 223 n. 9 [quoting *Stilp v. Commonwealth*, 558 Pa. 539, 905 A.2d 918 (Pa. 2006)].

Exhibit A at 10–11 & n.3

The Commonwealth Court returned to this subject at the end of its opinion in this case, writing:

> Finally, Mesivtah contends that in order to qualify as a purely public charity an entity should need only to satisfy the requirements of the Charity Act. Mesivtah argues that the General Assembly enacted the Charity Act in order to clarify the criteria that an entity needed to satisfy in order to qualify as a purely public charity because of inconsistent application of eligibility standards by the judiciary.
>
> As discussed above, our Supreme Court has stated that an entity must first satisfy the constitutional test set forth in *HUP*, prior to satisfying the mandates set forth in Section 5 of the Charity Act, 10 P.S. § 375. *See Alliance Home of Carlisle, Pa.*, 591 Pa. at 463, 919 A.2d at 222; *Community Options, Inc.*, 571 Pa. at 680, 813 A.2d at 685. * * * In the case at hand, the central question is whether Mesivtah qualifies as purely public charity. Accordingly, this court is required to perform the *HUP* analysis before proceeding to the Charity Act test.

Exhibit A at 11–12.

Camp Mesivtah has contested its real estate taxes since 1997. It has paid those taxes, totaling slightly more than $50,000 per year, under protest between 1997 and 2004. The school district takes nearly $40,000 of that amount per year, with the remainder being divided between the township and the county. If Camp Mesivtah were entitled to a refund of those payments, it would recover roughly $400,000 plus interest. Camp Mesivtah now owes unpaid real property taxes from 2005 through to the present.

Unless Camp Mesivtah prevails in its effort to obtain the real estate tax exemption that is the subject of this lawsuit, Camp Mesivtah will be required to stop operating its camp in Pike County, Pennsylvania and will likely need to sell the property.

VI. SUMMARY OF THE ARGUMENT

When this Court undertook to determine the meaning of "purely public charity" as contained in Article VIII, §2(a)(v) of Pennsylvania's Constitution in *Hospital Utilization Project* v. *Commonwealth*, 507 Pa. 1, 21–22, 487 A.2d 1306, 1317 (1985), this Court acknowledged that the General Assembly had not yet undertaken to provide any statutory definition of "purely public charity." *See id.* at 13, 487 A.2d at 1312.

Article VIII of Pennsylvania's Constitution, titled "Taxation and Finance," concerns matters that are uniquely within the purview of the General Assembly. Section 2(a) of Article VIII of Pennsylvania's Constitution expressly states that

"[t]he General Assembly may by law exempt from taxation" a specified list of five categories. Thus, the plain language of the constitutional provision at issue in this appeal specifies that it is the "General Assembly" that is empowered to enact "by law" a specified list of "exempt[ions] from taxation," including an exemption for "[i]nstitutions of purely public charity." Moreover, the constitutional language and structure demonstrates that Pennsylvania's Constitution assigned to the General Assembly the power to define what criteria an organization must satisfy in order to qualify as "purely public charities."

If the General Assembly already had enacted legislation to define what organizations qualified as "[i]nstitutions of purely public charity" exempt from taxation under Section 2(a)(v) of Article VIII of Pennsylvania's Constitution before this Court had issued its ruling in the so–called *HUP* case, this Court would have undertaken a highly deferential review of the General Assembly's legislation in the course of determining its lawfulness.

But, when this Court issued its ruling in the *HUP* case in 1985, the General Assembly had not yet enacted any legislation to define "purely public charity." Thus, in *HUP*, this Court announced its own list of five factors that an organization must satisfy in order to qualify as a "purely public charity" under Article VIII, §2(a)(v) of Pennsylvania's Constitution. Thereafter, in 1997, when the General Assembly enacted the Purely Public Charity Act, Act of November 26, 1997, P.L. 508, 10 Pa. Stat. Ann. §371, et seq. ("Act 55"), the General Assembly evidenced great respect toward this Court's ruling in *HUP* by legislatively adopting the very

same five *HUP* factors as the legislative criteria contained in Act 55 that an organization must satisfy in order to qualify as a purely public charity.

