IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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 guardians, James Hester and Darlene Hester; JAMES HESTER, individually; DARLENE HESTER, individually; and the ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT, *Plaintiffs*, v. DANIEL M. FRENCH, in his official capacity as Secretary of the Vermont Agency of Education, *Defendant*.	Case No. 2:19-cv-00015-cr

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Vermont's Dual Enrollment Program discriminates against religious schools and their students by excluding them from a public benefit because of their religious status. It funds college courses for high school students who attend public schools, secular private schools, and even home-schooled students. 16 V.S.A. § 944(b)(1)(A)(i)(II, III), (iii). But as Defendant's Program Coordinator explained, "students attend[ing] religious schools are not eligible to access the Dual Enrollment Program," including Plaintiff A.H., who attends Rice Memorial High School.

This is A.H.'s last chance to take Dual Enrollment courses. If she misses out now, the harm cannot be undone. A.H. wants to take courses starting this summer for the 2020–2021 school year to help her chances for college admission. And the Diocese of Burlington, which runs A.H.'s school, wants to overcome a state-made competitive disadvantage so it can offer A.H. and other Rice students the same opportunities enjoyed by their peers at other schools. Right now, families are deciding where to send their students next fall and Dual Enrollment availability factors into their decisions.

Vermont has made it clear since Dual Enrollment's adoption that Rice was ineligible and students at religious high schools need not apply. First, Defendant communicated that position directly to Rice, parents of affected students, colleges in the area, and inquiring legislators. Defendant's General Counsel told Rice it was "out," and Defendant's Dual Enrollment Program Coordinator told parents "[t]he law does not provide dual enrollment to Christian/parochial schools," told a local college official that students had to "unenroll" from their religious school to be eligible, and told the leader of the Vermont Senate that his Rice-based constituents were ineligible. Second, Defendant's sworn discovery answers show that not one religious school participates in Dual Enrollment. And discovery further shows that Defendant has never provided any program information to Rice. Third, the legislative and public record reflects this exclusion. A legislative memorandum says the law excludes "sectarian" schools from Dual Enrollment, and there have been many failed attempts to fix the law since enactment. In light of this clear evidence of religious discrimination and in the face of imminent, on-going, and irreparable harm, Plaintiffs ask this Court to enjoin Defendant from discriminating against religious high schools and their students by enforcing § 944 to exclude them from the Dual Enrollment Program.

STATEMENT OF FACTS

Vermont's Dual Enrollment Program

Dual Enrollment provides funds for eligible high school students to take dual credit classes at public or private colleges. 16 V.S.A. § 944(f), (g). Before 2013, no formal program existed in Vermont, but all high school students—including students at religious high schools—used state funding sources to pay for dual credit college courses. Lorenz Decl. ¶ 7. Then, in 2013, Vermont created the Dual Enrollment Program as part of its Flexible Pathways Initiative seeking to enable a greater number of eligible students to take college courses—that is, unless those students attend religious high schools. 16 V.S.A. § 941(a)(1)–(3), § 944(a), (b)(2).

When the legislature enacted the Dual Enrollment statute, it limited eligibility to students who (1) attend public high schools, (2) attend private schools designated as the public high school for a school district, (3) attend approved private schools receiving publicly funded tuition on behalf of the student, or (4) study at home as home school students. *Id.* at § 944(b)(1)(A)(i)(II, III), (iii). The second and third eligible student categories refer to Vermont's Town Tuitioning Program. *Id.* at § 821 *et seq*.

Under Town Tuitioning, students in districts without public schools can receive tuition payments to secular private schools that are approved independent schools or are designated as the district's "public high school." *Id*. at §§ 822, 824, & 827. In *Chittenden Town Sch. Dist. v. Dep't of Educ.*, however, the Vermont Supreme Court declared tuition payments to religious schools unconstitutional under the State's Compelled Support Clause unless the State established special safeguards to prevent government funding of religious worship. 738 A.2d 539, 541–42 (1999). *Chittenden* effectively excluded religious schools from Town Tuitioning because the State never implemented any safeguards. *Id*. at 563. And here, Defendant admitted that he cannot find

documentation that any safeguards were implemented. *See* Def.'s Resp. to Pl.'s Req. for Prod. No. 16, Ex. L.

