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; and **BETHANY GOODWIN**, individually.

Plaintiffs,

v.

ZOIE SAUNDERS, 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-gwc

PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs Mid Vermont Christian School, A.G., M.G., Christopher Goodwin, and Bethany Goodwin, move this Court for an immediate injunction pending appeal against Defendant Jay Nichols ("the VPA") pursuant to Fed. R. Civ. P. 62(d). This Motion is supported by Plaintiffs' previously filed documents, including the Verified Complaint (ECF No. 1) and the Declarations of Vicky Fogg, Christopher Goodwin, Bethany Goodwin, and Nathaniel and Dawna Slarve (ECF Nos. 14-15, 14-16, 14-17, 14-18, 42-4, 42-5, 58-1). It is also supported by the attached Memorandum in Support and Third Declaration of Christopher Goodwin.

Standard. Plaintiffs have appealed this Court's Order on Motion for Preliminary Injunction (ECF No. 57). They seek an injunction against the VPA as the appeal proceeds at the Second Circuit Court of Appeals. *See* Fed. R. App. P. 8(a)(1)(C) (party "must ordinarily move first in the district court for ... an order ... granting an injunction while an appeal is pending"). Plaintiffs are entitled to an injunction because: (a) they are still likely to succeed on the merits of their free exercise claims; (b) they are currently being irreparably harmed by being excluded from the VPA, including by being barred right now from scheduling games for upcoming and future seasons, thereby damaging the School now and for future seasons; and (c) an injunction would secure their constitutional rights and benefit the public interest. *See Agudath Israel of Am. v. Cuomo,* 980 F.3d 222, 226 (2d Cir. 2020) (per curiam).

Timing. Given the ongoing constitutional violations and irreparable harm, Plaintiffs request the Court expedite the briefing schedule on this motion and issue an **order no later than July 5, 2024**, so that Plaintiffs can be readmitted to the VPA and begin to partake in the scheduling process. Plaintiffs intend to seek relief at the Second Circuit Court of Appeals should this Court "fail[ ] to afford the relief requested." Fed. R. App. P. 8(a)(2)(A)(ii).

Requested relief. Plaintiffs move for the following relief pending their appeal:

1. Order the VPA to allow Mid Vermont Christian School to rejoin the VPA as a full-status member eligible to participate in all VPA sanctioned events and activities;

2. Enjoin the VPA from applying or enforcing its gender identity policy against Mid Vermont Christian;

3. Enjoin the VPA from penalizing the School for exercising its religious beliefs about sex and gender, including by penalizing the School in any way for forfeiting VPA competitions where the School is set to compete against an opposing girls' team that has a male participant (or vice versa);

4. Issue the above-requested relief without bond.

Dated: June 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

s/ Ryan J. Tucker
Ryan J. Tucker
Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Local Rule 7(a)(7), I made a good faith attempt to obtain the opposing parties' agreements to Plaintiffs' requested relief. The VPA's counsel stated the VPA did not agree to the requested relief.

s/ Ryan J. Tucker
Ryan J. Tucker
Counsel for Plaintiffs

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Mid Vermont Christian School and its families are suffering ongoing, irreparable harm because they are banned from participating in Vermont state-sanctioned interscholastic competitions. The injury is actual and real. Plaintiffs are ostracized from the league and students are prohibited from all VPA activities because the School declined to play a basketball game. With each passing day, the School's students miss out on Vermont athletic and academic competitions—opportunities they will never get back. Students could lose awards and scholarships. And although it is summer, the damage is still happening *right now*: the School cannot participate in the VPA's scheduling process, which is occurring now for games this fall. *See* Third Declaration of Christopher Goodwin, attached as Exhibit 1. This inability to schedule games injures the School now and for future seasons. If the School is successful on appeal months (or years) from now, it will be too late to remedy the present harm. An immediate injunction is thus needed to end the VPA's ongoing punishment.

