

IN THE SUPREME COURT OF THE STATE OF VERMONT

SARA VITALE, et.al.,

Plaintiffs and Appellants

v.

BELLOWS FALLS UNION HIGH SCHOOL, et.al.

Defendants and Appellees

Supreme Court Docket Number 22-AP-059

**BRIEF OF EDCHOICE AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

On Appeal

From the Vermont Superior Court Orleans Unit, Civil Division Docket
Number 215-12-20 Oscv

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INTEREST OF *AMICUS CURIAE*

EdChoice is a 501(c)(3) nonpartisan, nonprofit organization and a national leader in educational choice research, legal and fiscal analysis, policy development, and educational training and outreach. The mission of EdChoice is to advance educational freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice believes that all families — regardless of race, origin, residence, or family income—should have a full and unencumbered opportunity to choose schools or other educational resources that work best for their children. The public good is well-served when children have a chance to learn at their maximum potential, regardless of the environment where that learning occurs—public or private, near or far, religious or secular. When children find their best fit for education and succeed, they will thrive as adults. They are our future.

STATEMENT OF ISSUES

A first-rate education that fits the unique learning styles of individual students is the goal. When children feel comfortable and welcome in schools that recognize their innate value, children find the joy of learning. Given the uniqueness of how children – and each of us – see the world, any school may be a perfect fit for some, or most, but not all, children.

Plaintiffs illustrate this point with sincere clarity. The town schools their children attended were good fits for many children – but those schools were completely wrong for their children, and in some cases, even detrimental to their personal safety.

The lower court’s adverse ruling presents a limited, and flawed, viewpoint that misses the constitutional foundation for choice in education that is more profound in Vermont’s constitution than in most other state constitutions.

Vermont’s constitution “was built on individual freedoms” and contains 19 articles that “address personal freedoms guaranteed” to citizens. The strength of commitment to individual liberty and freedom for all is especially profound given that it is, “one of the shortest declarations ever written.”¹ This document is clear, direct and leaves no doubt about its purpose.

Vermont was prescient in passing school choice in 1869. The state’s proud heritage of being a government of the people, honoring individual rights and privileges to live freely – including being the first constitution to outlaw slavery, and the first to give the right to vote to all freemen over 21 years of age and the right of any citizen to secede from the Vermont Republic – has provided a firm foundation for town tuitioning to thrive, over 150 years.

This heritage is expressed clearly in the plain meaning of the Common Benefits Clause.² When individual rights are equally applied to all and equally protected, those rights are of common benefit to all. Rights need not be precisely equal, but they must be common to all – and must also confer a benefit.

In this case, the lower court undervalued the Common Benefits Clause and the personal freedoms guaranteed by that clause. It is unreasonable to expect a parent to accept, when denied the common benefit of town tuitioning

¹ Anthony Mastrantonio and Nate Schnittman; *The Vermont Republic*, “Detailing the Secessionist Movement of the Green Mountain Boys.”

² Vermont constitution, chapter I, section 7, states, “**Government for the people; they may change it**” That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.”

funds, that because the town had the *option* to provide town tuitioning, the constitution's Common Benefits Clause was satisfied – even though the parent received no actual benefit. This is not good enough for parents who need education funding assistance because their children are failing to learn at their town's public school. This injury to parents and their children is further compounded when they learn that parents in towns that exercise the town tuitioning option receive a real benefit – based solely on the fortuity of their geographic location. Education funding is a benefit based on constitutional guarantees of personal freedom, not geography.

Town tuitioning is a tremendous benefit to families and children, but to be a common benefit for all, the option to exercise that benefit must rest in the hands of the people, not the government.

Vermont's constitution is clear that government exists for the common benefit of the people. An option for town tuitioning that is limited to readily identifiable districts (that may or may not choose to accept the option) cannot seriously be considered a policy that satisfies the constitution's Common Benefit standard. For Sara Vitale and her children, there is no common benefit; her children are treated like chess pawns in a game that nobody wins.

Over time, a callousness has grown among the people, with parent and student dissatisfaction rising.³ Academic achievement – before COVID – had been declining. The Nation's Report Card has been used for many years as an evaluative tool; the most useful information is comparing current to prior years to show trend lines in academic achievement.⁴ This is far more accurate and predictive than a single year snapshot in time.

³ “Northeast State Principal on Angry Parents, Disappointed Children and Personal Difficulty,” *Vermont News*, March 10, 2022

⁴ U.S. Department of Education. Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), 2011 and 2019 Reading Assessments, 2011 and 2019 Math Assessments, Vermont.

