

**Testimony of
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before the
Finance Committee of the Pennsylvania State Senate
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Mr. Chairman, Members of the Senate Finance Committee:

Thank you for inviting me here today. It is an honor to speak to you. I have taught Tax Exempt Organizations, first at Pitt Law School, then at Duquesne Law School for over 20 years now. Before becoming a law professor I was the general counsel for two very large Pittsburgh charities, the Catholic diocese of Pittsburgh and Duquesne University. I know the great, good work that charities do, and I respect and appreciate it.

Lee Derr from Senator Eichelberger's office sent me some questions in advance that I have been asked to address. Let me take them in the order that they were sent to me. Lee asked that I be impartial and educational, and I will try to meet both of those reasonable requests.

First: What is the current state of the law in Pennsylvania with both Act 55 and the HUP case operating concurrently? I am glad that Lee put the question that way. We speak too often of the HUP test, not the HUP case; sometimes the Court itself has referred to HUP as a test - that has caused some unfortunate confusion because it sounds like we have two tests in Pennsylvania for charitable tax exemption - one by the Court in HUP and one by the Legislature in Act 55. I think we need to be more careful in our

terminology. We do not have two tests. The HUP case is not a test. HUP establishes the basis for constitutional interpretation pursuant to the Pennsylvania Supreme Court's unique ability to have the final word on what the Pennsylvania Constitution means. The HUP case says that the term "purely public charity" means an organization that advances a charitable purpose, donates or renders gratuitously a substantial portion of its services, benefits a substantial and indefinite class of persons who are legitimate subjects of charity, relieves the government of some of its burden, and operates entirely free from the private profit motive. That is a very good, very complete definition from the common law of charities. So HUP is a case which interprets the state constitution's use of a particular phrase: institutions of purely public charity and it does so using long-standing notions of the common law, which is the proper place to look for the meaning of a word or phrase in our constitution.

Within the framework of purely public charity, the state constitution assigns to you, the General Assembly, the ability to exempt institutions of purely public charity from state taxation. That phrase in the Constitution does not give the Pennsylvania Supreme Court the right to grant tax exemptions, and in fact the Court cannot grant tax exemptions. Only you, the general Assembly, can do that because the Constitution gives you that power.

This is an exception to the constitutional requirement that all taxes in Pennsylvania are to be uniform. Exemption from taxation is a privilege that may be granted by this body - it is not a right. The state constitution says that

you may grant tax exemption to institutions of purely public charity and that you may set the tests for tax exemption- not that you have to grant exemptions, not that any organization has a right to an exemption - but that you may if you chose to, and you can specify the conditions upon which such tax exemptions are available. How you do this is the real test for tax exemption of institutions of purely public charity, and you have done this in Act 55. Act 55 is the test for the tax exemption of purely public charities in Pennsylvania. So the two function together - the constitutional paramaters of the HUP case and the legislative test of Act 55.

Second: What is the effect of the 2012 Pike County case and its impact on both Act 55 and the limits on the General Assembly that the case may place on future attempts to pass legislation? I suspect that we are giving the Pike County case an importance that its facts do not warrant. That case did not say that Act 55 was without any value or that it was unconstitutional. It simply said that the Act 55 test had to be interpreted within the paramaters of the HUP case, in other words within the paramaters of the Pennsylvania Constitution.

There should be nothing surprising that, in a constitutional democracy, any law is subject to judicial review as to its meaning and as to its constitutionality. That is one of the key principles of a constitutional democracy with three branches of government. The judiciary gets to review both the acts of the executive and the acts of the legislature as to their constitutionality. That principle is as old as *Marbury v. Madison* in 1803, and

it is one that Americans hold dear. As I said, this notion of the court review of legislative and executive acts is foundational to our notion of a constitutional democracy. The Court in the Pike case did not over-step its bounds. It did not by its own fiat put any limits on what the legislature can do. The limitations that are on you come from the state constitution. That document is the source of your powers, but it also says how far those powers can go. It puts limits on them.

For example, the same section of the constitution that grants you the power to exempt from state taxation institutions of purely public charity also gives you the ability to exempt from state taxation actual places of regularly stated religious worship. Pursuant to this part of the Constitution, you have the ability to write rules for how actual places of regularly stated religious worship can qualify for tax exemption. If you used that power to try to redefine what an actual place of regularly stated religious worship was by, for example, saying that road-side shrines were places of regularly stated worship, I suspect that the Court would tell you that you have over-stepped your constitutional authority and that would be true, and that is the court's role.