The sole reason Mid Vermont Christian was kicked out of the VPA is because it would not violate its sincerely held religious beliefs. That comes as no surprise—after all the School inculcates a Biblical worldview in and through everything it does. The VPA has an "opposing world view[ ]." Order on Mot. for Prelim. Inj. at 20 ("MPI Order") (ECF No. 57). The School was punished for exercising its faith: it forfeited a game. This case is about whether the VPA can continue to penalize Mid Vermont Christian by banning it from the association because the School chose to stand by *its* worldview. The Court held that it could because the VPA's gender identity policy is neutral and generally applicable. But it's not for several reasons: the VPA can apply the policy "case-by-case," secular reasons are permissible to forfeit games without penalty, the VPA allows any member school to request a waiver from any policy, and the VPA has admitted the policy does not reach Mid Vermont Christian's own teams. Worse, the VPA never afforded the School a fair and neutral consideration of its religious objection. That religious hostility alone warrants immediate relief.

"The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). The VPA ignored that duty here, and its actions must be enjoined.

SUMMARY OF FACTS[1]

For decades Mid Vermont Christian competed in the VPA without issue. That was until February 2023, when it was asked to force its girls' basketball team to go head-to-head against a team with a male in the girls' state tournament. The School believed playing that game would violate its religious convictions by perpetuating a falsity and sending the wrong message to its students, families, and the world—that sex is mutable and boys can be girls. So the School asked the VPA to have a "discussion" about the situation. MVCS 2/16/23 Letter (ECF No. 14-7). But the VPA's response was clear: we can't accommodate you. *See* VPA 2/16/23 Email (ECF No. 14-8). Because the School would not contradict its faith, it elected to forfeit the game.

After skirting its own disciplinary procedures, a hearing was eventually held before the VPA's Activities Standards Committee. *See* VPA 4/3/23 Letter (ECF No. 30-2); *see also* VPA Athletic Policy § 12 (ECF No. 1-9). The School questioned the fairness and safety of allowing males to play against girls in a high-contact sport (by pointing to the VPA's own fairness policy, *see* VPA Athletic Policy § 16.11), and also reiterated its religious reasoning for forfeiting the game, *see* MVCS 4/9/23 Letter (ECF No. 14-10). The VPA denied the appeal and upheld a drastic "penalty of expulsion." VPA Appeal Decision at 5 (ECF No. 14-11). The VPA justified the severe penalty by asserting that it was "the only remedy that protects students from repeated denials of participation in the future." *Id.* at 4. This was so even though the VPA has permitted other member schools in the past to forfeit games for other reasons—like injury, sickness, or

[1] For a fuller recitation of the facts, *see* Verified Complaint ("VC") (ECF No. 1); Plfs.' Mem. in Supp. Mot. for Prelim. Inj. (ECF No. 14-1). Those facts are incorporated by reference.

refusing to play against a team with a player who had a mask exemption—with no punishment. *See* Verified Complaint ("VC") ¶ 219. In deciding penalties for forfeiting games, the VPA makes an individualized assessment of whether the school forfeited for an unstated legitimate reason. The Court was wrong to discount these facts. *Compare* MPI Order at 24 *with infra* § § I.A.4.

Some of the VPA's policies bear highlighting. First, the VPA's policies contain a waiver provision, providing that "[a]ppeals from the application of VPA policies and or waivers of VPA policies may be made by a member school directly to the VPA." VPA Athletic Policy § 11. Those requests are decided "by the VPA Office" or can be "referred" to the Activities Standards Committee "for consideration." *Id*. Second, the VPA's gender identity policy—which the VPA claims the School violated by forfeiting the basketball game—incorporates the Agency of Education's Best Practices for Schools For Transgender and Gender Nonconforming Students ("Agency Guidance") (ECF No. 1-3). The Guidance in turn states that a transgender student's "[p]articipation in competitive athletic activities and sports will be resolved on a case-by-case basis." *Id.* at 6. And in making those case-by-case decisions, "[a]ll appeals concerning a school's determination as to the eligibility of a gender non-conforming student to participate in interscholastic sports will go directly to the VPA for consideration/action." VPA Athletic Policy § 2. Third, the VPA's Activities Standards Committee has sole discretion for "assess[ing] appropriate sanctions." *Id.* § 12. Penalties can include anything from warnings to total bans. *Id.*

Mid Vermont Christian missed out on all VPA events for the 2023-24 school year. It remains excluded today—students cannot compete in any sporting or academic events. VC ¶¶ 249–66. Nor can the School schedule future games for volleyball, cross country, soccer, boys' and girls' basketball, or track. Third Decl. of Chris Goodwin at ¶¶ 6–15.

