UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

A.M., by and through his parents and natural guardians, Christopher Messineo and Jill Messineo; E.M., by and through her parents and natural guardians, Christopher Messineo and Jill Messineo; CHRISTOPHER MESSINEO, individually; JILL MESSINEO, individually; A.S., by and through her parents and natural guardians, Russell Senesac and Selena Senesac; RUSSELL SENESAC, individually; SELENA SENESAC, individually; A.H., by and through her parents and natural guaridans, James Hester and Darlene Hester; JAMES HESTER, individually; DARLENE HESTER, individually; and the ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT,

Plaintiffs-Appellants,

v.

DANIEL M. FRENCH, in his official capacity as Secretary of the Vermont Agency of Education,

Defendant-Appellee.

No. 20-1772

APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL UNDER FED. R. APP. P. 8

Introduction

This appeal involves a straightforward case of government discrimination based on religion. Vermont's Dual Enrollment Program provides public funding paid directly to colleges so eligible high school students can dual-enroll. In a Vermont school district that does not operate a public high school, every student is eligible for the Program—except those who attend religious high schools. It is undisputed that: (1) officials denied Appellant A.H. access to the Program because she attends a religious school and (2) officials have never approved a religious high school to participate in the program. This discrimination violates the Free Exercise Clause's neutrality principle. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (invalidating funding program that excluded religious schools).

Yet the district court excused this religious discrimination based on a different program—the Town Tuition Program—that provides public funding paid to private high schools. The State has decided that religious schools and their students must first qualify for that program before they may access the Dual Enrollment Program. But that hitch is unconstitutional. No one questions that A.H. would qualify for dual enrollment if she attended a secular private school. Once Vermont allows secular private schools and their students into the program, the Constitution requires it to allow religious schools and their students to participate too. The Free Exercise Clause bars Vermont from placing

extra barriers on religious schools, and their students, based solely on their religious status.

The State's response to this discriminatory treatment is that religious-school students *might* be able to qualify for the Town Tuition Program *if* they can prove that there are adequate safeguards to ensure that no public funding will be used for religious worship. And if a religious high school happens to convince local officials of this, the States says, then they can participate in the Dual Enrolment Program. But extra hurdles for those with a religious identity to access a neutral public benefit are the problem, not the solution. The U.S. Supreme Court has prohibited such "penalt[ies] on the free exercise of religion." *Trinity Lutheran*, 137 S. Ct. at 2021.

Moreover, those barriers are unnecessary. They are designed to keep public funds from subsidizing worship at religious high schools, because under the Town Tuition Program public funds flow directly to religious high schools. But no high schools receive public funds under the Dual Enrollment Program; the funds go directly to colleges. These barriers have also spawned a system of individualized assessments that gives officials discretion to discriminate against religious applicants. Either way, the Free Exercise Clause violation remains.

Because A.H. is a rising high-school senior, she is nearly out of time to enjoy the Program's benefits. Accordingly, Appellants request this Court to enter an immediate injunction to stop the discrimination.

Statement of Jurisdiction

Appellants appeal the district court's denial of their motion for preliminary injunction. This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1). Because the district court denied Appellants' preliminary injunction motion requesting substantially the same relief as this motion, it was futile for Appellants to have sought relief there first—erasing any chance for them to timely obtain the requested relief. Fed. R. App. P. 8(a)(2)(A)(i).

Background

Appellants

A.H. is a rising senior in high school. App'x in Supp. of Appellants' Emergency Mot. for Inj. Pending Appeal ("App'x") AA165. She lives with her parents, James and Darlene Hester, in South Hero, Vermont—a small town without a public high school. App'x AA165. The Hesters seek to give their daughter the best education possible. App'x AA165. As an exercise of their faith, the Hesters send A.H. to Rice Memorial High School. App'x AA165.

Rice is a ministry of the Roman Catholic Diocese of Burlington, Vermont.[1] App'x AA160. As an exercise of its faith, the Diocese launched Rice to help students realize their God-given potential. App'x AA160. It does this by offering faith-based academic instruction. App'x

[1] A.H., the Hesters, Rice, and the Diocese are the Plaintiffs-Appellants.

