24-1704

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

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Vermont
No. 2:23-cv-652

BRIEF OF *AMICUS CURIAE* NATIONAL EDUCATION ASSOCIATION, PUBLIC FUNDS PUBLIC SCHOOLS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND AMERICAN FEDERATION OF TEACHERS, IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* have no parent corporations and no stock.

Dated: October 22, 2024 */s/ Adam J. Hunt*

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INTEREST OF *AMICI CURIAE*[1]

Amici are committed to ensuring that public education remains the cornerstone of our nation's social, economic, and political structure, and that children of all backgrounds have the right to a public education that gives them a meaningful opportunity to succeed in school and in life.

The National Education Association ("NEA") is the largest union in the country, which represents three million educators who serve our nation's students in public schools, colleges, and universities. Since its founding over a century and a half ago, NEA has worked to create, expand and strengthen the quality of public education available to all children. NEA is committed to ensuring a strong public education system as the foundation of our vibrant, multiracial democracy. Consistent with NEA's commitment that public schools prepare every student to succeed in a diverse and interdependent world, NEA frequently appears as amicus in support of the rights of all students to fair treatment.

Public Funds Public Schools ("PFPS") is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools. PFPS opposes all forms of private school vouchers and other diversions of public funds to private education. PFPS is a partnership between Education Law

[1] No party or its counsel had any role in authoring this brief. No person or entity—other than *Amicus Curiae* and its counsel—contributed money that was intended to fund preparing or submitting this brief.

Center ("ELC") and the Southern Poverty Law Center ("SPLC"). ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that pursues justice and equity for public school students by enforcing their right to a high-quality education in safe, equitable, non-discriminatory, integrated, and well-funded learning environments. SPLC, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 that serves as a catalyst for racial justice in the South and beyond, working to advance human rights. PFPS has participated as *amicus curiae* in matters involving issues similar to those presented in this case before numerous state and federal courts, including the supreme courts of Arizona, Kentucky, Michigan, Mississippi, Nevada, South Carolina, and Tennessee, as well as the U.S. Supreme Court.

The National School Boards Association ("NSBA"), founded in 1940, is a nonprofit organization ensuring that each student everywhere has access to excellent and equitable public education governed by high-performing school board leaders and supported by the community. NSBA regularly represents its members' interests before Congress and federal courts and has participated as amicus curiae in numerous cases addressing public schools.

The American Federation of Teachers ("AFT"), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.8 million members in more than 3,500 local affiliates nationwide. Since its founding, the AFT has been a major force for America's democracy and for preserving and strengthening America's commitment to

public education and to educational opportunity for all. AFT's K-12 members are committed to providing their students with the highest quality public education consistent with the standards set by the local, state, and federal government. AFT frequently submits amicus briefs in cases that directly impact public school education.

All parties have consented to the filing of this brief.

ARGUMENT

I. Introduction

This case asks the Court to decide whether a voluntary association of Vermont schools that protects student-athletes' right to "participate in [its] activities in a manner consistent with their gender identity," Pls.' Mem. Supp. Mot. Prelim. Inj. at 6, ECF No. 14-1, may enforce that rule and require schools that opt to join the association to abide by it. That question can only be answered, "Yes."[2] And even if one concludes that the voluntary membership association is so entwined with the state for purposes of enforcing its non-discrimination rule that it may be considered a state actor, that answer does not change. A neutral, generally applicable rule

[2] In the proceedings below, the parties assumed with little analysis of the relevant factors under *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), that the Vermont Principals' Association ("VPA") is a state actor for all purposes relevant to this appeal. That is not evident from the record. The factual allegations in the complaint here fall far short of *Brentwood*'s findings of pervasive entwinement between the state and an association, including the state's express delegation of authority to the association, *id.* at 292, and the state's review and approval on multiple occasions of the rule at issue in *Brentwood*. *Id.* In contrast, the factual allegations here are that the VPA is comprised mostly of public schools and "has historically been seen to regulate" interscholastic competitions in lieu of the state. Compl. ¶ 99, ECF No. 1; *see also id.* ¶ 115 (alleging that some $423,000 of the VPA's approximately $1.7 million in revenue comes from public school members). *Amici* respectfully submit that these allegations are not sufficient to establish that the VPA is a state actor for purposes of enforcing its nondiscrimination rule. This Court, of course, is "free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." *Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir. 1995); *accord Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 160 n.6 (2d Cir. 2017).

allowing student-athletes to compete in voluntary activities without discrimination does not infringe on any competing teams' religious exercise rights.

