UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MID VERMONT CHRISTIAN SCHOOL, on behalf of itself and its students and its students' parents; **A.G.** and **M.G.**, by and through their parents and natural guardians, Chris and Bethany Goodwin; **CHRISTOPHER GOODWIN**, individually; **BETHANY GOODWIN,** individually; **T.S. and K. S.**, by and through their parents and natural guardians, Nathaniel and Dawna Slarve; **NATHANIEL SLARVE**, individually; and **DAWNA SLARVE**, individually,

Plaintiffs,

v.

HEATHER BOUCHEY, in her official capacity as Interim Secretary of the Vermont Agency of Education; **JENNIFER DECK SAMUELSON**, in her official capacity as Chair of the Vermont State Board of Education; **CHRISTINE BOURNE**, in her official capacity as Windsor Southeast Supervisory Union Superintendent; **HARTLAND SCHOOL BOARD**; **RANDALL GAWEL**, in his official capacity as Orange East Supervisory Union Superintendent; **WAITS RIVER VALLEY (UNIFIED #36 ELEMENTARY) SCHOOL BOARD**; and **JAY NICHOLS**, in his official capacity as the Executive Director of The Vermont Principals' Association,

Defendants.

Case No. 2:23-cv-00652-kjd

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Mid Vermont Christian School is a private religious school in Quechee, Vermont. The School's goal above all else is to "glorify God ... through a program of academic excellence established in Biblical truth," so it holistically educates its students in a biblical worldview through everything it does—from curriculum to the basketball court. The School operates according to its belief that God uniquely created humans as male or female, that sex is immutable, and that marriage is the uniting of one man to one woman.

Vermont wants the School to operate—and thus believe—differently to participate in public programs. But that's unconstitutional. The government can't pressure religious schools to change their beliefs or punish them for adhering to their faith. Vermont's discrimination against the School comes in two forms.

First, for decades, Vermont discriminated against religious schools by excluding them from the State-funded Town Tuitioning and Dual Enrollment Programs (collectively, the "Program"). The Second Circuit ended that discrimination in 2021. *See In re A.H. v. French*, 999 F.3d 98 (2d Cir. 2021) (Town Tuitioning); *A.H. v. French*, 985 F.3d 165 (2d Cir. 2021) (Dual Enrollment). And just last year, the Supreme Court admonished Maine for likewise depriving religious schools of public funds based on their "religious exercise." *See Carson v. Makin*, 596 U.S. 767, 789 (2022). But Vermont's Agency and Board of Education ("Agency" and "Board," respectively) have simply found a new way to accomplish the same end—by adopting new rules that require the School to hire those who do not share its faith and to alter its policies on admissions, locker rooms, pronoun use, dress codes, and athletic teams. The Agency and Board refused to accommodate the School's faith, causing its students and families to lose the tuition funds promised to them.

Second, the Vermont Principals' Association ("VPA") expelled the School from membership—without written warning or notice—because the School forfeited a girls' basketball game rather than compete against a team with a biological male. Although the VPA's

own rules prohibit boys from competing in girls' sports, the VPA requires the School to treat biological males as girls in certain circumstances, which the School's religious beliefs forbid it from doing. By expelling the School, the VPA has barred all of its students from competing in any VPA events or competitions—from girls' basketball games to science fairs.

The Agency, Board, and VPA (collectively, "the State" or "Vermont") have punished Plaintiffs, simply for adhering to their Christian beliefs. A preliminary injunction is needed to end the State's religious discrimination.

