UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Introduction 1

Summary of Facts 2

A. The Board of Education refuses to approve Mid Vermont Christian because the School does not comply with Rule 2226.6. 2

B. The State tells Mid Vermont Christian it is a recognized school, and then reverses course after getting sued. 3

C. The VPA expels Mid Vermont Christian for adhering to its religious beliefs. 4

Argument 4

I. An injunction against the State is needed to prevent the unconstitutional enforcement of Rule 2226.6. 4

A. Plaintiffs have standing because Rule 2226.6 proscribes and credibly threatens their religious exercise and speech. 4

B. Sovereign immunity does not apply because enforcement of Rule 2226.6 violates the School's and Families' constitutional rights. 10

C. Plaintiffs will face irreparable harm absent injunctive relief. 11

II. An injunction against the VPA is needed to stop its ongoing religious discrimination. 12

A. Neither res judicata nor collateral estoppel bar Plaintiffs' claims. 12

B. Abstention does not apply because there is no ongoing state proceeding. 14

C. Plaintiffs are likely to succeed on the merits against the VPA. 15

III. Plaintiffs seek prohibitory injunctions that would protect the School and its families during this case and would benefit the public interest. 19

Conclusion 20

TABLE OF AUTHORITIES

Cases

303 Creative LLC v. Elenis, 600 U.S. 570 (2023) 19

A.H. v. French, 511 F. Supp. 3d 482 (D. Vt. 2021) 15

Agudath Israel of America v. Cuomo, 983 F.3d 620 (2d Cir. 2020) 12

Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023) 11

Braidwood Management, Inc. v. Equal Employment Opportunity Commission, 70 F.4th 914 (5th Cir. 2023) 8

Bray v. City of New York, 346 F. Supp. 2d 480 (S.D.N.Y. 2004) 12

Buttaro v. City of New York, No. 15 CV 5703, 2016 WL 4926179 (E.D.N.Y. Sept. 15, 2016) 14

Carson v. Makin, 596 U.S. 767 (2022) 16, 18, 19

Casler v. West Irondequoit School District, 563 F. Supp. 3d 60 (W.D.N.Y. 2021) 14

Cavanaugh v. Geballe, 28 F.4th 428 (2d Cir. 2022) 15

Choma v. Tucker, 443 F. Supp. 3d 545 (D. Vt. 2020) 13

City of Boerne v. Flores, 521 U.S. 507 (1997) 2

CSX Transportation, Inc. v. New York State Office of Real Property Services, 306 F.3d 87 (2d Cir. 2002) 10

Darren Patterson Christian Academy v. Roy, No. 1:23-cv-01557, 2023 WL 7270874 (D. Colo. Oct. 20, 2023) 6, 9, 10

DeSario v. Thomas, 139 F.3d 80 (2d Cir. 1998) 13

Doe v. Annucci, No. 14 Civ. 2953, 2015 WL 4393012 (S.D.N.Y. July 15, 2015) 11

Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998) 13

Elrod v. Burns, 427 U.S. 347 (1976) 11

F&H Architectural Design & Consulting, LLC v. Cafferelli, No. 3:23-CV-624(VLB), 2023 WL 4203684 (D. Conn. June 27, 2023) 12

Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) 18, 19

In re A.H., 999 F.3d 98 (2d Cir. 2021) 12, 20

In re Dairy Mart Convenience Stores, Inc., 411 F.3d 367 (2d Cir. 2005) 10

Kane v. De Blasio, 19 F.4th 152 (2d Cir. 2021) 12

*Kennedy v. Bremerton School Dist*rict, 597 U.S. 507 (2022) 17

Koontz v. St. Johns River Water Management District, 570 U.S. 595 (2013) 12

Kravitz v. Purcell, 87 F.4th 111 (2d Cir. 2023) 16

Kurowski v. City of Bridgeport, No. CIV. B-85-96, 1988 WL 25417 (D. Conn. Mar. 14, 1988), *aff'd*, 880 F.2d 1319 (2d Cir. 1989) 14

Levich v. Liberty Central School District, 361 F. Supp. 2d 151 (S.D.N.Y. 2004) 14

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 6

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. 617 (2018) 18

McDaniel v. Paty, 435 U.S. 618 (1978) 17

Montana v. United States, 440 U.S. 147 (1979) 13

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 11

North American Soccer League, LLC v. United States Soccer Federation, Inc., 883 F.3d 32 (2d Cir. 2018) 20

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004) 20

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) 15

Pappas v. Giuliani, 118 F. Supp. 2d 433 (S.D.N.Y. 2000), *aff'd,* 290 F.3d 143 (2d Cir. 2002) 14

Parents Defending Education v. Olentangy Local School District Board of Education, No. 2:23-CV-01595, 2023 WL 4848509 (S.D. Ohio July 28, 2023) 18

Picard v. Magliano, 42 F.4th 89 (2d Cir. 2022) 1, 5, 6, 8

Regeneron Pharms., Inc. v. HHS, 510 F. Supp. 3d 29 (S.D.N.Y. 2020) 12

Sacerdote v. Cammack Larhette Advisors, LLC, 939 F.3d 498 (2d Cir. 2019) 13

Slekis v. Thomas, 525 U.S. 1098 (1999) 13

Soule v. Connecticut Association of Schools, Inc., 90 F.4th 34 (2d Cir. 2023) 18

Sprint Communications, Inc. v. Jacobs, 571 U.S. 69 (2013) 15

Steffel v. Thompson, 415 U.S. 452 (1974) 5

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014) 5, 6, 8, 9

Talukder v. New York, No. 122CV01452RASDA, 2022 WL 20056291 (S.D.N.Y. Nov. 18, 2022) 12

Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981) 17

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 18

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017) 16, 17

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 13, 14

Vitagliano v. County of Westchester, 71 F.4th 130 (2d Cir. 2023), *cert. denied* No. 23-74, 2023 WL 8531888 (U.S. Dec. 11, 2023). 6, 8

Wiercinski v. Mangia 57, Inc., No. 09-CV-4413, 2010 WL 2681168 (E.D.N.Y. July 2, 2010) 14

