

STATE OF NEW HAMPSHIRE  
SUPREME COURT

2009-0621

---

THE BOARD OF TRUSTEES OF THE NEW  
HAMPSHIRE JUDICIAL RETIREMENT PLAN  
and  
NEW HAMPSHIRE RETIREMENT SYSTEM

v.

---

WILLIAM GARDNER, SECRETARY OF STATE

---

Appeal From A Final Judgment  
Of The Merrimack County Superior Court

---

BRIEF FOR THE INTERVENOR/PLAINTIFF  
NEW HAMPSHIRE RETIREMENT SYSTEM

---

Andrew R. Schulman, Esq.  
NH Bar 2276  
GETMAN, SCHULTHESS  
& STEERE, P.A.  
3 Executive Park Drive, Suite 9  
Bedford, New Hampshire 03110  
(603) 634-4300  
(603) 626-3647 (fax)  
ASchulman@GetmanStacey.com  
*Counsel for intervenor New Hampshire  
Retirement System*

15 Minutes Oral Argument Requested  
*Andrew R. Schulman, Esq. to argue*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

TEXT OF RELEVANT AUTHORITIES..... v

    N.H. Constitution, Part 1, Article 36-a ..... v

    RSA Chapter 100-D..... v

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS ..... 2

    I. Introduction ..... 2

    II. How The NHRS’ Pension Trust Funds Are Invested In The  
        Financial Markets..... 2

    III. The Harm Caused By RSA 100-D..... 5

SUMMARY OF ARGUMENT ..... 12

LEGAL ARGUMENT..... 14

    I. PART I, ARTICLE 36-A OF THE NEW HAMPSHIRE  
        CONSTITUTION PROHIBITS THE LEGISLATURE FROM  
        USING THE ASSETS OF THE NEW HAMPSHIRE  
        RETIREMENT SYSTEM TO ADVANCE GLOBAL  
        HUMANITARIAN CAUSES..... 14

        A. Introduction..... 14

        B. Statutory Background..... 16

        C. The Text Of Part 1, Article 36-a And The Intent Of Its  
            Drafters ..... 18

        D. The Text Of The Ballot Question And The Intent Of  
            The Voters..... 23

        E. Applying Article 36-a To Responsible Investing..... 27

        F. Conclusion..... 30

    II. THE SUDAN DIVESTMENT ACT, RSA CHAPTER 100-D  
        VIOLATES PART 1, ARTICLE 36-a OF THE NEW  
        HAMPSHIRE CONSTITUTION ..... 30

CONCLUSION..... 35

CERTIFICATE OF SERVICE ..... 36

TABLE OF AUTHORITIES

**Cases:**

Appeal of Corporators of Portsmouth Sav. Bank, 129 N.H. 183,  
525 A.2d 671 (N.H. 1987) ..... 21

Blankenship v. Boyle, 329 F.Supp. 1089 (D.D.C. 1971) ..... 21, 22, 29

Board of Trustees of the Retirement System of the City  
of Baltimore v. Mayor and City Council of Baltimore City,  
317 Md. 72, 562 A.2d 720 (Md. Ct. App. 1987) cert. den.  
493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990)..... 22, 23

In re Concord Teachers (New Hampshire Retirement System),  
158 N.H. 529, 969 A.2d 403 (N.H. 2009) ..... 33

Municipal Trust Workers Compensation Fund v. Flynn,  
133 N.H. 17, 573 A.2d 439 (1990) ..... 23

National Education Association—Rhode Island v. Retirement Board  
Of The Rhode Island Employees’ Retirement System, 172 F.3d 22 (1st Cir. 1999),  
cert. den. 528 U.S. 929, 120 S.Ct. 326, 145 L.Ed.2d 254..... 33

New Hampshire Retirement System v. Sununu, 126 N.H. 104, 489 A.2d 61 (N.H.1985) ..... 16, 17

Parker v. Waeklin, 123 F.3d 1 (1<sup>st</sup> Cir. 1997), cert. den.  
523 U.S. 1106, 118 S.Ct. 1675, 140 L.Ed.2d 813 (1998)..... 33

Pegram v. Herdrich, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) ..... 20

Reinhold v. Mallery, 135 N.H. 31, 599 A.2d 126 (N.H. 1991) ..... 21

Sgaglione v. Levitt, 37 N.Y.2d 507, 375 N.Y.S.2d 79 (N.Y. 1975)..... 22

State Employees' Association of New Hampshire, Inc. v. Belknap County,  
122 N.H. 614, 448 A.2d 969 (N.H. 1982) ..... 16

Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association,  
Slip Op. 2009-555, \_\_\_ N.H. \_\_\_, \_\_\_ A.2d \_\_\_ (N.H. January 28, 2010) ..... 32, 33

United States v. Winstart, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996)..... 33

Varity Corp. v. Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ..... 20

Withers v. Teachers Retirement System Of The City Of New York,  
447 F. Supp. 1248 (D.C.N.Y. 1978), aff'd 595 F.2d 12 (2<sup>nd</sup> Cir. 1979) ..... 21, 29

**Statutes:**

26 U.S.C. §401(a) (Internal Revenue Code Section 401(a))..... 29

29 U.S.C. §1002(32) ..... 20

29 U.S.C. §1003(b) ..... 20

29 U.S.C. §1104(a) (ERISA Section 404(a))..... 18,20

1967 N.H. Laws, Ch. 134:1 ..... 16

2008 N.H. Laws Ch. 300:19 ..... 33

2008 Laws Ch. 300:5 through 7..... 34

RSA Chapter 100-A ..... 33

RSA 100-A:1 ..... 33

RSA 100-A:2 ..... 2,16

RSA 100-A:3 ..... 2

RSA 100-A:15 ..... *passim*

RSA 100-A:41-a ..... 33

RSA 100-A:52 ..... 34

RSA 100-A:52-a ..... 34

RSA 100-A:52-b ..... 34

RSA 100-A:54 ..... 34

RSA Chapter 100-D..... *passim*

RSA 100-D:1 ..... 6

RSA 100-D:7 ..... 13, 31

**Regulations:**

29 C.F.R. 2904.08-1 (DOL Interpretative Bulletin) ..... 27

29 CFR 2509.94-1 (1994 to 2008) (Superceded DOL Interpreted Bulletin) ..... 27

**Other Agency Publications:**

U.S. Department of Labor Advisory Opinion 98-04A ..... 27

U.S. Internal Revenue Service Revenue Ruling 69-494..... 29

**Constitutional Provisions**

N.H. Constitution, Part 1, Article 23 ..... 32  
N.H. Constitution, Part 1, Article 36-a ..... *passim*  
U.S. Constitution, Section 1, Article 10..... 32

**Legislative And Constitutional Convention Materials:**

Journal of the 1984 New Hampshire Constitutional Convention ..... 19  
Report of the Committee on Executive Departments and Administration,  
2009 New Hampshire House Record, Vol. 31, No. 22 (March 9, 2009)..... 15

**Restatement Provisions:**

Restatement (Third) of Trusts §78 ..... 18,20  
Restatement (Third) of Trusts §90 ..... 21

**Other:**

Hutchinson, *Legal Standards Governing Investment Of Pension Assets  
For Social And Political Goals*, 128 U. Pa. L. Rev. 1340 (1980) ..... 29  
Langbein & Posner, *Social Investing and the Law of Trusts*,  
79 Mich.L.Rev. 72 (1980)..... 29  
Lanoff, *The Social Investment of Private Plan Assets: May It Be Done Lawfully  
Under ERISA?*, 31 Lab.L.J. 387 (1980) ..... 29  
Mamet, David (screenplay) *Hoffa* (Twentieth Century Fox Films, 1992) ..... 24, 26  
Munnell, Alicia, *Should Public Pension Plans Engage In Social Investing,  
Issues In Brief*, Center For Retirement Research at Boston College, No. 7-12 (2007) ..... 8  
Pileggi, Nicholas, *Casino* (screenplay) (MGM,1995) ..... 24, 26

TEXT OF RELEVANT AUTHORITIES

**N.H. Constitution, Part 1, Article 36-a  
(Use Of Retirement Funds)**

The employer contributions certified as payable to the New Hampshire retirement system or any successor system to fund the system's liabilities, as shall be determined by sound actuarial valuation and practice, independent of the executive office, shall be appropriated each fiscal year to the same extent as is certified. All of the assets and proceeds, and income there from, of the New Hampshire retirement system and of any and all other retirement systems for public officers and employees operated by the state or by any of its political subdivisions, and of any successor system, and all contributions and payments made to any such system to provide for retirement and related benefits shall be held, invested or disbursed as in trust for the exclusive purpose of providing for such benefits and shall not be encumbered for, or diverted to, any other purposes.

\* \* \*

**RSA Chapter 100-D  
(Divestiture Of Retirement System Assets Relating To Sudan)**

**RSA 100-D:1  
(Definitions)**

In this chapter:

I. "Active business operations" means all business operations that are not inactive business operations.

II. "Business operations" means engaging in commerce in any form in Sudan, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

III. "Company" means any sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other entity or business association, including all wholly-owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates of such entities or business associations, that exists for profit-making purposes.

IV. "Complicit" means taking actions during any preceding 20-month period which have directly supported or promoted the genocidal campaign in Darfur, including, but not limited to, preventing Darfur's victimized population from communicating with each other, encouraging Sudanese citizens to speak out

*Text of Authorities*

against an internationally approved security force for Darfur, actively working to deny, cover up, or alter the record on human rights abuses in Darfur, or other similar actions.

V. "Direct holdings" in a company means all securities of that company held directly by the public fund or in an account or fund in which the public fund owns all shares or interests.

VI. "Government of Sudan" means the government in Khartoum, Sudan, which is led by the National Congress Party (formerly known as the National Islamic Front) or any successor government formed on or after October 13, 2006, including the coalition national unity government agreed upon in the comprehensive peace agreement for Sudan, and does not include the regional government of southern Sudan.

VII. "Inactive business operations" means the mere continued holding or renewal of rights to property previously operated for the purpose of generating revenues but not presently deployed for such purpose.

