

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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 OF THE HOSPITAL AND HEALTHSYSTEM
ASSOCIATION OF PENNSYLVANIA AS *AMICUS CURIAE* IN SUPPORT OF
APPELLANT MESIVTAH EITZ CHAIM OF BOBOV, INC.

On 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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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae, The Hospital & Healthsystem Association of Pennsylvania (“HAP”), is the principal trade association for Commonwealth health care institutions, representing over 250 hospitals and health systems, as well as affiliated physicians, nursing homes, home health agencies and other health care providers. As a forum in the Commonwealth for developing health care policy initiatives, HAP works with its members to improve and deliver safe and efficient health care services and frequently raises matters of importance to hospitals and other providers before the courts in the Commonwealth.

Amicus and its members have a unique and substantial interest in the resolution of this appeal. At issue in this case is the applicability of the Act commonly referred to as “Act 55” (Act November 26, 1997, P.L. 508, §5), codified at 10 P.S. § 371 *et seq.*, and called the Institutions of Purely Public Charity Act. Specifically, the case raises the issue of whether Act 55, a statute defining the class of institutions that are eligible for tax exemptions consistent with the constitutional standard, or the test set forth in *Hospital Utilization Project v. Commonwealth*, 507 Pa. 1, 487 A.2d 1306 (1985) (the “*HUP* test”) should be applied in determining whether an entity is a purely public charity for purposes of tax exemption.

HAP’s members include many non-profit medical institutions that maintain tax exemptions as institutions of purely public charity. If this Court upholds the Commonwealth Court’s decision that an entity must first satisfy the judicially-created *HUP* test prior to satisfying the statutory mandate of Act 55, it will detrimentally affect HAP’s members by perpetuating an area of law characterized by confusion and conflicting decisions, requiring entities in litigation to essentially prove two cases under two different tests, and by decreasing the uniformity and predictability that Act 55 provides. Therefore, HAP files this *Amicus* Brief in support of

Mesivtah Eitz Chaim of Bobov, Inc. (“Mesivtah”), pursuant to Pa. R.A.P. § 531, to urge the Court to reverse the decisions below as to the applicability of Act 55.

STATEMENT OF JURISDICTION

HAP adopts the Statement of Jurisdiction set forth in the Brief filed by Mesivtah.

ORDER OR OTHER DETERMINATION IN QUESTION

HAP adopts the Statement of the Order or Other Determination in Question set forth in the Brief filed by Mesivtah.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

HAP adopts the Statement of the Scope and Standard of Review set forth in the Brief filed by Mesivtah.

STATEMENT OF THE QUESTIONS INVOLVED

HAP adopts the Statement of the Questions Involved set forth in the Brief filed by Mesivtah.

STATEMENT OF THE CASE

HAP adopts the Statement of the Case set forth in the Brief filed by Mesivtah with the additional information as set forth below.

By Order of February 9, 2011, this Court granted a Petition for Allowance of Appeal to consider an issue that has significance beyond the litigation in which it arises and is of importance to the membership of HAP. Pennsylvania courts currently reference two different tests or methods for assessing whether an institution is a “purely public charity” under Article VIII, § 2 of the Pennsylvania Constitution and thus is eligible to qualify for tax exemption. The Court will decide whether the statutory test set forth in Act 55 for determining whether an entity is a “purely public charity”, which was passed by the General Assembly with the intent to “provid[e] standards to be applied uniformly in all proceedings throughout this Commonwealth

for determining eligibility for exemption from state and local taxation”, 10 P.S. § 372(b), supersedes the *HUP* test created by this Court prior to the enactment of Act 55.

Under the *HUP* test, an entity qualifies as a purely public charity if it has the following characteristics:

- 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.

Hosp. Utilization Project, 507 Pa. at 21-22, 487 A.2d at 1317. Whether an entity meets this test is decided on a case-by-case basis.

Act 55 incorporates and codifies the *HUP* test’s five criteria for determining an eligible charity. Under Act 55, the institution must:

- a) Advance a charitable purpose;
- b) Operate entirely free from private profit motive;
- c) Donate or render gratuitously a substantial portion of its services;
- d) Benefit a substantial and indefinite class of persons who are legitimate subjects of charity; and
- e) Relieve the government of some of its burden.

10 P.S. § 375(b)-(f). Act 55 further clarifies the five *HUP* test criteria by providing several enumerated ways in which each of the five criteria may be met. *See* 10 P.S. § 375(b)(1)-(6); 10 P.S. § 375(c)(1)-(4); 10 P.S. § 375(d)(1)-(4); 10 P.S. § 375(e)(1)-(5); 10 P.S. § 375(f)(1)-(6).