STATEMENT OF FACTS

A. Plaintiffs and their religious beliefs and practices.

Mid Vermont Christian is a private, Christian, pre-K through 12th grade school. Declaration of Vicky Fogg ("Fogg Decl.") ¶ 4. Mid Vermont Christian's religious beliefs, rooted in the Bible, form the foundation for everything it does. *Id.* ¶¶ 4–5. Relevant here are the School's beliefs on marriage, sexuality, and gender: the School believes that God creates each person as immutably male or female, that sex is determined biologically, and that marriage is only the uniting of one man and one woman. *Id.* ¶ 8. The School also believes that every person deserves compassion, kindness, respect, dignity, and the love of Christ, regardless of their beliefs or background. *Id.* ¶ 9. Consistent with the School's purpose "to glorify God by preparing each student," MVCS Webpages at 2 (ECF No. 1-1), the School inculcates a biblical worldview in its students through word and deed, Fogg Decl. ¶¶ 10–16.

Mid Vermont Christian's religious beliefs—including those on sexuality and gender—guide its admissions, employment, and operations policies. *Id.* ¶ 17. First, the School requires at least one parent of each student to be a Christian who agrees with the School's religious beliefs. *Id.* ¶ 19. Second, to advance the School's mission, it employs only coreligionists—those who share and live according to its religious beliefs. *Id.* ¶ 18. Third, the School separates locker rooms and restrooms, uses pronouns, has a dress code, and divides its own athletic teams based on biological sex, not "gender identity." *Id.* ¶ 20.

And because the School teaches, models, and professes biblical truths about sex and gender not only in the classroom but also on the court, the School believes that treating biological males as girls during athletic competitions would affirm that biological males can actually be girls. *Id.* ¶ 21. The School believes this would make it complicit in furthering the falsity that sex is mutable and biological differences do not matter. *Id.* ¶ 22. The School also believes God's purposeful design of females and males is paramount in athletics because males have significant size, weight, and physical advantages over females. *Id.* ¶ 98; *see B. P. J. v. W. Virginia State Bd. of Educ.,* 649 F. Supp. 3d 220, 231 (S.D.W. Va. 2023) ("it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes."); *accord* White Paper of Dr. Chad T. Carlson, M.D., attached as Exhibit 12 (risk of female injury increases when biological males compete in women's sports)[1]. So the School believes and teaches that boys and girls should not engage in inappropriate physical contact, including subjecting girls to competitive athletic competition against biological boys. *Id.* ¶ 99.

Plaintiffs A.G., M.G., and Chris and Bethany Goodwin ("the Goodwins") and T.S., K.S., and Nathaniel and Dawna Slarve ("the Slarves") selected Mid Vermont Christian because of the School's biblical worldview and religious practices. Declaration of Chris Goodwin ("C. Goodwin Decl.") ¶ 7; Declaration of Bethany Goodwin ("B. Goodwin Decl.") ¶ 7; Joint Declaration of Nathaniel and Dawna Slarve ("Slarve Decl.") ¶ 6. The Goodwins and Slarves all share Mid Vermont Christian's religious beliefs. C. Goodwin Decl. ¶¶ 7–14; B. Goodwin Decl. ¶¶ 7–14; Slarve Decl. ¶¶ 6–12.

Chris is the School's head girls' varsity basketball coach, and his daughter, M.G. is a member of the team. C. Goodwin Decl. ¶¶ 4, 6. His son, A.G., plays on the boys' basketball and track teams. *Id.* ¶ 3. T.S. also plays basketball, and K.S. plays volleyball. Slarve Decl. ¶¶ 3–4. All four desire to play at the School and compete in the VPA. *Id.* ¶ 5; C. Goodwin Decl. ¶ 5.

[1] This type of evidence is not necessary to support the School's religious beliefs about biology and safety in girls' sports, but it confirms the biological differences between males and females.

B. The State devises a new way to exclude religious schools from the Town Tuitioning and Dual Enrollment Programs.

Vermont's Town Tuition Program requires school districts that do not operate public high schools to pay for students who reside in the district to attend a public high school or a private independent high school. 16 V.S.A. § 822(a)(1). Private schools must obtain "approved independent school" status as determined by the Board to participate in the Program and thus to receive public tuition funds. 16 V.S.A. § 828; *id.* § 166(b); 7-1 Vt. Code R. § 3:2220, *et seq.* ("Rule 2200"). "Recognized independent schools," on the other hand, are ineligible to receive tuition payments under the Program. 16 V.S.A. § 828; 7-1 Vt. Code R. §§ 3:2222, 3:2225.1.