VIII. "Indirect holdings" in a company means all securities of that company held in an account or fund, such as a mutual fund, managed by one or more persons not employed by the public fund, in which the public fund owns shares or interests together with other investors not subject to the provisions of this chapter.

IX. "Marginalized populations of Sudan" include, but are not limited to, the portion of the population in the Darfur region that has been genocidally victimized; the portion of the population of southern Sudan victimized by Sudan's North-South civil war; the Beja, Rashidiya, and other similarly underserved groups of eastern Sudan; the Nubian and other similarly underserved groups in Sudan's Abyei, Southern Blue Nile, and Nuba Mountain regions; and the Amri, Hamadab, Manasir, and other similarly underserved groups of northern Sudan.

X. "Military equipment" means weapons, arms, military supplies, and equipment that readily may be used for military purposes, including, but not limited to, radar systems or military-grade transport vehicles; or supplies or services sold or provided directly or indirectly to any force actively participating in armed conflict in Sudan.

XI. "Mineral extraction activities" include exploring, extracting, processing, transporting, or wholesale selling or trading of elemental minerals or associated metal alloys or oxides (ore), including gold, copper, chromium, chromite, diamonds, iron, iron ore, silver, tungsten, uranium, and zinc, as well as facilitating such activities, including by providing supplies or services in support of such activities.

XII. "Oil-related activities" include, but are not limited to, owning rights to oil blocks; exporting, extracting, producing, refining, processing, exploring for, transporting, selling, or trading of oil; constructing, maintaining, or operating a pipeline, refinery, or other oil field infrastructure; and facilitating such activities, including by providing supplies or services in support of such activities, provided that the mere retail sale of gasoline and related consumer products shall not be considered oil-related activities.

XIII. "Power production activities" means any business operation that involves a project commissioned by the National Electricity Corporation (NEC) of Sudan or other similar government of Sudan entity whose purpose is to facilitate power generation and delivery, including, but not limited to, establishing power-generating plants or hydroelectric dams, selling or installing components for the project, providing service contracts related to the installation or maintenance of the project, as well as facilitating such activities, including by providing supplies or services in support of such activities.

XIV. "Public fund" means New Hampshire retirement system board of trustees and the judicial retirement plan board of trustees which invest and manage funds held by the state to the credit of the New Hampshire retirement system under RSA 100-A and the New Hampshire judicial retirement plan under RSA 100-C.

XV. "Scrutinized company" means any company that meets the criteria of (a), (b), or (c), as follows:

(a) The company has business operations that involve contracts with and/or provision of supplies or services to:

(1) The government of Sudan;

(2) Companies in which the government of Sudan has any direct or indirect equity share;

(3) Government-of-Sudan-commissioned consortiums or projects; or

(4) Companies involved in government-of-Sudan-commissioned consortiums or projects; and either (i) more than 10 percent of the company's revenues or assets linked to Sudan involve oil-related activities or mineral extraction activities; less than 75 percent of the company's revenues or assets linked to Sudan involve contracts with and/or provision of oil-related or mineral extracting products or services to the regional government of southern Sudan or a project or consortium created exclusively by that regional government; and the company has failed to take substantial action; or (ii) more than 10 percent of the company's revenues or assets linked to Sudan involve power production activities; less than 75 percent of the company's power production activities

include projects whose intent is to provide power or electricity to the marginalized populations of Sudan; and the company has failed to take substantial action.

(b) The company is complicit in the Darfur genocide.

(c) The company supplies military equipment within Sudan, unless it clearly shows that the military equipment cannot be used to facilitate offensive military actions in Sudan or the company implements rigorous and verifiable safeguards to prevent use of that equipment by forces actively participating in armed conflict, for example, through post-sale tracking of such equipment by the company, certification from a reputable and objective third party that such equipment is not being used by a party participating in armed conflict in Sudan, or sale of such equipment solely to the regional government of southern Sudan or any internationally recognized peacekeeping force or humanitarian organization. Notwithstanding anything in this paragraph to the contrary, a social development company which is not complicit in the Darfur genocide shall not be considered a scrutinized company.

XVI. ““Social development company”” means a company whose primary purpose in Sudan is to provide humanitarian goods or services, including medicine or medical equipment, agricultural supplies or infrastructure, educational opportunities, journalism-related activities, information or information materials, spiritual-related activities, services of a purely clerical or reporting nature, food, clothing, or general consumer goods that are unrelated to oil-related activities, mineral extraction activities, or power production activities.

XVII. ““Substantial action”” means adopting, publicizing, and implementing a formal plan to cease scrutinized business operations within one year and to refrain from any such new business operations; undertaking significant humanitarian efforts in conjunction with an international organization, the government of Sudan, the regional government of southern Sudan, or a nonprofit entity and evaluated and certified by an independent third party to be substantial in relationship to the company’s Sudan business operations and of benefit to one or more marginalized populations of Sudan; or through engagement with the government of Sudan, materially improving conditions for the genocidally victimized population in Darfur.

\* \* \*

**RSA Section 100-D:2  
(Identification of Companies)**

I. Within 90 days of this chapter becoming effective, the public fund shall make its best efforts to identify all scrutinized companies in which the public fund has direct or indirect holdings or could possibly have such holdings in the future. Such efforts shall include, as appropriate:

*Text of Authorities*

(a) Reviewing and relying, as appropriate in the public fund’s judgment, on publicly available information regarding companies with business operations in Sudan, including information provided by nonprofit organizations, research firms, international organizations, and government entities;

(b) Contacting asset managers contracted by the public fund that invest in companies with business operations in Sudan; or

I Contacting other institutional investors that have divested from and/or engaged with companies that have business operations in Sudan.

II. By the first meeting of the public fund following the 90-day period described in paragraph I, the public fund shall assemble all scrutinized companies identified into a “scrutinized companies list.”

III. The public fund shall update the scrutinized companies list on a quarterly basis based on evolving information from, among other sources, those listed in paragraph I.

\* \* \*

**RSA Section 100-D:3  
(Required Actions)**

I. General. The public fund shall adhere to the procedure for companies on the scrutinized companies list as provided in this section.

II. Engagement.

(a) The public fund shall immediately determine the companies on the scrutinized companies list in which the public fund owns direct or indirect holdings.

(b) For each company identified in subparagraph (a) with only inactive business operations, the public fund shall send a written notice informing the company of this chapter and encouraging it to continue to refrain from initiating active business operations in Sudan until it is able to avoid scrutinized business operations. The public fund shall continue such correspondence on a semiannual basis.

(c) For each company newly identified in subparagraph (a) with active business operations, the public fund shall send a written notice informing the company of its scrutinized company status and that it may become subject to divestment by the public fund. The notice shall offer the company the opportunity to clarify its Sudan-related activities and shall encourage the company, within 90 days, to either cease its scrutinized business operations or convert such operations

to inactive business operations in order to avoid qualifying for divestment by the public fund.

(d) If, within 90 days following the public fund's first engagement with a company pursuant to subparagraph (c) that company ceases scrutinized business operations, the company shall be removed from the scrutinized companies list and the provisions of this section shall cease to apply to it unless it resumes scrutinized business operations. If, within 90 days following the public fund's first engagement, the company converts its scrutinized active business operations to inactive business operations, the company shall be subject to all provisions relating thereto.

### III. Divestment.

(a) If, after 90 days following the public fund's first engagement with a company pursuant to subparagraph II(c), the company continues to have scrutinized active business operations, and only while such company continues to have scrutinized active business operations, the public fund shall sell, redeem, divest, or withdraw all publicly traded securities of the company, except as otherwise provided, according to the following schedule:

(1) At least 50 percent of such assets shall be removed from the public fund's assets under management by 9 months after the company's most recent appearance on the scrutinized companies list.

(2) One hundred percent of such assets shall be removed from the public fund's assets under management within 15 months after the company's most recent appearance on the scrutinized companies list.

(b) If a company that ceased scrutinized active business operations following engagement pursuant to subparagraph II(c) resumes such operations, subparagraph (a) shall immediately apply, and the public fund shall send a written notice to the company. The company shall also be immediately reintroduced onto the scrutinized companies list.

IV. Prohibition. At no time shall the public fund acquire securities of companies on the scrutinized companies list that have active business operations, except as provided in paragraph V and VI.

V. Exemption. No company which the United States government affirmatively declares to be excluded from its present or any future federal sanctions regime relating to Sudan shall be subject to divestment or investment prohibition pursuant to paragraphs III and IV.

VI. Excluded Securities. Notwithstanding anything herein to the contrary, paragraphs III and IV shall not apply to indirect holdings in actively managed

*Text of Authorities*

investment funds. The public fund shall, however, submit letters to the managers of such investment funds containing companies with scrutinized active business operations requesting that they consider removing such companies from the fund or create a similar actively managed fund with indirect holdings devoid of such companies. If the manager creates a similar fund, the public fund shall replace all applicable investments with investments in the similar fund in an expedited time frame consistent with prudent investing standards. For the purposes of this section, ""private equity" funds shall be deemed to be actively managed investment funds.

\* \* \*

#### **RSA 100-D:4 (Reporting)**

I. The public fund shall file a publicly available report to the general court that includes the scrutinized companies list within 30 days after the list is created.

II. Annually thereafter, the public fund shall file a publicly available report to the general court and send a copy of that report to the United States Presidential Special Envoy to Sudan (or an appropriate designee or successor) that includes:

(a) A summary of correspondence with companies engaged by the public fund under RSA 100-D:3, II(b) and (c);

(b) All investments sold, redeemed, divested, or withdrawn in compliance with RSA 100-D:3, III;

(c) All prohibited investments under RSA 100-D:3, IV; and

(d) Any progress made under RSA 100-D:3, VI.

\* \* \*

#### **RSA 100-D:5 (Provisions for Expiration of Requirements)**

The requirements in this chapter shall expire upon the occurrence of any of the following:

I. The Congress or President of the United States declaring that the Darfur genocide has been halted for at least 12 months.