AA160. All of its instruction is consistent with the doctrine and teachings of the Catholic Church. App'x AA160. And some includes teaching Catholic doctrine itself. App'x AA160.

A.H. dreams about becoming a veterinarian and hopes to attend McGill University. App'x AA057, AA165. To bolster her admission chances, she wants to dual-enroll in two science classes at the University of Vermont. App'x AA165. But the Hesters cannot afford those classes *and* Rice tuition. App'x AA166. So they turned to Vermont's Dual Enrollment Program to cover the cost. App'x AA166.

The Dual Enrollment Program

The Vermont Agency of Education—led by Defendant-Appellee Secretary French—runs the Dual Enrollment Program to (1) "expand high-quality education experiences," (2) "promote opportunities for Vermont students to achieve postsecondary readiness," and (3) "increase the rates of secondary school completion and postsecondary continuation in Vermont." 16 V.S.A. § 941(a). In other words, the Program is uniquely designed to help someone like A.H.

To achieve those goals, the program allows Vermont high school juniors and seniors to "enroll in up to two dual enrollment courses" at Vermont colleges before they finish high school. *Id.* § 944(b)(2). The State pays tuition directly to colleges for this opportunity. App'x AA104. But rather than extend the Program to all, Vermont excludes students attending religious high schools.

Specifically, Vermont limits Program eligibility to students who are enrolled in (1) a public school, (2) home studies, or (3) an approved independent school (i) "that is designated as the public secondary school for the student's district of residence" or (ii) "to which the student's district of residence pays publicly funded tuition on behalf of the student." *Id* § 944(b)(1)(A). That rule effectively bars students at religious schools like Rice from participating in the program.

Consider the third category of eligible students in a school district like A.H.'s, which offers elementary education but no public high school. App'x AA165. Vermont requires such a district to provide secondary education under Vermont's so-called Town Tuition Program, 16 V.S.A. § 821 *et seq*. To satisfy that obligation, eligible towns without public high schools ("sending towns") must offer to pay tuition on behalf of its students directly to either a public school in another school district or to an approved private school. *Id*. § 822(a)-(b).

For those students attending a public school in another district or a secular private school, the dual-enrollment eligibility question is easy: they all qualify. But when it comes to religious private schools, it's more complicated. The Vermont Supreme Court has held that the Compelled Support Clause of Vermont's Constitution prohibits government payments to religious schools that lack "adequate safeguards against the use of such funds for religious worship." *Chittenden Town Sch. Dist. v. Dep't of Educ*, 738 A.2d 539, 542 (Vt. 1999).

By choosing these criteria, Vermont excluded from the Dual Enrollment Program all students in districts that lack a public high school who attend private religious schools because the State has not defined adequate safeguards to ensure that no public funds go to religious schools under town tuition. And there's no reason Vermont had to do so. While Vermont's Constitution prohibits government payments to religious schools that have a worship component, students use Program funds entirely for tuition covering secular college classes, typically at Vermont public colleges. And those funds go directly to colleges and universities—not high schools. App'x AA104.

No one disputes that Vermont has never defined the "safeguards" criteria that *Chittenden* requires; when asked, Secretary French could provide no documents showing any such safeguards exist. App'x AA142. So no students in religious high schools participate because, as Secretary French admits, *no* religious high schools located in districts like A.H.'s have been approved to participate in dual enrollment. App'x AA124. Meanwhile, *all* students in such districts are eligible if they are in homeschool or attend a secular private high school. The Program burdens religious students alone, either by excluding them categorically or by requiring them to satisfy an adequate-safeguards test that Vermont has not defined and no other student need fulfill.

