Bringing Vermont's Dual Enrollment and Tuition Reimbursement Policy Into Compliance with the U.S. Supreme Court's Decision in *Espinoza* without Violating the Compelled Support Clause" in Article III of Chapter I of the Vermont Constitution

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I. Introduction:

My name is Peter Teachout. I am a Professor of Constitutional Law at Vermont Law School. One of my areas of scholarly interest is Vermont constitutional law and history. I have published a number of articles dealing with issues in that field. I have also testified before committees of the Vermont state legislature on issues of both federal and state constitutional law. I appreciate this opportunity to testify before the House Education Committee today.

Since I testified before the Senate Education Committee on this same topic a couple of weeks ago I have had a chance to do additional research and I incorporate what I have learned into the recommendations below. The recommendations correspond to three passes through important recent cases in this area as follows:

First pass: recommendations based on a reading of the *Trinity Lutheran*[1] and *Espinoza*[2] decisions of the U.S. Supreme Court that Jim DesMarais from the Legislative Council office described to you in his testimony this morning; the recent federal court decisions in *A.G. v. French*, the challenge to Vermont's tuition reimbursement policy; and the "Best Practices" memorandum issued by the Vermont Office of Education on January 17th of this year.

Second pass: an elaboration of those recommendations based on a reading of another important U.S. Supreme Court decision handed down this past summer, *Our Lady of Guadalupe*,[3] in which the Court held that religious institutions, including private religious schools, are not bound by federal and state anti-discrimination laws in making decisions about hiring and firing and controlling the conduct of employees who participate, even in fairly minor ways, in furthering the faith mission of the institution.

Third pass: additional suggestions based on a reading of the recent First Circuit Court of Appeals decision in *Carson as next friend of O.C. v. Makin*[4] in which a panel of three judges, which included retired Supreme Court Justice Souter sitting by designation, upheld against a Free Exercise challenge a tuition reimbursement program in Maine that is similar in many respects to Vermont's program. I think that some of the things the panel found significant in upholding Maine's law might inform the way Vermont structures its own program and policy.

II. The Problem

[1] 582 U.S. (2017)
[2] 140 Sp.Ct. 2246 (2020)
[3] 140 S.Ct. 2049 (2020)
[4] 979 F.3rd 21 (10/29/2020)

Recent federal court decisions, nationally and at the local level, have raised questions about the constitutionality of Vermont's dual enrollment and tuition reimbursement programs. At the national level, two recent Supreme Court decisions, the *Trintity Lutheran* and *Espinoza* decisions as DesMarais explained, held that, in providing generally available public benefits, states cannot discriminate against institutions or individuals "based solely on religious status" without violating the Free Exercise Clause. These Supreme Court decisions form the basis for more recent decisions by the federal District Court in Vermont and by the Second Circuit Court of Appeals ruling that the Vermont cannot deny tuition reimbursement payments to private religious schools "based solely on religious status." In mid-January of this year, a Court of Appeals judge issued an emergency injunction prohibiting Vermont school districts from continuing to deny tuition reimbursement to private religious schools "based solely on religious status."

The Compelled Support Clause

The problem is that if Vermont were to provide direct reimbursement payments to private religious schools without safeguards in place to ensure that the taxpayer funds would not be used to support religious instruction and worship it would violate the Compelled Support Clause of Article III of Chapter I of the Vermont Constitution.[5] The Vermont constitution prohibits the state from compelling taxpayers to support religious instruction and worship, and the propagation of religious views, with which they disagree. The Compelled Support Clause is a core provision of the Vermont constitution. During the formative period in the state's history, it was the subject of focused and deliberate attention and discussion by the Council of Censors, the institution charged during that period with ensuring that state laws complied with the state constitution. The purpose of the Compelled Support Clause, the Council of Censors explained, was to protect the "right of conscience" - a right as fundamental as, and with if anything deeper roots in our constitutional tradition than, the right to free exercise of religion

Federal and State Anti-Discrimination Policy

But the problem runs deeper than that. If the state were to provide direct payment to private religious schools under the state's tuition reimbursement program, again without proper safeguards in place, it would mean that the taxpayers of the state might end up supporting with their tax dollars discriminatory practices and beliefs that run counter to the commitments and values embodied in federal and state anti-discrimination laws. The explanation for this lies in another recent decision by the U.S. Supreme Court, *Our Lady of Guadalupe*, in which the Court held that religious institutions, including private religious schools, do not have to comply with federal or state anti-discrimination laws in making decisions about hiring and firing and regulating the conduct of employees who, in one capacity or another, further the religious mission of the schools. In constitutional terms, this exemption is called the "ministerial exception." As a consequence of the Court's ruling in the *Guadalupe* case, the exemption has now been expanded to cover virtually all the employees of a school where the instruction in religious faith is a pervasive aspect of the school's educational mission.