Unfortunately, in the aftermath of *HUP*, Pennsylvania courts have erroneously viewed this Court's ruling in *HUP* as announcing the minimum requirements as a matter of constitutional interpretation that an organization must satisfy to qualify as a "purely public charity," so that an organization must now satisfy not only the legislatively determined requirements set forth in Act 55 but also separately satisfy the criteria that this Court announced in its ruling in the *HUP* case to qualify as a "purely public charity."

In deciding this case, this Court should make clear that in *HUP*, this Court was merely performing a gap–filling role in the absence of any preexisting legislative criteria from the General Assembly to determine what constituted a "purely public charity." Now that the General Assembly has itself fulfilled the responsibility assigned to it under Pennsylvania's Constitution to define the criteria that an organization must satisfy to qualify as a purely public charity, this Court should appropriately defer to Act 55 as setting forth the definitive test for a tax exemption.

If anything, the General Assembly should be applauded for the amount of respect and deference that it has shown to this Court's ruling in the *HUP* case. Act 55 adopts intact the *HUP* five–prong test as the starting point for determining what organizations qualify as a "purely public charity." But, in the absence of any argument that Act 55 is itself somehow unconstitutional— and there is no such

argument being asserted by the local taxing authorities in this case — this Court should defer to Act 55 as setting forth *the exclusive criteria* for qualifying for a tax exemption, instead of requiring organizations to satisfy both the Act 55 criteria and the criteria that this Court set forth in the *HUP* case.

This type of deference is particularly appropriate under the specific facts and circumstances of this case. The only one of the five *HUP* prongs that the Commonwealth Court ruled that Camp Mesivtah failed to satisfy was the "relieving the government of some of its burden" prong. The General Assembly, with its power to tax and spend, has unique and unparalleled expertise in deciding what should be recognized as burdens that the government itself has assumed. Because Camp Mesivtah satisfies in multiple ways the "relieving the government of some of its burden" criteria that the General Assembly has enacted in Act 55, the judicial inquiry should be at an end, resolved in favor of Camp Mesivtah. Moreover, because the "relieving the government of some of its burden" prong of the *HUP* test is of questionable relevance as a criteria for tax exemption, the General Assembly should be allowed to relax the showing necessary to satisfy that prong of the *HUP* test.

For these reasons, this Court should hold that an organization merely needs to satisfy the General Assembly's criteria in Act 55 to qualify as a "purely public charity" entitled to an exemption from taxation under Article VIII, §2(a)(v) of Pennsylvania's Constitution and that Camp Mesivtah satisfies those criteria and thus qualifies as a "purely public charity."

VII. ARGUMENT

A. The Text Of Pennsylvania's Constitution Assigns To The General Assembly The Responsibility Of Defining Through Legislation What Criteria An Organization Must Satisfy To Qualify As A Tax–Exempt "Purely Public Charity"

Article VIII, §2(a)(v) of the Pennsylvania Constitution provides in pertinent part that "The General Assembly may by law exempt from taxation: Institutions of purely public charity . . . ." Pa. Const. Art VIII, §2(a)(v). Thus, the express language of Pennsylvania's Constitution assigns to the General Assembly the ability "by law" to "exempt from taxation" organizations that qualify as "institutions of purely public charity." Moreover, because Pennsylvania's Constitution does not itself further define the term "institutions of purely public charity," the power and responsibility for defining that term necessarily rests in the first instance within the General Assembly, subject of course to this Court's power to invalidate laws that this Court determines to be unconstitutional.

