24-1704

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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, Christopher and Bethany Goodwin; CHRISTOPHER GOODWIN, individually; and BETHANY GOODWIN, individually,

Plaintiffs-Appellants,

v.

ZOIE SAUNDERS, in her official capacity as 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-Appellees.

On Appeal from the United States District Court
for the District of Vermont
Case No. 2:23-cv-00652

OPENING BRIEF OF APPELLANTS
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AND CHRISTOPHER AND BETHANY GOODWIN

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1, Appellants Mid Vermont Christian School, A.G. and M.G., and Christopher and Bethany Goodwin state that they have no parent corporation, they do not issue stock, they are not a subsidiary or an affiliate of a publicly owned corporation, and there is no publicly owned corporation or its affiliate, not a party to this appeal, that has a financial interest in the outcome of this case.

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STATEMENT REGARDING ORAL ARGUMENT

This case concerns Appellants' important First Amendment right to exercise their religious beliefs without being punished by non-neutral state actors that willingly tolerate comparable secular activity and possess wide discretion in their decision-making. This appeal will resolve whether, while the case proceeds below, Appellants will be allowed to rejoin the public athletic association they competed in for close to 30 years before they and their students were permanently expelled from all middle-school and high-school sports because Appellants exercised their religious beliefs by forfeiting a single high-school girls' basketball game.

Given the important rights at stake, Appellants Mid Vermont Christian School, students A.G. and M.G., and Christopher and Bethany Goodwin request oral argument.

STATEMENT OF JURISDICTION

Mid Vermont Christian School, some of the School's students, and those students' parents (collectively "Mid Vermont") sued in the United States District Court for the District of Vermont under 42 U.S.C. § 1983 to vindicate their rights under the First and Fourteenth Amendments to the U.S. Constitution. The district court exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343 and had the authority to grant the requested injunctive relief under 28 U.S.C. § 1343; the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202; and damages, costs, and attorney fees under 42 U.S.C. §§ 1983 and 1988.

The district court denied Mid Vermont's motion for a preliminary injunction on June 11, 2024. Mid Vermont timely filed its notice of appeal on June 21, 2024, within the 30-day time limit allowed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Vermont Principals' Association (VPA) expelled Mid Vermont from all middle- and high-school sporting activities because the School forfeited one girls' basketball game to avoid violating its religious beliefs. The VPA imposed this punishment despite allowing forfeits for secular reasons, including allowing three girls' basketball teams to forfeit to avoid competing against an athlete with an exemption from a COVID-19 mask mandate, and despite the VPA's widespread discretion in applying the policies at issue here. Yet the district court applied rational-basis review and denied Mid Vermont's motion for a preliminary injunction. This appeal raises four[1] issues:

1. Whether the district court erred in applying rational-basis review and refusing to preliminarily enjoin the VPA's expulsion of Mid Vermont given the VPA's failure to punish comparable secular activity.

2. Whether the district court erred in applying rational-basis review and refusing to preliminarily enjoin the VPA's expulsion of Mid Vermont given the VPA's vast discretion to grant individualized exceptions.

[1] To streamline the issues, Mid Vermont does not appeal the portion of the district court's order denying preliminary-injunctive relief related to the Town Tuitioning and Dual Enrollment programs. JA866–68. But it reserves the right to seek final relief on this issue.

3. Whether the district court erred in applying rational-basis review and refusing to preliminarily enjoin the VPA's expulsion of Mid Vermont given the VPA's non-neutrality toward religion.

4. Whether the district court erred in applying rational-basis review and refusing to preliminarily enjoin the VPA's expulsion of Mid Vermont given that the VPA excluded Mid Vermont from a public benefit solely because of its religious exercise.

INTRODUCTION

For 28 years, Mid Vermont Christian School's sports teams competed against other sports teams at public and private schools across the state as part of the Vermont Principals' Association. But that came to a halt when the VPA expelled Mid Vermont after the School forfeited a single high-school girls' basketball game—an action compelled by the School's religious beliefs. JA48–50. To justify its expulsion decision, the VPA invoked discretionary policies applied on a "case-by-case basis" and subject to individualized exceptions. And though the VPA penalized Mid Vermont, it lets other schools forfeit games for secular reasons, such as illness, injury, and refusing to play against an athlete with a COVID-19 mask exemption. Indeed, the VPA allowed three schools to forfeit games against one school's girls' basketball team to avoid competing against a player who had a mask exemption. JA50. But the VPA immediately expelled Mid Vermont for forfeiting a game to avoid violating its religious beliefs by competing against a girls' basketball team allowing a male to compete as a girl. JA48–50.

Adding insult to injury, Jay Nichols, the Executive Director of the VPA, disparaged Mid Vermont's religious beliefs on sex-separated teams as "blatant discrimination under the guise of religious freedom." JA50, 182. And the VPA's Activities Standards Committee affirmed Mid Vermont's expulsion after second-guessing the School's theology, declaring that playing against an athlete who identifies as transgender

would not have violated Mid Vermont's religious beliefs because "Brigham Young University athletes do not compromise their Mormon faith—or endorse Catholicism—when they play Notre Dame." JA248.

The Free Exercise Clause demands more. State actors trigger strict scrutiny when they treat *any* comparable secular activity better than religious exercise. And the same goes for denying a religious accommodation based on *someone else*'s religious views. State actors also trigger strict scrutiny when they maintain a discretionary system of individualized assessments that makes decisions on a case-by-case basis. The VPA cannot wield such unbridled discretion, accept when schools forfeit games for secular reasons, and then expel Mid Vermont for forfeiting a game based on its religious beliefs. Nor can the VPA deny Mid Vermont a religious accommodation because a Mormon school can compete against a Catholic school without violating its beliefs. The VPA's actions trigger strict scrutiny, which the district court refused to apply and the VPA cannot satisfy.

The VPA's actions independently trigger strict scrutiny because they excluded an otherwise eligible religious school from a public benefit solely because of its religious exercise. The district court recognized this principle favors Mid Vermont's inclusion, but it failed to apply the relevant cases. The VPA concedes it is a state actor, and it offers Vermont schools a public benefit using public funds. Yet the VPA excluded Mid Vermont for exercising its faith. That requires strict scrutiny.

This Court should reverse the district court's order denying a preliminary injunction and direct the district court on remand to enter a preliminary injunction ordering Mid Vermont's reinstatement and prohibiting the VPA from enforcing its policies against Mid Vermont in the ways described in Mid Vermont's motion for a preliminary injunction. *See New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 180 (2d Cir. 2020) (recognizing the Court's authority to issue that directive). Each day that passes subjects Mid Vermont to the irreparable harm of being unable to compete in VPA athletics consistent with its religious beliefs.

STATEMENT OF THE CASE

Mid Vermont appeals the Honorable Geoffrey W. Crawford's decision denying Mid Vermont's motion for a preliminary injunction. JA878; *Mid Vermont Christian Sch. v. Bouchey*, No. 2:23-CV-652, 2024 WL 3221367 (D. Vt. June 11, 2024).

A. The VPA invokes discretionary policies to expel Mid Vermont for forfeiting a girls' basketball game while allowing comparable secular forfeits.

Mid Vermont Christian School is a private, Christian, pre-K-through-12th-grade school in Quechee, Vermont. JA19. The School was founded in 1987. JA19, 87. From the beginning, its religious beliefs have driven and formed the foundation for everything it does. JA14, 86–88. And many families choose to send their children to the School because of its Christian character and education. JA19.

Mid Vermont began its first basketball season during the 1993–94 school year. JA87. Around the same time, it joined the Vermont Principals' Association, an association of Vermont schools and school leaders that oversees sports and other activities in Vermont for its 270 member schools. JA16, 28–29. Over the years, Mid Vermont added volleyball, soccer, cross-country, track, and golf teams. JA55–56. And its students have excelled academically and in athletics. JA19. For example, they regularly outperform public-school students in SAT testing. *Id.* And the girls' and boys' basketball teams have competed in the state playoffs. *Id.*

During the 2022–2023 school year, Mid Vermont's girls' varsity basketball team qualified to compete in the state tournament. JA48. Their first-round opponent was scheduled to be the Long Trail School. *Id.* Mid Vermont's coach, Christopher Goodwin, had learned from reading articles, watching videos, and having discussions with other coaches and athletic directors that the Long Trail School had a male athlete on its girls' basketball team. JA355. The athlete was over six feet tall (taller than any player on Mid Vermont), repeatedly blocked shots, threw elbows, and knocked girls down. JA48–49, 338.[2] The Long Trail School's coach had nicknamed the athlete "Not in My House" after a famous basketball player known for blocking shots. JA242.

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[2] Mid Vermont included a link to a compilation of video clips in its memorandum in support of its preliminary-injunction motion. JA200–01, n.2. That video is available here: vimeo.com/850274119/14b4023ced.

Mid Vermont believes that "sex is God-given and immutable and that God created each of us either male or female." JA242; *accord* JA21. As a result, Mid Vermont also believes that rejecting "one's biological sex is a rejection of the image of God within that person." JA21, 242. So Mid Vermont believes that forcing its "girls' basketball team that plays in a league reserved for females" to compete against a biologically male athlete would mean forcing the School to "affirm something that violates [its] religious beliefs," namely that "the males who play in the girls' league are females." JA242; *accord* JA21–22.

Hoping to avoid violating its beliefs by expressing that message, Mid Vermont reached out to the VPA before the tournament. JA233. The School also was concerned about the "clear advantage" biologically male athletes have over female athletes, and its girls were "extremely uncomfortable playing a contact sport with a member of the opposite sex both for reasons of safety and the overall uncomfortableness of the proximity and contact necessary to play [the] sport to its fullest." JA233. So Mid Vermont's head of school, Vicky Fogg, shared these concerns in a letter asking that the VPA not allow the male athlete to play against Mid Vermont if the two teams were scheduled to play each other in the state tournament. JA233.

The VPA denied that request. JA49, 235. Citing the VPA's policy on gender identity and participation, Vermont's Public Accommodations Act, and the Vermont Agency of Education's "Best Practices for Schools

for Transgender and Gender Nonconforming Students," a VPA representative notified Fogg by email that the VPA did "not intend to violate [its] policy by honoring" Mid Vermont's request. JA235.

