IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

A.H., by and through her parents and natural guardians, James Hester and Darlene Hester; **JAMES HESTER**, individually; **DARLENE HESTER**, individually; **E.R.**, by and through her parents and natural guardians Chad Ross and Angela Ross; **CHAD ROSS**, individually; **ANGELA ROSS**, individually; **A.F.**, by and through her parents and natural guardians, Daniel Foley and Juliane Foley; **DANIEL FOLEY**, individually; **JULIANE FOLEY**, individually; **C.R.**, by and through her parents and natural guardians, Gilles Rainville and Elke Rainville; **GILLES RAINVILLE**, individually; **ELKE RAINVILLE**, individually; and the **ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT,**

Plaintiffs,

v.

Case No. 2:20-CV-00151-cr

DANIEL M. FRENCH, in his official capacity as Secretary of the Vermont Agency of Education; **MICHAEL CLARK**, in his official capacity as Grand Isle Supervisory Union Superintendent; the **SOUTH HERO BOARD OF SCHOOL DIRECTORS**; the **CHAMPLAIN ISLANDS UNIFIED UNION SCHOOL DISTRICT BOARD OF SCHOOL DIRECTORS**; **JAMES TAGER**, in his official capacity as Franklin West Supervisory Union Superintendent; and the **GEORGIA BOARD OF SCHOOL DIRECTORS**,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Four Catholic families are deprived a public benefit that their neighbors enjoy, simply because they send their daughters to a Catholic school. Three separate school boards voted to exclude Rice Memorial High School from a public benefit, just because it is religious. Those denials violate the U.S. Constitution and reflect a system of discrimination that robs Plaintiffs of unrecoverable opportunities and discourages countless families from sending their children to religious schools.

The Rainvilles live in Georgia, Vermont, a town without a public high school (a "sending town"). Vermont's Town Tuition Program requires Georgia to pay tuition for their daughter, C.R., to attend the school the Rainvilles choose—even a private school. C.R. wants to attend Rice, a Catholic school with outstanding academics, small class sizes, and a close community. The Rainvilles want to ground their daughter in an education integrated with their Catholic faith. They asked their school district to approve a tuition payment so that C.R. could start at Rice in January. But as it did with other families, the district denied the Rainvilles' request because Rice is religious. Without access to town tuition funds, C.R. cannot attend Rice and the Rainvilles cannot exercise their religion by sending her there.

Georgia also rejected the Foleys' tuition request for their daughter, A.F. The Foleys have made extraordinary sacrifices to fund her Rice Tuition out-of-pocket. To give A.F. an education that reinforces the family's Catholic faith, Juliane Foley changed jobs and must sacrifice precious time with her children for work.

The Rosses live in another sending town, Grand Isle. Their daughter, E.R., decided that she wanted to attend Rice and mom and dad enthusiastically agreed. The Rosses asked their school board for town tuition funds for Rice, but the school board rejected their request because Rice is religious. By making personal and financial sacrifices—and with help from Rice's tuition assistance fund—the Rosses

managed to send E.R. to Rice out-of-pocket. But new COVID-19 restrictions have put Chad Ross out of work and paying tuition out-of-pocket significantly burdens the family. Without town tuition funds, the Rosses will be unable to keep E.R. at Rice, much less send their younger daughter there next year.

South Hero has rejected two of the Hesters' requests for A.H.'s Rice tuition because Rice is religious. The Hesters pay A.H.'s tuition out-of-pocket, but that means they have been unable to help their children much with college. Giving their children a solid foundation at a Catholic high school was a necessary trade-off.

And Defendants' discrimination also hurts the churches that operate religious schools. Rice is a ministry of the Catholic Diocese of Burlington, which provides financial support to make Rice affordable for families. But the Diocese's help cannot meet the needs of every interested family. That means some students from sending towns who want to attend Rice cannot. It also means that some tuition assistance unnecessarily goes to students from sending towns when it could go to other students. Each student who must attend a different school instead of Rice is a lost ministry opportunity for the Diocese. And other aspects of the Diocese's Gospel mission suffer because it must reallocate resources toward tuition assistance.

