



INSTITUTE FOR JUSTICE

Testimony on Senate Bill 219
Senate Committee on Education
January 25, 2022

Chair Campion, Vice-Chair Hooker, and members of the Committee,

My name is Erica Smith, and I am a senior attorney at the Institute for Justice. Thank you for allowing me the opportunity to testify against S.219¹, which would impose new and unprecedented restrictions on schools participating in Vermont’s town tuitioning program. There are serious constitutional problems with the bill. If the bill were to pass, it would likely result in one or more lawsuits against the State of Vermont, which would almost certainly result in the courts declaring key aspects of the bill unconstitutional. IJ strongly recommends the Committee not vote for the bill.

About the Institute for Justice

The Institute for Justice, also known as “IJ,” is a national nonprofit law firm that protects constitutional rights. One of our areas of expertise is educational choice programs, and we are the leading legal experts on this issue. IJ represented the plaintiff families in the landmark educational choice case decided by the U.S. Supreme Court in 2020, *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (holding that the federal Free Exercise Clause prevents the government from excluding religious schools from publicly funded educational choice programs). IJ also represents the plaintiff families in *Carson v. Makin*, No. 20-1088—an ongoing case at the U.S. Supreme Court concerning the constitutionality of Maine’s religious restrictions in its town tuitioning program. The Supreme Court is expected to issue a decision in *Carson* this spring, and it is quite possible that the Court will declare the religious restrictions unconstitutional.

IJ also represents the plaintiff families in *Valente v. French*, No. 2:20-cv-00135 (D. Vt., filed Sept. 9, 2020), a pending federal civil rights lawsuit that challenges the exclusion of schools that provide religious instruction and worship from Vermont’s town tuitioning program. *Valente* is currently in the federal district court for Vermont, where the judge is awaiting the Supreme Court’s decision in *Carson* before moving forward with the case. This Committee should similarly await resolution of *Carson* before proceeding with consideration of S.219.

S.219 is Unconstitutional

There are two problems with S.219. First, the bill would prohibit parents’ use of tuition funds to provide religious education, including instruction and worship, for their children. These religious restrictions are very likely unconstitutional under the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution. As discussed below, similar religious restrictions are already the subject of ongoing lawsuits

¹ This testimony quotes from the working draft of this bill from January 18, 2022, but the previous version of this bill from January 7, 2022 is for all relevant purposes substantially similar.

in *Carson, Valente, and Valente's* companion case, *A.H. ex rel. Hester v. French*, No. 2:20-cv-151 (D. Vt., filed Sept. 28, 2020). In fact, in *French*, the Second Circuit issued an injunction last year prohibiting Vermont from denying tuitioning funds based on the parent's choice of religious school for her child. See *A.H. ex rel. Hester v. French*, 999 F.3d 98, 108 (2d Cir. 2021).

The second problem with the bill is that S.219 would apply all anti-discrimination provisions that apply to public schools to private schools participating in the program. As discussed below, this would have many unintended consequences and cause additional constitutional violations.

S.219's religious restrictions violate the federal Constitution.

The first problem with the bill is that it states that schools cannot participate in the program unless "none of the tuition for which payment is requested has been or will be used to support religious instruction or worship or the propagation of religious views." Whether the State can impose a religious restriction like this in its town tuition program is the central issue in the *Carson* case, argued before the U.S. Supreme Court in December 2021.

Carson concerns Maine's town tuitioning program, which is very similar to Vermont's program in giving publicly funded tuition assistance to families who live in towns without a public school, so that they may attend a private (or public) school of their choice. Maine had excluded certain schools from participating in the program because of the religious instruction or worship in which they engage. IJ filed suit against Maine on behalf of families who wished to attend such schools under the program but were not allowed to do so. IJ argued the program's restrictions violated the U.S. Constitution's Free Exercise, Establishment, and Equal Protection Clauses. As IJ argued, excluding schools that provide religious instruction and worship discriminates against religious schools and the families who wish to attend them. After all, the Supreme Court "ha[s] long recognized the rights of parents to direct 'the religious upbringing' of their children," and that "[m]any parents exercise that right by sending their children to religious schools." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). The government cannot force families to choose between receipt of a government benefit and their right to exercise their faith in this way.

While *Carson* was in the lower courts, the U.S. Supreme Court decided *Espinoza v. Montana Department of Revenue* and held that the Free Exercise Clause prohibits the government from excluding religious schools from a publicly funded educational choice program. But despite the Supreme Court's ruling in *Espinoza*, the First U.S. Circuit Court of Appeals upheld the religious restrictions at issue in *Carson*. *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020). According to the First Circuit, *Espinoza* only prevented discrimination based on the religious *status* of schools, while Maine's restrictions discriminated against the religious *use* of tuition funds—namely, obtaining an education that includes religious instruction. *Id.* at 40. The First Circuit held this discrimination based on "religious use" to be constitutional. Note that such religious use discrimination is exactly what S.219 proposes.

IJ appealed *Carson* to the U.S. Supreme Court. IJ argued that barring parents from choosing schools because of the religious things they *do* (*i.e.*, use) is just as unconstitutional as barring them because they *are* religious (*i.e.*, status). It should not matter if the discrimination is framed as being against religious status or against religious

use—both are unconstitutional.² The U.S. Supreme Court accepted the case and JJ argued before the Justices in December 2021. The Court is expected to issue a decision this spring.