MOTION STANDARD

The test to obtain an injunction pending appeal is the same as for a preliminary injunction. *See Agudath Israel of Am. v. Cuomo,* 980 F.3d 222, 226 (2d Cir. 2020) (per curiam). Plaintiffs are entitled to one because (1) they are likely to succeed on the merits of their claims,

(2) they currently are (and have been) suffering irreparable harm, and (3) an injunction would benefit the public interest. Plaintiffs seek to be restored to "the last actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (citation omitted).

ARGUMENT

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

The Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (cleaned up).

The Court held Plaintiffs were not likely to succeed on their free exercise claims because the VPA's gender identity policy is neutral and generally applicable. But that was error for three reasons. First, the analysis disregarded the VPA's hostility and lack of neutrality toward Mid Vermont Christian's sincere religious objection to playing a male in girls' basketball (Claim 1b). *Infra* § I.A.4. Second, the Court also did not address the fact that the VPA excludes Plaintiffs from a public benefit available to all other public and independent schools in the state—interscholastic competitions—because of their religious exercise (Claim 1a). *Infra* § I.B. Neither claim hinges on *Smith's* neutrality and general applicability rule. *See Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990). And third, the VPA violated the Free Exercise Clause even under *Smith* (Claim 2). *Infra* § I.A.1–3. The VPA's policy is not neutral or generally applicable because the VPA has at least three separate systems that give it discretion to apply the policy in the first instance, to exempt schools from any policy, and to decide punishment arbitrarily. The VPA also admits it won't enforce the gender identity policy against the School for arranging its own teams, thus conceding the policy is underinclusive.

Each of these violations, standing alone, warrants an injunction. *Kennedy*, 597 U.S. at 525 (Plaintiffs can "prov[e] a free exercise violation in various ways.").

A. The VPA's application of its policy is not neutral or generally applicable.

The VPA burdened Plaintiffs' religious exercise—by punishing them—through the enforcement of its policy, which is not neutral or generally applicable. *Kennedy*, 597 U.S. at 525. So the VPA must survive strict scrutiny. *Id*. It cannot. *See infra* § II.

Enforcement of a policy is not generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" or "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 593 U.S. 522, 533–34 (2021) (cleaned up). And "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 533. The Free Exercise Clause thus "forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534 (cleaned up). Put another way, a state actor fails the test, "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). And "whether ... activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation [or conduct] at issue." *Id.*

It is far from clear what interest the VPA asserts to justify expelling Plaintiffs from the *entire* league. The VPA has said it has "a duty" to prevent "deny[ing] transgender students full participation in activities," VPA Appeal Decision at 3, "uphold[ing] the policies of the VPA," VPA Opp'n to MPI at 14 (ECF No. 30), and "[p]reventing discrimination at VPA-sanctioned events," VPA Mot. to Dismiss at 14 (ECF No. 40). However characterized, the VPA fails neutrality and general applicability for at least four reasons.

1. The VPA applies its policy with case-by-case discretion.

The VPA's gender identity policy operates through "a formal system of entirely discretionary exceptions" rendering it "not generally applicable." *Fulton*, 593 U.S. at 536. The VPA's policy provides that students can participate "in a manner consistent with their gender identity as is outlined in the [Agency Guidance]." VPA Athletic Policy § 2. The policy states a

general rule: "students should be permitted to participate ... in accordance with the student's gender identity." Agency Guidance at 6. But the policy allows for individualized discretion: "[p]articipation in competitive athletic activities and sports *will be resolved on a case-by-case basis*." *Id.* (emphasis added). The case-by-case discretion available under the policy thus allows for exceptions from the general rule.

The VPA's policy is much like one the Ninth Circuit (en banc) recently held not generally applicable in *Fellowship of Christian Athletes v. San Jose Unified School District.* 82 F.4th 664 (9th Cir. 2023). There, a local school district stripped a Christian student group of official status because the club required student leaders to affirm its "core religious beliefs," including those about marriage and sexuality. *Id*. at 671. The school district relied on an interest "in ensuring equal access for all students" and in "prohibiting discrimination on protected enumerated bases." *Id.* at 689. But district officials retained the discretion to allow some groups to be selective, using their "'common sense' on a case-by-case basis." *Id*. at 688. The VPA's gender identity policy operates much the same way: "the very fact that [it] require[s] a case-by-case analysis is antithetical to a generally applicable policy." *Id.*

This Court held that the policy's "case-by-case" reference meant that individual discretion surrounded each student's decision whether they would play sports on an opposite-sex team. *See* MPI Order at 23 ("the decision ... is an individualized decision about that athlete"); *id*. ("the case-by-case consideration concerns relations between students and their school administrators"). But the rest of the gender identity policy shows that the discretion is vested in *the VPA*. The VPA's policy first requires a "student's home school [to] determine the eligibility of a student seeking to participate in interscholastic athletics in a manner consistent with their gender identity." VPA Athletic Policy § 2. And *the VPA* has the final say-so in the process. *Id.* ("All appeals ... will go directly to the VPA for consideration/action.").

