To: The House Committee on Education
Re: Carson v. Makin's Implications for Education Funding in Vermont
Date: 1/11/23

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Background: The U.S. and Vermont Constitutions

The First Amendment of the U.S. Constitution includes the Establishment Clause, which prohibits the government from "establishing" a religion. This is the origin of the "separation of church and state," and has historically been understood to prohibit government entanglement with religion. Though the Establishment Clause's contours have changed over time, traditionally the U.S. Supreme Court had understood it to require states to be cautious about comingling government functions with religion.

The First Amendment also includes the Free Exercise Clause, which protects an individual's right to practice their religion free from governmental intrusion. The Free Exercise Clause prohibits the Government from "discriminating" against religious persons or a particular religion. The arc of the past few years is that the new Supreme Court majority has generally viewed preferences for secular government or services as a form of "discrimination" against religion.

Vermont has its own related constitutional provision, known as the "Compelled Support Clause." This clause provides that "that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience."[1] This is an individual right that includes elements of Free Exercise and Establishment Clause concerns, but—at the risk of over-simplifying—has been understood to essentially mean that Vermont cannot force a taxpayer or citizen to subsidize religious programming or institutions against their will.

Funding Religious Schools: Historically Limited by the Establishment Clause

Traditionally, the Supreme Court has been skeptical of public funds flowing to private religious institutions. For decades, the Supreme Court held that *any* governmental subsidy or support of religious schools violated the Establishment Clause. But, especially in the context of schools, the Court has gradually weakened the Establishment Clause's force over time. As the composition of the Court changed, the Court has ruled that the

[1] Vt. Const. ch. I, art 3

Establishment Clause permitted some public funds to go to religious institutions, so long as the purpose of those funds was largely secular.[2]

In an important school voucher case in 2002, *Zelman v. Simmons-Harris*, the Court held that the Establishment Clause permitted a state to allow parents to choose a religious school using a public voucher. *Zelman*'s essential holding was that there is no Establishment Clause problem where *parents* exercise the choice of institution, since no one could reasonably think the *government* was endorsing or establishing religion.[3] But even then, the Court made clear that while the Establishment Clause permitted some funding to go to religious institutions, the Free Exercise Clause in no way compelled states to fund religious instruction. Instead, states were free to "draw[] a more stringent line than that drawn by the United States Constitution" and validly exclude religious programs "without violating the Free Exercise Clause."[4]

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Until recently, this is what Vermont did, consistent with our state Constitution. In a decades-old case called *Chittenden Town School District v. Department of Education*, the Supreme Court of Vermont ruled that "a school district violates [the compelled support clause] when it reimburses tuition for a sectarian school . . . in the absence of adequate safeguards against the use of such funds for religious worship."[5]

Although Vermont was more protective of church-state separation and individual conscience than the federal Establishment Clause required, this was part of the traditional "play-in-the-joints" between the Free Exercise and Establishment Clauses. To implement this, the Vermont Agency of Education (AOE) excluded religious schools from eligibility for public tuition.

Funding Religious Schools: Now Often Mandated by the Free Exercise Clause

As described above, the U.S. Supreme Court had already weakened the Establishment Clause to allow states to fund some religious programming. However, the newly constituted Court has aggressively expanded the Free Exercise Clause in this context to *require* states to fund religious schools if they fund other, secular private schools. The Court's ruling in *Carson v. Makin* is the latest domino in this chain and it's important to understand what came before it:

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[2] Mueller v. Allen 463 US 388 (1983) clarified that parents of all types of school students could claim an income tax deduction for tuition, transportation, and secular textbook expenses—even if the school was religious. The central logic of the opinion was that the state was only funding the secular parts of the educational experience.
[3] Zelman v. Simmons-Harris, 536 U.S. 639 (2002)
[4] Locke v. Davey, 540 U.S. 712, 722 (2004)
[5] Chittenden Town School Dist. v. Dept. of Education (97-275); 169 Vt. 310; 738 A.2d 539

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In 2017's *Trinity Lutheran Church of Columbia, Inc. v. Comer*, Missouri excluded religious organizations from a state grant program for playground resurfacing. The Court held 7-2 that the Free Exercise Clause prohibited Missouri from excluding a recipient purely due to its status as a church.[6] As the 7-2 holding reflects, that conclusion was relatively uncontroversial as applied to the facts of that case: there was no reason to exclude churches, and only churches, from playground grants.