This matter comes before the Court following the Pike County Assessment Board's decision to deny a property tax exemption to Mesivtah, a nonprofit religious organization that operates an Orthodox Jewish summer camp ("Camp Mesivtah"). Mesivtah's appeal of the decision was first heard by the Pike County Court of Common Pleas, which affirmed the denial of Camp Mesivtah's exemption because the court found that Mesivtah did not satisfy the requirements for qualifying as a purely public charity under the *HUP* test.¹ The Commonwealth Court likewise prioritized the *HUP* test over Act 55, and affirmed the Court of Common Pleas' decision. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment*, No. 2343 C.D. 2008 (Pa. Commw. Ct., decision filed December 29, 2009) ("Op.").²

In its decision, the Commonwealth Court held that Mesivtah met four of the five prongs of the *HUP* test, but failed to prove the fifth prong -- that it relieves the government of some of its burden. Op. at 11. However, the Commonwealth Court noted that under Section 5(f) of Act 55, 10 P.S. § 375(f), this same factor may be met by the entity satisfying any *one* of six specific tests, and assumed that Mesivtah satisfied four of the six. Op. at 10. The court cited Mesivtah's contention that:

- it provides a service in furtherance of its charitable purpose which historically has been assumed, offered or funded by government (education and recreational activities for youth);
- it receives payments for services under a government program that are less than its costs (received government payment for food service);
- it provides a service to the public that reduces dependence on government programs or lessens government burden for advancement of social, moral, educational and physical objectives (educational and moral teachings provided at camp); or
- it advances or promotes religion (camp used to train future rabbis).

¹ A copy of the Court of Common Pleas decision is attached to Mesivtah's Brief.

² A copy of the Commonwealth Court's decision is attached to Mesivtah's Brief.

Op. at 10.

By contrast, the Commonwealth Court held that under the *HUP* test, Mesivtah needed to present evidence that its campers “would have used Pike County recreational facilities if the camp did not have such facilities.” Op. at 11. The court determined that Mesivtah failed this test because “the primary purpose of the camp is intensive study of Judaism and that recreation was purely ancillary.” *Id.* Thus, had Mesivtah’s activities been judged by the Act 55 test, it likely would have been held to be a purely public charity and would have received the exemption. Instead, the Commonwealth Court required Mesivtah to first satisfy the *HUP* test prior to satisfying the statutory mandate of Act 55, and reached the opposite result.³ Op. at 10, 12.

SUMMARY OF ARGUMENT

Act 55 should be used as the principal test for determining whether an entity is a purely public charity for purposes of tax exemption. Act 55 was enacted by the General Assembly pursuant to its constitutional authority to define “purely public charity” in a manner consistent with the requirements of Article VIII, Section 2 of the Pennsylvania Constitution. This definition is intended to apply to all tax exemption statutes so that the beneficiaries of such statutes are limited to only those entities constitutionally entitled to receive an exemption.

Because the Act 55 requirements were adopted expressly to follow and reflect the *HUP* test, which itself was an interpretation of the limits of the term “purely public charity” in Article VIII, Section 2, Act 55 on its face is a reasonable and appropriate interpretation of Article VIII,

³ Because the hospital and healthsystem members of HAP typically are found without hesitation to have relieved the government of some of its burden, *Amicus* does not address the substance of that issue herein. *See, e.g., Lewistown Hosp. v. County of Mifflin*, 706 A.2d 1269, 1273 (Pa. Commw. Ct. 1998).

Section 2 of the Pennsylvania Constitution. This facial validity is confirmed by the several cases in which Act 55 has been applied since its enactment.

Thus, in cases where an entity does not meet the requirements of Act 55, no further inquiry is needed. If an entity meets the requirements of Act 55, an opposing party may challenge whether Act 55, as applied in that instance, is overbroad or unconstitutional. The test for such a determination, given the presumption of constitutionality applicable to legislative enactments, is not the *HUP* test, but rather whether the application of Act 55 to that entity clearly, palpably and plainly violates the Pennsylvania Constitution as applied in a particular case.

The prior case law on the applicability of Act 55 has created uncertainty and confusion for institutions seeking exemptions, taxing authorities, and lower courts, by conflating and confusing the tests that reference purely public charities. As a result, entities must now use their resources for the duplicative purpose of proving two cases – one under the *HUP* test and one under Act 55 – to demonstrate that they qualify as purely public charities. The Court can resolve that confusion and inefficiency here by holding that, based on both legal and public policy reasons, Act 55 should be the principal test for determining an entity’s status as a purely public charity.

ARGUMENT

I. ACT 55 SHOULD BE THE PRINCIPAL TEST FOR DETERMINING WHAT ENTITIES QUALIFY AS “PURELY PUBLIC CHARITIES”

A. Act 55 is Intended to Define “Purely Public Charity” to be Within the Pennsylvania Constitution

The General Assembly passed Act 55 with the intent that it would apply to all tax exemption statutes, so that all such statutes included the Act 55 criteria limiting their beneficiaries to those entities constitutionally entitled to tax exemption, *i.e.*, purely public

charities. In doing so, the General Assembly acted pursuant to its constitutional authority to define the organizations that qualify for tax exemptions. The legislative history further supports this legislative intent; accordingly, Act 55 should be the principal test for determining whether an entity is a purely public charity.