The VPA's "Policy on Gender Identity" stated that the VPA was "committed to providing all students with the opportunity to participate in VPA activities in a manner consistent with their gender identity as outlined in the Vermont Agency of Education Best Practices for Schools for Transgender and Gender Nonconforming Students." JA142. But that policy allows for exceptions; indeed, participation is not guaranteed but "resolved on a case-by-case basis." JA123. And the VPA reserves the right to waive its policies upon request, including its gender-identity policy. JA152. It may grant or deny waivers of eligibility rules like this one "as an exercise of discretion" based on any "information" it "deems relevant." *Id.*

A related policy, titled "Commitment to Racial, Gender-Fair, and Disability Awareness," states that the VPA believes "*all* individuals should be treated with dignity, fairness, and respect." JA142 (emphasis added). And the VPA says it is "committed to creating an environment in [its] activities and programs that promotes respect for and appreciation of racial, gender, sexual orientation, religious and ethnic differences" and is "disability aware." *Id.*

Despite these policies, the VPA refused to accommodate Mid Vermont's religious exercise while allowing other schools to freely forfeit games for secular reasons. *See* JA340. In fact, the VPA allowed three girls' basketball teams to forfeit games against a school with a girls' basketball player who had an exemption from the state's mask mandate during the COVID-19 pandemic. JA50, 340. As an article linked to in Mid Vermont's complaint explains, JA50, the Woodstock Union High School girls' basketball team "missed out on their first three scheduled contests because opponents chose to forfeit rather than play someone with an approved exemption to the state's mask mandate." Austin Danforth, *Nobody would play Woodstock—until a policy change allowed Hartford to step up*, Burlington Free Press (Feb. 25, 2021), perma.cc/MQ6C-DSW5; Add.1.[3] That included Woodstock's home opener, which the opposing team forfeited on short notice. Add.3.

Under the Vermont Agency of Education's school-reopening policy in place at the time, students with "a medical or behavioral reason for not wearing a face covering [were] not … required to wear one." Vermont Agency of Education and Department of Health, *A Strong and Healthy Start: Safety and Health Guidelines for Reopening Schools, Fall 2020*, (Issued June 16, 2020, Revised Oct. 23, 2020, Effective Nov. 16,

[3] For the Court's convenience, this article is included in an addendum to this brief. Add.1–4.

2020), perma.cc/ZK55-39AQ; Add.7–12.[4] Decisions about exempting students were to be made "in partnership with the healthcare provider and school nurse" consulting a separate policy listing the "rare conditions" that allowed children to qualify for a mask exemption. Add.11.

That policy, in turn, provided that the "physical, developmental and behavioral conditions that may make wearing a mask unsafe for children are very rare." Vermont Department of Health, *Guidance on Mask Exemptions in Children and Adolescents*, (Sept. 2020), perma.cc/Q58G-AKC9; Add.13.[5] Specifically, those conditions included "[d]evelopmental delays," "[l]imited physical mobility," "[s]evere autism," and "[s]tructural abnormalities of the head or neck." *Id.* They also could include children who were "deaf, deaf-blind, hard of hearing or speech impaired," and children "with limited physical and/or mental capacity," "behavioral challenges or intellectual disability." Add.14.

The school-reopening policy also warned schools that "[s]tigma, discrimination, or bullying may arise due to wearing or not wearing a facial covering." Add.12. And schools were to "have a plan to prevent

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[4] This policy is still publicly available online: perma.cc/2Y49-KNVS. (The policy can be accessed by viewing the live page or by opening it here: perma.cc/ZK55-39AQ.) As a result, the Court can take judicial notice of it. For the Court's convenience, relevant portions of the policy and the page showing its public availability have been added to the addendum to this brief. Add.5–12.

[5] This policy also is publicly available online and has been added to the addendum to this brief. Add.13–14.

and address harmful or inappropriate behavior." *Id.* That policy is consistent with the VPA's commitment to creating an environment that is free from prejudice and discrimination and "disability aware." JA142.

Despite these policies, the VPA never penalized any of the teams that forfeited their games to avoid playing against a player with a mask exemption. JA50. Quite the opposite, a VPA representative suggested that the school *with the mask-exempt athlete* might be penalized in state tournament seeding if too many of their wins came from opposing-team forfeits. Add.3. He also predicted that schools unwilling to play a team with a mask-exempt athlete could simply forfeit and take themselves out of contention: "You have to make a decision, do you come to the tournament or don't you come to the tournament?" *Id.*

Once it became clear that Mid Vermont's only options were to violate its religious beliefs by playing the game against Long Trail or to forfeit the game, Mid Vermont reluctantly chose to forfeit, taking themselves out of the tournament. JA16, 49, 355. Before making that decision, Coach Goodwin consulted with Vicky Fogg, Mid Vermont's administrators, coaching staff and players, and players' parents. JA355. Together, they decided that the School would not "force its girls to play against a biological male in girls' basketball" because doing so would "undermine the School's religious beliefs" and "jeopardize the fairness and safety of the game." *Id.*

In response, the VPA's Executive Council issued a press release stating that it had made an "immediate determination of ineligibility" and expelled Mid Vermont from all VPA "activities and tournaments going forward." JA49, 178. According to the VPA, Mid Vermont's forfeit "and corresponding rationale" shared in a news article violated two VPA policies: its "Policy [on] Gender Identity" and its "Commitment to Racial, Gender-Fair, and Disability Awareness." JA179. As a result, the VPA barred Mid Vermont and all its students from competing in *any* VPA sports or activities, not just girls' basketball. JA340. That meant barring Mid Vermont even from participating in co-ed, non-athletic events like geography and spelling bees, science and math fairs, drama festivals, and debate competitions. JA17, 863, 967.

In the article cited by the VPA, Vicky Fogg explained the School's belief that "playing against an opponent with a biological male jeopardizes the fairness of the game and the safety of [the School's] players." Benjamin Rosenberg, *MVCS girls basketball forfeits playoff game rather than compete against team with transgender player*, Valley News (Feb. 25, 2023), perma.cc/FFX8-JLE2. "Allowing biological males to participate in women's sports sets a bad precedent for the future of women's sports in general," Fogg added. *Id.* The article also notes Mid Vermont had sent a letter to the Agency of Education earlier in the year asserting its "statutory and constitutional right to make decisions based on its religious beliefs," including its beliefs on "marriage and sexuality." *Id.*

B. The VPA upholds Mid Vermont's expulsion while calling Mid Vermont "wrong" about what its beliefs require.

Two days after Mid Vermont's decision to forfeit, VPA Executive Director Jay Nichols testified about Mid Vermont before the Vermont legislature, telling a committee, "Thank goodness the student in question didn't attend that religious school," before asking rhetorically, "[B]ut what if they did?" JA182. "Would we be okay with that blatant discrimination under the guise of religious freedom?" *Id.*

Nichols also accused Mid Vermont and one other religious school of refusing to "sign an assurance that they would follow State Board rules regarding non-discrimination," adding that it "doesn't take a rocket scientist to see that these schools and their far right supporters are gearing up for another lawsuit." *Id.* "If parents want to send their children to private schools that discriminate for any reason, that is their right," Nichols conceded. JA181. He just thought the state "should never provide any tax dollars to schools that don't follow the same rules as public schools, at least on the most important issues." *Id.*

After the VPA made the unanimous decision to expel Mid Vermont, Nichols told the press, "If you don't want to follow VPA rules, that's fine." JA51 (citing Peter D'Auria, *Vermont religious school that refused to play team with trans player banned from sporting events*, VTDigger (Mar. 13, 2023), perma.cc/3LU5-2TY4). "But then you're just not a VPA member," Nichols added. *Id.* "It's fairly simple." *Id.*

In the same article, Nichols conceded that he could not recall any past examples of the VPA barring a school from sporting events. D'Auria, *supra*, perma.cc/3LU5-2TY4. Nichols also told the media that there was no existing appeals process for Mid Vermont to challenge the VPA's decision. *Id.*

But that turned out to be wrong. JA51–52. The VPA's disciplinary policy required Nichols or his designee to give Mid Vermont "written notice of [its] probable violation" and the VPA's "*recommended* penalty"—which Nichols failed to do. JA153 (emphasis added). The same policy required him to advise Mid Vermont of its right to appeal and be heard before the VPA's Activities Standards Committee—which Nichols also failed to do. JA153–54. And the policy provided that Nichols or his designee could "temporarily" suspend Mid Vermont and its students until a "final determination of any appeal." JA154. But nothing in the policy authorized an "immediate determination of ineligibility" and expulsion. JA49, 178.

In response to the VPA's expulsion decision, Vicky Fogg wrote to the VPA and its Activities Standards Committee to note the School's "written appeal of VPA's letter of ineligibility." JA237. In her letter, Fogg explained that Mid Vermont's position was "rooted in its religious beliefs," specifically its belief that "sex is God-given and immutable and that God created each of us either male or female." JA238. By trying to force the School's "young ladies to compete against biological males,"

the VPA was trying to force Mid Vermont "to affirm something that violates [its] religious beliefs," namely "that the males who play in the girls' league are females." *Id.* The VPA also was trying to force Mid Vermont to knowingly put its students "in an unsafe situation," which also would have violated the School's religious beliefs. *Id.*

Rather than place the School's students "in harm's way and sacrifice [its] religious beliefs," Mid Vermont "chose to forfeit the basketball game." *Id.* "Ending the season on that note—in the playoffs no less—[should have been] 'punishment' enough" for Mid Vermont and its students. *Id.* So Fogg asked the VPA to lift the expulsion. JA239.

Instead of lifting the expulsion, the VPA's Activities Standards Committee met to consider the appeal and instructed Nichols to follow the proper procedures if he "wish[ed] to proceed with discipline in this case," including issuing a "notice of probable violation." JA484.

The next day, Nichols complied with the Activities Committee's instruction, issuing a "formal Notice of Violation" explaining that Mid Vermont had violated the VPA's "Policy on Gender Identity" and its "Commitment to Racial, Gender-Fair, and Disability Awareness" by declining "to play a tournament basketball game against another member school solely because that school included a transgender youth on its team." JA486. "The recommended penalty for these violations," the notice continued, "is expulsion." *Id.*

To justify such a severe penalty, Nichols wrote that "[n]o Vermont student should endure the refusal of another school to compete with that student because of their gender identity." *Id.* And "[n]o Vermont student should have to fear that by virtue of their presence their team may be denied the opportunity to play a game." *Id.*[6]

Fogg responded by letter, noting her second written notice of appeal to the VPA's Activities Committee. JA241–43. Fogg reiterated that Mid Vermont's "decision to forfeit the basketball game was rooted in its religious beliefs." JA242. And she again described those beliefs in detail. *Id.* She also explained that the School's students were already suffering harm from being unable to participate in spring sports due to the VPA's actions. JA243.