II. The Vermont Principals' Association's Athletic Policy and its Uniform Application of its Nondiscrimination Rule Did Not Violate Mid Vermont Christian School's Constitutional Rights

The voluntary association in this case is the Vermont Principals' Association ("VPA"), a membership organization that private and public schools and their leaders may opt to join. Compl. ¶ 95, ECF No. 1. No school in Vermont and no school leader is required to join the VPA. *Id.* ¶ 188. Schools and leaders that join the VPA must abide by the VPA's rules when participating in activities organized by the VPA. *Id.* ¶ 188, 222; *see also id.* ¶ 96 & Ex. 2, ECF No. 1-2 (VPA's Bylaws providing for officers democratically elected by VPA members and requiring VPA members to abide by VPA's rules).

One of those rules, as Appellants admitted in the trial court proceedings, reflects the VPA's belief that student-athletes should be able to "participate in [its] activities in a manner consistent with their gender identity." Pls.' Mem. Supp. Mot. Prelim. Inj. at 6, ECF No. 14-1. This rule is consistent with Vermont law, which the VPA understands requires it to prohibit discrimination that would violate Vermont's public accommodations law. *See infra* at 16-18. The rule is also aligned with best practices that the state of Vermont has identified for such extracurricular activities. *See infra* at 15-16. As applied in interscholastic competitions, the VPA's

nondiscrimination rule does not require participating schools to organize their own teams in any particular way. Mid Vermont Christian was free to exercise its own beliefs regarding the composition of its teams, choice of coaches, and instruction of its own players. In VPA competitions, however, teams may not refuse to compete against another team based on the identity of the players on the opposing team.

Because Mid Vermont Christian did just that by refusing to play against a team whose roster included a transgender girl, the VPA—after proceeding through its internal procedures and appeals—terminated Mid Vermont Christian's membership. Mid Vermont Christian subsequently joined a different interscholastic athletic association, the New England Association of Christian Schools, and is fielding teams in that association's competitions. Compl. ¶¶ 236-37, ECF No. 1. Yet, Mid Vermont Christian brought this lawsuit seeking to compel the VPA to reinstate Mid Vermont Christian's membership in the VPA, despite the school's refusal to abide by the VPA's non-discrimination rule.

It requires no extended analysis to show that a voluntary association like the VPA may set and enforce its own rules and, indeed, is protected by the First Amendment in doing so. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (state may not compel "the organization to accept members where such acceptance would derogate from the organization's expressive message"); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574, 581 (1995). Mid Vermont

Christian may choose to join or not join the VPA, but there is no legal principle that requires the VPA to change its beliefs regarding fair play and nondiscrimination just because Mid Vermont Christian disagrees with those views. Rather, Mid Vermont Christian's remedy is to do what it already has done—join an association that conducts athletic tournaments aligned with the school's views. JA342.

III. Even if VPA's Decision to Enforce its Own Democratically Created Rules Amounts to State Action, the VPA's Neutral and General Nondiscrimination Rule Does Not Violate Mid Vermont Christian's Free Exercise Rights

Amici recognize that before the district court, the parties assumed that the VPA was a state actor for purposes relevant to this case. Assuming *arguendo* that is so, the VPA's non-discrimination requirement and its enforcement of that requirement did not violate Mid Vermont Christian's Free Exercise rights. This Court should affirm the district court's application of well-established precedent to determine that the VPA's policy passes rational basis review. And even if this Court were to apply a strict scrutiny standard, the VPA's antidiscrimination provisions still pass muster. The VPA has demonstrated that its interests are compelling because states have a critical interest in public education, eliminating discrimination, and—at the intersection of these crucial interests—ensuring that students have equal access to the full range of educational opportunities, including extracurricular sports. Moreover, the VPA's antidiscrimination provisions are narrowly tailored, as they solely cover certain discriminatory conduct against protected classes and, moreover,

do not apply to nonmember schools.

