IN THE SUPREME COURT OF THE STATE OF VERMONT
CASE NO. 22-AP-059

SARA VITALE and LOUIS VITALE, as parents and next friends of K.V., L.V., and T.V.; BRIANNA SCHAEFER, as parent and next friend) of W.S. and S.L.; MARISA and BENJAMIN, TREVITS, as parents and next friends of V.T., R.T., and E.T.; and CINDI and FREDRICK ROSA, as parents and next friends of E.R. and D.R.;

Plaintiffs-Appellants,

v.

STATE OF VERMONT; DANIEL FRENCH, in his official capacity as Secretary of the Vermont Agency of Education; VERMONT STATE BOARD OF EDUCATION,

Defendants-Appellees.

APPEAL FROM SUPERIOR COURT CIVIL DIVISION, ORLEANS
Docket No. 215-12-20 Oscv

BRIEF OF APPELLEES

STATE OF VERMONT

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STATEMENT OF ISSUES

1. Whether the trial court correctly rejected Appellants' facial challenge to Vermont's tuition statutes on the theory that they violate the Education Clause of the Vermont Constitution?

2. Whether the trial court correctly rejected Appellants' facial challenge to Vermont's tuition statutes on the theory that they violate the Common Benefits Clause of the Vermont Constitution?

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STATEMENT OF THE CASE

Appellants asked the Superior Court below to replace Vermont's long-standing tuition statutes with a universal tuition voucher system. The trial court correctly declined to do so because "there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent." *Mason v. Thetford Sch. Bd.*, 142 Vt. 495, 499 (1983). *Mason* is consistent with similar rulings nationwide and Appellants and amici do not cite a single case decided anywhere, on any theory, reaching a contrary conclusion.

Under the current statutory framework, school districts in Vermont must operate schools to educate their resident students, unless their electorate authorizes them to pay tuition instead, either to public schools in another school district or to certain independent schools. *See* 16 V.S.A. § 821(a)(1)-(3), (d) (districts "shall maintain" schools through grade 6 unless "the electorate authorizes" them to pay tuition instead, they are "organized to provide only high school education" or "the General Assembly provides otherwise"); 16 V.S.A. § 822(a) (school districts "shall maintain" high schools unless "the electorate authorizes" them to pay tuition instead or they are "organized to provide only elementary education").

In practice, 95% of Vermont students have historically attended Vermont public schools. App. 19. Most districts educate their students by operating schools for all grades from K-12. App. 19; AV 232, ¶ 2. A minority of districts choose instead to pay tuition to other public or private schools to educate some of their resident students for some grades. App. 19, AV 244, ¶ 66. These districts generally operate schools for lower grades and pay tuition for upper grades only, which involve more elective classes that can be more difficult for smaller districts to fill. App. 32, 35 (districts paid more than 10 times as much tuition for upper grades as for elementary grades in the 2018/19 school year); AV 244 ¶ 66 (alleging that 73% of districts that pay tuition do so for grades 7-8, 7-12, or 9-12 only). A very small fraction of students reside in districts that do not operate schools at all and instead pay tuition for all grades. *Id.*

In recent years, there has been an active debate in the legislature about how to respond to changing student enrollment levels in Vermont. For

example, in Act 46, the legislature responded to a substantial decline in student enrollment over time by concluding that many districts were "'not well-suited to achieve economies of scale'" and creating a structure that ultimately merged many districts throughout the state. *See Athens Sch. Dist. v. Vt. St. Bd. of Educ.*, 2020 VT 52, ¶ 1, 3; 2015, No. 46 § 1(a) (reflecting a decline from 103,000 students in FY97 to 78,300 students in FY15). More recently, the legislature has decided to revise existing funding formulas, including by increasing per-pupil weights for districts with lower enrollment levels.[1]

When considering potential policy changes, the legislature has correctly recognized that how schools are funded "is complex, with many factors that interact and impact each other" and noted that "one change can have ripple effects across the entire system."[2] And it has repeatedly considered and rejected efforts by voucher advocates to expand Vermont's current tuition statutes in a manner that could further reduce public school enrollment levels and make them more variable. For example, during the 2015-16 legislative session, the legislature declined to pass a bill that would have "expand[ed] Vermont's publicly funded tuition system by providing vouchers to all Vermont students."[3]

The trial court below declined to wade into this complex policy area and dismissed Appellants' claims.

STANDARD OF REVIEW

This Court reviews the "disposition of a motion to dismiss de novo and may affirm on any appropriate ground." *Bock v. Gold*, 2008 VT 81, ¶ 4.

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[1] *See* S.287 § 4 (2022) (enacted); https://legislature.vermont.gov/bill/status/2022/S.287.

[2] Task Force on the Implementation of the Pupil Weighting Factors Report, 2, https://ljfo.vermont.gov/assets/Uploads/e11b031427/Final-Report-Weighting-Study-Task-Force-12_17_21.pdf.

[3] H.263 (2015); https://legislature.vermont.gov/Documents/2016/Docs/BILLS/H-0263/H-0263%20As%20Introduced.pdf.

SUMMARY OF ARGUMENT

The Superior Court correctly dismissed Appellants' claims. Appellants assert that the Vermont Constitution allows parents to compel public school districts to pay private school tuition to the school of their choice. But whether Vermont should keep, expand, or contract its current tuition statutes is a complex policy question for the executive and legislative branches, not a constitutional question. This Court has previously held that "there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent." *Mason*, 142 Vt. at 499. And it did so in the specific context of a tuition request denied by a school district.

Although Appellants seek the reversal of *Mason*, they do not cite a single case decided anywhere on any theory suggesting that the Vermont Constitution requires a universal K-12 voucher system. Appellants contend that the State was required to prove as a matter of fact that there is no such requirement. But they did not make this argument below and cannot make it now. And even if they could, the burden was on Appellants because the statutes they challenge are "presumed to be constitutional" and the "proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley v. Walton*, 2010 VT 68, ¶ 20. Appellants' new burden argument also fails because the "facial constitutionality" of a statute is a "question of law" not fact. *See State v. VanBuren*, 2018 VT 95, ¶ 19.