II. The United States revoking all sanctions imposed against the government of Sudan.

III. The Congress or President of the United States declaring that the government of Sudan has honored its commitments to cease attacks on civilians,

*Text of Authorities*

demobilize and demilitarize the Janjaweed and associated militias, grant free and unfettered access for deliveries of humanitarian assistance, and allow for the safe and voluntary return of refugees and internally displaced persons.

IV. The Congress or President of the United States, through legislation or executive order, declaring that mandatory divestment of the type provided for in this chapter interferes with the conduct of United States foreign policy.

\* \* \*

**RSA 100-D:6  
(Other Legal Obligations)**

With respect to actions taken in compliance with this chapter, including all good faith determinations regarding companies as required by this chapter, the public fund shall be exempt from any conflicting statutory or common law obligations, including any such obligations in respect to choice of asset managers, investment funds, or investments for the public fund's securities portfolios.

**RSA 100-D:7  
(Reinvestment in Certain Companies With Scrutinized Active Business Operations)**

Notwithstanding any other provision of this chapter, the public fund is permitted to cease divesting from certain scrutinized companies pursuant to RSA 100-D:3, III and/or reinvest in certain scrutinized companies from which it divested pursuant to RSA 100-D:3, III if clear and convincing evidence shows that the value for all assets under management by the public fund becomes equal to or less than 99.50 percent (50 basis points) of the hypothetical value of all assets under management by the public fund assuming no divestment for any company had occurred under RSA 100-D:3, III. Cessation of divestment, reinvestment, and/or any subsequent ongoing investment authorized by this section shall be strictly limited to the minimum steps necessary to avoid the contingency set forth in the preceding sentence. For any cessation of divestment, reinvestment, and/or subsequent ongoing investment authorized by this section, the public fund shall provide a written report to the general court in advance of initial reinvestment, updated semiannually thereafter as applicable, setting forth the reasons and justification, supported by clear and convincing evidence, for its decisions to cease divestment, reinvest, and/or remain invested in companies with scrutinized active business operations. This section has no application to reinvestment in companies on the ground that they have ceased to have scrutinized active business operations.

\* \* \*

**RSA 100-D:8  
(Enforcement)**

The attorney general is charged with enforcing the provisions of this chapter and, through any lawful designee, may bring such actions in court as are necessary to do so.

QUESTIONS PRESENTED

- I. DOES PART 1, ARTICLE 36-A OF THE NEW HAMPSHIRE CONSTITUTION PERMIT THE LEGISLATURE TO USE THE ASSETS OF THE NEW HAMPSHIRE RETIREMENT SYSTEM TO ADVANCE GLOBAL HUMANITARIAN CAUSES THROUGH A LEGISLATIVELY MANDATED SOCIALLY RESPONSIBLE INVESTMENT STRATEGY?
  
- II. DOES THE SUDAN DIVESTMENT ACT, RSA CHAPTER 100-D VIOLATE PART 1, ARTICLE 36-a OF THE NEW HAMPSHIRE CONSTITUTION

## STATEMENT OF THE CASE

The New Hampshire Retirement System (“NHRS”) adopts the Statement of the Case set forth in the State’s Brief.

## STATEMENT OF THE FACTS<sup>1</sup>

### I. Introduction

The central factual question in this case is whether compliance with the Sudan Divestment Act will impose a greater than *de minimus* burden on NHRS or cause a greater than *de minimus* loss in the value of its trust funds. Relying on NHRS’ uncontested written and oral offers of proof, T,6, 39-40, the trial court found “concrete evidence of the irreparable harm NHRS will suffer,” A,19, and noted “the substantial financial consequences to NHRS from complying with RSA Chapter 100-D.” A,18.

While not directly challenging this finding, the State’s Brief certainly does not concede the point. Instead, the State argues that “[E]ven if it were true that compliance with the Act could be costly, those losses would not adversely affect the Retirement Systems’ beneficiaries[.]” State’s Brief at p. 16 (emphasis added). Therefore, it is necessary to explain exactly how implementing and complying with the Sudan Divestment Act will impact both NHRS and its beneficiaries.

### II. How The NHRS’ Pension Trust Funds Are Invested In The Financial Markets

NHRS’ Current Financial Situation: NHRS is a tax qualified, defined benefit pension trust for state and political subdivision employees. See, RSA 100-A:2 and 3; A,2-3. It is funded

---

<sup>1</sup>The trial court record is cited in this Brief as follows: “A” refers to the Appendix to the State’s Brief. “T” refers to the transcript of the oral argument on the motion for preliminary injunction held on May 6, 2009.

and administered exclusively through member and employer contributions and investment income. A,3. Thus, NHRS is self-supporting—it does not receive additional public funds for staff, consultants, facilities or operations.

The trust is presently underfunded. A,3. As of June, 2008 (the date of the last actuarial report prior to the written offer of proof in this case), NHRS had an accrued liability of \$7.8 billion and assets of \$5.3 billion. A,3. Thus, it had funding for 67.8% of its anticipated long term liabilities. A,3. As of May, 2009 (the date of the hearing in this case), NHRS's assets were between \$4 and \$5 billion, due to the sharp downturn in the global financial markets, and its long term liabilities remained relatively unchanged. T,6.

NHRS' Overall Investment Goals: Simple algebra says that if benefits are to remain constant and if contribution levels are to stay within the same order of magnitude, then NHRS must continue to seek prudent long term investment gains. To this end, NHRS's investment strategy has all of the following attributes:

- It is focused on long term gains rather than short term swings; A,101
- It is tilted (by majority percent) to equity and equity like investments; A,101
- It is diversified across asset classes; A,101
- It is diversified through the use of multiple external investment managers; A,101, and
- Each investment portfolio is managed against a well defined and generally accepted benchmark (for example, the S&P 500). A,101-102

Every two years, the NHRS Trustees set the trust's asset allocation strategy. A,103. The process begins when the Trustees commission an actuarial report to determine the system's long term liability. A,103. Then, in consultation with the actuary and investment professionals, they

determine an appropriate rate of return for the trust as a whole over the long term. A,103; T,11. The Trustees' present goal is a long term annual, system-wide rate of return of 8.5%. A, 103.

The Asset Allocation Determination: With this long term rate of return in mind, the Trustees next retain an investment consultant to prepare an asset allocation study. A, 103; T,11. The consultant projects expected rates of return for various asset classes. A,103. The Trustees then determine their risk tolerance and, ultimately, decide the percentage of trust funds will be invested in each asset class. A,103. Additionally, they must determine, for each chosen asset class, the extent to which the level of actual investments may vary from the target level. A,104. By building "ranges" around each target, the Trustees allow for implementation timeframes and market fluctuations. A,104.

As noted above, the Trustees are required to invest in a diverse array of asset classes in order to increase overall returns while reducing overall investment risk. A,104. Therefore, they must invest some portion of NHRS' funds in international stocks and bonds. A, 104. Likewise, they must take advantage of the potential for higher returns offered by asset classes that are exposed to unusual geographic and political risk. A, 103. For this reason, the Trustees must invest some funds in emerging and frontier markets. A, 103. At the same time, of course, they must make other investments to hedge the risks involved in investing in foreign currencies and emerging markets. A,104.

The Selection Of Benchmarks And The Choice Between Active And Passive Investing: For each asset class, the Trustees select an externally published index to serve as the asset class benchmark. A,105. These benchmarks are used both for modeling purposes and as an objective yardstick by which to measure the performance of NHRS' investment managers. A,105. The

most famous of these benchmarks is likely the Standard & Poor's 500 Domestic Stock Index. A,105.

To be useful, a benchmark must be both:

(a) Investable (i.e., it must be reasonably possible to invest in all of the securities that comprise the benchmark), A,105; and

(b) Understandable (i.e., it must be transparent so that investment professionals can identify the underlying securities and their weight in comprising the benchmark). A,105.

Once a benchmark is chosen, the Trustees next determine the extent to which they wish to invest in a passively managed fund, where this is an option, (by, for example, selecting an S&P 500 Index fund). A,105. Passively managed funds have lower investment expenses than funds where managers actively choose individual securities. A,105. Passively managed funds also have no "tracking error" because they always (or virtually always) hold the entire benchmark index. A,105.

However, along with eliminating tracking error, passive investing eliminates the opportunity to obtain returns in excess of the published benchmark. A,105. When there are opportunities to outperform a benchmark, NHRS is well-positioned to make the effort (because it has billions of dollars to invest and a dedicated professional staff and Independent Investment Committee). A,105. Therefore, NHRS does purchase actively managed funds as well as passively managed funds. A,105.

### III. The Harm Caused By RSA 100-D

The NT\_ACWI Ex-US Fund: NHRS has approximately \$100 million invested in the Northern Trust All Country World Index Ex-US fund ("the NT\_ACWI Ex-US"). A, 107. This is a passively managed fund that tracks the widely published ACWI Ex-US index. A,107.

Although the amount that NHRS has invested in this fund is small relative to the size of the entire NHRS trust corpus, the fund is nonetheless a vital and integral part of NHRS' asset allocation plan. T,12. The rest of NHRS' asset allocation depends, in part, on NHRS investing in the ACWI sector. T,12.

As of September, 2008, NT\_ACWI Ex-US held securities in a number of "scrutinized companies" (as defined by the Sudan Divestment Act, RSA 100-D:1, XV) representing approximately \$4.5 million of NHRS' investment. A, 107. Some of the scrutinized companies in NT\_ACWI Ex-US, representing approximately \$2.5 million of NHRS' investment, are candidates for divestment under RSA 100-D:3. A, 107. These scrutinized companies are large multinational corporations that have divisions that are involved in the energy sector in Sudan. T,10. For example, the ACWI EX-US index includes a French oil company, Total S.A., that is a scrutinized company even though its Sudan operations contribute very little to the company as a whole. T,10. Another is a large Chinese conglomerate. T,10.

Because NT\_ACWI Ex-US is a passively managed fund, the Sudan Divestment Act requires NHRS to divest from the fund completely in order to avoid holding a small interest in fewer than fifteen individual scrutinized company securities. A, 107.