So while the policy's "case-by-case" clause is in passive voice, the context of the entire gender identity policy confirms that the VPA is the implied subject within that sentence. *See*

King v. Burwell, 576 U.S. 473, 486 (2015) ("But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (cleaned up)). For instance, put the clause in active voice, considering what the rest of the gender identity policy says: "Home school districts first, and ultimately the VPA, resolve participation in competitive athletic activities and sports on a case-by-case basis." If the VPA lacked authority to exercise its discretion, then the entire procedure in outlined in Section 2 would be superfluous—*i.e.*, there would be no need for VPA "consideration/action." VPA Athletic Policy § 2.

To put meat on bones, consider a biological male athlete who identifies as female and desires to play girls' ice hockey. Perhaps the male is 6'6", 250 pounds, a junior Olympic skater, and so there is a great community uproar about him playing a highly physical sport against females. Perhaps all this sways the VPA to deny the male athlete from participating in the girls' division. Perhaps it doesn't. In the end, it doesn't matter *what* the VPA decides—what matters is the VPA *can* decide.[2] The VPA's policy "is one in which case-by-case inquiries" are made, and which necessarily "appli[es] a subjective test." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (cleaned up). That allows it to "decide which reasons for not complying with the policy are worthy of solicitude," triggering strict scrutiny. *Fulton*, 593 U.S. at 537.

2. The VPA can exempt schools from any policy.

The VPA's policies also contain another mechanism for individualized exemptions that permits any member school to request an exemption from any policy: "Appeals from the application of VPA policies and or waivers of VPA policies may be made by a member school

[2] To reiterate, Mid Vermont Christian is not asking that an opposing team's transgender athlete be benched whenever they are set to play such a team. The School simply seeks to forfeit without punishment. Ironically, the VPA has the authority to prohibit the hypothetical transgender athlete from competing against Mid Vermont Christian pursuant to its discretion as just explained, so the policy fails general applicability.

directly to the VPA." VPA Athletic Policy § 11.[3] The "text sweeps ... broadly," *Fulton*, 593 U.S. at 536, and authorizes *any* school to request an exemption from *any* VPA policy. That settles the matter. *See Peralta-Taveras v. Att'y Gen.,* 488 F.3d 580, 584 (2d Cir. 2007) (per curiam) (court's "inquiry begins with the plain language of the [policy] and where the [policy's] language provides a clear answer, it ends there as well" (cleaned up)). If the VPA can issue a waiver for any of its policies, it cannot "refuse to extend [one] to cases of religious hardship without compelling reason." *Fulton*, 593 U.S. at 534 (cleaned up).

3. The policy is underinclusive.

The School serves all students, including those who may question their gender, but it requires those students to play on athletic teams based on their sex. VC ¶¶ 48–49. The VPA previously conceded that the gender identity policy wouldn't bar the School's practice because it doesn't apply internally to Mid Vermont Christian's own teams. *See* VPA Opp'n to MPI at 3 ("Mid Vermont Christian School is free to ... compose their teams however it chooses"); *id.* at 14 ("The VPA has no interest in regulating ... how [Mid Vermont Christian] constitutes its teams."); *id.* ("Mid Vermont Christian would not be penalized if ... [it] does not allow transgender women to participate on its athletic teams."). The VPA says this now even though its policy says, "all students" shall have the "opportunity" to compete "in a manner consistent with their gender identity." VPA Athletic Policy § 2. "All" means all. So this is case-in-point of the VPA exercising its discretion to decide when the policy applies and when it doesn't. Because the gender identity policy doesn't apply internally to Mid Vermont Christian's teams, it is underinclusive to the VPA's interests in preventing discrimination against transgender students.