1. The General Assembly intended Act 55 to apply to all exemption statutes

The General Assembly passed Act 55 in 1997 in an effort to limit the statutory tax exemptions it has created to apply only to those institutions that it is constitutionally permitted to exempt. In essence, in passing Act 55, the General Assembly declared that every tax exemption may only be applied for the benefit of the entities defined in Act 55. Whether or not Act 55 is expressly incorporated into each such tax exemption statute is immaterial. *See In re Free & Clear Sale Conducted November 19, 1988*, 801 A.2d 1280, 1288 (Pa. Commw. Ct. 2002) (constitutionally-required notice requirements located in one tax sale statute interpreted to apply to another statute related to different type of tax sale). In doing so, the General Assembly is fulfilling its responsibility to uphold the constitution. *See The Sch. Dists. of Deer Lakes and Allegheny Valley v. Kane*, 463 Pa. 554, 562, 345 A.2d 658, 662 (1975) (“legislators [] are sworn to uphold the fundamental law . . .”). The broad application of Act 55 is also made explicit by language included in the recently passed Consolidated County Assessment Law⁴ which states that “[e]ach provision of this chapter is to be read in para [*sic*] materia with . . . the Institutions of Purely Public Charity Act [Act 55], and to the extent that a provision of this chapter is

⁴ The Fourth to Eighth Class and Selective County Assessment Law, Act of May 21, 1943, P.L. 571, previously included a tax exemption provision for the Fourth to Eighth Class counties. Simultaneous with The Fourth to Eighth Class and Selective County Assessment Law’s repeal, the General Assembly passed The Consolidated County Assessment Law, which consolidated and amended the Third Class County Assessment Board Law, The Fourth to Eighth Class and Selective County Assessment Law and certain provisions of The County Code and included the tax exemption cited *infra* pp. 8-9. *See Consolidated County Assessment Law, Act of Oct. 27, 2010, P.L. 895, codified at 53 Pa.C.S. § 8801 et seq.*

inconsistent with the Institutions of Purely Public Charity Act, the provision is superseded by that act.” 53 Pa.C.S. § 8812(c).

2. It is within the authority of the General Assembly to adopt Act 55

The Pennsylvania Constitution expressly grants the General Assembly the authority to enact exemptions to general taxes. Article VIII, Section 2(a)(v) of the Pennsylvania Constitution states that “[t]he General Assembly may by law exempt from taxation . . . (v) [i]nstitutions of *purely public charity* . . .” (emphasis added). This provision both authorizes the legislature to exempt certain entities from taxation and limits that authority to apply exemptions only to “institutions of purely public charity.”

In interpreting this provision, this Court has held that “the Constitution does not, of itself, exempt any property; it merely permits the legislature to do so within certain limits.” *G.D.L. Plaza Corp. v. Council Rock Sch. Dist.*, 515 Pa. 54, 58, 526 A.2d 1173, 1175 (1987) (quoting *In re Donohugh's Appeal*, 86 Pa. 306, 309 (1878)); see also *Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals*, 591 Pa. 436, 450, 919 A.2d 206, 215 (2007); *Robert Morris College v. Bd. of Prop. Assessment, Appeals and Review of Allegheny County*, 291 A.2d 567, 571 (Pa. Commw. Ct. 1972) (“legislation is required to create an exemption from real estate taxes”). In enacting the General County Assessment Law, Act of May 22, 1933, P.L. 853, codified at 72 P.S. § 5020-1 *et seq.*, the General Assembly exempted certain property from all “all county, city, borough, town, township, road, poor and school tax”, including “[a]ll . . . associations and institutions of learning, benevolence, or charity, including fire and rescue stations, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity”⁵ 72 P.S. § 5020-204(a)(3); see also, *e.g.*, *The*

⁵ The General County Assessment Law did not use the term “institution of purely public charity” and did not define the term. As a result, the courts “faced the task of giving meaning to the

Consolidated County Assessment Law, Act of Oct. 27, 2010, P.L. 895, codified at 53 Pa. C.S.A. § 8801 *et seq.* (exemption from county, city, borough, town, township, road, poor and school taxes applicable to counties of the second class A, third, fourth, fifth, sixth, seventh and eighth classes of the Commonwealth); The Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, codified at 72 P.S. § 7204(1) (exemption from sales and use tax for “any charitable organization”).

In addition to the authority to create the exemptions, the General Assembly has the authority to define the organizations that qualify for such exemption. This Court has previously recognized the ability of the General Assembly to define terms used in the constitution and has held those definitions to be binding on the courts. *See Ray v. Commonwealth*, 442 Pa. 606, 609, 276 A.2d 509, 510 (1971) (Legislature has power to define constitutional term “qualified electors” to exclude inmates); *Alliance Home*, 591 Pa. at 466, 919 A.2d at 224 (recognizing that Act 55 defines term “institution” as used in Article VIII, Section 2(a)(v) of the constitution). Likewise, in *Commonwealth v. Widovich*, 295 Pa. 311, 318, 145 A. 295, 298 (1929), the court addressed the Sedition Act passed by the Legislature in terms of whether the Legislature may “define the constitutional limitations on the freedom of speech and the liberty of the press in matters touching the government” or whether that was solely for the judiciary. The court noted that the Pennsylvania Constitution states that “every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty” and went on to hold that “[t]he body

constitutional restriction on a case-by-case basis, and thereby determining which institutions should enjoy charitable exemptions” until the enactment of Act 55 in 1997, when the General Assembly “weighed in on questions affecting determinations of charitable exemption which had, to that point, been left to the realm of the judiciary.” *See Alliance Home*, 591 Pa. at 452-53, 919 A.2d at 216 (describing history of charitable exemptions, the *HUP* test, and Act 55).

that determines in the first instance what utterances of speech shall constitute abuse, is the legislature.” *Id.* at 320-21, 145 A. at 299.⁶