Harm Caused By Divestment From NT\_ACWI-Ex-US: In order to adhere as closely as possible to the investment strategy and asset allocation targets described above, NHRS will be forced to enter into a new contract with Northern Trust for a separate account portfolio that tracks NT\_ACWI Ex-US, without holding interests in "scrutinized companies." A,107; T,14-15. The "separate account portfolio" would belong entirely to NHRS. A, 106; T, 14-15. In contrast,

the current NT\_ACWI EX-US fund is a “commingled account” that pools funds from multiple institutional investors.<sup>2</sup> A,106.

The management fees and expenses for this separate account will be much higher than those associated with the present commingled fund. A, 107. NHRS’s Director of investments estimated that the *annual* management fees and investment expenses for a separate NT\_ACWI EX-US fund (without the scrutinized companies) would be \$200,000 higher than those for the commingled fund. A,107. Over a five year period these recurring costs would be \$1 million. A, 107. This would represent a loss equal to (a) 1% of NHRS’ \$100 million dollar ACWI EX-US investment; (b) 25% of the value NHRS’ current investment in scrutinized companies held by the NT\_ACWI Ex-US fund; and (b) 45% of the value of NHRS’ current investment in scrutinized companies that are targeted for divestment (as of September, 2008). A, 107.

Additionally, it would cost NHRS approximately \$200,000 in one time transaction costs to migrate from the commingled fund to the separate account. A, 107; T,14. This one time expense would represent another 9% of the funds that NHRS has currently invested in NT\_ACWI Ex-US securities that are targeted for divestment. A, 107. *Thus, between the one time transaction costs and the annual costs and fees (over a five year period), NHRS would lose 54% of the value of the \$2.2 million it presently holds in scrutinized companies through*

---

<sup>2</sup>A “commingled account” is roughly, but imperfectly analogous to a mutual fund in which a myriad of individual investors pool their money to purchase a broad portfolio of securities. A “separate account portfolio” is roughly analogous to an individual investor’s personal portfolio of securities. The advantage of a separate account is that it can be customized to NHRS’ specifications and guidelines. A,106. One disadvantage is that separate accounts typically have higher management fees and investment expenses than commingled accounts. A,106. Additionally, separate funds are sometimes inappropriate because they may require an larger than planned investment to replicate a benchmark. A,106.

*NT\_ACWI Ex-US fund*. That would be the financial equivalent of selling those securities for 46% of their fair market value.

More important, perhaps, replacing the NT\_ACWI Ex-US fund with a separate account which mimics the benchmark, except for investments in “scrutinized companies” could significantly alter NHRS’ implementation of its asset allocation plan:

Fund managers take the Sudan-link list and attempt to construct “Sudan Free” funds that mimic popular benchmarks. This step is also a challenge. According to the chief investment strategist at Northern Trust, whose fund tracks the Morgan Stanley Capital International Europe Australasia Far East Index (MSCI EAFE), constructing a “Sudan-free” index will require divesting 25 companies or 9 percent of assets.

A,107 (NHRS’ Director of Investments quoting, Munnell, Alicia, *Should Public Pension Plans Engage In Social Investing*, Issues In Brief, Center For Retirement Research at Boston College, No. 7-12 (2007) at p. 3 (a copy of which can be found at A,113 -127).

Further, because NT ACWI Ex-US owns some 2,000 different securities, T,15, a separate account would have to purchase, hold and trade almost the same number of securities to track the benchmark. A, 107. This requires a very high level of assets in order to achieve efficiently. A, 107. The practical reality is that it may be impractical to duplicate the index and, therefore, a separate account may vary significantly from the benchmark. A, 108.

Additionally, NT\_ACWI Ex-US and other commingled accounts are currently somewhat illiquid. A, 108. This means that it may not be possible to quickly trade out of these accounts without accepting non-benchmark assets in return. A, 108. This would cause NHRS’ actual investment portfolio to vary even farther from the its asset allocation plan. A, 108.

It is impossible to estimate the cost to NHRS if its ACWI Ex-US passive index investment strategy is altered through (a) the lack of investment in scrutinized companies that are included in the underlying index; (b) the financial impracticality of purchasing *all* of the other

securities in the index; and (c) the impossibility of purchasing *some* of those securities due to liquidity issues. A,108. However, NHRS' Director of Investments and the NHRS Trustees do not believe that this would be a cost neutral outcome. A,108.

Trading Costs And Untimely Forced Sales: In addition to the “scrutinized companies” in the NT\_ACWI Ex-US fund, as of September, 2008, NHRS held approximately \$7.1 million in “scrutinized companies” within actively managed separate accounts. A, 108. Approximately \$3.4 million was invested in securities targeted for divestment. A, 108. NHRS estimates that the trading costs for these sales would be in the neighborhood of \$20,000 to \$40,000 *per year*. A, 108.

All of these trades (out of NT\_ACWI-Ex US and more generally) will be forced and untimely sales of securities. A,108. Those sales will be effectively announced ahead of time through legislatively mandated schedules at time when other American investors may be divesting. A,108. This suggests that the selling price for these securities may be artificially and temporarily depressed. A,108. Therefore, it seems likely that NHRS will suffer significant additional investment losses, even though the precise amount of these losses cannot be determined with accuracy. A,108.

Restricting Investment Choices: NHRS will be prohibited from investing in “scrutinized companies” and funds that hold interests in “scrutinized companies.” A,108. This means that NHRS will be prohibited from investing in numerous passively managed funds and other investments. A,108. Sound investment practice requires NHRS to consider the full panoply of investment choices. A,108. By eliminating many investment choices wholesale, the Sudan Divestment Act makes it less likely that NHRS will be able to accurately approximate its

benchmarks. A,108. Neither the Director of Investments nor the Trustees believe that this will be a cost neutral result. A, 108.

Additionally, NHRS makes regular use of short term investments in passively managed exchange traded funds (“ETFs”) for the purpose of parking cash pending more long term investment opportunities. A,108. One or more of these ETFs invests in “scrutinized companies.” A,108-109. Therefore, it seems likely that NHRS’ fund managers will have to use less appropriate or less valuable short term investments. A 109. The cost to NHRS in having its choice of ETFs limited in this manner is unknown. A,109. However, it will not likely be cost neutral. A,109.

Internal Administrative Expenses: NHRS will incur significant and continuing administrative expenses to monitor its investment portfolio for “scrutinized companies.” A,109. This is not a one time expense because (i) the list of “scrutinized companies” changes over time, and is therefore a moving target and (ii) NHRS’ passively managed funds trade securities all the time to mimic their benchmarks and may, therefore, purchase an interest in a scrutinized company in the future. A, 109. It must be remembered that Sudan is an oil producing country which attracts investment from foreign and multinational corporations, many of which are represented in various asset class benchmarks. A, 109.

Further, NHRS is required to “engage” with certain actively managed funds which hold investments in “scrutinized companies” and with other funds that hold interests in “inactive scrutinized companies.” A,109. NHRS holds several million dollars in funds which require “engagement” under the Sudan Divestment Act. A, 109.

NHRS’ Director of Investments has estimated that, exclusive of legal expenses, the administrative costs of continued compliance will be approximately \$9,000 per year. A, 109.

While this may sound like a small amount, it must be remembered that NHRS employs only four full time staff members in its investments department. A, 109. At some point, the burdens on these existing staff members (from Sudan Divestment compliance and other duties) will become so great that additional staff will need to be hired. A, 109. The \$9,000 figure represents weeks of staff time and, therefore, represents a real and continuing burden on NHRS staff. A, 109

## SUMMARY OF ARGUMENT

I. NHRS is pension trust for government workers. Like private pension trusts, NHRS is funded solely through employee and employer contributions and investment returns. Its Board of Trustees has, by statute, the same legal personhood as a corporation. It pays its own operating expenses and, because it is not part of the executive branch, NHRS never submits contracts or budgets to the Governor and Council. NHRS' Trustees and Independent Investment Committee are instead accountable under RSA 100-A:15 as fiduciaries who must hold and invest trust assets for the **exclusive purpose** of funding pension benefits for retired workers and their families.

The legal question presented today is whether the Legislature can subvert that exclusive purpose rule by directing the Trustees to also use the trust fund for the **collateral purpose** of discouraging multinational corporations from doing certain types of business in Sudan. See, RSA 100-D. If NHRS were a private pension trust, the common law and ERISA would prohibit divestment for such a collateral purpose unless the Trustees first determined there would be (a) no increased expense, (b) no decrease in expected returns and (c) no additional risk. In this case the Trustees have instead concluded precisely the opposite.

Government plans are exempt from ERISA and, absent a Constitutional prohibition, the Legislature could eliminate the longstanding common law and state statutory exclusive purpose rule. It is for this very reason that the People wrote Part 1, Article 36-a into the New Hampshire Constitution following the 1984 Constitutional Convention. The black letter text of Article 36-a constitutionalizes the exclusive purpose doctrine. The ballot question presented to the voters included the exclusive purpose language. The voters—whose intent controls—overwhelmingly approved Article 36-a in the wake of great national publicity surrounding the debate and passage of ERISA. Accordingly, this court should affirm the trial court's holding that Article 36-a

forbids the investment of NHRS trust funds for any purpose other than providing for member benefits and defraying the expenses of the trust.

II. As explained above, complying with the Sudan Divestment Act would reduce the NHRS trust funds by at least a \$1.2 million and possibly much more. The “safety valve” in the Act, RSA 100-D:7, is illusory and cannot protect against this loss: (A) It can only be triggered after \$26 million loss (or a \$900 loss per beneficiary); (B) It looks to past losses rather than future returns; (C) It reverses the Article 36-a standard by placing the burden on the Trustees to prove by clear and convincing evidence that the Act caused the loss; and (D) it is impossible to quantify the investment losses resulting from a forced sale of securities on a set timetable. Therefore, this court should affirm the trial court’s finding that a permanent injunction preventing enforcement of the Act is necessary to protect NHRS and its members and beneficiaries from irreparable harm.

