

Outline of Oral Testimony Before Senate Education Committee on Constitutional Aspects of S.219

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Ten points:

I. General: Applicable to both non-discrimination and religious indoctrination components

1. No need to wait until Court hands down decision in *Carson v. Makim*

Anticipate position of justices from questions in oral argument
in *Carson v. Makim*

2. Problems with 16 V.S.A. §166

Clear process for certifying “approved” independent schools
Not a clear process for certifying “eligibility” for public tuition
support

Recommend: review and revision of 16 V.S.A. §166

3. Important to structure as tuition reimbursement to participating schools not as tuition
reimbursement to parents –

“product of private individual choice” problem

16 V.S.A. §166

challengers seek to characterize as “school choice” legislation

II. Making tuition reimbursement dependent upon certification of compliance with state and
federal anti-discrimination laws.

4. Not an issue in *Carson v. Makim*

See Appendix A: excerpt from oral argument (Gorsuch-Bindas)

5. Complication posed by Guadalupe case

Independent religious schools cannot be compelled to comply
with state and federal anti-discrimination laws in hiring and
retaining employees (“ministerial exemption”)

But does that mean state has to subsidize such
schools? Competing arguments. Alito’s position: state refusal
provide tuition support creates economic pressure tantamount
to coercion

6. Complication posed by *Fulton v. City of Philadelphia*

“No exception” requirement – if there are exceptions Court will apply strict scrutiny

But see concurring opinion by Justices Barrett and Breyer

III. Making tuition reimbursement dependent on certification that tuition requested will not be used for purposes of religious worship or indoctrination

7. Questions posed by Justices in the Maine case (*Carson v. Makim*) provide clear indication of the headwinds an attorney seeking to defend Vermont’s provision will encounter

See Appendix B: Questions posed by C.J. Roberts and Justices Alito and Gorsuch

Possible distinction: Maine did not have a constitutional provision like Article 3 of Chapter I of the Vermont Constitution protecting a fundamental right of conscience.

Recommend: sub-group be created to comb through the questions raised by the justices in the Maine case to anticipate how they would apply to the proposed Vermont approach

8. Problems with inviting “calibrated” tuition reimbursement requests

Serious “entanglement” problems: violation of Establishment Clause

See Appendix B: Questions posed by justices in Maine case about difficulty of separating the religious and non-religious components

See Appendix C: Secretary Holcombe’s refusal to try to separate out religious and non-religious elements in calculating how much tuition should be reimbursed.

Not an “adequate safeguard” within meaning of the Chittenden Case

9. Make the “eligibility for publicly funded support” determination a front-line responsibility of the Board of Education with a process similar to that for determining “approval” of independent schools

Relieve local school districts from burden of making this determination

Local school district decisions likely to be all over the map

At least, uniform application of standards

10. Simplify the “eligibility” standard to ensure uniform application (two-requirements):

- (1) Require schools submitting requests for tuition reimbursement to submit the same tuition bill that they submit to parents who are paying tuition and
- (2) Provide tuition reimbursement only to those schools who certify that none of the requested tuition has been or will be used to support religious worship or indoctrination

IV. Long-term implications: two final observations:

- (1) If Vermont's tuition reimbursement law is characterized as a "school choice" program, and if plaintiff's succeed in persuading the Court to strike down the program as it applies to those communities that have no public schools of their own, the next step will be a lawsuit brought by plaintiffs invoking the Vermont Supreme Court's decision in the *Brigham* case arguing that parents of children in other districts are being denied "substantially equal educational opportunity" to have their children educated in religious schools at taxpayer expense.
- (2) If the Court were to so rule, Vermont has the option under *Espinoza*, and arguably the responsibility under Article 3 of Chapter I of the Vermont constitution, of limiting tuition reimbursement payments to public schools in other school districts, eliminating any participation by independent schools.

Appendix A

Excerpt from transcript of oral argument in *Carson v. Makim*

<https://www.oyez.org/cases/2021/20-1088>

Neil Gorsuch

Yeah, I -- I just want to follow up on that.