In *Heller v. Depuy*, 277 A.2d 849 (Pa. Commw. Ct. 1971), the court held that it was bound by the General Assembly’s definition of the term “public utilities” as used in the constitution. The legislature had passed an act which, among other things, defined the term “public utilities” as used in Article VIII, Section 4 of the Pennsylvania Constitution, which relates to taxes on the real estate of public utilities. *Id.* at 852. The plaintiffs in the case argued that because the constitution used the term “public utilities,” “the Legislature could only apply that provision to what was commonly accepted within the term ‘public utilities,’ that is, those persons and organizations subject to the jurisdiction of the Public Utility Commission.” *Id.* at 857. The court disagreed and stated that the legislature had the power to define the constitutional term and the court was bound by the legislature’s definition:

There can be no question that the Legislature has the power to define and redefine terms such as ‘public utility’, and that is exactly what they did in Section 2(b) of Act No. 66. In that section, when the Legislature added to the usual definition the words ‘and any electric cooperative corporation, municipality or municipality authority furnishing public utility service, but shall not mean any public utility furnishing public utility sewage services’, everyone, including this Court, was bound by that definition.

Id.

Furthermore, courts have followed the terms of constitutional legislative enactments even where the courts have previously spoken on the issue. In *Commonwealth v. Carsia*, 512 Pa. 509, 517 A.2d 956 (1986), the Court addressed whether the Commonwealth Attorneys Act enacted by the General Assembly was the sole source of the Attorney General’s powers or whether common

⁶ As stated in the case, the courts’ role is to determine “[w]hether the regulation of speech or print goes beyond the ‘abuse of liberty’ as contemplated by the Constitution. . . . They may review the reasonableness of the enactments. . . .” *Widovich*, 295 Pa. at 321, 145 A. at 299.

law also defined those powers. Prior to a constitutional amendment in 1978, the powers of the Attorney General were set forth in common law by the Supreme Court. *Id.* at 512, 517 A.2d at 957. In 1978, the constitution was amended to state that the Attorney General should have the powers “as may be imposed by law” and subsequently in 1980, the General Assembly passed the Commonwealth Attorneys Act setting forth the powers of the Attorney General in a statute, 71 P.S. § 732-205. *Id.* at 513, 517 A.2d at 958. The appellant in the case argued that the Attorney General retained the common law powers enumerated by the Supreme Court. *Id.* The Court disagreed, holding that the constitution provided “an extension of power to the legislature to statutorily define and regulate the powers and duties of the Attorney General” and that the Commonwealth Attorneys Act, not the previous court interpretations, was the definitive statement of those powers. *Id.*; *see also In re Free & Clear Sale Conducted November 19, 1988*, 801 A.2d at 1287-88 (following terms of statute intended to codify previous judicial interpretation and construing statute not to violate prior case law).

Similarly here, the authority to define the entities qualified to receive tax exemptions is implicit in the authority given to the General Assembly to create tax exemptions. If the legislature is authorized to create an exemption, then it necessarily has the authority to enumerate the standards and criteria required to qualify for those exemptions consistent with the Constitution. *See Stilp v. Commonwealth*, 588 Pa. 539, 589, 905 A.2d 918, 948 (2006) (“[I]t is not uncommon for the Legislature or Executive to interpret constitutional provisions during the exercise of their respective constitutional duties.”);⁷ *Appeal of Nat’l Church Residences of*

⁷ In *Stilp*, the court ultimately held that the definition of public officer set by the General Assembly was not controlling because it was “contrary to the plain meaning of Section 16(a) [of the constitution], as well as substantial case law examining the definition of a public officer.” *Stilp*, 588 Pa. at 589, 905 A.2d at 948. In contrast, here the General Assembly has enacted a statute that is consistent with both the constitution and prior judicial case law, *i.e.*, the *HUP* test.

Neshannock, Pa., 56 Pa. D & C. 4th 219, 222 (C.P. Lawrence, 2000) (“[T]he General Assembly may, within the bounds of reasonableness, give [tax exemptions] to some worthy institutions and withhold it from others. In so doing, it would be incumbent upon the legislature to define a qualifying organization as used in the legislation at hand.”).

3. The legislative history of Act 55 supports the General Assembly’s intent to define “purely public charity” to be within the meaning of the Pennsylvania Constitution

The legislative history confirms that the purpose of Act 55 is to delineate the class of entities eligible to benefit from the tax exemption statutes. In enacting Act 55, the General Assembly intended to create uniform, legislative standards for determining when an institution is a “purely public charity.” The express language of intent included in Act 55, as well as its legislative history, supports this notion and warrants deference from the Court. *See* 1 Pa.C.S. § 1921(a) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”).

In passing Act 55, the General Assembly expressly set forth certain declarations regarding determinations of tax exemption, including the following:

(1) It is in the best interest of this Commonwealth and its citizens that the recognition of tax-exempt status be accomplished in an orderly, uniform and economical manner.

(4) Lack of specific legislative standards defining the term “institutions of purely public charity” has led to increasing confusion and confrontation among traditionally tax-exempt institutions and political subdivisions to the detriment of the public.