Recently, the U.S. Supreme Court confirmed that "once a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). Plaintiffs ask this Court to save them from ongoing, irreparable harm caused by Defendants' systemic religious discrimination.

STATEMENT OF FACTS

The facts here are straightforward. Defendants barred four families and the Diocese from a neutral public benefit because Rice is religious. The evidence shows that Vermont engages in religious discrimination.

A. Defendants Deny Families Tuition Because Rice is Religious.

The Rainvilles live in Georgia, Vermont, which does not have a public high school and provides its students school choice. Rainville Decl. at ¶¶ 5-7; Ex. D. at PI042. Their daughter, C.R., is a sophomore at Bellows Free Academy (BFA) in St. Albans, a public school in a different district. Rainville Decl. ¶ 2. Georgia pays C.R.'s $17,500 BFA tuition through the Town Tuition Program. *Id.* ¶ 8. C.R. wants to attend Rice starting in January 2021, Rice is willing to admit her, and her parents want to send her there as an exercise of their Catholic faith. *Id.* ¶¶ 10-16; Lorenz Decl. ¶ 20. But they simply cannot afford the $11,600 tuition. Rainville Decl. ¶ 17. The Rainvilles requested that Georgia fund C.R.'s Rice Tuition starting in January, but their request was denied. Ex. A at PI015–16. The Georgia School Board previously decided to reject Rice tuition requests after its superintendent, Defendant Trager, conferred with the Agency's Defendant French about *Espinoza*'s impact on the Town Tuition Program. First Am. V. Compl. at ¶¶ 301, 304, ECF No. 16; Ex. B at PI028–29; Georgia School Board 2020_09_01, Vimeo (Nov. 23, 2020), https://vimeo.com/482702790/a3ff4a4d06 at 1:48. Georgia's board chair sent the Rainvilles a denial saying "we cannot pay for tuition to Rice High School. The recent Supreme Court decision clears the way for parochial school tuition payments so long as the state law doesn't prohibit them." Ex. A at PI015.

The Foleys are another Catholic family from Georgia. Foley Decl. at ¶¶ 5, 8. Their daughter, A.F., is a sophomore at Rice. *Id.* ¶ 2. The Foleys pay for A.F. to attend Rice even though Georgia provides other residents vouchers through the Town Tuition Program. *Id.* ¶¶ 7, 11, 16, 17. And the Foleys do this as an exercise of their Catholic faith. *Id.* ¶¶ 9-10. To pay A.F.'s full Rice tuition out-of-pocket, the Foleys had to make significant personal and professional sacrifices. *Id.* ¶¶ 11-14. Juliane Foley had to take a more demanding job that requires she spend less time with her son with special needs. *Id.* ¶¶ 12-13. This shifted childcare duties to Daniel Foley, who

sacrifices his personal business to help balance the family's needs. *Id.* ¶ 14. Seeking relief, the Foleys applied for town tuition funds for A.F.'s Rice tuition for the 2020–21 school year. *Id.* ¶ 16. But the Foleys' request was denied because Rice is a religious school. Ex. A at PI012. The school district sent the Foleys an email that explained, "we cannot pay for tuition to Rice High School. . . . The current state of the law in Vermont, applying our constitution (not federal law), is that public schools cannot pay tuition to parochial schools." *Id.*

The Rosses live in Grand Isle. Ross Decl. at ¶ 5. Last year, their school board approved E.R.'s request for town tuition funds when she attended South Burlington High School as a freshman. *Id.* ¶ 16. E.R. and her parents, though, decided that Rice was a better fit and they applied for town tuition for E.R. to attend Rice during the current, 2020–21 school year. *Id.* ¶¶ 17, 19. But their school board denied the request because Rice is religious and "the Vermont Constitution bars public payments to religious institutions." Ex. A at PI008; Ex. B at PI026. Fortunately, E.R. was able to attend Rice due to Rice's tuition assistance fund and her parents' sacrifices. Ross Decl. at ¶¶ 21, 23.