The following performance results will illustrate why Vermont parents in non-tuitioning towns are dissatisfied and wonder why some children have a choice of educational opportunities while their children do not, only because of the location of their home.

Vermont: Nation’s Report Card State Profile

Grade	Subject	Year		Proficient		Ranking Among States	
		2011	2019	2011	2019	2011	2019
4	Math		2019		38.8		35
		2011		49.14		5	
4	Reading		2019		37.14		14
		2011		41.29		7	
8	Math		2019		38.33		11
		2011		46.00		4	
8	Reading		2019		40.23		5
		2011		44.37		4	

Parents who need choice lack confidence that fighting for it at the legislature will yield results for their children. Legislators frequently defer “blame” for lack of tuition funding in a town by saying the towns, not the legislature or the parents, have the right to exercise the option of town tuitioning. Parents are right to question whether the common benefit referenced in the constitution is a benefit for government or for the people?

Drawing lines of connection through over 150 years of this town tuitioning may help to reveal Vermont’s unique and inspired position as a leader – the first leader – for educational choice and will highlight the constitutionally supported value in insuring equally available educational resources that are not mere options but funded, accessible-to-all opportunities.

ARGUMENT

- I. **Vermont’s long history of towns providing education for children has worked remarkably well.**
 - a. **Vermont’s first Constitution of 1777, and subsequent amendment in 1786, taught the value of educational options.**

Vermont’s first constitution required that the legislature establish in each town a school and set the salaries of school instructors to be paid by the town using income from school lands to fund or offset these expenses. By direction of the General Assembly, each county ought to have a grammar school and there would be one state university.⁵ School lands were dedicated lands for schools, often farmed, and the income was used to fund schools.

Similar dedicated funds were directed for Vermont’s grammar schools shortly after ratification of the 1777 constitution. In 1782, the legislature empowered county judges to levy taxes for support of the schools.⁶

The Constitution of 1777 established the Council of Censors to function primarily as an advisory body, acting as a check on the legislative and executive branches of government. Thirteen men were elected to the Council every seven years to serve a one-year term. The most important duty was to call a constitutional convention, to occur two years after their one-year term, if necessary to fix constitutional provisions that had proven to be defective or to add provisions necessary to preserve the rights of the people. Thirteen councils were convened and ten of those councils called constitutional conventions where constitutional amendments were debated.⁷

⁵ Vermont Constitution of 1777, Chapter II, Section XL

⁶ Edward Deming Adams, “The County Grammar Schools and Academies of Vermont,” Vt. Hist. Soc., Vol. IV, No. 3; p.148, 122 (1936)

⁷ Paul S. Gillies and D. Gregory Sanford, editors; *Records of the Council of Censors of the State of Vermont, 1777-1870* Published by authority of James H. Douglas, Secretary of State, 1991.

The Council of Censors offered proposals to the 1786 constitutional convention that were notable. A separation of powers clause was added to the constitution and the role of the judiciary was strengthened.

Also notable was the Council's proposed amendment to the education clause, renumbered as Section XXXVIII. The Council of Censors proposed a change to the constitutional mandate requiring the legislature to establish a school (or schools) in every town, with towns obligated to pay the salaries of the instructors. The Council's proposal weakened the requirement for towns to run their own schools.

The Council made a bold recommendation, which was adopted, to eliminate the mandate for town-funded schools. The new language shifted the existing *mandate* to a *suggestion*: that towns "ought to" maintain "a competent number of schools." Although no definition of "maintain" is provided, the new "ought to" provision includes no mandate to fund schools in any particular manner.⁸

This is a substantial change from mandating towns to fund schools established by the legislature. This appears to be a first nod toward recognition that multiple schools may be necessary or useful and that towns need not be the only source of educational options.

⁸ Vermont Constitution of 1786. SECTION XXXVIII.

Laws for the encouragement of virtue, and prevention of vice and immorality, ought to be constantly kept in force, and duly executed: and a competent number of schools ought to be maintained in each town, for the convenient instruction of youth; and one or more grammar schools be incorporated, and properly supported in each county in this State. And all religious societies, or bodies of men, that may be hereafter united or incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates, which they in justice ought to enjoy, under such regulations, as the General Assembly of this State shall direct.

Also, the school provision is sandwiched between, 1) a suggestion to the legislature that they “ought to” encourage and enforce laws to prevent immorality and to encourage virtue, and 2) a mandate that the legislature “shall” encourage and protect religious societies for the advancement of religions, learning, or charity.