The Dual Enrollment program differs from Town Tuitioning in significant ways. Unlike Town Tuitioning, the State does not fund religious high schools for Dual Enrollment courses. It pays funds directly to the colleges. Vermont 2019 Budget Book, Ex. C, at 57 ("Established tuition rates are paid by the Agency to the post-secondary institution."). And students may use their voucher with no subject matter restriction on the college course—including religion. Def.'s Ans. to Int. No. 3, Ex. K.

As Defendant previously told this Court, incorporating Town Tuitioning's eligibility requirements into Dual Enrollment "has the effect of excluding" from Dual Enrollment "students who are residents of a school district that does not maintain a public high school (and whose secondary education would normally be supported by district-paid tuition), but who choose to attend a religious independent school . . . by operation of the *Chittenden Town* decision[.]"). Def.'s Mot. to Dismiss 8, ECF No. 14. Shortly after § 944 went into effect, the Agency of Education's General Counsel confirmed to Rice's Principal that the new law "leaves Rice out. Sorry." Ex. A at AGO00579. In the following years, Defendant's Dual Enrollment Program Coordinator confirmed to parents in emails that "[t]he law does not provide dual enrollment to Christian/parochial schools" (*id*. at AGO00597) and tried to "provide a better understanding of why students attend[ing] religious schools are not eligible to access the Dual Enrollment Program." *Id*. at AGO00591. She similarly told a Community College of Vermont official that "[s]tudents at Christian or parochial school[s] . . . are not eligible for Dual Enrollment" and that those students "would need to be unenrolled at the Christian/parochial school . . . if they wanted to participate in dual enrollment." *Id*. at AGO00595. Altogether, in numerous responses to eligibility inquiries over

the years, the Program Coordinator pointed to *Chittenden* to explain why religious schools and their students are out. *See, e.g., id*. at AGO00604 (Defendant's Program Coordinator pins Rice's ineligibility on *Chittenden*); *see also* Ex. B, at AGO00477–78 (internal memorandum explains religious student ineligibility and warns about *Chittenden*).

While the State has relied on *Chittenden* for years as justification for excluding religious schools from the Dual Enrollment Program, it now tries to claim that *Chittenden* does not require the prohibition of religious schools or that there is some work-around. But neither matter here. What matters now is that Defendant has unconstitutionally prohibited the Plaintiffs from participating in Dual Enrollment. Why it did so—or continues to do so—does not change the unconstitutional result.

The State never sent a Dual Enrollment participation agreement to Rice, nor did it ever communicate to Rice that its students could participate. Def.'s Resp. to Pl.'s Req. for Prod. 3 & 4, Ex. L; Senecal Decl. at ¶ 12. In fact, no religious schools participate in Dual Enrollment. Def.'s Ans. to Pl.'s Int. No. 2, Ex. K.

The Excluded Plaintiffs

A.H., a Rice junior, lives with her parents in a school district without a public high school. Hester Decl. at ¶¶ 4–6. She would normally receive Town Tuitioning funds, but her application was rejected because she attends a religious school. *Id*. at ¶¶ 19–20; 16 V.S.A. § 822(a)(1); Dave Mills Email, Ex. N ("Rice is a religious school for which we do not pay tuition."). A.H. tried to apply for Dual Enrollment, but the State rejected her application. Hester Decl. at ¶ 21–22. If admitted for Dual Enrollment, she would take a Summer 2020 semester course at the University of Vermont, which would relieve some financial difficulties facing her parents. *Id*. at ¶¶ 11, 15, 17; Learning Plan, Ex. J. The Hesters exercise their faith by sending their children to Rice. Hester

Decl. at ¶ 8. But like many parents, the Hesters cannot afford Dual Enrollment courses out of their own pockets. *Id*. at ¶¶ 17–18.

Plaintiff Roman Catholic Diocese of Burlington owns and operates Rice as part of its Christian ministry. Lorenz Decl. ¶¶ 3–4. The Diocese exercises its religion through Rice by providing instruction in academics and Catholic doctrine. *Id*. at ¶¶ 4–6. Rice wants its students to have access to Dual Enrollment. *Id*. at ¶¶ 7–9, 14. But Vermont's policy of denying Rice students access to Dual Enrollment rests on Rice's religious status. *Id*. at ¶¶ 16–17; Def.'s Mot. to Dismiss 8; Ex. A at AGO00604 (explaining ineligibility to a Rice parent). Because Rice is ineligible for Dual Enrollment, some families send their students to other schools instead. Lorenz Decl. at ¶ 13. Participating schools advertise Dual Enrollment on their websites and families consider this factor, leaving Rice with a competitive disadvantage. *Id*. at ¶¶ 12–14; Examples of School Webpages, Ex. E. In a further attempt to remedy this wrong, Rice submitted a Dual Enrollment participation agreement to Vermont, but the State did not accept Rice's application. Lorenz Decl. at ¶ 18.

