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.

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.

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

"The Supreme Court has made clear that the prevailing practice in Vermont—maintaining a policy of excluding religious schools from the [Town Tuition Program]—is unconstitutional." *In re A.H.*, 999 F.3d 98, 103 (2d Cir. 2021). "Four years ago, the Supreme Court reminded states that it 'has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.'" *Id. at* 100 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017)). And just last year, the U.S. Supreme Court repeated 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).

Defendants disqualified four Catholic families from a public benefit that their neighbors enjoy simply because they send their daughters to a religious school. Despite the U.S. Supreme Court's clear reminders, the school districts and Vermont refused to relent until this Court and the Court of Appeals intervened. And even now, Defendants are reserving the right to resume their discrimination. Plaintiffs are entitled to judgment as a matter of law because Defendants violated their clearly established rights.

LEGAL STANDARD

Summary judgment is appropriate because "there are no genuine issues of material fact in dispute" and Plaintiffs are "entitled to judgment as a matter of law." *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016).

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 discriminates against Plaintiffs and other

Vermont families because their schools are religious. Plaintiffs are entitled to judgment as a matter of law because Defendants' discrimination violates their religious free exercise, free speech, and equal protection rights.

I. Defendants' Discrimination Violates Plaintiffs' Free Exercise Rights.

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 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.").

And here, Defendants violate Plaintiffs' free exercise rights in two ways. First, Defendants regularly denied tuition benefits to children and their families just because they chose religious schools, even after the Supreme Court's *Trinity Lutheran* and *Espinoza* decisions. Second, Vermont's nebulous "adequate safeguards" requirement violates the Free Exercise Clause because it is neither neutral nor generally applicable, and it excludes religious schools and their students from the program.

A. Defendants deny benefits to Plaintiffs because they are religious.

Defendant school boards denied town tuition funds in each case because Rice is religious. *See* ECF 21-3, Ex. A (denial emails based on religion). Following years of State guidance, they "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 (cleaned up, *quoting Trinity Lutheran*, 137 S. Ct. at 2023). These denials also "put families to a choice between sending their children to a religious school or receiving such benefits." *Id.* (cleaned up). Families whose children attend religious schools "are members 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) (cleaned up).

In *Trinity Lutheran*, the Supreme Court held that Missouri could not rely on its state constitution to deny a religious school access to a playground resurfacing program just because the school was religious. 137 S. Ct. at 2025. In *Espinoza*, the Court similarly held that Montana could not rely on the state constitution's "no aid" provision to exclude some families from a state program providing scholarships for children to attend private schools just because their families chose to use the scholarships at religious schools that "teach[ ] the same Christian values that [they] teach at home." 140 S. Ct. at 2252–55, 2262–63.

In both cases, the Court explained that the Free Exercise Clause trumped the state constitutional provision. *Espinoza*, 140 S. Ct. at 2262 ("Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have 'disregarded' the no-aid provision and decided this case 'conformably to the Constitution' of the United States.") (cleaned up). *See also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1253 (10th Cir. 2008) (concluding U.S. Constitution commanded that Colorado may not "choose to exclude pervasively sectarian institutions, as defined by Colorado law"). The same result is required here because "the Free Exercise Clause of the U.S. Constitution" does not "provide[ ] less protection against religious discrimination in Vermont than it does in Montana." *In re A.H.*, 999 F.3d at 107 n.7. Defendants cannot rely on the Vermont Constitution to exclude the families and the Diocese from their Program. U.S. Const. art. VI cl. 2.

B. The "Adequate Safeguards" Requirement is Unconstitutional.

"Government fails to act neutrally when it proceeds in a manner intolerant of

religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021). In *Chittenden Town School District v. Department of Education*, the Vermont Supreme Court held that school districts could not fund tuition to religious private schools unless they implemented "adequate safeguards" that prevented schools from putting tuition toward religious education. 738 A.2d 539, 541–42, 563 (1999). But the adequate safeguards requirement is unconstitutional for five reasons. First, it puts Plaintiffs to a choice between exercising their faith and receiving a public benefit. Second, it discriminates based on religion. Third, it's rooted in an abandoned, discriminatory doctrine. Fourth, the requirement is not generally applicable. Fifth, it targets religious schools and families for worse treatment than their peers. Any application of the adequate safeguards requirement would violate the Constitution.