Appellants allege that their districts disserved their children by failing to adequately address the needs of students with disabilities and harassment concerns. But districts cannot ignore the needs of students with disabilities or harassment, and parents can compel them to act if they do. Appellants cannot bring an as applied challenge based on the alleged experiences of their children without exhausting the administrative remedies available to them and naming their districts as parties.[4] Even if they could, proof that a specific

[4] Appellants initially named their districts, but the districts denied their allegations and filed a motion to dismiss on exhaustion and other grounds, which was granted. AV 8-10, 190-208. After filing this appeal, Appellants

district failed a specific child would not establish a facial claim "that 'no set of circumstances exists under which'" Vermont's tuition statutes "'[c]ould be valid'" as to other districts and students. *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22 (quoting *VanBuren*, 2018 VT 95, ¶ 19).

Appellants suggest that this Court's conclusion in *Mason* was: (1) distinguishable, (2) dicta, and (3) silently overruled by *Brigham v. State*, 166 Vt. 246 (1997). But *Mason* was directly on point because it involved a district denial of a private school tuition request and the parents made constitutional arguments. *Mason*'s conclusion that there is no constitutional tuition right was part of its holding because it was pivotal to its jurisdictional decision. And *Brigham* did not overrule *Mason*'s tuition decision—without citing or discussing it—by rejecting the separate and distinct concept of making school district funding primarily a product of local property values.

The Court need go no further than *Mason* to resolve this case. But even if *Mason* did not foreclose Appellants' claims, they would fail under intermediate scrutiny. As this Court explained in *Baker* and *Badgley*, the standard that would apply is the relatively uniform standard that applies in common benefits cases, not strict scrutiny.

Appellants' claims would fail first under this standard because their districts are not excluded from the benefit of the tuition statutes. They can choose whether, or not, to pay tuition based on local factors such as their size and enrollment. Allowing districts to make local choices on uniform terms is not facially unconstitutional under all circumstances. And Appellants do not claim that they have done what they would need to do to bring an as applied challenge to any specific tuition decision by any of their districts.

The tuition statutes are also constitutional because they bear a reasonable and just relation to furthering local control, controlling costs, and enhancing educational opportunity. Eliminating local control over tuitioning would reduce local control by taking a local choice away from districts. Controlling costs is a legitimate state interest and declining and variable enrollment can seriously stress district finances, particularly in smaller districts. Finally, "[w]hether parental choice improves the quality of

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dismissed their districts, presumably for the reasons set forth in the districts' motion.

education for some or all students must be determined by the executive and legislative branches, not this Court." *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 316 (1999).[5]

ARGUMENT

I. The Superior Court correctly concluded that the Vermont Constitution does not require a universal voucher system.

The trial court correctly dismissed the complaint in its entirety. Appellants improperly seek to answer a series of disputed policy questions by creating and constitutionalizing a right that does not exist. Whether Vermont should adopt a universal voucher system in which all Vermont students could compel their local districts to pay private school tuition to the school of their choice is a policy question for the legislature. *See Chittenden*, 169 Vt. at 316 ("Whether parental choice improves the quality of education for some or all students must be determined by the executive and legislative branches, not this Court."); *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2261 (2020) ("A State need not subsidize private education."). The legislature is also the proper forum for considering the host of associated complex policy questions any change in this area would raise.[6]

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[5] The U.S. Supreme Court recently undercut *Chittenden*'s discussion of adequate safeguards "against the use" of public funds paid to private religious schools "for religious worship" by holding that "a State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Compare* 169 Vt. at 312 *with Carson v. Makin*, 142 S. Ct. 1987, 1998 (2022). But *Chittenden*'s observation that voucher questions generally should be resolved by the "executive and legislative branches" remains good law, and indeed, appears to be consistent with a universal consensus among courts nationwide. 169 Vt. at 316.

[6] For example, the legislature would be better equipped to predict and evaluate the potential impact of changing voucher eligibility on public school enrollment, public school districts, costs, and educational outcomes. And if it was inclined to expand eligibility, it would also be the correct forum to

Under the current statutory framework, school districts in Vermont must maintain elementary and high schools unless their electorate authorizes them to pay tuition instead. *See* 16 V.S.A. § 821(a)(1)-(3) (districts "shall maintain" schools through grade 6, unless "the electorate authorizes" them to pay tuition instead, they are "organized to provide only high school education," or "the General Assembly provides otherwise"); 16 V.S.A. § 822(a) (school districts "shall maintain" high schools unless "the electorate authorizes" them to pay tuition instead or they are "organized to provide only elementary education"). Electorates considering how to proceed must consider a series of questions.[7] First, they must consider whether to operate schools for all grades, some grades, or no grades at all. *See* 16 V.S.A. § 821(a)(1); 16 V.S.A. § 822(a). Electorates that choose to pay tuition for at least some grades must then make a series of subsequent choices, which in turn can influence how much tuition they pay, to what schools, and their corresponding tax rates.

Specifically, districts can authorize payment to one or more public schools in other districts, in which case, with some exceptions, they pay tuition only to those schools. *See* 16 V.S.A. § 821(a)(1) (district that does not operate elementary schools may authorize payment of tuition "to one or more public elementary schools"); 16 V.S.A. § 827(a)-(b) (district that does not operate high school can vote to designate three or fewer schools "as the public high school or schools of the district" and pay tuition only to those schools). Districts may also authorize payment of tuition more broadly by authorizing payment of tuition to private schools. *See* 16 V.S.A. § 821(d) (district that does not operate elementary schools may authorize Board to pay tuition to an "approved independent elementary school or an independent school meeting education quality standards"); 16 V.S.A. § 822(a)(1) (district that does not

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evaluate how much to do so, whether tuition levels should be capped, whether income or wealth limits should apply, whether vouchers should be available to students already attending private schools without them, and potentially many other issues.