The Pennsylvania Constitution's assignment of these powers to the General Assembly is consistent with the overarching constitutional structure of Pennsylvania government. As this Court has recognized, "[t]he power of taxation, in all forms and of whatever nature, lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution." *Mastrangelo* v. *Buckley*, 433 Pa. 352, 362–63, 250 A.2d 447, 452 (1969). This Court's ruling in *Mastrangelo* proceeded to explain that, "[a]bsent a grant or delegation of the power to tax from the General Assembly," no local governmental entity "has any power or authority to levy, assess or collect taxes." *Id.* at 363, 250 A.2d at 452–53.

Article VIII of Pennsylvania's Constitution, titled "Taxation and Finance," concerns matters that are uniquely within the purview of the General Assembly. Section 2(a) of Article VIII of Pennsylvania's Constitution expressly states that "[t]he General Assembly may by law exempt from taxation" a specified list of five categories. Thus, the plain language of the constitutional provision at issue in this appeal specifies that it is the "General Assembly" that is empowered to enact "by law" a specified list of "exempt[ions] from taxation," including an exemption for "[i]nstitutions of purely public charity." Moreover, the constitutional language and structure demonstrates that Pennsylvania's Constitution has exclusively assigned to the General Assembly in the first instance the power to define what criteria an organization must satisfy in order to qualify as "purely public charities."

Of course, Camp Mesivtah does not mean to suggest that the judicial branch has absolutely no role to play with regard to issues of taxing and spending or tax exemptions. Certainly if the General Assembly were to enact tax exemptions that were themselves unconstitutional — perhaps because they impermissibly discriminated on the basis of race, gender, national origin, or sexual orientation — the judiciary would certainly be well within its lawful power to invalidate such exemptions. But, ordinarily, the legality of legislation is reviewed by courts under a highly deferential rational basis analysis. *See Parker* v. *Children's Hospital of Philadelphia*, 483 Pa. 106, 116, 394 A.2d 932, 937 (1978) ("[I]t must be remembered that a legislative enactment enjoys a presumption in favor of its constitutionality and will not be declared unconstitutional unless it clearly, palpably and plainly

violates the Constitution. All doubts are to be resolved in favor of a finding of constitutionality."). Here, the General Assembly's enactment of Act 55 easily satisfies those criteria, and none of the taxing authorities has ever raised any argument in this case that the legislative criteria for obtaining a tax exemption under Act 55 are somehow themselves unconstitutional.

B. This Court's Ruling In The *HUP* Case Was Appropriate In The Absence Of Any Preexisting Legislative Definition Of "Purely Public Charity," But This Court Did Not Purport To, And Could Not, Usurp The General Assembly's Power To Define That Term

In 1985, when this Court issued its ruling in *Hospital Utilization Project* v. *Commonwealth*, 507 Pa. 1, 487 A.2d 1306 (1985), this Court's decision recognized that the General Assembly had yet to enact any legislative criteria to determine what organizations qualified as "institutions of purely public charity" under Article VIII, §2(a)(v) of the Pennsylvania Constitution. *See* 507 Pa. at 13, 487 A.2d at 1312. Accordingly, acting in the absence of any pertinent legislative definition from the General Assembly, in the *HUP* case this Court recognized a five–part test for determining whether an entity qualifies as a "purely public charity" under the Pennsylvania Constitution. The so–called *HUP* test asks whether the entity:

> (a) Advances a charitable purpose;
>
> (b) Donates or renders gratuitously a substantial portion of its services;
>
> (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity;

(d) Relieves the government of some of its burden; and

(e) Operates entirely free from private profit motive.

Id. at 21–22, 487 A.2d at 1317.

Camp Mesivtah acknowledges that this Court properly performed its judicial role in the *HUP* case — in the absence of any preexisting criteria from the General Assembly — in setting forth criteria that an organization must satisfy to qualify as a "purely public charity" under Pennsylvania's Constitution. In essence, this Court was performing an appropriate gap–filling function, in the absence of any relevant preexisting legislative enactment. Nevertheless, there was no indication from this Court's decision in *HUP* that this Court viewed its decision as supplanting the responsibility that Pennsylvania's Constitution expressly assigned to the General Assembly to define the criteria that an organization must satisfy in order to constitute a tax–exempt "purely public charity." Rather, this Court's ruling in *HUP* did not purport to, and indeed could not, usurp the responsibility that Pennsylvania's Constitution has assigned to the General Assembly to decide what criteria an organization must satisfy to qualify as a tax–exempt "purely public charity."