Nor does it matter that the VPA permits *some* of the School's religious conduct—control over transgender participation on its own teams—while prohibiting *other* religious conduct—

[3] This section also reinforces the VPA's exercise of discretion when it comes to transgender athletes. It provides that, "[f]or eligibility in matters other than age"—*i.e.,* gender identity—"waivers may be granted or denied as an exercise of discretion by the Activities Standards Committee after considering the information that the Committee deems relevant."

declining to play against other teams with transgender players. General applicability requires government policies to be "applied in an evenhanded, across-the-board way." *Kennedy*, 597 U.S. at 527; *see also Tandon*, 593 U.S. at 62 ("Comparability is concerned with the risks various activities pose."). The VPA fails that requirement because it partially exempts the School for its own teams, yet refuses to exempt the School when playing other teams. And "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). Because the policy is underinclusive, it is not generally applicable and triggers strict scrutiny. *Id.*

4. The VPA failed to act neutrally and engaged in impermissible hostility.

The Free Exercise Clause demands respectful treatment of religious objectors and that policies "be applied in a manner that is neutral toward religion." *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 640 (2018). Throughout its forfeiture and appeal in the VPA, Mid Vermont Christian "was entitled to a neutral decisionmaker who would give full and fair consideration to [its] religious objection." *Id.* The VPA fell well short of this requirement. The VPA's actions, at a minimum, require strict scrutiny, *see Lukumi*, 508 U.S. at 546, but they should be "set aside ... without further inquiry" because the VPA exhibited "hostility" towards the School's religious beliefs, *Kennedy*, 597 U.S. at 525 n.1 (cleaned up).

First, the VPA skirted its own policies, yet again showing the association's arbitrariness and individualized discretion. Just three weeks after Mid Vermont Christian's forfeiture, the VPA decided the school was ineligible to participate in VPA activities. *See* VPA 3/13/23 Press Release & Letter (ECF No. 1-10). The VPA did so despite its policies requiring a full investigation, probable violation finding, written notice, recommended penalty, and opportunity for a hearing. VPA Athletic Policy § 12. Defendant Nichols even had to be corrected by the Activities Standards Committee as to the procedural violation. *See* VPA 4/3/23 Letter. What's more, VPA policies expressly stated that "[i]nterscholastic athletics involving mixed (boys/girls) competition is prohibited." VPA Athletic Policy § 16.11. So it was entirely reasonable for Mid

Vermont Christian to forfeit a game that, in its view, violated Section 16.11. Rather than adhere to its own policies, the VPA immediately penalized the School.

Second, *two days* after the forfeiture, Defendant Nichols disparaged Mid Vermont Christian's beliefs before the Vermont legislature, saying the School engaged in "blatant discrimination under the guise of religious freedom." Nichols' Testimony at 2 (ECF No. 1-10); *cf. Masterpiece*, 584 U.S. at 635 (commissioner stating religion has been used to "justify all kinds of discrimination throughout history"). And even before this Court, the VPA continues with the same intolerant rhetoric, claiming: (a) that Plaintiffs' religious claims are "ludicrous," VPA Mot. to Dismiss at 2; (b) that Mid Vermont Christian's goal is to "harm[ ] other children just because of who they are," VPA Opp'n to MPI at 3; (c) that the School is "hid[ing] behind their [sic] beliefs to discriminate against other[s]," *id.*; and (d) that "[t]his case has never been about the Plaintiffs' beliefs," *id.* at 16. Whether inside the courtroom or outside, the VPA's hostility to Plaintiffs' beliefs is "inconsistent with what the Free Exercise Clause requires." *Masterpiece*, 584 U.S. at 639.

Third, the VPA appointed itself arbiter of the School's religious beliefs and flatly concluded that the School's religious justification for forfeiting the Long Trail game was "wrong" and had "nothing to do with beliefs." VPA Appeal Decision at 4. But to Mid Vermont Christian, it had *everything* to do with its religious beliefs, how it perpetuates those beliefs, and the example and message it sends to its students, staff, parents, and the world. *See, e.g.*, Decl. of Vicky Fogg at ¶¶ 91–103 (ECF No. 14-15). In short, the VPA handled the School's "religious objection based on a negative normative evaluation" of its beliefs even though the VPA had "no role in deciding or even suggesting whether the religious ground for [its] conscience-based objection [wa]s legitimate or illegitimate." *Masterpiece*, 584 U.S. at 639 (cleaned up).