[7] The historical background portion of Appellants' brief ignores all of these choices when it asserts, without citation to any authority, that a "student in a 'choice' town can attend any accredited school" they wish at a rate set as the "average tuition cost for Vermont public schools." App. Br. at 6.

operate high school can authorize its board to pay tuition to public or private schools selected by parents). Districts that authorize payment of tuition to private schools pay tuition either at amounts determined by statute, or at higher amounts approved by their electorates. *See* 16 V.S.A. § 823(b); 16 V.S.A. § 824(c).

Appellants correctly alleged below that more than 80% of students in Vermont attend schools operated by their local public school system for all grades and that more than 75% of districts that pay tuition do so only for some, generally upper grades. AV 232, ¶ 2 (alleging that 17% of students can receive tuition for at least some grades); AV 244, ¶ 66 (alleging that 73 of 96 districts that chose to pay tuition in a particular year did so only for some grades). And Appellants contend on appeal that in a typical year, 95% of publicly funded students attend Vermont public schools. App. 23. Whether Vermont should replace this system with a universal voucher system, as Appellants propose, is a policy question for the legislature. Appellants' constitutional theories fail as a matter of law.

"[T]here is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent." *Mason*, 142 Vt. at 499. Indeed, the specific issue in *Mason* was whether parents could compel a school district to pay tuition to a school of their choice. *Id.* at 496–97. The electorate had chosen to designate a school "as the town's public high school" and the parents asked the district's board to instead pay tuition for their son to a different school. *Id.* The district declined, and the parents appealed the decision to the State Board of Education, which at the time was permitted by 16 V.S.A § 827(c). *Id.* The State Board upheld the decision. *Id.* Because there was no constitutional right at issue, and the legislature had chosen by statute to deny appellate review of the State Board decision, the parents' claims failed as a matter of law. *Id.* at 499.

This Court reached a similar conclusion in *Buttolph v. Osborn*, 119 Vt. 116, 116-17 (1956), in which residents and taxpayers of a district sought a writ of mandamus compelling the district to reopen a high school its board had decided to close. The plaintiffs contended that the voters of the district had "by a vote . . . instructed the board" to continue to maintain the high school and that the board's failure to do so violated the Common Benefits

Clause. *Id.* at 117, 122–23. The Court rejected this argument and concluded that the plaintiffs' remedy was to replace the allegedly recalcitrant "school directors . . . with others who advocate maintaining a high school" "at the next election." *Id.* at 123.

Amici suggests that the 1786 amendment of the Education Clause changes the constitutional analysis because it replaced the phrase "schools shall be established" with the phrase "schools ought to be maintained." Amicus Br. at 10; Vt. Const. of 1777, ch. II, § 40; Vt. Const. of 1786, ch. II § 38. But this change long predated *Mason, Buttolph*, and *Chittenden*. And in *Brigham*, this Court expressly rejected an argument that the difference between "ought" and "shall" in the Education Clause was constitutionally significant. To the contrary, the framers "drew no distinction between 'ought' and 'shall' in defining rights and duties." *Brigham*, 166 Vt. at 262.

In sum, "[w]hether parental choice improves the quality of education for some or all students must be determined by the executive and legislative branches, not this Court." *Chittenden*, 169 Vt. at 316. Courts around the country have reached the same conclusion. *See, e.g., Stevenson v. Blytheville Sch. Dist. # 5*, 800 F.3d 955, 967 (8th Cir. 2015) ("We agree with the District Court that neither *Meyer*, *Pierce*, nor any other relevant precedent support the proposition that a parent's ability to choose where his or her child is educated within the public school system is a fundamental right or liberty." (quotations and citations omitted)); *Fails v. Jefferson Davis Cty. Public Schs.,* 553 Fed. Appx. 383, 385 (5th Cir. 2014) ("[Plaintiffs] . . . have brought no cases to our attention that allow parents to enroll a child in the public school of their specific and unilateral choosing . . . . In fact, we have previously recognized that states have a compelling interest in tying a student's domicile to the district in which he attends public schools."); *Does v. Peyser*, No. 2015–2788, 2016 WL 9738404, *9 (Mass. Super. Oct. 4, 2016) ("The education clause obligates the Commonwealth to educate all its children . . . . This obligation does not mean that Plaintiffs have the constitutional right to choose a particular flavor of education, whether it be a trade school, a sports Academy, an art school, or a charter school.") (quotations omitted) *aff'd* 95 N.E.3d 241 (Mass. 2018); *Doe v. Sec. of Educ.*, 95 N.E. 3d 241, 255 (Mass. 2018) ("there is no constitutional entitlement to attend charter schools");

Dolores Huerta Prep. High v. Colo. State Bd. of Educ., 215 P.3d 1229, 1236 (Colo. Ct. App. 2009) ("Parents have cited no authority, and we have found none, treating attendance at a charter school as a constitutional right."); *Ward v. Bd. of Trustees of Goshen Cty. Sch. Dist. No. 1*, 865 P.2d 618, 623 (Wyo. 1993) ("Ward cites no cases in his brief, nor can we find any, where a student has a property interest in attending a specific school.").

A. Appellants' attempts to sidestep *Mason* fail.

Appellants alternatively assert that this Court's conclusion in *Mason*: (1) was distinguishable, (2) was dicta, and (3) was silently overruled by *Brigham v. State*, 166 Vt. 246 (1997). Br. at 22-24. Not so.