Some 12 years later, in 1997, Pennsylvania's General Assembly enacted the Purely Public Charity Act, Act of November 26, 1997, P.L. 508, 10 Pa. Stat. Ann. §371, et seq. ("Act 55"), to set forth the criteria that an organization must satisfy to qualify as a "purely public charity" under Pennsylvania's Constitution. In Act 55, the General Assembly expressed its dissatisfaction with the "inconsistent

application of eligibility standards for charitable tax exemptions" which judicial decisions on that subject had reflected. *See Alliance Home* v. *Board of Assessment Appeals*, 591 Pa. 436, 464, 919 A.2d 206, 223 (2007) (citing 10 Pa. Stat. Ann. §372(b)). As a result, in enacting Act 55 into law, the General Assembly expressly intended to "provid[e] standards to be applied uniformly in all proceedings throughout this Commonwealth for determining eligibility for exemption from State and local taxation which are consistent with traditional legislative and judicial applications of the constitutional term 'institutions of purely public charity.'" 10 Pa. Stat. Ann. §372(b) (describing the General Assembly's intent).

On the one hand, Act 55 reflects a remarkably high degree of legislative deference to this Court's decision in the *HUP* case. In particular, the General Assembly in Act 55 adopted intact from *HUP* the entire five–prong test that this Court had set forth in its ruling in the *HUP* case for an organization to qualify as a "purely public charity." Under Act 55, as under *HUP* itself, an organization must satisfy all five of those criteria in order to qualify for a tax exemption as a "purely public charity." But, on the other hand, Act 55 makes clear the General Assembly's intention that the statutory criteria for obtaining a tax exemption would be *the sole and exclusive criteria* that an organization must satisfy in order to qualify as a "purely public charity." And this Court appropriately should defer to that intention, as Article VIII, §2(a)(v) of the Pennsylvania Constitution expressly empowers the General Assembly to be the governmental entity that, in the first instance,

determines what criteria an organization must satisfy in order to qualify as a "purely public charity."

The situation that this case presents is entirely distinct from a scenario in which it would clearly be improper for the legislative branch to seek to "overrule" a constitution–based ruling of the judiciary. For example, consider a hypothetical in which the Supreme Court of Pennsylvania has invalidated a content–based tax on certain types of newspapers as contrary to the freedom of expression provision of Pennsylvania's Constitution. If the General Assembly, after receiving and reviewing this Court's ruling, were to reenact the identical statute with an accompanying statement of purpose disagreeing with this Court's constitutional analysis, this Court would have no choice but to invalidate the identical law as reenacted because the judiciary would be entitled to have the final word in that scenario over whether a given statute was or was not constitutional.

By contrast, in this case a far different scenario is presented. When this Court issued its ruling in the *HUP* case, this Court had no choice but to fill the legislative gap that resulted from the General Assembly's failure as of 1985 to issue any statutory definition setting forth the criteria that an organization must satisfy to constitute a "purely public charity." But, in the course of deciding what criteria an organization must satisfy to qualify as a "purely public charity," this Court was of necessity forced to engage in the very sort of policy choices that this Court has elsewhere recognized are exclusively reserved to the General Assembly. *See Glenn Johnston, Inc.* v. *Commonwealth, Dep't of Revenue*, 556 Pa. 22, 30, 726 A.2d 384,

388 (1999) (recognizing, in deciding a dispute over the availability of a particular tax exemption, that "[s]uch policy determinations, however, are within the exclusive purview of the legislature, and it would be a gross violation of the separation of powers doctrine for us to intrude into that arena"); *see also Weaver* v. *Harpster*, 601 Pa. 488, 502, 975 A.2d 555, 563 (2009) ("it is for the legislature to formulate the public policies of the Commonwealth"); *Program Administration Services, Inc.* v. *Dauphin County General Auth.*, 593 Pa. 184, 192, 928 A.2d 1013, 1017–18 (2007) ("[C]ourts should not lose sight of the respective roles of the General Assembly and the courts in terms of establishing public policy. In particular, it is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations.").

