Vermont Supreme Court
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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' REPLY BRIEF

Deborah T. Bucknam (ERN # 1391)
Bucknam Law, PC
434 Eastman Road
Walden, Vermont 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 Street, Suite 200
Chicago, Illinois 60654
312-637-2280
bkelsey@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

Attorneys for Plaintiffs – Appellants

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SUMMARY OF ARGUMENT

The State conflates the Parents' burden of pleading with their burden of proof. State Br. 12-13. The Parents needed only to plead that distributing town tuitioning unequally to children in Vermont violates the state constitution. *Brigham v. State*, 2005 VT 105, ¶ 15 (*Brigham II*). They have done so. Speculating that the State's interests justify excluding some children from town tuitioning goes to the burden of proof, which is an improper analysis at the motion-to-dismiss stage.

The State's arguments that there is no constitutional right to attend a school of one's choice and that the issue is one of public policy miss the mark. The State overlooks the fundamental principle of constitutional law implicated here: once the State provides a governmental benefit, it must do so equally.

Providing educational services to children in an unequal manner, based on the "mere fortuity of their residence," is unconstitutional. *Brigham v. State*, 166 Vt. 246, 265 (1997) (*Brigham I*). Even if the State's proffered interests were properly weighed in a motion for summary judgment or bench trial, they do not justify distributing the benefit of town tuitioning in such an unfair fashion. This Court should reverse and remand.

ARGUMENT

I. The Superior Court should be reversed because the Parents met their burden at the motion-to-dismiss stage to plead facts stating a claim that the town tuitioning statutes violate the Common Benefits and Education clauses of the Vermont Constitution.

The State is wrong that the Parents have not met their burden at this stage of the case. State Br. 12-13. Vermont Rule of Civil Procedure 12(b)(6) requires the Superior Court to "assume that the factual allegations in the complaint are true." *Brigham II*, 2005 VT at ¶ 11.

The Parents' allegations mirror the complaint in *Brigham II*. There, public school students alleged that the "curriculum offered at Whitingham School is inadequate because it is so limited," and "Wilmington Middle High School's facilities are in substandard condition and insufficient funds are available

under the current education-funding scheme for replacement." *Id.* at ¶ 2. The students alleged that this violated the "right to an equal educational opportunity under the Vermont Constitution." *Id.* at ¶ 1. The superior court granted a motion to dismiss. *Id.* at ¶ 8.

But this Court held that because the students had pled "facts sufficient to satisfy the liberal Rule 12(b)(6) standard, the [students'] claims must be allowed to go forward." *Id.* It reasoned that "[a]t this early stage in the litigation . . . a court should be reluctant to dismiss a plaintiff's claims, and should not consider the merits of whether a plaintiff's claims will ultimately succeed." *Id.* at ¶ 12. It rejected the State's justifications for the funding scheme, stating, "[W]e must accept the plaintiff's allegations as true." *Id.* at ¶ 15. This Court correctly concluded, "[A]lthough [the students] may not ultimately prove the alleged violations once a full record is developed, a Rule 12(b)(6) motion is not the proper procedure for testing the factual support for plaintiffs' claims." *Id.*

So too here. The Parents pled: "Vermont statutes that require only certain Vermont children to attend schools in the district where they reside while allowing other Vermont children to attend virtually any schools of their choice violate the right to equal educational opportunity found in Chapter I, Article 7 and Chapter II, Section 68 of the Vermont Constitution." PC-43 (First Am. Compl. ¶ 5). The Parents detailed their own families' tragic stories of the inadequate educational opportunities offered to them and their struggles caused by the unequal treatment: "The Vitales live on limited income, are receiving Supplemental Nutrition Assistance Program food benefits (food stamps), and are scrimping and saving to pay tuition to keep L.V. at Compass. Forcing them to pay for the same benefit that others receive for free is inherently unequal." PC-48 (First Am. Compl. ¶ 25). Under the holding of *Brigham II*, these allegations must be assumed to be true, and the Court cannot weigh them against any alleged State interests in providing unequal educational opportunities at the motion-to-dismiss stage. Such a determination of proof must wait until summary judgment or a bench trial.

This Court further solidified its reasoning in *Boyd v. State*, 2022 VT 12. The State finds it "surprising" that the Parents rely on *Boyd* because, there, the Court found that the plaintiffs did not meet their burden of *proof*. State Br. 14. They presented only "limited evidence" that a lack of funding resulted in fewer classes. 2022 VT 12, at ¶¶ at 24-25. But the plaintiffs in *Boyd* did meet their burden of *pleading*. This Court explained that "at the summary judgment stage it was plaintiffs' burden to put forth admissible evidence to support their allegations," but "such allegations may have been sufficient to withstand a motion to dismiss." *Id.* at ¶ 28. Thus, this Court's holding in *Brigham II* stands.

