May Vermont Require Independent School Compliance with State and Federal Anti-Discrimination Laws as a Condition of Continued Eligibility for Publicly Funded Tuition Support? A Constitutional Primer

Testimony of Professor Peter Teachout, Vermont Law School,
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Introduction

My name is Peter Teachout. I am a Professor of Constitutional Law at Vermont Law School. I have testified on numerous occasions before committees of the Vermont state legislature on federal and state constitutional law issues and published law review articles dealing with those issues. I like to try to be helpful; but I have to warn you this is my first excursion into the labyrinth of statutory provisions and regulatory rules governing independent school approval and funding in Vermont and I am not sure that I understand accurately and completely the system created. My role in this memo, in any event, is to provide a basic introduction to the key relevant U.S. Supreme Court decisions.

I understand the Subcommittee has been working on rules aimed at implementing Act 173 dealing with special education requirements, (now incorporated in Section 166 of Title 16 of the Vermont statutes) and, in that context, the question has arisen whether the proposed rules might be amended to require that independent schools comply with state and federal anti-discrimination laws as a condition of continued eligibility for receiving public tuition support. I have reviewed the draft rules and the proposed amendment and, by way of anticipating the thrust of my testimony this morning, I have three basic conclusions:

- First, as a matter of federal constitutional law, the State of Vermont cannot require religious independent schools to comply with state and federal anti-discrimination laws since to do so would violate the "free exercise rights" of the religious schools, but it can provide that schools that fail to comply with state and federal anti-discrimination laws are not eligible to receive public tuition support. There is nothing in current federal constitutional jurisprudence to prevent the state from doing so.

- Second, as a matter of state constitutional law, the state has to bar public funding of independent schools that fail to comply with anti-discrimination laws in those instances *where the funding is used to support religious worship or religious instruction* since to do otherwise would violate the "Compelled Support Clause" in Article 3 of Chapter I of the Vermont Constitution.

- Third, I am not sure that amending the proposed rules aimed at implementing Act 173 is the best or most effective way to do so. This is a matter that, in my judgment, calls for distinct and focused legislative authorization – either by adding a new section to Title 16 of the Vermont statutes dealing specifically with state tuition support policy or by adoption of stand-alone legislation along the lines of the bill introduced by Senator Campion before the Senate Education Committee in February of this year.

With that in mind, let me briefly review the key U.S. Supreme Court cases that bear on this question:

I. *Our Lady of Guadalupe:* States May Not Require That Religious Institutions, Including Religious Schools, Comply with State or Federal Anti-Discrimination Laws Where Such Laws Conflict with Religious Belief

In *Our Lady of Guadalupe*[1] decided in 2020, the Court held that religious schools (and religious institutions generally) are exempt from complying with federal and state anti-discrimination laws in making hiring and firing decisions and in regulating the conduct of employees if the employees play a "vital role" in furthering the religious mission of those institutions. That case involved two challenges: In one case, a teacher alleged violation of federal age discrimination laws by a private religious school when she was not renewed so the school could replace her with a younger teacher. In the second case, a teacher at a Catholic elementary school brought action against her school employer under the Americans with Disabilities Act (ADA), alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer.

The Supreme Court ordered dismissal of both cases on grounds that private religious institutions cannot be compelled to comply with state and federal anti-discrimination laws invoking what is called the "ministerial exception." The Court held that religious schools should be given substantial deference in deciding which positions can claim the ministerial exemption. The following passage indicates the breadth of latitude that religious schools have in determining which positions qualify:

> "There is abundant record evidence that [both teachers] performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. . . . . Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's

[1] 140 S.Ct. 2049 (2020)

explanation of the role of such employees in the life of the religion in question is important."

This decision means that Vermont cannot require religious independent schools to comply with state or federal anti-discrimination laws, especially in the context of hiring and firing decisions and other decisions relating to employment conduct. But there is nothing in this decision saying or suggesting that a state cannot condition eligibility for public funding support upon compliance with anti-discrimination laws.