First, *Mason* is directly on point. Appellants do not want their children to attend their local public schools. Instead, they want to compel their districts to pay private school tuition to the schools of their choice. The parents in *Mason* wanted the exact same thing. In *Mason*, the district had designated the Thetford Academy as its public high school. 142 Vt. at 496. As here, the parents did not want their child to attend the school designated by their district as their public school and instead wanted it to pay tuition to the private school of their choice. *Id.*

Second, *Mason's* conclusion that "there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent" is part of its holding. *Id.* at 499. After the district denied parents' tuition request, the State Board affirmed, and the parents sought to pursue a Superior Court appeal. *Id.* at 496. The Superior Court reversed the Board, and was in turn reversed by this Court, which correctly held that:

> there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent. As such, the legislature has the power to deny appellate review of the State Board's decision whether or not to make such reimbursement . . . . The legislature exercised this power in § 827 by including the phrase the "[Board's] decision shall be final" in said statute. Thus, it was error for the court to deny the State Board's motion to dismiss for lack of jurisdiction.

Id. at 499.

A holding is "[a] court's determination of a matter of law pivotal to its decision." Black's Law Dictionary (11th ed. 2019). *Mason*'s determination of law that "there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent" was "pivotal to its decision" that it lacked jurisdiction because "[a]s such, the legislature ha[d] the power to deny appellate review." *Id.* And contrary to Appellants' assertion, Br. at 23, the parents in *Mason* made constitutional arguments. They specifically claimed that the "exercise of unfettered discretion by a local school board" as to tuition decisions "raises serious constitutional concerns" including "equal protection and state constitutional problems." SPC 38.

Third, *Brigham* did not silently overrule *Mason* by addressing an unrelated issue. *See, e.g., United States v. Shabani*, 513 U.S. 10, 16 (2006) (questions that are not addressed in appellate opinions "are not resolved and no resolution of them may be inferred"). Appellants concede that *Brigham* did not cite or discuss *Mason* at any time. Br. at 6. This is so because *Mason* and *Brigham* addressed different issues. *Mason* addressed tuitioning statutes and *Brigham* addressed a property tax-based education funding system. This Court has repeatedly approvingly cited *Mason* without qualification since deciding *Brigham*. *See, e.g., Friends of Pine Street v. City of Burlington*, 2020 VT 43, ¶ 23; *Handverger v. City of Winooski*, 2011 VT 130, ¶ 7.

This Court also confirmed again in 1997 that "[w]hether parental choice improves the quality of education for some or all students must be determined by the executive and legislative branches, not this Court." *Chittenden*, 169 Vt. at 316. Appellants make no effort to distinguish this express statement and it flatly contradicts their position that this Court, rather than the executive and legislative branches, should decide whether Vermont should adopt a universal K-12 voucher program.

To the contrary, Appellants are asking this Court to reverse *Mason*'s holding that "there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent" and create a new constitutional right. 142 Vt. at 499; AV 171. And they are doing so without

citing a single case decided anywhere, on any theory, reaching a contrary conclusion.

II. Appellants did not preserve their new burden argument and it would fail as a matter of law if they had.

Appellants and amici cite no cases holding or suggesting that they have a constitutional right to a publicly funded private school education. Instead, they contend that the State was required to prove there is no such right as a matter of fact. But Appellants did not make this argument below and so cannot make it now. And even if they could, Appellants' new burden theory mischaracterizes every aspect of the straightforward framework that applies to this case.

In short, the burden below was on Appellants, not the State. *See Badgley v. Walton*, 2010 VT 68, ¶ 20. The State did not need to present evidence because the "facial constitutionality" of the tuition statutes was a "question of law." *See State v. VanBuren*, 2018 VT 95, ¶ 19. Indeed, "the specific facts" of Appellants' alleged experiences "were not relevant." *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999). Rather, the burden was on Appellants to argue that "no set of circumstances exists under which" it could be constitutional for the State to allow local districts to make tuition decisions. *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22 (quotations omitted).\

A. Appellants cannot base their appeal on an argument they did not make below.

When Appellants first filed this case, they sued a mix of state and local defendants, including each of Appellants' local school districts. It was not entirely clear whether they sought to bring a facial challenge contending that "no set of circumstances exists under which" Vermont's tuition statutes "[c]ould be valid" or an as applied challenge contending that the statutes are "invalid as applied to the facts of a specific case." *Mountain Top*, 2020 VT 57, 22. After all of the defendants filed motions to dismiss, Appellants clarified

that they are bringing a facial challenge only. AV 137; Br. at 13 ("this is a facial challenge").

Appellants did not argue that the state defendants bore an evidentiary burden that prevented the state defendants from filing a motion to dismiss below. AV 169–186. Nor did they contend that the state defendants improperly cited extrinsic materials. *Id.* Instead, Appellants argued that every case rejecting an attempt to create a similar universal voucher right was distinguishable and that Vermont's tuition statutes are unconstitutional. *Id.*

It is well-settled that "[a]rguments not raised below will not be addressed for the first time on appeal." *See, e.g., Randall v. Hooper*, 2020 VT 32, ¶ 10 (quotations omitted); *Bull v. Pinkham Engineering Assocs., Inc*, 170 Vt. 450, 459 (Vt. 2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal"). Because Appellants did not argue below that the "Common Benefits Clause requires a consideration of interests that must be established on the record," they may not do so now. *Id.*; Br. at 12; AV 169-186.

B. Appellants' new burden argument fails as a matter of law.

Appellants assert that the State could not file a motion to dismiss explaining that their claims would fail as a matter of law even if their allegations were true. They posit instead that the State was required to present "factual evidence, affidavits, and other exhibits" proving that the tuition statutes bear a reasonable and just relationship to legitimate governmental purposes. Br. at 14. To the contrary, the burden was on Appellants and whether the statutes are constitutional is a question of law.

The burden was on Appellants below because statutes "are presumed to be constitutional" and "reasonable" and the "proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley*, 2010 VT 68, ¶ 20. And the burden is particularly heavy for facial challenges. "In a facial challenge, a litigant argues that "'no set of circumstances exists under which [a statute or regulation] [c]ould be valid.'" *Mountain Top*, 2020 VT 57, ¶ 22 (quoting *State v. VanBuren*, 2018 VT 95, ¶ 19).