Any ruling from this Court that a judicial decision construing the meaning of a provision contained in Pennsylvania's Constitution takes supremacy, where the Constitution itself gives the General Assembly the ability in the first instance to define the provision, could trigger an unseemly race to define terms simply to preserve legislative power and prerogative. In other words, so long as the General Assembly does not make patently unconstitutional choices, the mere fact that it was necessary for this Court to define a provision of Pennsylvania's Constitution that the General Assembly was itself empowered to define under the Constitution's express text should not be viewed as restricting or limiting the policy choices open to the General Assembly when the legislature eventually seeks to exercise the definitional power that the Constitution itself has vested in the legislative branch.

Unquestionably, if the General Assembly had enacted Act 55 before this Court issued its ruling in the *HUP* case, this Court would have shown great deference toward the legislature's policy choices in reviewing any challenges to the legality of Act 55. As this Court has explained, enactments of the General Assembly enjoy a strong presumption of constitutionality. *See Commonwealth* v. *Barud*, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996) (citing *Commonwealth* v. *Mikulan*, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983)). All doubts are to be resolved in favor of sustaining the constitutionality of the legislation. *See Commonwealth* v. *Blystone*, 519 Pa. 450, 463, 549 A.2d 81, 87 (1988) (citing *Hayes* v. *Erie Ins. Exchange*, 493 Pa. 150, 155, 425 A.2d 419, 421 (1981)), *aff'd*, 494 U.S. 299 (1990). "[N]othing but a clear violation of the Constitution — a clear usurpation of powers prohibited — will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Glancey* v. *Casey*, 447 Pa. 77, 88, 288 A.2d 812, 818 (1972) (citing *Busser* v. *Snyder*, 282 Pa. 440, 449, 128 A. 80, 83 (1925)).

As this Court long ago recognized, "[t]he right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases." *Erie & North–East R.R. Co.* v. *Casey*, 26 Pa. 287, 300–01 (1856). Moreover, one of the most firmly established principles of Pennsylvania law is that the challenging party has a heavy burden of proving an act unconstitutional. *See Barud*, 545 Pa. at 304, 681 A.2d at 165. In order for an act to be declared

unconstitutional, the challenging party must prove the act "clearly, palpably and plainly" violates the constitution. *Id.*

Accordingly, there is no reason even to suspect that this Court would have viewed Act 55 as anything other than a constitutional exercise of the General Assembly's power had Act 55 been enacted into law in advance of this Court's ruling in the *HUP* case. However, if this Court were to now hold that its ruling in *HUP* establishes the constitutional minimum requirements that an organization must satisfy to qualify as a "purely public charity," this Court would thereby improperly be depriving the General Assembly of the express power delegated to it under Pennsylvania's Constitution to enact into law the criteria that an organization must satisfy to qualify as a "purely public charity" simply because the General Assembly did not act more quickly in enacting appropriate legislation. *See School Districts of Deer Lakes and Allegheny Valley* v. *Kane*, 463 Pa. 554, 564, 345 A.2d 658, 663 (1975) ("when a constitutional provision contemplates the enactment of implementing legislation, the provision should, absent clear language to the contrary, be interpreted as establishing general guidelines for the forthcoming legislation, rather than mandatory directives as to its content").

It is also important to note that, notwithstanding that it has been Camp Mesivtah's consistent argument throughout the course of this proceeding that Camp Mesivtah should qualify as a "purely public charity" simply as the result of satisfying Act 55's criteria, none of the governmental taxing authorities has ever

advanced the argument in this case that Act 55's criteria for qualifying as a "purely public charity" are themselves unconstitutional in any respect.