But in 2020, the Court expanded *Trinity Lutheran* to the entire field of school tuitioning in *Espinoza v. Montana Department of Revenue*. Montana's Constitution contained a no-aid clause, prohibiting public funding of religious schools. The Supreme Court held that it violated the federal Free Exercise clause to exclude private schools from Montana's voucher program due to their religious status, even if the Montana Constitution required it.[7]

Significantly, the Court was clear that a State has no obligation to fund private schools, but once it chooses to, it cannot exclude participants because of their religiosity. This directly implicated Vermont's historical practice of excluding all religious schools from tuitioning based on their religious status. Shortly after *Espinoza*, the U.S. Court of Appeals for the Second Circuit ruled that Vermont's prior practice was unconstitutional.[8]

Espinoza's holding was based on religious status: Montana could not exclude religious institutions, as a group, simply because they were religious. But the Court left open the question of whether States could restrict funding based on religious use—that is, restrict funding based not on who the recipient *was* but what they planned to *do*.

Carson v. Makin

Last year, the Court decided *Carson v. Makin* and answered the questions left open by *Espinoza*. Maine required that any private school receiving public tuition had to offer the "equivalent" of a "public education," including that its educational practice was secular. The Supreme Court held that this, too, violated the Free Exercise Clause.[9] Although the Court claimed it was just applying *Espinoza*, the opinion expands the principles and the reach of *Trinity Lutheran* and *Espinoza*. In practice, *Carson* eliminates much of the flexibility left open by those earlier cases, and, at a practical level, means that if a state chooses to subsidize private education, it generally must treat religious schools and non-religious schools the same.

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[6] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017)
[7] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020)
[8] In re A.H., 999 F.3d 98 (2d Cir. 2021)
[9] Carson as next friend of O. C. v. Makin, 142 S. Ct. 1987, 1993 (2022)

The key legal concept underlying these cases is that government action must be "neutral" towards religion and "generally applicable"—a standard derived from Free Exercise cases in other contexts. In *Trinity Lutheran* and *Espinoza*, the Court ruled that the express exclusion of religious institutions was not "neutral"—it singled out religion for worse treatment. *Carson* shows, however, that the Supreme Court is taking an aggressive stance as to what religious "neutrality" means—looking at whether neutral-seeming programs *operate* to disadvantage religious actors specifically.

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First, *Carson* makes clear that *Trinity Lutheran* and *Espinoza* apply in full to restrictions on religious *activity* or *instruction*, not just religious status. In *Carson*, the lower court that had concluded Maine's program was constitutional since it allowed religious schools to *participate* in the program, but simply prohibited the use of public funds for religious purposes. The Supreme Court reversed, and held that any restriction on religious *use* also violated the Free Exercise clause, answering the question left open in *Espinoza*.

Second, the Court also took an aggressive approach to defining the benefit at issue. Unlike Montana, which categorically excluded religious schools—as a class—from the benefit of "tuition," Maine tried to argue that it didn't offer private school tuition generally, but instead just offered a "public education"—a "neutral" benefit that didn't single out religion—which it fulfilled by allowing certain private schools to provide the "equivalent" of a public-school experience, which, of course, was secular. The court ruled that Maine's program was not "neutral" and "generally applicable"—it concluded that, despite Maine's description of its program as a neutral benefit equally open to all, Maine was not offering a public education, but rather tuition that can be used at institutions that are neither public nor free. The opinion reiterated that a State need not fund private schools, but confirmed that once a State does, it cannot exclude schools for anything having to do with their religious character or activity.

While *Carson* was making its way through the courts, religious organizations filed several lawsuits against Vermont. Those cases were paused while the Court considered *Carson*. On September 9, the Attorney General's office and the plaintiffs in these cases submitted a proposed settlement—virtually identical in each of those cases—agreeing that, in light of *Carson* the "adequate safeguards" test from *Chittenden Town* was unconstitutional. The Attorney General averred that Secretary French and the Agency of Education would not attempt to enforce the "adequate safeguards" test.

Secretary French issued guidance to school districts on September 13, advising that "School districts may not deny tuition payments to religious approved private schools or religious private schools that meet educational

quality standards based on the Vermont Constitution's Compelled Support Clause, Vermont Constitution Chapter I, Article 3."