ARGUMENT

Plaintiffs need a preliminary injunction to prevent the imminent loss of constitutional rights. The harm is not the loss of funds, but the loss of an educational opportunity that cannot be remedied or replaced. To prevail, Plaintiffs must establish: "(1) irreparable harm; (2) either a likelihood of success on the merits, or sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (cleaned up). For the reasons explained below—and as Defendant's own documents demonstrate—Plaintiffs not only meet this standard but have shown a clear likelihood of success on the merits. *Id*. at 651.

I. Vermont's Dual Enrollment Statute Violates the First and Fourteenth Amendments.

Vermont's Dual Enrollment statute excludes students at religious private schools—students like A.H. at Rice. *See* 16 V.S.A. § 944; Def.'s Mot. to Dismiss 8 (admitting religious exclusion). This religious exclusion unconstitutionally burdens Plaintiffs' free exercise rights and fails strict scrutiny. The statute also draws an irrational distinction between secular and religious private schools (and their students), permitting the former to participate while excluding the latter. This arbitrary distinction fulfills no constitutional or public policy rationale.

A. Excluding Religious School Students Violates the Free Exercise Clause.

Laws violate the Free Exercise Clause when they "impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (cleaned up). This is because an "automatic and absolute exclusion" based on religious character forces a religious organization into an unacceptable choice between the public benefit and its religious status. *Id.* at 2021–22. "[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Id*. at 2022 (*quoting Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). "As the Court put it more than 50 years ago, '[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'" *Id*. "[T]he effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). And here, the statute and Defendant's administration of the Dual Enrollment Program burden Plaintiffs' religious exercise.

First, since Dual Enrollment's enactment, the Agency of Education has made it clear to religious schools, parents of students, participating colleges, and lawmakers that religious schools and their students need not apply. In 2013, when asked about its Dual Enrollment eligibility,

Defendant's General Counsel told Rice's Principal that the school was "out. Sorry." *See* Agency of Education Communications, Ex. A. at AGO00579; *See also id.* at AGO00591 (Program Coordinator writing in 2018 to "provide a better understanding of why students attend[ing] religious schools are not eligible to access the Dual Enrollment Program."). Defendant's Program Coordinator also told Rice parents their students were out and communicated to the Community College of Vermont that "[s]tudents at a Christian or parochial school or privately funded students are not eligible for Dual Enrollment." *See id.* at AGO00595–96, AGO00604. The Program Coordinator also told the Senate President Pro Tem that *Chittenden* excluded his Rice constituents. *See id*. at AGO00610–11.

Defendant also admitted in sworn answers to interrogatories that not a single religious school participates in Dual Enrollment. *See* Def.'s Ans. to Int. No. 2, Ex. K. After Dual Enrollment's adoption, Defendant never invited Rice to participate, never told the school its students could participate, and never sent it paperwork like had been done to eligible schools. *See* Def.'s Resp. to Pl.'s Req. for Prod. No. 3 & 4, Ex. L; 2019–20 Program Manual, Ex. D at 7 ("The AOE sends the memorandum and participation agreements electronically to the High Schools ... each academic year."); Bourgeois Decl. at ¶ 14; Lorenz Decl. at ¶ 23. And Defendant declined to approve Plaintiffs' Dual Enrollment applications. Hester Decl. at ¶ 21; Lorenz Decl. at ¶ 18.