Statutes

21 V.S.A. § 495(a)(1) 15

21 V.S.A. § 495b 17

9 V.S.A. § 4501(1) 14

9 V.S.A. § 4502(a) 15

9 V.S.A. § 4506 17

42 U.S.C. § 1983 ..... 20, 21, 22, 24

Regulations

7-1 Vt. Code R. § 3:2223.4 11

7-1 Vt. Code R. § 3:2226.6 ..... passim

7-1 Vt. Code R. § 3:2226.6(1) 14, 15

7-1 Vt. Code R. § 3:2226.6(2) 15

7-1 Vt. Code R. § 3:2226.8 19

7-1 Vt. Code R. § 3:2226.9 ..... 16, 19

INTRODUCTION

Vermont's Agency and Board of Education ("the State"[1]) have banned religious schools from their Town Tuitioning and Dual Enrollment Programs ("the Program") before; this is not the first time. After failing once, the State has concocted a new way to keep them out by demanding that private schools promise that they will not "discriminate" based on religion, sexual orientation, or gender identity in order to participate in the Program. Schools are even required to put pen to paper and "assure" the State of their compliance. But Mid Vermont Christian School employs only those who share and live out the School's faith, conditions student enrollment on at least one parent sharing the faith, and aligns its internal policies on its religious beliefs about sex. When the School told the State that its nondiscrimination rule conflicted with the above religious practices, the Agency recommended that the Board deny the School's application to participate unless the School "came into compliance." The School did not, and last summer the Agency told the School it would be unable to participate in the Program for the current school year. So Mid Vermont Christian sued.

Rather than trying to defend the constitutionality of its rule, the State opted for post-filing chicanery. Despite the State's prior clear statements to the contrary, it now claims that the Board never acted on the School's application, the School remains approved, and it cannot make a "final" decision until "late spring or early summer." But the State's equivocation does not resolve the controversy over whether Mid Vermont Christian must comply with the State's nondiscrimination rule to participate in the Program. The State continues to refuse to answer that question. *See* 01/11/24 Letter to Gallagher, attached as Exhibit 1. The School need not wait in potential perpetuity or "first expose [itself] to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced." *Picard v. Magliano*, 42 F.4th 89, 97 (2d Cir. 2022) (cleaned up and citation omitted). The Court should not postpone relief when the

[1] Because the School Districts admit that their funding decisions are derivative of the Agency of Education, ECF No. 27 at 4, Plaintiffs address both the School Districts' and State Defendants' arguments together and refer to both as "the State."

challenged rule applies right now, and Mid Vermont Christian could be punished at any time. The School seeks to ensure that the State cannot kick it out of the Program, again.

For its part, the Vermont Principals Association ("VPA") argues Mid Vermont Christian's claims are barred because the VPA already adjudicated them, and this Court is bound by its conclusions. That is a remarkable claim. This Court retains full authority to adjudicate the School's First Amendment injuries. Also like the State, the VPA hardly mentions the merits, virtually conceding it violated Mid Vermont Christian's rights. To the extent the VPA attempts to satisfy strict scrutiny, its generalized and speculative interests fall short of the "most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997).

There are no procedural or jurisdictional bars to this case. The Court should agree and issue a preliminary injunction to end Plaintiffs' ongoing and impending constitutional harm.

SUMMARY OF FACTS

A. The Board of Education refuses to approve Mid Vermont Christian because the School does not comply with Rule 2226.6.

Newly adopted Board of Education Rule 2226.6[2] requires schools to (a) adopt and post "statement[s] of nondiscrimination" "consistent with" the Vermont Public Accommodations and Fair Employment Practices Acts, and (b) sign an "assurance" verifying that the "school complies with the Vermont Public Accommodations Act in all aspects of the school's admissions and operations," as a condition to gaining approved independent status. 7-1 Vt. Code R. § 3:2226.6. This had never been required before. When Mid Vermont Christian applied to renew its status, the State required the School to sign the Rule 2226.6 "assurance." Instead, the School sought an exemption because compliance with Rule 2226.6 would come at the cost of sacrificing its religious practices. Declaration of Vicky Fogg ("Fogg Decl.") ¶¶ 45–47 (ECF No. 14-15).

The Agency says its "Independent School team recommended a five-year renewal" for the School. *See* State's Opposition to Motion for Preliminary Injunction at 5 (ECF No. 26)

[2] Plaintiffs' challenge and seek relief from the nondiscrimination rule regardless of its exact codification. For example, the Board's current proposed regulations reclassify it in § 2223.

("State's Opp."). But the Secretary of Education "makes [the] final recommendation regarding approval to the State Board," 7-1 Vt. Code R. § 3:2223.2, and "designate[s] a date for action by the Board," *id.* § 3:2223.4. The Secretary did both on February 1, 2023, advising the Board that it should only approve Mid Vermont Christian "subject to the condition that, by the March [2023] SBE meeting, the [School] come[s] into compliance with [Rule 2226.6]." French 02/01/23 Memo to BOE at 2 (ECF No. 14-3). But if the School "d[id] not provide such an assurance by the deadline, the State Board would make a finding that the condition has not been met, and the school would not be approved." *Id.* Mid Vermont Christian did not provide the assurance by the March meeting, so the Board "postponed consideration of re-approval until" it received an assurance "without revision." BOE 02/15/23 Minutes, attached as Exhibit 2.

B. The State tells Mid Vermont Christian it is a recognized school, and then reverses course after getting sued.

The Agency's recommendation and the Board's neglect was a denial. Five days after the Agency published its independent school directory, it sent the School an email asking it to complete a form "to seek recognized school status for the 2023-2024 school year." Agency 07/06/23 Email (ECF No. 14-6). Mid Vermont Christian completed that form "under protest" to ensure it would be able to remain open for the school year. Supplemental Declaration of Vicky Fogg ¶¶ 13–16 ("Fogg Suppl. Decl."); MVCS Recognized School Enrollment Form, attached as Exhibit 3. The School *again* reiterated that it "should be classified as an approved independent school." Ex. 3 at 5. Despite the School's objections, the Agency responded and confirmed the School's status as a "Recognized Independent School." Agency 08/03/23 Letter (ECF No. 1-6).