For several years, Vermont school districts refused Program tuition payments to religious schools. *In re A.H.*, 999 F.3d 98, 100 (2d Cir. 2021). In 2021, however, the Second Circuit held that Vermont's refusal to provide Program funding to religious schools was unconstitutional, explaining that religious schools "ha[d] been deprived of a public benefit as a result of the state's and the school districts' decades-long policy of unconstitutional religious discrimination." *Id.* at 108. So religious schools were "entitled to [Program] funding to the same extent as" secular schools, "regardless of [their] religious affiliation or activities." *Id.* Similarly, just last year the Supreme Court held that Maine's tuition assistance program—which is much like Vermont's Program—discriminated against religious schools and families. *Carson,* 596 U.S. 767. After these decisions, the Agency reluctantly conceded that "[s]chool districts may not deny tuition payments to religious approved independent schools." French Mem. at 1 (ECF No. 1-4).

Attempting to sidestep these precedents, in 2022 the Agency changed how private schools could become "approved independent schools" and thus eligible to receive Program funds. Specifically, the Agency amended Rule 2200 to require schools to (1) post a nondiscrimination statement consistent with the Vermont Public Accommodations Act and Fair Employment Practices Act on their website and in application materials, and (2) sign an assurance confirming that the school complies with the Public Accommodations Act "in all aspects of the school's admissions and operations." 7-1 Vt. Code R. § 3:2226.6. The Public Accommodations Act and

Fair Employment Practices Act, in turn, prohibit discrimination based on sexual orientation, gender identity, and religion (among other classes) in services and employment. 9 V.S.A. § 4502; 21 V.S.A. § 495(a).

Each school—including Mid Vermont Christian—seeking approved independent status was then required to affirm compliance with these new provisions by signing an addendum to their application. *See* Addendum for Independent Schools at 1 (ECF No. 1-5). Mid Vermont Christian signed the addendum but clarified it was signing with the understanding that "the school has a statutory and constitutional right to make decisions based on its religious beliefs, including hiring and disciplining employees, associating with others, and in its admissions, conduct, and operations policies and procedures." *Id*. The School added that it could not adopt the required nondiscrimination language or affirm compliance with the Public Accommodations Act "to the extent [the language or Act] conflict[s] with any of the school's [religious] beliefs, including on marriage and sexuality." *Id.*

Because Mid Vermont Christian "decline[d] to provide assurances that [it] will comply with the Vermont Public Accommodations Act," "indicate[d] that its handbook and website may not be consistent with the Act," and "suggest[ed] that it may not follow the Act 'in its admissions, conduct, and operations policies and procedures,'" the Board refused to approve the School until it submitted an unaltered, unequivocal addendum. *See* French 02/01/23 Memo, attached as Exhibit 1; Board 03/21/23 Email, attached as Exhibit 3**.** The School could not do so without abandoning its religiously based policies. Fogg Decl. ¶¶ 49, 55; MVCS 03/09/23 Letter to Board, attached as Exhibit 2. Then in August, the Agency told the School that it considered it a "Recognized Independent School," confirming the School's denial of approved independent status. *Id.* ¶ 54; AOE Status Letter at 1 (ECF No. 1-6).

As a result, Defendants Hartland and River Valley School Boards, through their respective Superintendents (Defendants Bourne and Gawel), recouped Town Tuitioning payments initially made to Mid Vermont Christian. Fogg Decl. ¶¶ 58–63. That included payments made for

Plaintiff T.S. Slarve Decl. ¶¶ 17–25. As of today, Mid Vermont Christian and the Slarves cannot receive Town Tuitioning or Dual Enrollment funds. *Id.* ¶ 25, 32; Fogg Decl. ¶¶ 67, 73–75.

