IN THE SUPREME COURT OF THE STATE OF VERMONT

Supreme Court Case No. 22-AP-059

Vitale et al.,

Plaintiffs – Appellants,

v.

State of Vermont et al.,

Defendants – Appellees.

APPELLANTS' PRINCIPAL BRIEF

Deborah T. Bucknam (ERN # 1391)
Bucknam Law, PC
434 Eastman Road
Walden, VT 05836
802-748-5525
DBucknam@vtlegalhelp.com

Brian K. Kelsey (ERN # 11526)
Admitted Pro hac vice
Daniel R. Suhr (WI Bar No. 1056658)
Pro hac vice motion forthcoming
Jeffrey D. Jennings (ERN # 11579)
Admitted Pro hac vice
Liberty Justice Center
440 N. Wells St. Suite 200
Chicago, IL 60654
312-637-2280
bkelsey@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

Attorneys for Plaintiffs – Appellants

ISSUES PRESENTED

1. Did the Superior Court err by granting a motion to dismiss plaintiffs' claim based on the Common Benefits Clause, which requires publicly funded programs to be made available on an equal basis to all Vermonters, without developing a factual record of the government's interests in providing disparate benefits? (p.11)

2. Did the Superior Court err by granting a motion to dismiss plaintiffs' claim based on the Education Clause before any record had been developed establishing whether children enjoy equal educational opportunities in different localities as a result of whether town tuitioning is offered to them? (p.17)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

STATEMENT OF THE CASE

I. Introduction

Allowing some Vermont children to attend the school of their choice while denying this common benefit to other children violates the "paramount duty to place the means of obtaining instruction and information equally within the reach of all." *Brigham v. State*, 166 Vt. 246, 266 (1997) (quoting the Inaugural Address of Governor Samuel Craft, 1828).

In nearly 40% of Vermont towns, parents have some form of choice to receive tuition to send their children to public or independent schools outside their town's public school system. App. 003. But these benefits are not available to all. This lawsuit is brought on behalf of those children who are not in the lucky 40% of towns which offer choice.

The Plaintiffs-Appellants are parents who desire a school that best fits the specific needs of their children but are instead automatically shunted into particular schools by nothing more than the happenstance of geography. They bring this action to ensure the educational opportunity and common benefits of Vermont citizenship are extended equally to all the state's children.

II. Historical Background

Vermont boasts a school choice system unique among all the states. Its town tuitioning system is the oldest publicly funded school choice system in the United States. App. 004 The first State Superintendent's Annual Report, issued in 1849, indicates that the State was already paying school tuition then, App. 009, and the system was officially instituted in 1869. App. 004. Thus, Vermont instituted school long before other states.

The system is unusual for its simplicity and its international reach. A student in a "choice" town can attend any accredited school, public or independent, anywhere he or she wants—out of district, out of state, or even outside the U.S. The town where the student lives pays the child's school directly. The State calculates the amount to be paid each year based on the average tuition cost for Vermont public schools. Presently, nearly 4,000 students choose to receive town tuitioning. App. 013.

Only two other states have town tuitioning, but neither state's program is as robust as Vermont's. Maine's program, begun in 1873, is more restrictive than Vermont's, and only 2% of the state's students participate. New Hampshire, which instituted town tuitioning in 2017, presently has fewer than two dozen students participating. App. 054.

When Vermont enacted its first state constitution, education consisted of local schools typically started by parents or local leaders: "Instead of waiting, as in many of the

States, for teachers to establish schools and invite the children to them, the people of Vermont set up the schools and then invited teachers." App. 059-60. As one contemporary described it, "[O]ne of the first things the new settlers attend to is to procure a schoolmaster to instruct their children in the arts of reading, writing, and arithmetic, and where they are not able to procure or hire an instructor the parents attend to it themselves." App. 060 (quoting Samuel Williams, Natural and Civil History of Vermont (1809)).

During the 18th and 19th centuries, Vermont's educational system consisted of two distinct types of schools. The first were the common schools, tiny district schools serving neighborhoods, independently governed by neighborhood leaders and funded by local taxation. The State Secretary of Education's report of 1860 demonstrates the purely local nature of the common schools. At that time, there were 2,754 district schools serving 89,697 students—each school, encompassing all the elementary grades, averaging 35 students. App. 061. The second type of school were privately-run grammar schools and academies, each contributing to the unique educational landscape in Vermont:

> The small academies and county grammar schools which sprang up in the segregated frontier communities of Vermont during the formative stages of that state's history offer to the student of education a fascinating field for research ..... For sixty years before the public high school began to overshadow these picturesque halls of learning, the academy was active with change and alive with the spirit which makes education (before it is something taken for granted) one of the most vital of human experiences. . . . [The academies] all reflected the conviction of a free and independent people, that education was a fundamental right; that the welfare of the individual student was their greatest obligation; that the purpose of the school was not to repress, examine or standardize youth ..... but to give him enlightenment, understanding and fellowship, to aid him in the development of his own personality and innate abilities, and by intimate association to help him on his individual way.

Proceedings of the Vermont Historical Society, 1936, Vol IV, No. 3., at 118. The town tuitioning system that developed from this two-tiered approach maintained its character unique to Vermont.

Vermont's Common Benefits Clause is also unique. Only Virginia's constitution contains language similar to Vermont's. *See* Va. Const. art. I, § 3. However, Virginia courts have held that their common benefits clause confers no private right of action, unlike Vermont's. *See Williamson v. Angelone*, 197 F. Supp. 2d 476, 480 (E.D. Va. 2001).

Thus, Vermont is the only state in the union that has determined that its common benefits clause confers constitutional rights on its citizens. Moreover, as noted by this Court in *Baker v. State,* 170 Vt. 194, 201-11 (1999), those rights are more robust than the rights found in the federal constitution.