About a month later, the VPA's Activities Committee unanimously upheld the expulsion in its entirety. JA249. First, the Committee concluded that it was a "myth that transgender students endanger others when they participate in high school sports or create unfair competition." JA247. Second, the Committee rejected Mid Vermont's claim that it "should grant its appeal to avoid burdening the exercise of their religious beliefs." JA248. Noting that Mid Vermont had explained that forcing its girls' teams to compete against male athletes would

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[6] The VPA did not raise any such objection when Woodstock's player was denied three straight opportunities to play because teams forfeited games without penalty to avoid playing against her. JA50.

mean forcing it to affirm that male athletes who play in the girls' league are female, the Committee replied, "The School's claim is wrong." *Id.*

According to the Committee, "[p]articipating in an athletic contest does not signify a common belief with the opponent." *Id.* "Brigham Young University athletes do not compromise their Mormon faith—or endorse Catholicism—when they play Notre Dame." *Id.* And the VPA thought that proved "[t]his case [had] nothing to do with beliefs." *Id.*

C. The VPA's expulsion decision deprives Mid Vermont students of opportunities to play sports while relegating the School to a less competitive league.

As a result of the VPA's expulsion decision, Mid Vermont's students were denied opportunities to play sports in the spring of 2023. JA56, 355. For example, Coach Goodwin's son A.G. could not run track. JA355. And while Mid Vermont joined the less-competitive New England Association of Christian Schools for the 2023-2024 school year, that association includes schools spread across five states—Connecticut, Rhode Island, New Hampshire, Vermont, and Massachusetts—so Mid Vermont must travel "on average twice as long … to an away game by car and bus" as it did before. JA53–54, 356. As a result, Mid Vermont's varsity girls' basketball season "included three overnight hotel trips this [past] year," an inconvenience they "never had to contend with before." JA634. And that has increased the School's travel expenses while forcing students to miss more school as a result. *Id.*

Being expelled from the VPA has hurt Mid Vermont and its students in other ways, too. For example, it means being shut out from state tournaments and from competing in state championships. JA356. Coach Goodwin's son A.G. has received awards from the Vermont Basketball Coach's Association, including being named to the 2022–2023 Dream Dozen team. *Id.* But he wasn't able to compete for those awards during his senior season because Mid Vermont was excluded from the VPA. *Id.* And his potential to earn college scholarships was diminished as a result. *Id.*

Finally, other students are also suffering harm. JA57. Some students chose to stop attending Mid Vermont altogether because they were no longer able to play sports at the School or through the VPA's Member-to-Member program. JA57, 884. For students who have stayed, one was denied the opportunity to play VPA baseball for another school because Mid Vermont can no longer participate in the VPA's Member-to-Member program. JA45, 56, 170–73. Similarly, Mid Vermont did not offer girls' soccer last fall, so one of its 12-year-old girls asked her local high school if she could play on their girls' soccer team. JA57. Because Mid Vermont is no longer a member of the VPA, the girl was not allowed to play. *Id.* These harms continue and compound with each passing day.

D. Mid Vermont sues seeking readmission into the VPA, and the district court denies preliminary-injunctive relief.

After missing out on spring 2023 sports and enduring the increased time and expense required to participate in the NEACS, Fogg reached out to the VPA to express interest in reapplying for membership. JA54, 251. In response, VPA Executive Director Jay Nichols informed Fogg that the Activities Committee's decision denying Mid Vermont's appeal was "binding." JA253. And to be considered for membership again, Fogg needed to "address in writing how the School intend[ed] to assure" the VPA that it would "compete with other schools who include transgender athletes." JA253.

Mid Vermont could not commit to violating its religious beliefs as a condition to regaining membership, so the School filed suit seeking declaratory and injunctive relief and nominal damages. JA76–77.[7] Throughout its briefing, the VPA adopted the same stance toward Mid Vermont's religious beliefs that it had taken from the start: Mid Vermont was *not* trying to exercise its religion, it was trying to "enlist the aid of [the] Court in harming other children just because of who they are." JA457. And the claim that forcing girls to compete against biological boys "amount[ed] to a violation of their constitutional right to [the] free exercise of their religion" was "ludicrous." JA558.

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[7] Mid Vermont also sought compensatory damages against some defendants for tuition funding that the School had been denied because of its beliefs. But that claim is not at issue in this appeal.

At the hearing on Mid Vermont's preliminary-injunction motion, the VPA's counsel went further, comparing Mid Vermont's religious beliefs to historical opposition to allowing women to vote and to allowing "racial minorities … equal access to public facilities. JA820–21. "[D]ecades from now," counsel claimed, there would be a "consensus" that Mid Vermont was wrong. JA821.

Following that hearing, the district court issued an opinion denying Mid Vermont's motion. JA852–78. Relevant here, the court rejected Mid Vermont's argument that the VPA's expulsion decision triggered strict scrutiny (1) because the VPA had tolerated comparable secular conduct—namely teams forfeiting games for secular reasons—and (2) because the VPA had not remained neutral toward Mid Vermont's religious beliefs. JA872–76.

On the first point, the court brushed aside teams forfeiting games based on injury or illness before conceding that three girls' basketball teams forfeiting games "because an opposing player was exempt from a league-wide mask requirement" was "a little closer to this case." JA875. "[T]he VPA did not expel those schools." *Id.* But to the district court, those circumstances were unique enough that they did not affect the analysis: "A health concern in the midst of the fear and caution that gripped us during the COVID emergency is scant evidence that the VPA … applies its policies concerning transgender athletes on an individualized basis." JA875. And though the court acknowledged that a

transgender student's ability to compete in athletics is determined on an "individualized" and case-by-case basis, it did not believe that fact undermined the policies' general applicability either. JA874.

On the second point, the court concluded that the VPA had not developed its policies "with a view towards restricting religious practice or belief." JA876. The "gender inclusion" policy itself was "neutral as to religion." *Id.* It applied to all high schools that joined the VPA. *Id.* And as Justice Frankfurter had observed in *Gobitis* (which the Supreme Court overruled in *Barnette*), "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 595 (1940), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

The district court also failed to mention Mid Vermont's argument that strict scrutiny applies to the VPA's expulsion decision under the principles announced in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Carson v. Makin*, 596 U.S. 767 (2022). JA203–04. In those cases, the Supreme Court established that strict scrutiny applies when religious organizations are excluded from a public benefit because of their religious exercise. *Carson*, 596 U.S. at 778–81. In a subsequent order in this case, the district court recognized the "sound constitutional authority in favor of including Mid Vermont

in state-sponsored activities in the line of cases starting with *Trinity Lutheran*." JA958. But in ruling on Mid Vermont's motion for a preliminary injunction allowing it to play VPA sports, the court failed even to mention them. JA872–76.

As a result, the court applied rational-basis review to assess the constitutionality of the VPA's expulsion decision. The VPA Activities Standards Committee had "rejected" Mid Vermont's "contention that sending students to play on the same court" as a male who identified as a girl "amounted to an endorsement" of the student's "gender choice." JA866. And the district court rejected that contention, too. JA876–77.

Mid Vermont had argued that the VPA's decision and policies forced it to make an "impossible Hobson's [c]hoice." JA17. The School and its students could "abandon their religious beliefs, character, and practices … so they [could] participate in school athletics," or they could "adhere to their religious beliefs, character, and practices, [and] miss out on middle school and high school sports." JA17–18.

But the district court disagreed. JA876–77. According to the court, Mid Vermont "had choices." JA876. "It could have explained to its students that the world holds many forms of belief and behavior, not all of which are universally accepted, and that playing basketball with a transgender student was no endorsement of their gender identity." JA876–77. "Or it could withdraw from the competition[,] which is the course it chose." JA877.

The VPA had rejected that choice based on its "concerns over the consequences to other schools and transgender athletes." *Id.* The VPA had a "legitimate interest" in protecting students who identify as transgender. *Id.* And the VPA's policy "received broad support from elected officials and representatives, from medical authorities, and from existing state law." *Id.* That was enough to satisfy rational-basis review. *Id.* So the court denied Mid Vermont's motion for a preliminary injunction. JA878. Mid Vermont now appeals that decision.

STANDARD OF REVIEW

This Court "review[s] the denial of a motion for a preliminary injunction for abuse of discretion." *New Hope*, 966 F.3d at 180. "Such an abuse occurs when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (cleaned up). And this Court "must assess *de novo* whether the court proceeded on the basis of an erroneous view of the applicable law." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020) (cleaned up). This includes the mistaken conclusion that a law or policy is "neutral and generally applicable and thus subject only to rational basis review." *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014).

SUMMARY OF THE ARGUMENT

The First Amendment commits all state actors to a position of neutrality toward religion and its practices. When state actors treat *any* comparable secular conduct better than religious conduct, or when they maintain a discretionary system of individualized assessments, strict scrutiny applies. State actors independently trigger strict scrutiny when they exclude an otherwise eligible religious institution from a public benefit because of its religious character or exercise. Once strict scrutiny applies, courts must enjoin the state actor's conduct unless it is narrowly tailored to advance a compelling government interest.

Here, the VPA expelled Mid Vermont from membership—an undeniable public benefit—based on the School's faith-based decision to forfeit a girls' basketball game to avoid violating its religious beliefs. The VPA claimed it was advancing interests in ensuring that all students could compete in accordance with their gender identity and that no Vermont student would have to fear that their presence would prevent their team from playing. But the relevant policies include exceptions and can be waived in the VPA's discretion. The VPA also has allowed teams to forfeit games for secular reasons to avoid playing a high-school girls' basketball player who had an exemption to a mask mandate during the COVID-19 pandemic. And VPA officials made statements and decisions in response to Mid Vermont's forfeit that show the VPA departed from the neutrality the Constitution requires.

Accordingly, the VPA's expulsion decision must survive strict scrutiny, and the VPA has not met its burden under that demanding standard. This Court should reverse the decision below and direct the district court to enter the requested relief.

ARGUMENT

I. State action must be generally applicable and neutral toward religion to avoid strict scrutiny, and the VPA's decision to expel Mid Vermont was neither.

The First Amendment "states that 'Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof.'" *New Hope*, 966 F.3d at 160 (quoting U.S. CONST. amend. I). These clauses "aim to foster a society in which people of all beliefs can live together harmoniously, not a society devoid of religious beliefs and symbols." *Id.* (cleaned up). And the "Free Exercise Clause, in particular, guarantees to all Americans the 'right to believe and profess whatever religious doctrine they desire,' even doctrines out of favor with a majority of fellow citizens." *Id.* at 161 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)) (cleaned up). "Thus, it has long been the rule—as famously pronounced by Justice Jackson—that no government 'official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* (quoting *Barnette*, 319 U.S. at 642).

Instead, the "Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 638–39 (2018) (cleaned up).

A. Expelling Mid Vermont for its religious forfeit was not neutral and generally applicable because the VPA allows comparable forfeits for secular reasons.

Under the Supreme Court's caselaw, a challenged law or policy "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Phila.*, 593 U.S. 522, 534 (2021). Indeed, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). "It is no answer that a State treats some comparable secular [entities] or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* The Free Exercise Clause requires more.