For all of these reasons, this Court should hold that the mere fact that the *HUP* case was decided before the General Assembly enacted Act 55 did not deprive the General Assembly of the power entrusted to it under the express language of Pennsylvania's Constitution to legislatively determine the sole and exclusive criteria that an organization must satisfy to qualify as a "purely public charity" under Pennsylvania's Constitution.

C. The General Assembly's Purpose In Enacting Act 55 Was To Achieve Goals That The Judiciary Likewise Values — Namely, To Avoid Conflicting Judicial Decisions, To Avoid Wasteful Litigation, And To Provide Charitable Organizations And Local Taxing Authorities With Added Certainty

Not only did the General Assembly's enactment of Act 55 exhibit laudable deference toward this Court's ruling in the *HUP* case by enacting into law all five prongs of the *HUP* test, but the General Assembly's express statement of purpose in enacting Act 55 also discloses that the General Assembly sought to achieve other praiseworthy goals that the judiciary itself highly values. As then–Justice Castille, writing for a unanimous Supreme Court of Pennsylvania, observed in *Alliance Home* v. *Board of Assessment Appeals*, 591 Pa. 436, 919 A.2d 206 (2007):

> The declaration and findings of legislative intent attending Act 55, while not binding upon this Court, make clear that the General Assembly was concerned with a perceived inconsistent application of eligibility standards for charitable tax exemptions. Act 55 found that the inconsistencies had led to "confusion and confrontation" among traditionally tax–exempt institutions and political subdivisions to the

> detriment of the public, a detriment which included the "unnecessar[y] diver[sion]" of "charitable and public funds . . . from the public good to litigate eligibility for tax–exempt status." 10 P.S. §372(b).

Id. at 464, 919 A.2d at 233. This Court, of course, unquestionably recognizes the importance of avoiding inconsistent adjudications, as the existence of conflicting judicial decisions is one of the established bases for this Court to grant discretionary review by means of a petition for allowance of appeal. *See* Pa. R. App. P. 1114 note. Only by allowing Act 55 to serve as the exclusive criteria to qualify for a charitable exclusion as a "purely public charity" can this important goal be achieved.

Likewise, the General Assembly in Act 55 explained that another purpose for the enactment of that law was to avoid the "unnecessar[y] diver[sion]" of "charitable and public funds . . . from the public good to litigate eligibility for tax–exempt status." It is obviously an important goal to avoid the unnecessary expenditure of money held in the public fisc and also money donated for charitable purposes in litigation over whether an organization satisfies the criteria to qualify as a "purely public charity." Once again, only by allowing Act 55 to serve as the exclusive criteria to qualify for a charitable exclusion as a "purely public charity" can this important goal be achieved.

Last but not least, the added certainty that Act 55 was intended to provide would allow both charitable organizations and governmental taxing authorities to conduct their affairs with added certainty in their interactions with one another. And allowing the General Assembly to have the ability to legislatively determine when an organization qualifies as a "purely public charity" would allow the General

Assembly to react promptly to changes in society, technology, and the needs of local governments in a manner that the comparatively slow pace of judicial decision–making cannot. *Cf. G.D.L. Plaza Corp.* v. *Council Rock School Dist.*, 515 Pa. 54, 59–60, 526 A.2d 1173, 1175 (1987) (noting that "prior cases have limited value as precedent because of the continually changing nature of the concept of charity and the many variable circumstances of time, place, and purpose") (internal quotations and citations omitted).

In sum, because the General Assembly's enactment of Act 55 reflects proper deference to this Court's ruling in the *HUP* case, and because Act 55's enactment was intended to, and does, advance various laudable goals that the judiciary itself highly values, this Court should hold that Act 55's criteria for qualifying as a "purely public charity" have displaced and take precedence over the *HUP* test in accord with the Pennsylvania Constitution's delegation to the General Assembly of the power to define which organizations qualify as "purely public charities."