The outcome is *Carson* will directly affect the constitutionality of the current religious exclusion in Vermont’s town tuitioning program, as well as the constitutionality of S.219. First, as a U.S. Supreme Court decision, *Carson* will be binding precedent on Vermont, including on the question of whether the State can interpret its own constitution to bar religious instruction in the tuitioning program. Second, *Carson* may decide that religious restrictions like those in S.219 are unconstitutional. And it is irrelevant that S.129 would allow religious schools to participate in Vermont’s program as long as those schools segregate or certify that a student’s tuitioning funds will be used for non-religious instruction only. For many religious schools, religion is inextricably entwined in everything they do. Separating out religious and nonreligious “uses” of a student’s tuition is impossible for them and requiring them to do it is unconstitutional.

Moreover, Vermont’s town tuitioning program is already the subject of two lawsuits. *Valente v. French*, No. 2:20-cv-00135 (D. Vt., filed Sept. 9, 2020); *A.H. v. French*, No. 2:20-cv-151 (D. Vt., filed Sept. 28, 2020). That is because, like Maine, Vermont has a policy and practice of excluding schools that provide religious worship and instruction from its town tuitioning program. Vermont bases that policy on the Vermont Supreme Court decision in *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999)—decided well before *Espinoza* and other recent religious liberty cases. Judge Christina Reiss has stayed proceedings in *Valente* pending the outcome in *Carson*, so that she can give due consideration to the Supreme Court’s holding, which will be the law of the land. This Committee should exercise the same caution that Judge Reiss is exercising.

Finally, the Second U.S. Circuit Court of Appeals did not hesitate to impose an injunction in *A.H.* preventing Vermont’s town tuitioning program from denying tuition to one of the student plaintiffs in the program based on her chosen school’s “religious affiliation or activities.” *A.H. v. French*, 999 F.3d 98, 108 (2d Cir. 2021) (emphasis added). As the Second Circuit held, this injunction was necessary because of the program’s “decades-long policy of unconstitutional religious discrimination.” *Id.*

Thus, S.219 should not impose religious restrictions on the town tuitioning program—whether by codifying Vermont’s existing discriminatory policy or otherwise. Moreover, even if *Carson*, *Valente*, and *A.H.* uphold religious restrictions under the Free Exercise, Establishment, and Equal Protection Clauses, S.219’s religious restrictions would still violate the Free Speech Clause. The U.S. Supreme Court has repeatedly held that the government cannot discriminate based on the subject matter, or “content,” of speech, nor on the viewpoint that a speaker expresses on a particular subject matter. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015). Yet that is exactly what S.219 would do. The bill would allow private schools to use a student’s tuition funds “to provide an overview of religious history and teachings,” but it would prohibit private schools from using a student’s tuition funds to provide “religious instruction or worship or the propagation of any one religion or theology over others.” Allowing participating schools

² The exact question presented in the case is “Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or ‘sectarian,’ instruction?”

to talk about religion in some contexts or from some viewpoints, but not others, is an impermissible content- and viewpoint-based restriction on the speech of private schools.

Therefore, S.219's religious restrictions violate several clauses of the First and Fourteenth Amendments and should be rejected. Enactment of the bill will almost certainly draw additional litigation beyond that in which the State is already embroiled, and would ultimately put Vermont taxpayers on the hook not only for the costs the State incurs in defending against that litigation, but also the attorneys' fees of the litigants who bring the litigation. *See* 42 U.S.C. § 1988(b) (providing for attorneys' fees to prevailing litigants in federal constitutional lawsuits). At the very least, we ask that the Committee wait until the United States Supreme Court decides *Carson* before considering S.219.

S.219's anti-discrimination provision poses severe policy problems and constitutional problems.

The second problem with the bill is that it requires private schools participating in the tuitioning program to "comply with all federal and State antidiscrimination laws applicable to public schools." This provision has several serious issues, both in terms of policy and constitutionality. If this provision is enacted, very few—if any—private schools would participate in the program. That would be a devastating result for Vermont students, as well as Vermont's public schools, which could be suddenly forced to educate thousands more students than they currently expect to educate.

It appears that the Committee has not thought through the sweeping and radical implications of imposing, on participating independent schools, "all federal and State antidiscrimination laws applicable to public schools." For example:

- Are all-girl schools and all-boy schools prohibited from participating in the program?
- Would the Greenwood School, an approved, non-religious independent school in Putney that focuses on educating students with dyslexia, dysgraphia, dyscalculia, and similar conditions, be excluded from the tuitioning program because it is all-male, which Vermont's public schools may not be?
- Would participating private schools have to provide accommodations to children with disabilities even if providing the services would fundamentally alter the school's program or require significant difficulty or expense? If so, where does the funding to provide these accommodations come from?
- Would a school that serves hearing impaired children be required to also serve children who are blind, when the school does not currently have those services? More broadly, would all private schools be required to take students with any kind of special need or interest even if the school does not currently have the ability to serve those needs?

These are critical questions that must be considered before passing this bill.

Beyond these questions, there are serious constitutional problems with prohibiting religious schools from considering the religious affiliation of employees in hiring or seeking to serve families of a particular faith. Other commentators may point out the possible implications of provisions concerning sexual orientation and gender identity. Certainly, the legislature should examine whether those provisions are constitutional in

this situation. But, as demonstrated above, this proposed law has many other serious constitutional problems that will gut the tuitioning program long before anyone has to worry about provisions concerning sexual orientation and gender identity.

Independent schools are called independent schools for a reason: they are independent—not public. Agreeing to educate students who receive tuitioning funds does not change this fact. The tuitioning program, after all, exists for the benefit of students—not schools—and not a penny flows to any independent school but for the private and independent choice of a student's parents. In order to avoid the unintended consequences that will harm Vermont schoolchildren, as well as the serious constitutional problems that will embroil Vermont in costly litigation for the foreseeable future, this Committee should decline to proceed with S.219.