Bringing Vermont's 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

Senate Education Committee
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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 Senate Education Committee today. I hope I can be helpful.

II. The Problem and Suggested Response

I will be happy to share with the Committee my thoughts about the court challenge to Vermont's dual enrollment program but I would like to focus on the court challenge to Vermont's tuition reimbursement program in these written comments.

The practical question, it seems to me, is what change is required, if any, to bring Vermont tuition reimbursement policy and practice into compliance with the U.S. Supreme Court's ruling in the *Espinoza* case[1] 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 Meanshi in that case on January 22nd. I am familiar with the "Best Practices" memorandum issued by the Agency of Education on January 15th and generally agree with the approach recommended there, with a couple of concerns about how the recommendations might work as a practical matter.

Consistent with those recommendations, and as a stop-gap measure, I suggest the school districts subject to the emergency injunction adopt and announce the following policy, if necessary at a special meeting called for that purpose:

> "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."[2]

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[1] 140 Sp. Ct. 2246 (2020)

[2] If the legal organizations representing the plaintiffs in the *AH v. French* case want to challenge this 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

The policy should apply to requests for tuition reimbursement from all participating independent schools without regard to religious affiliation or status.

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

It is in compliance with Judge Reiss's decision in *AH v. French* and 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. It is consistent with the Court's approval of the use by government of the certification mechanism in other cases involving provision of government aid to private religious schools, as in the *Agostini* case and *Mitchell v. Helms.*[3] As those cases demonstrate, it is a simple and practical and workable approach.

Most importantly for Vermont school districts, it is consistent with the Compelled Support Clause in Article III of Chapter I of the Vermont Constitution and the Vermont Supreme Court's interpretation of that Article in the *Chittenden* case.[4] It provides a "constitutionally sufficient" safeguard to ensure that Vermont taxpayer dollars will not be used to support religious instruction or worship or the propagation of religious views with which they disagree.

III. Use of the Certification Mechanism

The great advantage of the certification mechanism is that it avoids the need to get into any great detail about which expenditures might be eligible for tuition reimbursement and which might not be. I think that is a hornet's nest best avoided.

Moreover it is a familiar mechanism used by both the federal and state governments in the past with court approval to ensure that taxpayer supported funds are not used for purposes of religious instruction and worship. In *Mitchell v. Helms*,[5] 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 basis of a concurrence that found the program's "safeguards" against possible diversion of the government aid to support religious instruction were constitutionally sufficient. 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

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certification mechanism (given the stamp of approval by the Supreme Court in other contexts) so far in the present litigation.

[3] See discussion in Section III below.
[4] 738 A.2d 539 (Vt. 1999)
[5] 530 U.S. 793 (2000)

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."

IV. The Compelled Support Clause in Article III of Chapter I of the Vermont Constitution: Protecting the "Right of Conscience"

It is important to stress that the Compelled Support Clause in Article III of Chapter I of the Vermont Constitution is a very different provision from the Montana constitutional provision challenged in the *Espinoza* case. The Montana provision was a state replication of the Blaine Amendment adopted in the post-Civil-War period. The Blaine Amendment, and state versions of that amendment, had as their purpose discrimination against Catholics and rightly have been found to violate the most fundamental principles of religious diversity and freedom upon which this country was founded. In contrast, the Compelled Support Clause in the Vermont Constitution was adopted at a very different time and had a very different purpose. It formed a core provision in the original Vermont constitution and was intended to protect the "right of conscience," a right as important and fundamental as the right to free exercise of religion and with, if anything, more ancient lineage in the Western cultural tradition.

I set out in Appendix A immediately below the historical background of Article III and an account of the early application and original understanding of the Compelled Support Clause.

Thank you for your consideration.

Appendix A

Article III of Chapter I of the Vermont Constitution: 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.**
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> 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.

Historical Background

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.
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> "[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.
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> " . . . 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.