Proceedings below

Appellants sued Secretary French to stop this religious discrimination last year. App'x AA045. Secretary French moved to dismiss, and the district court partially denied that request. App'x AA001. Critically, Secretary French admitted in his motion papers that limiting access to the Dual Enrollment Program to those eligible for town tuition "has the effect of excluding" from dual enrollment students in sending towns who "choose to attend a religious independent school." App'x AA009. Agency policy and communications over the last decade confirm as much:

> ***Dual Enrollment Program***
>
> - 2013 – When asked about Rice's Dual Enrollment eligibility, the Agency's General Counsel told Rice's principal that the school was "out. Sorry." App'x AA066.
>
> - December 31, 2015 – Dual Enrollment Program Coordinator says, "Students at a Christian or parochial school or privately funded students are not eligible for Dual Enrollment." She then explains, "the student would need to be unenrolled at the Christian/parochial school and be enrolled in a publicly funded school if they wanted to participate in dual enrollment." App'x AA071.
>
> - July 16, 2018 – Agency official says, "*students attend[ing] religious schools are not eligible* to access the Dual Enrollment Program." App'x AA070 (emphasis added).
>
> - January 23, 2019 – Secretary French says, "In order to be an approved independent school, *the school must be [ ] non-sectarian*." App'x AA172 (emphasis added).

Town Tuition Program

- March 25, 2010 – Agency official distributes white paper titled, "Summary of School Choice Options in Vermont – 2010," which says, "school boards pay tuition to public or approved independent schools that parents choose, within or outside Vermont, *not including religious schools*." App'x AA179 (emphasis added).

- December 27, 2010 – Agency official says, to qualify for Town Tuition Program, the student must attend "any approved public high school or approved independent school, *though not a religious school*." App'x AA173 (emphasis added).

- December 2012 – Agency issues white paper titled "Other School Choice Options in Vermont," which says "school boards pay tuition to public or approved independent schools that parents choose, within or outside Vermont, *not including religious schools*." App'x AA182 (emphasis added).

- December 14, 2015 – In a former role, Secretary French requests guidance from Agency advisor about the "subjective" criteria he used to deny school "affiliated with the Episcopal Church" from the town tuition program. App'x AA185.

- December 6, 2019 – Agency official says, "[P]ublic tuition can be paid to approved, *non-sectarian" schools*." App'x AA176 (emphasis added).

Apparently realizing that this long-held official position was fatal to the Agency's position in this litigation, Secretary French changed his story and suggested for the first time that religious schools and their students *could possibly* participate in dual enrollment. App'x AA032. So A.H. applied for town tuition reimbursement from her local school

district—Grand Isle Supervisory Union. App'x AA157. And Rice applied to become an approved school for dual enrollment. App'x AA161.

Predictably, government officials denied both applications. Grand Isle told the Hesters that "Rice is a religious school. . ." App'x AA157. And the Agency told Rice it was too late—even though the State had not sent any deadline information to Rice. App'x AA137. But had Rice "timely" applied, the outcome would have been the same because *no* Rice students received public tuition, App'x AA194, rendering all Rice students categorically ineligible for the Dual Enrollment Program.

Out of options, Appellants moved for injunctive relief. App'x AA189. The district court denied that request. *Id*. It correctly concluded that A.H. timely filed her Program application, that officials denied her eligibility, and that, if she established a likelihood of success on the merits, A.H. would suffer irreparable harm. App'x AA193, AA201. But the district court rejected a likelihood of success because the Program's eligibility requirements do not facially classify based on religion, were not motivated by a discriminatory intent, and do not impose unconstitutional burdens on religious exercise. App'x AA203—AA204. Alternatively, the district court held that any unconstitutional burden was imposed not by Vermont and Secretary French, but by the local school district that denied A.H.'s Program application, App'x AA202, even though the local school district was given the authority to make the decision by the State, and was merely applying Vermont's criteria.

As explained in detail below, the district court erred. Even statutes that do not mention religion can classify based on religion. And, properly understood, the Program does impose unconstitutional burdens on religious exercise; students in districts like A.H.'s who attend a private religious high school face a hurdle to Program eligibility that no public-school or private-secular-school student must jump. What's more, it was wrong to say the local school district is the proper party defendant when it is the State that delegates the authority to them, and that created and enforces the discriminatory criteria. A.H. has established a strong likelihood of success on the merits.