Facial challenges "are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). They "often rest on speculation" and "run contrary to the fundamental principle" that courts should not unnecessarily anticipate constitutional questions or "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (quotations omitted). Facial challenges also "threaten to short circuit the democratic process" by preventing the implementation of laws in a constitutional manner. *Id.* at 451.

Appellants cannot contradict this Court's decision in *Badgley* by citing an earlier trial court motion to dismiss ruling in the same case. *See* Br. at 13 (citing *Badgley*, No. 538-11–102, 2006 Vt. Super. Lexis 19, *1 (Vt. Super. Ct. Aug. 3, 2006)). Because *Badgley* was ultimately decided in defendants' favor after a bench trial, this Court never reviewed the motion to dismiss ruling. When it instead reviewed the trial court's findings of fact and conclusions of law, this Court specifically observed that a rule that "would place the burden on the State to prove a statute is constitutional" would be directly contrary to "many holdings" establishing "that statutes are presumed to be constitutional." *Badgley*, 2010 VT 68, ¶ 42.

Appellants' reliance on *Mello v. Cohen*, 168 Vt. 639 (1998) is similarly misplaced. First, *Mello* confirmed that to survive a motion to dismiss, a party must plead facts that "if proven" would allow them to state a claim. *Id.* at 641. Second, *Mello* bore no resemblance to this case. It was not a facial challenge to a statute. It was a medical malpractice case that concluded that a specific plaintiff did not carry his burden on summary judgment when he failed to offer expert testimony about "[t]ongue lesion types and associated diagnostic procedures and treatments" because these topics "do not fall within the common knowledge of lay factfinders." *Id.* at 640.

Appellants also suggest that the Second Circuit recently reversed a motion to dismiss ruling because record evidence was needed in *Cornelio v. Connecticut*, 32 F.4th 160 (2d Cir. 2022). Br. at 13. But *Cornelio* is a First Amendment case and a different standard applies to First Amendment claims than to claims invoking the Common Benefits and Education Clauses. *Id.* at 166, 171 (observing that "the party seeking to uphold a restriction on . . . speech carries the burden of justifying it" and describing the specific First

Amendment standard that applies to content neutral restrictions (quotations omitted)).

Appellants' attempted reliance on *Boyd v. State*, 2022 VT 12 is particularly surprising because *Boyd* expressly confirms that the burden is on plaintiffs who seek to invoke the Common Benefits and Education Clauses. In *Boyd*, the plaintiffs claimed that the State's "education funding and property taxation system" was "unconstitutional because it deprived" the student plaintiff "of an equal educational opportunity." 2022 VT 12, ¶ 1. This Court observed that a party that "does not bear the burden of persuasion" may obtain summary judgment "by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." *Id.* ¶ 19 (quotations omitted). And it found that summary judgment was properly entered in favor of the State because plaintiffs had "failed to present evidence sufficient" to show that "the current statewide education funding system deprived plaintiff Boyd of a substantially equal educational opportunity." *Id.* ¶ 20.

Appellants' evidentiary assertion also fails because the "facial constitutionality" of the tuition "statute[s] present[ed] a pure question of law." *Van Buren*, 2018 VT 95, ¶ 19; *United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002) ("A challenge to the constitutionality of a criminal statute is a pure question of law"); *St. Croix*, 178 F.3d at 519 ("because the Association's complaint asserted a facial constitutional challenge, the issues presented . . . were questions of law"). Indeed, "the specific facts" of Appellants' alleged experiences "were not relevant." *St. Croix*, 178 F.3d at 519. Rather, the burden was on Appellants to argue that "no set of circumstances exists under which" it could be constitutional for the State to allow local districts to make tuition decisions. *Mountain Top*, 2020 VT 57, ¶ 22 (quotations omitted).

III. Appellants cannot bring an as applied challenge to district level decisions by suing the State.

Appellants allege that their local districts did not provide supports needed by some of their children and did not respond appropriately to harassment and isolation of their other children. Br. at 8-11. And Appellants

assert that they "deserve the opportunity to prove on the record why the educational opportunities offered them by their assigned schools are not equal to those offered by independent schools." Br. at 22. The amicus brief takes a similar approach, suggesting that it "would be a great injustice to tell any plaintiff . . . that the education offered at the schools where their children were bullied, neglected, or failed to thrive was 'good enough.'" Amicus Br. at 20-21. But a claim that a specific district failed to adequately serve a specific child is an as applied claim, not a facial one. "In an as-applied challenge . . . a party claims that a statute or regulation is invalid as applied to the facts of a specific case." *Mountain Top*, 2020 VT 57, ¶ 22.

For example, Appellants allege that the Windham Northeast Union Elementary School District did not properly accommodate L.V.'s disabilities, but an independent school he attended in seventh and eighth grade did. AV 236-38, ¶¶ 16–21. Appellants then allege a different district – the Bellows Falls Union High School District – has chosen to operate a public high school and not pay tuition. AV 238, ¶ 23. As a threshold matter, alleging that a specific district failed to accommodate a student's needs could not possibly establish that a different district would not either. But even if it could, school districts cannot ignore allegations that they are failing to provide supports needed by students with disabilities.

There is a large and developed body of law confirming that districts must provide a free and appropriate public education to students with disabilities and that parents can compel them to do so if they do not. *See, e.g.,* the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et. seq.*; State of Vermont, Special Education Rules 2360–2368. Indeed, the IDEA specifically "authorizes reimbursement for the cost of private special-education services when a school district fails to provide" a free and appropriate public education and a "private school placement is appropriate." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

Appellants also allege that local districts failed to respond appropriately to harassment and isolation of R.T., E.T., and E.R. by other students. AV 239–43. Districts cannot ignore harassment on the basis of gender identity or disability either. *See* 16 V.S.A. § 570(b) (requiring all districts to have harassment prevention policies "at least as stringent as

model policies developed by the Secretary" of the Agency of Education); 16 V.S.A. § 11(26)(A) (policies must address harassment on the basis of both gender identity and disability). The model policies districts must meet or exceed contemplate an investigation followed by "prompt and appropriate disciplinary and/or remedial action reasonably calculated to stop" bullying and provide a procedure for parents to request an independent review if they disagree with the outcome. *See* Model Procedures on the Prevention of Harassment, Hazing and Bullying of Students, §§ III.F., III.G., IV.A., V.B., https://education.vermont.gov/sites/aoe/files/documents/edu-memo-holcombe-regarding-hhb-model-policies.pdf.