I just want to be clear in my mind that we're not -- we're not being called upon today to interpret Maine's anti-discrimination laws, and we don't need to do that to decide this case?

Michael Bindas

Not at all, Your Honor. Maine has never said these schools will be excluded.

Appendix B

Excerpt from transcript of oral argument in *Carson v. Makim*

<https://www.oyez.org/cases/2021/20-1088>

John G. Roberts, Jr.

Let's suppose you have two schools.

School A is run by Religion A, and -- and that religion has a doctrine that they should provide service to their -- their neighbors.

So they're running -- set up and running a school, but there's nothing in their -- in their doctrine about propagating the faith or whatever, so it does look just like a public school, but it's owned by religion. Religion B also has a school, but its doctrine requires adherence to educate children in the faith, and the -- the school is infused in every subject with their view of the faith. Now would the first school get the funds?

Christopher C. Taub (Attorney for State of Maine)

Yes.

John G. Roberts, Jr.

Okay.

Would the second school?

Christopher C. Taub

No.

John G. Roberts, Jr.

And that's because of the difference between the two religions, right?

Christopher C. Taub

That's because they are -- their -- their program is specifically instilling and promoting --

John G. Roberts, Jr.

Right.

Christopher C. Taub

-- religion in students, and --

John G. Roberts, Jr.

And the other religion does not?

Christopher C. Taub

That -- that is correct.

John G. Roberts, Jr.

So you're discriminating among religions based on their belief, right?

Christopher C. Taub

No, I would not say that. Religions can have whatever belief they want, but if they want to take part in Maine's tuition program, the education service they have to provide has to be the service that Maine is purchasing.

John G. Roberts, Jr.

Well, and one religion says that's what they do with education, and the other religion says, no, we use it to propagate the faith. So it is the beliefs of the two religions that determines whether or not their schools are going to get the funds or not. And -- and we have said that that is the most basic violation of the -- the First Amendment religion clauses, for the government to draw distinctions between religions based on their doctrine.

Christopher C. Taub

Again, Your Honor, we're not -- we're not drawing those distinctions based on doctrine.

We are drawing those distinctions based on -- on what the school is going to promote. And let me just give you a hypothetical.

If -- if -- if there were a school that was -- that was -- that was run by an organization that felt it was critical to have part of the program be to inculcate religious beliefs, if -- if that school otherwise provided a public education, and let's say it had chapel services and a

class that was intended to instill religion, if -- if those classes were optional, it's likely that that state -- that that school would -- would be eligible for the Maine tuition program. What the state is not going to provide public funding to is a school that is going to require students to take part in programs that are intended to instill religion.

* * * *

Samuel A. Alito, Jr.

Well, suppose that a -- a school is affiliated with a religious group and they say, we do infuse our religious beliefs into all aspects of the community, but our salient -- our salient religious beliefs are that all people are created equal and that nobody should be treated -- should be subjected to any form of invidious discrimination and that everybody is worthy of respect and should be treated with dignity and that everybody has an obligation to make contributions to the community and engage in charitable work, those are our religious beliefs and we don't -- we don't really have any dogma, but these are principles that we think our students should keep in mind, consistent with the religious outlook of our community. Would that school be disqualified?

Christopher C. Taub

So, I mean, that would be very close to a public school.

Public schools often have a set of values that they want to instill: public service, be kind to others, be generous. I think what -- what -- what the defining feature or what -- or -- or what would make the difference is -- is whether children are being taught that your religion demands that you do these things, that -- that your religion demands --

Samuel A. Alito, Jr.

Well, then you really are discriminating on the basis of religious belief.

What I described is, I think, pretty close to Unitarian Universalism, isn't it? And that is a -- that is a religious community. So that would be okay.

That religious community is okay.

They can have a school that inculcates students with their beliefs because those are okay religious beliefs, but other religious beliefs, no.