1. The adequate safeguards requirement unconstitutionally forces families and schools to choose between a benefit and their faith.

The Supreme Court has explained "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). That's because "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Id.* (citation omitted). Vermont cannot enforce the adequate safeguards requirement because "the provision puts families to a choice between sending their children to a religious school or receiving such benefits." *Espinoza*, 140 S. Ct. at 2257.

But the adequate safeguards requirement does just that. In this case, three separate school districts refused to award families their tuition benefit because they chose to send their daughters to a religious school. ECF 21-3, Ex. A (denial emails);

ECF 21-4, Ex. B (Board meeting minutes reflecting denials). The districts would not pay tuition to Rice because it chooses to exercise and express its faith in teaching its students. *Id*. And because of Defendants' commitment to the adequate safeguards, two families are able to participate only because the U.S. Court of Appeals intervened on their behalf. *In re A.H.*, 999 F.3d at 106 ("C.R. and E.R.[ ] cannot afford to attend Rice without access to [Program] funding.").

2. Requiring adequate safeguards necessarily discriminates based on religion.

In *Espinoza*, government officials sought to justify their discriminatory denials with an interest in preventing the "religious use" of benefits. 140 S. Ct. at 2256. But the Court rejected that argument because "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." *Espinoza*, 140 S. Ct. at 2256. The same is true here.

Defendants apply the "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 send their children to those schools. The adequate safeguards requirement only applies to religious schools because it restricts activities that only religious schools provide: faith-based education.[1] Because the Vermont Supreme Court's *Chittenden* opinion determined that religious education is indistinguishable from religious worship, 738 A.2d at 562, the adequate safeguards requirement is a *de*

[1] "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 bars 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.'").

facto religious-based discrimination that excludes a particular kind of school, and no others. *See A.H. by & through Hester v. French*, 985 F.3d 165, 180–81 (2d Cir. 2021) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535–36 (1993)) ("Because 'the effect of [the] law in its real operation' burdens only religious school students in Sending Districts and no others, we cannot conclude that the [adequate safeguards are] religion-neutral.").

3. The adequate safeguards are based in a discriminatory, abandoned doctrine.

The adequate safeguards are born of a discriminatory legacy that should be finally buried: exclusions of "sectarian" schools from neutral programs. *See Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion). In establishing the adequate safeguards requirement, the Vermont Supreme Court concluded "the Vermont Constitution renders unconstitutional the Chittenden Town School District tuition-payment policy to the extent that it authorizes tuition reimbursement to sectarian schools without appropriate restrictions." *Chittenden*, 738 A.2d at 563–64. In the wake of this decision, the Agency, Defendant French, and countless other government officials employed tests to prevent "pervasively sectarian" schools from participating. *In re A.H.*, 999 F.3d at 103; ECF 21-10, Ex. H at PI134, PI136.

In *Mitchell*, the Supreme Court explained that its doctrines barred "the exclusion of pervasively sectarian schools from otherwise permissible aid programs." 530 U.S. at 829. That's partially because laws aimed at excluding sectarian schools and institutions discriminated against Catholics: "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Espinoza*, 140 S. Ct. at 2259 (Alito, J., concurring) (quoting *Mitchell*, 530 U.S. at 828). And in this case, the school defendants say that "given the sectarian nature of Rice's curriculum," "it is not possible to safeguard against the use of [tuition] funds" to comply with the Vermont Constitution. ECF 28 at 7. The adequate safeguards requirement is a mere remnant of bans on sectarian

schools. "This doctrine, born of bigotry, should be buried now." *Mitchell*, 530 U.S. at 829.

4. The Program and its safeguards are not generally applicable.

Recently in *Fulton*, the Supreme Court held that Philadelphia violated Catholic Social Services' Free Exercise rights when they refused to provide the adoption agency with an exemption from the City's nondiscrimination provision, especially where the law provided a formal mechanism for individualized exemptions. 141 S. Ct. at 1874.

"A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* at 1877 (cleaned up). This occurs where government officials make eligibility determinations based on a system of individualized assessments that allows officials make "ad hoc discretionary decisions." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004).; *Lukumi*, 508 U.S. at 537. *See also Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990) (explaining situations that require "individualized governmental assessment of the reasons for the relevant conduct" are not generally applicable).

