In the Supreme Court of Pennsylvania

No. _____

MESIVTAH EITZ CHAIM OF BOBOV INC.,

Petitioner,

v.

PIKE COUNTY BOARD OF ASSESSMENT APPEALS,
DELAWARE VALLEY SCHOOL DISTRICT and
DELAWARE TOWNSHIP.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for 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. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinion and order that the Commonwealth Court of Pennsylvania issued in this matter on December 29, 2009 is attached hereto as Exhibit A.

And the opinion and order that the Court of Common Pleas of Pike County, Pennsylvania issued in this matter on September 11, 2008 is attached hereto as Exhibit B.

II. 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.

III. QUESTIONS PRESENTED

This case squarely presents the "fundamental and foundational questions" that this Court unanimously recognized as deserving of this Court's resolution in *Alliance Home* v. *Board of Assessment Appeals*, 591 Pa. 436, 464, 919 A.2d 206, 223 (2007) (Castille, J.). Here, the Commonwealth Court, at page 10 of its opinion, observed that Camp Mesivtah satisfies the legislative criteria for relieving the government of some of its burden under the Purely Public Charity Act, Act of November 26, 1997, P.L. 508, 10 Pa. Stat. Ann. §371, et seq. ("Act 55"). The Commonwealth Court nonetheless ruled that Camp Mesivtah did not qualify as a "purely public charity" because the camp did not separately satisfy the "relieving the government of some of its burden" prong of the so–called "*HUP* test" that this Court judicially created in *Hospital Utilization Project* v. *Commonwealth*, 507 Pa. 1, 21–22, 487 A.2d 1306, 1317 (1985), to determine whether an organization qualifies as a "purely public charity" under Pennsylvania's Constitution, *see* Pa. Const. art. VIII, §2.

The questions presented herein are:

1. 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 from Pennsylvania Judiciary's in deciding whether an organization qualifies as a "purely public charity" under Pennsylvania's Constitution, or has the so–called "*HUP* test" occupied the constitutional field, leaving no room for legislative influence and input?

2. Whether this Court should grant review to clarify its holding in *Unionville–Chadds Ford School Dist.* v. *Chester County Bd. of Assessment Appeals*, 552 Pa. 212, 714 A.2d 397 (1998), on the subject of what constitutes an assumed government burden for purposes of an organization's qualifying as a purely public charity under Pennsylvania's Constitution?

3. To qualify as a purely public charity under Pennsylvania's Constitution, must the organization relieve the burden of the very governmental entity from which it is seeking a tax exemption, or does it suffice that the organization has relieved any governmental entity of a burden, regardless of whether the relieved governmental entity is the same governmental entity from which a tax exemption is sought?

IV. 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. 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 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 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 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

* Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Commonwealth Court. In accordance with Pennsylvania Rule of Appellate Procedure 1112(d), petitioner is filing one copy of that Reproduced Record in this Court together with its Petition for Allowance of Appeal.

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 Mesivtah's earnings and the donations it receives are applied toward Mesivtah's charitable operations. R.39a, 42a. Rabbi Geller further testified that 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 Mesivtah's dining facilities at the camp, 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.

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 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 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 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 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 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 Mesivtah benefits a substantial and indefinite class of persons who are legitimate subjects of charity, 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 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). The trial court, however, appears to have relied on the Commonwealth Court's 1992 ruling in *Associated YM–YWHA of Greater New York/Camp Poyntelle* v. *County of Wayne*, 613 A.2d 125 (Pa. Commw. Ct. 1992), in concluding that offering summer recreation to children cannot constitute relieving the government of its burden. Exhibit B at 6. The trial court's ruling failed to take into consideration that the precedential value of that 1992 ruling was called into question by this Court's 1998 ruling in *Unionville–Chadds Ford School Dist.* v. *Chester County Bd. of Assessment Appeals*, 552 Pa. 212, 714 A.2d 397 (1998), which recognized that providing recreational facilities for public enjoyment "fall[s] clearly within the scope of burdens that are routinely shouldered by the government." *Id.* at 221–22, 714 A.2d at 401.

The trial court's ruling also seems to suggest that a charity that primarily benefits those less fortunate who ordinarily reside outside of the locality where the charity's operations are based cannot relieve the government of its burden because the government would have no burden to provide for those people were it not for the charity's presence in the locality. Exhibit B at 5–6.