## LEGAL ARGUMENT

### I. PART I, ARTICLE 36-A OF THE NEW HAMPSHIRE CONSTITUTION PROHIBITS THE LEGISLATURE FROM USING THE ASSETS OF THE NEW HAMPSHIRE RETIREMENT SYSTEM TO ADVANCE GLOBAL HUMANITARIAN CAUSES

#### A. Introduction

The legal question presented in this case is whether the Legislature has the constitutional authority to direct the investment strategy of the New Hampshire Retirement System for the purpose of promoting social change. At issue *today* is RSA Chapter 100-D (“the Sudan Divestment Act” or “the Act”). This is an effort by the Legislature to directly manage the System’s trust funds by requiring it to divest from companies, and funds which own shares of companies, that do certain types of business in Sudan.

Standing alone, this legislation will necessarily reduce the NHRS trust funds—which equitably belong to government workers, retirees and their families—by well over \$1.2 million (see, above) and possibly by millions more due to investment losses. Worse, it leaves the trust vulnerable to further political interference. For if the Legislature may constitutionally manage the trust’s portfolio to accomplish divestment from Sudan, then what could stop it from ordering more robust forms of socially responsible investing? What could stop it from ordering NHRS to divest from companies, and funds that own shares of companies, engaged in alcohol, tobacco or gambling activities? Indeed, what could stop the Legislature from ordering the trust to *invest*, e.g. to make economically targeted investments to aid the local economy or to build up the state’s infrastructure?

These are questions that the Legislature has recently asked itself. Last year it considered 2009 HB 475-FN which would have required NHRS to divest from companies that invested the energy sectors of nations that sponsor terrorism. The bill was voted inexpedient to legislate in

part because the Legislature is waiting for this case to be decided. See, Report of the Committee on Executive Departments and Administration, 2009 New Hampshire House Record, Vol. 31, No. 22 (March 9, 2009):

This bill was intended to prohibit the investment of state funds, including the state retirement system, in countries that have been identified as sponsors of terrorism. *While the intention of the bill was thoughtful, it was similar to legislation passed last year regarding investments in the Sudan. That legislation is presently being evaluated by the state supreme court, and the decision has not yet been handed down.* There are controls at the federal level by the Office of Foreign Assets Controls which is a more appropriate level to investigate foreign assets than the NH state treasurer.

Yet these questions are not new. They were asked at the 1984 Constitutional Convention and answered, with finality, when the voters approved Part 1, Article 36-a of the New Hampshire Constitution which (a) requires that NHRS' trust funds be invested for the *exclusive purpose* of providing retirement benefits for its members and (b) prohibits the diversion of those trust funds for any other pursuit:

[Use of Retirement Funds.] The employer contributions certified as payable to the New Hampshire retirement system or any successor system to fund the system's liabilities, as shall be determined by sound actuarial valuation and practice, independent of the executive office, shall be appropriated each fiscal year to the same extent as is certified. *All of the assets and proceeds, and income there from, of the New Hampshire retirement system and of any and all other retirement systems for public officers and employees operated by the state or by any of its political subdivisions, and of any successor system, and all contributions and payments made to any such system to provide for retirement and related benefits shall be held, invested or disbursed as in trust for the **exclusive purpose** of providing for such benefits and shall not be encumbered for, or diverted to, any other purposes.*

(emphasis and special emphasis added).

Unlike the common law of trusts and fiduciaries, Article 36-a cannot be modified by a simple Legislative majority. Therefore, no matter how laudable the goal, the Legislature simply cannot use these pension trusts funds to achieve political ends.

## B. Statutory Background

Forty-three years ago the New Hampshire Legislature established the New Hampshire Retirement System to serve as a tax qualified government pension trust for state and political subdivision employees. 1967 Laws, 134:1, codified as RSA 100-A:2. Although the Legislature could have arranged to fund government pensions differently, it opted to place funds into trust, under the legal ownership of the NHRS Trustees for them to manage “solely in the interest of the participants and beneficiaries” and “[f]or the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system.” RSA 100-A:15.

By establishing a self-governing trust, the Legislature created an institution that did not fit nicely into the grammar school description of the three branches of government. On the one hand, there is no there is no doubt that NHRS is a public institution and an instrumentality of the State. See, State Employees' Association of New Hampshire, Inc. v. Belknap County, 122 N.H. 614 (1982). On the other hand, the Trustees “have the powers, privileges and immunities of a corporation,” RSA 100-A:15, and they function without any direct oversight by the executive branch.

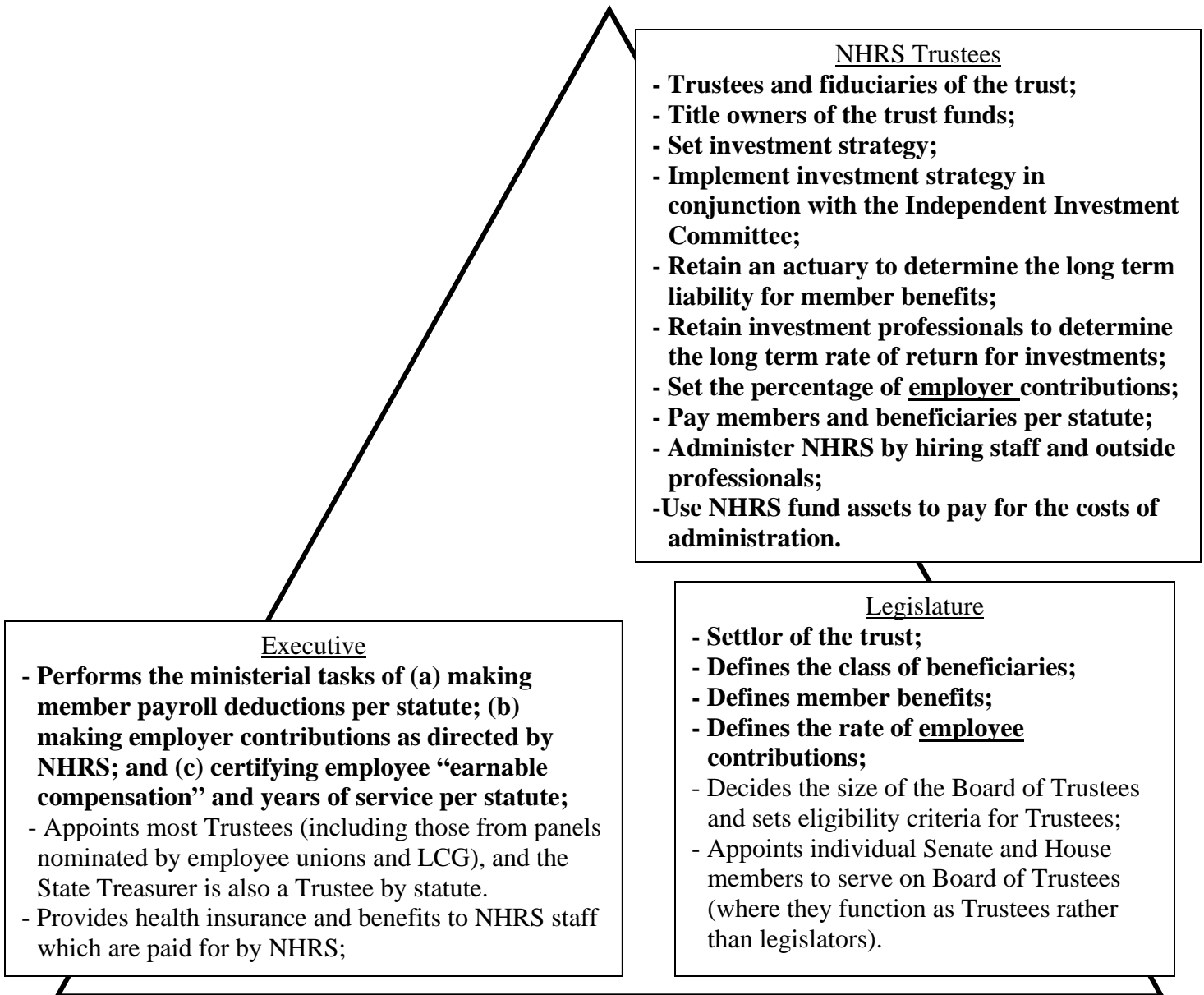
This point was driven home in New Hampshire Retirement System v. Sununu, 126 N.H. 104, 109 (1985). After operating as an independent pension trust that paid its own way for almost twenty years, NHRS was asked to submit all proposed contracts to the Governor and Council for their approval. This court found that request to be improper because NHRS is an incorporated trust, rather than an executive branch agency:

Three factors convince us that the legislature intended the System to be an independent entity rather than an executive department or agency: first, the language of RSA chapter 100-A, establishing the System as an incorporated pension trust under the “full power” of its board of trustees; second, the fiduciary

obligation that the trustees owe the System's members and beneficiaries; and third, the long-standing practice by the System of autonomy in its contractual dealings, which establishes an administrative gloss on the statute.

Sununu, 126 N.H. at 108.

Read in the light of Sununu and against the background of four decades of practice, RSA Chapter 100-A creates a tripartite relationship between NHRS, the Legislature and the Executive. This relationship is diagrammed below with functions pertinent to this case in bold font:



As this chart makes clear, RSA 100-A:15 grants the NHRS Trustees (and Independent Investment Committee) authority to chart the trust’s investment strategy. This prerogative is accompanied, however, by a requirement of strict fiduciary accountability set forth in RSA 100-A:15,I,a:

I-a. (a) A trustee, independent investment committee member, or other fiduciary shall discharge duties with respect to the retirement system:

- (1) **Solely in the interest of the participants and beneficiaries;**
- (2) **For the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system;**
- (3) With the care, skill, and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose;
- (4) Impartially, taking into account any differing interests of participants and beneficiaries;
- (5) Incurring only costs that are appropriate and reasonable; and
- (6) In accordance with a good-faith interpretation of the law governing the retirement system.

(emphasis added).

As explained in detail below, the “exclusive purpose” or “exclusive benefit” rule set forth in RSA 100-A:15 is a codification of the common law rule. See e.g., Restatement (Third) of Trusts, §§78(1) and 90(C)(1). Also as discussed below, the same language and the same doctrine are codified in ERISA for private pension trusts. See, 29 U.S.C. §1104(a)(1)(A).