In conclusion, the uniqueness of Vermont's oldest school choice program in the nation and the uniqueness of its citizens' rights under the Common Benefits Clause call for a careful and considered constitutional review of the present system of school choice granted to a few, but not all, of Vermont's students.

III. Factual Background[1]

Sara and Louis Vitale

Sara and Louis Vitale are the married parents of three children: K.V., L.V., and T.V. Their second child, son L.V., was born with multiple medical and physiological problems, including Arthrogryposis multiplex congenital**,** bilateral club feet, hip dysplasia, malformed rib cage, and severe respiratory disorder. L.V. is wheelchair bound and needs a tracheostomy at night to breathe. He also needs and uses a feeding tube. He cannot scratch his head, go to the bathroom unassisted, or eat without assistance.

The Vitales live in the Windham Northeast Union Elementary School District and in the Bellows Falls Union High School District. L.V. attended Grafton Elementary School through grade six. The Vitales had constant struggles with the school system and the way it treated L.V. One time, L.V.'s para-educator forgot him and left him alone in the bathroom for an hour. Another time, his teachers intentionally left L.V. inside the school with his para-educator while everyone else went outside for a fire drill. Grafton Elementary treated L.V. as if he were a nuisance. If there was a problem, the school would simply isolate L.V. rather than working with L.V. and his family to solve the problem.

When L.V. was entering 7th grade, he visited Bellows Falls Middle School. Though told ahead of time of L.V.'s disabilities, the middle school made no attempt at accommodation. L.V.'s wheelchair would not fit through the door of the very first classroom visited. At the end of the day, during a school assembly, the Vitales were informed that L.V. had to leave early because the district was short on wheelchair buses, and transporting L.V. would disrupt their regular route. The Vitales declined, keeping

[1] All facts are drawn almost verbatim from the Amended Complaint for Declaratory Judgment and Injunctive Relief at 5-12, have been updated, and are presumed true for purposes of the motion to dismiss. P.C. 046-53.

L.V. at the assembly and taking him home themselves. They were deeply concerned after their visit, knowing of L.V.'s needs and seeing the callous indifference of the school even after it had been notified weeks before of his special needs.

After the disturbing visit to Bellows Falls, L.V. and his parents decided to enroll L.V. in an independent school, Compass School. Compass provided L.V. with his own bathroom, added ramps for wheelchair access, hired staff, and even accommodated L.V.'s needs by processing L.V.'s food so he could eat at school. Compass works hard to accommodate L.V.'s educational, physical, and emotional needs. As a result, L.V. is thriving at Compass. When an issue arises at Compass, it becomes a community issue that the entire community solves together. Compass treats L.V. as a welcomed member of the school community rather than as an imposition. L.V. loved his 7th and 8th grade years at Compass, which were made possible through town tuitioning.

However, L.V.'s school district does not offer town tuitioning for high school. The Vitales live on limited income, receive Supplemental Nutrition Assistance Program food stamp benefits, and are scrimping and saving to pay tuition to keep L.V. at Compass.

This is doubly hard because K.V. attended Compass, as well. The youngest child, T.V., is enrolled in public school at Grafton Elementary, but she, too, is struggling. The school declined to provide her with the mental health disability evaluation that she needed. For the entire Vitale family, then, the inability to access town tuitioning has led to severe financial stress in the face of already difficult circumstances.

Marisa and Benjamin Trevits

Marisa and Benjamin Trevits are the parents of three children: a 17-year-old daughter, V.T., and 14-year-old twins, R.T. and E.T. The Trevitses live in the Lake Region Union Elementary School District.

At about age 11, R.T., whose gender assignment at birth was female, began showing signs of depression, including engaging in self-cutting behavior and self-isolation. The Trevitses decided to enter R.T. into therapy. As a result, R.T. began identifying as male and adopted a male name. R.T.'s identification as male had devastating results at school. R.T. was teased, bullied, and shunned. R.T. and E.T. were forced to sit alone at lunch because the other children would not associate with them. The Trevitses attempted to work with the school administration to end the bullying and isolation, but the assigned school failed to accommodate their needs.

R.T. and E.T. began complaining of headaches and stomach aches, and they stopped attending school regularly. R.T. became suicidal. The Trevitses met with the Lake Region Union School Board to request that it provide town tuitioning for R.T. and E.T. to attend another school, where they would not be met with bullying and isolation.

The Board refused. The Trevitses made the difficult decision to pay to send the twins to an independent school, Thaddeus Stevens School, in Lyndon, Vermont.

Thankfully, the twins initially thrived at Thaddeus Stevens School and were supported by the administrators, teachers, and students. Even though the schoolwork was more challenging than at Glover Community School, their educational achievement improved. Without the emotional heartache they received at Glover Community School, they were able to focus on their academics. R.T. was no longer suicidal, and E.T.'s anxiety and stress were reduced.

However, the Trevitses struggled to pay tuition to Thaddeus Stevens School. They survive on a limited income. Ben works in carpentry, and Marisa works a second job as a bartender. The Trevitses need the town tuitioning program that other Vermont students receive, so they can make ends meet for their family. Because they are being locked out of the program based on their residency, their children had to make other sacrifices to attend independent school. Their oldest child, V.T., needs braces on her teeth, but the Trevitses cannot afford them due to the money they have been forced to pay in independent school tuition.

Cindi and Frederick Rosa

The Rosas are the parents of a 12-year-old daughter, E.R., and a 7-year-old son, D.R. The Rosas live in the First Branch Unified School District.

In August 2014, E.R. began attending kindergarten at Chelsea Public School. While E.R. tests above average in both reading comprehension and math, she has a form of aphasia, a speech delay that has required speech therapy. As a result of her speech delay, E.R. was taunted and teased by several students in kindergarten. Understandably, this harassment upset her tremendously, but the other students used her reaction to make fun of her, calling her a "cry baby." E.R. would come home from school visibly upset, and she repeatedly asked not to return to school. E.R. asked her mother why she was broken and not like other kids.