In short, this case is an as applied challenge to the education provided to specific children by specific districts masquerading as a general facial challenge. Proof that specific districts did not meet the needs of specific children could potentially be relevant to as applied claims, but would not establish a facial claim "that 'no set of circumstances exists under which" Vermont's tuition statutes "[c]ould be valid" as to other districts and other students. *Mountain Top*, 2020 VT 57, ¶ 22.

Appellants cannot bring an as applied challenge based on the specific experiences of their children without: (1) exhausting the administrative remedies available to them and (2) naming their districts as parties. And as the superior court correctly observed:

> Plaintiffs concede that they have not exhausted their administrative remedies and that they are not, therefore, positioned to bring an as-applied challenge to the statutes at issue. *See, e.g.*, 16 V.S.A. § 828 ("Unless otherwise provided, a person who is aggrieved by a decision of the school board relating to eligibility for tuition payments, the amount of tuition payable, or the school he or she may attend, may appeal to the State Board and its decision shall be final."); Vt. R. Civ. P. 75(c) (party must file Amended Complaint seeking judicial review of administrative decision within thirty days after notice of the agency decision).

AV 32.

Appellants attempt to sidestep their inability to bring an as applied challenge by suggesting that the legislature has "impos[ed] a geographically discriminatory education policy." Br. at 20. It has done no such thing. As the Superior Court correctly observed, the "Legislature has not determined which districts will have their own schools and which will tuition. Instead, the electorate in each district makes that choice" based on a set of uniform tuition statutes that apply "equally to all." AV 40.

Whether this case is characterized as relating to students in need of additional supports, student harassment, or tuition decisions, it is an as applied challenge to alleged decisions made by nonparty school districts. And it fails because Appellants cannot bring an as applied challenge without following all of the necessary procedures and naming all of the necessary parties.

IV. If this case was a facial challenge, intermediate scrutiny would apply, and it would fail as a matter of law.

A. If this Court had not already rejected a similar tuition demand in *Mason*, intermediate scrutiny would apply.

For the reasons discussed above, this Court need go no further than *Mason* to resolve this case. But even if: (1) Appellants could bring this case as a facial challenge and (2) *Mason* was not on point, Appellants' claims would fail under intermediate scrutiny. *Brigham* is not, as Appellants suggest, a strict scrutiny case.

Rather, this Court has rejected "the rigid, multi-tiered analysis evolved by the federal courts" in favor of "a relatively uniform standard" for common benefits cases similar in practice to what federal courts would characterize as intermediate scrutiny. *Baker v. State*, 170 Vt. 194, 212 (1999). This approach can "be discerned . . . in *Brigham*," which addressed "an Article 7 challenge to the State's education funding system." *Id.* at 205, 206. "Consistent with prior decisions" *Brigham* "acknowledged the federal standard" "even as it eschewed the federal categories of analysis." *Id.*

Thus, if Appellants could state a claim here, it would be subject to the uniform standard *Brigham* effectively applied and *Baker* formally acknowledged. This conclusion is entirely consistent with the analysis set forth by the trial court in *Athens Sch. Dist. v. Vt. State Bd. of Educ.,* No. 33-1-19 Frcv, 2019 WL 5549822, *14 (Super. Ct. June 18, 2019). In *Athens,* Judge Mello explained the applicable standard by reference to *Baker* and *Badgley v. Walton*, 2010 VT 68, ¶ 21, and characterized *Brigham* as an example of the application of that standard, just as this Court did in *Baker*. *Id.*; *Baker* 170 Vt. at 206.

Horton v. Meskill, 376 A.2d 359 (Conn. 1977) and *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) are not to the contrary. Both involved public education rights, not a claimed right to publicly funded private school tuition, and a "State need not subsidize private education." *Espinoza,* 140 S.Ct. at 2261. *Horton* and *Claremont* also involved school funding systems, not tuition statutes, and in both a very small fraction of education funding overall was equalized. *Horton*, 376 A.2d at 366 (non-equalized local property taxes were "approximately 70 percent" of funding); *Claremont*, 703 A.2d at 1354 (non-equalized local property taxes were "seventy-four to eighty-nine percent" of revenue). Indeed, *Horton* subsequently declined to impose a requested requirement that the state equalize and fund 50% of education spending. 486 A.2d 1099, 1108.

The trial court correctly concluded that strict scrutiny does not apply. It also rightly highlighted the intractable problems Appellants' proposed new right would cause. As it observed:

> When queried whether, under Plaintiffs' understanding of the Common Benefits Clause, some other set of plaintiffs could compellingly argue that each town must create and maintain its own school system (instead of an existing tuitioning system), counsel for Plaintiffs agreed. In other words, the Common Benefits Clause envisioned by Plaintiffs would require each municipality to have universal tuitioning and also maintain a public school. It is unclear [how] Plaintiffs would resolve the constitutional issue presented by multiple sets of parents: one that favors a union school district, another that favors a standard

> school district, and another that favors tuitioning. Indeed, under Plaintiffs' conception of the Common Benefits Clause, resolution of such dispute would be a practical impossibility. The Court does not believe the Common Benefits Clause mandates such extreme results, nor can it be interpreted to eliminate virtually all local decision making concerning the means through which education is provided to Vermont's children.

AV 47-48.

1. Appellants' districts are not disadvantaged by the tuition statutes.

Under the *Baker/Badgley* framework, Courts "first define that part of the community disadvantaged by the law" and "examine the statutory basis that distinguishes these protected by law from those excluded from the state's protection." *Badgley*, 2010 VT 68, ¶ 21. Appellants and amici do not address this first step and it is fatal to their claims for three reasons.