Mesivtah filed a timely notice of appeal to the Commonwealth Court of Pennsylvania on October 3, 2008. R.159a. On December 29, 2009, after briefing and oral argument, the Commonwealth Court issued its ruling on Mesivtah's appeal. *See* Exhibit A. The Commonwealth Court first ruled that Mesivtah additionally satisfied the third prong of the so–called "*HUP* test" because 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, Mesivtah has now satisfied four of the five prongs of the *HUP* test.

The Commonwealth Court then turned to review the trial court's ruling that Mesivtah did not satisfy the fourth prong of the *HUP* test, which requires the 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]
>
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>
> [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.

The Commonwealth Court's ruling also rejected Mesivtah's argument that Mesivtah relieves the government of some of its burden by providing recreational activities and opportunities for Mesivtah's campers and for local residents and by providing educational and moral instruction to its campers. The Commonwealth Court held that Mesivtah's attempt to gain the benefit of this Court's ruling in

Unionville–Chadds Ford School Dist. v. *Chester County Bd. of Assessment Appeals*, 552 Pa. 212, 714 A.2d 397 (1998), failed because that case involved Longwood Gardens, whereas by contrast Camp Mesivtah's facilities were neither unique nor in high demand from the general public. The Commonwealth Court also reasoned that Mesivtah had failed to show either that the public had wanted to use its recreational facilities or that Mesivtah's campers would have used public recreational facilities had Camp Mesivtah's own facilities not existed.

Lastly, the Commonwealth Court addressed Mesivtah's argument that the Court of Common Pleas had unconstitutionally discriminated against the constitutional right to travel of Mesivtah's campers when the trial court suggested in its opinion that a charity which primarily benefits those less fortunate who ordinarily reside outside of the locality where the property is located cannot relieve the government of its burden because the government would have no obligation to those people were it not for the charity's presence in the locality.

Addressing that argument, the Commonwealth Court wrote in its opinion:

> Mesivtah also contends that common pleas' ruling is in error because it suggests that a charity that primarily benefits those who ordinarily reside outside of the locality where the charity's operations are based cannot relieve the government of its burden because the government would have no burden to those people were it not for the charity's presence in the locality. Mesivtah relies upon *Wert v. Commonwealth, Department of Transportation*, 821 A.2d 182 (Pa. Cmwlth. 2003), which recognizes a constitutional right to travel.
>
> Nonetheless, there remains a lack of evidence regarding whether the local government's burden was relieved. For instance, Mesivtah did not present any evidence that the campers would have utilized Pike County recreational facilities if the camp did not have such facilities given that the primary purpose of the camp is intensive

> study of Judaism and that recreation was purely ancillary. Thus, we find that that the common pleas did not err in concluding that Mesivtah failed to prove that it relieves the government of some of its burden.

Exhibit A at 11.

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 Mesivtah were entitled to a refund of those payments, it would recover roughly $400,000 plus interest. Mesivtah now owes unpaid real property taxes for the years 2005 through 2009, totaling roughly $250,000.

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

Because this case squarely presents the very questions that this Court viewed as important and deserving of resolution in an appropriate later case in *Alliance Home* v. *Board of Assessment Appeals*, 591 Pa. 436, 464, 919 A.2d 206, 223 (2007); because this case provides an opportunity for this Court to clarify the scope if its holding about voluntarily assumed governmental burdens in *Unionville–Chadds Ford School Dist.* v. *Chester County Bd. of Assessment Appeals*, 552 Pa. 212, 714 A.2d 397 (1998); and because the question whether the government entity whose burden is relieved must be the same governmental entity from which a tax exemption is being sought presents an important question of first impression,

Mesivtah Eitz Chaim of Bobov, Inc. respectfully files this Petition for Allowance of Appeal seeking review of the Commonwealth Court's ruling in this case.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. This Case Squarely Presents The Very Issues That This Court Has Described As "Fundamental And Foundational" Regarding The Proper Roles Of The Legislature And The Judiciary In Deciding Whether An Organization Qualifies As A "Purely Public Charity" Under Pennsylvania's Constitution

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).

In *Hospital Utilization Project* v. *Commonwealth*, 507 Pa. 1, 487 A.2d 1306 (1985), 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.