II. *Fulton v. City of Philadelphia:* Government Cannot Terminate a Contract with a Religious Organization for Failure to Comply with Anti-Discrimination Laws When Doing So Would Require the Organization to Choose Between Abandoning its Service Mission or Violating a Fundamental Tenet of Religious Belief.

In *Fulton v. City of Philadelphia*[2] decided this past summer, the Court held that the City of Philadelphia's termination of a contract with a Catholic foster care placement agency because of the agency's refusal to place children with same-sex foster parents in violation of city anti-discrimination policy violated the Free Exercise rights of the Catholic placement agency. The Court found that the termination of the contract substantially burdened the religious organization's Free Exercise rights because it had the effect of forcing the organization to choose between curtailing its public service mission or violating its religious beliefs.

A. Significance of the Standard of Review: The Controversial *Smith* Decision

In doing so, the Court applied a "strict scrutiny" standard of review to Philadelphia's termination decision, relying on a distinction established in an earlier decision, *Smith v. Employment Division*[3]. In the *Smith* case, the Court adopted an approach to reviewing laws that incidentally burden the free exercise of religion which has proved quite controversial. In *Smith,* the Court ruled that laws that burden the free exercise of religion, no matter how serious the burden, would be subject to only a deferential "rational basis" standard of review if such laws were "neutral and generally applicable." Generally, that meant the laws would be upheld. If, on the other hand, the laws were not "neutral," that is, if they singled out religion for special treatment, or, alternatively, if they were not "generally applicable," if, that is, they provided for exceptions, they would be subject to "strict scrutiny," an extremely difficult standard to meet. Essentially, to survive a constitutional challenge when the Court applies "strict scrutiny," government must show that the law is "necessary to further a compelling state interest." When the Court applies the "rational basis" standard, in contrast, all government has to show is that the law furthers a "legitimate interest" in a not irrational way.

In the *Fulton* case, the Court applied "strict scrutiny" to Philadelphia's termination decision since the city's contract with the Catholic agency contained an "exception clause." Although one section of the contract required an agency to provide services defined in the contract to prospective foster parents without regard to their sexual orientation, another permitted exceptions

[2] 141 S.Ct. 1868 (June 2021)

[3] Citation to be supplied

to this requirement at the "sole discretion" of the Commissioner. The inclusion of a mechanism for entirely discretionary exceptions, according to the Court, rendered the non-discrimination provision not "generally applicable," and thus the Court applied the "strict scrutiny" standard of review to the City's termination decision. Since the City was unable to meet this standard, the termination decision was found to violate the Free Exercise rights of the Catholic placement agency.

It is important to add that four justices on the Court argued strongly that *Smith* ought to be overruled, and a fifth expressed serious reservations about the doctrine established by that case but declined to use the *Fulton* case as an occasion for overruling *Smith* since it was not necessary to do so. Nonetheless, this breakdown among the justices indicates that the distinction that *Smith* makes between laws that are "neutral and generally applicable" and those that are not may not survive in the longer term.

B. Application to a Vermont Law Making Public Tuition Support Contingent Upon Compliance with Anti-Discrimination Laws

The *Fulton* case comes perhaps a little closer to home with respect to the question we are considering because it seems to limit government's ability to make public funding of religious organizations contingent upon compliance with anti-discrimination laws. But the case can clearly be distinguished on its facts. In the first place, unlike the situation in *Fulton*, a decision by the State of Vermont to withhold public tuition support from religious independent schools that fail to comply with anti-discrimination laws would not force those schools to choose between abandoning their educational mission or violating a fundamental tenet of faith. Religious independent schools have long existed in Vermont and performed their religious and educational missions without relying on public tuition support.