(5) There is increasing concern that the eligibility standards for charitable tax exemptions are being applied inconsistently, which

See infra pp. 17-18. Act 55 codifies the prior case law and clarifies it by enumerating criteria necessary to satisfy the five-part test that was set forth by the Supreme Court.

may violate the uniformity provision of the Constitution of Pennsylvania.

10 P.S. § 372(a). Clearly, the legislature was aware that the then-current method of establishing an entity's "purely public charity" status, *i.e.*, the *HUP* test, was resulting in inconsistent and unpredictable determinations. Thus, the General Assembly expressly stated that its intent in passing Act 55 was to provide standards applicable to *all* tax exemption eligibility determinations:

It is the intent of the General Assembly to eliminate inconsistent application of eligibility standards for charitable tax exemptions, reduce confusion and confrontation among traditionally tax-exempt institutions and political subdivisions and ensure that charitable and public funds are not unnecessarily diverted from the public good to litigate eligibility for tax-exempt status by providing *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 P.S. § 372(b)(emphasis added). The General Assembly thus recognized that the *HUP* test was being inconsistently applied by taxing authorities and the courts, and that the legislature could remedy the situation by creating its own standards, consistent with the constitutional requirements, to replace and clarify the judicial test. Thus, Act 55 was intended to be the sole mechanism used to limit those entities receiving tax exemptions to only those that are constitutionally permitted to be exempted. *See also Alliance Home*, 591 Pa. at 464, 919 A.2d at 223 (discussing legislative intent in enacting Act 55).

Statements made during consideration of Act 55 further support the notion that Act 55 was intended to replace and clarify the *HUP* test by setting forth specific ways in which an entity could satisfy the *HUP* criteria, thus creating uniform standards to be applied to determinations of

an entity's status as a "purely public charity." During the consideration of Act 55, Senator O'Pake commented in support of the Act:

This bill will establish in State statute a uniform standard for determining tax exempt statusThe present system, relying on local courts' interpretations of the State Supreme Court's five criteria for tax-exempt status has resulted in uncertainty, confusion, and countless dollars wasted for attorney's fees to litigate and appeal local taxing authority's decisions.

Pa. Legislative Journal- Senate at 1181 (Nov. 19, 1997). *See also id.* at 1182 (Senator Hart commenting on the amount of money various institutions have spent defending their charitable status and stating "[t]here have been many inconsistencies from community to community as to how a purely public charity is defined. . . .What we needed to do was set down a clear set of standards that these institutions must meet to qualify as purely public charities in this Commonwealth"). Furthermore, in opposing an amendment put forth by Representative Smith, Representative Brown stated:

The main thing we are doing today is defining a constitutional provision. In the Constitution it says that the General Assembly should act in defining what a purely public charity is, and the reason why there is so much confrontation and so much confusion on this issue is because we have not acted. . . . Now, the intent of this bill is to go forward and define what this constitutional test is, and when we do that, we set a line where, based on five tests, who is tax exempt and who is not.

Pa. Legislative Journal-House at 353 (March 18, 1997). In opposition to the same amendment, Representative Clark stated:

[W]e are trying to craft legislation which would codify the court decisions and the five basic tests. As part of that codification, we have listed subcategories which an institution must meet, and our idea with this bill is to bring clarity to this realm of litigious contention and not to expand it.

Id. at 356. Thus, the demonstrable legislative intent of Act 55, both included in the text of the Act and discussed during legislative debate, is to define “purely public charity” by statute to replace the common law interpretation of the term under the *HUP* test.

B. If an Entity Meets the Requirements Set Forth in Act 55, the Court May Consider Whether Application of Act 55 in a Particular Case is Unconstitutional

Act 55 should be applied as the primary test for determining whether an entity is a purely public charity. While the General Assembly was authorized by the Constitution to pass Act 55 and define “institutions of purely public charity”, the courts remain the ultimate arbiter of whether the Act comports with the Pennsylvania Constitution. *See Stilp*, 588 Pa. at 590, 905 A.2d at 948; *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 118 (Pa. Commw. Ct. 1998); *Widovich*, 295 Pa. at 321, 145 A. at 299. Act 55 is constitutional on its face because the criteria in 10 P.S. § 375(b)-(f) are taken directly from the five-part *HUP* test, which is the Court’s interpretation of Article VIII, Section 2 of the Pennsylvania Constitution. In subsequent cases, if an entity is found to meet the requirements of Act 55, a court may consider whether the application of Act 55 as applied in that case is constitutional. In making that determination, however, courts must afford Act 55 a presumption of constitutionality. Given this presumption, the court would need to evaluate Act 55 using the standard applicable to assessing the constitutionality of all statutes—whether it clearly, palpably and plainly violates the constitution—and not the standards of the *HUP* test.

1. Act 55 is entitled to a presumption of constitutionality

The presumption of constitutionality of duly enacted legislation is a fundamental one. 1 Pa.C.S. §1922 (“the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth”); *Schmehl v. Wegelin*, 592 Pa. 581, 587, 927 A.2d 183, 186 (2007); *Commonwealth v. Means*, 565 Pa. 309, 315, 773 A.2d 143, 147 (2001); *Commonwealth*

v. *Swinehart*, 541 Pa. 500, 508, 664 A.2d 957, 961 (1995). The Court has held 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.” *Pantuso Motors, Inc. v. CoreStates Bank*, 568 Pa. 601, 610, 798 A.2d 1277, 1283 (2002); see also *The Sch. Dists. of Deer Lakes and Allegheny Valley*, 463 Pa. at 562, 345 n.16 A.2d at 662 n.16 (quoting I Cooley, *Constitutional Limitations* 153 (8th ed. Carrington 1927) (“But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action. . . .”)).