Importantly, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* "Comparability is concerned with the risks various activities pose, not the reasons why people" engage in the activities. *Id.* It doesn't matter whether the "risks" posed by the secular activity have ever materialized into actual harm. *Id.* And the secular activity does not have to be exactly like the religious activity in every respect to be "comparable" enough to trigger strict scrutiny. *Id.* at 63–64.

For example, as the Supreme Court in *Tandon* described its decision in *Roman Catholic Diocese*, it was enough there that the "secular activities treated more favorably than religious worship … either '[had] contributed to the spread of COVID-19' or '*could*' have presented similar risks." *Tandon*, 593 U.S. at 62 (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020) (per curiam)) (emphasis added).

And in *Tandon* itself, the Supreme Court rejected the Ninth Circuit's (and the dissent's) view that the less-regulated secular activities were not sufficiently analogous because the challenged regulations governed in-home, *private* gatherings, whereas the less-regulated secular conduct involved *public* gatherings at "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* at 63.

As the dissent pointed out, California had "adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike." *Id.* at 65 (Kagan, J., dissenting). But under the majority's "expansive … comparative net," that wasn't enough. *Id.* To avoid strict scrutiny, the State had to "treat at-home religious gatherings the same as hardware stores and hair salons," even if that meant treating them "*unlike* at-home secular gatherings," which the dissent thought was "the obvious comparator." *Id.* (emphasis added). To the majority, the less-regulated *public* gatherings were "comparable" enough. *Id.* at 63–64.

Roman Catholic Diocese and *Tandon*'s predecessors—*Masterpiece Cakeshop* and *Lukumi*—make the same point. In both cases, the comparable secular conduct was different from the regulated religious conduct in certain ways. But it also undermined the same broadly defined state interests in similar ways. And that was enough to make the challenged laws not neutral and generally applicable.

In *Masterpiece Cakeshop*, one "indication of hostility" that the Supreme Court relied on was "the difference in treatment between [Jack] Phillips' case and the cases of other bakers who [had] objected to a requested cake on the basis of conscience and [had] prevailed before the [Colorado Civil Rights] Commission." 584 U.S. at 636. Those bakers had not declined to bake a cake for a same-sex ceremony. *Id.* So there was no accusation that they had engaged in the same kind of alleged "discrimination" as Phillips. *Id.*

Instead, the bakers had refused to "create cakes with images that conveyed disapproval of same-sex marriage, along with religious text." *Id.* If anything, then, they had discriminated against religious patrons "on the basis of … creed," not sexual orientation. *Id.* at 637 (quotation marks omitted). But that made no difference to the analysis. *Id.* at 637–38. And the Colorado Court of Appeals' "attempt to account for the difference in treatment" by focusing on the "offensive nature of the requested message" was no "answer [to Phillips'] concern that the State's practice was to disfavor the religious basis of his objection." *Id.* at 638 (quotation marks omitted).

Similarly, in *Lukumi*, the challenged ordinances prohibited owning or possessing animals for the purpose of killing, slaughtering, or sacrificing them "for any type of ritual." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527 (1993). The government claimed the ordinances advanced two interests: "protecting the public health and preventing cruelty to animals." *Id.* at 543. But the Supreme Court held that they were not generally applicable because they failed to "prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice [did]." *Id.*

As to public health, "[d]espite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, restaurants [were] outside the scope of the ordinances." *Id.* at 544–45 (cleaned up). "If improper disposal, not the

sacrifice itself, [were] the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage." *Id.* at 538. But it "did not do so." *Id.* And that failure to regulate comparable secular activity supported the Court's conclusion the ordinances were not neutral and generally applicable. *Id.* at 538–39, 544–46.

All these principles apply equally here. "[J]udged against the asserted government interest that justifies the regulation at issue," *Tandon*, 593 U.S. at 62, the three schools that forfeited games to avoid playing against a player with an exemption to the state's mask mandate engaged in secular activity comparable to Mid Vermont's decision to forfeit its game against the Long Trail School to avoid violating its religious beliefs. "Comparability is concerned with the risks" the schools forfeit decisions "pose[d], not the reasons why" the schools forfeited. *Id.*

The VPA has repeatedly described the interests justifying Mid Vermont's expulsion using broad terms that apply equally to decisions to forfeit games to avoid playing against a player suffering from one of the "rare conditions" justifying an exemption from a mask mandate. Add.11. For example, in the VPA's Notice of Probable Violation, Nichols claimed that Mid Vermont's expulsion was warranted because "[n]o Vermont student should have to fear that by virtue of their presence their team may be denied the opportunity to play a game." JA486. And the VPA's Activities Standards Committee quoted the same language in upholding Nichols' expulsion decision. JA245–46.

Similarly, in its briefing below, the VPA wrote that the "obvious humiliation and resulting harm" Mid Vermont's forfeit "causes other students—who (along with their teammates) will lose the ability to play games and be marked with the associated stigma—is *itself* discrimination." JA457. And the first policy the VPA says Mid Vermont violated says "[s]tudents must be able to participate in Association-sponsored activities in an environment that is free of sexual harassment, prejudice, and discrimination." JA142. Nothing in that policy suggests discrimination against a student with a disability or rare condition requiring a mask exemption will be tolerated. Quite the opposite, the policy says the VPA is "committed to creating an environment" that is "disability aware." *Id.* And the VPA "believes that *all* individuals should be treated with dignity, fairness, and respect." *Id.* (emphasis added).[8]

Taking the VPA at its word, what explains its decision to expel Mid Vermont while allowing school after school to forfeit games to avoid playing against a girls' basketball player with a mask exemption due to a "very rare" medical, physical, developmental, or behavioral condition? JA50; Add.1–4, 11, 13. The Agency of Education warned schools that "[s]tigma, discrimination, or bullying may arise due to wearing or not wearing a facial covering." Add.12. And schools were to "have a plan to

[8] This policy was in place when the COVID-related forfeits occurred. *See* web.archive.org/web/20201001202833/https://vpaonline.org/athletics/high-school-policies/ (captured Oct. 1, 2020).

prevent and address harmful or inappropriate behavior." *Id.* Yet the VPA repeatedly looked the other way as schools refused to play against a player who had good reason not to wear a facial covering. JA50; Add.1–4. The VPA did nothing as *that* Vermont student was made "to fear that by virtue of [her] presence [her] team may be denied the opportunity to play a game." JA486.

Perhaps the VPA's ideological sympathies lay more with the teams opposed to playing against a player with a mask exemption than with the unmasked player herself. Or perhaps the VPA credited the safety concerns expressed by teams concerned about catching COVID more than it credited the safety concerns expressed by Mid Vermont, which the VPA denigrated as a "myth." JA247. Whatever the reason, state action is "not neutral and generally applicable, and therefore trigger[s] strict scrutiny under the Free Exercise Clause, whenever [it] treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. And the VPA did exactly that.

Finally, it is no answer that the VPA also sometimes stated its interests in narrower terms—ensuring that "[n]o Vermont student should endure the refusal of another school to compete with that student because of their gender identity." JA245, 486. Nor is it an answer that the VPA accused Mid Vermont of violating its "Policy on Gender Identity" in addition to its broader "Commitment to Racial, Gender-Fair, and Disability Awareness" policy. JA486.

For one thing, the VPA's discretionary gender-identity policy states the VPA's interests in broad terms: the VPA "recognizes the value of participation in interscholastic sports for *all* student-athletes." JA142 (emphasis added).

For another, though secular conduct might not be "comparable" where "bona fide public policy reasons … justify differential treatment by the government," *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 111 (2d Cir. 2024), no "bona fide public policy reasons" justify the VPA's decision to treat a girls' basketball player with a mask exemption worse than a biologically male player who identifies as transgender, *id.* Both players were cleared to play by the VPA. And both players' participation resulted in forfeits by opposing teams. But only one of those opposing teams forfeited based on religious reasons. JA238. And that is the only team the VPA chose to expel. Any attempt to distinguish between the two players whose participation prompted the forfeits would "not, therefore, answer [Mid Vermont's] concern that the [VPA's] practice was to disfavor the religious basis of [its] objection." *Masterpiece Cakeshop*, 584 U.S. at 638.

Nor would any such distinction be consistent with the Supreme Court's caselaw. Letting the VPA define its interests narrowly to distinguish between student-athletes with rare conditions or disabilities requiring a mask exemption and student-athletes who identify as transgender would be akin to letting California distinguish between

public gatherings and private gatherings. *Tandon*, 593 U.S. at 63. Or letting Colorado distinguish between religious discrimination and alleged sexual-orientation discrimination. *Masterpiece Cakeshop*, 584 U.S. at 636–38. Or letting the City of Hialeah distinguish between the improper disposal of animal carcasses and the improper disposal of food waste. *Lukumi*, 508 U.S. at 544–45. All these activities are sufficiently comparable to trigger strict scrutiny.

In Vermont, one Christian school is forever banned from VPA sports for forfeiting a single game while other schools have forfeited games to avoid playing a specific player with no penalty. JA49–50. The VPA's actions treat "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. And the VPA thus "has the burden to establish" that it can satisfy strict scrutiny. *Id.*

B. Mid Vermont's expulsion was not the result of the application of generally applicable policies because the VPA's policies allow for individualized exceptions.

The VPA's policies themselves also are not generally applicable because they include "a mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533 (cleaned up). The mere possibility of such exceptions destroys general applicability "because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 537 (cleaned up). And this is true "regardless whether any exceptions have been given." *Id.*

Here, the relevant policies are riddled with exceptions. Start with the VPA's "[g]eneral rule[]" that "[i]nterscholastic athletics involving mixed (boys/girls) competition is prohibited." JA158–59. Under that rule, "boys shall not try out for" or "be eligible for state competition" in "traditional girls' sports," such as "girls' basketball." *Id.* That rule is simple, straightforward, and sufficient to avoid disputes like this one.

But as the district court correctly realized, the VPA "create[d] an exception" to this general rule with its gender-identity policy. JA871. Under that policy, the VPA says students will be given "the opportunity to participate" in athletic competitions "consistent with their gender identity," not their biological sex, "as outlined in the Vermont Agency of Education Best Practices for Schools for Transgender and Gender Non-conforming Students." JA142.

But even that exception has exceptions. The "Best Practices" guidance makes clear that schools need not allow students to compete consistent with their gender identity in all circumstances. While students "[g]enerally" should be allowed to compete "in accordance with [their] gender identity," each request is to be "resolved on a case-by-case basis." JA123; *accord* JA143 ("The student's home school will determine the eligibility of a student seeking to participate in interscholastic athletics in a manner consistent with their gender identity.").