The Rosses are Catholic and consider sending E.R. to Rice an exercise of their faith. Ross Decl. ¶¶ 9–10. E.R. has been thriving at Rice and she earned straight "A" grades in her first quarter there. *Id.* ¶12. The Rosses would like to send their younger daughter to Rice too, but paying tuition out-of-pocket strains them. *Id.* ¶¶ 14, 22. The new COVID-19 restrictions put Chad Ross out of work. And without access to the town tuition funds, the Rosses will be unable to afford to keep E.R. at Rice and will be unable to send their younger daughter to the school. Ross Decl. at ¶¶ 27, 29–30.

The Hesters live in South Hero. Hester Decl. ¶ 6. Their daughter, A.H., is a senior at Rice, and they have sacrificed to send her and their other children there as an exercise of their Catholic faith. *Id.* ¶¶ 2, 10, 12. They twice applied for town tuition for A.H. *Id.* ¶¶ 16, 18. Their application for the 2019–20 school year was rejected

because "Rice is a religious school." Ex. A at PI001. And after the Supreme Court issued its decision in *Espinoza*, the Hesters applied again—this time for the 2020–21 school year—and their school board denied their application because "[t]he Vermont Constitution bars public school payments to religious schools. It is considered state support for religion." Ex. A at PI003. *See also id.* at PI005 (school board minutes reflecting denial because paying tuition to Rice "is contradictory to the Vermont Constitution."). If the Hesters sent A.H. to a secular school, the town would fund her tuition up to $17,539. Hester Decl. ¶ 21–22; Ex. D at PI043. The Hesters will pay $11,600 for this year's Rice tuition. ECF No. 16 at ¶ 142.

B. Vermont's Historically Discriminatory Town Tuition Program.

Vermont law requires towns to either maintain a public high school or pay tuition to another school on behalf of their students. 16 V.S.A. § 822. Towns can fulfill this requirement by paying tuition to any approved school of the parents' choice. *Id.* at §§ 822, 824. For years, Vermont relied on the U.S. Constitution's Establishment Clause to exclude religious schools and their students from its tuition program. *See Swart v. S. Burlington Town Sch. Dist.*, 167 A.2d 514 (Vt. 1961). But when the U.S. Supreme Court reiterated that governments could not broadly apply the Establishment Clause to violate citizens' Free Exercise rights, the Vermont Supreme Court and state officials shifted the legal justification for their discriminatory practice to Vermont's Compelled Support Clause, Vt. Const. Ch. I, art. III.[1] *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 552 (1999).

[1] The Compelled Support Clause derives from Vermont's original 1777 constitution, which included "prohibitions on religious discrimination . . . [that] applied only to men who professed 'the protestant religion.'" *Chittenden*, 738 A.2d at 552. The clause was drafted when "the vast majority of state governments supported and encouraged religious exercise in one form or another." Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1086 (1995). It pre-dates the U.S. Constitution's adoption in 1789, the First Amendment's Free Exercise Clause, and the Fourteenth Amendment's application of

In *Chittenden*, the Vermont Supreme Court theorized that the Compelled Support Clause might allow religious schools to receive public benefits if the State imposed "adequate safeguards" to ensure funds are not used for religious worship, but the court delivered a death blow when it added that "worship" includes religious instruction. 738 A.2d at 562 ("we see no way to separate religious instruction from religious worship."). In short, the Vermont Constitution allegedly allows religious schools to receive public benefits so long as they do not say or do anything religious.

But Defendants never established any "adequate safeguards" or changed the Program to allow religious schools to participate. ECF No. 16 at ¶ 94. Instead, 21 years after *Chittenden*, the State of Vermont and local school boards apply the law to exclude religious schools and their students from public programs. They either 1) refuse to allow religious schools and their students to participate at all, or 2) continue to apply an obsolete and discriminatory "pervasively sectarian" test to determine whether the school is too religious to receive funding.