The Town Tuition Program provides school districts with the capacity to choose which schools they will fund. 16 V.S.A. § 822. The Statute's language includes a formal system of exceptions. It even allows school districts to both maintain a public high school and tuition students if it is in their best interest. 16 V.S.A. § 822(c)(1). Assessing a child's best interest necessarily requires an individualized assessment. And the adequate safeguards require government officials to look into the religious practices of Catholic schools and single out religious conduct for disqualification of benefits, as Defendants have done here. *See* ECF 33-1 (asking Court to take judicial

notice of Rice's website); ECF 37 (State looking at Rice's curriculum to argue against injunctive relief).

The record shows that school officials—including Defendant French—look at schools' religiosity to determine their eligibility. *See* ECF 21-10, Ex. H at PI134 (AOE emails with then-Superintendent French applying the pervasively sectarian test); *see* ECF 21-3, Ex A (instructing local governments to assess religious content and reduce benefit). Even after this suit was filed, Defendant Tager wrote to other Rice families about their tuition requests and explained that the district could not grant the requests because Rice conducts daily Mass, because it has religious classes, and because the school's religious mission is "weaved into every aspect of life at" Rice. Ex. K at 5, 10; *see also id*. at 10 (Franklin West Supervisory Union certification document asking for a percentage of school's programming that is religious). Other districts have followed suit. *See* Ex. O (another district's form requesting same information). And Defendant French has argued that some schools have paid tuition to religious schools—so long as they did not do religious things. ECF 29 at 3, 15. These mixed results show that the adequate safeguards requirement is not generally applicable because it involves a system of individualized assessments. *Lukumi*, 508 U.S. at 537. It therefore faces "the strictest scrutiny." *Fulton*, 141 S. Ct. at 1881.

5. Enforcing adequate safeguards targets religious exercise.

The *Chittenden* interpretation of Vermont's Compelled Support Clause requires government officials to single out religious private high schools and their students for worse treatment than other schools.[2] In *Lukumi*, the Supreme Court explained "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral" and therefore "it is invalid unless

[2] The Clause provides: "no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Vt. Const. ch. I, art. III.

it is justified by a compelling interest and is narrowly tailored to advance that interest." 508 U.S. at 533 (emphasis added). It's not enough that a law or practice appears facially neutral because the Free Exercise Clause "extends beyond facial discrimination" and even "forbids subtle departures from neutrality." *Lukumi*, 508 U.S. at 534. Said plainly, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.*

To determine whether a law is neutral, this "Court must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders." *Lukumi*, 508 U.S. at 534 (citation omitted). The adequate safeguards only exist to "prevent the use of public money to fund religious education." *Chittenden*, 738 A.2d at 562. Because the Compelled Support Clause's adequate safeguards requirement explicitly target religious conduct for distinctive treatment it is subject to strict scrutiny.

6. Any application of the "adequate safeguards" requirement violates the Free Exercise Clause.

"[I]n the two decades since the Vermont Supreme Court's decision, neither the school districts nor Vermont's Agency of Education had ever developed any alternative criteria for TTP eligibility." *In re A.H.*, 999 F.3d at 101. "Vermont's Agency of Education . . . provides guidance regarding how the school districts should discharge their responsibilities under the TTP." *Id.* at 102. And following direction from Defendant French's Agency, school districts routinely denied funding requests from religious schools just because they were religious. ECF 21-10, Ex. H (Agency emails directing exclusion of religious schools); ECF 21-3, Ex. A (denying plaintiffs because Rice is religious); ECF 21-4, Ex. B (same); ECF 21-5, Ex. C (denying tuition request after checking with French's legal team); Ex. N (denying request after

Espinoza and at Agency's Deputy Secretary's instruction). *See also* Ex. J (French's guidance).[3]

Now some Vermont school districts, following Defendant French's direction, are asking private schools to certify that they won't use tuition for religious purposes. Ex. K (Franklin West certification asking for percent of religious activity); Exs. N, O (other districts doing the same); *see also* Ex. M (school defendants reserving right to do so when injunction lapses). Of course, that certification is relevant only to religious schools and is therefore not facially neutral. And the First Amendment bars even "subtle" departures from neutrality and "governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534; *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Other school districts, following Defendant French's lead, are requiring religious schools to estimate how much religion is in their program, so that they can proportionately reduce the families' tuition benefit. *See* Exs. N, O (tuition certifications asking for religious activity percentage); Ex. J (Agency's safeguards advising school districts to "pay tuition according to the provisions of [Vermont Statutes] minus the dollar amount of tuition indicated by a school's certification, to the extent applicable."). And the School Defendants intend to reduce Plaintiffs' benefits in such a way, consistent with French's adequate safeguards guidance. *See* Ex. K at 5, 8–10, 13.