Equally important, A.H. is running out of time. Because the Agency kept her from participating in dual enrollment during her junior year, she now has only one chance to enroll before submitting college applications in the fall. This summer or fall, A.H. wants to take a science class at the University of Vermont. The fall class starts in late August. App'x AA242. So Appellants request that this Court temporarily enjoin Vermont from discriminating against them during this appeal to make summer and fall enrollment possible while the Court considers Appellants' appeal on an expedited basis.

Requested Relief

Appellants request that this Court order that Secretary French, and those acting with him and on his behalf, stop applying 16 V.S.A.

§ 944 to exclude Appellants from participating in Vermont's Dual Enrollment Program based on the religious status of Rice Memorial High School while this appeal is pending.

Argument

To obtain the requested injunction, Appellants can show (1) they suffer irreparable harm, (2) a likelihood of success on the merits, and (3) the injunction is in the public interest. *N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

The loss of First Amendment rights, "for even minimal periods," constitutes "irreparable injury." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). And Vermont has no legitimate interest in enforcing an unconstitutional law. *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). So the Court should enter the requested injunction because Appellants can show a probability of success on the merits. That alone is sufficient, though the balance of equities strongly favors Appellants here anyway.

I. Appellants will likely succeed in showing that Vermont's Dual Enrollment Program violates their First Amendment right to freely exercise their religion.

When laws impose "special disabilities" on the religious or target them for "unequal treatment" due to their "religious status," they violate the First Amendment's Free Exercise Clause and must satisfy strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2019 (cleaned up). The

Program violates this principle because it excludes and burdens Appellants solely due to their religious status. *Id*. at 2021.

A. Per Agency policy, the Dual Enrollment Program excludes and discriminates against Appellants solely due to their religious status.

The Dual Enrollment Program excludes and uniquely burdens religious schools and their students "solely because of their religious character." *Id*. at 2021. Per Agency policy, no religious school has ever been permitted into the Program. So while students in sending towns can participate in the Program if they are enrolled in a public school, homeschool, or secular private school, they *cannot* access the Program if they are enrolled in a religious school.

The Agency's words and actions confirm this discriminatory policy. As noted above, the Agency and Secretary French have repeatedly said that students in religious schools cannot participate in the Program. Those words reflect the State Legislature's intent; the legislative record reveals that dual enrollment excludes "sectarian" schools. App'x AA082. And it cautions against granting religious-school students Program eligibility for fear that their schools may receive some indirect benefit, App'x AA083, even though no high schools receive any Program dollars. 16 V.S.A. § 944(f)–(g). These officials' "statements" confirm that officials unconstitutionally intended and understood their actions to preclude religious schools and their students from accessing

dual enrollment. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993).

The Agency's actions match those words. As the State indicates, no religious high schools participate in dual enrollment. App'x AA124. And it's not as if none have tried. The State has said for years that the Program excludes religious schools and their students—including telling Rice that due to its religious status, it was "out. Sorry." App'x AA066. But in a mid-litigation about-face—after first admitting religious schools are out, App'x AA009—the State then claimed in the proceedings below that may not *really* be its policy. So, the Hesters and Rice applied for dual enrollment. Both were denied. The reason: "Rice is a religious school. . ." App'x AA157.

Those denials show that Appellants—and all others like them—are "put to the choice between" retaining their religious identity "and receiving a government benefit." *Trinity Lutheran*, 137 S. Ct. at 2024. And it makes them feel less like they too are "a member of the community." *Id.* at 2022. No matter what Vermont says, the Dual Enrollment Program's "effect" of excluding all religious schools and their students "is strong evidence of its object" to do just that. *Lukumi*, 508 U.S. at 535.

B. Vermont officials cannot excuse the Dual Enrollment Program's religious discrimination because the State unconstitutionally hitched its eligibility requirements to town tuition.

Vermont excuses this discriminatory policy because the State has tied the Dual Enrollment Program to town tuition. But while that excuse may *explain* its discrimination, it cannot *justify* it. Because no Program funds go to high schools, the Program's public-funding requirement *only* works to (1) categorically bar religious schools and their students from the Program, (2) subject them to an unequal process, and (3) grant officials discretion to discriminate against them. That application violates Appellants' free exercise rights.