Additionally, the legislative and public record shows this pattern of exclusion. One legislative memorandum states that the law excludes "sectarian" schools from Dual Enrollment. *See* Memo, Ex. B (explaining that, because of *Chittenden*, approved independent schools are "eligible to receive publicly funded tuition dollars from sending school districts . . . *Except* if the approved independent school is sectarian[.]") (original emphasis). The memorandum even cautions against expanding Dual Enrollment to religious school students for fear that their schools

might receive some indirect benefit. *Id.* at AGO00478. Moreover, the public record also reflects that since Dual Enrollment's adoption, Defendant administered the program to exclude religious schools. *See* Josh O'Gorman, *Dual enrollment No state funding for students at religious high schools*, BARRE MONTPELIER TIMES ARGUS, (March 26, 2014), http://bit.ly/DEPargus; *see also Private school students still barred from dual enrollment*, BURLINGTON FREE PRESS, (May 22, 2015), https://bit.ly/2H0huZd.

That is why private school leaders testified against the religious discrimination at the program's adoption. *See* Ex. F (former Rice Principal Msgr. Bourgeois' testimony); Bourgeois Decl. at ¶¶ 8–10. That is why school choice advocacy organizations lobbied to change the statute. *See* Ex. I ("This exclusion has barred students—principally students attending several Vermont religious high schools—from continuing in the dual enrollment program[.]"). And that is why legislators perennially try to amend the Dual Enrollment statute. *See* Ex. G at 3 (House Bill 125 of 2019, proposing to amend § 944); *See* Ex. H at 2 (Senate Bill 183 of 2018 trying to do the same).

Defendant's newfound argument that religious schools could theoretically participate in Dual Enrollment if they establish special safeguards not only contradicts his earlier position in this case, but also contradicts a litany of unrebutted evidence. In his Motion to Dismiss, Defendant stated that, "by operation of . . . *Chittenden*," those students "who choose to attend a religious . . . school" are ineligible for Dual Enrollment. Def.'s Mot. to Dismiss 8, 19. But now Defendant suggests that religious private schools and their students could (maybe) participate in Dual Enrollment if they would only jump through hoops that their counterparts at secular schools do not endure. *Compare id. with* Def.'s Reply Br. at 2–5. This litigation flip-flop is implausible.

Defendant's argument that religious schools could participate with special "safeguards" is made up of whole cloth and unconstitutionally burdens Plaintiffs' religious exercise because

secular schools do not have to jump through such (nonexistent) hoops. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963). "[G]overnment, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief[.]" *Lukumi*, 508 U.S. at 543; *see also Trinity Lutheran*, 137 S. Ct. at 2019 (reserving the "strictest scrutiny" for "laws that target the religious for special disabilities based on their religious status[.]").

Here, Defendant controls both Dual Enrollment admissions and payments. *See* Dual Enrollment Website, Ex. O at 1 (linking to applications); Ex. C at 57. Defendant has the final say over who participates in Dual Enrollment, but still declined to approve Plaintiffs' applications. Hester Decl. at ¶ 21; Lorenz Decl. at ¶ 18. Instead, Defendant suggests that Plaintiffs can participate with special "safeguards" to access town tuitioning.[1] But the State has never articulated any acceptable "safeguards" and Defendant admitted that he cannot find documentation that any safeguards were ever implemented. *See* Def.'s Resp. to Pl.'s Req. for Prod. No. 16, Ex L. Defendant merely offers a shell game where acceptable safeguards are never established and the justification for excluding Plaintiffs is based on non-satisfaction of those non-existent safeguards. Def.'s Reply Br. at 2–5.

Defendant's actions cannot survive strict scrutiny. Laws burdening religious exercise must "advance interests of the highest order" and be "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (cleaned up). Here, the claimed "safeguards" for the Town Tuitioning Program are nonexistent and irrelevant because the State pays Dual Enrollment funds to the participating colleges—not to the high schools. *See* Vermont 2019 Budget Book Ex. C at 57 (the state directly reimburses colleges for Dual Enrollment tuition); *see* VERMONT HOUSE JOURNAL,

[1] Defendant's theory also fails as a practical matter: A.H.'s Town Tuitioning application was explicitly rejected because she attends a religious school. *See* Dave Mills Email, Ex. N ("Rice is a religious school for which we do not pay tuition.").

March 25, 2014, Ex. M, at 782 ("I find it ironic that by the defeat of this amendment we will not allow students from sectarian schools to have equal access to the Dual Enrollment program, yet . . . we will allow the state general fund dollars for that program to flow to sectarian post-secondary institutions."). Plaintiffs thus prevail under *Trinity Lutheran*.