---

[3] After this suit was filed, Defendant French claimed that his agency is not involved in Program eligibility determinations. *See*, *e.g.*, ECF 29 at 1–2. Despite that claim, "[o]n January 14," (after this Court's January 7 preliminary injunction opinion) "for the first time in over twenty years, the AOE issued guidance to school districts regarding how to fashion and implement adequate safeguards." *In re A.H.*, 999 F.3d at 104. *See* Ex. J (Agency of Education's "non-mandatory guidance"). Perhaps realizing the inconsistency, French later rescinded the guidance. *See* Ex L. French's letter to school superintendents made clear that it was only for litigation, and that he would publish guidance once litigation is resolved. *See* Ex. L at 3.

But religious families are entitled to "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Espinoza*, 140 S. Ct. at 2255 (citation omitted); *see also Trinity Lutheran*, 137 S. Ct. at 2021 (laws that "impose special disabilities" because schools are religious violate the Free Exercise Clause). And when "the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral," and thus "it is invalid." *Lukumi*, 508 U.S. at 533.

The school Defendants here are reserving the right to discriminate against Plaintiffs and other students once they are out from under this Court's preliminary injunction. *See* Ex. M (email from Defendants' counsel stating intent to implement restrictions after injunction ends). These actions brazenly violate the Free Exercise Clause and Plaintiffs are entitled to a permanent injunction preventing future harm.

II. Defendants Violates the Diocese's Free Speech Rights.

Excluding some schools from the Program because their curriculum includes religious content violates those schools' free speech rights too. "The First Amendment . . . prohibits laws that abridge the freedom of speech." *Nat'l Inst. of Fam. & Life Advocs.* ("*NIFLA*") *v. Becerra*, 138 S. Ct. 2361, 2371 (2018). It protects speech "without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 444–45 (1963).

And here, the government cannot condition the Diocese's receipt of a public benefit on its abandoning religious speech. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). Defendants recognize Rice as an approved independent school, which means Rice meets all the requirements to participate in

the Program. ECF 24, School Defs.' Answer ¶ 218; ECF 21-8, Ex. F at PI097; 16 V.S.A. § 822. But because Rice transmits the Diocese's religious speech, Defendants unconstitutionally punish the school.

A. Defendants impose an unconstitutional condition on the receipt of the town tuition benefit.

"[T]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("*AOSI*") (cleaned up). "[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828–29.

In *Rosenberger*, the University of Virginia created a program that allowed student organizations to receive funding paid to contractors for the organization's printing expenses, but the University refused to fund printing for a student organization's newspaper that had a Christian editorial view. *Id.* at 822–27. The University's policy "withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" *Id.* at 822–23. And the University justified its anti-religious discrimination by saying the Establishment Clause required it. *Id.* at 837.

The Supreme Court rejected these arguments, concluding that "the separate Clauses of the First Amendment" command the State to act with "neutrality." *Rosenberger*, 515 U.S. at 845. The Court explained that in a neutral benefit program, it is an "error" to "focus[ ] on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient." *Rosenberger*, 515 U.S. at 843. "If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral

program, used by a group for sectarian purposes, then [long-standing precedent] would have to be overruled." *Id.*[4]

Defendants here violated the Diocese's free speech rights by imposing an unconstitutional condition on the receipt of the town tuition benefit. Religious schools must give up their right to express their religious beliefs in order to participate in the Program. *See* Exs. K, N & O (asking for percent of religious instruction); Ex. J (French advising districts to reduce benefit based on the percentage of religious content in schools' curriculum). The First Amendment does not allow Defendants to make the Diocese choose between its religious speech or a public benefit. *AOSI*, 570 U.S. at 214.

B. The adequate safeguards requirement is an unconstitutional content and viewpoint-based restriction on speech.

Courts "distinguish between content-based and content-neutral regulations of speech." *NIFLA*, 138 S. Ct. at 2371. "Content-based regulations 'target speech based on its communicative content.'" *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163.

Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 155. "This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *NIFLA*, 138 S. Ct. at 2371 (quotations omitted). "[A] speech regulation targeted at specific subject matter is

[4] No Establishment concerns exist in neutral programs where, as here, the government is not the speaker. *See Lamb's Chapel*, 508 U.S. 384 (religious group entitled to equal access to government facilities, even for religious worship services); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same for university's facilities); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 240 (1990) (same for high school student group).

content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 576 U.S. at 169.

Worse than content-based restrictions are viewpoint-based restrictions. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. "Viewpoint discrimination is . . . an egregious form of content discrimination." *Id.* "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

Here, the Program's restrictions on funding "religious education" are like the viewpoint-based discrimination struck down in *Rosenberger*. Because "the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief," the Supreme Court explained it demonstrated viewpoint discrimination. *Id.* at 845. The Court cautioned that allowing the University to proceed with its policy of denying benefits to religious speech "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845–46.

Defendants aim to follow the same unconstitutional course of action. They even scour Rice's website to scrutinize the content of its courses—that is, the Diocese's speech. *See* ECF 37 (surveying religious content in Rice's curriculum); ECF 33-1 (reviewing Rice's website to discern school's sectarian nature); Ex. J (instructing districts to reduce benefits by percent of religious content); Exs. K, N & O (tuition certification requesting religious percentage).

Because the Town Tuition Program is a neutral benefit program where parents choose the ultimate destination for tuition funds, it is inappropriate for government officials to attempt to control the speech of the ultimate recipient. *AOSI*, 570 U.S. at

214. "In enforcing the prohibition against laws respecting establishment of religion, we must be sure that we do not inadvertently prohibit the government from extending its general state law benefits to all its citizens without regard to their religious belief." *Rosenberger*, 515 U.S. at 839 (cleaned up). The First Amendment's "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.*

C. The adequate safeguards requirement gives unbridled discretion to local government officials.

The Program's adequate safeguards requirement violates the First Amendment for another reason. Laws violate the Constitution when they provide government officials with unbridled discretion. *See Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 103 (2d Cir. 2007). The Constitution proscribes "granting unbridled discretion" to government officials "because it allows [them] to suppress viewpoints in surreptitious ways that are difficult to detect." *Id.*

To pass constitutional muster, the law restricting speech must provide "adequate standards to guide the official's decision." *Id.* (quoting *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 176 (2d Cir. 2006)). The standards don't have to be perfectly clear or precise, but "a law subjecting speech to a prior restraint must, as a prophylactic matter, contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (fee for holding an assembly or parade was based on content of an applicant's speech because an administrator must examine the content of the message conveyed)).

Vermont's Town Tuition Program and its adequate safeguards requirement only regulate the religious "ideology" or "perspective" of speakers. *Rosenberger*, 515 U.S. at 829. And the law gives local officials unbridled discretion to make ad hoc

enforcement decisions, in violation of the First Amendment. 16 V.S.A. §§ 822, 828. The undefined adequate safeguards require government officials to evaluate the content of schools' speech, and to exclude religious content and viewpoints from the program. *See* Ex. J (French encouraging districts to deduct benefits for religious content); Exs. K N & O (districts following suit). And the lines between which speech is "too religious," "religious," or "not religious" are not clear—making the adequate safeguards requirement ripe for abuse by officials who could suppress viewpoints that they do not like. *See Amidon*, 508 F.3d at 104 ("we fail to see how viewpoint-discriminatory referenda can be saved by a nonexclusive set of 'safeguards,' some of which are so indefinite as to be meaningless and thus incapable of providing guidance to [ ] decision makers.").

III. Treating Religious Schools and Their Students Worse Than Secular Schools Violates Equal Protection.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. But "the general rule gives way" when laws classify by suspect classes or "when state laws impinge on personal rights protected by the Constitution." *Id. See Oyler v. Boles*, 368 U.S. 448, 456 (1962) (religion an "unjustifiable standard" in enforcement of laws under Equal Protection Clause); *see also Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (Supreme Court explaining that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right.").

By treating religious schools and their students worse than secular schools and their students, Defendants violated Plaintiffs' right to equal protection. They are treated differently simply because they are religious. ECF 21-3, Ex. A. But this differential treatment must face strict scrutiny—a burden Defendants cannot satisfy. *Cleburne*, 473 U.S. at 440.

