THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2025-0240

Hologic, Inc. and Subsidiaries

v.

Commissioner, New Hampshire Department of Revenue Administration

& a.

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION

COUNCIL ON STATE TAXATION

By Its Attorneys,

PIERCE ATWOOD LLP

Jonathan A. Block, Esq., NH Bar No. 10972

Olga J. Goldberg, Esq., NH Bar No. 268521

254 Commercial Street

Portland, Maine 04101

(207) 791-1100

jblock@pierceatwood.com

ogoldberg@pierceatwood.com

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. since 1969. Its membership comprises approximately 500 of the largest multistate corporations engaged in interstate and international business and represents multistate industries doing business in every state across the country. Many COST members do business in New Hampshire and are directly impacted by this case. COST has participated as amicus in numerous cases before the U.S. Supreme Court and state courts, including cases arising in New Hampshire. Notably, in the past 25 years, COST has filed amicus briefs addressing New Hampshire issues in *General Electric Company v. Commissioner, New Hampshire Department of Revenue Administration,* 154 N.H. 457, 914 A. 2d. 246 (2007), Pet. for Cert. denied, 552 U.S. 989 (2007); and *Caterpillar, Inc. v New Hampshire Department of Revenue Administration*, 144 N.H. 253, 741 A.2d 56 (1999).

COST's objective is to preserve and promote equitable, transparent, and non-discriminatory state and local taxation of multijurisdictional business entities. COST has a longstanding policy position addressing the treatment of tax attributes for corporate income tax purposes when a state requires the filing of a unitary combined return.[1] As a representative of

[1] COST has a policy position (approved by COST's Board of Directors) on State Corporate Income Tax Filing methods that notes "[l]imiting the use of tax attributes to separate entities within the combined group violates the principle of treating the group as an economic unit." This policy position is

multinational and multistate businesses, COST is uniquely positioned to provide this Court with why the analytical underpinnings of the unitary business combined filing method support the Merrimack County Superior Court holding in *Hologic Inc. and Subsidiaries* that a unitary business is treated as a single taxpayer for purposes of the using the unitary group's tax attributes related to both income and losses.

The fundamental issue in this matter is whether New Hampshire's Business Profits Tax ("BPT") statute limits the use of capital loss offsets solely to the member of the combined group that generated the capital gains when the unitary business group ("UBG") is determining the taxable base. The Department of Revenue Administration's ("DRA") position denying the use of the capital loss offset is inconsistent with the terms of RSA 77-A:6, IV and the definition of "combined net income" in RSA 77-A:1. The Superior Court correctly reviewed the statutory history of New Hampshire's switch in 1981 from separate entity reporting method to a combined reporting filing method. Based on that analysis, the Superior Court rejected the DRA's disallowance of the capital loss offsets. The Court ruled that "[t]he plain language of the statute and the underlying purpose of combined reporting permit treating a water's edge group 'as one business organization' in order to identify and mitigate profit shifting between multi-form corporations." Order at 8. "Thus, the plaintiff, when taxed as one unitary business

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available at: https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/state-corporate-income-tax-filing-methods-policy-statement-final.pdf.

organization, should be permitted to apply a long-term capital loss carryback generated by one member of the water's edge unitary group to the water's edge group's capital gains." Order at 9. The Superior Court's holding is consistent with both the plain wording of the statute and the underlying principles of a unitary combined reporting regime.

SUMMARY OF THE ARGUMENT

This case addresses the appropriate application of the combined unitary filing principles for both income earned and losses incurred by a unitary group's members. The central issue is the application of the unitary principles to the utilization of a combined unitary group's tax attributes. Specifically, in keeping with the unitary theory, may one member's capital loss be utilized to offset another member's capital gain. In support of the sharing of both income and loss attributes, New Hampshire adopted the unitary combined reporting method for its BPT in 1981.

Business organizations that are part of a UBG are required to file returns that include the "combined net income" of the group. RSA 77-A:6, IV.[2] The statute is clear that a UBG is treated as a "single business organization" for purposes of computing the tax base under the BPT. The DRA, however, ignores the clear statutory language and erroneously seeks

[2] Pursuant to the statute, the income of each member of the unitary business group is added together to calculate the combined group's net income subject to tax.

to isolate capital losses from capital gains within the combined unitary group framework.

When determining state tax obligations, businesses rely on clear statutory language and administrative guidance. New Hampshire has a long history of embracing the unitary combined business principle, which recognizes that affiliated corporations operating as a single economic enterprise should be treated as one business organization. The BPT adopted this principle by explicitly stating that the tax is imposed "as though the entire combined net income of the water's edge combined group was that of one business organization." RSA 77-A:6, IV. The DRA's position to restrict the use of capital losses to the UBG member that incurred the capital loss completely runs afoul of basic unitary combined income tax principles, fosters uncertainty and unfairness by ignoring a straightforward interpretation of the State's tax law, hinders voluntary compliance, and disrupts the reasonable expectations of all taxpayers subject to BPT. For these reasons, this Court should affirm the holding of the Superior Court.