C. The State boots Mid Vermont Christian from the VPA because the School operates according to its religious beliefs.

As if excluding Mid Vermont Christian and its families from generally available public funding wasn't enough, the VPA—the State's only sports association that includes both public and private schools—expelled and refused to readmit the School because of its religious views about sex and gender. The VPA did so because, at bottom, it disagrees with the School's religious views about what it means to be a "girl." The VPA believes sex is based on identity, so it allows student-athletes to "participate in VPA activities in a manner consistent with their gender identity." VPA Athletic Policies § 2 (ECF No. 1-9) ("gender identity policy"). The VPA incorporates Agency Guidance, *id.*, which agrees: "students should be permitted to participate in physical education and sports in accordance with the student's gender identity," AOE Best Practices for Schools at 6 (ECF No. 1-3) ("Agency Guidance"). And so Mid Vermont Christian must apply this rule to its own teams, meaning the School would have to rewrite its policies and allow biological boys who identify as female on its girls' teams, thus undermining its belief that sex is immutable and that only biological females are girls. Fogg Decl. ¶ 91.

In direct conflict with the VPA's gender identity policy is its fairness policy. That policy prohibits boys from competing in "traditional girls' sports" because the association "recognizes traditional boys-dominated sports and the need to protect opportunities for girl athletes." VPA Athletic Policies § 16.11 (ECF No. 1-9). Per the fairness policy, "[i]nterscholastic *athletics involving mixed (boys/girls) competition is prohibited* except in those instances where the member school does not offer equivalent (same) activities for girls." *Id.* (emphasis added).

When the School's girls' basketball team was set to face a team with a male who identifies as female[2], it asked that it not be forced to do so, consistent with its religious beliefs and the

[2] Video of the biological male repeatedly blocking shots, fouling girls, and using his height advantage is available at: Proctor HS Athletics, *V Ladies vs Long Trail*, YOUTUBE (Feb. 7,

VPA's fairness policy. Fogg Decl. ¶¶ 93–101. The School wanted to adhere to its beliefs about sex and gender and did not want to participate in an event communicating that biological boys can be girls. *Id.* ¶ 103; C. Goodwin Decl. ¶¶ 20–24. The VPA refused, invoking its gender identity policy, Vermont's Public Accommodations Act, and the Agency Guidance. *See* VPA 2/16/23 Email to MVCS, attached as Exhibit 6. The VPA said it did "not intend to violate [its] policy by honoring [the School's] request." *Id.*

Yet the VPA saw no issue with violating its fairness policy. Resolving the tension between the gender identity policy and the fairness policy depends on what it means to be a "girl." The School's religious beliefs answer that question differently than the VPA, so it decided to forfeit the game rather than adopt the State's view and compromise its religious beliefs.

In response, the VPA ignored its own disciplinary procedures—including the requirement that it submit a written notice of probable violation, *see* VPA Athletic Policies § 12 (ECF No. 1-9)—and immediately expelled Mid Vermont Christian from the association even though other schools have historically forfeited games without VPA repercussion. Fogg Decl. ¶ 107. The VPA then falsely informed the media that no appeal procedure was available to the School and that the VPA first learned of the School's rationale for forfeiting the game through a news article. *Id.* ¶¶ 111–112. Worse still, days after the scheduled game, Defendant Nichols criticized the School for allegedly supporting "blatant discrimination under the guise of religious freedom." *Id.* ¶ 108.

The VPA eventually allowed Mid Vermont Christian to appeal, and the School reiterated its religious justification for its decision. *See* MVCS Appeal Letter, attached as Exhibit 8. But the VPA's Activity Standards Committee unanimously upheld the VPA's "penalty of expulsion."