A. Deciding an equal educational opportunity case based on the law requires applying a heightened level of scrutiny, which analyzes whether the benefit is distributed unequally and whether the governmental interests are compelling.

This Court has declared that courts must apply a heightened level of scrutiny in determining whether a violation of the right to equal educational opportunities has occurred: "Where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny." *Brigham I*, 166 Vt. at 265. To survive this heightened level of scrutiny, the State must show that its governmental interest is compelling: "[T]he State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective." *Id.*

A heightened level of scrutiny is necessary in this case because of the importance of the right to education: "[I]n Vermont the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification." *Id.* at 256. Indeed, since this Court's decision in *Brigham I*, the Court in *Vasseur v. State*, 2021 VT 53, ¶ 2, labelled education "a fundamental right."

Although the State correctly notes that this Court has rejected the federal "tiers of scrutiny" in favor of a "uniform standard" for claims under the Common Benefits Clause, this Court still weighs the underlying constitutional right's significance even under that clause. State's Br. 17-18.

In *Baker v. State*, 170 Vt. 194, 220 (1999), this Court explained that "in determining whether a statutory exclusion reasonably relates to the governmental purpose it is appropriate to consider the history and significance of the benefits denied." This Court then held that marriage is of "such significance" that "any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned." *Id.* at 221-22.

Conversely, in *Badgley v. Walton*, 2010 VT 68, ¶ 21, the Court applied a less deferential form of scrutiny to an age discrimination claim under the Common Benefits Clause. It explained that "[t]he right to work as a state-employed police officer is not as significant a governmental interest as the right to the benefits of marriage addressed in *Baker* or the right to educational opportunities addressed in *Brigham* [*I*]." *Id.* at ¶ 28. Thus, *Badgley* confirms that an alleged violation of the right to educational opportunities requires a heightened level of scrutiny.

But the Superior Court in this case erred by effectively applying a federal rational basis test. It misinterpreted *Baker* to say that it must uphold all "legislation having any reasonable relation to a legitimate public purpose." PC-17 (Sup. Ct. Decision 15). Instead, it should have recognized that education is an individual, fundamental right, which requires an inquiry of "searching scrutiny" toward the law in question. *Brigham I*, 166 Vt. at 265.

The Superior Court effectively applied the federal rational basis test to the underlying merits question by accepting, at the motion-to-dismiss stage, the State's speculation that its interests justify excluding children from town tuitioning. Under the federal rational basis test, "legislative choice is not

subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993). Instead of accepting rational speculation, the Superior Court should have allowed the Parents to proceed to summary judgment or to a bench trial and then weighed the interests at stake.

This Court has rejected the federal rational basis test for claims under the Common Benefits Clause. In *Badgley*, the Court emphasized that "we are not adopting the federal rational basis standard for evaluating most equal protection claims." 2010 VT 68, ¶ 39. And *Baker* explained that *Brigham I* was an example of a case where the Court's analysis was "more rigorous than traditional federal rational-basis review." 170 Vt. 194, 205-06 (1999).

What is more, even when this Court applies a deferential form of review under the Common Benefits Clause, it at least allows the plaintiff to discover and produce evidence in advance of summary judgment or a bench trial. In *Badgley*, the Court applied a deferential form of review to an age discrimination claim, but it still reviewed the evidence the plaintiffs presented at a "bench trial." 2010 VT 68, ¶¶ 3, 5, 7. Only then did it affirm the judgment for the State "based on the trial court's findings and conclusions and the evidence." *Id.* at ¶ 35.

Thus, even though "statutes 'are presumed constitutional,'" as the State points out, the Parents must be allowed to put on evidence that the presumption has been overcome in this instance. State Br. 12 (quoting *Badgley*, 2010 VT 68, ¶ 20). The State cannot rely on mere speculation that its interests will prevail at the motion to dismiss stage.