A student whose desk was next to E.R. was the worst bully. He threatened to kill E.R.'s dog. He told her he was going to sneak out of his house to do so and that he had killed other dogs before. E.R. was terrified that her beloved dog was going to be killed. Another time, he grabbed E.R. by the throat, leaving scratch marks.

The Rosas filed a formal harassment complaint with the principal of Chelsea Elementary School. The principal and other school personnel minimized E.R.'s concerns, and rather than punishing the bully, they punished the victim and moved E.R. to another area in the classroom. That action made E.R. and others feel that she was the one at fault.

The teasing and taunting continued. The Rosas appealed to the superintendent's office, but their phone call was never returned.

E.R. was evaluated by Chelsea Elementary School, which labeled her as having "oppositional defiant disorder." However, the Rosas had E.R. evaluated by an independent psychologist, who determined that E.R.'s anxiety was caused by the school and was "environmentally based." By the end of second grade, E.R. was so traumatized by the treatment she had received that she told her mom she would rather die than go back school. As a result, the Rosas decided to homeschool E.R. because they could not afford to pay tuition to a school that would fit their daughter's needs.

Cindi Rosa homeschooled E.R. until the fall of 2019. But she was forced to stop homeschooling E.R. because Cindi's mother, E.R.'s grandmother, had become seriously ill and required regular home care. The Rosas petitioned the First Branch Unified School District to admit E.R. to the Tunbridge Central School, and the school board agreed, so E.R. now attends Tunbridge. However, some of the same issues E.R. encountered at Chelsea re-surfaced at Tunbridge. E.R. developed social anxiety because of what she experienced at Chelsea. At Tunbridge, one boy and one girl also bullied E.R. One day at Tunbridge, E.R. started crying as a result of the teasing. The school's response was victim-shaming: they sent her home. One day, when Rosa was picking up E.R. from school, she witnessed E.R. being teased by her fellow students as a "cry baby." The teachers were standing nearby but said and did nothing. As a result of this continued bullying, E.R. told her parents that she does not want to attend school and that she has no friends at school. E.R.'s parents talked to school administrators about the problem, but the response was only that they were "getting things in place." They did not inform the Rosas how they planned to stop the bullying.

The Rosas have investigated independent schools and have determined that E.R. would benefit from attending an independent school. However, they are unable to afford school tuition. The Rosas have no choice but to keep E.R. in public school, despite the damage being done to E.R.'s emotional health and academic progress.

The Rosas' son, D.R., is also attending Tunbridge. He is in speech and occupational therapy, but the Rosas believe that he needs more individualized services, and they wish he too could access tuitioning assistance to attend an independent school.

IV. Procedural History

The Vitales, Trevitses, and Rosas ("Parents") brought this action to vindicate their children's right to equal educational opportunity as guaranteed by the Vermont Constitution. On February 1, 2021, the State of Vermont, Daniel French, and the Vermont

State Board of Education (collectively, the "State Defendants") filed a motion to dismiss. On February 10, 2021, Windham Northeast Union Elementary School District, Bellows Falls Union High School District #27, Lake Region Union Elementary School District, and First Branch Unified School District (collectively, the "School District Defendants") also filed a motion to dismiss. Judge Timothy B. Tomasi of the Orleans Unit of Vermont Superior Court heard oral argument on Nov. 12, 2021. On January 28, 2022, the Superior Court granted the motions to dismiss. On February 25, 2022, the Parents timely filed their notice of appeal. On April 7, 2022, the record on appeal was completed. On June 6, 2022, the parties filed a joint stipulation dismissing the School District Defendants from this appeal. Parents now file this Appellants' Brief against the State Defendants only.

STANDARD OF REVIEW

"In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Colby v. Umbrella, Inc*., 2008 VT 20, ¶5 (cleaned up). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." *Boland v. Estate of Estate of Paul Smith,* 2020 VT 51, ¶ 5 (quoting *Colby*). Indeed, this Court's decision in *Brigham II* makes clear that the State has a very high bar to hurdle to stop claims to an equal education at this stage. *Brigham v. State*, 2005 VT 105, ¶ 13. This Court reviews the legal conclusions underlying a superior court's decision to grant a motion to dismiss de novo. *Record v. Kempe*, 2007 VT 39, ¶ 9.

ARGUMENT

I. The Superior Court erred because the Common Benefits Clause requires a consideration of interests that must be established on the record, an action which was not taken in this case.

The presumption underlying the Common Benefits Clause is inclusion, and the burden is on the government to prove why its exclusion of some citizens from a particular benefit is reasonable and just. *Baker,* 170 Vt. at 214 ("the core presumption of inclusion"). *See id*. (focusing on "whether *the omission* of a part of the community" can be justified) (emphasis added). *Accord State v. Misch,* 2021 VT 10, ¶ 62 (quoting *Badgley v. Walton*, 2010 VT 68, ¶ 21 ("[T]he inclusionary principle [is] at the Common Benefits Clause's core.")). The omission of these children from tuitioning assistance is neither reasonable nor just; at minimum, the government has introduced no evidence at this stage showing its exclusionary policy is reasonable and just.

To determine whether an exclusion is justified, the court considers whether the exclusion "bears a reasonable and just relation to the governmental purpose." *Baker*, 170 Vt. at 214. "[F]actors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." *Id*. This three-part test remains the Court's standard framework for considering Common Benefits Clause claims. *Quinlan v. Five-Town Health All., Inc*., 2018 VT 53, ¶ 23; *Badgley*, 2010 VT 68, ¶ 21.