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"), for the purpose of clarifying the criteria that an organization must satisfy in order to qualify as a "purely public charity" under Pennsylvania's Constitution. In particular, the General Assembly expressed its dissatisfaction with the "inconsistent application of eligibility standards for charitable tax exemptions" that the 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).

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.

Then–Justice Castille, writing for a unanimous Supreme Court of Pennsylvania in the *Alliance Home* case, addressed the very situation that is now squarely presented by means of this Petition for Allowance of Appeal in Camp Mesivtah's case:

> 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). If the Act 55 presumption and test would lead to a holding that a taxpayer qualified as "an institution of purely public charity," where the *HUP* test would not, fundamental and foundational questions could arise concerning whether: (1) the *HUP* test, which was adopted in the absence of legislation addressing the constitutional term, occupied the constitutional field concerning the exemption, or instead left room for the General Assembly to address the matter; (2) the legislative scheme as adopted comported with the constitutional command and displaced the *HUP* test; and/or (3) if *HUP* were deemed authoritative and comprehensive, whether the legislative findings and scheme set forth in Act 55 gave reason to reconsider the contours of the test thus distilled from judicial experience with individual cases.

Alliance Home, 591 Pa. at 464, 919 A.2d at 223.

Then–Justice Castille's opinion for a unanimous Court in *Alliance Home* noted that those questions were not presented in that case, but the opinion perceptively predicted that the Court may someday need to review and resolve those very "fundamental and foundational" questions. Camp Mesivtah's case squarely presents that opportunity for much needed guidance from this Court on those very issues.

Indeed, this case represents an excellent vehicle in which to address and resolve those questions, because the lone aspect of the *HUP* test that is at issue here is the "relieving the government of some of its burden" prong. Both the *HUP* test and Act 55, see 10 Pa. Stat. Ann. §375(f), require that the charitable institution "must relieve the government of some of its burden" in order to qualify for a tax exemption.

Pennsylvania's government, through its General Assembly, has already spelled out in Act 55 what burdens the government has chosen to assume. 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 government itself. *See 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 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).

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.

Pennsylvania's Constitution expressly gives the General Assembly the power to exempt institutions of purely public charity from taxation. *See* Pa. Const. art. VIII, §2(a)(v). Act 55 expressly states, in its declaration of intent, that the General Assembly was dissatisfied with the inconsistent manner in which the courts were applying the five–part *HUP* test that this Court announced in 1985. *See* 10 Pa. Stat. Ann. §372(b). Accordingly, one of Act 55's express purposes was to provide definite standards for determining if and when an organization satisfies the five–part test to qualify as a purely public charity "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).

The Commonwealth Court's failure in this case to even consider whether to defer to the General Assembly's expression of legislative purpose as set forth in Act 55 has already come under criticism from an expert commentator unaffiliated with Mesivtah and its counsel in this case. In a "Tax Alert" newsletter prepared for the clients of the Cozen & O'Connor law firm, attorney Joseph C. Bright criticizes the Commonwealth Court's ruling in Camp Mesivtah's case for "ignor[ing] this entire discussion in *Alliance Home*" about possible judicial deference to the General Assembly's legislative purposes and findings as reflected in Act 55. This "Tax Alert" newsletter can be freely accessed online at: http://www.cozen.com/cozendocs/outgoing/alerts/2010/tax011510.pdf (last visited January 27, 2010).

Although amicus briefs cannot be filed as of right at the Petition for Allowance of Appeal stage at which this case is currently pending, *see* Pa. R. App. P.

531(a), Mesivtah has received expressions of interest from organizations that are interested in filing amicus briefs on the merits in this Court in support of Mesivtah's position if this Court grants review here.

For these reasons, this Court should grant allowance of appeal to address and resolve the "fundamental and foundational questions" that arise when the *HUP* test and Act 55 produce different outcomes concerning whether an organization qualifies as a purely public charity under Pennsylvania's Constitution. Then–Justice Castille, in his opinion for a unanimous Court in *Alliance Home*, recognized that these questions would warrant this Court's review and resolution in an appropriate case, and those very questions are squarely presented in this case.