ARGUMENT

I. THE STATE'S UNITARY COMBINED REPORTING METHOD REQUIRES THAT A UNITARY BUSINESS GROUP IS TREATED AS A SINGLE ECONOMIC UNIT

The unitary combined reporting method of reporting is based on the principle that affiliated companies are interrelated and should apportion income among the states as a single entity based on the related group's

income and apportionment factors.[3] New Hampshire's combined reporting methodology dictates that the apportionable tax base must include the income (and losses) of all unitary affiliates. RSA 77-A:1, XVI. The objective of the combined reporting method is to treat all members of a unitary business group as a single entity[4]. This objective is accomplished by

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[3] The U.S. Supreme Court in *Butler Brothers v. McColgan*, 315 U.S. 510 (1942) defines what constitutes a unitary business for income tax purposes. In its decision, the Court set out the three unities test which has become the basis for determining the existence of a unitary business relationship. The Court concluded that a unitary business relationship will exist if there is unity of ownership, unity of operation and unity of use. *See also Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

[4] The underlying legal support of the principles of the unitary business theory was developed is a series of late 19th century cases in which the U.S. Supreme Court affirmed several state taxes imposed on the property and capital stock that were not specifically limited to a single state's borders that involving railroads, telegraph, and express companies. The Court addressed whether the states could include an apportioned amount of the value of property located in other states in the tax base. The Court in these early cases sanctioned the use of the "unit rule" for determining the taxable portion of the value of the capital stock of an interstate railroad adopting the theory that the property was so interconnected it had to be included to accurately reflect values. *See State R.R. Tax Cases*, 92 U.S. 575 (1875); *Del. R.R. Tax*, 85 U.S. (18 Wall.) 206 (1873); *Pittsburgh, C., C. & S. L. R.*

requiring a taxpayer to include the income and apportionment factors of unitary affiliated entities when calculating their share of the unitary business income subject to tax. New Hampshire adopted the unitary combined reporting method for corporate income taxes in 1981 with the enactment of mandatory worldwide combined reporting.[5] The General Assembly, in 1986, modified the unitary combined reporting method limiting a unitary business to a water's-edge combined group.[6] A water's-edge combined group includes business organizations operating a unitary business but excludes foreign business organizations with 80% or more of their average payroll and property assignable to a location outside the United States. RSA 77-A:1,

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Co. v. Backus, 154 U.S. 421 (1894), and *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897). Subsequently, those principles were expanded to corporate income taxes and the Court allowing the apportionment of multijurisdictional business's income comprising numerous entities that constituted a unitary business. *See Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120 (1920); and *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271, 284 (1924).

[5] *See* General Court of New Hampshire, Commission on Worldwide Combined Reporting for Unitary Business Under the Business Profits Tax, Worldwide Combined Reporting, Final Report 2023, issued pursuant to RSA 77-A:23-b (HB 102, Chapter 12, Laws of 2022, pages 9 and 10).

[6] *Id.*

XV. The adoption of the water's-edge reporting method did not alter the fundamental principles of unitary reporting.[7]

DRA's argument that the taxpayer's 2020 capital loss cannot offset the 2017 capital gain because the loss was incurred by a unitary group member other than the group member that generated the gain is contrary to the fundamental principles of the unitary combined reporting method. The purpose of requiring combined reporting is to accurately reflect the economic reality of an integrated corporate group. The UBG is treated as a single economic enterprise.[8] The New Hampshire courts have recognized that a unitary business is a single economic enterprise and that the adoption of the unitary concept was intended to more accurately measure the related group's taxable income in New Hampshire.[9]

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[7] For purposes of the Business Profits Tax, New Hampshire defines a unitary business as one or more related business organizations engaged in business activity both within and without the State among which there exists a unity of ownership, operation and use; or an interdependence in their functions. N. H. Rev. Stat. Ann. § 77-A:1, XIV.

[8] Hellerstein State Taxation ¶8.11[1]. (3rd ed. 2024.)

[9] *See generally Caterpillar, Inc. v. New Hampshire Department of Revenue Admin.*, 144 N.H. 253, 255-256, 741 A.2d 56 (1999); and *General Electric Company v. N.H. Dep't of Revenue Admin. I,* 154 N.H. 457, 914 A.2d 246 (2006).