Fourth, to Plaintiffs' knowledge, the VPA had never expelled a member school from the league for any reason, until it banished Mid Vermont Christian because the School stood by its religious convictions. The VPA has thus "single[d] out [Plaintiffs] for especially harsh

treatment." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020) (per curiam); *see also Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

This Court recognized that other schools have forfeited games for other reasons without penalty. MPI Order at 24. It distinguished them by noting that they do not "evidence" different treatment for religious schools or "individualized" application of VPA policies. *Id*. But that's precisely what they do. In each case, the VPA "evaluat[es] [ ] the particular justification" for the forfeiture thereby creating a "system of individualized governmental assessment of the reasons for the relevant conduct." *Lukumi*, 508 U.S. at 537 (cleaned up). So the VPA decides that forfeiting for secular reasons—like sickness or not wanting to compete against a maskless player—warrants no punishment (rightfully so), but forfeiting for religious reasons warrants expulsion. *See* VPA Athletic Policy § 12. That "devalues religious reasons ... by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. That disparate treatment must be "set aside," *Kennedy*, 597 U.S. at 525 n.1, or at least undergo strict scrutiny.

B. The VPA excludes Plaintiffs from a public benefit due to their religious exercise.

The VPA also violated the Free Exercise Clause by excluding Plaintiffs from a public benefit because "of their religious exercise." *Carson v. Makin*, 596 U.S. 767, 789 (2022); *accord In re A.H.*, 999 F.3d 98, 108 (2d Cir. 2021) (religious schools are eligible for public benefits "regardless of [their] religious affiliation or *activities*" (emphasis added)). This Court did not analyze Plaintiffs' claims under *Carson*, *Espinoza*, and *Trinity Lutheran* but those cases apply if two factors are met. First, the case must involve a "public benefit." *See Carson*, 596 U.S. at 780–81. Second, the government must withhold that benefit due to a religious observer's religious "character," *id.* at 780, or "exercise," *id.* at 789. Both are met here.

First, the VPA offers a public benefit: extracurricular athletics and activities for its members. Like the tuition assistance program in *Carson*, here "a wide range of private [and public] schools are eligible" to participate. 596 U.S. at 780; *see* VPA Bylaws at 1 (ECF No. 1-2)

("Any school in Vermont approved by the State Board of Education is eligible to become a school member."). Second, the VPA has banned Mid Vermont Christian from membership "solely" because the School decided to forfeit a girls' basketball game rather than violate its religious convictions. The VPA retorts it expelled the School not because it is religious, but because it exercised its faith by forfeiting the game. But this is the same kind of argument Maine made, and was rejected by the Court, in *Carson*: schools could participate in the tuition program so long as they did not "promote[ ] a particular faith" or "present[ ] academic material through the lens of that faith." 596 U.S. at 787. The Court explained that such "use-based discrimination" nevertheless violated the Free Exercise Clause. *Id.* This makes sense because religious schools do religious things. Indeed, the VPA says it will re-admit Mid Vermont Christian *if* it capitulates and agrees to stop its religious exercise. *See* Nichols Email to Fogg re: Readmission (ECF No. 14-13); VPA Letter to Plaintiffs' Counsel (ECF No. 53-1). That "indirect coercion [and] penalt[y]" violates the Free Exercise Cause all the same. *Carson*, 596 U.S. at 778 (cleaned up).

II. The VPA's actions and policy fail strict scrutiny.

The "burden shifts" to the VPA to satisfy strict scrutiny. *Kennedy*, 597 U.S. at 531–32.

A. The VPA lacks a compelling interest in expelling the School from the association.

The VPA cannot rely on "broadly formulated interests" that are stated, "at a high level of generality." *Fulton*, 593 U.S. at 541 (cleaned up). Instead, it must show a compelling interest in "denying an exception" to Mid Vermont Christian. *Id. Fulton* is dispositive on this front. There, Philadelphia advanced a very similar interest in equal treatment of foster parents and children to justify excluding Catholic Social Services from its foster matching process. *Id.* Yet the City's "creation of a system of exceptions ... undermine[d] [its] contention that its non-discrimination policies c[ould] brook no departures." *Id*. at 542. The same is true here. The VPA has various mechanisms to exempt Schools from its policies, including from its gender identity policy. And the VPA has confessed it has no interest in prohibiting potential "discrimination" on Mid Vermont Christian's *own* teams. These exceptions prove the VPA's interests are not compelling.