IV. Vermont's Antidiscrimination Laws and Policies, Including those Governing Extracurricular Activities Such as Athletics, Further the Critical Goal of Providing Quality Education

A. Vermont is constitutionally committed to equitable educational opportunities

Providing public education is "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). From its earliest days, Vermont has recognized the obligation to provide for the education of its children, including a public education guarantee from its first constitution onward. Vt. Const. of 1777, ch. II, § XL. The Vermont Supreme Court recently reaffirmed that Vermont children have a fundamental right to education under the Vermont Constitution. *Vitale v. Bellows Falls Union High Sch.*, 2023 VT 15, ¶ 11, 217 Vt. 611, 622 (2023). And the Court has read the education guarantee in combination with the Common Benefit Clause (Vt. Const. ch. 1, art. 7), which provides that government "is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community," to hold that the state has a constitutional duty to ensure that education must be of substantial equality throughout the state. *Brigham v. State*, 166 Vt. 246, 268 (1997).

Vermont's constitutional duty to provide equitable education for all is further codified in statutory laws. Indeed, the Vermont Statutes provide that the right to public education is "integral to Vermont's constitutional form of government and its

guarantees of political and civil rights. Further, the right to education is fundamental for the success of Vermont's children in a rapidly-changing society and global marketplace as well as for the State's own economic and social prosperity." Vt. Stat. Ann. tit. 16, § 1. To keep Vermont's democracy competitive and thriving, students must be afforded "substantially equal access" to "a quality basic education." *Id.* All Vermont educational institutions are required to provide "safe, orderly, civil, and positive learning environments. Harassment, hazing, and bullying have no place and will not be tolerated in Vermont schools." *Id.* § 570(a). Moreover, schools (public, independent and postsecondary) are considered places of public accommodation and therefore generally cannot discriminate on the basis of sexual orientation or gender identity in their accommodations, advantages, facilities, or privileges. Vt. Stat. Ann. tit. 9, §§ 4501, 4502.

As a part of providing quality educational opportunities for all students, Vermont aims to ensure equal access to extracurricular activities, including competitive sports. The 2017 *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students*[3] issued by the Vermont Agency of Education endorsed the inclusion of transgender students on sports teams "in

[3] Vt. Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* (Feb. 23, 2017), https://education.vermont.gov/sites/aoe/files/documents/edu-best-practices-transgender-andgnc.pdf [https://perma.cc/P39U-WH6E].

accordance with the student's gender identity." *Id.* at 6. This directive seeks to reduce the high rate of harassment and assault aimed against transgender students by highlighting their rights to self-determination, privacy, safety, and freedom from discrimination. *Id*. at 3. The guidance is also consistent with Vermont's Public Accommodations Act as well as the prohibition against harassment in schools established by Title 16, section 570 of the Vermont Statutes Annotated.[4]

B. The VPA's Athletic Policies align with Vermont's commitment to equitable education free from discrimination

The VPA has followed the guidance of the Vermont Agency of Education in its Athletic Policies governing member schools' participation in its sports activities. Athletic Policies, *Vermont Principals' Association*, at 4-5, https://bit.ly/3XYyZQw.[5] The VPA's Athletic Policies, which apply equally to all member schools, include a "Policy on Gender Identity" that follows the Agency of Education's Best Practices in "providing all students with the opportunity to participate in VPA activities in a manner consistent with their gender identity." *Id.* The VPA also has a "Commitment to Racial, Gender-Fair, and Disability Awareness," which states that the VPA believes "all individuals should be treated with dignity, fairness, and respect." *Id.* at 4. The VPA is "committed to creating an environment in [its]

[4] The document also references federal statutes including the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq*; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and other provisions.

activities and programs that promotes respect for and appreciation of racial, gender, sexual orientation, religious and ethnic differences" and is "disability aware." *Id.* The VPA's provisions further Vermont's goal of ensuring that students participating in extracurricular programs have the opportunity to do so without facing discrimination. Put differently, Vermont's antidiscrimination laws and policies, embodied in the VPA's Athletic Policies, guarantee that the VPA does not facilitate discrimination against Vermont's students.