The BPT statute is clear, a UBG is characterized as a single taxpayer and as such, must share income and tax attributes. RSA 77-A:6, IV. The statute specifically states:

> A business organization which is part of a water's edge combined group and required to report under this chapter shall file a return containing the combined net income of the water's edge combined group and such other informational returns as the commissioner shall require by rules adopted under RSA 541-A. The commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business organization or the commissioner may adjust the tax or income in such other manner as the commissioner shall determine to be equitable if the commissioner determines it to be necessary in order to clearly reflect the net income earned by such organization from business done in this state.

DRA's arguments eviscerate this provision's mandates. The DRA's position that the capital gains and losses generated by different group members are not offset on a combined basis has no statutory or theoretical support.[10] The importance of states allowing the sharing of all tax attributes

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[10] DRA asserts that the trial court's holding would reverse the method by which it apportions a combined group's income under the "Joyce" and "Finnigan" rules of apportionment. State's Brief, p. 37-38. The "Joyce" and "Finnigan" rules address two different methods used by the states to

attribute sales to the sales factor numerator of the combined apportionment factor when one member of a combined group has sales attributed to a state in which it is not taxable, but in which other members of the combined group are taxable. The "Joyce" method refers to a California State Board of Equalization ("SBE") decision, In *Appeal of Joyce*, No. 66-SBE-070, Cal. State Bd. of Equaliz. (Nov. 23, 1966), which held that receipts from sales of goods shipped to a state's customers are not included in the combined group's sales factor numerator if the individual member making the sales is not taxable in the state. The "Finnigan" method refers to a California SBE decision, In *Appeal of Finnigan*, No. 85A-623-LB (88-SBE-022) (1988), on reh'g, No. 85A-623-DB (88-SBE-022-A) (1990), which held that receipts from sales of goods sourced to the state are included in the combined group's sales factor numerator even if the individual member making the sales is not taxable in the state, because other members of the combined group are taxable in the state. Contrary to the DRA's Brief, states choose either the Joyce or Finnigan rule without any impact on the calculation of a combined group's tax base (which is before apportionment) or other aspects of its taxing schemes. New Hampshire has chosen the Joyce rule for purposes of sourcing receipts. It should be noted, the sole issue in this matter relates to the calculation of the tax base which occurs prior to the application of the apportionment rules and therefore the apportionment methodology chosen by the state is irrelevant to this matter.

(*e.g.,* tax credits and net operating losses, etc.) when it requires a UBG to file a mandatory unitary combined return is noted in one of Amicus' policy positions.[11]

The DRA's refusal to allow one member of the unitary group's capital losses to offset another member's capital gains is not only inconsistent with the principle of unitary taxation, but also contrary to the DRA's own position on ordinary losses. The DRA treats the capital loss of the parent as trapped and isolated, notwithstanding the filing of a combined return. However, if instead of a capital loss, the parent has an ordinary business loss, the DRA allows the parent's ordinary business loss to offset the business gain of its affiliate in the combined return.[12]

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[11] *Supra* note 2.

[12] See testimony of the taxpayer's expert witness, Richard Pomp, the Alva P. Loiselle Professor of Law at the University of Connecticut and author of one of the two leading state and local tax casebooks "State and Local Taxation." Pomp testified: "The State's position is that the capital loss is trapped and isolated in the parent, siloed in the parent, and cannot offset the capital gains of the subsidiary. So the taxpayer has to report the subsidiary's 1,000 gain, notwithstanding the filing of a combined report. And the whole idea of a combined report, as the name suggests, is you combine parent and sub. That's why it's called a combined report. And according to the State, the parent can offset its capital loss only against its own capital gains and not those of any other corporation included in the combined return. And that's it. I think you stated it perfectly accurately at

Hologic, Inc.'s (Hologic) UBG is treated as a single taxpayer under the BPT and was required to file a single unitary combined return for the tax periods at issue. Consistent with the fundamental unitary combined reporting principles, and the statute, the capital loss incurred by the Hologic unitary combined group in 2020 should offset the Hologic unitary combined group's 2017 capital gain. This result is consistent with this Court's own guidance on interpreting the State's statutes. *See Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. 267, 271 (N.H. 2013) ("the context of the overall statutory scheme … must start with consideration of the plain meaning of the relevant statutes, construing them, when reasonably possible, to effectuate their underlying policies") (citing *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (N.H. 2010)).

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the beginning. So now, the State wouldn't take this position if, instead of a capital loss, the parent had an ordinary business loss of 1,000. And in a combined return, I think it's uncontroverted that the business operations of the parent would be combined with the business operations of the sub. This is page 16 of my report. And consequently, the parent's ordinary loss of 1,000 would offset the subsidiary's 1,000 of gain. So if it were a business loss, they would do exactly what the name combined report suggests. They would combine it. But somehow, because it's a capital gain and loss, they take this different position. And I don't understand why." See Transcript Bench Trial, at 19-10.