B. Exclusion of Religious Schools and Students Violates the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause "directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). A.H.—as a religious high school student from a district without a public high school—is similarly situated to secular nonpublic high school students from her same school district. Rice is also similarly situated to other nonpublic schools. Lorenz Decl. ¶ 16. Yet, Vermont treats religious schools and their students worse than their comparators by excluding them from Dual Enrollment purely because of their religious exercise and character. *See* Ex. A at AGO00591 ("students attend[ing] religious schools are not eligible to access the Dual Enrollment Program."); *id.* at AGO00595 (explaining that "[s]tudents at a Christian or parochial school . . . are not eligible for Dual Enrollment" unless they unenroll from those schools); Def.'s Mot. to Dismiss at 8, 19 (conceding exclusion).

"Under the equal protection analysis developed by the Supreme Court, the type of classification drawn by the legislature determines the appropriate level of judicial scrutiny." *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992). Laws that "impinge on personal rights protected by the Constitution" are subject to strict scrutiny and "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Vermont's impingement of Plaintiffs' free exercise rights requires strict scrutiny in this Court's equal protection analysis.

Defendant offers no plausible reason for treating Plaintiffs worse than their secular

comparators. Obedience to the Vermont Compelled Support Clause (or *Chittenden*) cannot be a compelling interest because *Trinity Lutheran* established that "skating as far as possible from religious establishment concerns" is not one. 137 S. Ct. at 2024. And Vermont does not even pursue that interest because while it refuses to fund A.H.'s desired science classes at UVM, it would allow a public school student to study religious worship at a religious college.[2] *See supra* at 4. Vermont takes no risk of funding the Diocese's religious worship because it pays Dual Enrollment tuition to the colleges, not the high schools. Ex. C at 57; *see* VERMONT HOUSE JOURNAL, March 25, 2014, Ex. M, at 782. And as this Court recognized, the other interests Defendant identified fair no better. *See* Op. and Order Den. Def.'s Mot. to Dismiss 15–16. Plaintiffs will likely prevail on their Equal Protection claims.

II. The Balance of Hardships Strongly Favors Plaintiffs.

Plaintiffs' free exercise claim falls squarely within *Trinity Lutheran*. 137 S. Ct. at 2021–22. Likewise, Defendant lacks any rational, let alone compelling, basis for treating some non-public students worse than others. And Defendant suffers no hardship if Plaintiffs are granted a preliminary injunction. By contrast, Plaintiffs suffer exceptional hardship with the loss of their constitutional rights without a preliminary injunction. The scales tip in Plaintiffs' favor.

III. Plaintiffs Suffer Irreparable Injury Because the Exclusion Violates Their Constitutional Rights and Eleventh Amendment Immunity Bars Money Damages.

This is A.H.'s last chance to receive funded college course credit in high school. *See* Hester Decl. at ¶ 16. Dual Enrollment's inaccessibility hurts her chances for admission into her desired

[2] South Burlington High School, a school three miles from Rice, advertises its participation in the Dual Enrollment program on its website. *See* http://bit.ly/3aXVo7i. St. Michael's College is a Catholic institution that participates in dual enrollment. *See* http://bit.ly/2OeSK3k. The College's coursebook, available at http://catalog.smcvt.edu/, includes listings for Religious Studies courses. *See also* Ex. E.

college. *Id*. at ¶¶ 11–14; Lorenz Decl. at ¶ 24. These missed educational opportunities cannot be replaced or undone later. Families are making decisions for the upcoming school year right now and Rice faces another year without Dual Enrollment eligibility, disadvantaging it against other schools. Lorenz Decl. at ¶¶ 12–14, 17. The weight of Defendant's constitutional violations coupled with immunity from money damages make Plaintiffs' harm irreparable. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (harm irreparable when sovereign immunity precludes money damages).

A. Plaintiffs are Irreparably Harmed by the Violation of their Constitutional Rights.

Irreparable harm means "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages. *New York ex rel. Schneiderman*, 787 F.3d at 660 (internal citations and quotation marks omitted). Constitutional claims are unique as evidenced by the fact that irreparable harm is "often presumed where a constitutional injury is at stake." *Nolen v. City of Barre, Vt.*, No. 2:10-CV-241, 2011 WL 805865, at *7 (D. Vt. Mar. 1, 2011) (internal citations omitted).