[5] I attach in Appendix A to this testimony a brief history of the Compelled Support Clause, its origins, and its original understanding as expressed in reports of the Council of Censors.

These problems are not insurmountable – it is possible to craft an approach that will bring state policy into line with the recent court decisions in this area and also comply with the Vermont constitution and with state and local anti-discrimination policy – but, to do so, steps have to be taken in both the short and longer term. Below I set forth some suggestions about how that might be done.

III. First Pass: *Trinity Lutheran, Espinoza, A.G. v. French* and the Compelled Support Clause

The immediate and most pressing question is what changes, if any, are required to bring Vermont tuition reimbursement policy and practice into compliance with the U.S. Supreme Court's ruling in the *Espinoza* case and the Second Circuit Court of Appeals ruling in Vermont case and how to do so without violating the Compelled Support Clause in Article III of Chapter I of the Vermont Constitution. I have read Federal District Court Judge Reiss's decision in *A.H. v. French* dated January 7th and the "Emergency Injunction" issued by Circuit Judge Menashi in that case on January 22nd. I am familiar with the "Best Practices" memorandum issued by the Agency of Education[6] on January 14th and generally agree with the approach recommended there, although I have a couple of recommendations.

To bring Vermont policy and practice into line with these decisions and constitutional mandates, I recommend that Vermont school districts (at least those subject to the emergency injunction but ideally all Vermont school districts) adopt and announce the following policy, or something like it, if they have not already done so:

> "It is the policy of this school district to authorize payment of monthly requests for reimbursement of tuition from all [otherwise qualified] independent schools, regardless of religious status or affiliation, upon receipt of certification that none of the tuition for which reimbursement is requested has been, or will be used to support religious instruction, worship, other religious activity, or the propagation of religious views."

This policy should apply to requests for tuition reimbursement from all participating independent schools, not just those with religious affiliation or status.

This is a pretty simple "Vermont" solution, but I think it does the work.

Adopting this approach would bring Vermont policy into compliance with Judge Reiss's decision in *AH v. French* and with Judge Menashi's emergency injunction in that case since there would no longer be discrimination "based solely on religious status." It is consistent with the U.S. Supreme Court's ruling in *Espinoza* for the same reason.

There might be some question of whether the certification requirement would comply with the Vermont Supreme Court's ruling in the *Town of Chittenden* case.[7] In that case, the Vermont Court held that the Compelled Support Clause in the Vermont constitution does not prohibit providing state aid to religious schools. It does prohibit the use of state aid to support religious instruction and worship. The problem with the state policy challenged in that case, the Court

[6] Best Practices for Districts That Pay Tuition to Approved Independent Schools (Revised: January 14, 2021)
[7] 738 A.2d 539 (Vt. 1999)

held, was that it did not provide adequate "safeguards" against the use of state funds for purposes of religious instruction and worship.

The distinction between prohibitions based on "religious status" and those based on "religious use" is crucial. Under federal constitutional law, discriminatory treatment based on "religious status" is prohibited, but the Court has never ruled that states may not prohibit the use of state aid to support religious instruction and worship. And the Compelled Support Clause in the Vermont constitution specifically prohibits the use of state aid for that purpose.

The question then is whether, in light of the Vermont court's ruling in the *Chittenden* case, the "certification requirement" in the above proposal would provide "adequate safeguards" against use of state aid for purposes of religious instruction and worship. I don't know how the Vermont court would answer that question, but I do know that the U.S. Supreme Court has given its stamp of approval to the use of the certification mechanism in other cases involving challenges to federal and state programs providing religious aid to religious schools. In *Mitchell v. Helms*,[8] the challenge was to a government program that provided educational materials and equipment to public and private secular and religious schools. The program was upheld by the Court on the basis of a concurrence by Justices O'Connor and Breyer finding that the program's "safeguards" against possible diversion of the government aid to support religious instruction were constitutionally sufficient. Those "safeguards" took the form of a certification requirement similar to that being proposed here. As Justice O'Connor wrote in concurrence:

> "The safeguards employed by the program are constitutionally sufficient. At the federal level, the statute limits aid to "secular, neutral, and non-ideological services, materials, and equipment"; requires that the aid only supplement and not supplant funds from non-Federal sources; and prohibits any payment . . . for religious worship or instruction." At the state level, [the program] requires all nonpublic schools to submit signed assurances that they will use [the] aid only to supplement and not to supplant non-federal funds, and that the instructional materials and equipment "will only be used for secular, neutral and non-ideological purposes."