B. This Court Should Grant Review To Resolve The Uncertainty That Has Arisen After This Court's Ruling In *Unionville–Chadds Ford School Dist.* Concerning What Constitutes An Assumed Government Burden

In *Unionville–Chadds Ford Sch. Dist.* v. *Chester County Bd. of Assessment Appeals*, 552 Pa. 212, 714 A.2d 397 (1998), this Court ruled that Longwood Gardens in Chester County, Pennsylvania qualified for an exemption from real property taxes as a purely public charity even though Longwood Gardens was a purely recreational facility where people could go to see trees, flowers, and vegetation. As this Court explained:

> Appellant contends that the government has no duty to provide the public with a facility like Longwood, and, thus, that Longwood does not provide relief from any governmental burden. We do not agree. The fact that there is no constitutional or statutory duty to provide public

> gardens and educational and research facilities exactly like the ones at Longwood is not determinative.
>
> Whenever the government provides services and facilities to its citizens, it bears certain burdens. Such burdens exist regardless of whether the governmental endeavor is obligatory or discretionary in origin. If services and facilities provided by government experience reduced demands due to the existence of independent institutions that meet the same needs, then it can fairly be said that the government's burden has been eased.
>
> The government has routinely assumed a responsibility for providing open space for public recreation and for conservation of natural landscapes and resources, as well as for providing cultural assets.

Id. at 220–21, 714 A.2d at 401.

Here, Camp Mesivtah exists to provide recreational activities for its campers and the children of its instructors and staff. If the sole purpose of Camp Mesivtah were to provide instruction to its campers, then there would be no reason to travel to northeastern Pennsylvania to have the instruction take place at a location that provides access to swimming, boating, organized sports activities, and the opportunity to experience the beauty of Pennsylvania's idyllic nature first–hand.

To establish that governments voluntarily assume the obligation to provide summer recreational opportunities to school children, Mesivtah noted in briefing this case in the Commonwealth Court that each summer in Philadelphia, which is Pennsylvania's largest city, the city opens dozens of public swimming pools, which the municipality owns and operates. An article posted on the web site of KYW NewsRadio 1060 on June 23, 2009 begins:

> Summer is here, and that means dozens of city swimming pools are opening for the season in Philadelphia.

> Kelly Pool in Fairmount Park is one of the largest pools in the city. Department of recreation workers began filling it late Monday so it would be ready for Tuesday's early arrivals.

"While Some Remain Closed, Many Phila. Public Swimming Pools Open for Summer Season," available online at http://www.kyw1060.com/pages/4657653.php (last visited January 27, 2010).

Similarly, the web site of the Pennsylvania Department of Conservation and Natural Resources lists scores of state parks, including seventeen in northeastern Pennsylvania, where Pike County is located. *See* http://www.dcnr.state.pa.us/stateparks/parks/index.aspx (last visited January 27, 2010); *see also* http://www.dcnr.state.pa.us/stateparks/parks/region_northeast.aspx (last visited January 27, 2010). The Pennsylvania DCNR's web page devoted to Frances Slocum State Park in Luzerne County, Pennsylvania shows that the campgrounds include a public swimming pool along with campgrounds and resources for hiking, fishing, boating, and picnicking. *See* http://www.dcnr.state.pa.us/stateparks/parks/francesslocum.aspx (last visited January 27, 2010).

Although the government may have no affirmative obligation to offer summertime recreational opportunities to young people, that is not the relevant or legally proper test, as this Court recognized in the Longwood Gardens case. There, this Court explained that "[t]he fact that there is no constitutional or statutory duty to provide public gardens and educational and research facilities exactly like the ones at Longwood *is not determinative*." *Unionville-Chadds Ford School Dist.* v. *Chester County Bd. of Assessment Appeals*, 552 Pa. 212, 220, 714 A.2d 397, 401

(1998) (emphasis added). What was determinative was that the government nevertheless affirmatively chooses to provide such recreational opportunities to the public: "The government has routinely assumed a responsibility for providing open space for public recreation." *Id.* at 221, 714 A.2d at 401.

As a result, when a charitable organization such as Longwood Gardens or Camp Mesivtah offers services to a portion of the public — services that the government has assumed the responsibility of providing, even though the government is neither "required" nor obligated to provide those services — the charitable organizations necessarily relieve the government of some of its burden.