Second, the adequate safeguards requirement creates a system of ad hoc enforcements that gives government officials unbridled discretion. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (plaintiff alleging it has been treated differently from others can bring equal protection claim). *See also Espinoza*, 140 S. Ct. at 2260 ("The protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests.").

Vermont's Program and its "adequate safeguards" requirement puts funding determinations in the hands of local government officials who apparently choose whether to fund schools based on how religious that official perceives them to be. Ex. H (Agency advising against paying tuition to "sectarian" schools).[5] These ad hoc enforcements violate the Plaintiffs' equal protection rights.

IV. Defendants Discrimination Cannot Satisfy Strict Scrutiny.

Because Defendants violated Plaintiffs' free exercise and equal protection

[5] Defendant French has pointed out repeatedly that—in less than one-tenth of 1% of circumstances—some school districts have paid tuition requests to some religious schools. *See*, *e.g.*, ECF 29 at 3, 15; *see also* ECF 21-7, Ex. E at PI070 (outlining instances of funding). But most school districts, like Defendants here, follow "the prevailing practice in Vermont" and "maintain[ ] a policy of excluding religious schools from the TTP." *In re A.H.*, 999 F.3d at 103. Simply put, tuition requests to religious schools are routinely denied. ECF 21-3, Ex. A (School Defendants' emails denying plaintiff families' requests); ECF 21-4, Ex. B (school board meeting minutes); ECF 21-5, Ex. C (emails denying family's tuition request for another Diocesan school); Ex. H (Agency emails advising ban on funding to religious schools); Ex. N (Agency's Deputy Secretary orally advised denial because *Espinoza* did not apply to Vermont.).

rights, and free speech rights, their denials must satisfy strict scrutiny. *See Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021) ("[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.'"). Only a "state interest of the highest order" can justify Defendants' discriminatory policy. *Trinity Lutheran*, 137 S. Ct. at 2024 (cleaned up). Defendants cannot meet this burden because they do not have a compelling interest in excluding the religious schools and their students from the Program. And they have not pursued their goals in the least restrictive means.

Vermont's interest in enforcing its Compelled Support Clause cannot justify infringing on federal constitutional rights. "[A] state cannot justify discrimination against religious schools and students by invoking an 'interest in separating church and State more fiercely than the Federal Constitution.'" *In re. A.H.*, 999 F.3d at 100 (quoting *Espinoza*, 140 S. Ct. at 2256, 2260). That's because "'the 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 In re A.H.*, 999 F.3d at 111 (Menashi, J., concurring).

In *Chittenden*, the Vermont Supreme Court rebuffed Free Exercise arguments by focusing on the Vermont Constitution's own non-establishment provision, the Compelled Support Clause. 738 A.2d at 541, 563 (explaining that even if "unfettered parental choice" eliminates First Amendment Establishment Clause concerns, they "cannot conclude . . . that parental choice has the same effect with respect to [the Compelled Support Clause]."); *see also* Vt. Const. ch. I., art. 3.

Thus, the Vermont Supreme Court elevated the "choice of those who are being required to support the religious education" over "the choice of the beneficiaries of the

funding." *Chittenden*, 738 A.2d at 563. The United States Constitution forbids this arrangement because 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 (cleaned up); *see also* U.S. Const. art. VI, cl. 2.

But that's exactly what Defendants did here. *See* ECF 21-3, 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. The Defendants' "desire[s] must give way to" Plaintiffs' "rights under the First Amendment to the U.S. Constitution." *In re A.H.*, 999 F.3d at 108.

And because *Trinity Lutheran* and *Espinoza* sunk Defendants' discriminatory regime, they cannot reach for *Locke v. Davey* as a lifesaver. *See* 540 U.S. 712, 723 (2004). In *Locke*, the Supreme Court allowed Washington to prohibit the use of a scholarship "to prepare for the ministry." *Espinoza*, 140 S. Ct. at 2257. This was justified by "a 'historic and substantial' state interest in not funding the training of clergy." *Espinoza*, 140 S. Ct. at 2257 (citation omitted).

"But no comparable 'historic and substantial' tradition supports [Vermont]'s decision to disqualify religious schools from government aid." *Espinoza*, 140 S. Ct. at 2258. "In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones. 'Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy.'" *Id.* (citing R. Gabel, Public Funds for Church and Private Schools (1937)).