A similar use of the certification mechanism was approved by the Court in the *Agostini* case which upheld the use of federal funds to support special needs education on the grounds of private religious schools.

I have reservations about the state getting into the business of trying to develop an elaborate accounting scheme identifying particular items which would be eligible for reimbursement and particular items not eligible. In the first place, I don't think it is practical and, even if such a scheme could be devised, it would present serious "entanglement" problems. The nice thing about the certification mechanism is that it is practical and simple and workable. All schools would have to do to comply is what schools applying for educational equipment in the *Mitchell v. Helms* case had to do: simply certify that any tuition reimbursement requested from the state had not been, and will not be, used for purposes of religious instruction and worship. If they cannot so certify, then they would not be eligible for reimbursement. It is that simple. Alternatively, the private schools could certify that the reimbursement requested had been

[8] 530 U.S. 793 (2000)

reduced from total tuition costs by a certain amount to ensure that none of the taxpayer supported funds would be used for purposes of religious instruction or worship.

Under this approach, schools requesting reimbursement would have pretty much a free hand in tailoring the amount requested to provide the assurances required. It is possible that the certification mechanism could be abused, but my own view is that the state ought to assume that the private schools are acting in good faith unless evidence surfaces to the contrary.

I think the simplest approach here is the best one.

The only other thing I would suggest is that the policy be uniform throughout the state. I am not sure what authority the state has under current law to require local school districts to adopt a uniform policy in this respect, but I think it is important that they do so.

If such a policy were adopted, it is likely that the legal organizations that have been pursuing challenges to Vermont's dual enrollment and tuition reimbursement programs will challenge it as well. In this and similar litigation around the country those organizations have pursued a strategy of consistently moving the goal posts in this area of constitutional law. If they want to challenge the proposed policy on grounds it violates the Free Exercise rights of their clients, there is nothing to stop them from doing so, but as far as I know there has been no challenge to the use of this sort of certification mechanism so far in the present litigation. Nor has the Supreme Court ruled that requiring certification of this sort fails to provide a sufficient safeguard against abuse.

IV Second Pass: *Our Lady of Guadalupe* and Anti-Discrimination Policy

In a second important U.S. Supreme Court decision handed down this past summer, *Our Lady of Guadalupe*, the Court held that religious schools are exempt from complying with federal and state anti-discrimination laws in making hiring and firing decisions and in regulating the conduct of employees if the employees play a "vital role" in furthering the religious mission of those institutions. That case involved two challenges: In one case, a teacher alleged violation of federal age discrimination laws by a private religious school when she was not renewed so the school could replace her with a younger teacher. In the second case, a teacher at a Catholic elementary school brought action against her school employer under the Americans with Disabilities Act (ADA), alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer.

The Supreme Court ordered dismissal of both cases on grounds that private religious institutions cannot be compelled to comply with state and federal anti-discrimination laws in light of what is called the "ministerial exception." The Court held that religious schools should be given substantial deference in deciding which positions can claim the ministerial exemption. The following passage indicates the breadth of latitude that religious schools have in determining which positions qualify:

> "There is abundant record evidence that [both teachers] performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this

> mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. . . . . Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important."

The implications of this decision for Vermont's tuition reimbursement policy are far reaching. If Vermont were to provide reimbursement payments to private religious schools, unless adequate safeguards are in place taxpayer dollars would be going to support school policies and practices that directly contravene the policies and commitments underlying federal and state anti-discrimination laws.

I think here again the solution to this problem is fairly simple. It would be to amend the policy recommended above by adding a second certification requirement as follows (suggested addition in italics):

> "It is the policy of this school district to authorize payment of monthly requests for reimbursement of tuition from all [otherwise qualified] independent schools, regardless of religious status or affiliation, upon receipt of certification that *(1) the school requesting certification complies will all applicable state and federal anti-discrimination laws and (2)* none of the tuition for which reimbursement is requested has been, or will be used to support religious instruction, worship, other religious activity, or the propagation of religious views."

It is clear from the *Guadalupe* decision that the state cannot require private religious schools to comply with federal and state anti-discrimination laws in hiring and firing employees who qualify for the "ministerial exception," but there is nothing it that decision that says the state has to provide financial support to religious institutions and schools that are unwilling to comply with those laws.