1. The Program violates free exercise because it categorically bars religious schools and their students from participation.

The Program mandates religious discrimination, even though the law does not use the word "religious." As explained above, if a student lives in a school district without a public high school, like A.H., and she enrolls in a private religious school, government officials will apply the Program criteria to exclude her. In particular, students like A.H. cannot access town tuition funds because the State forbids those funds from flowing to religious high schools without "adequate safeguards" (whatever that means) that no worship activity will take place with public funding. Because the State has not defined those safeguards, Vermont categorically excludes religious schools—no matter whether

they engage in religious worship—from receiving town tuition funds. And without approval for those town tuition funds, religious schools and their students cannot access the Dual Enrollment Program. Students in the same district who attend neighboring district public high schools are eligible. So are same-district homeschoolers. And so are same-district students who attend private secular schools. The *only* students excluded or burdened are those attending religious schools.

Moreover, no matter whether Vermont creates "adequate safeguards" now or later, incorporating them in the Dual Enrollment Program would still be unconstitutional. Schools deemed too religious could not comply with such safeguards. So they would still be denied access to Dual Enrollment. Because no Dual Enrollment funds go to religious high schools, it would be similarly unconstitutional to keep some religious schools out.

As *Trinity Lutheran* made clear, Appellants have the "right to participate in a government benefit program without having to disavow" their religious character. 137 S. Ct. at 2022. To be sure, Rice is free to continue operating as a religious school, just as "Trinity Lutheran [was] free to continue operating as a church." *Id*. "But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which [it] is otherwise fully qualified." *Id*. That penalty violates Appellants' free exercise rights. *Id*.

It makes no difference that the statute does not use the word "religious." Imagine a state that sends all students of one race to schools with names that begin with the letter "W" and all students of another race to schools with names that begin with the letter "B." If the state enacted a dual-enrollment program that funded only students who attend schools with names that begin with the letter "W," it would be no defense to a race-discrimination claim to say that the statute does not facially mention race. So too here. A.H. will likely prevail on her claim that the Program excludes religious schools and students.

2. The Program violates free exercise because it burdens religious schools and their students with a special procedure.

The Program also targets religious schools and their students for "disfavored treatment." *Id.* at 2020. It burdens them with an extra procedural bar—the adequate-safeguards test—"solely" due to their "religious identity." *Id.* at 2019. The only reason for such a test is to ensure public funds do not go to support "religious worship" in violation of Vermont's Constitution. *Chittenden*, 738 A.2d at 542. But the Dual Enrollment Program specifically excludes any state funding to high schools. 16 V.S.A. § 944(f)–(g). So there is no compelling, let alone legitimate, basis for imposing that burden.

The fact remains that Vermont may not deploy its adequate-safeguards test *only* to prevent providing religious schools and their

students *equal access* to the Dual Enrollment Program. *Trinity Lutheran*, 137 S. Ct. at 2022 ("express discrimination" came from unequal process, not undesired outcome). That is an irrational—and thus, unconstitutional—application of the adequate-safeguards test. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985) (irrational discrimination is not a legitimate state interest).

And to showcase just how unreasonable this application is, the State does not even apply the adequate-safeguards test on the back end to ensure that no public funds are paid to religious colleges or coursework. While the State refuses to fund A.H.'s desired science classes at the University of Vermont, it would allow a public school, homeschool, or secular private school student down the street to study religious worship at a religious college.[2] The Program's discrimination undercuts its express purpose to increase postsecondary opportunities for Vermont students. 16 V.S.A. § 941(a)(2). It is a "gratuitous" policy that targets the religious for no legitimate reason and is therefore unconstitutional. *Lukumi*, 508 U.S. at 538.

[2] South Burlington High School is three miles from Rice. It advertises its participation in the Dual Enrollment Program on its website. *See* https://bit.ly/2N0rwMZ. St. Michael's College is a Catholic institution that participates in dual enrollment. *See* http://bit.ly/2OeSK3k. And the College coursebook lists Religious Studies courses. *See* http://catalog.smcvt.edu/.

3. The Program violates free exercise because it gives officials discretion to discriminate against religious schools and their students.