2023), https://www.youtube.com/watch?v=oLXZMrLTLRU&t=2291s (Minute markers: 13:41, 1:01:24, 1:06:31, 1:20:24, 1:25:51, 1:26:32, 1:34:19, 1:02:31, 1:11:11, 1:29:45); and Poultney High School, *Poultney vs Long Trail Var Girls Girls' Varsity Basketball,* YOUTUBE (Feb. 14, 2023), https://www.youtube.com/watch?v=tEUc_dg8Amg&t=589s) (Minute markers: 35:08, 42:28, 44:00, 1:00:47, 1:13:37, 1:18:21, 1:20:42, 1:28:08, 1:28:31). For the convenience of the Court, a spliced video of the relevant actions is available at https://vimeo.com/850274119/14b4023ced. And just last week, the male elbowed an opposing player, knocking her out for the remainder of the game. Brandon Canevari, *Long Trail School pulls off comeback*, Bennington Banner (Dec. 15, 2023), https://perma.cc/DG7X-8PU2.

See VPA Appeal Decision at 5, attached as Exhibit 9. Appointing itself the theological arbiter over the School, the VPA declared that the School's religious justification for its decision was "wrong," that it "ha[d] nothing to do with [religious] beliefs," and that "[p]articipating in an athletic contest does not signify a common belief with the opponent." *Id.* at 4. According to the Committee, the School's religious concerns were baseless because, after all, BYU athletes "do not compromise their Mormon faith—or endorse Catholicism—when they play Notre Dame." *Id.*

After missing out on spring 2023 VPA competitions, Mid Vermont Christian asked the VPA how it could regain membership. Fogg 9/21/23 Email to VPA, attached as Exhibit 10. Defendant Nichols pointed back to the VPA's expulsion decision and told the School it must explain how the School would comply with the gender identity policy. Nichols 9/28/23 Email to MVCS, attached as Exhibit 11. Unable to do so, the School sued. Mid Vermont Christian and its students—including Plaintiffs M.G., A.G., K.S., and T.S.—remain excluded from *all* VPA activities and competitions. Fogg Decl. ¶ 124; C. Goodwin Decl. ¶ 27; Slarve Decl. ¶ 31.

ARGUMENT

A preliminary injunction is warranted because (1) Plaintiffs are likely to succeed on the merits of their claims—or at the very least have raised sufficiently serious questions going to the merits, and the balance of hardships tip in their favor; (2) Plaintiffs are experiencing irreparable harm; and (3) an injunction is in the public interest. *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015). Plaintiffs seek a prohibitive preliminary injunction restoring the status quo ante—returning the parties to "the last actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (citation omitted).

I. Plaintiffs are likely to succeed on the merits of their claims.

A. The State excludes Plaintiffs from the Program and the VPA because of their religious beliefs and practices.

Because the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988),

Vermont cannot exclude "otherwise eligible schools" like Mid Vermont Christian from a public benefit on the basis "of [its] religious exercise," *Carson,* 596 U.S. at 789. The Supreme Court has held three times within the last six years that this religious discrimination is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017).

First, *Trinity Lutheran* held that Missouri could not exclude a preschool from a playground resurfacing grant simply because the preschool was operated by a church. *See id*. Next, *Espinoza v. Montana Department of Revenue* held that religious schools and their families must be allowed to participate in a public scholarship program equally with secular schools. 140 S. Ct. 2246 (2020). The Court explained that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. And just last year, *Carson* held that Maine could not exclude sectarian private schools from the state's tuition assistance program. 596 U.S. at 789. Trying to avoid *Trinity Lutheran* and *Espinoza*, Maine argued it did not exclude religious schools based on their religious status but only based on their religious use, insisting that "a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith." *Id.* at 2001. The Court rejected that argument, noting the very reason religious schools exist is to teach their faith. "Any attempt to give effect to such a [status/use] distinction," the Court continued, would raise serious constitutional concerns. *Id.* "[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Id.*

These "'unremarkable' principles" are dispositive here. *Id.* at 1997. To even get in the door of the Town Tuitioning Program, Mid Vermont Christian must agree to comply with the Vermont Public Accommodations Act "in all aspects of [its] admissions and operations." 7-1 Vt. Code R. § 3:2226.6. And because religion, sexual orientation, and gender identity are included in that Act, the School cannot hire only coreligionists; align its internal policies on locker room usage, pronouns, dress code, and athletics with its religious beliefs; or require parents to share its religious beliefs. In the end, the School has two choices: (1) participate in the Program, *or* (2)

continue its religious exercise. By putting the School to that decision, the Agency and Board[3] "penalize[ ] the free exercise of religion," triggering strict scrutiny. *Carson*, 596 U.S. at 780. (cleaned up). The Slarves, too, are being "penalize[d]" because they "cho[se] a religious private school rather than a secular one." *Espinoza*, 140 S. Ct. at 2261.