To differentiate between Longwood Gardens and Camp Mesivtah, because one serves more people than the other, is not permissible. The number of people served should have no bearing; rather, it is the service provided that makes the difference. Recreational opportunities were found to be an assumed responsibility of government in the Longwood Gardens case, and thus so should recreational opportunities for inner–city kids, and for the public at large for that matter, be found to be the assumed responsibility of government in this case.

Camp Mesivtah also exists to provide educational and moral instruction to its campers. These, too, are assumed governmental burdens, and Camp Mesivtah relieves the government's burden by providing children with such instruction as part of Camp Mesivtah's charitable purpose. Under the assumed government burden rationale contained in this Court's Longwood Gardens ruling, Camp

Mesivtah should readily qualify as an organization that relieves the government of some of its burden for purposes of the *HUP* test and Act 55.

If the Longwood Garden's case is truly a unique decision that has no ongoing precedential value in other more run–of–the–mill cases such as this one, which is what the Commonwealth Court has seemingly ruled in this case, then this Court should so specify by clarifying the scope of that ruling. Because Camp Mesivtah believes that the Commonwealth Court misapplied this Court's Longwood Gardens decision, and because this Court should clarify that ruling if the Commonwealth Court has correctly applied it, this Petition for Allowance of Appeal should be granted.

C. This Court Should Grant Review To Address Whether The Government Whose Burden Is Being Relieved Must Be The Same Government From Which A Tax Exemption Is Being Sought

In ruling that Mesivtah had not established that it adequately relieved the government of some of its burden, the Commonwealth Court in this case focused on whether Mesivtah had relieved the local governments in Pike County, Pennsylvania of any of their relevant burdens. That narrow, geographically specific focus, Mesivtah submits, is erroneous under both Act 55 and this Court's own *HUP* test. Whether an organization qualifies as a charity for relieving the government of some of its burden should not focus exclusively or even predominantly on whether the government whose burden being relieved is the same as the government from which a tax exemption is being sought.

As Mesivtah explained in its briefing filed in the Commonwealth Court, if charities providing services in Pennsylvania to children from New York State are not exempt from taxation, then New York State will not exempt from taxation New York–based charities that provide services to children from Pennsylvania. Moreover, given that we are all citizens of the same nation, it is the duty of all governments to ensure that children are well–educated and morally strong regardless of where those children ordinarily reside.

It is also noteworthy that Act 55 does not require that the government whose burden is being relieved by the charity must be the same governmental entity from whose taxation the charity is being exempted. In other words, if a summer camp located in Pike County, Pennsylvania was operated for the benefit of inner–city children who ordinarily reside in Philadelphia, Pike County could not deny a tax exemption to the camp based on Pike County's assertion that it would have had no preexisting burden to care for poor children residing in Philadelphia.

Nevertheless, the Commonwealth Court in this case held that Mesivtah failed to satisfy the fourth prong of the *HUP* test because Mesivtah could not establish that it was relieving the local government in Pike County, Pennsylvania of any burden it would have had to local residents or to the children attending Camp Mesivtah. *See* Exhibit A at 11. Perhaps, under the Commonwealth Court's reasoning, the only governments whose burdens were being relieved were the governments of the State of New York and the Borough of Brooklyn in New York City. Nevertheless, Mesivtah maintains that relieving those governments of their

burden suffices to satisfy the *HUP* test and Act 55. If it did not, then a summer camp in Pike County, Pennsylvania for poor and disadvantaged children who ordinarily reside in Philadelphia would not be entitled to a tax exemption because Pike County would have no obligation to provide any services to those children in the absence of their traveling to Pike County to attend summer camp.

Mesivtah's request for review does not challenge the propriety of a requirement that, to obtain an exemption from taxation, the organization must relieve the government of some of its burden. To date, however, this Court has not yet resolved whether an organization, to qualify as a purely public charity, must relieve the burden of the very same government from which the tax exemption is sought, or whether it suffices to relieve the burden of government elsewhere or more generally. In an age when charitable organizations such as the Red Cross devote so much of their time and resources to international relief efforts such as assisting in recovery from the Haiti earthquake or the Indian Ocean tsunami disaster, this third and final question presented for review is both of great importance and highly deserving of this Court's resolution.

VI. CONCLUSION

For the reasons set forth above, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: January 28, 2010

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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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