Vermont's arbitrary enforcement of the Program means it may not exclude religious schools and their students. In the middle of this litigation, Secretary French revealed that some government officials are making case-by-case decisions on whether religious schools and their students qualify for tuition funds anyway, and a few religious schools have slipped through the cracks. App'x AA169. Vermont says this shows that religious schools and their students are not categorically excluded from dual enrollment. The district court agreed. App'x AA203.

That is incorrect. Uneven enforcement does nothing to eliminate the special procedural burden religious schools and their students face. Nor does it explain why no religious schools or students in them participate in *dual enrollment*. And finally, it does not change the fact that the Program criteria categorically discriminate against religious schools and their students. That is why laws that impose a 55 miles-per-hour speed limit categorically ban speeding in excess of 55 miles-per-hour even if some speeders escape detection or are let off by police.

Vermont says this anomaly also highlights that the State is not responsible for eligibility calls; those are made by local school districts. App'x AA194. The district court relied on this argument for its alternative holding that A.H. should have sued local officials instead. But that's wrong. Vermont may not (1) delegate decision-making

authority to local school officials, (2) allow them to make discretionary dual-enrollment decisions that disfavor religious schools and their students, or (3) escape blame for overlooking that discretion that they have provided.

Vermont cannot give officials unfettered discretion to discriminate against religious applicants. Because the State has never bothered to create "adequate safeguards" to ensure that town tuition funds do not support religious worship, some school districts necessarily make "ad hoc discretionary decisions" about whether religious schools and their students may receive town tuition—if they consider religious applicants at all. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004). This revelation is not a defense; it shows that the State *must* now include Appellants in the Program.

Vermont's decades-long neglect has spawned a spotty system of "individualized . . . assessment[s]." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990). Such a system permits "case-by-case inquiries" that use a "subjective test" that allows officials to selectively burden religious exercise. *Axson-Flynn*, 356 F.3d at 1297. To show this, Secretary French admits that when he was a superintendent, he created his own "subjective" test to scrutinize religious schools. And he used that test at least once to keep a school "affiliated with the Episcopal Church" from accessing town tuition. App'x AA185—AA186.

No wonder religious schools and their students fare poorly in this system. With no official "written policy," Vermont has let officials ban religious schools and their students from dual enrollment solely due to their religious status. *Axson-Flynn*, 356 F.3d at 1299. And the only guidance that the State has produced says that religious schools and their students are ineligible—no matter what. *See supra* 7-10. That violates free exercise. *Trinity Lutheran*, 137 S. Ct. at 2024-25.

Vermont also cannot excuse this religious discrimination by blaming local school districts. To be sure, school districts decide town tuition eligibility; but the *Agency* runs dual enrollment. App'x AA089. It must provide support—including "legal interpretations"—to help school districts create those opportunities. 16 V.S.A. § 941(b)(3)(C)(iii). The Agency neglected that duty here by not intervening to protect religious schools and students from status-based discrimination. *See United States v. City of Yonkers*, 96 F.3d 600, 613 (2d Cir. 1996) (officials may be liable for failure to fulfill duties); *Comer v. Cisneros*, 37 F.3d 775, 804 (2d Cir. 1994) (officials may violate civil rights if they know about unlawful discrimination and can "intervene" but do nothing).

C. The Dual Enrollment Program fails strict scrutiny.

A law that "targets" religious individuals and conduct for unequal treatment or "advances legitimate governmental interests only against conduct with a religious motivation will" rarely survive strict scrutiny. *Lukumi*, 508 U.S. at 546. To satisfy that "most demanding test known

to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997), Vermont must prove that excluding religious schools and their students from the Dual Enrollment Program is narrowly tailored to serve a compelling interest. *Lukumi*, 508 U.S. at 546. It cannot.

Vermont cannot identify any "problem in need of solving." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). The State has no legitimate—much less compelling—interest in banning religious schools and their students from dual enrollment because: (1) the program does not provide funds to religious high schools or their students and (2) barring them undercuts the program's purpose.