A Path Forward for Vermont

The Vermont Constitution makes clear that education is a common benefit, meant to be equally accessible to all Vermonters regardless of geography or status. Vermont, accordingly, has a longstanding commitment to guaranteeing access to high-quality public education and ensuring that our public education system is well-funded, equitable, and rooted in democratic values.

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Given the abundance of small towns and rural areas in Vermont, our education system relies in part on non-public schools to educate students living in areas not served by public institutions, or "school choice towns." For years, our state has paid public tuition to those private schools, while trying to maintain safeguards, including those designed to prevent public dollars from funding religious instruction.

As discussed above, *Carson* marks a substantial shift in constitutional law and therefore how we think about our traditions – specifically, how we balance the First Amendment rights to freely express one's religion with protecting against government establishment of religion. As a result of this decision, the Supreme Court has put Vermont in a very difficult position as it seeks to comply with the Court's ruling while still upholding Vermont's own constitutional protections, democratic values, and traditions.

Despite the challenges created by *Carson* decision, there is no question that Vermont has options for preserving its traditions and values. For example, as described below, the state can take action to ensure that public dollars go exclusively to public schools; alternatively, Vermont can limit public funding to a designated number of private schools that act in accordance with the same nondiscriminatory and generally applicable standards as public schools.

In addition, separate and apart from funding, Vermont can and must do more to ensure that all students can receive a quality education regardless of their identity or means by strengthening anti-discrimination protections and enforcement mechanisms for all schools.

Public Funds for Public Schools

The most straightforward way that Vermont can balance its values and constitutional mandates is to limit the use of public funds to go only to public schools. The Supreme Court has made clear that despite the constraints imposed by *Carson*, nothing forces a state to fund private schools, and the

best way to ensure our public school system remains strong, equitable, and a common benefit for all Vermonters is to direct the flow of public dollars to public schools.

This approach may be politically controversial, considering the number of private schools currently receiving a substantial portion of their funding and student body from sending towns. One approach we recommend is therefore for this body to examine—or at least start the process of gathering information around—what a future public school system would need to deliver high-quality education if it were to serve a higher number of Vermonters.

Also, as this Committee knows, the legal classification and status of some private schools, including some historic academies, has changed throughout Vermont's history. There could be ways to ensure particular institutions can continue to play their historic roles within the communities they serve, even as the larger landscape of tuitioning may evolve.

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Designate Independent Schools Eligible for Tuition Based on Content Neutral and Generally Applicable Criteria

If Vermont does not choose to eliminate public tuition to independent schools, another constitutionally viable option is to require school districts that do not maintain public schools designate a select number of public and independent schools that are eligible to receive public funds from their district. Under such a program the legislature could establish nondiscriminatory and universally applicable standards to help districts select what schools would best meet the needs of their communities.

Vermont law currently enables districts and municipalities that don't maintain public schools to designate where their students will receive an education.[10] This statue is often used to designate union high schools that serve students from a large catchment area. This statute could be amended so that districts that do not maintain public schools be required to designate a select number of public or independent schools that meet designated standards. Further, the legislature could provide guidance to districts in their decision-making process by enumerating neutral and generally applicable standards that designated schools must meet.

These standards should focus on anti-discrimination protections for students, curricular standards, facility safety criteria, disability accommodations, and any other educational quality standard the legislature deems appropriate.

[10] 16 V.S.A. § 827

This process would allow for districts to engage in a public and democratic process to designate the schools that would best serve the needs of their community. It would also allow the state to provide guideposts that can support the deliberation at the community level. Short of eliminating all public funding of independent schools, this would be the best option to ensure all Vermont students have access to the common benefit of a high-quality education and public dollars are used to support educational institutions that further that mission.

Strengthen Anti-Discrimination Protections and Enforcement

Regardless of which approach Vermont takes to school funding, it should strengthen anti-discrimination protections for students and make those protections apply to all schools, across-the-board, without exception. The Supreme Court has said that there is no Free Exercise problem when neutral, generally applicable requirements incidentally burden religion.[11] To truly advance the goal of educating students in schools free from discrimination, however, the state must also improve its system for investigations and strengthen enforcement mechanisms. We look forward to working with the legislature to craft those solutions.

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Thank you for the opportunity to provide this testimony. We are committed to working with stakeholders and policymakers in the upcoming legislative biennium to chart a path forward that both complies with the radically shifting Supreme Court precedent and upholds our core democratic values and traditions, including a public education system that is well-funded, equitable, and serves all Vermont students.

Sincerely,

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[11] Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 878–79 (1990)