This Court has often stated that the interpretation placed upon the constitution by the Legislature in the course of its enactment of statutes is entitled to great weight, and will be overcome only if it “clearly, palpably, and plainly” violates the Pennsylvania Constitution. See, e.g., *The Sch. Dists. of Deer Lakes and Allegheny Valley*, 463 Pa. at 562, 345 A.2d at 662 (denying challenge to constitutionality of Public Utility Realty Tax Act under Article VIII, Section 4 of Pennsylvania Constitution); *Schmehl*, 592 Pa. at 587, 927 A.2d at 186; *Means*, 565 Pa. at 315, 773 A.2d at 147; *Swinehart*, 541 Pa. at 508, 664 A.2d at 961; *Parker v. Children's Hospital of Philadelphia*, 483 Pa. 106, 116, 394 A.2d 932, 937 (1978). Any doubts as to validity are to be resolved in favor of sustaining the legislation. *Commonwealth v. Blystone*, 519 Pa. 450, 463, 549 A.2d 81, 87 (1988).⁸ Thus, Act 55 is deserving of the presumption of constitutionality, and unless it is held to be unconstitutional by this Court because it “clearly, palpably, and

⁸ This presumption reflects on the part of the judiciary the respect due the legislature as a co-equal branch of government. *The Sch. Dists. of Deer Lakes and Allegheny Valley*, 463 Pa. at 562, 345 A.2d at 662.

plainly” violates the Pennsylvania Constitution, it sets forth the law with respect to which entities qualify as purely public charities.

2. Act 55 is constitutional on its face

On its face, Act 55 is constitutional. It comports with and is a reasonable interpretation of Article VIII, Section 2 of the Pennsylvania Constitution.⁹ Act 55 was designed to clarify taxation of charitable organizations by incorporating the *HUP* test criteria and then providing specific guidelines, reflecting proper subdivisions of the *HUP* test, necessary to meet those criteria. *See supra* pp. 12-15; *see also Selfspot, Inc. v. Butler County Family YMCA*, 818 A.2d 587, 593 (Pa. Commw. Ct. 2003) (stating that Act 55 codified and elaborated on the *HUP* test); *Church of the Overcomer v. Del. County Bd. of Assessment Appeals*, No. 269 C.D. 2010, 2011 Pa. Commw. LEXIS 104 at *14-*15 (Pa. Commw. Ct. Mar. 17, 2011) (“The Charity Act codifies the *HUP* requirements and defines the same, setting forth specific elements that must be met to satisfy each requirement.”).¹⁰ The five-part test is the Court’s interpretation of the Pennsylvania

⁹ The absence of clear constitutional language defining “purely public charity” demonstrates that the framers intended the General Assembly to have freedom to enact reasonable implementing legislation. *The Sch. Dists. of Deer Lakes and Allegheny Valley*, 463 Pa. at 564, 345 A.2d at 663 (“[W]hen 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.”).

¹⁰ For example, Act 55 codifies the *HUP* test requirement that an entity “relieve government of some of its burden.” 10 P.S. §375(f). Act 55 then goes on to implement this requirement by setting forth the six ways in which an entity can satisfy it: (1) provide “a service to the public that the government would otherwise be obliged to fund or to provide directly or indirectly or to assure that a similar institution exists to provide the service”; (2) provide “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) receive “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) provide “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) advance or promote religion and be “owned and operated by a corporation or other entity as a religious ministry and

Constitution and each of the subparts is rationally related to, and encompassed by, its respective part of the test.¹¹ Thus, on its face, Act 55 is a valid, constitutional exercise of the General Assembly's legislative authority.

3. A court may consider the constitutionality of Act 55 as applied in a particular case

Because Act 55 is constitutional on its face, its application in a particular case would not be governed by the *HUP* test, but instead would require consideration of whether Act 55 clearly, palpably and plainly violated the constitution as applied in a particular case. Procedurally, therefore, a court would first apply Act 55 as the primary test for determining whether an entity is a purely public charity. If the entity meets the requirements of Act 55, the taxing authority could then assert that Act 55 is unconstitutional as applied in that particular instance. In reviewing that claim, a court would afford Act 55 the presumption of constitutionality and then would consider whether Act 55 as so applied violates the constitution. In this analysis, the constitutionality of Act 55 would be evaluated by determining whether the statute clearly, palpably, and plainly violates the constitution, and not by comparing Act 55 to the *HUP* test.¹²

See Clifton v. Allegheny County, 600 Pa. 662, 702, 969 A.2d 1197, 1221 (2009) (applying the

otherwise satisfies the criteria set forth in section 5"; or (6) have "a voluntary agreement under section 7." *Id.*

¹¹ In addition, Act 55 in no way lowers the exemption standards below those set forth in the *HUP* test; rather, Act 55 only enumerates specific ways in which institutions can satisfy the required criteria. *See Alliance Home*, 591 Pa. at 463, 919 A.2d at 223 ("[T]he General Assembly cannot authorize an exemption that would go beyond what is permitted by the constitutional text . . ."); *Appeal of Nat'l Church Residences of Neshannock, Pa.*, 56 Pa. D & C.4th at 222 ("[T]he General Assembly could not lower the standards for an exempt institution below any reasonable meaning of those simple words 'institutions of purely public charity.'").