First, the Program does not pay funds to religious high schools or their students. No matter whether the State has an interest under its Compelled Support Clause to prevent funding "religious worship" at religious high schools through town tuition, that interest evaporates in dual enrollment. It makes no sense to apply an adequate-safeguards test *only* as a status-based bar to religious schools and their students joining dual enrollment. *Trinity Lutheran*, 137 S. Ct. at 2022; *City of Cleburne*, 473 U.S. at 448-49.

Second, the State launched the Dual Enrollment Program "to promote opportunities for Vermont students to achieve postsecondary readiness through high-quality educational experiences." 16 V.S.A. § 941(a)(2). Students like A.H. deserve those opportunities as much as

any other Vermont student. Denying her those opportunities undercuts the State's express interest in creating dual enrollment.

II. The balance of equities strongly favors Appellants.

As noted above, because Appellants have shown they will likely succeed on their constitutional claims, irreparable injury is presumed. But the equities strongly favor them for another reason: A.H. is about to lose a "unique opportunity" that she can never recover. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995).

This is A.H.'s last chance to participate in dual enrollment before she applies for college this fall. Decl. of James Hester in Supp. of Appellants' Emergency Mot. for Inj. Pending Appeal. (Hester Decl.) (Ex. A) at ¶ 8. Proving herself in a college-level class at the University of Vermont could make the difference in securing her admission to McGill University. But some summer classes are already underway. And fall classes start in late August. App'x AA242. Neither A.H. nor her parents can afford to enroll her without State funds. Unless this Court stops Vermont from barring her from dual enrollment during this appeal, A.H. will miss an educational opportunity that cannot be replaced or undone later. Ex. A at ¶ 11.

Moreover, families are now making decisions for the upcoming school year. Decl. of Lisa Lorenz in Supp. of Appellants' Emergency Mot. for Inj. Pending Appeal. (Lorenz Decl.) (Ex. B) at ¶ 9. Rice faces

another year without dual enrollment eligibility. *Id*. at ¶ 12. This hampers the school's ability to attract and retain students. Some students have chosen not to attend or have left Rice because the school cannot join dual enrollment. *Id*. at ¶ 10. And each student lost is a lost ministry opportunity for the school. *Id*. at ¶ 13. Rice needs this Court to level the playing field. *Id*. at ¶ 10.

A.H. faces irreparable harm if she loses the last opportunity she has to expand her education and bolster her college admission chances. As does Rice if it loses out on expanding its fall enrollment.

Finally, as the district court accepted, the Eleventh Amendment prevents Appellants from recovering money damages for the loss of their constitutional rights. *CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 94-95 (2d Cir. 2002). The piling up of those unrecoverable damages also "constitutes irreparable injury." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011).

That is a high price to pay. And if this appeal lingers, the State will escape scot-free for violating Appellants' rights. That is a cost neither Appellants nor society should have to bear.

Conclusion

This is A.H.'s last chance to participate in the Dual Enrollment Program. She should not have to choose between exercising her faith and accessing this public benefit. Nor should her school. They need this

Court to reaffirm that they, too, are members of the community who deserve an equal shot at educational success. This Court should enter the requested injunction saying so before it's too late.

Dated: June 26, 2020

Respectfully submitted,

s/ David A. Cortman
David A. Cortman
GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org

Kristen K. Waggoner
DC Bar No. 242069
John J. Bursch
MI Bar No. P57679
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

Ryan J. Tucker
ALLIANCE DEFENDING FREEDOM
AZ Bar No. 034382
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rtucker@ADFlegal.org

Thomas E. McCormick
McCormick, Fitzpatrick, Kasper, & Burchard, P.C.
40 George St.
Burlington, VT 05402
(802) 863-3494
tem@mc-fitz.com

Attorneys for Appellants

Certificate of Compliance

This motion complies with the type-volume limit set forth in Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,200 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 360 in 14-point Century Schoolbook type-style.

Dated: June 26, 2020

s/ David A. Cortman
David A. Cortman
Attorney for Appellants

Certificate of Service

I hereby certify that on June 26, 2020, a copy of this Motion was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ David A. Cortman
David A. Cortman
Attorney for Appellants