So a student may be allowed to compete based on his or her gender identity—or may not.

That's not a generally applicable policy—and by design. As the State acknowledges, "[e]very student and school is unique." JA118. And allowing boys to compete in athletic competitions against girls raises serious questions about fairness and safety. The VPA itself recognizes there are "traditional boys-dominated sports" and that schools "need to protect opportunities for girl athletes." JA159–60. So rather than adopt an "across-the-board" rule, *Smith*, 494 U.S. at 884, the State has encouraged school "administrators" to discuss requests "with students and their families and draw on the experiences and expertise of their colleagues" before making any decisions. JA118. "No single policy, approach, or accommodation will apply in all circumstances," the State claims. JA119.

That means schools need not allow all students to compete according to their gender identity. In fact, the VPA told the district court that Mid Vermont could do precisely that when assembling its own teams. *See* JA468 (conceding that "Mid Vermont Christian would not be penalized if, for example, it fails to admit transgender women into its school or does not allow transgender women to participate on its athletic teams").

Even if allowing for flexibility and some exceptions may be "common sense," it undermines general applicability all the same. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 688 (9th Cir. 2023) (*FCA*). Indeed, the VPA-

approved exceptions undermine the government's purported interest in far worse ways than the slight accommodation sought by Mid Vermont ever would. Mid Vermont asks only that it not be excluded from the VPA for forfeiting a single game. In contrast, the VPA-approved exceptions can lead to transgender students being unable to compete *at all* according to their gender identity, in *any* game.

Nor does it matter if the State claims good reasons for allowing exceptions. As an en banc panel of the Ninth Circuit put it, "good intentions do not change the fact that [the VPA] is treating comparable secular activity more favorably than religious exercise." *FCA*, 82 F.4th at 688. The "broad discretion to grant exemptions on less than clear considerations removes [the VPA's] policies from the realm of general applicability and thus subjects the policy to strict scrutiny." *Id.*

The district court missed this important point. Although it acknowledged that a student's request to participate according to his or her gender identity is determined on an "individualized" and "case-by-case" basis, it believed "the decision about whether a transgender student should be allowed to try out for the girls' basketball team" is different from "Mid Vermont's decision to refuse to play against teams that include such an athlete." JA874. But even if the reasons differ, "there is no meaningful constitutionally acceptable distinction between the types of exclusions at play here." *FCA*, 82 F.4th at 689.

Again, under *Tandon*, "whether two activities are comparable" for purposes of the Free Exercise Clause "must be judged against the asserted government interest that justifies the regulation." 593 U.S. at 62. And in making that comparison, courts are "concerned with the risks various activities pose" to the government's asserted interests, not the "reasons" for those activities. *Id.* The VPA's gender-identity policy asserts an interest in "providing *all* students with the opportunity to participate in VPA activities in a manner consistent with their gender identity." JA142 (emphasis added). But the State undeniably allows each student's participation to be decided on a "case-by-case basis." JA123. And it has promised not to interfere with how Mid Vermont—and presumably other private schools—decide such requests for their own teams. *See* JA468 ("The VPA has no interest in regulating ... how [Mid Vermont] constitutes its teams.").

So despite its asserted interest, the VPA does not require "all" students to be allowed to compete in athletic events according to their gender identity. Participation depends instead on an "individualized governmental assessment of the reasons for the relevant conduct." *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). That makes the policy—and the VPA's enforcement of it—not generally applicable.

And it's not just sports. The State's gender-identity policy is intentionally ambiguous and noncommittal at every turn, reinforcing the VPA's individualized discretion. *E.g.*, JA118 ("These procedures do

not anticipate every situation that may occur and the needs of each student must be assessed on a case-by-case basis."); JA123 ("The use of restrooms and locker rooms by transgender students requires schools to consider numerous factors."); *id.* ("Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case-by-case basis.").

What's more, the VPA retains the power to waive its policies, creating another mechanism for individualized exemptions. Member schools can request a "waiver[] of VPA policies," and that includes a waiver of "eligibility" rules, which "may be granted or denied *as an exercise of discretion* by the Activities Standards Committee after considering the information that the Committee deems relevant." JA152 (emphasis added); *see also* JA143 ("The student's home school will determine the *eligibility* of a student seeking to participate in interscholastic athletics in a manner consistent with their gender identity.") (emphasis added). This vast discretion to grant or deny waivers triggers strict scrutiny because it allows the VPA to "decide which reasons for not complying with [its] polic[ies] are worthy of solicitude." *Fulton*, 593 U.S. at 537.

Despite all this, the district court held that Mid Vermont made "no showing" that the VPA has granted "individualized exemptions." JA874. But no such "showing" was needed. The mere discretion in the policies to grant individualized exceptions is enough to trigger strict

scrutiny, "regardless [of] whether any exceptions have been given." *Fulton*, 593 U.S. at 537. In any event, the record shows the VPA would allow Mid Vermont (and presumably other private schools) to assign players on its own teams based on biological sex rather than gender identity, in violation of the very same policies the VPA used to exclude Mid Vermont in the first place. *See* JA468. Because such an exception would "undermine[] the government's asserted interests," the VPA's authority to grant it further proves the gender-identity policy is not generally applicable. *Fulton*, 593 U.S. at 534.

C. The VPA's non-neutrality and hostility toward Mid Vermont's beliefs also trigger strict scrutiny.

"Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533.

And facial neutrality is not enough. *New Hope*, 966 F.3d at 163. "Mindful that government hostility to religion can be 'masked, as well as overt,' a court must … identify even those 'subtle departures from neutrality,' or 'covert suppression of particular religious beliefs' that will not be tolerated unless supported by a compelling interest and narrow tailoring." *Id.* (quoting *Lukumi*, 508 U.S. at 534). To do so, "a

court must 'survey meticulously' the totality of the evidence, 'both direct and circumstantial,'" and it must "carefully consider 'the effect of a law [or policy] in its real operation,' which 'is strong evidence of its object.'" *Id.* (quoting *Lukumi*, 508 U.S. at 534, 535).

Here, the combined effect of five factors shows the VPA failed to act neutrally when it proceeded "in a manner intolerant of [Mid Vermont's] religious beliefs" and punished Mid Vermont for its "practices because of their religious nature." *Fulton*, 593 U.S. at 533. These five factors parallel the factors this Court listed in *New Hope* to show that the Christian adoption ministry there had plausibly alleged that a government agency had not acted neutrally toward its religion when attempting to force it to choose between violating its faith or shutting down its 50-year ministry. 966 F.3d at 165–71.

"*First*, suspicion is raised by an apparent disconnect between" the VPA's enforcement of its gender-identity policy and the law that policy "purports to implement," Vermont's Public Accommodations Act, 9 V.S.A § 4502. *New Hope*, 966 F.3d at 165. The VPA's gender-identity policy explicitly invokes Vermont's Public Accommodations Act. JA142. Nichols' Notice of Probable Violation accuses the School of violating the Act by forfeiting the game against Long Trail. JA486. And the VPA's appeal-decision letter cites the "legal obligation to include transgender students in all educational programs" that the Public Accommodations Act purportedly imposes on schools and educators. JA246.

Yet Mid Vermont does not qualify as a public accommodation, and even if did, nothing in the Act indicates that forfeiting a basketball game somehow violates the Act. As the lower-seeded team, Mid Vermont was not even scheduled to host the game—Long Trail was. *See* Sports Illustrated, *Mid Vermont Christian vs Long Trail Girls Basketball,* Feb 21, 2023, perma.cc/D9LE-JESR. So Mid Vermont merely chose not to show up to play a game at another school. Nothing in the Public Accommodations Act forced the VPA to punish that decision.

"*Second*, a suspicion of religious animosity is further raised here" by the VPA's refusal to consider that Mid Vermont's decision to forfeit offered a meaningful compromise: Long Trail could continue on in the tournament while Mid Vermont could avoid violating its beliefs. *New Hope*, 966 F.3d at 166.

In other contexts, "[r]ecusal is a familiar and accepted way for decisionmakers to step aside when they recognize that personal interest, predispositions, or even religious beliefs might unduly influence (or appear to influence) their ability to render impartial judgment." *Id.* at 167. And in this case, Mid Vermont's decision to recuse itself from the state tournament came at a price to Mid Vermont and its students. JA238. It meant the end of their season, which even under the VPA's own policies could have been seen as "punishment" enough for Mid Vermont's faith-based inability to play the game. JA154, 238.

"*Third*, even before discovery," the record contains "statements by [VPA] personnel that are similar to statements in *Masterpiece Cakeshop* the Supreme Court interpreted as arguably evincing religious hostility," *New Hope*, 966 F.3d at 167–68, as well as other statements that go much further, JA50, 182, 248, 820–21.

After the VPA expelled Mid Vermont, Nichols told the media, "If you don't want to follow VPA rules, that's fine. But then you're just not a VPA member. It's fairly simple. That's really all we're gonna really say about it." JA341 (quoting Peter D'Auria, *Vermont religious school that refused to play team with trans player banned from sporting events*, VTDigger (Mar. 13, 2023), perma.cc/3LU5-2TY4).

In *New Hope* and in *Masterpiece Cakeshop*, this Court and the Supreme Court found that similarly uncompromising statements from agency officials supported an inference that the agency "did not think [the plaintiffs'] religious beliefs … could 'legitimately be carried into the public sphere.'" *New Hope*, 966 F.3d at 168 (quoting *Masterpiece Cakeshop*, 584 U.S. at 634). In *New Hope* that was enough to survive a motion to dismiss. *Id.* And here, as in *Masterpiece*, the statements get much worse.

Two days after Mid Vermont's decision to forfeit, Nichols testified before the Vermont legislature and called Mid Vermont's position on sex-separated sports teams "blatant discrimination under the guise of religious freedom." JA50, 182. In its briefing in the district court, the

VPA accused Mid Vermont of trying to "enlist the aid of [the] Court in harming other children just because of who they are." JA457. And in open court, the VPA's counsel compared Mid Vermont's religious beliefs to opposition to allowing women to vote and opposition to allowing "racial minorities … equal access to public facilities. JA820–21.

In *Masterpiece Cakeshop*, the Supreme Court held that similar statements "cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case." 584 U.S. at 636. Those statements, like the analogous statements here, characterized Phillips' faith "as merely rhetorical—something insubstantial and even insincere." *Id.* at 635. And they "even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." *Id.* While Jim Crow laws are not slavery and denying women the right to vote is not the Holocaust, comparing Mid Vermont's religious beliefs to support for such things "cast[s] doubt on the fairness and impartiality of the [VPA's] adjudication of [Mid Vermont's] case." *Id.* at 636.