First, as the Superior Court correctly recognized, Appellants' districts are not "excluded from the state's protection" by the tuition statutes. *Id.*; AV40-41. They can choose, like all other districts, whether or not to pay tuition, *see* 16 V.S.A. §§ 821–22, and cannot be said to be "disadvantaged by the" tuition statutes accordingly. *Badgley,* 2010 VT 68, ¶ 21. The State is not, as the amicus brief suggests, treating citizens differently "based on the mere fortuity of residence and for no other reason." Amicus Br. at 19. It is allowing local districts to decide, based on local reasons, how best to proceed.

Allowing local districts to make local choices on uniform terms is not facially unconstitutional. Local control is a "laudable goal" and *Brigham* expressly recognized that individual "school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature." 166 Vt. at 265-66. And Appellants are not challenging any specific decision by any specific district as applied to any specific child.

Amici also suggests that by funding education, the State effectively "controls the ability of towns to provide town tuitioning." Amicus Br. at 17. But this misunderstands how Vermont funds education. "[V]oters within each school district" make spending decisions and the State funds the resulting budgets – whatever they are – and "collects property taxes at rates it sets to cover a portion of the cost." *Boyd v. State*, 2022 VT 12, ¶ 5. And the State equalizes tax rates across districts "so that voters in districts with the same spending per equalized pupil pay approximately the same homestead property tax rate" without regard to local property values. *Id.* ¶ 6. Making funding available on the same terms to all districts does not control local tuition decisions. It allows districts to make local decisions on uniform terms.

Second, Appellants assert that they have been disadvantaged because their districts, consistent with the practice of districts educating the vast majority of students in Vermont, concluded that operating schools for some or all grades was better for their specific communities than paying tuition for those grades. But "[w]hether parental choice improves the quality of education for some or all students," is a disputed policy question that "must be determined by the executive and legislative branches, not this Court." *Chittenden*, 169 Vt. at 316. Where residents of a district disagree with its decision whether to operate schools or pay tuition their "remedy comes at the next election." *Buttolph*, 119 Vt. at 123.

Third, there are specific legal mechanisms available for parents and students to address concerns about supports needed by students with disabilities and bullying and Appellants do not allege that they attempted to invoke them. One of the primary purposes of exhaustion requirements is to give educational institutions an opportunity to promptly remedy alleged problems. *See Washington v. Pierce*, 2005 VT 125, ¶ 32. Appellants' choice not to pursue remedies designed to address their specific alleged problems: (1) bars this action for the reasons set forth in more detail above and (2) prevents Appellants from showing that they have been disadvantaged by the tuition statutes.

2. The tuition statutes bear a reasonable and just relation to legitimate governmental purposes.

Appellants focus instead on questioning whether the tuition statutes bear a reasonable and just relation to furthering local control, controlling costs, and enhancing educational opportunity. Eliminating local control over tuitioning would unquestionably reduce local control because it would eliminate a local choice districts currently have. And because how many teachers a district needs, and how many classes it can offer, depends in significant part on its enrollment, eliminating local control over tuitioning would also reduce local control over "whom to hire" and "how to structure" educational offerings by reducing enrollment levels and making them more variable. *Brigham*, 166 Vt. 256–266.

Appellants attempt to resist this conclusion by suggesting that the State "miscalculated" the percentage of students who "use town tuition to attend an independent school" in its motion to dismiss as "'about 1%.'" Br. at 15. But Appellants disappointingly quote only two words from a sentence the rest of which flatly contradicts their assertion. What the motion actually said is that districts "only tuitioned about 1%" of equalized pupils "*for all grades*," not that districts tuitioned 1% of students "to independent schools." AV 218 (emphasis added). The point was that Appellants seek to overrule hundreds of local choices not to pay tuition for any or most grades. And they do so on the tail-wags-the-dog theory that every district must pay tuition for all students for all grades because a handful of very small districts educating a very small percentage of Vermont students have chosen to do so instead of operating schools.

Turning to costs, because resources are necessarily limited, controlling education costs is also a legitimate state interest. *See Sch. Admin. Dist. No. 1 v. Comm'r of Educ.*, 659 A.2d 854, 858 (Me. 1995) (subsidizing education "within available state revenues" is "a legitimate state goal"). Indeed, as the amicus brief notes, Vermonters currently spend "the highest percentage of taxpayer income . . . on K-12 education in the nation." Amicus Br. at 15. A universal K-12 tuition right could unnecessarily divert public funds from public schools to pay

private school tuition that otherwise would have been paid privately. Diverting an unknown and potentially variable number of students from public school districts to private schools could also significantly impact public schools' per-pupil costs by requiring them to spread fixed costs for teachers, facilities, and transportation across a smaller and more variable student base.

Finally, "[w]hether parental choice improves the quality of education for some or all students must be determined by the executive and legislative branches, not this Court." *Chittenden*, 169 Vt. at 316. Appellants have cited studies suggesting that it might. As described below, other studies suggest the opposite.

3. The legislature is the proper forum for Appellants' policy arguments.

Appellants' assertions about the merits of their proposed new universal voucher program must be evaluated by the legislature, not the courts. As *Badgley* explained, because the policy questions raised by Appellants' proposal are "at least debatable" Appellants may not "procure invalidation" of the tuition statutes "by merely tendering evidence in court that the legislature was mistaken." *Badgley*, 2010 VT 68, ¶ 38 (quotations omitted).