The Superior Court erred by presuming to resolve the Parents' Common Benefits claim on a motion to dismiss because no factual record had been developed for it to rule on. The trial court in *Badgley* correctly "denied Defendants' motion to dismiss, ruling that determination of the Common Benefits question would require a consideration of evidence regarding whether mandatory retirement for public safety officers at 55 is reasonably necessary to accomplish the purpose of assuring the physical preparedness of uniformed police." *Badgley v. Walton*, No. 538-11-02, 2006 Vt. Super. LEXIS 19, at *1 (Vt. Super. Ct. Aug. 3, 2006) (Wesley, J.). *See Mello v. Cohen*, 168 Vt. 639, 641 (1998) (distinguishing the evidentiary burdens for a Common Benefits claim at the motion-to-dismiss stage and the summary judgment stage). The U.S. Court of Appeals for the Second Circuit recently applied this very principle to a motion-to-dismiss ruling on a First Amendment challenge, reminding federal courts in this circuit that speculation as to the government's countervailing interests is insufficient; record evidence is needed, and record evidence does not exist on a motion to dismiss. *Cornelio v. Connecticut*, No. 20-4106-cv, 2022 U.S. App. LEXIS 11208, at *18 (2d Cir. Apr. 26, 2022).

The only factual evidence properly before the Superior Court at this stage was the allegations of the Parents, which must be taken as true on a motion to dismiss. In their Amended Complaint, the Parents told three highly persuasive stories about the educational challenges facing their children and the Parents' experiences that led them to believe tuitioning would provide a vastly different and superior experience for their children. Parents pled the substantial significance of tuitioning to their children, including details as to the emotional, financial, and health impact on their individual children and broader families. Since this is a facial challenge, they will also have the responsibility on summary judgment to introduce additional evidence as to the broader impact of tuitioning on Vermont families and communities. *Cf., Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (Thomas, J., concurring) ("[P]rivate schools achieve far better educational

results than their public counterparts."[2]).

The State Defendants below asserted three interests in support of their discriminatory policy, none of which is established in the non-existent record at this point. They titled one section of their reply brief, "The Tuition Statutes Bear a Reasonable and Just Relation to Legitimate Governmental Purposes." AV-126 (Reply on Mot. to Dismiss 7). But these purportedly "legitimate governmental purposes" must be established by factual evidence, affidavits, and other exhibits, and they were not. Instead, the State Defendants simply asserted three interests to be weighed in favor of their geographically discriminatory policy: "furthering local control, controlling costs, and enhancing educational opportunities." AV-126 (Mot. to Dismiss 7), AV-196 (Reply 7). As explained more fully below, local control is not a factor this Court must consider legally and would not be affected by statewide town tuitioning, and controlling costs and enhancing educational opportunities would require significant factual development to establish on the record.

A. *Brigham I* denied local control as a legitimate governmental interest to justify unequal educational opportunities, and town tuitioning does not affect local control over public schools.

While Parents appreciate "the laudable goal of local control," *Brigham I*, 166 Vt. at 265, education is first and foremost "a fundamental obligation of state government." *Id*. at 264. Below, the State Defendants asserted the exact same argument that this Court explicitly rejected in *Brigham I*, that "the primary constitutional responsibility for education rests with the towns of Vermont." *Id*. This Court held that the State's "principal rationale" of local control was insufficient to survive even rational basis scrutiny. *Id*. This Court has all the more reason to do the same today, after *Athens School District v. Vermont State Board of Education*, 2020 VT 52, ¶ 54, and *Boyd v. State*, 2022 VT 12, ¶ 32, both reaffirmed that local control must take a back seat to statewide educational equality.[3]

Moreover, the State has not shown—indeed cannot show—that expanded town tuitioning will actually reduce local control in a meaningful way. Towns that currently

[2] "Of Cleveland eighth graders taking the 1999 Ohio proficiency test, 95 percent in Catholic schools passed the reading test, whereas only 57 percent in public schools passed. And 75 percent of Catholic school students passed the math proficiency test, compared to only 22 percent of public school students." *Zelman*, 536 U.S. at 681 (Thomas, J., concurring).

[3] *See also Paige v. State*, No. 167-9-17, 2018 Vt. Super. LEXIS 1238 (Vt. Super. Mar. 16, 2018).

choose to tuition will be able to continue their current policy unabated. And districts that do not tuition will have to offer it as an option. But equalizing the opportunity for tuitioning in no way reduces a local school board's control over the curriculum it uses in its own schools, the teachers it hires, or the programs it offers. School boards would retain exactly as much local control over the programs they offer as now. The only control they would lose would be the monopoly they currently enjoy over parents who cannot otherwise afford independent school tuition.

School districts would remain free to run their schools as they see fit, and parents would remain free to choose those schools if they wished. Just as equalizing educational funding leaves local control intact, so does town tuitioning:

> Some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less.

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989), subsequent mandamus proceeding, 804 S.W.2d 491 (Tex. 1991). *See also* Peter Teachout, *"No Simple Disposition": The Brigham Case and the Future of Local Control over School Spending in Vermont*, 22 Vt. L. Rev. 21 (1997) (arguing that equalized per pupil spending does not preclude local control). Equalized tuitioning does not reduce local control over local schools one iota.

B. Controlling costs must be established on the record.

The State Defendants must wait for summary judgment to successfully assert their second purported interest of controlling costs. The State Defendants' motion to dismiss below included reference to the "FY 19 Cohort School Spending by School Type" report. AV-218 (Mot. to Dismiss 8). The facts contained in that report are precisely the sort of evidence that is inappropriate at a motion-to-dismiss stage—both because they have not been authenticated and because they can be interpreted different ways, likely requiring expert testimony to explain.