Defendant French and State officials routinely state publicly that students at religious schools are ineligible for public funding. For example, Defendant French explained last year that "schools that are approved to receive public tuition dollars

---

the Free Exercise Clause against the states in 1868. History makes clear that the Compelled Support Clause was not fashioned to deprive the religious of neutral public benefits. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2258 (2020) ("In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones."). Vermont has a long history of publicly funding common schools that included Bible reading and generic protestant theology in their curriculum. *See* R. Gabel, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 192–193 (1937) ("Religious instruction was imparted in the [Vermont] academies whether under purely private or denominational management and was no obstacle to such public aid as was granted."). *See id*. at 574–575, n.15 noting that local communities "exercise considerable freedom in determining the religious character of their schools" but that Vermont's laws prohibited parochial and "sectarian" schools from participating in Vermont's public education system. "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Espinoza*, 140 S. Ct. at 2259 *quoting Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

from school districts. . . . must be 1) non-sectarian." Ex. H at PI121. And French is not alone. An Agency official clarified last year: "Please note—public tuition can be paid to approved, non-sectarian independent schools." *Id.* at PI125. Even after *Espinoza*, that same Agency official instructed a school district to deny a student's tuition request for another diocesan high school. Ex. C at PI035.

Agency officials have been consistent over the years, telling Rice parents "[t]here is no provision for public funds to be paid to schools with religious affiliations, according to [*Chittenden*]." Ex. H at PI143. Beyond the Agency, an Assistant Attorney General stated in 2018 that "Vermont school districts generally are not legally permitted to pay publicly funded tuition to religious schools." *Id.* at PI154. The State even published white papers that explicitly said religious schools cannot participate in the Town Tuition Program. *See id.* at PI151 (2010 paper, published 11 years after *Chittenden*); *id.* at PI132 (2012 paper, published 13 years after *Chittenden*).

If the Agency was not denying religious school participation outright, then it employed a test—the "pervasively sectarian" test—to determine whether schools were too religious to receive public benefits. *See* Ex. H. at PI136 (Department of Education using test one year after *Chittenden*). But the U.S. Supreme Court had ditched that test. In *Mitchell v. Helms*, the Court explained that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." 530 U.S. 793, 829 (2000) (plurality opinion). Yet Vermont continued to instruct local districts to use the test. Legal counsel for Vermont, for example, ratified Defendant French's use of the "pervasively sectarian" test as recently as 2015 when French was a school district superintendent. *See* Ex. H at PI134.

As a result of the Agency's interference and discrimination, school boards across the state refuse to fund tuition to religious schools, which prevents and

discourages families all across Vermont from exercising their religious faith and sending their children to those schools. The Agency's own data show that in FY 2018, only one of the 1,735 publicly funded students attending Vermont Approved Independent Schools attended a religious school. *See* Ex. E at PI073, PI081. In FY 2017, that number was zero out of 1,664 students. *Id*. Data from other years tell the same sad story of exclusion. *See id*. at PI070 (table with rates for past six years).

ARGUMENT

The United States Constitution "condemns discrimination against religious schools and the families whose children attend them." *Espinoza*, 140 S. Ct. at 2262. But Vermont's Town Tuition Program perpetuates religious discrimination and inflicts irreparable harm on Plaintiffs and other Vermont families. Plaintiffs need relief from this Court and can show "(1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of [their] claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in [their] favor[;] 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).

I. Defendants' Religious Discrimination Irreparably Harms Plaintiffs.

Four Catholic families suffer burdens that their neighbors do not, simply because they exercise their Catholic faith. Right now, Defendants' discrimination injures each family and the Diocese—discouraging or preventing their religious exercise and causing them to lose unrecoverable opportunities.

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). The Supreme Court made clear that "the loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). 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).

There is no question that Defendants' discrimination is irreparably harming Plaintiffs. Defendants penalize four families for exercising their religion. The families shoulder burdens that their neighbors do not, just because Rice is religious. Without this Court's intervention, the Rainvilles will be unable to exercise their faith and C.R. will miss out on the Catholic education she desires. Rainville Decl. at ¶ 20. Given Chad Ross' recent job loss, the Rosses simply cannot afford to send E.R. to Rice out-of-pocket; without town tuition, the Rosses will have to stop exercising their faith. Ross Decl. at ¶¶ 25–30. Juliane Foley will continue to miss out on irreplaceable time with her children and Daniel Foley will have to sacrifice his professional goals to balance the family's needs. Foley Decl. at ¶¶ 11–15. The Hesters are treated worse than their neighbors, just because A.H. attends a religious school. Hester Decl. ¶¶ 21–22. In all these cases, Defendants' discrimination either discourages or prevents religious exercise and deprives Plaintiffs of opportunities that they can never recover.