Appellants' brief suggests that the universal voucher program they ask the Court to create would improve outcomes and reduce costs and cites studies they contend support these assertions. Br. at 16. But other studies suggest the exact opposite. For example, recent large-scale studies of voucher programs in Indiana and Louisiana reflect "significant achievement losses for students who switch from a public to a private school with a voucher" and "large negative effects" of "voucher usage after four years, especially in math" respectively. Megan Austin, *et al.*, Voucher Pathways and Student Achievement in Indiana's Choice Scholarship Program, Abstract, 32 The Russell Sage Foundation Journal of the Social Sciences 5(3) (2019); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6546025/; Jonathan Mills and Patrick Wolf, The Effects of the Louisiana Scholarship Program on Student

Achievement after Four Years, Abstract, University of Arkansas, Fayetteville, AR; https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1076&context=edrepub.

Other studies have also questioned the claimed fiscal benefits of vouchers, suggesting that vouchers can cause states to unnecessarily pay private school tuition at significant expense, that vouchers cover only part of the total cost of private schools, and that many private schools primarily educate lower-cost students, in part by not providing expensive special and vocational education services. *See, e.g.,* Ellie Bruecker, Assessing the Fiscal Impact of Wisconsin's Statewide Voucher Program, 6, 8, National Education Policy Center; https://nepc.colorado.edu/sites/default/files/publications/PM%20Bruecker%20Funding_0.pdf. For example, the Bruecker study suggests that "86% of the students who received vouchers" in one year in Wisconsin "were already attending a private school prior to receiving a voucher" and that Indiana data "shows a similar pattern" and summarizes previous research addressing the other listed issues. *Id.* at 6, 8.

A ProPublica review of Vermont's existing tuition program similarly collected examples of Vermont districts paying tuition to schools that students likely would have attended without a public subsidy including Phillips Exeter Academy, Deerfield, ski academies, out-of-state art schools, and even foreign boarding schools. *See* Annie Waldman, Voucher Program Helps Well-Off Vermonters Pay for Prep School at Public Expense, ProPublica, June 2, 2017. It also observed that Vermonters who use vouchers to go to in state private schools were more affluent than the public-school population as a whole, with 22.5% eligible for free and reduced lunches as compared to a statewide average of 38.3%. *Id.* And many independent schools in Vermont do not provide a full range of special education services.[8]

[8] A list of independent schools that have been approved to provide at least some special education services, and an indication of what services they have been approved to provide, can be found at https://education.vermont.gov/documents/edu-list-of-ind-schools-approved-to-serve-students-w-disabilities.

Finally, studies have highlighted the potential adverse impact that creating two parallel school systems through vouchers could have on both public schools and their students. For example, a Wisconsin study found "that school districts could lose a substantial portion of their state aid as participation in the voucher program grows, and that small districts would be the most negatively affected." *See* Bruecker, at 3. An analysis by the Center for American Progress similarly concluded that for sparsely populated rural and small districts in particular "vouchers would be not just be ineffective, but they could also dramatically destabilize public school systems and communities." Neil Campbell and Catherine Brown, Vouchers Are Not a Viable Solution for Vast Swaths of America, Center for American Progress; https://www.americanprogress.org/issues/education-k-12/news/2017/03/03/414853/vouchers-are-not-a-viable-solution-for-vast-swaths-of-america/.

Indeed, the concerns associated with reducing public school enrollment and funding, and making both more variable, are potentially particularly acute in Vermont. Many smaller rural districts are already struggling with declining enrollments, and in some instances, are considering whether further declines would require them to close schools. *See, e.g.,* Jonathan Mingle, Finances Threaten Local Schools Such As Lincoln's. Can Towns Afford to Lose Them? Seven Days, Feb. 17, 2021, https://www.sevendaysvt.com/vermont/finances-threaten-local-schools-such-as-lincolns-can-towns-afford-to-lose-them/Content?oid=32345662. Reducing local control over tuitioning could significantly destabilize smaller districts by driving up, and increasing the variability of, districts' per-pupil costs. This, in turn, would reduce district control over "whom to hire" and "how to structure" educational offerings by impacting their options for staffing, class offerings, and the operation of specific schools. *Brigham*, 166 Vt. at 265–66.

Notably, "the exact issues being debated" nationwide about vouchers "remain under active investigation and consideration in the political process" here. *Badgley*, 2010 VT 60, ¶ 40. For example, during the 2015-16 legislative session, voucher advocates unsuccessfully proposed a bill "to expand Vermont's publicly funded tuition system by providing vouchers to all Vermont students to be used at any approved, nonsectarian independent or

public school in Vermont or an adjacent state or country."[9] After that bill did not succeed, advocates have continued to propose narrower expansions, such as a 2017-2018 bill that would have required districts to permit transfers to any other public school that provides a course, sport, or service not offered at the sending district.[10] Indeed, during the 2019-2020 session, advocates proposed a procedure to request the payment of tuition based on bullying concerns.[11]

In short, the Legislature is the proper forum for evaluating whether Vermont should expand the current tuition statutes to address concerns like those raised by the Plaintiffs here, curtail the tuition statutes to address other competing concerns, or leave the tuition statutes unchanged. *Badgley*, 2010 VT 60, ¶¶ 40-41. And, if the Legislature were inclined to alter the statutes, it would also be the proper forum for evaluating the plethora of complex associated questions. At a minimum, those questions would include how any revised system would be funded, whether it would divert funds from public to private schools, whether it would be subject to income, wealth, or capacity caps, whether participating schools would be required to accept all applicants, and how special education needs would be addressed and funded. A constitutional ruling "would end development of the issue" whereas the Legislature "by contrast, can experiment with different approaches . . . without irrevocably choosing one until the right approach is clear." *Id.*, ¶ 41.

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[9] H.263 (2015), https://legislature.vermont.gov/Documents/2016/Docs/BILLS/H-0263/H-0263%20As%20Introduced.pdf

[10] H.450 (2017), https://legislature.vermont.gov/Documents/2018/Docs/BILLS/H-0450/H-0450%20As%20Introduced.pdf

[11] H.297 (2019), https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0297/H-0297%20As%20Introduced.pdf

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CERTIFICATE OF COMPLIANCE

David Boyd, Assistant Attorney General and Counsel of Record for the Appellees, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(4). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 8,695 words.

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