For example, the State Defendants miscalculated the percentage of Vermont students utilizing town tuitioning, based on their misreading of the report. The State Defendants claim that only "about 1%" of Vermont students use town tuitioning to attend an independent school. AV-218 (State Defs. Mot. to Dismiss 8). But they included only students whose towns had no K-12 schools, not districts with school choice for some grades only.

The correct figure can be found in the 2021 Vermont Auditor's Report, which outlines that almost 5% of Vermont students are tuitioned to independent schools in Vermont, while 1% are tuitioned to independent or public schools out of state, and another unquantified number use town tuitioning to attend a public school in another town. App. 013. Thus, the State Defendants used the wrong figures to reach the wrong conclusions about costs, and this Court should allow the correct figures to be established on the record.[4]

Even the State Defendants' own proffered report reveals that town tuitioning has little effect on budgets. For example, in Line B1, budgeted expenditures in districts which pay tuition for all grades are $19,918 per equalized pupil, while Line B3 shows that districts which operate K-12 public schools spend $20,458 per equalized pupil; thus, town tuitioning seems to save money. Similarly, the FY19 average announced tuition rate for the four independent academies accepting secondary-level town tuitioning students is $18,155, whereas the dozen comparable secondary-only union school districts that do not accept town tuitioning students spent more—an average of $18,638 per pupil.

These data track two independent think-tank studies, the first of which evaluates several sources before concluding that "independent schools that accept tuition students . . . succeed with less tax money than their government-run counterparts." App. 073. Similarly, a second study concluded that the state and local budget impact of town tuitioning was revenue neutral. App. 090.

The very nature of these academic studies shows the need for remand for full evidentiary development below in advance of summary judgment. The State cannot assert interests that are not in the record and which initial evidence indicates are contrary to the existing research. This sort of back-and-forth over statistical evidence, especially as interpreted and analyzed by an expert witness, is precisely the sort of factual development appropriate for consideration on motions for summary judgment or at a bench trial, not on a motion to dismiss.

[4] In addition, the State's inference that because there are a small percentage of students who are afforded choice, the Common Benefits Clause should not apply is not sustainable. In *Baker*, this Court found that all couples, including same-sex couples, should be afforded the benefits of marriage, and the Court did not consider the percentage of the population affected by the benefit as relevant to its decision.

C. Enhancing educational opportunities also must be established on the record.

Similarly, it is unclear how the last interest proffered below by the State Defendants, "enhancing educational opportunities," is furthered by the present patchwork configuration of school districts with partial, full, or no town tuitioning, where some fortunate families enjoy enhanced educational opportunities, while other families are not afforded that benefit, based solely on geography. It is especially difficult to see in those places where town tuitioning is offered for some grades but not for others, such that students are forced to frequently change schools, a disruption which hurts students' academic performance.

In fact, at least one academic study specific to Vermont and Maine shows that increasing town tuitioning would lead to enhancing educational opportunities: "[P]arents are choosing those schools that can produce better scores with their tuition money rather than schools that produce lower scores or schools where the money makes no difference." App. 144.

Take, for instance, the results achieved by the Compass School, where Sarah and Louis Vitale send their children. According to the Foundation for Economic Education, "Nearly any public school in the county with Compass' student population (considered mid-poverty) would be aspiring to a 75 percent graduation rate and a 60 percent college-readiness rate. Compass has a virtually 100 percent graduation rate, and 90 percent of graduates are accepted to college. And still, Compass achieves these results with $5,500 less funding-per-pupil than the average Vermont government-run, public high school." App. 174. Again, enhancing educational opportunities is an interest that the State Defendants must prove at summary judgment or trial, and Defendants' assertions about that interest conflict with the initial evidence available.

In sum, the Superior Court failed to appropriately analyze the Parents' Common Benefits Clause claim. The Court should have started from a presumption of inclusion, which it did not. It should have then recognized, as Judge Wesley did in *Badgley*, that it is usually impossible for a judge to rule on a Common Benefits claim at the motion-to-dismiss stage because the elements of the test under that claim require the development of a factual record before summary judgment or trial. Because the Superior Court failed to undertake the necessary analysis, its ruling must be reversed.

II. The Education Clause prohibits discrimination in educational opportunity based on locality.

A. The Education Clause requires equal opportunity regardless of locality, but the Legislature's current policy discriminates based on locality.

"Vermont children have . . . a right to equal educational opportunities regardless of where they reside in the state." *Vasseur v. State*, 2021 VT 53, ¶ 2. This principle is the core of this Court's holding in *Brigham I*: "[E]ducational opportunity may not have as its determining force the mere fortuity of a child's residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system." 166 Vt. at 265. The Parents' children do not enjoy an important educational opportunity offered to children in other localities. In nearly forty percent of Vermont towns, families enjoy a publicly funded option to attend the public or independent school of their choice. App. 003. L.V.'s family does not reside in one of those towns, and as a result his family is forced to forgo medical procedures to afford his tuition at the independent school that meets his needs. Similarly, the Trevitses are forgoing dental work for their children to pay for an educational opportunity to attend an independent school that is free to other Vermonters. If E.R.'s family lived one town over, she would no longer have to endure the bullying and harassment at her current school.

Put differently, education "must be made available to all on equal terms." *Brigham I*, 166 Vt. at 250 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)). "[S]tudents must be afforded equal access to all that our educational system has to offer." *Id*. at 267. But education is not available on equal terms: residents in forty percent of Vermont towns enjoy a free choice of school, while residents in Vermont's other towns or cities are automatically assigned to a school with no choice. This is not "equal access to all that our educational system has to offer." It is discriminatory access to all that our educational system—which includes independent schools—has to offer, and it is based on zip code and family wealth. This difference in educational access based on residence violates the heart of *Brigham I*'s holding.