1. **The Parents made the levels-of-scrutiny argument to the Superior Court and did not waive it.**

The State claims the Parents waived the argument that they were entitled to put on evidence supporting their claims, but that is not so. State Br. 12-13. The Parents argued below that the Superior Court should review with strict scrutiny, which requires the government to justify its exclusion. PC-16; PC-56

(First Am. Compl. ¶ 76). Additionally, they prefaced factual claims concerning "the significance of the benefits and protections of the challenged law" with the statement that "[a]t the motion to dismiss stage . . . all assertions in the complaint are accepted as true." AV-180 (Resp. to State MTD 12). The Parents also cited several social science and journal articles that show the contested nature of the State's asserted rationales, which is the sort of evidence that demands eventual expert testimony. The majority of the Parents' brief below dwelt not on the factual burden or the governmental interests but on the predicate legal claim because, as they said at the beginning of their brief below, "at this stage Plaintiffs' burden is not to definitively win their argument on the law, as in summary judgment, but only to state a 'cognizable legal claim.' *Wentworth v. Crawford & Co.*, 174 Vt. 118, 120 (2002)." AV-170 (Resp. to State MTD 2). So the Parents focused on defending their legal claim, not on the self-evident need for evidence at a later stage in the proceedings.

2. The court must eventually develop a factual record to decide the Parents' facial challenge.

The State also says the Parents' demand for evidence fails because their claims are facial. State Br. 12-13. Or, phrased differently, because the Parents demand the right to present evidence, their claims must be as-applied. State Br. 15. This is wrong either way. The Parents' claim is facial: they seek relief on behalf of all schoolchildren in the state denied equal educational options, not only their own. *See In re Mt. Top Inn & Resort*, 2020 VT 57, ¶ 22 (explaining the difference between facial and as-applied). The Parents have been clear all along that this lawsuit represents a facial challenge. PC-10, 12. As such, they did not need to appeal against the school districts or exhaust other remedies as the State contends. State Br. 16.

But a facial challenge still requires evidence from both the plaintiffs and the defendants. It just requires a different kind of evidence. In an as-applied challenge, the plaintiff must show the government's policy burdens him or her in an unconstitutional way, and the defendant must show the government's policy is appropriately tailored as applied to this plaintiff. In a

facial challenge, the plaintiff must show that the government's policy burdens everybody affected by it, and the government must show that its policy is justified by the fit between its interests and its methods. Thus, courts frequently consider evidence to decide facial claims. *See Green Party of Conn. v. Garfield*, 616 F.3d 213, 233 (2d Cir. 2010) ("[C]ourts should avoid reasoning based on speculation and should, instead, require tangible evidence of the 'practical effects' of the" policy whose constitutionality is challenged.). *See also, e.g., Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1262-64 (D.C. Cir. 2011).

Indeed, this Court began its opinion in *Brigham I* by identifying the correct methodology for resolving such cases: "we consider the evidence in the record before us, and apply the Education and Common Benefits Clauses of the Vermont Constitution to that evidence." 166 Vt. at 249. At various times, the Court relied on "the record before [it]," *id*. at 254, "the undisputed evidence," *id*. at 255, and conclusions "evident from the record," *id*. at 265. That evidence was available because the trial court "set the case for trial to develop a factual record." *Id*. at 252.

As the Parents here are bringing the same type of claims brought by the *Brigham I* parents, the courts should follow the same type of process to determine their claims, starting with a full evidentiary record developed below. That is only possible if the Parents are allowed to proceed beyond the motion to dismiss, so they may develop their record evidence before the trial court, and the State may develop its evidence in support of its interests.

Like the *Brigham I* parents, these Parents bring facial claims regarding unequal treatment of children, but they do not focus on their children's specific exclusions from the program. They offer their stories only to establish standing and as anecdotal evidence for why town tuitioning is the type of benefit that affects educational outcomes, and is therefore of constitutional significance.

At this stage, no one bears an evidentiary burden. All Plaintiffs must do is plead allegations sufficient to support a claim. Later, at summary judgment or trial, the Parents must first show with record evidence that Vermont children who do not have access to town tuitioning are being afforded unequal educational opportunity. Then, after the Parents show that a right is being infringed, the burden shifts to the State Defendants to prove that this infringement survives the appropriate level of scrutiny by showing evidence to back up its interests.

3. The Court did not address this question in *Mason*.

Next, *Mason v. Thetford School Board* does not foreclose the Parents' claims. State Br. 7, 9-10 (discussing 142 Vt. 495, 499 (1983)). *Mason* considered whether a statute gave families the right to appeal a district board's decision denying their request for tuition assistance. 142 Vt. at 499. Thus, it did not involve a claim against the State that providing town tuitioning to some children while excluding others violates the Common Benefits and Education Clauses. So *Mason*'s holding does not control here.

In dicta, the Court said that there is "no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent," and Parents stipulate to that point. *Id.* But once the Legislature voluntarily chooses to provide that benefit to some children, there is a constitutional right not to be excluded from that same educational opportunity. This is no different from saying, "There is no constitutional right to a welfare check," but once the Legislature voluntarily chooses to give out welfare checks, it may not exclude a particular race or gender from the benefit.