¹² The *HUP* test was created in the absence of legislation to fill the legislative void. *See, e.g., Appeal of Nat'l Church Residences of Neshannock, Pa.*, 56 Pa. D & C.4th at 222 ("There is no argument that prior to the enactment of Act 55, in absence of legislative action, it fell to the courts to lay out the criteria and these standards were valid in the absence of legislative input."). However, now that the General Assembly, pursuant to its constitutional authority, has enacted Act 55 to define the term "purely public charity," Act 55 is now the touchstone, and may not, in effect, be second-guessed by the courts.

“clearly, palpably, and plainly” standard to an as applied constitutional challenge to tax assessment law); *Nixon v. Commonwealth*, 576 Pa. 385,398, 405, 839 A.2d 277, 286, 290 (2003) (holding law unconstitutional as applied using “clearly, palpably, and plainly” standard); *see also The Sch. Dists. of Deer Lakes and Allegheny Valley*, 463 Pa. at 562, 345 A.2d at 662; *Schmehl*, 592 Pa. at 587, 927 A.2d at 186; *Means*, 565 Pa. at 315, 773 A.2d at 147; *Swinehart*, 541 Pa. at 508, 664 A.2d at 961.

The Commonwealth Court’s reliance on this Court’s decisions in *Alliance Home*, 591 Pa. at 450, 919 A.2d at 215 and *Community Options, Inc. v. Board of Property Assessment*, 571 Pa. 672, 813 A.2d 680 (2002) to support the notion that an entity must first satisfy the requirements of the *HUP* test before addressing the question of whether an entity meets the requirements of Act 55, Op. at 10-11, is misplaced. In fact, in *Alliance Home*, the Court acknowledged that the exact situation as is presented here would raise “fundamental and foundational questions” regarding 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. Moreover, this Court went on to state that in *Community Options*, the Court had similarly avoided the above question by finding that the institution in that case did qualify as a purely public charity under the *HUP* test. *Alliance Home*, 591 Pa. at 464 n.10, 919 A.2d at 223 n.10. The analytical construct identified by the Court in (2) above reflects the proper use and consideration of Act 55 for the reasons set forth herein.

4. If an entity does not meet the requirements of Act 55, there is no need to consider Act 55's constitutionality in that case

If a particular entity is determined not to meet Act 55's requirements and is therefore determined not to be a purely public charity, a court will not need to engage in a constitutional analysis. A court should not address the constitutionality of a statute where the court can dispose of the issue on other grounds. *See Pottstown Sch. Dist. v. Hill Sch.*, 786 A.2d 312, 319 (Pa. Commw. Ct. 2001) (declining to analyze the constitutionality of Act 55 because the court's analysis under Act 55 and *HUP* led to the same conclusion); *see also Boettger v. Loverro*, 526 Pa. 510, 518, 587 A.2d 712, 716 (1991) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring)) (“[W]hen the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, . . . [we] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

II. THE SUPREME COURT SHOULD USE THIS OPPORTUNITY TO RESOLVE THE CONFUSION CAUSED BY PRIOR OPINIONS

The case law that has developed on this issue has caused confusion for institutions seeking tax exemptions, taxing authorities, and lower courts. While some courts have declined to address the constitutionality of Act 55, other courts have implicitly recognized that Act 55 is a facially valid, constitutional exercise of the General Assembly's authority, but have still applied the *HUP* test. The Court should take the opportunity in this case to clarify that Act 55's test provides the correct requirements for determining an entity's status as a purely public charity, subject only to a subsequent determination by a court that application of Act 55 in a particular case clearly, palpably, and plainly violates the Pennsylvania Constitution. *See supra* pp. 15-17.

When Act 55's constitutionality has been raised in prior cases explicitly, the courts have not dealt directly with the issue for a variety of reasons. *See, e.g., Pottstown Sch. Dist. v. Hill Sch.*, 786 A.2d 312, 318-319 (Pa. Commw. Ct. 2001) (because the *HUP* test and Act 55 led to

the same conclusion, not necessary to address whether Act 55 was constitutional); *Jameson Care Ctr., Inc. v. County of Lawrence*, 753 A.2d 902, 905 (Pa. Commw. Ct. 2000) (court declined to address constitutionality of Act 55 because entity was not entitled to exemption under Fourth to Eighth Class County Assessment Law); *Reading Soc'y of Model Eng'rs v. Berks County Bd. of Assessment Appeals*, 1999 Pa. Dist. & Cnty. Dec. LEXIS 18, *22 (C.P. Berks 1999) (appellants' only challenge to constitutionality of Act 55 was that legislature "usurped the judiciary's role" in interpreting the Constitution). The courts have had many opportunities since Act 55 was passed to apply both tests, however, and in doing so, the courts have either held that the entity passes both the *HUP* test and Act 55, or have simply analyzed the entity under Act 55 alone. *See, e.g., Am. Law Inst. v. Commonwealth*, 882 A.2d 1088 (Pa. Commw. Ct. 2005) (American Law Institute met requirements of *HUP* test and Act 55); *Pottstown Sch. Dist.*, 786 A.2d 312 (Pa. Commw. Ct. 2001) (Hill School held to be institution of purely public charity under both *HUP* test and Act 55); *Lutheran Home v. Schuylkill County Bd. of Assessment Appeals*, 782 A.2d 1 (Pa. Commw. Ct. 2001) (entity eligible for tax exemption without discussion of *HUP* test); *In re RHA Pennsylvania Nursing Homes Health & Rehabilitation Residence*, 747 A.2d 1257 (Pa. Commw. Ct. 2000) (entity met requirements of Act 55 without analysis under *HUP* test).¹³ If the courts in those cases believed that Act 55 was not valid on its face, there would have been no need for the courts to have engaged in analysis under Act 55 at all. In addition, where Act 55's requirements were met, the courts did not engage in an "as applied" analysis using the