But the Pennsylvania Supreme Court did not say anything like that in the Pike County case. What they said in that case was that your test for the tax exemption of institutions of purely public charity, namely Act 55, had to be read in the context of the Constitution's language, allowing you to exempt from taxation institutions of purely public charity. Just like you could not, by legislation, make my roadside shrine into a place of regularly stated religious

worship, you cannot, by legislation, make what is not an institution of purely public charity into one that is, not because the court says so, but because the constitution says so.

Third: Whether the passage of a constitutional amendment will revert the law entirely back to Act 55 or to Act 55 as limited by the Pike County case or whether new law will be necessary. The short answer to this question is that I do not believe that SB 4 will do any of that. All SB 4 says is that the General Assembly may by law establish uniform standards and qualifications which shall be the criteria to determine qualifications of institutions of purely public charity under clause (v) of subsection (a) of Article VIII, Section 2(b). But you already have that authority. You used it to write Act 55. Act 55 is a determination of how an institution of purely public charity in Pennsylvania can qualify for tax exemption in Pennsylvania. But Act 55 does not exist in a vacuum. It exists within the context of the state constitution and the ability of the Pennsylvania Supreme Court to interpret that constitution.

Now, if what you meant to say in SB 4 was that the Legislature's **definition** of "purely public charity," as opposed to **setting standards** for them - which is the language you used - that your **definition** of "purely public charity" should trump the Supreme Court's decision in the HUP case, the amendment needs to say that. But the language of the proposed constitutional amendment, despite its noble intentions, does not say that, so it cannot accomplish that.

Or if you meant to say that, under this constitutional amendment, the Legislature will have the right to establish standards for what is a purely public charity in Pennsylvania, and that the courts may not review those standards, that the courts have no right to review your standards for purely public charities, the standards that you, the legislature set, the language of the amendment ought to have said that, and it does not.

I am not sure what the legislative intent was behind SB 4. I am sure that it was a praiseworthy one. But I fervently hope that SB 4 does not mean you did not mean that, that SB4 does not mean that the General Assembly, in the area of public charities, is saying that none of its actions may be reviewed by the courts of Pennsylvania. That, I think, that would be an unintended assault on our constitutional democracy. No legislature in this country has the right to review the exercise of its own power. That role is uniquely that of the courts.

But, as I point out, the language of SB4 does not say that your standards replace those of the Court in interpreting the constitutional phrase “institutions of purely public charity” nor does it say that your actions in setting standards for purely public charities are not reviewable by the courts, so it does not accomplish either one. As we all know, unless the people clearly know what they are voting for when a constitutional amendment is before them, their vote is ineffective.

Fourth: Are there any issues that may pertain to the fact that the 2012 Pike County case discusses the power to “define” what is a “purely public charity” yet the proposed amendment does not use the word “define” but says

“establish standards.” I think that this question points out the major problem here. The proposed constitutional amendment is ambiguous on this point. You already have the constitutional authority to establish the standards by which an institution of purely public charity can be exempt from taxation in Pennsylvania. That’s what Act 55 does.

The power to **define** what an institution of purely public charity is, however, is an entirely different issue. That power lies with the courts because that phrase - “institutions of purely public charity” is the phrase used in the Pennsylvania Constitution, and, in a constitutional democracy, the right to interpret the constitution is the unique role of the judiciary, not the legislature.

So, if the General Assembly wants the people of the Commonwealth to give them the power to define constitutional terms, that is to say the power to interpret the state Constitution, in other words to take this power away from the courts and to give it to you, you need to ask for it in a much clearer and straightforward manner than the language of SB4.

I am not without sympathy for public charities and the situation they find themselves in. As I said, I spent a major portion of my professional life working to represent major charitable organizations. I understand that charities want protection from frivolous law suits challenging their tax exempt status and they believe this amendment will help to provide it. As I said, I don’t think that it will, but it would be a perfectly valid use of your current authority under the Constitution to protect charities from frivolous lawsuits challenging their tax exempt status. Pursuant to the standard setting ability

that you already clearly have under the state constitution, you could create a statute that says that any taxing body that frivolously challenges a charity's tax exempt status and loses must pay the charity's legal fees and costs. That's how you stop frivolous challenges to tax exempt status and you have that power today.

I also understand that charities are worried about frequent, repetitive challenges to their tax exempt status. Again, you currently have the authority to handle that under the constitution. You can legislate a uniform system which says that tax exempt status, once granted, is presumably valid for 3 years, 5 years, 10 years, as you choose, and that it cannot be challenged during that period. You could do that now.

And, you know, periodic review of exempt status is not a bad idea. Public charities ebb and flow. It's good to have to be re-certified every so often, because, after all, we are talking about a privilege and not a right.

I hope this testimony has been helpful to you in the difficult task you have before you. I know that each of you is a talented and dedicated person, who has taken on public service as a calling. I admire you for that and I thank you for it.

I would be happy to take any questions.