B. Equal access to educational opportunities is a fundamental right protected by heightened scrutiny.

Education is not only "a fundamental obligation of the State," AV-37 (Sup. Ct. Decision at 12), but also "a fundamental right" of Vermont's children. *Vasseur v. State*, 2021 VT 53, ¶ 2. Failing to properly situate education as an individual, fundamental right rather than just a collective obligation was a mistake in the opinion below because the

Superior Court never identified or considered the level of scrutiny appropriate to an Education Clause claim.

This Court in *Brigham I* declined to determine whether the right to equal educational opportunity is protected by rational basis review or strict scrutiny because the school finance system at issue in the case failed even rational basis review. *Brigham I*, 166 Vt. at 265. The State Defendants described *Brigham*'s reasoning as "similar in practice to intermediate scrutiny." AV-123. More recently, this Court in *Boyd* again declined to resolve the question of the proper level of scrutiny because it found the Parents failed to bear their burden of proof "under any standard." 2022 VT 12, ¶ 22.

But in *Vasseur*, this Court did label education "a fundamental right" of Vermont children. 2021 VT 53, ¶ 2. Judge Mello on the Superior Court had earlier reached the same conclusion. *Athens School Dist. v. Vermont State Bd. of Educ.*, No. 33-1-19 FRCV, 2019 WL 5549822, at *14 (Vt. Super. June 18, 2019), *aff'd* 2020 VT 5 ("under the Vermont Constitution, education is a fundamental right."). This conclusion also fits with the Legislature's own declaration of policy at the start of Vermont's education code, which recognizes education as "fundamental" and "integral" to the success of students and the state as a whole. 16 V.S.A. § 1. And it tracks the Court's discussion in *Brigham I*, which noted that the Connecticut Constitution has "the closest education clause textually to Vermont's," and the Connecticut Supreme Court has "held that this provision created a fundamental right to education," protected by strict scrutiny. 166 Vt. at 257 n.6 (discussing *Horton v. Meskill*, 172 Conn. 615, 646 (1977)).

This case squarely presents this Court with an opportunity to declare that education is an individual right protected not just by intermediate scrutiny but by strict scrutiny. Such a determination does not have to open the floodgates to a wave of litigation or put judges in place of principals running schools. It would simply apply what this Court has already said elsewhere and make meaningful the promise of judicial review. The high courts of Vermont's neighbors in Connecticut and New Hampshire found education to be a fundamental right with attending strict scrutiny, and those decisions have not resulted in any appreciably greater degree of judicial involvement in running schools. *See Horton*, 172 Conn. at 648-649; *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 473, 703 A.2d 1353, 1359 (1997).

As this Court has already said, "[A] statute that affects fundamental constitutional rights . . . necessitates a more searching scrutiny; the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective." *In re C.L.S.*, 2021 VT 25, ¶ 29 (cleaned up).

Rather than finding education is a fundamental right protected by heightened judicial scrutiny, the Superior Court began its opinion from a posture of submissive deference towards the Legislature. AV-36. It mentioned "scrutiny" only in its discussion of *Baker* and not *Brigham I*, and there, it incorrectly relied on this Court's reference to "legislation having any reasonable relation to a legitimate public purpose." AV-40. This is legal error, and it destroys the foundation of all that follows by failing to apply the correct scrutiny. The Superior Court should have started by recognizing that education is an individual, fundamental right protected by heightened scrutiny, which requires an attitude of "searching scrutiny" toward the law rather than a posture of deference that only tests the legislature's policy for a rational basis.

This Court should declare that strict scrutiny applies or at least demand that lower courts apply the heightened scrutiny it has recognized in the past.[5]

C. The Legislature's policy of discrimination based on locality fails heightened scrutiny.

The Superior Court never analyzed whether the Legislature can meet the "heavy burden of justification" it faces in imposing a geographically discriminatory education policy. *Brigham I*, 166 Vt. at 249. Again, this is a matter that requires factual development and a record. The State Defendants could theoretically bear their heavy burden of justification by proving their interests in the current policy or by showing that the educational opportunities are indeed equal. But the State must accomplish either of those goals with record evidence, which simply does not exist now.

The Superior Court failed in its responsibility to thoughtfully and thoroughly proceed through the Education Clause analysis laid out by this Court in its precedents. That required three steps: to determine the nature of the right at issue (the right to equal educational opportunity regardless of geography), to determine the level of scrutiny (heightened scrutiny for a fundamental right), and then to apply that scrutiny to determine whether the government can justify its policy based on its interests. Had the Superior

[5] Alternatively, this Court can again decline to reach the level-of-scrutiny question by following its own words in *Brigham I*: "[E]ducational opportunity may not have as its determining force the mere fortuity of a child's residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system." 166 Vt. at 265. It also requires no particular constitutional expertise to determine that granting town tuitioning to students in 40 percent of Vermont towns but denying that opportunity to children like L.V., R.T., and E.R. based on the "mere fortuity of [their] residence" is a capricious system. *Id*.

Court done so, it would have found that the right is well-established, that it is fundamental and protected, and that the State cannot succeed on a motion to dismiss because it has not established a factual record to prove its interests. Because the Superior Court failed to undertake this analysis, it must be reversed.

D. This Court's precedents do not command otherwise.

1. The recent *Boyd* decision presents a different factual question.

This Court's recent decision in *Boyd v. State* is distinguishable on the facts. 2022 VT 12. Whether a student is given the opportunity to attend a school of his or her choice is not the same question as whether a school offers a particular Advanced Placement class or sport. The latter is a matter of degree, but the former is a difference in kind. *See Brigham*, 166 Vt. at 267 ("We find no authority for the proposition that discrimination in the distribution of a constitutionally mandated right such as education may be excused merely because a 'minimal' level of opportunity is provided to all.").