The Diocese suffers irreparable harm at Defendants' hands, too. Each time Defendants deny a Rice tuition request and a student attends another school, the Diocese loses an opportunity to minister to that student. Lorenz Decl. at ¶¶ 7, 11. The Diocese tries to make up the difference through tuition assistance programs, but this takes resources away from other diocesan ministries. *Id.* ¶¶ 14, 24. Because Defendants force the Diocese to unnecessarily provide tuition assistance to students from sending towns, it cannot provide that aid to other students who need it.

Id. ¶¶ 14–16. And by stripping a public benefit away from diocesan students, Defendants put diocesan schools at a competitive disadvantage against other independent schools. *Id.* ¶ 31; Ex. G. The injuries Plaintiffs suffer cannot be undone by a later award of money damages. *Jolly*, 76 F.3d at 482.

II. Defendants Violate Plaintiffs' Free Exercise Rights and Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Supreme Court precedent is clear: States must treat students at religious private schools the same as students at secular private schools. In *Espinoza*, the Court recently confirmed that States cannot rely on provisions in their own constitutions to exclude religious schools from benefit programs just because they are religious. 140 S. Ct. at 2261 ("once a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious.").

Defendants violate the Free Exercise rights of Plaintiffs and others in three ways. First, Defendants have regularly denied tuition funds to children and their families just because their preferred school is religious. Second, even after *Espinoza*, Vermont has advised local school districts to deprive religious schools and their students of town tuition. Third, the *Chittenden* "adequate safeguards" requirement violates the Free Exercise Clause because although it pretends to prevent taxpayer dollars from funding religious "worship," it functionally serves to exclude religious schools and their students from the program. And the "adequate safeguards" do not even exist. All of these approaches violate Plaintiffs' Free Exercise rights and Defendants have no compelling interest in pursuing this discrimination.

A. Defendants Deny Benefits Because of Religion.

Plaintiffs need this Court to enjoin Defendants from discriminating against them by depriving a neutral public benefit. Defendant school boards denied town tuition funds in each case because Rice is religious. *See supra* at 3–5 (outlining denials based on religion). Defendants "bar[ ] all aid to a religious school 'simply because of

what it is,' putting the school to a choice between being religious or receiving government benefits." *Espinoza*, 140 S. Ct. at 2257, *quoting Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017). These denials "put[ ] families to a choice between sending their children to a religious school or receiving such benefits." *Id*. Families whose children attend religious schools "are 'member[s] of the community too,' and their exclusion from the scholarship program here is 'odious to our Constitution' and 'cannot stand.'" *Espinoza*, 140 S. Ct. at 2262–63, *quoting Trinity Lutheran*, 137 S. Ct. at 2023, 2025. Without this Court's help, Plaintiffs will continue to suffer a deprivation because their school is religious.

B. Defendants Exclude Plaintiffs Despite *Espinoza*.

Plaintiffs need an injunction because even since *Espinoza,* Defendant French and the Agency continue to advise school districts to deny tuition requests for religious schools. After *Espinoza,* Defendant Tager consulted with "French of the Agency of Education" and then urged denying the Rainvilles' and Foleys' tuition requests. *See* ECF No. 16 at ¶¶ 301–303. And after *Espinoza* other Agency officials followed suit and confirmed that Vermont law still requires excluding diocesan high schools. *See* Ex. C at PI035 (Agency official confirmed local school district's decision that the law still required denying tuition request for Catholic high school). This is occurring despite the Secretary's statutory obligations to ensure that public school districts comply with the laws. *See* 16 V.S.A. § 212(5), (6).

