**To: Vermont House Committee on Education**
**From: Harrison Stark, Staff Attorney, ACLU of Vermont**
**Re: S.219**
**Date: 4/5/2022**

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Thank you for the opportunity to submit testimony on S.219 as the Committee deliberates on how to move forward with this important issue. The American Civil Liberties Union of Vermont has a critical interest in ensuring that government services, including public education, remain both secular and equally accessible to all Vermonters regardless of disability, identity, or status, and we share the General Assembly's commitment to ensuring that independent schools receiving public tuition operate consistent with the state's deepest values. To that end, we strongly support S.219's dual purposes of guaranteeing that every child can attend school free from discrimination and protecting Vermonters' constitutional freedom not to subsidize religious instruction. We further approve of S.219's overall approach, which would require independent schools to commit to certain policies or guarantees as a condition of receiving public money.

But—precisely because we are committed to crafting a solution that will fully protect Vermont's values in the long-term—**we strongly urge the Committee to *wait* to enact legislation like S.219 until next year**. Implementing S.219 before the U.S. Supreme Court's decision in *Carson v. Makin*, the pending challenge to Maine's student-aid program, not only risks possible judicial invalidation of S.219, but could also jeopardize this body's *future* ability to craft a comprehensive—and constitutionally sound—solution. Other aspects of the bill, moreover, raise constitutional concerns that at a minimum require further analysis from the Committee before enactment. We therefore strongly advise the Committee to table any legislation until the 2022-23 session, at which point the legal landscape—and the roadmap to enacting a durable lawful solution—will be substantially clearer.

## I. The Supreme Court Will Soon Issue Critical Guidance on S.219's Central Provision

Any statute the General Assembly enacts in this arena will likely be subject to litigation. The goal should be crafting a legislative solution that stands the greatest chance of surviving any legal challenge.

The validity of S.219's prohibition on using public funds for religious instruction, however, rests almost entirely on how one reads a single Supreme Court case: *Locke v. Davey*, 540 U.S. 712 (2004). Although it is difficult to predict how a lower court might rule on S.219 today, the U.S. Supreme Court is currently authoring an opinion that must confront *Locke v. Davey*—and should clarify how and when a state may place conditions on the use of public dollars for religious instruction.

Legislative counsel and the bill's sponsor have already testified on the legal landscape undergirding S.219. The Committee is therefore already aware of

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*Chittenden Town School District v. Department of Education*, 169 Vt. 310 (1999), where the Vermont Supreme Court held that Chapter I, Article 3 of the Vermont Constitution—the so-called "compelled support clause"—required districts tuitioning students to religious schools to ensure there are "adequate safeguards against the use of such funds for religious worship," *id.* at 312. The Committee is also aware of the recent U.S. Supreme Court case *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), where the Court held that "once a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. Seeking to harmonize these directives, S.219 envisions a use-based restriction on public funding, which would require independent schools (including religious schools) to agree—as a condition of funding approval—that no public funds will subsidize religious worship or indoctrination and to confirm that Vermont's anti-discrimination statutes apply to the school's operations, in full.

The rationale behind S.219 is that after *Espinoza*, Vermont cannot differentiate between schools based on religious *status*, but that a prohibition on religious *use* will likely pass constitutional muster. **But the validity of a use-based exception like S.219's is an open question—even under current law.** The validity of a use-based restriction rests almost entirely on how one reads a single Supreme Court case: *Locke v. Davey*. There, the Supreme Court upheld Washington State's policy of excluding devotional degrees from a college-scholarship program.

But—particularly in the wake of the U.S. Supreme Court's recent decisions expanding the boundaries of the Free Exercise Clause—jurists disagree about what precisely *Locke v. Davey* stands for. Some, for example, read *Locke* to broadly authorize use-based restrictions like those contained in S.219. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2283 (Breyer, J., dissenting) (emphasizing that *Locke* approved of Washington's choice "not to fund a distinct category of instruction" that was "essentially religious") (quoting *Locke*); *Carson ex rel. O.C. v. Makin*, 979 F.3d 21, 44 (1st Cir. 2020) ("[W]e do not read *Espinoza* to hold that a use-based restriction on school aid necessarily violates the Free Exercise Clause unless it mimics the restriction in *Locke*.").