Boyd is like a proximate cause case in torts: the lack of money was not the proximate cause of the different offerings between districts. This case is about a direct cause: the State's policy of failing to provide town tuitioning to all students directly causes the harm faced by the Parents' children. The possibility of choosing one's own school is a "constitutionally significant disparit[y]" in the opportunities offered to students in different districts. *See Stowe Citizens for Responsible Gov't v. State*, 169 Vt. 559, 562 (1999). True, this Court has always recognized that some degree of difference is inherent between schools and does not create a constitutional violation. *Brigham I*, 166 Vt. at 268. And this Court has recognized that money is not always the answer to school quality. *Boyd*, 2022 VT 12, ¶ 25. But the Parents have alleged that the difference between their assigned school and their desired school is not about a specific class or sport but about fundamental matters of character, culture, and educational approach. *See Zelman*, 536 U.S. at 675 (O'Connor, J., concurring) (noting parents may choose independent schools because they "provide discipline and a safe environment for their children"). In short, the opportunity to choose an independent or another public school is fundamentally different from the question of whether one's assigned school offers A.P. Chemistry or only regular chemistry. For the plaintiff families—and thousands of others—town tuitioning would be a "life preserver to those [Vermont] children caught in the cruel riptide" of school bureaucracy, even if their assigned schools are equally funded. *See Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (Ceci, J., concurring). The choice of type of school is an educational opportunity different in kind from marginal differences between public schools.

At minimum, the Parents 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. In *Brigham II*, this Court said the superior court "has a duty to hear plaintiffs' claims on the alleged constitutional deficiencies of the education-funding system. Therefore, because plaintiffs have pleaded facts sufficient to satisfy the liberal Rule 12(b)(6) standard, the plaintiffs' claims must be allowed to go forward." *Brigham II*, 2005 VT 105, ¶ 8. This Court returned to this generous standard in *Boyd*, where it carefully distinguished between the incomplete record alleged in *Brigham II*, which had been decided on a motion to dismiss, and the more robust record established in *Boyd*, which had been decided on summary judgment. *Boyd*, 2022 VT 12, ¶ 28.

Here, the Parents have pled the constitutionally significant deficiencies of their assigned schools. AV-237, 240-42 (Am. Compl. ¶¶ 19, 35, 49-52). But the Superior Court did not undertake a proper analysis of those claims. Rather, as in *Brigham II*, the superior court judge relied on a mistaken notion of judicial deference and restraint. *Compare* Super. Ct. Decision at 11 *with Brigham II*, 2005 VT 105, ¶ 10. This alone should cause this Court to reverse and remand, so the Parents may provide personal and expert witness testimony to establish why their assigned schools are not substantially equal to those offered under town tuitioning.

2. The Superior Court incorrectly relied on a statement from *Mason* that is dicta from another context.

Instead of undertaking the required analysis, the court below simply quoted two lines from opinions of this Court as proof-texts for the result it reached. In the first, *Mason v. Thetford School Board*, this Court said 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). In the second, *Chittenden Town School District v. Department of Education*, 169 Vt. 310, 316 (1999), this Court said 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." Though each quote superficially appears to support the lower court's conclusion when stripped of its context, both, when read correctly, reveal they mean far less. This Court should reaffirm that the two statements have no bearing on this case.

Mason is a procedural case about "appellate review of administrative decisions." 142 Vt. at 498. It is not a constitutional case and cannot foreclose a constitutional claim. The issue in *Mason* was whether the Superior Court had jurisdiction to reverse a decision of the State Board of Education (the "State Board"). The State Board had denied the

parents' request to pay town tuitioning to one independent school, the Richmond School, rather than to another, Thetford Academy. *Id*. at 497. The case was about judicial review of payments between independent schools—not a constitutional case about geographic discrimination in educational opportunities. This Court held that the statute at issue in the case, 16 V.S.A. § 827(d), denied review of the State Board decision by the Superior Court. *Id*. at 498-99. Therefore, the motion to dismiss was granted on the procedural issue grounded in a *statute* (a statute that has since been rewritten, rendering *Mason* even less authoritative, *see* 16 V.S.A. § 827).

Mason is not a constitutional case. The parents in *Mason* did not raise a constitutional claim. Had they done so, the decision would have been written quite differently from the simple four-page application of the ordinary meaning of the statute. The Court acknowledged as much in its opinion: "[T]he legislature has the power, *in the absence of any constitutional requirement*, to deny such review." *Id*. at 498 (emphasis added). But in the current case, the Parents *have* alleged that there is a constitutional requirement of equal access to town tuitioning. AV-235-36 (Am. Compl. 13-15).

Because the Parents in *Mason* made no such allegation, it was dicta for the Court to make mention of the Constitution in passing in its final paragraph. The Court was not forced to grapple with the question of whether such a right existed because no such right had been alleged in the case. Because the case "did not address the question presented here, [its] broad language was essentially nonbinding dicta." *Roy v. Woodstock Cmty. Trust*, 2013 VT 100A, ¶ 56 n.12. "Dicta, it need hardly be stated, have no binding precedential effect." *Id*. By relying on *Mason*, the lower court succumbed to "the great risk of deciding important issues without hearing reasoned arguments on both sides of a question." *Harris v. Town of Waltham*, 158 Vt. 477, 485 (1992) (Allen, C.J., dissenting). And even if the Superior Court acted correctly in following Supreme Court dicta, this Court now is hardly bound by dicta from one of its prior cases. *Erickson v. Erickson*, Case No. 21-086, 2021 Vt. Unpub. LEXIS 112, at *6 (Dec. 17, 2021).

3. *Mason* does not address the equal treatment arguments raised here.

Separately, this single line of dicta from *Mason* does not control, or even address, the claims raised by Parents here. It may well be that there is no inherent constitutional right for children to receive town tuitioning to attend an independent school. But that is not the question here. Parents do not demand town tuitioning out of thin air, as the Court in *Mason* said they had no right to.