No copy of the journal of the 1786 constitutional convention survived, so we do not know why the change regarding schools was considered necessary. Nonetheless, there was a reason the education provision was placed in between two provisions dealing more with religious liberty and morality than town-run schools. Without guidance of a recorded journal, it is reasonable to believe that the Council may have meant to strike a balance between optional town schools and school options advanced by religious entities.

The constitutional amendment proposed by the Council of Censors and adopted in 1786 was in many ways an early forerunner of town tuitioning.

Between 1787 and 1810, common schools and county schools were created legislatively, with the power of taxation approved as an appropriate method of funding, in addition to local funding through land revenues and personal contributions. At this time, voters in towns were required to participate in approving or rejecting such funding.

The earliest version of town tuitioning occurred in 1844, when the first high schools and union districts were established. This was just ten years after the first public school in the nation was opened in Lexington, Massachusetts, in 1834.

In 1845, a state superintendent post was created to oversee common schools, followed by creation of the state board of education in 1856.

Grammar schools (also known as County schools) and Academies were private schools and the primary providers of secondary education in Vermont for at least the first 100 years. Between 1780 and 1867, 118 such schools were

established. Although privately funded, historical data suggests that tax dollars were also subsidizing these schools.⁹

On November 15, 1869, the General Assembly approved “An Act to Authorize School Districts to Send Scholars to Academies in Certain Cases Named Therein.”¹⁰ This was the official beginning of town tuitioning, Vermont being the nation’s first state to enact such an innovative way to provide instruction for its youth. Peter T. Washburn, counsellor at law, was Governor of Vermont at the time.

Vermont accepted true flexibility in ways to provide instruction at a time when other states were adopting the rigid Prussian-inspired factory model of government-controlled instruction, another indicator of the uniqueness of Vermont’s views on the most pressing education decisions of that time.

b. The 1954 Amendment revealed shortcomings of bureaucratic mandates.

The next amendment to this section of the constitution, now article II, section 68, was approved in 1954. Once again, each town was required to operate their own schools, or partner with another town. Such partnership required approval of the legislature, so this amendment proved to be unwieldy and did not improve the delivery of education.¹¹

II. The 1964 constitutional amendment revealed that town finances overshadowed providing equitable educational options to all children in the state.

a. Towns closed elementary schools prior to adoption of the constitutional amendment that gave them the right to close schools.

⁹ *Edward Deming Adams*, at 117.

¹⁰ “An act to authorize school districts to send scholars to academies in certain cases named therein.” *Bellows Falls Times*, page 1, December 3, 1869.

¹¹ “Constitutional Change” *Rutland Daily Herald*, pg 4, Monday, February 3, 1964.

1964 was an historically significant year for Vermont and education. By the time the constitutional convention of 1964 arrived, schools had proven to be expensive to maintain. Even though some towns could have merged, conditions were not conducive to mergers. Yet, the only way a town could operate a school was by funding it themselves or partnering with another town, and as provided in the 1954 amendment, that agreement had to be approved by the state legislature. Tuitioning a child to attend another town's school by contract was not possible during this brief time between amendments.¹²

As a result, eight towns closed their schools, even before the amendment was offered at convention. The Attorney General opined that these towns were in breach of their legal agreements. Ten towns operated schools with fewer than twenty students: Athens, Baltimore, Brookline, East Haven, Goshen, Granby, Granville, Landgrove, Ripton, St. George.¹³ A constitutional change was financially imperative.

The 1964 amendment to article II, section 68, removed the requirement for legislative approval and inserted language authorizing the legislature to allow "other provisions" for education; this language has not been altered since the 1964 amendment. With each constitutional amendment, the priority was focused on enabling towns and school districts to be able to afford state mandates for instruction of youth, and to be given the most flexibility to fulfill their constitutional obligations.

III. Today towns have administrative authority over education and schools, but the state retains control over the method of providing education and the funding of education.

a. Close examination of the Education Clause reveals the priorities of virtue and flexibility in education.

¹² "All Town Meetings Will Vote on Constitutional Amendment" *Bennington Banner*, pg 10, February 11, 1964.