### C. The Text Of Part 1, Article 36-a And The Intent Of Its Drafters

Although RSA 100-A:15 made the Trustees fiduciaries, with all of the obligations the word implies, the statute did not (and could not) impose any fiduciary-like responsibility on the

New Hampshire Legislature. In the early 1980s, the Legislature and Governor “short funded” NHRS by several million dollars. State’s Brief, at p. 14. They accomplished this by refusing to accept the Trustee’s actuarially determined rate for employer contributions, substituting instead a lower rate that allowed the Legislature to close a budget gap. See, A,46-49 (newspaper articles submitted by the State without objection); A,74 (NHRS’ motion, citing the Journal of the 1984 Constitutional Convention at p. 264). Thus, the political branches of government used funds that were otherwise destined to become part of the NHRS trust for unrelated purposes.

It was against this backdrop that Part 1, Article 36-a was proposed at the 1984 Constitutional Convention. The purposes of the Article were to (a) forever place NHRS’s trust funds beyond the reach of the New Hampshire Legislature and (b) forever ensure that those funds would be invested for the **exclusive benefit** of NHRS participants and beneficiaries:

It is imperative that the management of the system remain forever free of restraints other than those based on sound investments and actuarial practice.

-Remarks of Delegate Johnson  
Journal of the 1984 N.H. Constitutional Convention, p. 264.

\* \* \*

To ensure the integrity of the retirement system we need a constitutional amendment. It cannot be done by statute... Statutes can be suspended, they can be amended.

-Remarks of Delegate King  
Journal of the 1984 N.H Constitutional Convention, p. 263

\* \* \*

The monies, as you know, actually belong to the members, and the fund is a trust fund because it is held in trust. We want to assure all our retirees and our future retirees that the money will be there, it will be protected and it will be available upon their retirement and hopefully for as long as they live.

-Remarks of Delegate Ramsay  
Journal of the 1984 N.H. Constitutional Convention, p. 261.

The wording that the Constitutional Convention proposed, and that the voters approved, constitutionalized the longstanding “exclusive purpose” language that, up until this time, bound only the Trustees :

All of the assets and proceeds, and income there from, of the New Hampshire retirement system...and all contributions and payments made to any such system to provide for retirement and related benefits shall be held, invested or disbursed as in trust for **the exclusive purpose of providing for such benefits** and shall not be encumbered for, or diverted to, any other purposes.

N.H. Constitution, Part 1, Article 36-a (emphasis added). This new Constitutional language was virtually identical to the old statutory language in RSA 100-A:15.

The very same “exclusive purpose” language—and the same doctrine—was also already used to protect every private pension fund in the country. ERISA Section 404(a)(1)(A), codified as 29 U.S.C. §1104(a)(1)(A), required private plan trustees to act “solely in the interest of the participants and beneficiaries and...*for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.*” (emphasis added).<sup>3</sup>

The “exclusive purpose” doctrine that ERISA and RSA 100-A:15 codified was a well known feature of the common law of trusts. See, Pegram v. Herdrich, 120 S.Ct. 2143, 2145 (2000) (noting that the ERISA fiduciary standard codified the common law); Varity Corp. v. Howe, 116 S.Ct. 1065, 1070 (1996) (recognizing that ERISA’s fiduciary standards “draw much of their content from the common law of trusts, the law that governed most benefit plans before the enactment of ERISA”). See generally, Restatement (Third) of Trusts (“Restatement”), §78(1):

---

<sup>3</sup>Government pension trusts, such as NHRS , are not subject to ERISA. See, 29 U.S.C. §1003(b) (exempting government plans) and 29 U.S.C. §1002(32) (defining “government plan”).

Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust **solely in the interest of the beneficiaries**, or solely in furtherance of its charitable purpose.

(emphasis added) and Restatement §90(C)(1) (requiring a trustee who manages funds to conform to the fundamental fiduciary duty of loyalty in §78 and to incur costs only if they are “reasonable in amount and appropriate to the investment responsibilities of the trusteeship”); Appeal of Corporators of Portsmouth Sav. Bank, 129 N.H. 183 (1987) (discussing fiduciary duty generally); Reinhold v. Mallery, 135 N.H. 31, 34 (1991) (holding that fiduciaries must act with “undivided loyalty” to their principals).

Under the common law “exclusive purpose” doctrine (which effectively stopped developing in 1974 when it was incorporated into and supplanted by ERISA), the fiduciaries of employee pension trusts were prohibited from investing trust assets to pursue any objective other than providing for their beneficiaries. For example, in the leading case of Blankenship v. Boyle, 329 F.Supp. 1089, 1094 (D.D.C. 1971), the court held that the “strict common-law fiduciary responsibilities of trustees appointed for employee welfare or pension funds” forbid them from pursuing “collateral advantages.” In particular, the court ruled that the trustees of a coal miners’ employee benefit plan could not manage their trust funds with the collateral goal of increasing the amount of union mined coal. Id. Likewise, in Withers v. Teachers Retirement System Of The City Of New York, 447 F. Supp. 1248 (D.C.N.Y. 1978), the court allowed a retirement system to invest in city bonds, with an eye towards keeping the city solvent, but only because this was deemed necessary to ensure the participants’ benefits. Distinguishing, and approving the holdings in Blankenship, the Withers court wrote as follows:

Blankenship was thus a case in which the trustees pursued policies which may incidentally have aided the beneficiaries of the fund but which were intended, primarily, to enhance the position of the Union and the welfare of its members, presumably, through the creation and/or preservation of jobs in the coal industry.

The decision is inapplicable here. The trustees of the TRS gave consideration to the interests of the City of New York solely in its capacity as the major and indispensable contributor of monies to the pension system.

See also, Sgaglione v. Levitt, 375 N.Y.S.2d 79 (N.Y. 1975) in which the court held that the state legislature could not require a government pension fund fiduciary to purchase state bonds.

Although Sgaglione was a state contracts clause case, it was largely animated by common law notions of trusts and fiduciaries.<sup>4</sup>

---

<sup>4</sup>Oddly, there is apparently only one reported appellate court decision that directly addresses the question of whether the common law of trusts and fiduciaries allows a pension fund to divest from a class of securities for purely non-economic reasons. This is likely because (a) ERISA preempted state common law with respect to private pension funds long before the term “socially responsible investing” was coined (and before the push for divestment from companies doing business in apartheid South Africa in the mid-1980’s); and (b) public funds, which are not controlled by ERISA, are by and large controlled by statute in derogation of the common law. Thus, pre-ERISA cases, such as Blankenship, provide the best guidance. However, it must be noted that the single reported decision on socially responsible investing by pension funds held that there was no breach of fiduciary duty when a municipal fund complied with an ordinance requiring divestment from companies that did business in South Africa. Board of Trustees of the Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore City, 562 A.2d 720 (Md. Ct. App. 1987) (“Baltimore”). The Baltimore case is unpersuasive for several reasons:

-It was decided after the adoption of Article 36-a, and therefore its novel holdings could not have been in the minds of the drafters, the convention or the voters;

-It opined that social divestment on a grand scale—the fund’s trustees argued that the ordinance prohibited investment in almost half of the S&P 500, Baltimore, 562 A.2d at 103—would comport with the ERISA standard for fiduciary loyalty. Baltimore, 562 A.2d at 108, fn. 37 (“One of the Trustee’s own witnesses, a money manager, conceded that his company did not believe that it violated ERISA by building and managing [South Africa free] portfolios.”). In fact, as explained below, the ERISA standard forbids the consideration of any goal other than providing for member benefits unless a fund’s fiduciaries first determine that there would be *no* negative effect on fund assets, risk or expenses. As demonstrated below, ERISA’s strict Blankenship-equise standard *reflected* the common law as it generally existed in the United States at the time of ERISA’s enactment. For the Baltimore Court to get this wrong, suggests that both (a) Maryland’s view of fiduciary loyalty is out of the mainstream and (b) the Maryland Court of Appeals misread ERISA (which, to be fair, did not control the case).

*Continued on next page*

Given the similarity in language and the statements of the drafters at the Constitutional Convention, one can only conclude that Article 36-A was written to constitutionalize the “exclusive purpose” doctrine that was already a matter of (a) state statutory law (RSA 100-D:15), (b) federal statutory law (ERISA), and (c) the common law of trusts and fiduciaries.

D. The Text Of The Ballot Question And The Intent Of The Voters

If Article 36-a were a statute, rather than a Constitutional provision, the foregoing discussion of its language and its provenance would unambiguously establish the Legislature’s intent to codify the “exclusive purpose” doctrine. However, because Article 36-a is a Constitutional provision enacted by the People it is *their* intent, rather than that of the drafters that controls. As the State correctly argues, a Constitutional provision must be construed “in a manner that would be commonly understood by the electorate, and may not be subject to complex rules of statutory construction.” State’s Brief, at p. 10, citing Municipal Trust Workers Compensation Fund v. Flynn, 133 N.H. 17, 21-22 (1990) (emphasis added).

The State argues that the voters were focused on the problem of the moment, i.e. the political branches’ decision to “short fund” NHRS and spend the money elsewhere. See, State’s Brief at p. 14. For this reason, and because the word “invested” did not appear in the ballot question (as it does in Article 36-a itself), see State’s Brief at p. 13, the State suggests that the voters must have understood Article 36-a to be a narrow prohibition on the out-and-out

---

*Continued from previous page*

-The Baltimore Court approved the divestment protocol because it viewed the costs of divestment as *de minimus* as compared with the total amount of plan assets. Baltimore, 562 A.2d at 108. In this respect it missed two important points. First, due to the compounding effect over the very long term considered by government retirement fund investment professionals, even a small *annual* cost may cause significant harm. Second, as detailed above in great detail, divestment would cause havoc with respect to a fund’s ability to adhere to its benchmark indices, resulting in increased costs and expenses, in addition to the (unpredictable) change in asset values.

confiscation of NHRS funds by the Legislature to pay for other government priorities. See, State’s Brief at p. 13.