The Agency, faced with a lawsuit, now claims this was all "apparent[ ] confusion." State's Opp. at 7. But it had ample time to clear that up before this lawsuit. On October 4, 2023, both School Districts recouped tuition payments and asked the Agency "how to proceed" with future payments. *See* School District Emails (ECF Nos. 1-7, 1-8). The School waited for almost two months with no response. The deprivation of tuition funds has caused the School financial hardship and uncertainty; left with no other choice, the School sued. Fogg Suppl. Decl. ¶¶ 27–38.

Only *after* getting sued did the State purport to "clarify" Mid Vermont Christian's status. Bouchey Decl., Ex. B (ECF No. 26-4). In response, the School explained that its "status" was not the true underlying issue, but that Rule 2226.6 was. *See* Ex. 1. And so the School, *yet again*, asked the State to exempt it from Rule 2226.6. *Id.* at 2. True to form, the State never responded.

The Court should not credit the State's litigation tactics. The evidence clearly proves the State did not approve Mid Vermont Christian as an "Approved Independent School." Its new spin doesn't change that. Moreover, the current lawsuit asks this Court to rule that the State cannot apply Rule 2226.6 to the School. So the State's tactics do not change anything.

C. The VPA expels Mid Vermont Christian for adhering to its religious beliefs.

The VPA does not dispute the facts. It admits that it expelled Mid Vermont Christian from the association because the School declined to play against a girls' team with a biological male.[3] VPA's Opposition to Motion for Preliminary Injunction at 4–6 (ECF No. 30) ("VPA Opp."). It also concedes that Mid Vermont Christian must "assure" the VPA that it will comply with the VPA's gender identity policy as a condition to re-admittance. *Id.* at 5. Instead, the VPA disputes the legal impact of these facts, baldly asserting that "[t]his case is not about beliefs or the free exercise of religion." *Id.* at 3. But it is. The VPA doesn't get to decide what Mid Vermont Christian's religious beliefs are, or how the School puts those beliefs into practice.

ARGUMENT

I. An injunction against the State is needed to prevent the unconstitutional enforcement of Rule 2226.6.

A. Plaintiffs have standing because Rule 2226.6 proscribes and credibly threatens their religious exercise and speech.

The State contends that Mid Vermont Christian and the Slarves lack standing because it now claims that the School "retains its approved independent status" since the Board never took final action. State's Opp. at 6, 16–18. That's wrong twice over. First, it ignores the actual facts.

[3] The male athlete has injured at least two female players, including recently elbowing another girl in the head following a rebound. *See* Supplemental Declaration of Chris Goodwin, ¶¶ 4–5 ("Goodwin Suppl. Decl."); *see also* https://vimeo.com/915286290/f7a845a44e?share=copy.

Second, it ignores whether Mid Vermont Christian must comply with Rule 2226.6 to participate in the Program. To date, the School has twice asked to be exempted from Rule 2226.6. The State *refuses to answer that question.* If the State wishes to end this litigation, all it must do is exempt Mid Vermont Christian from Rule 2226.6 and state that it will not kick the School out of the Program for following its religious beliefs. It still refuses to do that.

Mid Vermont Christian's policies conflict with Rule 2226.6 as we speak, and the School must decide every day between compliance or its religious exercise, thus risking imminent injury in the form of burdensome investigations, exclusion from the Program (again), and denial of approved independent status. That suffices for injury in fact. The State does not get a pass from having to defend its unconstitutional provision in federal court by playing coy.

An Article III injury must be "concrete and particularized" and "actual or imminent." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158 (2014) ("SBA List") (citation omitted). The School already suffers this injury because it has been removed from the Program. And threatened future injury suffices if "there is a substantial risk that the harm will occur." *Id.* (cleaned up and citation omitted). So the School need not "first expose" itself to enforcement "to be entitled to challenge a statute that ... deters the exercise of [its] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *accord Picard*, 42 F.4th at 97. The State's post-filing seesawing aside, Mid Vermont Christian still satisfies the injury requirement because it intends to (a) "engage in a course of conduct arguably affected with a constitutional interest," (b) that conduct is "arguably proscribed" by Rule 2226.6, and (c) there is a credible threat of enforcement. *SBA List,* 573 U.S. at 159, 162.

Course of conduct affected with constitutional interests. No one disputes that Mid Vermont Christian intends to engage in conduct affected with constitutional interests. The School's religious beliefs require it to (a) separate restrooms, locker rooms, and athletic teams; (b) use pronouns according to; and (c) enforce a dress code based on biological sex. Fogg Decl. ¶ 20. The School also hires only those who fully adhere to its religious beliefs, and it requires one

parent of each student to share its faith. *Id.* ¶¶ 18–19. The School intends to continue its religious exercise and speech and is doing so right now. *Id*. ¶ 46.

Instead, the State argues that because the School has not chilled its constitutional rights, it somehow lacks standing. State's Opp. at 18–19. Of course, this assumes the Court buys the State's new concoction of the facts. Even so, a chill on constitutional activity is but one way to establish pre-enforcement standing. *E.g.*, *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 137–38 (2d Cir. 2023), *cert. denied* No. 23-74, 2023 WL 8531888 (U.S. Dec. 11, 2023). Chill has never been a *prerequisite*. Rather, Mid Vermont Christian "need only allege 'an intention to engage in a course of conduct.'" *Id*. (quoting *Picard*, 42 F.4th at 97). So the School has standing because it is *currently* violating Rule 2226.6. *See Darren Patterson Christian Acad. v. Roy*, No. 1:23-cv-01557, 2023 WL 7270874, at *5–6 (D. Colo. Oct. 20, 2023) (describing two types of pre-enforcement standing in a similar case). Both theories boil down to a credible threat. *Id.*

Arguably proscribed. Next, Mid Vermont Christian's intended conduct—enforcing its internal policies, hiring coreligionists, and requiring students' parents to agree with its beliefs—is "arguably proscribed" by Rule 2226.6. *SBA List*, 573 U.S. at 162. Mid Vermont Christian need not *prove* that its conduct is "in fact proscribed under the best interpretation of the statute or under the government's own interpretation," but only that the School's interpretation is "reasonable enough" that it "may legitimately fear that it will face enforcement of the statute." *Picard*, 42 F.4th at 98. And when a plaintiff is the "object of the action (or forgone action) at issue"—like the School is here—there is "ordinarily little question that the action or inaction has caused him injury." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561–62 (1992).