The VPA puts the School to the same unconstitutional choice. The VPA offers an educational benefit to all: "[a]ny school in Vermont approved by the [Board] is eligible to become a school member," VPA Bylaws at 1 (ECF No.1-2), and "a wide range of private schools are eligible" to participate, *Carson*, 596 U.S. at 780. Yet the VPA conditions Mid Vermont Christian's participation on adopting the State's view on sex and gender. The School declined to promote the ideas that sex is mutable and that a student's status as boy or girl is based on identity not sex, so it was punted from the VPA. In short, the VPA "exclude[s] [Mid Vermont Christian] on the basis of [its] religious exercise." *Id.* at 789; *Trinity Lutheran*, 582 U.S. at 458–461.

B. The State has engaged in unconstitutional religious hostility.

Plaintiffs' beliefs about marriage, sexuality, and gender are "decent and honorable" beliefs based on their religion. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). At a minimum, the Free Exercise Clause requires Vermont to be neutral and tolerant toward these beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). "[E]ven slight suspicion" that Vermont acted with "animosity to religion or distrust of its practices" is enough to violate the Constitution. *Id.* (citation omitted). The State here acted with hostility to the School's "religious viewpoint." *Id.* That hostility is evident in three ways.

First, Vermont has a history of excluding religious schools from public benefits. *See., e.g.*, *A.H. v. French*, 985 F.3d 165; *In re A.H.*, 999 F.3d 98. Despite the *French* cases, *Trinity Lutheran*, *Espinoza*, and *Carson*, the Agency still refused Mid Vermont Christian approved

[3] Defendants Hartland and River Valley School Boards, Bourne, and Gawel are responsible for making Program payments and acted under the directive of the Agency and Board. *See* V.S.A. §§ 822, 824. They are included in all references to the Agency or Board below.

independent status *only* because of the School's religious beliefs and practices. So the Agency allows religious schools to "participate" in the Program so long as they stop operating according to their religion. Finding new ways to exclude religious schools hardly satisfies "fair and neutral enforcement" of the law. *Masterpiece,* 138 S. Ct. at 1729.

Second, the VPA skirted its own disciplinary procedures when it expelled the School. VPA procedure required an initial investigation and probable violation finding. VPA Athletic Policies § 12 (ECF No. 1-9). Instead, the VPA informed the media that Mid Vermont Christian had no appellate remedy and then made an "immediate determination of ineligibility." VPA Press Release at 1 (ECF No. 1-10). And even when the VPA belatedly gave the School its procedural rights, the VPA sidestepped the School's religious justifications, flatly concluding that the School was "wrong" and that the "case ha[d] nothing to do with beliefs." *See* Ex. 9. But "government has no role in deciding or even suggesting whether the religious ground for [a] conscience-based objection is legitimate or illegitimate." *Masterpiece*, 138 S. Ct. at 1731. And the VPA handed the School the most extreme punishment (expulsion) even though other VPA schools have forfeited games for non-religious reasons without penalty. Fogg Decl. ¶ 107.

Third, Defendant Nichols asserted that Mid Vermont Christian engaged in discrimination under "the guise of religious freedom," Nichols' Testimony at 2 (ECF No. 1-10), the same hostile rhetoric lodged against the religious litigant in *Masterpiece*, 138 S. Ct. at 1729 (decisionmaker complaining that "freedom of religion has been used to justify discrimination"). The State cannot act with hostility toward Plaintiffs because it dislikes their convictions.