The same is true in Vermont, whose publicly funded private schools long included religious instruction. *See* R. Gabel, Public Funds for Church and Private Schools 192 (1937) ("It was natural for the settlers of Vermont . . . to associate the church with the school and to provide for religious education. . . . Religious instruction

was imparted in the academies, whether under purely private or denominational management and was no obstacle to such public aid as was granted.").[6] Whether *Chittenden*'s revisionist history calls education "worship" or not, the U.S. Supreme Court has rejected this as a compelling interest: "it is clear that there is no "historic and substantial" tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*." *Espinoza*, 140 S. Ct. at 2259. "The Supreme Court's decision in *Espinoza* applies to all states." *In re A.H.*, 999 F.3d at 107 n.7. (rejecting French's argument that Vermont has a historical interest in excluding religious schools from the Program). *See also id.* at 112, n.6 (Menashi, J., concurring) (explaining more reasons supporting writ of mandamus).

Carson v. Makin lends no support to Defendants either. 979 F.3d 21, 43 (1st Cir. 2020).[7] It hinges on reasoning that's not applicable in this case. In *Carson*, the First Circuit concluded that Maine could require "public educational instruction to be nonsectarian for reasons that reflect no hostility to religion." *Id.* at 43. Maine's program requires participating private schools to provide a secular education and its statute requires that participating schools "must be 'a nonsectarian school' . . . to qualify as 'approved' to receive tuition assistance payments." *Id.* at 25 (citing Me. Stat. tit. 20-A, § 2951(2)). The First Circuit reasoned that the government is effectively contracting with private schools for services. *Id.* at 25.

But that's not true in Vermont's Program, where the law only requires participating schools to be approved independent schools. 16 V.S.A. § 822. "[N]othing

---

[6] *See also* Ex. P, R. Gabel at 330–31 (in the mid-19th century religion still influenced Vermont's local public schools and private school teachers still benefitted from public funds.). *Id.* at 574 n.13 (in 1868, "State Supt. Rankin was greatly concerned . . . over the disuse of the Bible even in schools with only Protestant children. He wanted compulsory Bible reading, and 'moral and religious instruction.'").

[7] The Supreme Court recently granted *certiorari* in that case. *See Carson v. Makin*, No. 20-1088, 2021 WL 2742783 (Mem) (U.S. July 2, 2021).

in the legislation establishing the Town Tuition Program prohibits Sending Districts from paying tuition to religious schools." *In re A.H.*, 999 F.3d at 102 (quoting *A.H. by & through Hester v. French*, 985 F.3d 165, 172 (2d Cir. 2021)). Vermont's Program does not contract with private schools to provide a secular education. *Rosenberger*, 515 U.S. at 833 (distinguishing funding programs where the government enlists private organizations to communicate its own message). Defendants admit that Rice is recognized by the State of Vermont as an approved independent school. ECF 24, School Defs.' Answer ¶ 218. Rice therefore meets all the program requirements, and only Rice's religious character and activities cause its exclusion from the program. *See* ECF 21-3, Ex. A; ECF 21-4, Ex. B (Defendants denying Rice tuition requests because it is religious.).

In the end, this case is simple. Vermont's adequate safeguards requirement is not religion-neutral or generally applicable. The object of the law is to restrict benefit recipients' use of a benefit so that they do not fund religious behavior that Vermont considers religious "worship." *Chittenden*, 738 A.2d at 562. *See Lukumi*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral" and therefore "it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."). The U.S. Supreme Court has rejected the same state anti-establishment interest that Vermont asserts—at least three times. *See Widmar*, 454 U.S. at 276 (University's asserted interest 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 (same); *Espinoza*, 140 S. Ct. at 2260 (same for Montana). Vermont does not have "a greater interest in refusing to fund religious education than Montana does." *In re A.H.*, 999 F.3d at 107 n.7.

Lastly, Defendants did not pursue their interest in the least restrictive

means—they outright denied Plaintiffs' access to the Program. ECF 21-3, Ex. A; ECF 21-4, Ex. B.

CONCLUSION

Defendants excluded Plaintiffs from a neutral public benefit just because Rice is religious. The families and the Diocese are entitled to judgment as a matter of law. This Court should grant their motion, award judgment in their favor, and provide the relief requested in Plaintiffs' complaint along with any relief the Court deems fit.

Respectfully submitted this 21st day of September, 2021.

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 September 21, 2021, 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 21st day of September, 2021, 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