As applied in this instance, the VPA's nondiscrimination requirement meant only that Mid Vermont Christian could not refuse to play against teams that included transgender players and in so doing shun, disparage, and harm the opposing team and its transgender student players. *See* Ord. on Mot. Prelim. Inj. at 12-13, ECF No. 57. Mid Vermont Christian was otherwise free to continue its practices as it saw fit, including making choices about who might be admitted to the school and participate on its teams, who would be hired to teach and coach the students on those teams, and how those students would be instructed. What Mid Vermont Christian could not do was use the athletic competitions organized by VPA to propagate its discriminatory views by refusing to compete against teams that included transgender students, publicly ostracizing and discriminating against them in the process. That discrimination by Mid Vermont Christian against other players was a valid ground under the VPA's neutral non-discrimination policies for the VPA to revoke Mid

Vermont Christian's membership. The Court cannot rule otherwise without jeopardizing scores of civil rights and the laws protecting them.

C. Antidiscrimination laws are critically important and refusing to allow VPA to prohibit discrimination against competing teams and their players would harm students

Antidiscrimination laws and policies improve public education, thus promoting one of the most important functions of state governments. The U.S. Supreme Court has long affirmed the value in keeping schools free from discrimination, writing that "[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). In addition, the Supreme Court has acknowledged that antidiscrimination policies, because they allow all students to participate, promote the goals of education. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 688 (2010). Eliminating discrimination in educational programs sanctioned by the state protects students from discriminatory practices that are antithetical to those democratic values.

By contrast, permitting state-sanctioned discrimination against marginalized students is inimical to the state's attempts to provide educational opportunities, depriving students of an equitable education and constraining their potential. In particular, LGBTQ+ students are more likely than other students to be targets of

physical or online bullying.[6] Vermont's own data show LGBTQ+ students are twice as likely as heterosexual cisgender students to be bullied during the past month, are more likely to experience poor mental health and are 3.5 times more likely to have attempted suicide in the past year.[7]

Fully inclusive athletic policies are particularly vital to the wellbeing of LGBTQ+ students. A 2022 study showed that transgender students in states with fully inclusive athletic policies were fourteen percent less likely to have considered suicide in the past year than students in states with no guidance.[8] Antidiscrimination protections like the VPA's are therefore vital for student safety and educational achievement.[9] Their importance to students' well-being cannot be diminished,

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[6] Vt. Dep't of Health, *2017 Vermont Youth Risk Behavior Survey, High School Results* (May 2018), https://www.healthvermont.gov/sites/default/files/documents/pdf/HSVR_YRBS_HighSchool_2017.pdf, at *9-10, 12, 14-15.

[7] Vt. Dep't of Health, *Statement from Health Commissioner Mark Levine, MD and Interim Secretary of Education Heather Bouchey, Ph.D. on Supporting LGBTQIA+ Youth* (Mar. 20, 2024), https://www.healthvermont.gov/media/news-room/statement-health-commissioner-mark-levine-md-and-interim-secretary-education.

[8] Ctr. for Am. Progress, *The Importance of Sports Participation for Transgender Youth* (Mar. 18, 2021), https://www.americanprogress.org/wp-content/uploads/sites/2/2021/03/Importance-of-Sports-Participation1.pdf (citing CDC's Data and Documentation for Youth Risk Behavior).

[9] Any argument about discriminating against transgender athletes for the "safety" of the players is transphobic and outdated. There is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g., cross-sex hormones, gender-confirming surgery). Nat'l Library of Medicine, *Sport and Transgender People: A Systemic Review of the Literature Relating to Sport Participation and*

regardless of the justification an institution provides for discriminating, and they must not be watered down by broad exemptions.