D. This Court Should Hold That Camp Mesivtah Satisfies Act 55's Criteria For "Relieving The Government Of Some Of Its Burden" And Thus Qualifies As A "Purely Public Charity" Under Pennsylvania Law

In this case, in the aftermath of the Commonwealth Court's ruling, petitioner Mesivtah satisfies four of the five parts of the *HUP* test to qualify as a purely public charity under this Court's precedent. The lone prong of the *HUP* test that Mesivtah has not yet been recognized as satisfying is "relieving the government of some of its burden." Nevertheless, the Commonwealth Court's decision notes that Mesivtah

appears to satisfy several of the alternatives legislatively provided in Act 55 for "relieving the government of some of its burden." *See* Exhibit A at 10.

Pennsylvania's government, through its General Assembly, has already spelled out in Act 55 what burdens the government has chosen to assume. Camp Mesivtah maintains that the judiciary, at a minimum, should defer to the General Assembly's criteria in Act 55 when determining whether an organization satisfies the qualifications to constitute a "purely public charity." This Court has recognized "that there is a strong presumption in the law that legislative enactments do not violate the constitution." *Commonwealth* v. *Barud*, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). Similarly, in *Pantuso Motors, Inc.* v. *CoreStates Bank, N.A.*, 568 Pa. 601, 798 A.2d 1277 (2002), this Court explained that "absent constitutional infirmity the courts of this Commonwealth may not refuse to enforce on grounds of public policy that which the Legislature has prescribed." *Id.* at 610, 798 A.2d at 1283. And in *Alliance Home* v. *Board of Assessment Appeals*, 591 Pa. 436, 919 A.2d 206 (2007), this Court recognized that "Act 55 [may] g[i]ve reason to reconsider the contours of the [*HUP*] test thus distilled from judicial experience with individual cases." *Id.* at 464, 919 A.2d at 223.

Even putting aside the question of Act 55's impact on the *HUP* factors, and even assuming that what constitutes a purely public charity can only be defined by the judiciary, Act 55 nevertheless answers the question "What is a government responsibility?" The answer to that question changes with the times and is best

answered by the government itself. *See G.D.L. Plaza Corp.*, 515 Pa. at 59–60, 526 A.2d at 1175.

In Act 55, which Pennsylvania's General Assembly enacted into law to clarify the standards for qualifying as a "purely public charity" under Pennsylvania's Constitution, the General Assembly set forth six alternate ways in which an organization can establish that it "relieve[s] the government of some of its burden." 10 Pa. Stat. Ann. §375(f). Keeping in mind that an organization need only satisfy one of those six criteria to qualify as a "purely public charity," it necessarily follows that those six criteria undeniably constitute the assumed responsibilities of government. In other words, if the General Assembly has found that an organization that satisfies even one of these criteria relieves the government of some of its burden, then it necessary follows that the General Assembly has found these criteria to constitute responsibilities assumed by the government. After all, what branch of government is more qualified than the General Assembly, which provides the funding for governmental initiatives, to decide what the government believes to be its responsibility?

As noted in the Commonwealth Court's opinion at page 10, Mesivtah satisfies at least the following four of Act 55's criteria for "reliev[ing] the government of some of its burden," because Mesivtah:

> (2) Provides services in furtherance of its charitable purpose which are either the responsibility of the government by law or which historically have been assumed or offered or funded by the government.
>
> (3) Receives on a regular basis payments for services rendered under a government program if the payments are less than the full costs

> incurred by the institution, as determined by generally accepted accounting principles.
>
> (4) Provides a service to the public which directly or indirectly reduces dependence on government programs or relieves or lessens the burden borne by government for the advancement of social, moral, educational or physical objectives.
>
> (5) Advances or promotes religion and is owned and operated by a corporation or other entity as a religious ministry and otherwise satisfies the criteria set forth in section 5.