Rule 2226.6 prohibits the School's conduct three ways. First, it requires the School to adopt and post nondiscrimination statements—and thus act—consistent with Vermont's Public Accommodations Act. 7-1 Vt. Code R. § 3:2226.6(1). The Public Accommodation Act in turn prohibits "any school," 9 V.S.A. § 4501(1), from "deny[ing] to [a] person any of the accommodations, advantages, facilities, and privileges" of the school on account of "creed ...

marital status, sex, sexual orientation, or gender identity," *id.* § 4502(a). That at least *arguably* prohibits Mid Vermont Christian from enforcing its biological sex-based policies and requiring students' parents to share the School's religious beliefs as a condition of enrollment.

Second, Rule 2226.6 requires adopting a nondiscrimination policy consistent with the Vermont Fair Employment Practices Act, 7-1 Vt. Code R. § 3:2226.6(1), which makes it unlawful for an employer to "discriminate against any individual because of ... religion, ... sex, sexual orientation, [and] gender identity." 21 V.S.A. § 495(a)(1). In the same way, this law *arguably* prohibits the School from hiring only those who share and live out its religious beliefs, including those about marriage, sex, and gender.

Third, Rule 2226.6 compels Mid Vermont Christian's speech by forcing the School to post nondiscrimination provisions that contradict its religious practices (§ 2226.6(1)) and to sign an assurance confirming its compliance with the Public Accommodations Act (§ 2226.6(2)).

Of course, the State cannot dispute that under its interpretation of Rule 2226.6 the School's policies and practices are forbidden. Citing the Public Accommodations Act, the Agency of Education told schools they must base policies on preferred names and gender identities, not biological sex. *See* AOE Best Practices at 4–6 (ECF No. 1-3). Indeed, the Agency has already explained that Mid Vermont Christian is violating the provision. *See* French 02/01/23 Memo to BOE at 2. And Chair Samuelson has stated that if a school *merely fails to attest* to compliance, then that school "is a recognized independent school." Senate Education 04-20-2023, YOUTUBE (April 20, 2023), https://www.youtube.com/watch?v=2TvHnJdM2VE (18:08–19:12 minute marker). So the School is not just arguably violating Rule 2226.6, it has and is.

Credible threat. Next the State says there is no injury because "the Board has not taken any final action on [the School's] application." State's Opp. at 19. In addition to the fact that the State already removed Mid Vermont Christian from the Program, even under this new theory, the School need not wait for the Board to make a "final" decision before suing to protect its religious exercise. That's the same as saying pre-enforcement standing does not exist. That is not the law.

See Picard, 42 F.4th at 97. The proper question is whether there is a credible threat Rule 2226.6 will be invoked against Mid Vermont Christian to deny it participation in the Program. The School satisfies this "low" and "forgiving" standard. *Vitagliano*, 71 F.4th at 138.

First, "where a statute specifically proscribes conduct" a plaintiff need not "show an intent by the government to enforce the law against it. Rather, [courts] presume such intent in the absence of a disavowal by the government or another reason to conclude that no such intent existed." *Vitagliano*, 71 F.4th at 138 (cleaned up and citation omitted); *accord SBA List*, 573 U.S. at 165 (failure to disavow supports a credible threat). Enforcement is also presumed if the challenged law "is recent and not moribund." *Vitagliano*, 71 F.4th at 138 (citation omitted).

That presumption applies in full force here. Rule 2226.6 proscribes Mid Vermont Christian's internal policies and coreligionist hiring, and compels its speech. The State (still) refuses to disavow application of the provision to Mid Vermont Christian, despite the School asking *twice*—once before suing, *see* MVCS Addendum (ECF No. 1-5), and once after, *see* Ex. 1—to be exempted. And the rule took effect less than two years ago and has consistently been applied. *See, e.g.*, BOE 02/01/23 Minutes at 5–6 (ECF No. 14-3).

Second, "past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical," *SBA List*, 573 U.S. at 164 (cleaned up and citation omitted), and the State has already enforced Rule 2226.6 against Mid Vermont Christian, *but see Vitagliano*, 71 F.4th at 139 (past enforcement or "a stated threat of future" enforcement it is not "necessary to make out an injury in fact"). The Agency already told the Board to "make a finding" that the School "would not be approved." French 02/01/23 Memo to BOE at 2. And the Board declined to approve the School until it submitted an unequivocal assurance to comply, which it did not do. *See* Ex. 2. It is clear what the State thinks of the School's policies. So this Court need not "plug its ears and ignore [the State's] siren call, indicating the issues presented by this case require attention ... ." *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 928 (5th Cir. 2023).

Third, anyone can file complaints against Mid Vermont Christian, *see* 7-1 Vt. Code R. § 3:2226.9, thereby triggering potentially burdensome administrative investigations, which is "harm sufficient to justify pre-enforcement review," *SBA List*, 573 U.S. at 165; *see id.* at 164 (fact that "any person" can file complaints "bolster[s]" threat of enforcement). And by incorporating the Public Accommodations and Fair Employment Practices Acts, Rule 2226.6 opens the door for disgruntled individuals and activists to file separate state-court actions and charges of discrimination against the School. 9 V.S.A. § 4506; 21 V.S.A. § 495b.