See also Carson, 596 U.S. at 781 (Government action "that targets religious conduct for distinctive treatment will survive strict scrutiny only in rare cases." (cleaned up)).

The VPA justified expelling Mid Vermont Christian because of the "impact" forfeiting a game would have on "transgender students." VPA Appeal Decision at 4. But the VPA must "identify an 'actual problem' in need of solving," *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) (citation omitted), and cannot rely on "speculation" to "satisfy strict scrutiny," *Fulton,* 593 U.S. at 542. To support its interest, the VPA cites to an amicus brief in a different case about different issues. *See* VPA Opp'n to MPI at 15. That brief speaks to "harms to the health and well-being of transgender youth who are excluded from participating in school sports consistent with their gender identity." *See* Br. of *amici curiae* Am. Acad. of Pediatrics at 1 (ECF No. 30-5). But this is incorrect. The science behind those health outcomes for such students is far from settled. *See, e.g.,* Declaration of James M. Cantor, Ph.d., at § VI, *Roe v. Critchfield*, Case No. 1:23-cv-315 (D. Idaho August 22, 2023).

And Mid Vermont Christian doesn't seek to exclude *anybody* from participating in sports; it simply wants the option to forfeit without penalty rather than violate its convictions. So the VPA's assertion that transgender students will suffer severe harms if the School forfeits a game against them is based on mere conjecture. In fact, the VPA has offered *zero* evidence that the male athlete on Long Trail School's team suffered any harm because Mid Vermont Christian forfeited the game. The student and team got a win for the game and moved on in their schedule, just as with any other forfeit. If allowing forfeits for other reasons poses no harm, there is none here either. In defending its decision to ban the School, the VPA "must do more than simply posit the existence of the disease sought to be cured." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 307 (2022) (cleaned up). That's all it has done here, and it fails strict scrutiny.

B. The VPA's expulsion decision is not narrowly tailored.

Nor can the VPA explain how expelling the School was "the least restrictive means" to accomplish its goals. *Agudath Israel of Am. v. Cuomo,* 983 F.3d 620, 633 (2d Cir. 2020) (citation

omitted). If the VPA "can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. If the VPA is concerned with participation, it can schedule make-up games, rematches, or otherwise tailor the scheduling to ensure teams with transgender athletes can play the same number of games as other schools. The VPA claims this is unworkable because it will not always know if a team has a transgender athlete. But this misses the point—if and when the School discovers an opponent has a transgender athlete and then decides to forfeit, the VPA *can then* adjust the scheduling as needed to alleviate any participation concerns. Or it can do whatever it does with any other type of forfeit. In sum, forcing Mid Vermont Christian out of every single VPA activity is in no way tailored to preventing discrimination. The VPA has not explained why its claimed interests cannot "be achieved by narrower [policies] that burden[ ] religion to a far lesser degree." *Lukumi,* 508 U.S. at 546.

For the VPA, expelling the School from *all* activities made life easier. Rather than having to accommodate the School's religious exercise, it simply doesn't have to deal with it. But convenience does not excuse violating Plaintiffs' constitutional rights. *See Agudath Israel,* 983 F.3d at 633 (government must show "lesser burdens on religious liberty" would not achieve interests, "not simply that the chosen route was easier" (cleaned up)). Strict scrutiny is "not watered down but really means what it says." *Lukumi,* 508 U.S. at 546 (cleaned up).

III. Plaintiffs are being irreparably harmed and an injunction benefits the public interest.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Agudath Israel,* 983 F.3d at 636 (cleaned up). Plaintiffs are likely to succeed on their free exercise claims, so they satisfy irreparable harm. *See id.* at 637 ("in First Amendment cases the likelihood of success on the merits is the dominant, if not the dispositive, factor" (cleaned up)). Moreover, this Court rightly acknowledged that the VPA's actions have "had real consequences for students who can no longer participate in athletic competitions and other activities sanctioned by the VPA." MPI Order at 18.