¹³ "Holden Calls For Yes Vote on Constitutional Change," *The Times Argus* (Barre, Vermont), March 2, 1964

Vermont's constitution is notable for clearly defining the purpose for the "instruction of youth." Article II, Section 68, begins by declaring that laws encouraging virtue and preventing vice and immorality must be "duly executed." Section 68 next declares that schools "ought to be maintained" in each town unless other means of instructing youth are permitted by the state legislature.¹⁴ Thus, Vermont's Constitution unequivocally, provides the following:

1. Identifies virtue as the purpose of instructing youth,
2. Opens the door for instruction delivered by other means than town schools, and
3. Vests authority in the state legislature to permit towns to use other means for the instruction of youth.

The Vermont legislature has permitted towns to fund other means for instructing youth, but the legislature has also allowed towns to *deny* funding for other means of instruction. When towns fail to exercise their option for town tuitioning, they are denying parents in those towns the right to access a common benefit approved by the state. When the state allows this to happen, it is an affront to Vermont parents who rely on and cherish the state's constitutional guarantees of personal freedom.

¹⁴ Vermont Constitution, Article II, Section 68, reads, "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, **shall be encouraged** and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations **as the general assembly of this state shall direct**."

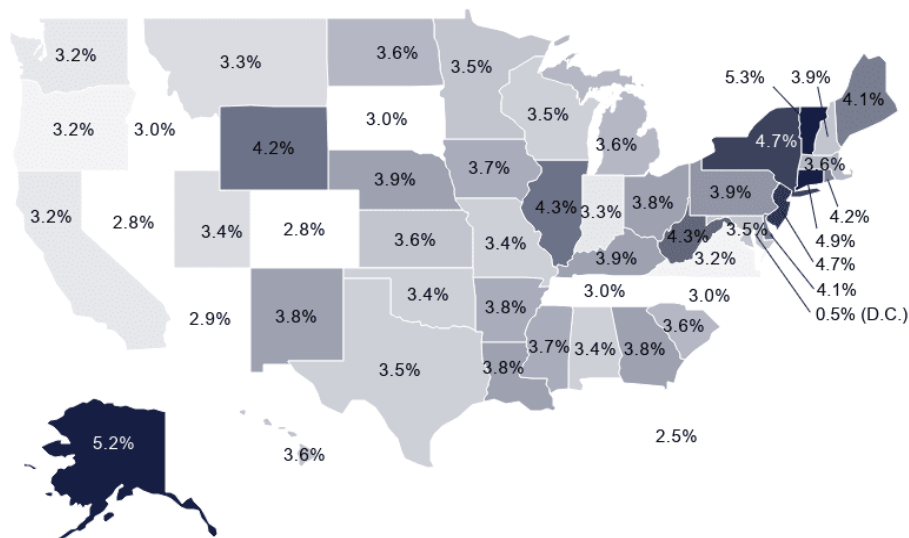
In harmony with declaring virtue as the goal for instructing youth, Section 68 also mandates encouragement of religious entities that advance religion and learning, and demands protection of their privileges, immunities, and estates. The state legislature is also mandated to *direct regulations in support of* these religious entities advancing religion and learning.

b. Education funding is primarily a state function, and a common benefit to all.

During the mid-20th century, towns felt the pinch of trying to operate schools with too little money. As referenced above, many towns closed their schools. Although public school advocates consistently complain that education funding is never enough, Vermont sits in an enviable position in relation to all other states. Although academic achievement trends may be declining, funding for education stands on solid ground.

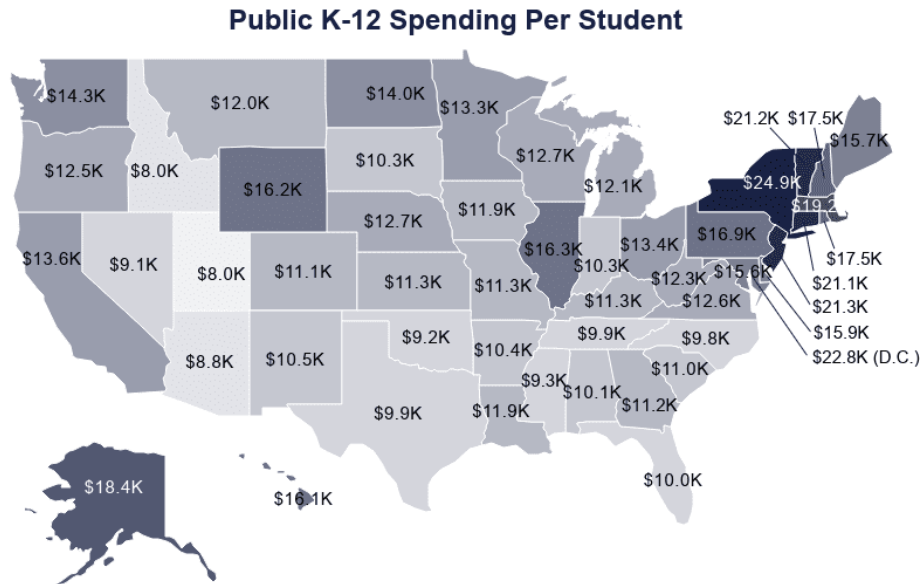
Vermont ranks fourth in the nation for actual dollars spent on public K-12 education. This spending represents 5.3% of state taxpayer income, the highest percentage of taxpayer income spent on K-12 education in the nation.¹⁵ The following graphic reveals state comparisons:

