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Supplemental Testimony to February 20 appearance

Proof of legislative intent under Proposition 4 to roll out equity programs

**In light of witness testimony, below, Vermont Family Alliance recommends Proposition 4 be referred to the Senate Committee on Appropriations for review and consideration.**

Link to Senate Committee on Judiciary, January 30, 2024, 10:10 AM:  
<https://www.youtube.com/watch?v=KKycLDBr2VQ&t=155s>

**Senator Baruth** repeatedly claimed on February 20<sup>th</sup> that Proposition 4 does nothing more than provide equal protections for people, and that there is nothing in the language regarding equity benefits and programs, yet statements about equity programs and the resources needed to support equity programs from witnesses on January 30<sup>th</sup> - detailed below - went unchallenged by members of the Senate Committee on Judiciary, with Committee members affirming and thanking witnesses for their testimony. Professor Teachout's statements indicate the legislature is seeking a State Constitutional amendment as a license to roll out protections and equity measures that come with a price tag to taxpayers.

**Reverend Mark Hughes, Executive Director, Vermont Racial Justice Alliance**, stated @24:37 *But what we see now is that programs and policies that are currently being implemented across the United States are at risk. And we do see that – you know – there have been programs and policies that have come from through ARPA [American Rescue Plan Act], like the FDA and the USDA assistance programs to black farmers, understanding that there was a tremendous amount of harm that was done to black farmers over the last several decades,. But yet still it was challenged constitutionally with the 14<sup>th</sup> Amendment, with the Equal Protection Clause with a 'so-called' reverse discrimination, if you will, allegation n there so there are many of these that are currently held up. I would say that that is one reason, and I have three, maybe four **that a Constitutional Amendment is important . . . what we know is that federal money has strings. Period. Federal money has strings, and so when you talk about federal funding, federal programs, you start talking about initiatives, activities . . . There's going to always be a requirement that the federal government is going to have, and there's going to be an authority that they have to step in and dictate the rules.** As far as discrimination rules that we're talking about, it's nuanced the way that it's done. We can talk more about that later. I think Professor Teachout has a huge presentation for you this afternoon. So, I think when we start talking about the law again, as I said, I'll leave it to him. **But the thing about the State is, when it comes to our laws, when it comes to our money, our***

***programs, our priorities, when it comes to those things that we think are important for us as a State, then our [State] Constitution prevails, and so I think that's why this is really important, because when we're doing things that are related to addressing inequities, and we are attempting to roll out programs and services across the State, then if it's governed by – if it's funded by our State of Vermont in all of the other criteria that I've just mentioned apply, is we don't have – we don't – there's no concern about the risks of these [federal strings] applying as far as what we now see the programs and policies that could be in jeopardy. Mr. Chair, I would ask that during your deliberations that you ask your counsel to appropriate a list of those policies and programs, or activities emerging; those that have failed the litmus test in the leg counsel and are not advanced; those that were introduced and are currently perhaps on various committees' walls; those that have been passed and are currently in implementation, for example, the Land Access Opportunity Board or the Health Equity Advisory Commission. And I would ask that this committee consider – contemplate – a thorough examination as to the implication of the federal policy. And I think we will find an overwhelming and compelling reason why this Constitutional Amendment is important and necessary, that we protect programs and our policies.***

Not one single member of the Committee corrected Reverend Hughes that Proposition 4 simply provides equal protections and does not intend to provide the legislature with a license to rollout programs and benefits for 'protected classes' that will not be afforded to all persons, and which will come at a cost to taxpayers.

**Chairman Sears** affirmed Reverend Hughes' testimony by asking about discrimination based upon religion @39:43 and then stating, *"That's the only question that I have at this point. You're pretty thorough – I think you're doing pretty well for stretching it together."*

**Jay Greene, Racial Equity Policy & Research Analyst, Office of Racial Equity**, stated (@59:45): *"Repairing historical harm sometimes requires equitable treatment, not equal treatment, and equity sometimes means targeting programs to populations based on need rather than absolute equal treatment,"* that religion is protected under the First Amendment of the United States Constitution, and according to his personal opinion, not necessarily the opinion of the Vermont Human Rights Commission, *"I have concerns with some people using 'freedom of religion' as an excuse to deny the human rights of people like myself, transgender people and other people of the protected classes that are listed in Proposal 4."*