The State claims that the families in *Mason* argued that the school board's decision to deny funds raises "equal protection and state constitutional problems," but that tells only part of the story. State Br. 10; SPC-38. The families' brief in *Mason* argued that there was "an unlawful delegation of legislative authority, raising equal protection and state constitutional problems" if there was no right to appeal and the school board had "unfettered discretion" to decide whether to grant tuition assistance. SPC-37-

38. That type of procedural due process argument is wholly different from the argument here that providing town tuitioning to some children but not all violates the Education and Common Benefits Clauses.

The cases the State cites as approving *Mason* "without qualification since *Brigham*" prove nothing. State Br. 10. *Friends of Pine Street v. City of Burlington* cites *Mason* for the proposition that "'there is no absolute right to appellate review of administrative decisions,'" which proves that *Mason* involved appellate procedure and not constitutional law. 2020 VT 43, ¶ 23. Likewise, *Handverger v. City of Winooski* applied *Mason* to hold there was no statutory right to appeal a city's termination of its employee and that the lack of judicial review did not violate due process. 2011 VT 130, ¶¶ 5, 12-13. *Mason* in no way binds this Court's decision.

4. This Court did not address the question in this case in *Chittenden.*

The State also cites *Chittenden Town School District v. Department of Education*, as saying that the Legislature must decide "whether parental choice improves the quality of education for some or all students," but that is, again, dicta at best. State Br. 7 (quoting 169 Vt. 310, 316 (1999)). That case did not consider parental choice through the lens of equal educational opportunities but instead considered whether providing tuition for religious schools violated a separate provision in the state constitution dealing with the establishment of religion (the Compelled Support Clause).

Also, the State's cherry-picked decisions from other jurisdictions ignore cases like *Vergara v. California*, No. BC484642 (Los Angeles County Superior Court 2014), where the court denied a motion to dismiss and held a bench trial before deciding that teacher tenure statutes denied students equal educational opportunities. The decision was reversed by *Vergara v. California*, 246 Cal. App. 4th 619, 627 (2016), but not on the denial of the motion to dismiss. Ultimately, cases from other jurisdictions that the State cites for the proposition that the Legislature should decide these questions are unhelpful because they do not interpret Vermont's constitution and its

unique historical tradition. State Br. 8-9. *See Brigham I*, 166 Vt. At 257 ("these cases are of limited precedential value to this Court because each state's constitutional evolution is unique and therefore incapable of providing a stock answer to the specific issue before us").

5. This Court did not address the question in this case in *Buttolph*.

Contrary to the State's argument, *Buttolph v. Osborn* did not address this issue under the Common Benefits Clause and provides the State with no help here. State Br. 7-8 (relying on 119 Vt. 116, 116-17 (1956)). In *Buttolph*, parents sought to force the reopening of a public school that a school board had decided to close. *Id.* at 118. They invoked the Common Benefits Clause but did *not* argue that other districts were providing public school options and that their children therefore were receiving unequal educational opportunities. *Id.* at 122-23. This Court dismissed the plaintiffs' argument by noting, "If this were a case in which the high school of a town had been closed by an official other than a locally elected one, even though that official might be acting pursuant to some act which might hereafter be passed purporting to give him such authority, then we might be presented with a genuine constitutional question." *Id.* at 123. The Court concluded, "But here we have no such situation." *Id.* Thus, it was considering an *ultra vires* claim, not a constitutional equality claim.

6. Equal educational opportunity is an individual right and not one that can be exercised by school districts.

The State contends that because school districts can opt in to town tuitioning, there is no violation of equal educational opportunity. State Br. 4, 19; PC-15-16. But educational opportunity is an individual right, not a right exercised by school districts. In *Brigham I*, the State also "argued that education was not considered by the framers to be an individual right," but this Court called that argument "unpersuasive." 166 Vt. at 262. It reasoned that education appeared alongside other individual rights, such as "the right to hold and acquire land." *Id.* Because *Brigham I* treated educational equality

as an individual right, the families here can seek to vindicate that individual right with a judicial remedy.

Still, the State argues it is not disadvantaging children excluded from town tuitioning because it simply allows “local districts to decide, based on local reasons, how best to proceed,” but that is shirking its responsibilities. State Br. 19. *Brigham I* held “education to be a fundamental obligation of the state.” 166 Vt. at 263. Accordingly, it rejected the State’s argument there “that the primary constitutional responsibility for education rests with the towns of Vermont.” *Id.* at 264.

