Possible Constitutional Challenges to S.219 Barring Publicly Supported Tuition Reimbursement to Independent [Private] Schools That Fail to Certify (1) that the School Requesting Reimbursement Complies with State and Federal Anti-Discrimination Law and (2) the Tuition Support Requested will not be Used for Purposes of Religious Worship or Indoctrination.

Testimony of Peter R. Teachout,
Professor of Law,
Vermont Law School,
before the Senate Education Committee, January 26, 2022

I. Introduction

I listened to a recording of the testimony before the Senate Education Committee this afternoon, January 25, 2022, by Professor Derek Black, a nationally recognized expert on education law, and by Sue Ceglowski, representing the VSAB and associated groups. I thought Professor Black did a helpful job of laying out the basic constitutional background which provides a framework for assessing the constitutionality of the provisions in S.219, although I would like to elaborate on some of the points he made. I am asking that a copy of this testimony be provided to Professor Black since he may want to disagree with or add qualifications to the views expressed here.

I respect the position taken by Ms. Ceglowski on behalf of the organizations she represents, which basically was to urge the Committee to postpone further action until the Supreme Court hands down a decision the *Makin v. Carson* (the Maine tuition support) case sometime in late spring or early summer, but I disagree with that position. I think the legislature has a responsibility to act in this session.

Let me begin by discussing the provisions in S.219 barring publicly funded tuition support to independent schools that violate state and federal anti-discrimination laws. Then I will turn to the provisions prohibiting publicly funded tuition support to otherwise "approved" independent schools that fail to certify that the public funds will not be used to support religious worship or religious indoctrination. I should add at the outset that this memo was knocked out between dinner this evening and the Australian Open so it may suffer in some respects as a consequence.

II. The Provisions in S.219 Barring Publicly Funded Tuition Support to Independent Schools that Violate State and Federal Anti-Discrimination Laws

There are two issues. First, should the legislature wait to act on this until the Supreme Court hands down a decision in the Carson v. Makin case sometime later this spring or early summer? Second, what possible problems might such a provision encounter if challenged in court?

(1) The answer to the first question is clear in one respect. The question of whether a school can be barred from receiving public tuition support for failing to certify that it complies with state and federal anti-discrimination laws was not an issue in the Maine case. So it is doubtful we will get any clarification on that question when the Supreme Court hands down a decision in that case later this spring. But, more fundamentally, we already have available significant evidence of how that question is likely to be decided from two sources: (1) the Court's decision in the

Fulton v. City of Philadelphia case (the catholic adoption agency case) including the concurring opinions – especially the concurring opinion by Justices Breyer and Barrett - and (2) the comments made by the various justices in oral argument in the *Carson v. Makin* case. By reference to those existing sources of evidence, we can at least structure applicable Vermont law so it is least vulnerable to constitutional challenge. I think it would be helpful to have representatives from the Legislative Council and others with an interest in this question convene to examine these cases and comments by the justices in oral argument to see what, if anything, should be done to minimize the chances of a successful constitutional challenge.

(2) With respect to the second question – can Vermont make compliance with state and federal anti-discrimination laws a condition of independent school eligibility for publicly funded tuition support? – I am inclined to agree with Professor Black's assessment that It ought to be able to do so. However, to ensure that result, the state will need to do two things: (1) distinguish the Vermont policy from the Philadelphia anti-discrimination policy that was struck down in the *Fulton* case[1] and (2) at least ask what the result would be if the somewhat different – multi-factored -standard of review embraced by Justices Breyer and Barrett in concurrence were to be adopted.

Although Professor Black was quick to dismiss it, I think the *Guadalupe* case, a question which Senator Chittenden raised, has some bearing here. In that case, the Court held that virtually all employees of a religious institution were exempt from application of state and federal anti-discrimination laws because of a so-called "ministerial exemption." What did that mean? It meant that states and federal government cannot require religious institutions to comply with anti-discrimination laws in hiring and removing employees. Shorthand: as a matter of law, religious schools can discriminate in making employment decisions against members of the LGBTQ community.

Now, the easy response to that is to say it is one thing for a state to tell a religious institution it has to comply with anti-discrimination laws (which it can't do), but that is different from a state saying, if you do not comply, you will be barred from publicly funded support. I happen to agree with that distinction. However, in oral argument in the Maine case, Justice Alito at one point suggested that to bar a religious institution from publicly funded support when it invokes the "ministerial exemption" is tantamount to forcing the religious institution to comply with anti-discrimination laws – itself, then, a violation of the ministerial exemption. So Vermont needs to be aware that at least one justice, and more likely at least three or four others, may take the same position.