The alleged violation of a First Amendment right alone satisfies Plaintiffs' burden to show irreparable harm, as the "denial of [a] plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). The Supreme Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, Vermont excludes students from religious schools from Dual Enrollment based solely on religious status. *See* Ex. A at AGO00591 ("students attend[ing] religious schools are not eligible to access the Dual Enrollment Program."); *id*. at AGO00595 ("[s]tudents at a Christian or parochial school . . . are not eligible for Dual Enrollment."); Def.'s Mot. to Dismiss 8, 19. This religious discrimination harms both students and their school. Lorenz Decl. at ¶ 12–15.

Given the realities of enrollment deadlines, course scheduling, and looming college applications, the Hesters face irreparable injury that only injunctive relief from this Court can fix. As a current junior, A.H. only has one more year to receive Dual Enrollment credits before college and must enroll soon for the fast-approaching summer semester. Hester Decl. ¶¶ 15–16; 16 V.S.A. § 944(b)(1); Ex. D at 16–17. Similarly, the Diocese will continue to lose out on invaluable ministry opportunities as it loses students to other schools who participate in Dual Enrollment. Lorenz Decl. at ¶ 13–15. Families are deciding now where to send their students for the upcoming 2020–21 school year. Lorenz Decl. at ¶ 22. Vermont's irrational distinction between religious private schools and secular private schools and the students who attend each deprives A.H., her family, and the Diocese of equal protection under the law. *See Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005) (granting preliminary injunction where likely success on Fourteenth Amendment equal protection claim shown).

B. Eleventh Amendment Immunity Bars Plaintiffs from Obtaining Money Damages.

Without Dual Enrollment funding, A.H. cannot take college courses in high school and the Diocese will lose more ministry opportunities as the State's exclusion disadvantages Rice against secular private schools. Hester Decl. ¶¶ 16–18; Lorenz Decl. at ¶¶ 12–15. On top of that, the "[i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe & Dunlevy, P.C.*, 640 F.3d at 1157 (internal citations omitted). The Eleventh Amendment precludes suits against states unless the state expressly "waive[s] its sovereign immunity and agree[s] to be sued in federal court," or Congress abrogates that immunity. *CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 94–95 (2d Cir. 2002) (internal citations omitted). Plaintiffs suffer this form of irreparable injury because Vermont has not expressly waived immunity.

IV. The Public Interest Supports a Preliminary Injunction in Plaintiffs' Favor

"The 'public interest' is defined as '[t]he general welfare of the public that warrants recognition and protection,' and/or '[s]omething in which the public as a whole has a stake[,] esp[ecially], an interest that justifies governmental regulation.'" *Hafez v. City of Schenectady*, No. 1:17-CV-0219 (GTS/TWD), 2017 WL 6387692, at *4 (N.D.N.Y. Sept. 11, 2017) (citing *Public Interest*, BLACK'S LAW DICTIONARY 1350 (9th ed. 2009)). Securing First Amendment rights is in the public interest. *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). And allowing Plaintiffs to benefit from Dual Enrollment will advance the public interest goal of "promot[ing] opportunities for Vermont students to achieve postsecondary readiness[.]" 16 V.S.A. § 941(a)(2); Op. and Order Den. Def.'s Mot. to Dismiss 15.

V. Oral Argument

Plaintiffs request oral argument for this Motion because they believe it will aid the Court by adding clarity to Plaintiffs' position, revealing the severity of the harms they suffer, and providing opportunities to answer the Court's questions or concerns. Plaintiffs face fast-approaching, time-sensitive summer semester enrollment deadlines for Dual Enrollment. *See* UVM Add, Drop, & Withdrawal Dates, available at https://www.uvm.edu/~summer/students/add-drop/. Enrollment is already underway. However, Plaintiffs recognize that the Court has reduced normal operations as a measure to mitigate public health risks associated with the spread of COVID-19. Should these COVID-19 mitigation efforts render oral argument impractical ahead of the impending deadlines, Plaintiffs respectfully request relief from this Court on the parties' briefing. Plaintiffs are willing and able to provide any supplemental briefing that may help the Court resolve their Motion and effectuate relief.

CONCLUSION

This Court should enjoin Defendant from enforcing 16 V.S.A. § 944 to exclude Plaintiffs from participating in Dual Enrollment based on Rice's religious status.

Respectfully submitted this 20th day of March, 2020.

s/ Tom McCormick

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all parties.

Dated this 20th day of March, 2020, by:

s/ Tom McCormick

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