This argument was rightly rejected by the trial court. The trial court agreed with NHRS that the voters’ intent, as expressed in the plain language of Article 36-a, “restricts the purpose for which [NHRS] funds may be invested, that being for the exclusive purpose of providing for retirement and related benefits.” A,17 (bracketing added; emphasis in original). The trial court thus found that Article 36-a did indeed constitutionalize the “exclusive purpose” doctrine. In reaching this result, the court noted that:

“Had the electorate seen a more limited need, the amendment could have been tailored to prohibit the use of retirement funds for state government operations or state projects. It was not so narrowly drafted and the operative language bears repeating: “[A]ll contributions and payments made to [NHRS and NHJRP]...shall be held, **invested** or dispersed **as in trust for the exclusive purpose** of providing for [retirement and related benefits] and shall not be encumbered for or diverted to, **any other purpose.**”

A,17 (emphasis and bracketing in original).

Furthermore, while we should not pretend that the voters were well versed in the niceties of the common law of trusts and the intricacies ERISA, we should also not pretend that they were completely ignorant of how their own retirement funds were looked after. The well publicized breaches of the exclusive benefit doctrine that prompted ERISA are cultural clichés. See e.g., Pileggi, Nicholas, *Casino* (screenplay) (MGM,1995) (Teamsters union pension funds used to build mafia operated casino); Mamet, David (screenplay) *Hoffa* (Twentieth Century Fox Films, 1992) (including scenes related to the investment of union pension funds for the collateral benefit of third parties); *Pensions: The Broken Promise* (television documentary) (NBC, 1972) (an hour long television special that highlighted abuses in corporate pension plans, leading

directly to public Congressional hearings and, two years later, to ERISA itself, signed by President Ford on Labor Day).

The debates—in Congress and on the editorial pages—over ERISA were recent memories when the voters were asked to approve Article 36-a by the following ballot question:

Are you in favor of amending the Constitution to provide that all the assets of both the New Hampshire retirement system and any other retirement system for public officers and employees operated by the state or its political subdivisions shall be used **exclusively** for the benefit of any such retirement system and shall not be diverted or used for any other purpose, and that the New Hampshire retirement system or any successor system shall be fully funded each fiscal year as determined by sound actuarial valuation and practice?

A, 36 (emphasis added). A total of 288,994 votes were cast in favor of the amendment. Only 48,690 votes were cast against it.

The voters certainly understood that they were (a) protecting public pension trust funds, by (b) requiring that the funds be used **exclusively** for the purpose of paying pension (and related) benefits. As argued above:

-That is what the plain language of Article 36-a says, see A,17 (trial court order stating that “the language adopted by the voters is broad an unambiguous”);

-That is what the plain language of the ballot question said;

-That was the standard for the voter’s private pension funds at the time they voted;

-That was the ERISA standard which was adopted nationally ten years earlier following extensive debate and publicity; and

-That was the common law standard for every other type of trust that the voters may have owned or managed.

It is the State—not NHRS—that is urging this court to adopt an artificially complex construction that does violence to both the language of the Constitution and the events (at both

the State and national level) surrounding the codification of the exclusive benefits doctrine as an essential safeguard of employee pension trusts. Although the State's Brief quotes the text of Article 36-a correctly, in the next sentence it effectively erases the word "exclusive" from the Constitution:

The second sentence [of Article 36-A] requires that money in the Retirement Systems, no matter, the source, "be held, invested or disbursed as in trust for **the exclusive purpose** of providing for such benefits and shall not be encumbered for, or diverted to, any other purpose. The words "such benefits" relate back to "provide for retirement and related benefits." Thus, the question is properly whether the Sudan Divestment Act prevents the Retirement Systems from holding, investing or disbursing funds for **the purpose** of providing retirement benefits.

State's Brief, at p. 12. Under this reading, Article 36-A forbids only the naked confiscation of NHRS' bank accounts. It would permit the Legislature to (a) dictate the trust's investment strategy to the penny; (b) order NHRS to divest from profitable investments; and (c) order NHRS to invest in pet projects with greater risks or lesser returns, so long as these investments ultimately funded NHRS benefits. Indeed, the State's reading of Article 36-A would permit the precise types of chicanery highlighted in movies *Casino* and *Hoffa*, cited above.

The State accomplished this grammatical legerdemain by ignoring the meaning of both the key word in the second sentence of Article 36-a, i.e. "**exclusive**," and the final clause of that sentence which prohibits the encumbrance or diversion of NHRS' trust funds for "**any other purpose**." The average voter, however, is presumed to have read both the adjectives and dependent clauses of two sentence paragraph placed on the ballot.

Thus, for all of the foregoing reasons, this court should concur with the trial court that Article 36-a should be construed similarly to the common law, state statutory and federal statutory "exclusive purpose" doctrines.

### E. Applying Article 36-a To Socially Responsible Investing

Since Article 36-A has the same language and purpose as the ERISA rule, this court should look to the practice under ERISA for guidance. The U.S. Department of Labor (“DOL”), which administers ERISA, has given clear guidance as to how the “exclusive purpose” rule should be applied when private pension funds wish to engage in socially responsible investing. In 1994, DOL issued an interpretative bulletin (that has since been replaced with an even stricter bulletin), concerning so-called “economically targeted investments,” i.e. investments made to promote social welfare in addition to investment returns. The bulletin, published at 29 CFR 2509.94-1 (1994 to 2008), provided in pertinent part that:

...[B]ecause every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

Thus, under DOL’s 1994 bulletin, economically targeted investments were deemed permissible only if the ERISA fiduciary first concluded that they provided the same rate of return as alternative investments with no increased risk. By extension, socially targeted divestment would be permissible only if the fiduciary makes an upfront determination that there will be no increase in costs, no decrease in returns and no additional risk. See also, DOL Advisory Opinion 98-04A (“A decision to make an investment, or to designate an investment alternative, may not be influenced by non-economic factors unless the investment ultimately chosen for the plan, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments.”)

In 2008, the Department replaced the 1994 interpretative bulletin with a new and even more restrictive one. See, 29 C.F.R. 2904.08-1; A,129-130. The new bulletin emphasizes that

the “exclusive purpose” language in ERISA “does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan.” Therefore, fiduciaries must make a contemporaneous and complete record of the manner in which they determine that an economically targeted investment is “truly equal” to alternative investments:

Given the significance of ERISA’s requirement that fiduciaries act “solely in the interest of participants and beneficiaries,” the Department believes that, before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan. ERISA’s fiduciary standards expressed in sections 403 and 404 do not permit fiduciaries to select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal. A less rigid rule would allow fiduciaries to act on the basis of factors outside the economic interest of the plan in situations where reliance on those factors might compromise or subordinate the interests of plan participants and their beneficiaries.

\* \* \*

In light of the rigorous requirements established by ERISA, the Department believes that fiduciaries who rely on factors outside the economic interests of the plan in making investment choices and subsequently find their decision challenged will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.

The 2008 DOL interpretative bulletin contains several hypothetical examples, one of which is quoted at length below:

A plan sponsor adopts an investment policy that favors plan investment in companies meeting certain environmental criteria (so-called “green” companies). In carrying out the policy, the plan’s fiduciaries may not simply consider investments only in green companies. They must consider all investments that meet the plan’s prudent financial criteria. The fiduciaries may apply the investment policy to eliminate a company from consideration only if they appropriately determine that other available investments provide equal or better returns at the same or lower risks, and would play the same role in the plan’s portfolio

This example makes it 100% clear that ERISA controlled private pension plans cannot implement a blanket policy of divestment from Sudan related companies. Instead, they can only

choose “Sudan free” alternatives when they (a) provide the same or better return; (b) carry the same or lower risk; and (c) have the same or lower costs as alternative investments.

The Department of Labor’s view of the “exclusive purpose” rule comports the common law as reflected in the Blankenship and Withers (discussed at p. 21-22, above). See, Hutchinson, *Legal Standards Governing Investment Of Pension Assets For Social And Political Goals*, 128 U. Pa. L. Rev. 1340, 1361-1362 (1980) (“The ERISA obligation on fiduciaries to act in the interests of the participants and beneficiaries is at least as stringent as the common-law obligation enforced in Blankenship v. Boyle. A primary legislative justification for ERISA's enactment was the failure of common-law remedies to ensure the integrity of employee pension plans.);<sup>5</sup> Langbein & Posner, *Social Investing and the Law of Trusts*, 79 Mich.L.Rev. 72, 98-99 (1980); Lanoff, *The Social Investment of Private Plan Assets: May It Be Done Lawfully Under ERISA?*, 31 Lab.L.J. 387, 391 (1980).

The Department of Labor’s 1994, 1998 and 2008 publications are also consistent with the U.S. Internal Revenue Service’s view of a parallel tax statute. Section 401(a) of the Internal Revenue Code, 26 U.S.C. §401(a), defines a qualified pension trust as one that is established for the “*exclusive benefit*” of employees and beneficiaries.<sup>6</sup> In Revenue Ruling 69-494, a pre-

---

<sup>5</sup> It should be noted that ERISA was not the first federal statute to impose this fiduciary standard on pension fund managers. Section 302(c)(5) of the Taft- Hartley Act, also known as the Labor Management Relations Act of 1947, 29 U.S.C. §186(c)(5) permits employer contributions to union pension and benefit funds only if those funds are held in trust “for the sole and exclusive benefit of the employees of such employer.” The Blankenship case arose under both the common law and the Taft-Hartley Act.

<sup>6</sup> NHRS and other government funds are subject to IRC Section 401(a). To counsel’s knowledge, the IRS has not sought to disqualify government pension funds that are subject to Sudan divestment statutes. However, one would expect the IRS to tread gently when the only enforcement tool it has is outright disqualification of pension plans for innocent government workers.

