Should the Senate Education Committee Intervene to Stop Further Consideration of S.219 Until After the Supreme Court Decides *Carson v. Makim* (the Maine tuition reimbursement case)?

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I have read the memo to the Committee from Attorney Harry Stark representing the Vermont ACLU arguing that the legislature ought not to act on S.219 until after the Supreme Court has decided the Maine tuition reimbursement case. In that memo, Attorney Stark raises a number of concerns that deserve attention and I will be happy to address those concerns in my testimony before the Committee today. Attorney Stark and I had a long conversation last evening about those concerns and about the pros and cons of proceeding with or delaying further action on S.219 in this session. I have great respect for Attorney Stark and for the Vermont ACLU but in this instance I am not convinced that delaying further action on S.219 would be in the state's best interests.

There are a number of important reasons for the legislature to act now to set up the new procedure established by S.219 for making determinations about which independent schools should be deemed eligible for publicly funded support. In the first place, it is unlikely that whatever the Court decides in the Maine case will determine whether the Vermont approach established by S.219 is or is not constitutional. The process and criteria employed are so different. In any case, if it turns out that the criteria established by S.219 need to be amended, we will have a sound structure in place for making whatever adjustments are called for. The alternative is for the state to limp along for the next two years with the hit-and-miss approach currently applied for making those determinations, an approach much more vulnerable to constitutional challenge than that that would be created by S.219.

My primary purpose in submitting this brief written "testimony" in advance of today's hearing is to allow me to attach three appendices which contain material to which I may want to refer in my oral testimony:

Appendix A: Crucial Differences in Criteria for Determining Eligibility (Maine vs. S.219).

Appendix B: Importance of Shifting to a "Direct Payment" Approach.

Appendix C: Origins and History of the Right to Conscience in the Vermont Constitution.

Appendix A

Significance of difference between criteria employed in S.219 to determine which schools are eligible for public funding support and the criteria employed in the Maine law challenged in *Carson v. Makim*

(1) The Maine law turns on whether the school requesting tuition support is "nonsectarian in accordance with the First Amendment."

To be an "approved" school, a private school must meet the state's compulsory attendance requirements (which can be demonstrated by accreditation by a New England association of schools and colleges or by approval by the Maine Department of Education), and it must be "nonsectarian in accordance with the First Amendment."

(2) S.219, in contrast, would deny public tuition support only to schools that are unable to certify that the tuition charged will not be used to support "religious worship" or "religious indoctrination." These limiting criteria are much more specific, more limited in application, and do not raise the same problems with regard to confident determination.

Appendix B

On significance of the difference between a "choice" and "direct state subsidy" approach: excerpt from interchange between Justice Barrett and the attorney for the challengers in oral argument in Carson v. Makim (the Maine case) argued December 8, 2021

Amy Coney Barrett

One follow-up on the same lines as Justice Kavanaugh. I -- I gather, in drawing the distinction that Zelman drew between choice and direct funding, that you would concede that if Maine retooled its program so that payments went directly to private schools, like, say, to Miss Porter's, you know, we will pay you X number of dollars to reserve 40 seats in each class for schools -- for students from districts that lack a public school, you're conceding, I take it, that in the case of that kind of direct subsidy, there would not be a problem with Maine not subsidizing a private religious school as well?

Michael Bindas

Well, Your Honor, in that situation, what I'd want to know is -- is whether the -- so we're talking about basically a per capita program where payment is to the institution but is determined on a per student basis of how many students the -- the district is sending? Is that --

Amy Coney Barrett

Well, I'm just trying to press on how important to your argument this severed link is where the money is going to the parents and then going to the school, as opposed to we'll just pay you a flat rate.

Whether 40 students enroll or not --

Michael Bindas

Oh.

Amy Coney Barrett

-- we want 40 -- 40 seats for students that lack a public school in their district.

Michael Bindas

If -- if -- if we're bringing choice out of the equation and we're talking about a direct institutional aid type program, then we're talking about a much, much different case, Your Honor.

Amy Coney Barrett

And -- and you -- when you say much, much different case, are you talking about then a case where there would not be a free exercise claim that could succeed?

Michael Bindas

I think, if the government's paying a flat rate to schools that doesn't turn on whether a student is choosing to attend that school, I -- I -- you know, again, I would want to know the particulars, but I think that that would be permissible in that situation for the state to say we're not going to pay a flat rate, we're not going to contract with a school that's providing religious instruction. But there are a lot of variables there, Your Honor.

If the --

Amy Coney Barrett

I understand.

Michael Bindas

-- if the payment is based on defraying the cost of tuition for the number of kids that -- but it's --

Amy Coney Barrett

No, I understand. I'm just -- I'm just clarifying that you're not defending the notion of that kind of direct subsidy, as opposed to saying that this program functions like choice, like a -- like a school choice program, particularly given that kids can go as far as California and to elite boarding schools all over the country with the money?

Michael Bindas

Not a penny flows to any school under this program but for the private and independent choice of families.

Amy Coney Barrett

Thank you.

Appendix C

The Compelled Support Clause: 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 taxpayer support of religion than does the federal Establishment Clause.

Origins of Article III

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."

"[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.

"[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.

" . . . 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.