Under this reasoning, the State here bears responsibility for the inequality between its Towns, which is made possible by its statutory scheme. Thus, it bears responsibility for the probable consequences of letting Towns opt in or opt out of town tuitioning. It was no answer in *Brigham I* that students could rally their neighbors to vote for more school funding. And it is no answer here that parents could theoretically petition others to vote for town tuitioning. This is because “parents in towns that exercise the town tuitioning option receive a real benefit – based solely on the fortuity of their geographic location,” and this injures those not receiving the benefit. Br. of EdChoice as *Amicus Curiae* Supp. Appellants 7. Therefore, none of the State’s arguments foreclose reviewing Parents’ claims on the merits.

II. Allowing some children to choose to attend an independent school while excluding others constitutes an unequal educational opportunity in violation of *Brigham I* and *Baker*.

As for the merits of this case, *Brigham I* and *Baker* show that excluding children from town tuitioning violates the Education and Common Benefits clauses. The “core presumption” under the Common Benefits Clause is “inclusion.” *Baker*, 170 Vt. at 214.

A. This Court has ruled that the right to equal educational opportunity trumps local control.

Brigham I answers the State's rebuttal that local control justifies it excluding some children from town tuitioning. Opening Br. 14-15. In *Brigham I*, this Court held that the "State [had] not explained . . . why the current [property tax] funding system is necessary to foster local control." 166 Vt. at 266. The court observed that the State could use a different funding system while still leaving "the basic decision-making power with the local districts." *Id.*

Under *Brigham I's* reasoning, the State here could use a different funding system to address its concerns that fewer students would enroll in public schools and thereby reduce a public school's options for hiring teachers and offering certain classes. State Br. 21. If anything, if fewer students attend public schools because they use town tuitioning to attend an independent school, the public schools will have lower operating costs and lower teacher-to-student ratios. This would increase public schools' flexibility in structuring their offerings. In any event, the State's speculation that expanded town tuitioning will harm towns' ability to operate public schools must be established with record evidence at the summary judgment stage.

B. Excluding children from town tuitioning does not bear a just relationship to controlling costs.

Likewise, whether excluding children from town tuitioning bears a just and reasonable relationship to controlling costs cannot be determined at the motion-to-dismiss stage. The Parents satisfied their burden to plead that the State is not justified in excluding some children from town tuitioning, and that is all they are required to do at this stage.

C. Excluding children from town tuitioning is underinclusive.

Lastly, regarding the "under- or over-inclusivity" of a particular benefit, the benefit here is clearly underinclusive: the optimal educational setting is possible for some students but not for most. The current system creates clear

winners and losers: rural students have educational options, while "urban children have been forced into a system that continually fails them" with no alternative. *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring).

D. Equality of educational opportunity is a judicial question of constitutionality and not a question of public policy.

The State contends that distributing town tuitioning benefits equally is a question of public policy and not for this Court to decide, but *Brigham II* rejected a similar argument. State Br. 22-23; *Brigham II*, 2005 VT at ¶ 10. There, the State had argued that the Legislature could decide how to fulfill the equality principle announced in *Brigham I*. *Id.* at ¶ 1. The trial court agreed and dismissed based on "judicial self-restraint." *Id.* But this Court reversed and held that the trial court had "abdicated its duty to uphold the Vermont Constitution by refusing to entertain plaintiffs' claim." *Id.* at ¶ 10. It reasoned, "Whether or not the Legislature has structured the education-funding system so that Vermont students are provided with a substantially equal educational opportunity is a constitutional issue properly before the court." *Id.*

Thus, whether town tuitioning must be provided equally is a judicial question. The State resists this argument by citing studies purporting to show that school choice is poor policy, but the Legislature already decided that it is good policy by providing town tuitioning to some children. State Br. 22-25. Once again, academic studies are precisely the sort of evidence appropriate to summary judgment or a bench trial, after review by an expert witness, but not appropriate for consideration on a motion to dismiss. Plus, the State's contention that school choice is a poor policy is exactly the sort of argument inappropriate for a court to consider. The State's studies are irrelevant to the question of equality.

Ultimately, the State confuses the declaration of a constitutional violation with the remedy that is appropriate to fix the violation. It is the Court's job to

declare when a statutory scheme violates the constitution, and it is the Legislature's job to adopt public policies that conform to the constitution.

CONCLUSION

The Superior Court's decision granting the motion to dismiss should be reversed.

Dated: October 21, 2022

Respectfully submitted,

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

Brian K. Kelsey (ERN # 11526)
Admitted Pro hac vice
Daniel R. Suhr (WI Bar No. 1056658)
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Admitted Pro hac vice
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 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' Reply Brief complies with the word-count limit. The number of words in the Brief are 4453. 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 21, 2022

/s/ Deborah T. Bucknam
Deborah T. Bucknam