C. The "Adequate Safeguards" Requirement Means Exclusion of Religious Schools.

Even 21 years after *Chittenden*, State officials have failed to develop any "adequate safeguards" whereby religious schools may be able to participate in the Program. And Defendants have never asked how the Diocese funds its religious worship activities, but instead have simply denied them access to the Program because they are religious. ECF No. 16 at ¶ 252. But applying such a test would allow

Defendants to violate Plaintiffs' Free Exercise rights regardless. Defendants apply the undefined "adequate safeguards" requirement in a manner indistinguishable in effect from the state constitutional provisions struck down in *Trinity Lutheran* and *Espinoza*: it only functions to exclude religious schools and families who exercise their religion. The Vermont Supreme Court's *Chittenden* opinion determined that religious education is indistinguishable from religious worship. 738 A.2d at 562. But that application of the clause would exclude all religious schools. "The religious education and formation of students is the very reason for the existence of most private religious schools." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). And it certainly bars all of the Diocese's schools. *See id.* at 2065 (quoting CATECHISM OF THE CATHOLIC CHURCH 8 (2d ed. 2016)) ("In the Catholic tradition, religious education is "'intimately bound up with the whole of the Church's life.'"'). The "adequate safeguards" requirement prevents the Diocese's schools from participating equally with other private schools because of its religious exercise.

And Rice families must receive the same benefit as their neighbors—a full voucher covering their child's tuition. They should not have their benefit docked or taxed to account for their religious exercise but should receive "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Espinoza*, 140 S. Ct. at 2255 (citation omitted). The "enduring American tradition" protects parents' right to "direct 'the religious upbringing' of their children." *Id.* at 2261 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213–214 (1972)). And here, "parents exercise that right by sending their children to religious schools, a choice protected by the Constitution." *Espinoza*, 140 S. Ct. at 2261 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–535 (1925)). Defendants cannot apply the Compelled Support Clause to "penalize[ ] that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." *Id.*

Vermont's Town Tuition Program pays the full tuition benefit to schools that center their curriculum on a variety of things, including snow skiing. *See* Ex. F. (listing Approved Independent Schools offering skiing curriculum). The Defendants cannot demerit families because they dare both exercise their religion and use their neutral public benefit. *Espinoza*, 140 S. Ct. at 2261. *See also Trinity Lutheran*, 137 S. Ct. at 2021 (laws that "impose special disabilities" because schools are religious violate the Free Exercise Clause).

D. Defendants fail strict scrutiny.

"[D]isqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Only a "state interest of the highest order" can justify Defendants' discriminatory policy. *Trinity Lutheran*, 137 S. Ct. at 2024. Vermont's interest in enforcing a flawed interpretation of its Compelled Support Clause cannot justify infringing on Free Exercise. "'[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.'" *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)). *See also Espinoza*, 140 S. Ct. at 2260 ("separating church and State 'more fiercely' than the Federal Constitution" not a compelling interest).

And Defendants cannot choose to apply the Vermont Constitution instead of the U.S. Constitution. *See* Ex. A at PI012 ("we cannot pay for tuition to Rice. . . . The current state of the law in Vermont, applying our constitution (not federal law), is that public schools cannot pay tuition to parochial schools."); *id.* at PI015. "Our federal system prizes state experimentation, but not state experimentation in the suppression of free speech, and the same goes for the free exercise of religion."

Espinoza, 140 S. Ct. at 2260 (quotation omitted). Whatever the Compelled Support Clause means, it must give way to the First Amendment's Free Exercise Clause. U.S. Const. art. VI ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The Supremacy "'Clause creates a rule of decision' directing state courts that they 'must not give effect to state laws that conflict with federal law[ ].'" *Espinoza*, 140 S. Ct. at 2262 (quoting *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324 (2015)).