@1:04:23 **Senator Hashim**, *"A few thoughts. Thank you for your testimony. I really appreciate it, and I agree with what you're saying,"* and asks Greene for an opinion of whether- rather than having qualifiers - to change language to 'all persons,' to which Greene replies, *"I think my concern goes back to the definition of 'equity' versus 'equality' again, where we need the ability to focus on people who have experienced the history of considerable harm and discrimination at the hands of government and other social structures, and I think saying 'all persons' doesn't give us that ability to finely tailor those programs to the people who have been most impacted historically."*

@1:19:55, **Big Hartman, Executive Director and General Counsel at the Vermont Human Rights Commission**, stated, “There’s an additional statement in the original proposal from 2019 that I think is really significant in light of recent constitutional law from the U.S. Constitution and additional language states, ‘nothing in this article shall be interpreted or applied to prevent the adoption or implementation of measures intended to provide equality of treatment and opportunity for members of groups that have been historically subjected to discrimination,’ and I think that is really speaking directly to the equity programs, the equity work that we’ve already been doing for many years and to confirm that the language in this Equal Protection Act would not – is not intended to alter the equity work or to be used as like a sword against equity programs and equity efforts throughout the State.”

@1:21:30 **Senator Baruth responded to Hartman**, ‘Thank you. I appreciate your testimony,’ and asked Hartman whether there was any risk by adding religion as a protected category. **Senator Baruth did not correct Hartman in assuming that Proposition 4 relates to equity programs.**

@1:26:08 **Professor Teachout, Vermont Law School**, “So if I can start then by simply explaining to the committee why I think amending the constitution to add an equal protection clause is important, and there are two reasons. The primary reason is my understanding is the legislature in Vermont would like to have State constitutional support for adopting measures that implement the kinds of protections against discrimination that are identified in PR6 [4]. I don’t know if that’s a problem, but it seems to me that that is a very important reason. That’s one function that would be served by a constitutional amendment to provide State constitutional support for legislation that, for example, would deal with problems of what are called ‘embedded racism to the extent they exist in the State; to provide the State constitutional support for the adoption by the State legislature of measures aimed at protecting and expanding the protections against discrimination for those that are identified in PR 4. Another possible reason is to somehow act as a bulwark against what sometimes is perceived as backsliding by the U.S. Supreme Court in terms of the protection of equal protection interests, and particularly somehow to provide some kind of response to recent Supreme Court decisions holding affirmative action programs that take race into account, violate federal equal protection clause. As I will indicate later, I think we ought not to place too much hope on what a State equal protection amendment would do in that respect, but at least that was one of the justifications I’ve heard for doing so.”

@1:39:23, **Senator Hashim** asks Teachout, “If you could talk a bit more about when a case goes to the Vermont Supreme Court, as opposed to when it goes to the US Supreme Court, and how that determination gets made, and how this language could affect that.” (Teachout did not understand the question.

@1:41:45 **Senator Hashim** clarifies his question to Teachout, “I think, what I’m trying to get more at is, I believe it’s more appellate review. So, if something is decided in Vermont, and trying to figure out if the Supreme Court is going to hear it or not, and how it’s determined

*whether or not it stays in Vermont rather than going to the U.S. Supreme Court.” (Teachout still did not understand, Hashim states maybe he’ll do some offline research.)*

**State Court Vs. SCOTUS** All four witnesses on January 30th mentioned disapproval of the SCOTUS application of the 14<sup>th</sup> Amendment in [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#), in which the SCOTUS decided race as a ‘determining tip’ for admission into colleges and universities is a violation of equal protections, and witnesses expressed a desire and intent to uphold affirmative action in State courts by ensuring ‘stronger protections.’

**Professor Teachout** states on page 2 of his written testimony, *“We live in a world where we can no longer count on the U.S. Supreme Court or the federal government to provide adequate protection against discrimination. Adding an article to the State constitution specifically designed to protect the rights of all Vermonters to equal protection of the law would provide lawmakers with constitutional support for (1) adopting policies and programs aimed at countering the effects of systemic racism; (2) dealing with recent Supreme Court decisions which, some have argued, have ‘weaponized’ the 14<sup>th</sup> Amendment to disadvantage the very groups it was intended to protect, and (3) shoring up and expanding the protection of other vulnerable groups in the State. It would provide both support and motivation for doing the work in this area that still needs to be done.”*

**Emolument:** Any person holding an unelected position created by a state or federal government, who may or may not be appointed in part based upon their ‘protected’ status and is employed at the expense of taxpayers falls under the general definition of Emolument: <https://www.law.cornell.edu/wex/emolument>.

**Under Article 6, Chapter 1 of the Vermont State Constitution, legislators have an obligation to disseminate their intent under Proposition 4 to the citizens of Vermont.**