Others, however, read *Locke* to be a narrow—and mostly unique—exception to a general rule that use-based restrictions like S.219's are unconstitutional. *See, e.g.*, *In re A.H.*, 999 F.3d 98, 112 (2d Cir. 2021) (Menashi, J., concurring) ("In order for a use-based exclusion to receive the less exacting scrutiny the Supreme Court applied in *Locke*, that exclusion must advance 'a historic and substantial state interest' or 'tradition.' And *Espinoza* clarifies that, while there is 'a "historic and substantial" state interest in not funding the training of clergy,' there is no comparable interest or tradition of states declining to aid religious education more broadly understood.") (some internal citations and quotation marks omitted). Although we believe the better reading of *Locke* is that use-based restrictions on religious instruction like S.219's *should* pass constitutional muster, we are far from confident that the current U.S. Supreme

Court would agree. The legality of S.219's central provision therefore remains an open question.

As the Committee knows, the U.S. Supreme Court is currently authoring its opinion in *Carson v. Makin*, a challenge to Maine's student-aid program. Several witnesses have testified that the Supreme Court may use that case to extinguish the use/status distinction entirely, which would imperil both S.219 and *Chittenden Town*'s "adequate safeguards" requirement more broadly. That is of course correct—but more importantly, *however* the Court rules, any merits decision will have to confront *Locke v. Davey* and will clarify the scope of that decision in explaining how that case applies to Maine's program. At a minimum, that decision should provide critical guidance on whether *Locke* authorized a narrow exception, specific to the facts of that case, or whether *Locke* allows for other use-based restrictions, like those contained in S.219. Because *Locke*'s scope is dispositive for S.219, the Committee should wait until its contours are made clearer by *Carson v. Makin* later this summer.

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## II. Any Invalidation of S.219 Could Jeopardize Future Legislative Efforts to Comply with the Vermont and Federal Constitutions

One possible solution is to simply press ahead and enact the bill despite the uncertainty surrounding S.219's validity. The Supreme Court may ultimately rule that S.219 is unconstitutional, proponents may say, but that is a risk that the legislature should take. After all, the argument goes, funds are currently going to religious schools without adequate safeguards. Better for the legislature to enact a solution *now* even if that solution is ultimately declared unlawful later because, at worst, the legislature arguably begins back where it started.

This Committee should reject that approach. **If S.219 is struck down, it could risk this body's future ability to craft a meaningful solution that balances Vermont's Constitution and the federal Free Exercise Clause.**

As a threshold matter, even if the current situation is untenable, this Committee should not lightly enact a statute that may well violate the Free Exercise rights of Vermonters. To be sure, no legislature should stay its hand simply because an activist Supreme Court *may*—in the future—change the law and render previously valid policies unconstitutional. But as described above, S.219 faces constitutional uncertainty under *current* law. Although the Supreme Court may ultimately change the constitutional landscape even further in *Carson*, it is the scope of *Locke*—a precedent from 2004—that raises questions about S.219's use-based restriction. A choice to delay consideration until after *Carson* is therefore not a decision to sit back and wait for the Court to change the law; it is instead to pause for necessary guidance about what the *current* constitutional landscape requires.

Waiting to legislate will also preserve maximum flexibility to enact a future solution. We know that the motivation behind S.219 is to guarantee that every child can attend school free from discrimination and to protect Vermonters'

constitutional freedom not to subsidize religious propagation, but are concerned a future court might misconstrue any legislative mis-steps as "hostil[e] to a religion or religious viewpoint." *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Rather than risk that scenario, it is far better for the Committee to wait the short period until it has *Carson*'s guidance in hand—**and get any bill right at the first attempt.**

Retaining full flexibility is essential because, regardless of how *Carson* comes out, there likely remains a valid legislative path that properly balances Vermonters' rights under the federal *and* state constitutions. As the Vermont Attorney General argued in an amicus brief in *Carson*, Vermont's compelled-support clause has a unique and powerful history that predates the federal Constitution.[1] Even if *Locke* turns out to be substantially narrower than many currently think, or even if the Supreme Court embraces the more radical argument that *all* use-based restrictions require exacting scrutiny, Vermont's unique history and traditions may permit—even require—it to honor federal and state constitutional rights in ways not available in other states. But to properly walk that tightrope, any legislation will need to meticulously follow *Carson*'s roadmap and rely on more than simply the Vermont Supreme Court's *Chittenden Town* decision. And those efforts stand the best chance of succeeding if they can rely on Vermont's longstanding constitutional interest in freedom of conscience—untainted by any judicial ruling declaring Vermont as hostile to religion.

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## III. S.219's Employee-based Anti-Discrimination Provisions Raise Additional Constitutional Concerns, Counseling Further Research and Deliberation

Understandably, the bulk of legislative and public attention has focused on the complexity and uncertainty surrounding funding religious instruction. However, S.219's employee-based anti-discrimination provisions raise additional constitutional questions that merit further research, testimony, and deliberation from the Committee. The serious questions surrounding these provisions provide additional reasons for the Committee to decline to enact a statute like S.219 immediately.