ERISA decision, the IRS determined that when an employer invests some pension funds in its own stock, the IRC's codification of the exclusive benefit rule requires, *inter alia*, a fair return commensurate with the market rate. More generally, the IRS ruled that "the primary purpose of benefiting employees or their beneficiaries must be maintained with respect to investments of the trust funds as well as with respect to other activities of the trust. This requirement, however, does not prevent others from also deriving some benefit from a transaction with the trust." The Revenue Ruling under the IRC jibes nicely with the Department of Labor's interpretive bulletin and advisory opinion under ERISA: Investment decisions that produce *incidental* collateral benefits are permissible; investment decisions that are made for collateral purposes are not, unless the trustee *first* determines that there will be no negative impact on the trust.

#### F. Conclusion

Part 1, Article 36-a means exactly what it says. The Legislature is categorically prohibited from directing the investment activities of the NHRS Trustees for any purpose other than providing retirement benefits to the System's members and beneficiaries.

#### II. THE SUDAN DIVESTMENT ACT, RSA CHAPTER 100-D VIOLATES PART 1, ARTICLE 36-a OF THE NEW HAMPSHIRE CONSTITUTION

In General: As explained in great detail in the factual section of this brief, the Sudan Divestment Act, RSA Chapter 100-D, violates Article 36-a in numerous ways:

-The Act is a Legislative encroachment on the Trustees' *Constitutional* role as the System's sole fiduciary decision makers;

-The NHRS Trustees have not determined that compliance with the Act will (a) cost no more than non-compliance *and* (b) provide an identical or better return than non-compliance *and* (c) do so at identical or lower risk than non-compliance;

-The Act imposes increased transactions costs, trading costs, expenses and fees on the System which will reduce the System's trust funds by at least \$1.4 million over five years (see, pp. 6-11 above discussing the costs associated with divestment from the NT\_ACWI Ex-US fund);

-The Act is likely to result in diminished investment returns that are immeasurable;

-The Act will impose *annual and continuing* costs to the System, thereby creating a drag on the System's long term performance.

The Statutory "Safety Valve" Is illusory: It is true that the Act contains a purported "safety valve" that supposedly allows the NHRS Trustees to cease compliance with the Act if it proves too costly. See, RSA 100-D:7. However, this safety valve is both illusory and insufficient to satisfy Article 36-a because:

(A) It requires the NHRS Trustees to prove—by clear and convincing evidence no less—that compliance with the act has resulted in at least a half a percent diminution of the trust assets (compared with their hypothetical value under a non-divestment scenario). This turns Article 36-a's fiduciary standard on its head. The Trustees need to be convinced *before they take steps to pursue a collateral and incidental goal* that there will be no negative effect on plan assets. Instead of merely allowing the trustees to pursue divestment from Sudan if this condition were met, RSA 100-D:7 creates a fictional presumption that can only be rebutted by clear and convincing evidence;

(B) The 0.5% threshold specified in RSA 100-D:7 is the equivalent of \$26 million or \$900 per NHRS retiree. A,109. This is anything but a *de minimus* standard.

(C) RSA 100-D:7 looks towards to past performance rather than prospective future performance. The Trustees and the NHRS Independent Investment Committee make their

decisions based on the investment community's rational expectations about the future. The past performance of a particular asset class or benchmark is but a single data point in the analysis.

(D) It is impossible to determine the precise cost of divestment. As noted above, the largest costs may come from the forced sale of securities on an announced time schedule during a time frame when some other American institutions are also divesting (or not investing).

The State's Argument That There Is No Harm Proves Too Much: The State argues that, regardless of the damage caused to the NHRS trust funds, the trust's beneficiaries will not be harmed because "benefits to employees are calculated by statute" rather than by "the success or failure of the investment strategies of the Retirement System." State's Brief at p. 16. Put another way, the State's argument is that (a) NHRS benefits are immutable and (b) the Legislature can always vote to fund them through annual appropriations from the general fund (balanced, of course, by annual taxes or decreases in other state spending).

While it is true that the state government possesses a unique ability to tax, NHRS was established as a pension *trust*, and the voters approved Article 36-a to safeguard that *trust* from the state government's equally unique ability to underfund it. Article 36-a was needed because government plans are exempted from ERISA and there is no other Constitutional limitation that adequately protects against legislative overreaching.

In particular, this Court has never determined the extent to which State and political subdivision employees have Constitutionally enforceable contractual rights, as opposed to mere expectations, in the various criteria and formulas for NHRS benefits. See generally, Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association, Slip Op. 2009-555, \_\_\_ N.H. \_\_\_, \_\_\_ A.2d \_\_\_ (N.H. January 28, 2010) (discussing and applying Part 1, Article 23 of the State Constitution and Section 1, Article 10 of the federal Constitution, both of which

forbid the State from substantially impairing contracts). The federal courts have refused to recognize state statutory rights, such as the pension benefits created by RSA Chapter 100-A, as Constitutionally protected “contractual obligations” absent an “unmistakable” legislative intent to create private rights of a contractual nature. See, United States v. Winstart, 116 S.Ct. 2432, 2454-2455 (1996). Because statutes can generally be repealed or modified by subsequent legislatures, “there must be a clear indication that the legislature intends to bind itself in a contractual manner.” Parker v. Waeklin, 123 F.3d 1, 5 (1<sup>st</sup> Cir. 1997). Applying this standard, the First Circuit found that a government pension trust in Maine did not have any protection at all under the federal contracts clause. Id. See also, National Education Association—Rhode Island v. Retirement Board Of The Rhode Island Employees’ Retirement System, 172 F.3d 22, 28 (1999) (holding that Rhode Island’s statutory pension scheme did not create any enforceable “contractual” rights). This court has held that the State Constitution’s contract clause provides no greater protection than its federal counterpart. See e.g., Tuttle, Slip. Op. at p. 9; In re Concord Teachers (New Hampshire Retirement System) 158 N.H. 529, 537 (2009).

The New Hampshire Legislature has certainly treated some of the benefits formulas in Chapter 100-A as matters of munificence rather than contract. See e.g., Concord Teachers (applying a statutory amendment to RSA 100-A:1, XVII that capped the amount of actual compensation in a member’s final year of employment that qualifies as “earnable compensation,” thereby reducing retirement annuities). See also, 2008 Laws Ch. 300:19 and presently codified as RSA 100-A:41-a (which altered and capped future cost of living increases

for NHRS retirees and beneficiaries)<sup>7</sup> and 2008 Laws Ch. 300:5 through 7 (which created a temporary freeze and permanent annual cap on increases to NHRS retiree medical subsidies).<sup>8</sup>

The Attorney General's office—which takes the position in this case that NHRS' defined benefits are immutable—has stated that it will likely take a different position in other litigation. In a pending Superior Court case, several NHRS members have raised a contract clause challenge to the 2008 legislation, cited above, that (a) altered the definition of “earnable compensation;” (b) altered and capped future COLAs; and (c) froze and capped future medical subsidy increases. See, American Federation of Teachers, et. al. v. The State Of New Hampshire et. al., Merrimack County Superior Court, 09-E-290. The Attorney General (through a different Assistant Attorney General) filed a Summary Statement arguing that “...[I]t is not clear that any contract was created by the statute. Further, to the extent the petitioners have any rights, the State is likely to dispute that such rights are vested. Even if any right were vested, it is not clear that any such right was unlawfully impaired or taken away.”

Thus, the State's cheery suggestion that that the size of NHRS' trust funds has no effect on member benefits suggests either clairvoyance regarding undetermined issues of Constitutional law or a utopian view of Legislative generosity. The very purpose of placing funds in *trust*, to be managed by independent Trustees was to avoid this result.

In any event, under the State's theory, because NHRS is a defined benefit plan, it can *never* establish a risk of irreparable harm resulting from a violation of Article 36-a. Thus, even

---

<sup>7</sup>Both prior to the amendment and presently, COLAs are only payable to the extent there are sufficient funds in NHRS' special account. See, RSA 100-A:52, 52-a and 52-b.

<sup>8</sup>The original statutory grant of medical subsidies to NHRS retirees had express language permitting the Legislature to modify or even eliminate the subsidy. See, RSA 100-A:54,II.

in the case a raw confiscation of trust funds or a refusal to make employer contributions, NHRS and its members would *never* be entitled to injunctive relief. This would transform Article 36-a into nothing more aspirational rhetoric.

Because the voters did not amend the Constitution for rhetorical purposes, and because NHRS has established a substantial likelihood or real, sustained and irreparable injury, the trial court's issuance of a permanent injunction prohibiting the enforcement of the Sudan Divestment Act was proper.

The Situation In Sudan: The New Hampshire Retirement System does not have a foreign policy. It accepts the factual findings of the New Hampshire Legislature and the U.S. Congress and the statements of the present and former U.S. Secretaries of State regarding the situation in Sudan. Nobody associated with NHRS condones genocide or any of the other atrocities committed by, or with the acquiescence of the current Sudanese regime. But that is not the point. Federal law *permits* investments in scrutinized companies and NHRS cannot use its member's retirement money to make a political statement about those companies' decisions to do some business in Sudan.

## CONCLUSION

The trial court's judgment should be affirmed.

Respectfully Submitted

New Hampshire Retirement System  
By Its attorney

---

Andrew R. Schulman, Esq., NH Bar 2276  
GETMAN, SCHULTHESS  
& STEERE, PA  
3 Executive Park Drive, Suite 9  
Bedford, NH 03110  
(603) 634-4300

CERTIFICATE OF SERVICE

I, Andrew R. Schulman, hereby certify that I have served two copies of this Brief on February 22, 2010, by first class mail, postage prepaid to all counsel in this matter including:

Charles G. Douglas, III, Esq.  
Douglas, Leonard  
& Garvey, P.C.  
6 Loudon Road  
Concord, NH 03301  
*Counsel for Petitioner,  
New Hampshire Judicial  
Retirement Fund*

David Martin Howe, Esq.  
4 Wildemere Terrace  
Concord, NH 03301  
*Counsel for Petitioner,  
New Hampshire Judicial  
Retirement Fund*

Richard Head, Esq.  
New Hampshire Attorney  
General's Office  
33 Capitol Street  
Concord, NH 03301  
*Counsel for Respondent  
New Hampshire Secretary of  
State and The State of New  
Hampshire*

February 22, 2010

\_\_\_\_\_  
Andrew Schulman, Esq.