And that's especially true given the VPA Activities Standards Committee's rejection of Mid Vermont's own understanding of what its religious beliefs require. JA248. "Denying an individual a religious accommodation based on someone else's publicly expressed religious views … runs afoul of the Supreme Court's teaching that '[i]t is not within the judicial ken to question the centrality of particular beliefs or

practices to a faith, *or the validity of particular litigants' interpretations of those creeds*.'" *Kane v. De Blasio*, 19 F.4th 152, 168 (2d Cir. 2021) (per curiam) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). But that is exactly what the VPA did here. JA248.

The Activities Committee rejected Mid Vermont's claim that forcing its girls' teams to compete against male athletes who identify as girls would mean forcing it "to affirm something that violates [Mid Vermont's] religious beliefs—i.e., that the males who play in the girls' league are female." JA248. As the Committee saw it, Mid Vermont was "wrong" about what its beliefs required. *Id.*

How did the Committee know? Because Mormon students can play sports against Catholic students without endorsing the Catholic faith: "Brigham Young University athletes do not compromise their Mormon faith—or endorse Catholicism—when they play Notre Dame." *Id.* And the Committee thought that fact proved that the "act of playing together on a basketball court does not imply any approval of the values or beliefs of the opponent." *Id.*

But that entirely misses the point. Mid Vermont did not object to competing against athletes who merely believe that a boy can become a girl. It objected to "facilitat[ing] a girls' sporting event that includes biological boys because that furthers a false idea of reality that contradicts the School's religious belief[s]." JA339.

The VPA's flawed theological rebuttal confirms what courts have long said: "that government has no role in deciding or even suggesting whether the religious ground for [Mid Vermont's] conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop*, 584 U.S. at 639. State actors "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* at 638. The VPA's failure to understand—and lack of sympathy toward—Mid Vermont's religious beliefs does not justify the VPA's decision to dismiss those beliefs as illegitimate.

"Fourth, another matter bearing on religious hostility" is the "severity" of the VPA's action in permanently and immediately banning Mid Vermont from all VPA activities without even initially granting it the due process the VPA's policies required. *New Hope*, 966 F.3d at 168. Mid Vermont had been a member of the VPA for 28 years before the VPA expelled it for forfeiting a single basketball game. JA16–17. And the VPA's initial decision prohibited Mid Vermont from participating even in co-ed activities like geography and spelling bees, science and math fairs, drama festivals, and debate competitions. JA17, 863, 967.

The VPA took that drastic action even though, for Mid Vermont, participating in *co-ed* activities does not raise the same conscience concerns as participating in sex-separated sports. JA967.[9] So there was

[9] After the district court strongly urged the VPA's counsel to find a way to allow Mid Vermont back into the VPA for the limited purpose of

no need to ban Mid Vermont from co-ed activities. And the VPA's inability to see that from the outset bolsters the conclusion that it was not neutral toward Mid Vermont's religion.

When, as here, state action punishes a religious organization more than "necessary to achieve its stated ends, it is not unreasonable to infer" that such state action "seeks not to effectuate the stated governmental interests, but to suppress" religiously motivated conduct. *New Hope*, 966 F.3d at 167 (quoting *Lukumi*, 508 U.S. at 538) (cleaned up).

Fifth and finally, the fact that Mid Vermont is apparently the only school the VPA has ever completely banned further shows that its expulsion decision was not neutral toward religion.[10] That's "because 'the effect of a law in its real operation' can be 'strong evidence of its object.'" *New Hope*, 966 F.3d at 169 (quoting *Lukumi*, 508 U.S. at 535).

That the VPA has only applied its newfound forfeiture-justifies-expulsion policy to religious schools that cannot compete against males who identify as female is "reason to suspect that the object" of the VPA's enforcement is "to target those beliefs and to exclude those who maintain them." *Id.* The VPA's "disparate consideration of [Mid Vermont's] case compared to the cases of the other [schools that forfeited games]

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participating in co-ed activities, JA788–92, the VPA eventually relented to that narrow degree, JA972–74, 981–83.

[10] Nichols could not recall any past examples of the VPA barring a school from sporting events. D'Auria, *supra*, perma.cc/3LU5-2TY4. And Mid Vermont's counsel has been unable to locate any either. JA951.

suggests the same." *Masterpiece Cakeshop*, 584 U.S. at 639. "For these reasons," this Court can, and should, "set aside" the VPA's expulsion decision without requiring further analysis. *Id.*; *accord Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 n.1 (2022). At the very least, the Court should apply strict scrutiny and reverse.[11]

II. The VPA's actions independently trigger strict scrutiny because they excluded Mid Vermont from a public benefit solely because of the School's religious exercise.

The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). And for this reason, the Supreme Court has held that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" because of their "religious character" or because of their "religious exercise." *Carson*, 596 U.S. at 778–81 (citing *Trinity Lutheran*, 582 U.S. 449; *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020)). Such an exclusion violates the Free Exercise Clause regardless of what this Court decides about the general applicability or neutrality of the VPA's actions. *See Carson*, 596 U.S. at 789 (holding that a program that "operates to identify and exclude

[11] If despite all this, the Court determines that the VPA's actions were neutral and generally applicable, *Smith* should be overruled. While this Court cannot do that, Mid Vermont preserves this issue for appeal. *See, e.g.*, *Fulton*, 593 U.S. at 545–618 (Alito, J., concurring) (detailing the many reasons to overrule *Smith*).

otherwise eligible schools on the basis of their religious exercise" violates the Free Exercise Clause "[r]egardless of how the benefit and restriction are described").

In *Carson*, the Court held that Maine could not exclude religious private schools from the state's tuition-assistance program. 596 U.S. at 788–89. Maine argued it excluded religious schools not because of their religious *status* but because of their religious *use* of state benefits. *Id.* at 787. But the Court rejected that argument, noting that schools *exercise* their religion precisely by "[e]ducating young people in their faith, inculcating its teachings, and *training them to live their faith*." *Id.* (emphasis added) (cleaned up). Emphasizing the breadth of its holding, the Court stated that "*[r]egardless of how the benefit and restriction are described*," state officials violate the Free Exercise Clause when their actions "operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789 (emphasis added).

This principle is decisive here. Indeed, in later urging the VPA to allow Mid Vermont to compete in non-athletic, co-ed activities like spelling bees, the district court highlighted the "sound constitutional authority in favor of including Mid Vermont in state-sponsored activities in the line of cases starting with *Trinity Lutheran*." JA958. But the court ignored that line of cases in the part of its analysis rejecting Mid Vermont's claim it should be allowed to compete in VPA sports. JA872–76. And this Court should correct that error for two reasons.

First, the VPA offers a public benefit, devoting public resources to create, maintain, and regulate a platform for schools to participate in athletics. *See* JA28–31. The VPA concedes that it is a state actor, JA558, and that it exists to "organize and supervise state[-]wide interscholastic activities" and "promote educational opportunities for Vermont students," JA110. These services convey a benefit to Vermont schools, students, and families. And because "[a]ny school in Vermont approved by the State Board of Education is eligible to become a school member," the VPA offers these benefits to a wide range of public and private schools. *Id.*

This is enough to establish a public benefit. *See Carson*, 596 U.S. at 780 (holding that a tuition-assistance program was a public benefit allowing "a wide range of private [and public] schools" to participate). It doesn't matter that the VPA offers its public benefit through an activity platform rather than a funding subsidy. *See id.* at 789 (applying the *Carson* principle "[r]egardless of how the benefit … [is] described"). Membership in the VPA is a public benefit all the same, supported with public funds and resources. *See* JA28–31, 52–53.

Second, the VPA excluded Mid Vermont because "of [its] religious exercise," *Carson*, 596 U.S. at 789, and "activities," *In re A.H.*, 999 F.3d 98, 108 (2d Cir. 2021). The School's decision to forfeit was an exercise and outworking of its religious beliefs (1) that "sex is God-given and immutable and that God created each of us either male or female,"

JA242; *accord* JA21; (2) that rejecting "one's biological sex is a rejection of the image of God within that person," JA21, 242; and (3) that forcing its "girls' basketball team that plays in a league reserved for females" to compete against a biological male athlete would "affirm something that violates [its] religious beliefs"—namely that "the males who play in the girls' league are females." JA242; *accord* JA21–22. Indeed, Mid Vermont made this decision only after concluding that proceeding with the game would have "undermine[d] the School's religious beliefs." JA355; *accord* JA238.

In short, Mid Vermont would be eligible to participate in the VPA but for its religious exercise, and the VPA's decision to exclude the School on that basis triggers strict scrutiny. *Carson*, 596 U.S. 786–87. It is no defense to say that the VPA would re-admit the School if it would capitulate and agree to stop its religious exercise. JA253, 837. Such "indirect coercion" equally violates the Free Exercise Clause. *Carson*, 596 U.S. at 778 (cleaned up). The VPA puts the School to an impossible choice: "It may participate in an otherwise available benefit program or remain a religious institution" that operates according to its faith. *Trinity Lutheran*, 582 U.S. at 462. But the VPA will not allow it to do both. Putting Mid Vermont to that impossible choice triggers strict scrutiny.

III. The VPA's decision to expel Mid Vermont fails strict scrutiny.

"[I]f a law is not neutral or not generally applicable, it is subject to strict scrutiny, and the burden shifts to the government to establish that the law is narrowly tailored to advance a compelling government interest." *Carpenter*, 107 F.4th at 109 (cleaned up). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. This is not one of those rare cases.

The VPA has not even tried to meet its burden to show that it can satisfy strict scrutiny, nor can it. To identify a compelling government interest, the question "is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [Mid Vermont]." *Fulton*, 593 U.S. at 541. The VPA asserts an interest in ensuring equal access to interscholastic sports for all students, but the availability of individualized exceptions and the VPA's willingness to overlook comparable forfeits for secular reasons "undermines the [VPA's] contention that its non-discrimination policies can brook no departures." *Id.* at 542.

In addition, the "absence of narrow tailoring suffices to establish the invalidity of the [VPA's expulsion decision]." *Lukumi*, 508 U.S. at 546. "The proffered objectives are not pursued with respect to analogous

non-religious conduct"—namely secular forfeits—"and those interests could be achieved by narrower [intervention] that burdened religion to a far lesser degree." *Id.*

"For example, the VPA [could have] tailor[ed] schedules to ensure Mid Vermont Christian would not be set to play teams with biological males." JA602. It could have done that here by reseeding Mid Vermont from the 12th seed to the 14th seed, which would have ensured that the only way Mid Vermont would have played against Long Trail would have been if both teams had advanced to the state championship—an unlikely scenario. *See* Sports Illustrated, *2023 VPA D4 Girls Basketball Championships*, perma.cc/29AY-T28U. And even if that had happened, the VPA could have simply allowed Mid Vermont "to forfeit *without penalty*." JA602. And it could have "reschedule[d] the game with a willing competitor." *Id.*

A VPA representative suggested during the COVID-19 pandemic in 2021 that the VPA might consider reseeding the school on the *receiving* end of three straight secular forfeits if too many of the school's wins had come by forfeit. Add.3. Because that was on the table to facilitate *secular* forfeits during the COVID-19 pandemic, the VPA was required to consider it as an accommodation of Mid Vermont's religious exercise two years later. But nothing in the record suggests the VPA ever considered *any* less restrictive alternatives. And that failure ends the strict-scrutiny analysis.