C. Vermont's policies are not neutral or generally applicable.

Vermont violates the Free Exercise Clause for another reason: Rule 2200 and the VPA's gender identity policy and actions are neither neutral nor generally applicable and fail strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021).

General Applicability. A regulation fails general applicability if: (1) it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or (2) it "invites the government to consider the particular reasons for a person's

conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (citations omitted and cleaned up). Rule 2200 and the VPA's gender identity policy do both.

To start, the independent school approval process has at least two mechanisms that permit the State to make individualized exemptions. First, Vermont statute allows the Board to approve, and the Agency to recommend approval for, an independent school if it finds that the school "substantially complies" with state law. 16 V.S.A. § 166(b); 7-1 Vt. Code R. § 3:2223.3; *id.* § 3:2227. "Substantial compliance" is not defined, so the Agency and Board have complete discretion "to decide which reasons for not complying with [state statute or regulation] are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879. Second, the Agency can "approve[ ] an exception" and permit tuition payments to a non-eligible school for special education placements. 7-1 Vt. Code R. § 3:2225.1(b).

The VPA also makes individualized assessments in two ways. For one, transgender "[p]articipation in competitive athletic activities and sports [are to] be resolved on a case-by-case basis." Agency Guidance at 6 (ECF. No 1-3); *see* VPA Athletic Policies § 2 (ECF No. 1-9) (incorporating Agency Guidance). Second, the VPA has sole discretion to "assess appropriate sanctions." VPA Athletic Policies § 12 (ECF No. 1-9). So the VPA gets to "consider the particular reasons," *Fulton*, 141 S. Ct. at 1877, when a school forfeits and what punishment to give. Indeed, other VPA schools have forfeited games for secular reasons—like not wanting to compete against unmasked players during the pandemic—and yet faced no repercussions. Fogg Decl. ¶ 107. But the VPA ousted Mid Vermont Christian when it forfeited for *religious reasons*. This "devalues religious reasons ... by judging them to be of lesser import than nonreligious reasons" and "single[s] out" "religious practice ... for discriminatory treatment." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 537–38 (1993); *see also Kravitz v. Purcell,* No. 22-764, 2023 WL 8177114, at *7 (2d Cir. Nov. 27, 2023) ("courts cannot inquire into the centrality or importance of" religious beliefs).

The "very fact that [Rule 2200 and VPA policies] require a case-by-case analysis is antithetical to a generally applicable policy." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 688 (9th Cir. 2023). So the State "may not refuse to extend [an exemption] to cases of religious hardship without compelling reason." *Fulton*, 141 S. Ct. at 1878 (cleaned up and citation omitted).

Next, both Rule 2200 and the VPA's gender identity policy require Mid Vermont Christian to comply with the Vermont Public Accommodations Act, but that law contains several exemptions that undermine any purportedly compelling interest. *See, e.g.*, 9 V.S.A. § 4502(d) (permitting small lodging facilities to discriminate based on sex or marital status); *id.* § 4502(h) (exempting entities in cases of "direct threat[s] to the health or safety of others"); *id.* § 4502(l) (partially exempting religious organizations for weddings). Because that law is underinclusive and not generally applicable, so too is Rule 2200 and the VPA's gender identity policy. *See Tandon v. Newsom,* 141 S. Ct. 1294, 1296 (2021) (regulations are not generally applicable whenever "they treat *any* comparable secular activity more favorably than religious exercise").

Neutrality. The State also falls short of the First Amendment's neutrality requirement. First, Rule 2200 "in its real operation" creates a "religious gerrymander" that excludes only those religious schools that hire coreligionists, are selective in their admissions based on religion, or have policies based on religion. *Lukumi*, 508 U.S. at 535 (citation omitted). Although *French* and *Carson* held that Vermont cannot exclude religious schools from the Program, the State now requires religious schools to stop operating consistent with their faith if they want to participate. Second, the VPA has "single[d] out [Plaintiffs] for especially harsh treatment," *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 66 (2020), by completely banning them from future VPA activities when the VPA has allowed other schools to forfeit without penalty.