Forcing the VPA to reinstate a school that explicitly discriminates against transgender students would result in the exclusion of transgender students who attend other schools—including public schools—from participation in a state-sponsored extracurricular opportunity. Mid Vermont Christian has explicitly stated that it does not tolerate transgender students, either in the school environment or outside of it (e.g., during games or athletic events). But Mid Vermont Christian cannot act on its beliefs in a vacuum. By refusing to play any games against teams with transgender students, Mid Vermont Christian seeks to use the athletic competitions organized by VPA to spread its discriminatory and harmful message that transgender students are so objectionable that one cannot even compete in a basketball game with a team that includes any transgender students. That message no doubt has and would continue to socially isolate and ostracize transgender students in *other* VPA schools, many of which are public schools, both preventing these students from participating in team sports and further socially isolating them. By allowing Mid Vermont Christian to participate in sports programs but "forfeit" (without penalty) any games where transgender students are playing, Vermont

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Competitive Sport Policies (Oct. 3, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5357259/.

would be granting Mid Vermont Christian a state forum in which to propagate its harmful views that transgender students should not exist. Mid Vermont Christian has no constitutional right to impose its discriminatory views on other schools, teams, and students. The VPA was entirely within its rights to enforce its neutral and general prohibition against discrimination to prevent Mid Vermont Christian from using VPA athletic contests to spread a message of discrimination and hate.

D. The result sought by Mid Vermont Christian would open the door to other discrimination based on religious beliefs

Permitting Mid Vermont Christian to rejoin the VPA and explicitly discriminate against students at public and other schools on the basis of sexual orientation or gender identity would set a dangerous precedent that would open the door to further discrimination against other vulnerable and protected groups. There is no limiting principle to Mid Vermont Christian's logic, threatening a slippery slope of discrimination up to and including racial discrimination. One can imagine schools refusing to play certain sports against other teams that include transgender players or singling out players on opposing teams for scrutiny and discrimination simply because they are too tall or masculine appearing. Or schools refusing to play teams that include students who may not have been born in the United States. Or even schools refusing to play teams that include students of a different race or ethnic background. The U.S. Supreme Court has categorically forbidden such conduct, *see, e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968)

(per curiam), and backsliding on these principles must be diligently avoided. There is no denying this nation's sordid history of racial discrimination in education.[10] Since *Brown v. Board of Education*, the United States has instituted broad legal protections against racial discrimination in schools, including Title VI of the Civil Rights Act, under which not only public schools but also *private schools* that accept federal funds are prohibited from discriminating on the basis of race, color, or national origin. 42 U.S.C. § 2000d *et seq*.

The U.S. Supreme Court has rejected arguments that religious rights trump the government's interest in preventing racial discrimination. *See Newman*, 390 U.S. at 402 n.5 (rejecting business owner's constitutional challenge to the Civil Rights Act's bar on racial discrimination in public accommodations based on his view that racial integration "contraven[ed] the will of God" (citation omitted)); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 631 (2018) (citing *Newman*, 390 U.S. at 402 n.5) (recognizing that "while . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow [actors] in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law").[11]

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[10] *See, e.g.*, Nat'l Museum of African American History and Culture, *The Struggle Against Segregated Education*, https://nmaahc.si.edu/explore/stories/struggle-against-segregated-education (last visited Aug. 7, 2024).

[11] Unlike in *303 Creative LLC v. Elenis*, here, Appellants are not being compelled to speak or promote views inconsistent with their religious commitments. 600 U.S.

These principles extend to educational institutions. *See Runyon v. McCrary*, 427 U.S. 160, 161 (1976) (stating that the practice of excluding racial minorities from schools is not protected by the right to freedom of association).