Nor does the State's claim that it is handcuffed by a "technical assistance project," Bouchey Decl. ¶ 9 (ECF No. 26-2) carry any weight because the State can move expeditiously when it so desires. *See* Peter D'Auria, 2 Vermont private schools get last-minute approval before moratorium, VTdigger (July 6, 2023), https://perma.cc/6KGV-Q3PV (expediting approval process for two schools last summer). Plus, this further proves a credible threat because the purpose of the "project" is to ensure compliance with Board rules, including Rule 2226.6.

Darren Patterson Christian Academy, No. 1:23-cv-01557, 2023 WL 7270874, is very similar and instructive. There, Colorado implemented a Universal Preschool Program and required preschools "as a condition of participating" to "agree not to discriminate on the basis of ... religion, gender, sexual orientation, and gender identity," among other classes. *Id.* at *1. The plaintiff, a Christian preschool, voiced its concerns about how the nondiscrimination provisions would prohibit the school's (a) internal policies on separating restrooms, pronoun usage, dress codes, and field trip sleeping arrangements, and (b) hiring of only employees who shared its faith. *Id.* at *3. *Before* the start of the program, the school asked state officials to be exempted from the conflicting nondiscrimination rules. *Id.* State officials declined. *Id.*

After the school sued, the state argued the school lacked standing because it "remained an active participant" in the program and was receiving tuition funds. *Id.* at *4. The court held the school had standing to challenge the nondiscrimination provisions as a condition to participating in the program. *Id.* at *11. The court focused on the fact that the state refused to "answer[ ] the

straightforward question: Does the state believe Plaintiff is violating the law or breaching the [nondiscrimination provisions]?" *Id.* at *6. It then held the school faced a credible threat because the program was new, third parties could "initiate charges" that would "jeopardize Plaintiff's participation in the program," and the state refused to disavow enforcement. *Id.* at *7–11.

Same here. Just like Colorado, Vermont's "pre-litigation refusal to grant Plaintiff an exemption" is strong evidence that a credible threat exists. *Id.* at *9. And like in *Darren Patterson*, the State only changed its tune *after* getting sued. At bottom, the State has not refuted the presumption of enforcement other than saying, "we'll see." But that doesn't absolve it from having to defend its unconstitutional provision in federal court. The State refuses to "answer the straightforward question": does Mid Vermont Christian have to comply with Rule 2226.6? But we already know the State's answer, and so Mid Vermont Christian has standing.

B. Sovereign immunity does not apply because enforcement of Rule 2226.6 violates the School's and Families' constitutional rights.

Plaintiffs' claims against the State are also not barred by sovereign immunity. Under *Ex parte Young*, "a plaintiff can sue in federal court to obtain prospective injunctive relief against a state official who the plaintiff alleges is violating or threatening to violate the United States Constitution or a federal statute." *Merritt Parkway Conservancy v. Mineta,* No. 3:05CV860, 2005 WL 2648683, at *6 (D. Conn. Oct. 14, 2005) (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md*., 535 U.S. 635, 645 (2002). The *Ex parte Young* exception applies if the "complaint alleges an ongoing violation of federal law and seeks [prospective] relief.'" *In re Dairy Mart Convenience Stores, Inc*., 411 F.3d 367, 372 (2d Cir. 2005) (citation omitted).

Plaintiffs have concretely alleged that Bouchey and Samuelson are engaged in an ongoing constitutional violation because they are "connect[ed] with the enforcement of [unconstitutional Rule 2226.6]." *Id.* at 372–73. Bouchey and Samuelson "possess[] both the power and the duty under [Vermont] law to" enforce Program policies, including Rule 2226.6. *CSX Transp., Inc. v. N.Y. State Off. of Real Prop. Servs*., 306 F.3d 87, 99 (2d Cir. 2002). Bouchey "supervis[es] and direct[s] the execution of laws relating to public schools," including

Rule 2200, and "ensur[es] compliance with such laws." Compl. ¶ 77 (ECF No. 1). Bouchey also "supervis[es] the expenditure and distribution of all money appropriated by Vermont for public schools," including Program funds. *Id.* ¶ 78. Samuelson "has supervision over, and management of, the Agency." *Id.* ¶ 79. Together, they have "the authority to enforce compliance with the law by stripping public funding from school districts." *Id.* ¶ 81. Samuelson can revoke or suspend Mid Vermont Christian's approval, including for "failure to comply with" Rule 2226.6. 7-1 Vt. Code R. § 3:2226.8. And Bouchey may place the School on probation if she determines the School is violating any law or rule applicable to independent schools. *Id.* § 3:2226.9.

The State echoes its argument that the Board has done nothing yet. But this argument fails for the same reason the School satisfies standing: it faces a threat of exclusion that alone constitutes an ongoing constitutional violation. A "challenged action need not literally 'be in progress' to defeat a claim of sovereign immunity; rather, 'where there is a threat of future enforcement that may be remedied by prospective relief the ongoing ... requirement has been satisfied.'" *Doe v. Annucci*, No. 14 Civ. 2953, 2015 WL 4393012, at *16 (S.D.N.Y. July 15, 2015) (citation omitted). The State has not disavowed Rule 2226.6 as applied to the School and it is thus putting Mid Vermont Christian to an unconstitutional "Hobson's choice" which falls under *Ex parte Young*. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

C. Plaintiffs will face irreparable harm absent injunctive relief.

The State's irreparable harm argument rehashes its lack of injury in fact argument. So it follows that Mid Vermont Christian "will suffer irreparable harm if [Rule 2226.6] is enforced against [it]." *Antonyuk v. Chiumento*, 89 F.4th 271, 351 (2d Cir. 2023). In other words, the credible threat of enforcement equates to a threat of irreparable harm. The State concedes as much, noting that irreparable harm is satisfied if "First Amendment interests are *threatened* or impaired at the time relief is sought." State's Opp. at 12 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)) (emphasis added). The instant the State enforces Rule 2226.6 against the School—by investigating an alleged violation; placing it on probation; or suspending, revoking, or denying its approved independent status—irreparable harm occurs because that penalizes the School for

exercising its constitutional rights. That's why "[r]eligious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020).