IV. Mid Vermont is entitled to a preliminary injunction allowing it to compete in VPA sports.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Once the Court determines that Mid Vermont is likely to succeed on its free-exercise claim because the VPA's expulsion decision was not neutral and generally applicable and cannot survive strict scrutiny, the rest of the preliminary-injunction analysis flows from that.

As to irreparable harm, "[r]eligious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation because a presumption of irreparable injury flows from a violation of constitutional rights." *Agudath Israel*, 983 F.3d at 636 (cleaned up). In other words, Mid Vermont's "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (cleaned up). And "[b]ecause the deprivation of First Amendment rights is an irreparable harm, in First Amendment cases the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Id.* at 637 (cleaned up).

Mid Vermont suffers still more irreparable harm in the form of lost opportunities, not only to participate in athletics but also for related awards and possible scholarship opportunities. JA356. And the School can no longer use VPA competition as a recruiting tool, which is a huge blow because many families view competitive sports as an important aspect of education. The district court rightly acknowledged that the VPA's actions have "had real consequences for students who can no longer participate in athletic competitions and other activities sanctioned by the VPA," JA869, but it erred in refusing to remedy these irreparable harms.

As for the public interest, "[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Agudath Israel*, 983 F.3d at 637. And the VPA had a number of constitutional alternatives it could have tried. *Supra* at 55. For similar reasons, the balance of equities tips decidedly in Mid Vermont's favor. The state action "challenged here specially and disproportionately burden[s] religious exercise, and thus 'strike[s] at the very heart of the First Amendment's guarantee of religious liberty.'" *Agudath Israel*, 983 F.3d at 637 (quoting *Roman Cath. Diocese*, 592 U.S. at 19–20). "Such a direct and severe constitutional violation weighs heavily in favor of granting injunctive relief." *Id.* And the district court's failure to apply strict scrutiny and then grant that relief was an abuse of discretion.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's order denying Mid Vermont's motion for a preliminary injunction reinstating Mid Vermont's full membership in the VPA and should direct the district court to enter a preliminary injunction ordering such reinstatement and prohibiting the VPA from enforcing its policies against Mid Vermont in the ways described in Mid Vermont's motion for a preliminary injunction, JA187, until the district court enters a ruling on the merits.

Dated: August 30, 2024

Respectfully submitted,

s/Christopher P. Schandevel

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it contains 13,034 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

August 30, 2024

/s/ Christopher P. Schandevel
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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ Christopher P. Schandevel
Christopher P. Schandevel
Counsel for Appellants

August 30, 2024

ADDENDUM

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Burlington Free Press

HIGH-SCHOOL

Nobody would play Woodstock — until a policy change allowed Hartford to step up.

Austin Danforth
Burlington Free Press

Published 6:56 a.m. ET Feb. 25, 2021 | **Updated 11:04 a.m. ET Feb. 25, 2021**

It took an opposing district's policy change for the Woodstock Union High School varsity girls basketball team to play its first game of the year on Tuesday night.

The Wasps had missed out on their first three scheduled contests because opponents chose to forfeit rather than play someone with an approved exemption to the state's mask mandate to combat the risk of COVID-19 transmission.

Neither the rule requiring facial coverings during play, nor the exemption for medical or behavioral reasons, are new. They've been in place since the the start of the 2020-21 school year. And none of the exemptions in the fall led to teams forfeiting, according to Bob Johnson, associate executive director of the Vermont Principals' Association.

Yet, even a week ago, Hartford High School probably would've done the same thing that Woodstock's first three opponents had, Hartford athletic director Jeff Moreno said Wednesday. The Wasps have a player with an exemption and the Hurricanes' district only allowed games in which all competitors were masked.

But Moreno, after conferring with colleagues around the state, floated a proposal to his superintendent and the district's COVID coordinator˘seeking to approach mask-exemption instances on a game-by-game basis.

A more nuanced approach would allow the school to consider context rather than blindly say yes or no — and the administrators agreed.

More: Vermont high school and youth indoor sports given green light to begin competition

"That wasn't done lightly at all. There's a lot of factors and a lot of trust," Moreno said. "We were not trying to find a way to play a game just to play a game."

In this case, it was worth considering the Woodstock school community has managed the pandemic as well as anyone, with just one confirmed COVID-19 case to date, according to data compiled by the state.

The exempted Woodstock student had attended school and practice without any issues, Moreno said. And Hartford's athletic trainer vetted the exemption prior to the game, an eventual 70-45 Hurricanes win.

"There's zero negative feelings — nobody was breaking any rule, nobody was trying to do anything untoward," Moreno said. "Here's a group of kids who were excited to play and have a season just as much as we were."

More: Q-and-A with VPA's Bob Johnson: How did COVID impact athletes in the fall sports season

Woodstock's perspective

Reached by phone on Wednesday afternoon, Sherry Sousa, superintendent of the Woodstock school district, declined to offer any context to the situation facing the girls basketball team, citing confidentiality issues.

"As the VPA rules and guidelines say, there's a mask rule and there's an opportunity to (be exempted). And then other schools have the opportunity to choose to play with us or not," she said. "So all I can say, please, is that we are following the VPA expectations and guidelines and other schools are making their decisions.

"I really don't want to say any more because I really am concerned about that situation."

When asked how the Woodstock girls basketball team has handled and reacted to opponents deciding to forfeit, Sousa said she didn't want to make any assumptions about how the players felt. Sousa also declined to make those closer to the team, either coach Steven Landon or athletic director Jack Boymer, available for comment.

More: Coronavirus in Vermont: Face masks now required for youth, adult recreation sports leagues

"They do not feel comfortable having those conversations either. They are also concerned with confidentiality," she said.

"It's challenging to be a student-athlete during the pandemic and we are doing everything we can to make sure students are involved and engaged in sports," Sousa said.

Earlier this month, after Windsor forfeited the season-opener on short notice, Boymer told the Valley News hat he is informing opposing schools of Woodstock's mask exemption a week in advance. He said he understood both sides of the issue, why schools would choose to forfeit out of caution.

"Nobody preemptively saw this coming; otherwise, we would've probably had more dialogue about it," Boymer said. "We talked about procedures and protocols for months ahead of the season; I just don't think we thought it would be an issue."

What it could mean for playoffs

Any schools unwilling to play a team with a mask-exempt athlete, like Woodstock, could find themselves in that situation in the postseason. But the VPA's stance on the rule is clear.

"You have to make a decision, do you come to the tournament or don't you come to the tournament?" Johnson said. "If you do, you play by the rules that we have."

The situation could also force the VPA to tweak its approach to seeding teams for postseason play. Currently, that's done according to wins and losses in a points-based rankings formula.

But Woodstock's case brings about the very real possibility that a team's position in the standings could owe in large part to a number of wins by forfeit, which are otherwise quite rare, and not a measurement of its actual performance.

"That's something we'll have to look at as we get closer to the playoffs," Johnson said.

"If someone came in and they were 8-2 and six of the wins were by forfeits then we'd have to look at that and see what we could do with the placement of that team," Johnson said. "It's not a guarantee they'd necessarily be placed first. Our plan is to follow the same seeding guidelines we've followed in the past, but we understand this year is anything but normal."

Moreno hopes his school's process and decision to play Woodstock helps alleviate those concerns but knows it's not a given others would follow Hartford's example.

"There's a lot of schools out there that have the same approach we did," Moreno said.

"Maybe we've helped create a blueprint for other schools to consider how they can navigate this path," Moreno said. "If we have created a blueprint, that's great. I'm happy to work with any athletic director or school administrator that's in the same boat."

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A Strong and Healthy Start: Safety and Health Guidance for Vermont Schools

October 23, 2020
As of April 8, 2021 this document has been rescinded and is superseded by guidance in A Strong and Healthy Year: Safety and Health Guidance for Vermont Schools, 2021, available at www.education.vermont.gov/covid19.
File
guidance-strong-healthy-start-school-health-updated-10-23 (740.8 KB)
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EVENTS

A STRONG AND HEALTHY START

Safety and Health Guidance for Reopening Schools, Fall 2020

Issued by the Vermont Agency of Education and the Vermont Department of Health

Issued: June 16, 2020
Revised: October 23, 2020
EFFECTIVE: November 16, 2020

VERMONT AGENCY OF EDUCATION
DEPARTMENT OF HEALTH

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June 16, 2020

Introduction

COVID-19 presents novel and unprecedented challenges to our society. The pandemic is placing our economic system, our system of government, our health system, and every sector and area of human life under great stress and forcing us to rise to the challenge in new ways.

Education is no exception. Educating students, ensuring they make progress, and safeguarding their health, welfare and nutrition has been made vastly more difficult by the presence of the virus. In Vermont, COVID-19 forced the rapid dismissal of schools in March 2020, followed by a period of maintenance of learning, while we worked as an education system to stand up a Continuity of Learning structure. Our education community has worked incredibly hard and risen to the challenge in truly inspiring ways.

The lessons we have learned from these experiences indicate that we need to resume in-person instruction of students as soon as safely possible, while continuing to strengthen our Continuity of Learning systems and our ability to be nimble and move quickly to respond to future outbreaks of the virus.

The following guidance is written with this in mind. It is one of several sets of guidance our agencies will release in the coming weeks, intended to help School Districts and Supervisory Unions (SU/SDs) and independent schools prepare to reopen school in the Fall of 2020. This document is focused on safeguarding student and staff health while operating in-person instruction.

We expect that the situation will continue to evolve as the pandemic progresses, and we continue to learn more about this novel coronavirus. This document was developed with the input and feedback of Vermonters who are infectious disease experts, practitioners of pediatric medicine, public health experts, and education professionals. It is our best judgement based on the information we have now. However, we expect to update this document as new information becomes available. **Key updates/changes since the last revision are indicated in green.**

Sincerely,

Daniel M. French, Ed.D.
Secretary, Vermont Agency of Education

Mark Levine, M.D.
Commissioner, Vermont Department of Health

NEW Effective Date

As of writing, Vermont schools are currently operating under the previous version (Version 2) of this guidance. This version is the first time that Strong and Healthy Start Guidance is being updated while schools are engaged in the operation of in-person learning. Vermont schools have, across the board, done an excellent job of implementing the previous versions of this guidance, and have an excellent track record of containing cases of COVID-19 and safeguarding student, staff and community health.