Not only are these harms retrospective, but they are *still ongoing now*. First, Mid Vermont Christian cannot schedule VPA games for this fall and beyond. The inability to schedule games as we speak means the School is losing the ability to participate in dozens of activities, sports, and competitions now and for future seasons. *See* Third Decl. of Chris Goodwin at ¶¶ 6–15. Second, the ban harms students far and wide. Mid Vermont Christian students are barred from *all* VPA activities; they cannot even play on teams at other schools via the VPA's member-to-member policy. *See* Decl. of Vicky Fogg ¶¶ 129–32; *see also* Decl. of Dawna Slarve at ¶¶ 3, 6 (ECF No. 58-1) (inability to play football was a factor in decision to leave the School). So the VPA is also *directly* penalizing families for simply deciding to enroll at Mid Vermont Christian. The inverse is also true. Students at public schools are harmed because they cannot use the member-to-member policy to play on Mid Vermont Christian teams, like volleyball. Decl. of Vicky Fogg ¶ 132. Third, many families view competitive sports as an essential aspect of a holistic education, but the School can no longer use VPA competition as a recruiting tool. Now, if the School wants to give its students *some* athletic opportunities, it must compete in the New England Association of Christian Schools, which requires the School and its students to travel much further away, costing more and resulting in missed school; that league also provides less sports and other competitions to choose from. *See* Decl. of Chris Goodwin at ¶¶ 31–34 (ECF Nos. 14-17); Suppl. Decl. of Chris Goodwin at ¶ 6 (ECF No.42-5).

Lastly, "securing First Amendment rights is in the public interest." *SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 278 (2d Cir. 2021) (citation omitted). The VPA's actions "strike at the very heart of the First Amendment's guarantee of religious liberty" and "[s]uch a direct and severe constitutional violation weighs heavily in favor of granting injunctive relief." *Agudath Israel,* 983 F.3d at 637 (cleaned up).

CONCLUSION

The Court should grant Plaintiffs' motion for an injunction pending appeal.

Dated: June 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

s/ Ryan J. Tucker
Ryan J. Tucker
Counsel for Plaintiffs

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; and **BETHANY GOODWIN**, individually.

Plaintiffs,

v.

ZOIE SAUNDERS, 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-gwc

THIRD DECLARATION OF CHRISTOPHER GOODWIN

I, Christopher Goodwin, hereby declare as follows:

1. I am a citizen of the United States and a resident of the state of Vermont. I am competent to make this declaration, and it is based on my personal knowledge.

2. I have been Mid Vermont Christian's varsity girls' basketball coach since 2015.

3. Each season I coached, up until the end of the 2022-2023 basketball season, our team was in the Vermont Principals Association.

4. Before being expelled from the association, Mid Vermont Christian had been a VPA member for over 28 years.

5. As head coach I worked with VPA staff and other VPA member schools to schedule games for our team.

6. Typical boys' and girls' basketball seasons consisted of 14 games scheduled through the VPA. Each individual school is permitted to schedule 20 regular season games, and so each school would work directly with other schools to find and schedule opponents for the six remaining "game-slots" each season.

7. This process is perpetual; teams are always looking for opponents to fill-out their schedules.

8. I understand that the same process happens with other sports within the VPA as well. Schools are constantly scheduling opponents for upcoming and future seasons.

9. If Mid Vermont Chrisitan was currently in the VPA, I would be scheduling future games for our upcoming girls' basketball seasons right now. And the School would be scheduling other games in other sports for future seasons. For example, right now and throughout the summer, our school would be working to finalize the following schedules (at a minimum): 2024 volleyball, cross country, golf, and soccer; 2024-25 boys' and girls' basketball; and 2025 track.

10. But because we are not currently in the VPA, other VPA member schools will not schedule future games with us.

11. The inability for us to schedule future games within the VPA right now is hurting us now and into the future. Because future games are being scheduled now, the School will necessarily miss out on future VPA seasons.

12. And once other schools complete their schedules for future seasons, it will then be too late for our School to schedule games against those teams.

13. Take, for example, a school schedules 20 games for an upcoming girls' basketball season (while Mid Vermont Christian is excluded from the VPA). It then cannot schedule any more games. As a result, Mid Vermont Christian would be barred from scheduling that school (once readmitted to the VPA).

14. When other VPA member schools complete their future schedules, our teams will be left with no other teams to schedule games against within the VPA.

15. With each passing day that we are excluded from the VPA, this harm continues and increases.

I hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 21 day of June, 2024, in Quechee, Vermont.

Christopher Goodwin