The State's cited cases are inapposite. *Kane v. De Blasio,* 19 F.4th 152 (2d Cir. 2021), and *Talukder v. New York*, No. 122CV01452RASDA, 2022 WL 20056291 (S.D.N.Y. Nov. 18, 2022), are inapplicable for the simple fact that those plaintiffs' harm was reparable—could be compensated by monetary damages. Here, because Mid Vermont Christian and its families cannot recover any damages from the State, their harm is irreparable. *Regeneron Pharms., Inc. v. HHS*, 510 F. Supp. 3d 29, 39 (S.D.N.Y. 2020) ("where a plaintiff cannot recover damages due to sovereign immunity, monetary loss may amount to irreparable harm"). More so, the School's harm is not merely monetary; by "refus[ing] to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz v. St. Johns River Water Mgmt. Dist.,* 570 U.S. 595, 607 (2013). Religious schools like Mid Vermont Christian have been harmed by years of Vermont's religious discrimination. *See, e.g., In re A.H.,* 999 F.3d 98, 103 (2d Cir. 2021).

Next, the plaintiffs in both *Bray v. City of New York*, 346 F. Supp. 2d 480, 488–89 (S.D.N.Y. 2004), and *F&H Architectural Design & Consulting, LLC v. Cafferelli*, No. 3:23-CV-624(VLB), 2023 WL 4203684, at *4 (D. Conn. June 27, 2023), failed to point to any chill on their speech *or any imminent threat* against them for speaking—*i.e.*, they did not face a credible threat. But Mid Vermont Christian does here. *Supra* § I.A.

II. An injunction against the VPA is needed to stop its ongoing religious discrimination.

A. Neither res judicata nor collateral estoppel bar Plaintiffs' claims.

The VPA's administrative proceedings do not preclude the School's claims here because (1) Mid Vermont Christian need not raise and exhaust its federal claims in administrative proceedings and state court and (2) federal courts are not bound by the VPA's *legal* conclusions.

First, claim preclusion does not apply here by its own terms. The VPA does not (and cannot) assert that Mid Vermont Christian has already litigated its § 1983 claims. Instead, it

argues that preclusion applies because Plaintiffs' claims "should have been litigated" before the VPA or a state court. VPA Opp. at 7–9. That's wrong. The School "could not have raised [its] section 1983 claims in the [VPA] proceeding." *DeSario v. Thomas*, 139 F.3d 80, 87 (2d Cir. 1998), *vacated on other grounds sub nom. Slekis v. Thomas*, 525 U.S. 1098 (1999). And section 1983 plaintiffs need not exhaust their administrative or state judicial remedies to avoid preclusion of their claims. *See id.* at 87 (rejecting argument that claim preclusion applied because "plaintiffs could have brought their federal claims in state court, to which they could have appealed after their administrative appeals were denied"); *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998) (finding that plaintiffs may "seek relief under § 1983 without first resorting to state administrative procedures").

As for issue preclusion, the VPA does not attempt to identify legal issues that meet the issue preclusion standard. "[T]he burden of proving ... preclusion is on [the VPA, *i.e.,*] the party asserting that affirmative defense." *Sacerdote v. Cammack Larhette Advisors*, LLC, 939 F.3d 498, 508 n.52 (2d Cir. 2019). Again, the VPA does not (and cannot) point to any legal "issues necessarily and essentially determined in" the VPA proceedings that are "the same as the one[s] raised in" this action. *Choma v. Tucker*, 443 F. Supp. 3d 545, 550 (D. Vt. 2020); *see also Montana v. United States*, 440 U.S. 147, 153–55 (1979) (explaining that issue preclusion applies to issues that were "actually and necessarily determined" and "are in substance the same" as the issues in the later case). The VPA did not engage in any serious consideration of any legal issues. To the contrary, it superficially concluded that "[t]he School's claim is wrong" and the "case has nothing to do with beliefs." VPA Appeal Decision at 4 (ECF No. 14-11). And "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana*, 440 U.S. at 164 n.11.

Second, the VPA's reliance on *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) is misplaced. VPA Opp. at 6. *Elliott* only held that issue, not *claim,* preclusion may apply in a subsequent § 1983 suit "to the *factfinding*"—not the legal decisions—"of administrative bodies

acting in a judicial capacity." 478 U.S. at 797 (emphasis added); s*ee also Wiercinski v. Mangia 57, Inc.*, No. 09-CV-4413, 2010 WL 2681168, at *4 (E.D.N.Y. July 2, 2010) ("*Elliott* speaks only in terms of issue preclusion, and does not answer the question of whether claim preclusion might also apply."). Here, the VPA is not a quasi-judicial body because it cannot impose "binding judgments" on the School's First Amendment claims, *see Maple Run Unified Sch. Dist. v. Vermont Hum. Rts. Comm'n*, 2023 VT 63, ¶ 23 (Vt. Dec. 8, 2023), nor can its "unreviewed determinations of law ... be given preclusive effect under *Elliott* because of the Supreme Court's very specific use of the word 'factfinding.'" *Levich v. Liberty Cent. Sch. Dist*., 361 F. Supp. 2d 151, 160–61 (S.D.N.Y. 2004). *Elliott* does not preclude adjudication of the *legal issues* here.

"Although some courts have found civil rights claims precluded by an unreviewed administrative proceeding, ... the Second Circuit has not taken a side," *Wiercinski*, 2010 WL 2681168, at *4 (citation omitted), and consistent with *Elliot*, courts in this circuit routinely hold that administrative decisions do not preclude claims or legal issues in a subsequent § 1983 action. *See, e.g.*, *Casler v. W. Irondequoit Sch. Dist.*, 563 F. Supp. 3d 60, 68 (W.D.N.Y. 2021) (the court "must address de novo [a First Amendment] legal question ... as opposed to simply relying on the legal conclusions of the Commissioner"); *Buttaro v. City of New York*, No. 15 CV 5703, 2016 WL 4926179, at *5 (E.D.N.Y. Sept. 15, 2016) (ALJ rejection of First Amendment defense had no preclusive effect); *Wiercinski,* 2010 WL 2681168, at *5 (no preclusive effect given to administrative decisions of law); *Levich,* 361 F. Supp. 2d 151 (same); *Pappas v. Giuliani,* 118 F. Supp. 2d 433, 442 (S.D.N.Y. 2000), *aff'd,* 290 F.3d 143 (2d Cir. 2002) (same); *Kurowski v. City of Bridgeport*, No. CIV. B-85-96, 1988 WL 25417, at *5–6 (D. Conn. Mar. 14, 1988), *aff'd*, 880 F.2d 1319 (2d Cir. 1989) (same). As a result, this Court is not bound by the VPA's administrative decisions, especially its cursory legal "conclusions" that this case has nothing to do with the School's religious exercise.