¹³ The case at bar further illustrates the confusion. The only way to read the Commonwealth Court and the trial court opinions that Mesivtah met the Act 55 requirements but not the *HUP* test is that both courts found, without discussion and without the proper presumption of constitutionality, that Act 55 is unconstitutional. To overturn properly adopted legislation *sub silentio* would in itself be contrary to Pennsylvania law. *Mastromarco v. Title Ins. Corp. of Pa.*, 8 Phila. 265, 273 (C.P. Phila. 1982) (refusing to infer that the Pennsylvania Supreme Court declared a statute illegal or unconstitutional *sub silentio*).

appropriate standard to assess constitutional validity. Such holdings illustrate the confusion and duplication that has existed to date regarding Act 55 and its applicability. It is incumbent on the Court in this case to alleviate this confusion and hold that Act 55 should be the principal test to determine whether an entity is a purely public charity, and that in a particular case where an entity meets Act 55, the court may consider whether the Act's application clearly, palpably and plainly is unconstitutional.

III. PUBLIC POLICY REASONS FURTHER SUPPORT APPLICATION OF ACT 55 AS THE PRIMARY TEST FOR DETERMINING AN ENTITY'S STATUS AS A PURELY PUBLIC CHARITY

Act 55 provides greater certainty for taxing authorities, nonprofit organizations, and courts in determining whether a particular organization is eligible for tax exemption and should therefore be used in place of the *HUP* test. While the Court's decision in *HUP* ably summarized and integrated over a century of case law in creating the five-part *HUP* test, application of the test resulted in uncertainty and confusion. See discussion of legislative history, *supra* pp. 12-15. Under the *HUP* test, nonprofit organizations, including HAP members, have spent much-needed resources fighting with taxing authorities in the court system over issues related to tax-exempt status. See, e.g., *Wilson Area Sch. Dist. v. Easton Hosp.*, 561 Pa. 1, 747 A.2d 877 (2000); *In re Appeal of Cmty. Gen. Hosp.*, 708 A.2d 124 (Pa. Commw. Ct. 1998); *Saint Joseph Hosp. v. Berks County Bd. of Assessment Appeals*, 709 A.2d 928 (Pa. Commw. Ct. 1998); *Cmty. Gen. Osteopathic Hosp. v. Dauphin County Bd. of Assessment Appeals*, 706 A.2d 383 (Pa. Commw. Ct. 1998), *aff'd*, 562 Pa. 229, 754 A.2d 679 (2000); *Lewistown Hosp. v. County of Mifflin*, 706 A.2d 1269 (Pa. Commw. Ct. 1998).

The limited resources of hospitals and other nonprofit organizations are best used for fulfilling their charitable mission, not for defending their tax-exempt status in the courts. Under current law, nonprofit entities must essentially prove two cases – one under Act 55 and the other

under the *HUP* test – to demonstrate that they qualify as purely public charities, when the legislature specifically adopted a more certain set of standards to avoid this result.

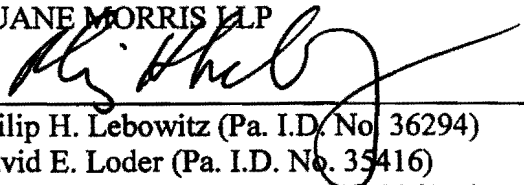
In passing Act 55, the General Assembly recognized the need to allow charitable institutions to focus on their missions and adopted clear uniform standards to be applied in resolving tax-exemption determinations in order to decrease the existing confusion and uncertainty. These clear standards have supplanted the *HUP* test and the presumption of constitutionality to which they are entitled makes the *HUP* test now totally inapplicable. Continued reliance on the *HUP* test in any context would not only offend the principle of judicial respect for legislative action, but would also run counter to the public interest in promoting certainty and maximizing the resources that charitable institutions can devote to their primary missions.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* respectfully requests that this Honorable Court hold that Act 55, not the *HUP* test, should be applied to determine an entity's status as a purely public charity, and that the *HUP* test no longer shall have any applicability in the determination of tax-exempt status.

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Dated: April 20, 2011

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.A.P. 121.

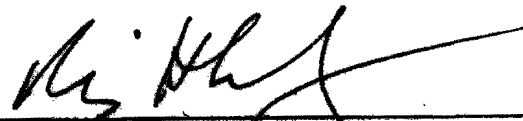
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