III. The Balance of Hardships Strongly Favors Plaintiffs.

Plaintiffs suffer greatly from their exclusion from town tuition. Defendants' discrimination hampers Plaintiffs' religious exercise. Right now, C.R. is missing out on an educational experience she will never get back. Rainville Decl. at ¶ 20. Without relief from this Court, E.R. will soon have to leave Rice. Ross Decl. at ¶ 29. Juliane Foley will continue to miss out on important time with her children. Foley Decl. at ¶ 13. Daniel Foley will continue to sacrifice business opportunities to help the family balance. *Id.* ¶ 14. The Hesters will continue to suffer burdens that their neighbors do not, just because they dare to exercise their faith and send their daughter to Catholic school. Hester Decl. at ¶¶ 21–22. Rice will continue to lose potential students from sending towns, so the Diocese will continue to lose invaluable ministry opportunities. Lorenz Decl. at ¶¶ 13, 17–18. And it will have to make sacrifices in other ministries to help provide tuition assistance to students and their families. *Id.* ¶ 24. Every day, Plaintiffs lose out on opportunities that they can never get back. Every day, they continue to suffer discrimination because they exercise their religion.

Defendants, on the other hand, will suffer nothing from following the Free Exercise Clause's commands. They have no legitimate interest in perpetuating an unconstitutional, discriminatory town tuition regime. Defendants have a legal

obligation to provide a publicly funded education to their students. 16 V.S.A. § 822. Rather than suffer any burden, Defendant sending towns will actually save thousands of dollars for each student who chooses to attend Rice instead of a competing school. *See* Ex. D (Rice's tuition rate is $11,600, while the sending towns regularly pay more than $15,000 for their students). And an injunction will not impose any administrative burden on Defendants because they can just treat Rice the same as other private schools and its families the same as their neighbors.

IV. The Public Interest Supports Enjoining Defendants' Discrimination.

Given Defendants' discrimination and Plaintiffs' circumscribed rights, an injunction supports the public interest. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). But enforcing "an unconstitutional law" always clashes with "the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). See *also Soos v. Cuomo*, No. 120CV651GLSDJS, 2020 WL 3488742, at *12 (N.D.N.Y. June 26, 2020) ("treatment of similarly situated entities in comparable ways serves public . . . interests at the same time it preserves bedrock free-exercise guarantees.") (citation omitted).

CONCLUSION

Defendants are excluding Plaintiffs from a neutral public benefit. This Court should enter an injunction preventing Defendants from discriminating against Plaintiffs because Rice is religious.

Respectfully submitted this 25th day of November, 2020.

s/ Thomas E. McCormick

Thomas E. McCormick
(VT Bar No. 837)
McCormick, Fitzpatrick, Kasper & Burchard, P.C.
40 George Street
Burlington, VT 05402
Telephone: (802) 863-3494
Fax: (802) 865-9747
Email: tem@mc-fitz.com

Paul Daniel Schmitt*
(IN Bar No. 34765-49)
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393-8690
Fax: (202) 393-3622
Email: PSchmitt@ADFlegal.org

Ryan J. Tucker*
(AZ Bar No. 034382)
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Fax: (480) 444-0028
Email: RTucker@ADFlegal.org

David A. Cortman
(GA Bar No. 188810)
Alliance Defending Freedom
1000 Hurricane Shoals Road NE
Suite D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
Fax: (700) 339-6744
Email: DCortman@ADFlegal.org

* *Admitted Pro Hac Vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

Jon T. Alexander
Office of the Vermont Attorney General
Civil Division
109 State Street
Montpelier, VT 05609-1001
Email: jon.alexander@vermont.gov

Rachel E. Smith
Vermont Attorney General's Office
Agency of Education
1 National Life Drive, Davis 5
Montpelier, VT 05602
Email: rachel.e.smith@vermont.gov

William F. Ellis
McNeil, Leddy & Sheahan, P.C.
271 South Union Street
Burlington, VT 05401
Email: wellis@mcneilvt.com

Dated this 25th day of November, 2020, by:

s/ Thomas E. McCormick
Thomas E. McCormick (VT Bar No. 837)
MCCORMICK, FITZPATRICK, KASPER & BURCHARD, P.C.
40 George Street
Burlington, VT 05402
Telephone: (802) 863-3494
Fax: (802) 865-9747
Email: tem@mc-fitz.com

Counsel for Plaintiffs