II. THE RESTRICTION OF THE USE OF TAX ATTRIBUTES IS INEQUITABLE

Clearly written statutes and consistent interpretation of those statutes are paramount for fair and equitable tax administration and compliance. Equitable and sound tax policy requires tax administrators to interpret and apply the plain meaning of the tax statutes. Taxpayers, particularly multistate and multinational taxpayers, must be able to rely on the statutory language. Consistent and clear guidance of this State's laws creates certainty and predictability, reduces confusion, prevents unintentional non-compliance, and enhances fairness and equity in the tax system.[13] By creating a transparent and understandable framework, clear interpretation of tax statutes ensures that such laws serve their intended purposes while building and maintaining public trust in the tax system. This mutual trust between the government and business (and individual income taxpayers) fosters voluntary compliance and promotes a stable economic environment for the states.

The New Hampshire BPT is a net income tax imposed on business organizations carrying on business activity within the state.[14] The starting point for computing the BPT is federal taxable income. Businesses that are

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[13] Any guidance that does not follow the state's law exceeds DRA's authority. *See Appeal of Gallant*, 125 N.H. 832, 834, 485 A.2d 1034 (1984) ("[a]gency regulations that contradict the terms of a governing statute exceed the agency's authority.").

[14] Chapter 77-A of the New Hampshire Revised Statutes.

part of a water's edge combined group are required to file a unitary combined return reporting the combined net income of the water's edge unitary group.[15] The statute specifically defines the term "combined net income" as:

> [T]he revenues less expenses as would be determinable under the provisions of the Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for **all business organizations conducting a unitary business** regardless of whether such business organizations are required to file a federal income tax return. RSA 77-A:1, XIII. (Emphasis added.)

There is no dispute that Hologic is a UBG that operates in several states including New Hampshire. For tax years 2017 and 2020, Hologic, consistent with the statute, filed its BPT returns as a water's edge combined group. In 2017, Hologic's combined BPT return included net capital gains that were primarily generated by group member, Gen-Probe. In 2020, the group generated a significant capital loss primarily attributable to Hologic, Inc. Hologic amended the 2017 combined return to carryback the 2020 capital loss offsetting the 2017 capital gains and sought a refund of 2017 BPT. The DRA denied the refund on the grounds that a capital loss carryback

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[15] In general, under the "water's-edge" reporting method, only the income and the apportionment factors derived from operations within the domestic United States (i.e., up to the "water's edge") are used to calculate state corporate income tax liability.

may only be used to offset the capital gain of the group member that generated the capital loss.

Sound tax policy requires statutes are given their plain meaning allowing taxpayers to rely on and comply with the taxing statutes[16]. DRA's statutory arguments ignore the plain language of the statute, the overall BPT structure and the fundamental principles of unitary business combined reporting. The DRA's actions do not promote sound tax policy. Rather, the actions lead to confusion, inequity, and unfairness in the tax system. The Superior Court recognized this, and its holding should be affirmed.

CONCLUSION

The Superior Court properly interpreted the plain language of the BPT in holding that the Final Order erred in its interpretation of RSA 77-A by failing to treat Hologic as a single business enterprise as required by the statute. The DRA's proposed interpretation disregards the plain statutory language, contradicts principles of sound tax policy, and undermines taxpayer reliance on the rule of law.

Treating a UBG as a single business organization is consistent with the theory underlying unitary combined reporting and the legislative design

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[16] Order at 6, citing *Polonsky v. Town of Bedford*, 171 N.H. 89, 93 (2018) for the proposition that New Hampshire courts are to "look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning."

of the BPT, which promotes equitable tax administration. The DRA's interpretation effectively rewrites this State's law and introduces unjustified complexity and uncertainty into New Hampshire's BPT regime.

COST therefore urges this Court to affirm the decision of the Superior Court.

Respectfully submitted,

COUNCIL ON STATE TAXATION

By its attorneys,
PIERCE ATWOOD LLP

Date: December 4, 2025

By: /s/ Jonathan A. Block
Jonathan A. Block
NH Bar No. 10972
Olga J. Goldberg
NH Bar No. 268521
254 Commercial St.
Portland ME, 04101
(207) 791-1100
jblock@pierceatwood.com
ogoldberg@pierceatwood.com

COMPLIANCE WITH RULE 16(11)

The undersigned counsel hereby certify that this Brief complies with the word limitation under Supreme Court Rule 16(11). Excluding the Table of Contents, Table of Authorities and Certificates of Compliance and Service, the foregoing Brief contains 3,431 words.

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I have caused this Brief to be served upon all parties or their counsel, pursuant to Sup. Ct. Supp. R. 18, through the Supreme Court's electronic filing system's means of service.

Date: December 4, 2025 /s/ Jonathan A. Block

Jonathan A. Block