Public K-12 Spending as a Percentage of State Taxpayer Income



¹⁵ Hanson, Melanie. “U.S. Public Education Spending Statistics” EducationData.org, June 15, 2022.

It is reported that Vermont spends \$21,219 per student for public K-12 education. New Jersey, District of Columbia, and New York spend more. The state in first place for public K-12 education spending is New York, at \$24,881 per student. The bottom four states are Utah, Idaho, Arizona, and Nevada. Utah, spending \$7,951 per student, is the lowest ranked state for public K-12 education spending. The following reveals state comparisons:



The amount of Vermont’s spending on public K-12 education is significant, yet its relevance to town tuitioning and the Common Benefits Clause is of greater significance. Education is funded via three main sources: local, state, and federal tax revenues. As reported by the National Center for Education Statistics (NCES), a principal agency of the U.S. Federal Statistical System, Vermont’s state spending on public K-12 education is the highest in the nation at 90%. Percentages of revenues going to public K-12 education from local revenues is second to the lowest in the country at 4%. The remaining 6% of Vermont’s public K-12 education revenue is from federal funding.¹⁶

¹⁶ The Condition of Education 2020, Chapter 1, Section Finances: Public School Revenue Sources, as sourced from U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “National Public Education Financial Survey,” 2016–17. See Digest of Education Statistics 2019, table 235.20.

The lower court supported its ruling against plaintiff-appellants, in large measure, on the assumption that local governments have control of education decisions and that any of those decisions about whether to exercise the town tuitioning option can be easily changed if citizens in the local community so desire. While that is a pleasant view of the small towns in Vermont, which are quite beautiful, it is also an oversimplification of the realities of everyday life. Education is expensive, as noted in the above graphics. Towns may make some decisions, but with 90% of public K-12 education being provided to towns by the state, those town decisions about education are not made in a vacuum.

The state controls the ability of towns to provide town tuitioning, by financial control and constitutional authority. It is disingenuous to allege that towns are solely responsible for the geographic discrimination plaintiffs are experiencing when accessing education for their children. Towns did not decide to use town tuitioning to create a piecemeal pattern of funding education; towns are not in control of funding this system.

The state chose to give towns, not citizens, the right to exercise the town tuitioning option. This state action, not town action, is what has created unequal treatment of student funding and the remedy can only be found at the state level. In the absence of a legislative solution (which begs the constitutional question), the state remedy rests with this court.

The state can honor the Common Benefits clause by making town tuitioning a uniform education benefit accessible by all Vermont students, consistent with the 19 articles of Vermont's Constitution that confer guaranteed personal freedoms. In so doing, the state would uphold the proud history of educational flexibility and innovation that made Vermont first-in-the-nation to support access to whatever educational options parents determine will work best for their children.

- c. It is not a secret which towns are more or less likely to offer town tuitioning; parents know where they must move to gain access to education that works for their children.**

School districts *advise* parents and students about their school choice options.¹⁷ A town's authority to offer school choice options rests with the state, which has violated the Common Benefits clause by allowing towns to exclude certain children. Vermont's long-standing history of equitable treatment of its citizens is betrayed when an easily identifiable class of students is denied access to school choice opportunities.

The lower court said, "the Court does not see a portion of the community that is omitted from current law." This language disparages families like the plaintiffs in this case and is far-afield from equal treatment. Families often feel like they are not seen by those who do not know how to help them when the family is excluded from the common benefit of town tuitioning. Plaintiffs are not outliers; they are representative of many other families who cannot access the type of education their children need.