Second, in *Fulton,* the Court applied a "strict scrutiny" standard of review to the challenged contract arrangement because the contract provided for discretionary exemptions and thus was not "generally applicable." It is crucial, therefore, that whatever law or rule is adopted to make independent school eligibility for public tuition support contingent upon compliance with state and federal anti-discrimination laws be (1) "neutral" (that is, not single out religious schools for special treatment) and (2) "generally applicable," that is, contain no provisions that might be construed as providing for exceptions.

III. *Espinoza v. Montana:* Government Cannot Deny Generally Available "Public Benefits" to Organizations or Individuals "Based Solely on the Religious Status" of the Beneficiaries.

In the *Espinoza* case,[4] decided in 2020, the Supreme Court struck down a Montana law making tuition tax credits available generally but not to parents who wished to send their children to religious schools. Following an earlier decision in the *Trinity Lutheran Church* case, the Court held that a state cannot deny generally available public benefits "based solely on religious status." The *Espinoza* decision served as the basis for recent federal court decisions in Vermont striking down the refusal by local school districts to reimburse tuition fees to parents from districts with no public schools of their own who enrolled their children in approved religious independent schools "based solely on the religious status" of those schools. The federal courts also struck down Vermont's "dual enrollment" program because, although on the surface the

[4] 140 Sp.Ct. 2246 (2020)

program proceeded upon "neutral" criteria, in practice it had the effect of excluding from participation in the program only students from religious independent schools "based solely on religious status."

The *Espinoza* court explicitly reserved the question of whether a state could deny generally available public benefits on the basis of religious use as opposed to religious status. Federal court decisions striking down aspects of Vermont's tuition and dual enrollment programs this past year are also specifically limited in this respect. Thus, at least as federal constitutional law now stands, states are free to provide, as does the Vermont constitution, that state taxpayer dollars cannot be used to support religious worship or religious instruction or the propagation of religious views in independent schools. Such legislation must be careful to make clear, however, that the prohibition is based not on "religious status" but on "religious use." Although I have some concerns about the bill as written, I think the bill introduced by Senator Campion in the Senate Education Committee this past February does this in an effective way.

IV. Vermont Constitutional Law and the *Chittenden* Decision*:* Providing Public Tuition Support to Religious Independent Schools Without Ensuring that the Tuition Will Not Be Used for Purposes of Religious Worship or Religious Instruction or the Propagation of Religious Views Would Violate the "Compelled Support Clause" of Article 3 of Chapter I of the Vermont Constitution

I would be remiss if I did not make two additional points relating to the relevance of Vermont (as distinct from federal) constitutional law. First, the Compelled Support Clause in Article 3 of Chapter I of the Vermont Constitution specifically prohibits public funding of religious worship and religious instruction. This provision, a core provision in the original state constitution, reflects a fundamental constitutional commitment to protect a "right of conscience" – the belief that no person should be required to support the propagation of religious views with which he or she disagrees.

Second, in the *Chittenden* decision,[5] the Compelled Support Clause was interpreted by the Vermont Supreme Court in a way that is entirely consistent with the federal constitutional law discussed above. According to the *Chittenden* decision, the state is not barred from providing taxpayer support to religious schools but can do so consistently with the Compelled Support Clause only if "adequate safeguards" are in place to ensure that the public funding is not used to support religious worship or religious instruction or the propagation of religious views. This accords with the distinction between discrimination "based solely on religious status" (prohibited) and discrimination based on religious use (so far, permitted) reflected in the federal constitutional jurisprudence discussed above.

V. Relation to Proposed Amendment to Draft of Rules Series 2200 Implementing Act 173

This provides a basic introduction to the constitutional framework that would apply to any amendment of Vermont law aimed at making sure that public taxpayer funds are not used to support programs of schools that violate state and federal anti-discrimination laws. For reasons that we may or may not want to discuss this morning, I am of the view that the proposed amendment to the draft rules aimed at implementing Act 173 is not the best or most effective way to provide for that. In light of recent decisions by federal courts striking down aspects of

[5] Citation to be supplied

Vermont's town tuition and dual enrollment programs, I think legislation specifically addressing state tuition support and dual enrollment policy is called for.