B. Abstention does not apply because there is no ongoing state proceeding.

Next, the VPA claims *Younger v. Harris,* 401 U.S. 37 (1971) bars this case but fails to explain how. VPA Opp. at 9. The purpose of *Younger* abstention is to avoid the "duplication of

legal proceedings" and to afford respect to certain state court functions. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). Courts abstain under *Younger* only in three "exceptional circumstances," where there are ongoing: (1) "state criminal prosecutions"; (2) "civil enforcement proceedings" that are "akin to a criminal prosecution"; and (3) "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions," like contempt and the posting of bonds pending appeal. *Id.* at 78–79 (cleaned up and citation omitted). None of these circumstances are present here; there is no current or ongoing proceeding happening at all. And the VPA cannot point to a single case in which abstention was used as a sword to force a plaintiff to *begin* a state administrative process. *Contra* VPA Opp. at 10 ("[t]his Court should direct the School to engage in the VPA process to pursue ... a new membership application.").

For the same reason, *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986), does not apply. There, the Supreme Court held that *Younger* applied when a Christian school filed a federal lawsuit while state civil rights commission proceedings "*were pending*." *Id.* at 624 (emphasis added). Lastly, in a footnote, the VPA claims Mid Vermont Christian could raise its constitutional claims in state-court review of administrative proceedings. VPA Opp. at 10 n.4. But as explained above, the School need not exhaust state law remedies before suing here. Plus, the Second Circuit recently explained that the "non-dispositive *Middlesex* factors"—to which the VPA cites—"do not by themselves tell us whether the federal court should abstain." *Cavanaugh v. Geballe*, 28 F.4th 428, 435 (2d Cir. 2022). There, the court made clear that following *Sprint*, a case must fall within one of the three narrow grounds for *Younger* abstention to apply. *Id.* at 432–35. This case does not.

C. Plaintiffs are likely to succeed on the merits against the VPA.

Irreparable harm. The VPA correctly notes that if Mid Vermont Christian shows a likelihood of success on the merits of its First Amendment claims against the VPA, it satisfies a showing of irreparable harm. VPA Opp. at 12–13 (citing *A.H. v. French*, 511 F. Supp. 3d 482, 497 (D. Vt. 2021), *mandamus granted by In re A.H.,* 999 F.3d 98).

But then the VPA immediately sidesteps this rule, arguing that there cannot be irreparable harm because the School currently participates in a different athletic conference. VPA Opp. at 13. That's not how a constitutional injury—and irreparable harm—works. A state actor like the VPA is not absolved from the demands of the Constitution simply because a plaintiff can seek services or benefits elsewhere. If that were the case, the student plaintiffs in *Carson v. Makin*, 596 U.S. 767 (2022), would not have been harmed because, after all, they could have used public tuition funds at other schools. In fact, under this far-reaching theory, separate but equal would still be the law. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (cleaned up and citation omitted) ("[t]he Free Exercise Clause protects religious observers against unequal treatment"). The VPA's constitutional violation is not justified because the School sought to give its students other athletic opportunities until it could obtain injunctive relief. *See* Goodwin Supp. Decl. ¶ 6 (noting other harms from playing in the NEACS). All that is required is that the VPA "depriv[ed]" the School of "a right ... secured by the Constitution." 42 U.S.C. § 1983. It did, so there's an irreparable injury. Full stop.

***Merits*.** Rather than offering any real legal analysis, the VPA attacks the legitimacy of Mid Vermont Christian's religious beliefs. The VPA asserts that its gender identity policy does not and cannot infringe the School's free exercise rights because "[t]he act of playing together on a basketball court does not imply any approval of the values or beliefs of the opponent." VPA Opp. at 13. The problem with the VPA's argument, however, is the School *does* believe that forcing its girls' basketball team to compete against a male in girls' basketball furthers what it believes to be a lie: that sex is mutable. Fogg. Decl. ¶¶ 21–22; Goodwin Suppl. Decl. ¶ 3. And the VPA does not get to decide what violates Mid Vermont Christian's convictions.

The VPA cannot "pass[ ] judgment on the centrality of [Mid Vermont Christian's] religious practices." *Kravitz v. Purcell,* 87 F.4th 111, 122 (2d Cir. 2023) (cleaned up and citation omitted). The School need only show that its beliefs are "sincerely held" and in its "own scheme of things, religious." *Id.* (citation omitted). And "religious beliefs need not be acceptable, logical,

consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). The School has no issue playing teams who *believe* different things, *contra* VPA Opp. at 13 (noting BYU does not adopt Catholicism when playing Notre Dame), but that misses the point. The School inculcates its faith through everything it does, and it believes facilitating an event where a biological male attempts to pass as a female violates its core convictions and undermines its religious teaching. Fogg Decl. ¶¶ 10–22. The VPA has presented no evidence contesting the sincerity of that belief.

Next, the VPA claims it "has no interest in regulating what [the School] teaches; who it admits or employs; and/or how it constitutes its teams." *See* VPA Opp. at 14. So the VPA would cabin the Free Exercise Clause's protections to those internal decisions. *Id.* But this is the same kind of argument squarely rejected by *Trinity Lutheran*. There Missouri's Department of Natural Resources argued that "merely declining to extend funds to Trinity Lutheran d[id] not prohibit the Church from engaging in any religious conduct or otherwise exercising its religious rights." *Trinity Lutheran*, 582 U.S. at 462. The Supreme Court explained that because "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,'" the government could not condition the receipt of public benefits on surrendering free exercise rights. *Id.* at 463 (citation omitted); *see also McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is ... squarely rejected by precedent").