Isn't that -- is that what Maine is doing?

Christopher C. Taub

Well, what I'm saying, Your Honor, is that -- and -- and, again, this is what I said in response to the Chief Justice's questions -- is that -- is that we have two schools here at issue.

There are other schools that could come in the future that are going to pose thornier questions, and, again, those might be challenges that could be brought at that point. So, you know, I can't sit here and -- and tell you whether or not the Department of Education would approve a Unitarian school.

We would just have to know more information about what their curriculum is and -- and how they're teaching it.

It would be a process where they --

Samuel A. Alito, Jr.

Well, unless you can say that you would treat a Unitarian school the same as a Christian school or an Orthodox Jewish school or a Catholic school, then I think you've got a problem of discrimination among religious groups --

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Neil Gorsuch

Yeah, just to follow up on that.

So the Cardigan school had a chapel in the middle of campus, and it was allowed to participate.

Christopher C. Taub

Yes.

Neil Gorsuch

But the Kent school, which was the second one you mentioned, though you didn't identify it by name, an Episcopal school, said it's not owned or affiliated with the church, but it was not allowed to participate, right?

Christopher C. Taub

Well, what we told the school is that, based on our review, because you say that your life centers around your chapel and be -- because --

Neil Gorsuch

Right.

It was not allowed to participate, right

....

So somebody in Maine, in Bangor, has to sit down and decide Cardigan good/Kent bad, right?

Appendix C

In the *Good Shepherd Evangelical v. Vermont Agency of Education* case (Rutland Superior Court, Civil Division, Docket No. 50-3-16), Secretary of Education Rebecca Holbrook was asked whether a particular education program that involved mixed elements of religious indoctrination and non-religious instruction should be eligible for publicly funded tuition support. Secretary Holcombe refused to get entangled in trying to sort out the religious and non-religious elements in words that should give us pause:

“The General Assembly has not provided any direction, since the Chittenden case Was decided, on how a church-affiliated school like [GSSL] can segregate receipt of public funds in such a way to comply with the Court’s decision. There is no defined system by which a sectarian school can segregate public funds it might receive and apply them to non-sectarian purposes.

“Frankly, I do not know how the legislature might create such a system. Any effort along those lines would require state regulators {ed, or a local school district) to examine the financial records of a sectarian school to see how it deposited and spent its money. I do not believe that type of church-state entanglement would serve the interests of either the State or your client. IN any case, since there has been no legislative action (or clarifying judicial precedent) since the Chittenden case was decided, we are left to speculate, without any ability to ensure compliance with Chapter I, Article 3 of the Vermont Constitution.”

Now if the Secretary of Education felt that no workable system had been, or could be, established to segregate the sectarian and non-sectarian aspects of an independent school’s program, how much more difficult is it going to be for (1) the independent schools themselves (2) local school districts charged with reviewing requests for publicly funded tuition support and (3) courts reviewing decisions by local school districts or by the Secretary of Education. Under almost any imaginable scenario, making those decisions will lead to impermissible entanglement between state and church in violation of the Establishment Clause.

Here is a simple example: Saint Peter’s Academy, a fully approved independent school, claims exemption from compliance with state and federal anti-discrimination laws based on the ministerial exemption, and therefore refuses to hire a teacher involved in a same-sex relationship. Under the Guadalupe decision, virtually all the employees of the Academy would be covered by the same exemption. St. Peter’s in most respects has a pretty standard educational program that meets all the

requirements necessary to qualify as an “approved” independent school under Vermont law. St. Peters submits a request for tuition reimbursement for its full educational program, discounting 5% for one special class that is devoted particularly to religious indoctrination and prayer. Yet every member of the faculty is hired with the view that they will participate on an on-going basis in furthering the religious mission of the school. I don’t know how a local school district is supposed to decide under those circumstances if and how much publicly funded tuition support to grant. But I can tell you it is likely that local school districts will end up coming down all over the map in making those decisions.