10 Pa. Stat. Ann. §375(f)(2)–(5). The General Assembly acted rationally in concluding that an organization which satisfies one or more of these criteria relieves the government of some of its burden. None of the taxing authorities involved in this case has ever argued to the contrary during the course of this litigation.

Applying these statutory criteria to the facts of this case, under subsection (2), both education of youth and recreational activities are responsibilities that the government has historically offered or funded. Under subsection (3), the government payments that Camp Mesivtah receives for food service are less than the full cost of providing meals to the campers. R.49a. Under subsection (4), Camp Mesivtah's educational and moral teachings relieve or lessen the burdens borne by government. And, under subsection (5), Camp Mesivtah advances or promotes religion and is used to train future rabbis in the orthodox Jewish faith. R.45a–46a.

Because an organization need only satisfy one of those six criteria to qualify as a "purely public charity," and because Camp Mesivtah satisfies at least four of those criteria, this Court should hold that Camp Mesivtah satisfies all five prongs of

the *HUP* test, as incorporated into Act 55, and thus qualifies as a purely public charity under Pennsylvania law.

Before concluding, Camp Mesivtah wishes to note that the General Assembly's decision to relax the criteria for satisfying the "reliev[ing] the government of some of its burden" prong of the *HUP* test should also be accorded special deference in light of the questionable relevance of any "quid pro quo" analysis in determining the availability of a charitable exemption. As the Supreme Judicial Court of Maine cogently explained in *Christian Fellowship and Renewal Center* v. *Town of Limington*, 896 A.2d 287 (Me. 2006):

> None of these opinions indicated that a charitable exemption could be denied because the recreational activities supported by the religious or preservation organizations did not provide a service or benefit — a quid pro quo — to offset a government service or benefit.
>
> The charitable exemption was created in an age when government provided few services and religious institutions and charities provided many services that government neither provided nor subsidized. *See Me. Baptist Missionary Convention v. City of Portland*, 65 Me. 92, 93–94 (1876). Then and now, organizations need not displace government programs in order to serve the common good and qualify for the charitable exemption by providing charitable services to defined groups or to the public at large. One legislative study indicated that the original purposes of the charitable exemption were to promote not only providing services in lieu of government services, but also "providing a service in which the state has a genuine interest." Report of the Joint Standing Committee on Taxation on the Statutory Review of the Property Tax Exemptions Contained in Title 36, Sections 652 & 656, 14–15 (Feb. 1979).
>
> Whether a charitable activity offsets or displaces a government service is one factor to consider, along with other evidence, in reviewing qualification for a charitable exemption, *see Episcopal Camp*, 666 A.2d at 110 (quoting *Johnson*, 221 A.2d at 287) ("'or otherwise lessening the burdens of government'"), but the "quid pro

> quo" factor alone does not control qualification or disqualification for the charitable exemption.

Id. at 295.

Camp Mesivtah recognizes that it has not challenged, nor has this Court granted review to determine, whether the "reliev[ing] the government of some of its burden" prong of the *HUP* test should remain pertinent to the question of charitable exemption. Moreover, Camp Mesivtah further recognizes that its argument herein regarding Act 55's primacy ensures the continued relevance of the "reliev[ing] the government of some of its burden" prong as enacted in Act 55. Rather, Camp Mesivtah's only point here is that, because the "reliev[ing] the government of some of its burden" prong of the *HUP* test is of questionable relevance, Act 55 appropriately relaxes the specific showing necessary to satisfy that prong of the *HUP* test.

VIII. CONCLUSION

For all of the reasons set forth above, this Court should hold that Act 55 replaces and supplants the *HUP* test in determining whether an organization qualifies as a "purely public charity" under Pennsylvania's Constitution. This Court should further hold that Camp Mesivtah satisfies Act 55's criteria for "reliev[ing] the government of some of its burden" and therefore qualifies as a "purely public charity" under Pennsylvania law.

Respectfully submitted,

Dated: April 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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