Indeed, 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) (citation and quotation marks omitted) (emphasis added). As explained in the School's Motion for Preliminary Injunction, punishing Mid Vermont Christian for abstaining from an event that would violate its core convictions violates the Free Exercise Clause in at least

three ways. The VPA is silent on—and effectively concedes—that it excludes Mid Vermont Christian from an "otherwise generally available public benefit because of [its] religious exercise," *Carson*, 596 U.S. at 781, that it failed to act with "full and fair consideration to [the School's] religious objection," *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617, 640 (2018), or that the gender identity policy lacks neutrality and general applicability, *see Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021).

The VPA instead points to *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:23-CV-01595, 2023 WL 4848509 (S.D. Ohio July 28, 2023), a district court case out of Ohio. But that case is not remotely similar—either factually or legally—to this case. That case dealt with *public school students* challenging anti-harassment policies solely on free speech grounds, which were analyzed under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). None of the plaintiffs there brought a free exercise claim. And that case is pending appeal at the Sixth Circuit. *Id., appeal docketed,* No. 23-3630 (6th Cir. July 31, 2023).

Strict scrutiny. If anything, the VPA makes a strict scrutiny argument of sorts, claiming a generalized interest in enforcing its gender identity policy. *See* VPA Opp. at 15–16 (arguing an injunction would harm the public interest). But to satisfy strict scrutiny, the VPA must show it has a *compelling* interest and that expelling Mid Vermont Christian from the association was necessary to achieve that interest. *Fulton*, 141 S. Ct. at 1881. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.* The VPA's actions cannot withstand scrutiny.

The VPA does not specifically say what its interest is; it only points to an amicus brief filed in a different case[4]. 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* ECF No. 30-5 at 14. Assuming that is the interest the VPA asserts, it's a nonstarter. For one thing, what the VPA did here does not correlate to that interest and is thus not narrowly tailored.

[4] The VPA says *Soule*'s dismissal was upheld, but the Second Circuit recently reversed the dismissal en banc. *Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34 (2d Cir. 2023) (en banc).

Mid Vermont Christian is not facially challenging the gender identity policy and is not seeking to ban *any* students from competing. It only desires to not be forced to compete in events that violate its beliefs. Simply put, that interest does not justify expelling Mid Vermont Christian *from all events*, including coeducational academic competitions. As *Fulton* and *Carson* instruct, the VPA can achieve that interest without burdening Mid Vermont Christian's religious exercise. There are myriad less restrictive alternatives. For example, the VPA can tailor schedules to ensure Mid Vermont Christian would not be set to play teams with biological males. Or even if Mid Vermont Christian were scheduled to play such a team—say in the state championship—the VPA could simply allow the School to forfeit *without penalty*. The VPA could then reschedule the game with a willing competitor. In other words, the VPA can still pursue its interests if the School is part of the association but exempted from the VPA's gender identity policy.

Second, the science behind health outcomes for individuals who identify as a different gender than their biological sex 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). At most the VPA can offer "only speculation" that allowing Mid Vermont Christian in the association will cause students to suffer negative mental health outcomes and increased rates of suicide, and "speculation is insufficient to satisfy strict scrutiny." *Fulton*, 141 S.Ct. at 1882.

In the end, the VPA's issue is with the Constitution. *See* VPA Opp. at 15 (arguing that if the School's "arguments were accepted ... nearly all, anti-discrimination statutes" would be "unconstitutional restrictions on speech or free exercise"). Even those laws are not "immune from the demands of the Constitution." *303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023).

III. Plaintiffs seek prohibitory injunctions that would protect the School and its families during this case and would benefit the public interest.

Lastly, both the State and VPA claim Plaintiffs seek mandatory injunctions that alter the status quo. State's Opp. at 9; VPA Opp. at 15. Not so. The status quo is not simply what things were the day before the lawsuit was filed. It is really a "status quo ante," which is "the last actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer*

League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 37 (2d Cir. 2018). "This special 'ante' formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current 'status quo' precipitated by their wrongdoing." *Id.* at n.5.

As for the Town Tuitioning Program, the status quo was that Mid Vermont Christian participated in the Program, *while following its religiously based policies and practices*. Fogg Decl. ¶ 37. The State disrupted that status quo by enacting and enforcing Rule 2226.6. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (en banc) (per curiam) ("requir[ing] a party who has recently disturbed the status quo to reverse its actions ... restores, rather than disturbs, the status quo ante."). So the State says the School "seek[s] to require the Board to take up [its] pending application," but that simply isn't true. State Opp. at n.9. In fact, the School didn't even know its application was still "pending" until January 4, 2024—*after* it filed its motion. And the School's motion makes clear it seeks an injunction "[p]rohibiting Defendants Bouchey and Samuelson from requiring Mid Vermont Christian School ... to comply with the Vermont Public Accommodations Act and Vermont Fair Employment Practices Act (via Agency of Education Rule 2200)." Mot. Prelim. Inj. at 2 (ECF No. 14). Such an injunction maintains the status quo as it was in the 2022-23 school year.

Turning to the VPA, the "last peaceable uncontested status" was that Mid Vermont Christian was a member of the association and able to compete in all competitions and events. The School's requested injunction "restore[s] [it] to the position [it] would have occupied had the [VPA] not violated [its] rights under the First Amendment." *In re A.H.,* 999 F.3d at 108.

In any event, Plaintiffs are entitled to an injunction regardless of the status quo ante because they have shown "a clear or substantial likelihood of success on the merits." *N. Am. Soccer League,* 883 F.3d at 37. And an injunction "securing" their First Amendment rights is in the public interest. *In re A.H.,* 999 F.3d at 103 (citation omitted).

CONCLUSION

The Court should grant Plaintiffs' Motion for Preliminary Injunction in whole.

Dated: February 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 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
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