It is foreseeable that certain towns will tuition students to attend independent schools, while other towns will not. The division of those towns may be predictable. That said, the state has placed into statute an attempt at a caveat:

"The right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights . . . Vermont students must be afforded equal access to a quality basic education . . . Therefore, it is the policy of the State that all Vermont children will be afforded educational opportunities that are substantially equal although educational programs may vary from district to district."
16 V.S.A. section 1

Town tuitioning is consistent with the Common Benefits clause and Vermont's history; denying town tuitioning to an identified group of students is inconsistent with the state's proud history. It is no secret which towns are unlikely to offer tuition for attendance at any school other than the school

¹⁷ 16 V.S.A. Section 563 (28). Powers of School Boards

operated by the town. After 150 years, there is a long record of tuitioning.

The lower court cited *Mason v. Thetford Sch. Bd.*, where this Court held that there, “is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent.” 142 Vt. 495, 499 (1983).

This is an answer to the wrong question. The question is whether a parent can be denied the right to be reimbursed for tuition at a school of the parent’s choice when another parent similarly situated but living in a different geographic location in the state has the right to reimbursement. When the state is providing authority and funding for tuition reimbursement, this unequal treatment of two citizens – based on the mere fortuity of residence and for no other reason – is clearly inconsistent with Vermont’s constitution that stresses the importance of equality under the law, and equality as a way of life.

In the year prior to *Mason*, the state made the same type of assertion in *State of Vermont v. Ludlow Supermarkets, Inc.*, d.b.a. Clark’s Bennington IGA [448 A.2d 791], No. 299-81, and this court took a decidedly different view than the lower court in the instant case. At issue in *Ludlow* was a statutory restriction against opening a grocery store on Sundays. The State argued “that there is no constitutional right to shop on Sunday.”

This Court responded by accusing the state of standing Constitutional Law on its head. The Court said, “Our constitutions are restraints on governmental powers. The rights of citizens are not conditioned on grants given by constitutional fiat.” *Ludlow* at 264. The Court went on to say that if the policy behind the rule is compelling, the unbalanced impact may be a “necessary consequence” of reasonable implementation efforts. Nonetheless, it was determined that there was a special purpose in the closed-on-Sunday law to protect small, local retailers, and as a result, the law violated the Common Benefits Clause. A similar purpose may be active in Vermont today.

CONCLUSION

Vermont's Constitution affirms that the rights of the people are of paramount importance. Vermont's towns have a long history of providing educational instruction in ways that are both flexible and innovative. Also, the U.S. Supreme Court has recognized that parents know their children best and have the right to decide how and where they are educated. As the Court held 97 years ago,

“The fundamental theory of liberty upon which all governments in this Union repose **excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁸**

In opining about a state compelling a parent to send a child to a public district school, the Court said, “It is an unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children.”

Whether a parent is compelled to send a child to a school of the government's choice due to the absence of town tuitioning, or a parent is compelled to send a child to the school assigned to the child by the government because the parent lacks financial resources to access another choice, that parent and the child are both denied the personal freedoms so prized by Vermont's Constitution. This is emphasized to an untenable level when the parent knows that people living in different locations in the state are not compelled to send their children to any school other than a school the parent decides is the best fit for the child.

It would be a great injustice to tell any plaintiff in this case that the

¹⁸ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070(1925)

education offered at the schools where their children were bullied, neglected, or failed to thrive was “good enough” to be considered a Common Benefit, a personal freedom, guaranteed by Vermont’s Constitution. With such a strong history of educational flexibility and innovation designed to provide meaningful equality that is honestly beneficial, Vermont’s citizens deserve, and their constitution supports, something more than, “good enough.” As supported by over 153 years of historical evidence and common experience, Vermont’s constitution was never considered a document brimming with rights that are “good enough”, but not meaningful.

Vermont’s parents deserve equal treatment and access to a variety of educational opportunities in every corner of the state – not as an expansion of rights or expansion of an educational program, but as rights granted over 153 years ago, supported by Vermont’s constitution. The rights, or common benefits, of town tuitioning have been woven into the fabric of Vermont’s culture. This Court is asked to enforce the equal right to access the town tuitioning benefit for every parent, with no discrimination of any kind. This would be consistent with Vermont’s history, and legacy.

Dated: July 20, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to V.R.A.P. 32(a)(4)(D), the undersigned hereby certifies that the word count in Appellants' Principal Brief complies with the word-count limit. The number of words in the Brief are 5299. The undersigned used Microsoft Word to calculate the word count. Pursuant to V.R.A.P. 25(c)(1), the undersigned hereby certifies that this document was filed electronically and that all parties were served via the electronic filing service, in compliance with 2020 V.R.E.F. 11(g).

Dated: July 20, 2022

/s/ Leslie Davis Hiner

Leslie Davis Hiner