D. Vermont infringes Plaintiffs' freedom of speech.

Rule 2200 and the VPA's gender identity policy also infringe Plaintiffs' free speech rights by censoring and compelling their speech based on "the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Start with the school's protected speech. "[T]he First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided." *303 Creative, LLC v. Elenis*, 600 U.S. 570, 586 (2023) (cleaned up). The School engages in protected speech when it communicates that sex is based on biology, unchangeable, and predetermined by God. Fogg Decl. ¶ 8.

But the State forces the School to contradict those messages. Both Rule 2200 (by incorporating the Vermont Public Accommodations Act) and the VPA's policies address gender identity issues and thus regulate the School's use of pronouns and other speech on sex and gender. In fact, the Agency's Guidance—incorporated into the VPA's gender identity policy—states that "[s]tudents should be addressed by school staff by the name and pronoun corresponding to their gender identity." Agency Guidance at 5 (ECF No. 1-3). Compelling the School "to affirm in one breath that which they deny in the next" violates free speech guarantees. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 576 (1995). In addition, Rule 2200 *compels* the School to post a nondiscrimination statement and sign an assurance. 7-1 Vt. Code R. § 3:2226.6. In this way, too, the State "command[s] involuntary affirmation" that forces the School to "betray[ ] [its] convictions." *Janus v. AFSMCE Council* 31, 138 S. Ct. 2448, 2464 (2018) (cleaned up).

In short, Plaintiffs "must either speak as the State demands" or be excluded from public tuition and sports "for expressing [their] own beliefs." *303 Creative*, 600 U.S. at 589. That's a content-based speech restriction that must face strict scrutiny, which it fails. *Infra* § I.E.

E. Vermont's policies fail strict scrutiny.

To survive strict scrutiny, Vermont's policies "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Carson*, 596 U.S. at 780 (cleaned up). The State fails both prongs.

The existence of categorical and individualized exemptions under the policies dooms any purported compelling interest because they "undermine[ ] [any] contention" that the "non-discrimination policies can brook no departures." *Fulton*, 141 S. Ct. at 1882. When the School

requested narrow religious exemptions, neither the Agency, Board, nor VPA seriously considered the School's requests or gave *any* reason why an exemption could not be granted.

Nor does the State have a compelling interest in stifling the School's speech. Issues related to gender identity are "undoubtedly [a] matter[ ] of profound value and concern to the public" and speech about it "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Janus*, 138 S. Ct. at 2476 (cleaned up and citations omitted).

Lastly, Vermont's policies are not narrowly tailored. By allowing exceptions to its policies, Vermont has shown there are less restrictive alternatives that would still accomplish any asserted interest. For example, if the VPA's interest is ensuring all students can participate in events, it could tailor scheduling to avoid religious conflicts.

II. Plaintiffs satisfy the remaining preliminary injunction factors.

Plaintiffs also satisfy the other preliminary injunction factors. "Because the deprivation of First Amendment rights is an irreparable harm, in First Amendment cases the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020) (quotation marks and citation omitted). Plaintiffs have met that burden, so "no further showing of irreparable injury is necessary." *Id*. In addition, absent an injunction, A.G., M.G., K.S., T.S., and other Mid Vermont Christian students will continue to lose out on playing in state-sponsored athletics. This also means they are ineligible for state-wide awards and are missing possible scholarship opportunities. *See, e.g.,* C. Goodwin ¶ 34. Moreover, the Slarve family will continue to be deprived of Town Tuitioning Funds. Finally, the equities tip in Plaintiffs' favor because "securing First Amendment rights is in the public interest." *SAM Party of New York v. Kosinski*, 987 F.3d 267, 278 (2d Cir. 2021).

CONCLUSION

For the reasons stated above, the Court should grant the motion and issue the requested preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and served it on the following via electronic mail and mail:

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