It seems to me it would be inexcusable - a violation of trust - for the state to require state taxpayers to support with taxpayer dollars discriminatory practices by any private school, regardless of religious affiliation, that contravene the policies in our anti-discrimination laws. The "Best Practices" memorandum issued by the Agency of Education on January 14th includes

an expectation that private schools requesting reimbursement will comply with state and federal anti-discrimination laws. I think it should be made a certification requirement.

V. Third Pass: The First Circuit Decision in *Carson v. Makin* (Maine tuition reimbursement case)

In yet another important court decision handed down this past year, the First Circuit Court of Appeals upheld against a Free Exercise challenge a tuition reimbursement program in Maine similar in many respects to Vermont's program. The decision is particularly important because sitting on that panel by designation was retired U.S. Supreme Court Justice David Souter, so the decision carries particular weight. In rejecting the Free Exercise challenge, the First Circuit made a number of important points which should inform Vermont's own policy and position in litigation:

(1) The Court emphasized that *Espinoza* prohibited discrimination "based solely on religious status" and did not prohibit states from denying aid on grounds of "religious use."

(2) It stressed the Maine's tuition reimbursement law was not based on a replica of the "Blaine Amendment" as was the challenged "no aid" provision in the Montana constitution challenged in the *Espinoza* case. Neither is Vermont's. Maine's law, the Court stressed, was not based, as was Montana's no-aid provision, on animosity toward religion.

Neither is Vermont's tuition reimbursement policy or, for that matter, the Compelled Support Clause itself. The basic purpose of the Compelled Support Clause was to protect religious minorities from having to contribute to the propagation of religious views with which they disagreed.

(4) The Court stressed that the purpose of the Maine law was not to create a general system of private choice but rather to provide students from towns that had no secondary schools of their own to have access to an education "that is roughly equivalent to the education they would receive in public schools." There is no question, the Court declared, that Maine may require its public schools to provide a secular educational curriculum rather than a sectarian one. Thus it may require the same of schools applying for tuition reimbursement.

(5) The Court also stressed that Maine's law did not deny anyone of their rights to freely exercise their religion, since parents were free to send their children to religious schools if they wished. In support the Court cited Supreme Court decisions standing for the proposition that the freedom to exercise constitutional rights does not include the right to have government subsidize the exercise of those rights.

The First Circuit opinion in *Carson v. Makin* is thorough and involves a fairly sophisticated and nuanced treatment of the issues which I cannot get into adequately here, but the parallels between the Maine tuition reimbursement program and the Vermont program are many, so I think it is important to consider that ruling carefully in crafting Vermont's own response to current litigation and its longer term policy in this area. There is one crucial difference: Maine does not have a constitutional provision comparable to the Compelled Support Clause in the Vermont constitution so the case was argued and decided entirely on the basis of federal

constitutional law. The decision has been appealed to the U.S. Supreme Court but no decision has been made as to whether the Court will hear the appeal.

Thank you for your consideration. I will be happy to respond to questions.

Appendix A

The Compelled Support Clause: Historical Background and Original Understanding

> **That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and 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, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.**
>
> Article III of Chapter I of the Vermont Constitution

History: Con. 1777, Ch. 1, Art. 3. Con. 1786, Ch. 1, Art. 3. Con. 1793, Ch. 1, Art. 3rd. Art. Amend. 52 (1994).

Article 3, the "religious liberty" article in the Vermont Constitution, contains two substantive clauses: a Free Exercise Clause and a Compelled Support Clause. While these correspond roughly to the two religion clauses in the First Amendment to the U.S. Constitution, they are not necessarily coterminous in scope and coverage. Vermont Supreme Court decisions under the Free Exercise Clause in Article 3 have generally followed federal Free Exercise jurisprudence, but the Court has ruled that the Compelled Support Clause in Article 3 may provide greater protection against compelled tax payer support of religion than does the federal Establishment Clause.

Origins of Article III

The Vermont framers borrowed the basic model and language for this article from Article II of the Pennsylvania Constitution of 1776. In doing so, however, they made two significant changes: First, while the Pennsylvania version of this article guaranteed religious freedom to all who acknowledged "the being of a God," the Vermont version covered only those "who profess the protestant religion." This is one of the few instances where the Vermont framers adopted a more restrictive view of fundamental liberties than found in other early state constitutions. Second, the Vermont framers added a new clause at the end:

nevertheless, every sect or denomination of people ought to observe the Sabbath or the Lord's day, and keep up some sort of religious worship which to them shall seem most agreeable to the revealed will of God."