Rather, Parents demand equal treatment: if the Legislature has chosen to allow town tuitioning for some students, then the Education and Common Benefits clauses bar the Legislature from discriminating in access to that benefit based on geography.

In this sense, town tuitioning is just like any other public benefit. Numerous courts have rightly recognized "no fundamental right to public assistance exists under the Constitution." *Hassan v. Wright*, 45 F.3d 1063, 1068 (7th Cir. 1995); *see also Clark v. Prichard*, 812 F.2d 991, 995 (5th Cir. 1987) ("Neither the Supreme Court nor this court has ever held that any substantive right to welfare exists under the United States Constitution."). This is essentially what this Court said in *Mason*: no substantive right to town tuitioning exists under the Vermont Constitution. But even if there is no substantive right to welfare, once the government has decided to extend a welfare benefit, its decisions about who does and does not qualify for the benefit must survive judicial scrutiny under the equal protection clause. *Id. Compare Bowen v. Gilliard*, 483 U.S. 587, 598 (1987) (classification restricting welfare benefits survives scrutiny) *with Graham v. Richardson*, 403 U.S. 365, 366 (1971) (classification restricting benefits fails equal protection scrutiny).

Thus, *Mason's* dicta, even if true and authoritative, would add nothing to this case because it addresses the claim to an inherent right rather than an equal treatment claim, which is what the Parents advance here.

4. *Mason* predated *Brigham I* and *Baker*.

Even if *Mason* was once as broad and binding as the lower court thought, that proposition has been reshaped by *Brigham I*. *Brigham I* held that the state educational funding system denied equal educational opportunities to all. 166 Vt. At 268. It is the Supreme Court's definitive ruling on what constitutes a violation of the Education and Common Benefits clauses, which is at the heart of the current case. And the Court in *Brigham I* did not even mention *Mason*. Therefore, it did not consider *Mason* to be a constitutional case, nor did it consider the dicta in *Mason* regarding the constitution to be a holding worth analyzing.

5. *Chittenden Town School District* also does not control.

In *Chittenden Town*, this Court interpreted a constitutional provision on state support of religious worship that is not at issue in the current case, 169 Vt. at 311; therefore, the language quoted is again dicta that this Court should set aside. And like *Mason*, *Chittenden Town's* precedential value has only declined since its issuance; the U.S. Court of Appeals for the Second Circuit criticized *Chittenden Town* last year because

it "created substantial uncertainty." *A.H. v. French*, 985 F.3d 165, 181 (2d Cir. 2021). In practice and as interpreted, *Chittenden Town* had barred public funds from being used at religious schools. *Id.* In contradiction, the Second Circuit granted a preliminary injunction allowing such funds to be used at religious schools in Vermont, *id*., based on the U.S. Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). *A.H. French* is a good reminder that even as legislatures set policy, it is still the role of the courts to enforce constitutional guarantees.

A more recent, on-point decision regarding the judiciary's role in determining the constitutionality of legislative action concerning education is *Brigham II*: "Adjudicating cases involving alleged violations of Plaintiffs' constitutional rights resulting from a legislative enactment does not undermine the legislative process, nor is it disrespectful of the other branches of government. Rather, the court [below] abdicated its duty to uphold the Vermont Constitution by refusing to entertain Plaintiffs' claims." 2005 VT 105, ¶ 10.

6. Other cases relied on by the Superior Court are not on point.

The other authorities the Superior Court cited for the proposition that there is no constitutional right to town tuitioning are also off- point. In *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955 (8th Cir. 2015), the court found that the plaintiffs had no constitutional rights under the due process and equal protections clauses of the U.S. Constitution. The Parents here are not claiming that there is a federal constitutional right to town tuitioning. This Court has recognized that the protections of the federal equal protection clause are not identical to those of Vermont's Common Benefits Clause: "[T]he Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters." *Baker*, 170 Vt. at 202. Similarly, *Doe v. Secretary of Education*, cited by the Superior Court, involved interpretation of the equal protection clause in the Massachusetts constitution, under which the court's analysis was identical to the federal courts' analysis of the language of the Fourteenth Amendment. 479 Mass. 375, 391, 95 N.E.3d 241, 256 (2018). Thus, neither of these cases cited by the Superior Court are pertinent to the analysis of the Common Benefits Clause, which affords a higher level of constitutional protection to Vermont citizens.

CONCLUSION

"While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor [] families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society." *Zelman*, 536 U.S. at 682 (Thomas, J., concurring). Today, poor families in Vermont towns that fail to provide tuitioning are forced to attend public schools while rich families in those same towns, as well as students of varying means in other towns that do provide tuitioning, are given the choice to attend the school that best fits their needs. This is not equal educational opportunity. And the State has yet to establish any record evidence justifying its interests in declining to provide equal opportunity based on geography.

The Superior Court's decision granting the motion to dismiss from the State Defendants should be reversed and remanded for the necessary factual development in advance of summary judgment.

Dated: October 27, 2022

Respectfully submitted,

/s/ Deborah T. Bucknam
Deborah T. Bucknam (ERN # 1391)
Bucknam Law, PC
434 Eastman Road
Walden, VT 05836
802-748-5525
DBucknam@vtlegalhelp.com

Brian K. Kelsey (ERN # 11526)
Admitted Pro hac vice
Daniel R. Suhr (WI Bar No. 1056658)
Pro hac vice motion forthcoming
Jeffrey D. Jennings (ERN # 11579)
Admitted Pro hac vice
Liberty Justice Center
440 N. Wells St. Suite 200
Chicago, IL 60654
312-637-2280
bkelsey@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

Attorneys for Plaintiffs – Appellants

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 8,847. 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: October 27, 2022

/s/ Deborah T. Bucknam
Deborah T. Bucknam