As the Committee knows, S.219's anti-discrimination provisions require schools to agree that they will abide by the substantive terms of Vermont's anti-discrimination statutes, including Vermont's Public Accommodations and Fair Employment Practices Acts, even if those laws would not otherwise apply. The bill also contains a proviso stating that "[n]otwithstanding 21 V.S.A. § 495(e) (Unlawful Employment Practice), which permits religious organizations, under limited circumstances, to discriminate on the basis of sexual orientation or gender identity," any school that wishes to participate in the program "shall not

[1] *Available at* https://www.supremecourt.gov/DocketPDF/20/20-1088/198024/20211028145105538_VT%20-%20Amicus%20Brief.pdf. In particular, *see* Part III.

discriminate on the basis of sexual orientation or gender identity with respect to matters of employment." S.219 § 1(b)(1)(B).

The American Civil Liberties Union of Vermont fully supports the drafters' intent to protect as many Vermonters as possible from discrimination, and we commend S.219's focus on further implementing the Public Accommodations Act's mandate to protect students from discrimination at "any school." 9 V.S.A. § 4501(1). **However, we have significant concerns about the constitutionality of requiring religious organizations or schools to apply Vermont's Fair Employment Practices Act statute to all employees.**

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The Supreme Court has made clear that the First Amendment protects a religious institution's "autonomy with respect to internal management decisions that are essential to the institution's central mission," including "the selection of the individuals who play certain key roles." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). As a result, religious institutions enjoy a so-called "ministerial exception" to liability from certain employment suits, based on the Court's conclusion that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181 (2012). Based on these cases, we have significant constitutional concerns about requiring a religious organization to apply the Fair Employment Practices Act to all employees as a condition of participation in tuition reimbursement—particularly where, as here, the contractual provision eliminates an existing exception that would otherwise apply.

Legislative counsel and others have distinguished S.219 from the Supreme Court's ministerial exception cases on the ground that those cases concerned lawsuits brought by private individuals under generally applicable laws; S.219, in contrast, simply requires schools to "choose" to apply these statutes if they want to participate in Vermont's tuitioning program. While it is true that no Supreme Court case squarely addresses a condition like S.219's, we think it unlikely that a court would regard that distinction as meaningful for First Amendment purposes. The ministerial exception finds its roots in longstanding constitutional doctrine confirming that religious organizations possess "[the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). As a result, the Court has made clear that the state may not "[r]equir[e] a church to accept or retain an unwanted minister, or punish[] a church for failing to do so," because "such action interferes with the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. In other words, the ministerial exception stands for more than just an immunity from private suit; it makes clear that "[t]he First Amendment outlaws" "any attempt by government to dictate or even to influence" certain internal religious decisions. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060. S.219's employee-based requirements appear to run afoul of that prohibition.

To be sure, even at religious schools, many employees do not participate in matters of religious formation and therefore will not qualify as "ministers" for the purposes of the exception. Vermont can plainly require schools, including religious schools, to enforce fair employment practices for these employees, who are lawfully protected by the existing statute. But at a minimum, this Committee should pause and investigate further whether requiring full compliance with the Fair Employment Practices Act, even for certain employees engaging in religious instruction, raises First Amendment concerns.

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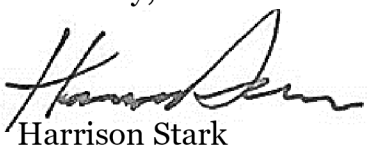
S.219 is no ordinary legislation. The bill seeks to balance several of Vermont's most fundamental values—including religious liberty; freedom of conscience; non-discrimination; and the right to equal educational opportunity. In grafting these values onto Vermont's existing tuition reimbursement infrastructure, the bill offers a creative and promising solution to an exceptionally thorny issue. We acknowledge and appreciate the thoughtful consideration that S.219's drafters have taken in crafting the bill, as well as the extraordinary work that legislative counsel has undertaken in constructing S.219's framework to date.

But precisely because this legislation implicates so many of our deepest commitments, the General Assembly cannot afford to get S.219 wrong. Waiting for the Supreme Court's decision in *Carson v. Makin* ensures that this Committee has the benefit of a full and complete constitutional landscape, offering the greatest opportunity to craft a durable and constitutional solution that protects Vermont's most important values in the long term.

We therefore ask that the Committee table any legislation like S.219 until next year. In the meantime, the Committee is free to focus on shorter term solutions, including refining schools' anti-discrimination obligations through the Series 2200 Rules, or providing limited, temporary guidance for school districts on how to employ "adequate safeguards" until the legislature can craft a more permanent solution in the wake of C*arson*.

Thank you for the opportunity to submit testimony on this important issue. If we can provide any further information, please do not hesitate to contact us.

Sincerely,



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