When the constitution was revised in 1786, the word "people" in this last clause was changed to "christians" reflecting what appears to have been the uncritical assumption at the time that relevant religious worship in Vermont was "christian" worship. As part of the same revision, the words in the body of the Article limiting protection only to those "who profess the protestant religion" were deleted. Consequently, the protections of religious freedom under this Article were now made available to adherents of all forms of religious belief, not just to Protestants. At the same time, Christian belief was singled out for special constitutional recognition. This last clause has never been amended. Thus the constitutional injunction to "every sect or denomination of christians" to "observe . . . the Lord's day" remains embodied in the state's current constitution.

Original Understanding of the Compelled Support Clause

Notwithstanding the constitutional prohibition of compelled support of religion, in 1783 the state legislature adopted a Ministerial Act to Support the Gospel under which two-thirds of the voters of a town were authorized to levy a tax on property to construct a meeting house and hire a minister. 13 *Laws of Vermont* 195. Citizens could avoid being taxed to support the church only by producing a certificate signed by the minister or other church official certifying that they had "different Sentiments in religious Duties" from those of the town's majority. Since judicial review had not yet been established in Vermont, the only way to challenge the constitutionality of the act was by bringing a complaint before the Council of Censors.

In 1799, the Council of Censors determined that an amended 1797 version of the Ministerial Act violated Article 3 and proposed that it be repealed. The Council's explanation of why rights of conscience should be protected against government interference deserves to be quoted at length:

> "The framers of the bill of rights, by this article, indisputably meant to convey the idea, that man necessarily possesses natural knowledge, or simple reason, which they have designated by the name of conscience. This they declare is inalienable, clearly conveying the idea, that one man cannot convey to another man his individual right of worshipping God according to the dictates of his conscience, any more than he can convey to him his right of breathing; for it is impossible in the nature of things, that one person can be profited intellectually, by a conveyance to him of another person's right of thinking; and if these premises are correct, it certainly follows, that the rights of conscience cannot be deputed; that religion is a concern personally and exclusively operative between the individual and his God; and that whoever attempts to control this sacred right, in any possible way, does it by usurpation and not by right."
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> "[C]onscience is made the only criterion by which a man can possibly be bound, in the execution of such designs; in opposition to which, the law we hereby propose to

have repealed, expressly binds the citizens of this state, indiscriminately, to erect and support places of public worship, and to maintain ministers, contrary to this clearly defined right, provided they are so unfortunate as to be in the minority of any town, who may act under the authority of this law, and who are not at the time of taking the vote, possessed of a certain prescribed certificate.

"[I]n no case have civil power any constitutional right to interfere in religious concerns, except to bind persons or communities to discharge their civil contracts, individually entered into, for the mutual support of religious social worship."

In response, in 1801 the state legislature amended the Ministerial Act to eliminate what they believed to be its offending provision. The amended legislation dropped the requirement that an objecting taxpayer produce a certificate from church authorities, instead providing for automatic exemption when the voter delivered to the town clerk a signed writing stating, "I do not agree in religious opinion with a majority of the inhabitants of this town." But in its next report in 1806, the Council of Censors concluded that the amended Act also violated Article 3 and should be repealed. The Council reiterated the view that support for religion was a matter of personal conscience for which man should be "accountable to none but his God." Requiring an objecting taxpayer to deliver a statement to the town clerk publically declaring his religious differences from the majority thus also ran counter to the protection of religious liberty embodied in Article 3:

"Man therefore being possessed of knowledge, or reason, which is generally called conscience, and which, by the assistance of scripture, he regards as his rule of faith and manners, considers himself, in the important concerns of religion, the only judge for himself, and on this principle, he believes that his right to worship God undisturbed, and without inconvenience, is an inalienable right. On this principle too, he believes that no man ought, 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 his own conscience.

" . . . Man being his own judge, agreeably to this article, feels himself accountable to none but his God: And as this right was given him by his maker . . . for which he only must be accountable, it follows that all restraint in one case, or compulsion in another, is contrary to the nature of the thing itself, and the above recited article."

In addition to interfering with the rights of conscience, the Report went on, imposition of this requirement promoted the view that certain religious views were more privileged, less encumbered, than others, which tended to excite animosity and ill-will among the members of the community.

In 1807, in response to this second constitutional condemnation by the Council of Censors, the legislature repealed the Ministerial Act and ended the practice of tax support for churches and ministers in Vermont.