Nevertheless, it is important to minimize the impact that any new changes in this version may have as schools are engaged in the critical work of in-person instruction, as long as doing so does not put public health at risk. Vermont school districts and independent schools need time to update and adjust their individual school- and district- level plans in order to implement the changes in this document in a way that is safe and minimizes disruption to student learning. Accordingly, the effective date for this version of the Strong and Healthy Start Guidance is November 16, 2020.

NEW Summary of Changes

This document has been updated based on the evolving understanding of COVID-19 in a school setting. It also incorporates supplemental guidance that was issued separately by the Health Department or Agency of Education (AOE). Significant changes have been made to:

- **Clarify and emphasize quarantine guidance for out-of-state travel.**
  - **Add the requirement of a daily travel screening for staff and students.**
- **Clarify return-to-school after illness, including links to Vermont's return-to-school algorithm and parent guidance.**
- **Clarify cleaning schedule when an individual is sent to a school's isolation room, as well as cleaning of the isolation room.**
- **Clarify factors the Health Department will use in making recommendations when there is a case of COVID-19 in school.**
- **Add winter weather considerations for buses and transportation.**
- **Add recommendations for seating charts in the school bus and cafeteria, along with classrooms.**
- **Add a link to guidance on mask exemptions.**
- **Clarify guidance on cleaning and disinfecting, including accidental large volume spills or body fluids.**
- **Add guidance on the use of plexiglass/plastic barriers.**
- **Clarify guidance on shared materials and lockers.**
- **Update definition of younger students for the purposes of physical distancing requirements to students in PreK through Grade 6.**
- **Clarify guidance on <u>minimum</u> physical distancing requirements for younger and older students.**
- **Clarify guidance on performance arts.**

- All students, staff and contracted service providers should engage in hand hygiene at the following times:
    - Arrival to the facility
    - After staff breaks
    - Before and after preparing food or drinks
    - Before and after eating, handling food or feeding students
    - Before and after administering medication or medical ointment
    - After using the toilet or helping a child use the bathroom
    - After coming in contact with bodily fluid
    - Before and after handling facial coverings/face shields/goggles
    - After handling animals or cleaning up animal waste
    - After playing outdoors
    - Before and after playing with sand and sensory play
    - After handling garbage
    - Before and after cleaning
    - Prior to switching rooms or locations
- Provide plenty of hand lotion to support healthy skin for students and staff.
- Wash hands with soap and water for at least 20 seconds. If hands are not visibly dirty, alcohol-based hand sanitizers with at least 60% alcohol can be used if soap and water are not readily available (monitor for ingestion of hand sanitizer among young children). Steps for proper handwashing can be found on the CDC website.
- After assisting students with handwashing, staff should also wash their hands.
- Place posters describing handwashing steps near sinks. Developmentally appropriate posters in multiple languages are available from CDC.

Facial Coverings and Personal Protective Equipment

UPDATED **All staff and students (of all ages) are required to wear facial coverings while in the building. They must also wear them when outside of the building if adequate physical distancing of at least six (6) cannot be maintained.** CDC recommends facial coverings in settings where other physical distancing measures are difficult to maintain, especially in areas of significant community-based transmission. Adults doing drop-off and pick-up **must** wear facial coverings. Teach about and reinforce the use of cloth facial coverings among staff and students. Instructions for making, wearing and washing facial coverings can be found on the Health Department website and CDC website. PreK students require special consideration regarding age and child development.

The following stipulations are for students, as well as staff, where applicable:

- Facial coverings are developmentally appropriate when children can properly put on, take off, and not touch or suck on the covering.
- UPDATED Students who have a medical or behavioral reason for not wearing a facial covering should not be required to wear one. These decisions should be made in partnership with the health care provider and school nurse. **Guidance on Mask Exemptions in Children and Adolescents provides guidance for the rare conditions that allow children or adolescents to qualify for a mask exemption. From the Health Department, University**

of Vermont Children's Hospital, Vermont Child Health Improvement Program and Vermont Chapter American Association of Pediatrics.

- Students/staff should not wear facial coverings while sleeping, eating or swimming (or when they would get wet)—reinforce physical distancing during these times.
- Facial coverings with ties are not recommended for young children as they pose a risk of choking or strangulation.
- In some situations, teachers and staff may prefer to use clear face coverings that cover the nose and wrap securely around the face. Teachers and staff who may consider using clear face coverings include:
    - Those who interact with students or staff who are deaf or hard of hearing, per the Individuals with Disabilities Education Act
    - Teachers of young students learning to read
    - Teachers of students in English as a second language classes
    - Teachers of students with disabilities

UPDATED
- **Face shields are primarily meant for eye protection.** The use of clear facial shields for adults that cover the eyes, nose and mouth is less preferable, but allowable. They must meet all of the health guidance of the Vermont Department of Health. Face shields should extend below the chin and to the ears laterally, and there should be no exposed gap between the forehead and the shield's headpiece.

UPDATED
- Staff may take off their facial covering in select circumstances when physical distancing cannot be maintained, such as when a parent/caregiver is hearing impaired and reads lips to communicate. **If such encounters are anticipated, a face shield for the staff could be considered during the encounter.**
- Staff that work with students unable to control their secretions should wear a surgical mask and eye protection (either goggles or a face shield) for added protection. If surgical masks are not available, staff may use a KN95 mask if available.

Additional considerations regarding facial coverings:

- Stigma, discrimination, or bullying may arise due to wearing or not wearing a facial covering. Schools should have a plan to prevent and address harmful or inappropriate behavior.
- Not all families will agree with school policies about cloth face coverings. Schools should have a plan to address challenges that may arise and refer parents, caregivers and guardians to Health Department guidance on facial coverings.
- Include cloth face coverings on school supply lists and provide cloth face coverings as needed to students, teachers, staff, or visitors who do not have them available.
- Students' cloth face coverings should be clearly identified with their names or initials, to avoid confusion or swapping. Students' face coverings may also be labeled to indicate top/bottom and front/back.
- When not in use, facial coverings should be stored in individually labeled containers or paper bags.
- Face coverings should be washed after every day of use and/or before being used again, or if visibly soiled.

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DEPARTMENT OF HEALTH

Guidance on Mask Exemptions in Children and Adolescents

Medical experts agree that masks/cloth face coverings and social distancing are essential to prevent the spread of COVID-19. As schools require children to wear masks, parents may have questions for their pediatricians about medical conditions that make wearing a mask unsafe for children.

The following guidance regarding medical mask exemptions for children reflects the consensus of the American Academy of Pediatrics Vermont Chapter, and the pediatric subspecialists of the Vermont Children's Hospital.

This guidance does not replace conversations between parents and their medical home about the risks and benefits of individual children attending school in person or using only remote learning during the pandemic.

Face Mask Medical Exemptions examples are listed here.

Because most children who meet mask exemption criteria for school attendance universally need IEPs to access their education, we do not believe additional documentation from the medical home is necessary. However, please discuss this with the student, family, medical home, school nurse and/or subspecialty team if you are uncertain.

General Mask Guidance:
-All children should wear a mask at school unless physical, developmental or behavioral impairments make wearing a mask unsafe.
-Masks should not be worn by anyone who is having trouble breathing, is unconscious or incapacitated. If a student desires a mask to attend school and is unable to remove the mask on their own, s/he should be supervised by a caregiver who is able to immediately assist if needed.

The physical, developmental and behavioral conditions that may make wearing a mask unsafe for children are very rare. They include the following:
• Developmental delays
• Limited physical mobility
• Severe autism
• Structural abnormalities of the head or neck, however, some of these children may be able to wear bandanna-style coverings.

In most cases, a child who is unable to wear a mask safely for medical reasons should not attend school in person.

Guidance for specific conditions:

- **Allergies.** There is no medical reason that allergies should prevent children from wearing masks. If a child is suffering from allergy-associated nasal congestion, over-the-counter or prescription steroid nasal sprays may provide relief.
- **Anxiety**. This is a difficult time for children who suffer from anxiety. Parents can support them by modeling appropriate mask wearing and providing factual, reality-based information about COVID19. For children with mask related anxiety or distress who are going to school, please refer to the additional

resources and information provided at the end of this document. Anxiety is not a medical reason for not wearing a mask, and your child's pediatrician and Vermont Children's Hospital can help support your child.

- **Asthma**. Children with asthma should not be exempt from wearing masks, nor should masks cause asthma symptoms. It is always important for children to follow their prescribed asthma action plan, including their maintenance medications. Masks should be removed if a child experiences active asthma symptoms. If the asthma symptoms prevent wearing a mask, then the family should see their physician to work together to improve their asthma care.
- **Communication Differences**: Students who are deaf, deaf-blind, hard of hearing or speech impaired may require the use of face shields to promote adequate communication to access their education.
- **Cardiology**. There are no cardiology conditions that make wearing a mask unsafe for children who are well enough to attend school.
- **Developmental Pediatrics**. Some children with limited physical and/or mental capacity may not be able to wear masks safely. Masks may agitate some children with autism, behavioral challenges or intellectual disability. However, with consistent positive reinforcement and gradual desensitization, most children can get used to wearing a mask. Support should be provided at school to continue to encourage students in this category to wear masks, without excluding them from school if they cannot.
- **ENT**. Children who have structural abnormalities of the head, neck or face may not be able to wear a traditional mask safely, but may be able to use a bandanna-style mask. These may also be helpful for children with tracheostomies.
- **Hematology/oncology**. If cancer and blood disorder patients are well enough to attend school in person, they should wear masks.
- **Neurology.** There are no neurological conditions that make wearing a mask unsafe for children who are well enough to attend school.
- **Physical Medicine and Rehabilitation**. Some children with limited physical mobility may not be able to wear masks safely and/or require an individual to monitor their facial covering at all times.
- **Pulmonology**. There are no pulmonology conditions that make wearing a mask unsafe for children who are well enough to attend school.

  Our community primary care pediatricians and medical homes are happy to work in conjunction with the pediatric subspecialists of the Vermont Children's Hospital, parents, and schools to determine whether children qualify for mask exemptions. We believe that these criteria will limit the need for additional medical documentation.

Resources to help children adapt to the use of masks

Specific to masks:

- National Child Traumatic Stress Network (NCTSN):
  - This PDF has younger child-friendly descriptions of masks, their use, etc. (See PDF pg 17, 18, 19)
- Nemours
  - Lots of good resources for kids, CYSHN
  - Coronavirus (COVID-19): Helping Kids Get Used to Masks

General resource for anxiety related to the pandemic