In *Masterpiece Cakeshop*, the Court understood that broad exceptions to antidiscrimination laws would result "in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop*, 584 U.S. at 632. The same principle applies here: adopting Appellants' reasoning threatens to thrust society back into a long-rejected era of discrimination in school activities that was justified by religion. *See Berea Coll. v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), *aff'd*, 211 U.S. 45 (1908) (upholding a law prohibiting integrated schools because "separation of the human family into races, distinguished . . . by color . . . is as certain as anything in nature" and is "divinely ordered"); *see also W. Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (1867) (justifying segregation on railroads because "the Creator" made two distinct races and "He intends that they shall not overstep the natural boundaries He has assigned to them").

Vermont's and the VPA's prohibitions against discrimination are engineered

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570, 595 (2023). In this case, Mid Vermont Christian is attempting to "speak" by taking actions on its purported religious commitments at events sponsored by the VPA, a voluntary membership association with its own set of policies. With respect to VPA-organized events, the VPA's own messaging must prevail to the extent that there is any conflict between the VPA's messaging and Mid Vermont Christian's.

to prevent precisely this type of discrimination and to ensure the protection of all students participating in the VPA's interscholastic sports and extracurricular programs.

V. Conditioning VPA Membership on Compliance with Nondiscrimination Standards Is Proper

A. The VPA's policies are neutral and generally applicable, and thus subject to rational basis review

It is well established that states have the power to condition public benefits on compliance with neutral, generally applicable nondiscrimination requirements. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *superseded by statute as stated in Ramirez v. Collier*, 595 U.S. 411, 424 (2022)); *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) ("[N]eutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."), *superseded by statute as stated in Ramirez*, 595 U.S. at 424. These neutral and generally applicable nondiscrimination requirements are particularly appropriate where they impact the provision of a core government function, public education. Vt. Stat. Ann. tit. 16, § 1; *see Brown*, 347 U.S. at 493.

The VPA's antidiscrimination policies are neutral. They do not target religious practices, nor are they motivated by religious animus. Moreover, the policies are generally applicable. *Every* school that participates in the VPA—

whether public or private, religious or not—is prohibited from discriminating on the basis of racial, gender identity, sexual orientation, religious, or ethnic differences. *Vermont Principals' Association*, at 4-5. Simply put, a religious school that discriminates would receive the *same* treatment as a secular private school that discriminates. Accordingly, Appellants' suggestion that the VPA's antidiscrimination policies cannot be neutral or generally applicable is directly controverted by the policies' plain language. Although Appellants suggest that the VPA's policies perpetuate religious discrimination, Appellants' Opening Br. at 49, its policies in fact explicitly prohibit discrimination on the basis of religion. *Vermont Principals' Association*, at 4, 25.

Appellants' attempts to liken this case to *Carson* are inapposite. In *Carson*, the Supreme Court held that "there is nothing neutral about" wholly barring religious schools from the receipt of publicly funded tuition payments. *Carson v. Makin*, 596 U.S. 767, 781 (2022). In so holding, the Court emphasized that "the Free Exercise Clause forbids discrimination on the basis of religious status." *Id.* at 787. But here, unlike in *Carson*, religious schools are not excluded from publicly sponsored activities, such as membership in the VPA and the ability to participate in competitive athletics with other VPA member schools in Vermont. That is, neither Mid Vermont Christian's religious identity nor its religious practices prevent it from participating in the VPA. And the VPA specifically prohibits discrimination on the

basis of religion. Only Mid Vermont Christian's insistence on discriminating against students at other VPA member schools precludes it from membership. Indeed, if a school objects to a condition on the benefits of a publicly available opportunity, "its recourse is to decline the benefits. This remains true when the objection is that a condition may affect the [school's] exercise of its First Amendment rights." *See AID v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

Besides Mid Vermont Christian's conclusory assertion that playing basketball opposite a transgender student would amount to an endorsement of the student's gender identity, which strains credulity, Appellants articulate no religious commitments that are restricted by the VPA's nondiscrimination rule. Nor have they identified any burden whatsoever, even incidental, on their religious practice. Even if they had made such a showing, this Court has held that a neutrally and generally applicable law that incidentally burdens religious exercise is constitutional. *We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 144 (2d Cir. 2023) ("[A] law that incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review."), *cert. denied*, 144 S. Ct. 2682 (2024); *see also Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 531. Nor is a burden on religious expression (incidental or not) in and of itself cause to render a law unconstitutional. *Browne v. United States*, 176 F.3d

25, 26 (2d Cir. 1999) (quoting *Smith*, 494 U.S. at 878-79).