[1] Two possible bases for distinction: (1) Since there were "exceptions" to the Philadelphia law, the Court applied a "strict scrutiny" standard of review. Could Vermont frame its law so it was "generally applicable" with no exceptions? (2) In the *Fulton* case, the Court made a big deal out of the fact that; if the Philadelphia anti-discrimination policy were upheld, the Catholic adoption agency, which was dependent upon public funds, would have to go out of business. That would not necessarily be the case with independent religious schools which have long gotten by without public funding.

III. The Provision in S.219 Barring Publicly Funded Tuition Support from Independent Schools that Refuse or Fail to Certify that the Public Funds will not be Used to Support Religious Worship and Indoctrination.

I think Professor Black did a nice job of laying out the basic distinction made by the Court in the *Espinosa* case between discriminating on the basis of religious status (forbidden) and discriminating on the basis of religious use (left open by the Court). This is a familiar distinction to the Committee and indeed S.219 is specifically tailored to address that distinction and does a nice job of making clear that the Vermont law is carefully tailored to comply with both *Espinoza* and the Vermont Supreme Court decision in the *Chittenden* case.

I have however two reservations:

(1) First, although I agree with Professor Black as to <u>what should be the case</u> – Vermont ought to be allowed to contract with only those schools that comply with the Vermont constitutional prohibition (in Article 3 of Chapter I) against requiring the taxpayers of the state to subsidize the promulgation of religious views with which they disagree – I am not as sanguine as Professor Black is that the current Supreme Court will allow a state to do so. Again, if you study the oral argument and the questions pressed by the justices in the Maine case, which had tuition support program very similar to Vermont's, you will find the State of Maine being pressed again and again to justify denying public support to some "religious" independent schools while not denying it to others depending on how much and what kind of religion was involved in the daily educational program. So here again, I think that, in crafting its own approach, Vermont would be well advised to pay special attention to the questions raised by several of the justices about the Maine program.

    Professor Black, who submitted a brief in the Maine case, seems to believe that the distinction between "status" and "use" is still a viable one. I have to say I am not so sure after listening to the oral argument in that case. Again and again, the question posed by the conservative justices on the Court was: "Well, does that not mean that only religious schools will be adversely affected?" Or, "Do you mean to say Maine discriminates between one independent school and another based upon how much and what kind of religious indoctrination is involved in the program?"

(2) My major quarrel with S.219 in this respect however involves something else. As I indicated in the rough comments I submitted to the Chair of the Committee last night, I have serious questions about the "calibrated" approach to tuition reimbursement adopted by S.219. By calibrated, I mean the invitation S.219 offers to independent schools to separate out the religious aspects of the program and only request tuition reimbursement for the non-religious components. I just think that will be a can of worms. 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:

(3)

> "The General Assembly has not provided any direction, since the Chittenden case Was decided, on how a church-affiliated school like [GSLL] 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.

That is why I strongly recommend two things: (1) that front-line responsibility for making the "eligibility" decision be removed from local school districts and assigned to the State Board of Education (at least that way you are more likely to get uniform decisions) and (2), in order to eliminate the problem that Secretary Holcombe encountered in trying to sift out the sectarian from the non-sectarian elements of a school's program, require that schools requesting tuition support submit the same tuition

bill that the school submits to parents of the students enrolled there with a certification to the effect that none of the funds requested have been, are being, or will be, used to support religious worship or religious indoctrination. If a school cannot so certify, then the school should not be deemed eligible for taxpayer support.

IV. A Final Consideration: Maybe Some Hard Choices Will Have to be Made

A key difference between the Maine program challenged in the Carson v. Makin case and the Vermont tuition support program is that, unlike Maine, Vermont has a constitutional provision barring publicly funded support to independent schools unless adequate safeguards are in place to ensure the public funds will not be used (directly or through leakage) to support religious worship or indoctrination. That may have profound significance.

If the Supreme Court should rule that, if Vermont provides tuition reimbursement to private schools it cannot discriminate directly (through status) or indirectly (through a prohibition on religious use) against religious independent schools, then, in order to comply with both the federal court mandate and the Vermont constitution, the State of Vermont will have to cease providing tuition reimbursement to any independent schools, limiting the option of parents with children in a district without a public school of its own the option of having their children educated in a public school in another district. It seems like a draconian option, but it is the only option that I can think of that would allow the state to remain in compliance with both the federal court ruling and Article 3 of Chapter I of the Vermont constitution.

The only other option I can think of is to develop some other limiting non-religious criteria for identifying those schools eligible for publicly funded support, but if such criteria have the consequence of denying only religious public schools from participation, I think the current Supreme Court will look askance at that.

There are other issues that need to be discussed – for example, the importance of making clear that the Vermont program is not a school choice but a tuition reimbursement program, and of making clear that the purpose of the Vermont program is to provide children is districts without a public school of their own the opportunity to obtain the equivalent of a public school education in other public schools or qualifying independent schools – but I have already delivered a full load of hay and if tried to add more bales the whole load might tumble off. So I will stop here. Thanks for the opportunity to testify.