In short, the VPA may restrict membership to those schools that comply with the VPA's neutral and generally applicable antidiscrimination policies.

B. The VPA's antidiscrimination policies survive strict scrutiny

Even if this Court finds that the VPA's policies are not neutral or generally applicable, the VPA's decisions at issue here should still be upheld because they pass strict scrutiny.

Vermont's interest in eliminating discrimination in the VPA's sports and other extracurricular activities is compelling. As demonstrated above, *supra* Section III, there can be no dispute that states have a compelling interest in eliminating discrimination. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982) (finding states have a "substantial interest" in protecting their citizens from "the political, social, and moral damage of discrimination"); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (eliminating discrimination "plainly serves compelling state interests of the highest order").

Moreover, Vermont has a compelling interest, under the education clause of the state constitution, Vt. Const. ch. II, § 68, in ensuring that students are adequately educated free from discrimination. *See Vitale*, 2023 VT 15, ¶ 10, 217 Vt. at 622 ("[T]he state must ensure substantial equality of educational opportunity throughout Vermont." (emphasis and citation omitted)). An essential component of the state's

affirmative constitutional duty is the guarantee that public education benefits are open to all children. *Id.* ¶ 20, 217 Vt. at 627 ("The Common Benefits Clause is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons who are a part only of that community." (internal quotation marks and citations omitted)). Thus, the VPA's nondiscrimination requirements further Vermont's compelling interest.

The Supreme Court's decision in *Bob Jones University v. United States* is instructive. There, private religious universities challenged an IRS policy that made private schools with racially discriminatory admissions policies ineligible for tax-exempt status. In so doing, the universities argued that their racially discriminatory policies qualified as protected free exercise based on sincerely held religious beliefs. *See* 461 U.S. 574, 579-85, 602-03 (1983). But the Supreme Court rejected the religious college's challenge, finding that the government had a "compelling," "fundamental," and "overriding" interest in eliminating racial discrimination in education. *Id.* at 604.[12]

The VPA's policies are also narrowly tailored. The provisions at issue only apply to schools that seek membership in the VPA, and schools are not barred from

[12] Because *Bob Jones* was decided before *Smith*, 494 U.S. at 872, the Court applied strict scrutiny. Today, the IRS ruling would likely be upheld as a neutral law of general applicability.

the program due to religious status nor prohibited from engaging in religious activity. Mid Vermont Christian is free to teach and promote Christianity and, according to the record below, to decide who may participate on its teams, how those students may be instructed and taught, and by whom they may be coached. The only reason Mid Vermont Christian was removed from the VPA was because it refuses to play against teams from other schools that include transgender players. *See supra* at 12. As the lower court rightly found—and as Appellants' brief fails to cure—Appellants make no showing of individualized exemptions from the rules of the VPA that would support strict scrutiny. *See* JA874. Simply put, the antidiscrimination provisions are narrowly tailored because they are written to encompass discriminatory conduct against protected classes, and nothing more. *See Bob Jones*, 461 U.S. at 604 (finding "no less restrictive means are available" to eradicate discrimination in education than denying tax benefits (internal citation omitted)).

Accordingly, even if this Court does not consider the VPA's anti-discrimination policies neutral or generally applicable, this Court should still uphold the polices under a strict scrutiny standard.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: October 22, 2024

Respectfully Submitted

/s/ *Adam J. Hunt*

CERTIFICATE OF COMPLIANCE

I certify that his brief complies with the type-volume limitation of Rule 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Second Circuit Rule 29.1(c) because it contains 5370 words, excluding the parts of the brief exempted by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word Version 16.88 in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: October 22, 2024 */s/ Adam J. Hunt*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the CM/ECF system on October 22, 2024.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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