20-1772

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

E.M., by and through her parents and natural guardians, Christopher Messineo and Jill Messineo, other Christopher Messineo, other Jill Messineo; CHRISTOPHER MESSINEO, individually; JILL MESSINEO, individually; A.S., by and through her parents and natural guardians, Russell Senesac and Selena Senesac, other Russell Senesac, other Selena Senesac; A.M., by and through his parents and natural guardians, Christopher Messineo and Jill Messineo, other Christopher Messineo, other Jill Messineo; RUSSELL SENESAC, individually; SELENA SENESAC, individually; ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT;
(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

CHRISTINA E. NOLAN
United States Attorney
District of Vermont
P.O. Box 570
Burlington, VT 05402-0570

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

THOMAS E. CHANDLER
Attorney
U.S. Department of Justice
Civil Rights Division
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

(*Continuation of caption*)

JAMES HESTER, individually; DARLENE HESTER, individually; A.H., by and through her parents and natural guardians, James Hester and Darlene Hester, other James Hester, other Darlene Hester,

Plaintiffs-Appellants

v.

DANIEL M. FRENCH, in his official capacity as Secretary of the Vermont Agency of Education,

Defendant-Appellee

GEORGE B. SPAULDING, in his official capacity as Chancellor of the Vermont State Colleges System, AKA Jeb,

Defendant

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RULE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-1772

A.M., by and through his parents and natural guardians, CHRISTOPHER MESSINEO and JILL MESSINEO; *et al.*,

Plaintiffs-Appellants

v.

DANIEL M. FRENCH, in his official capacity as Secretary of the Vermont Agency of Education,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a). The United States has a substantial interest in preserving the free exercise of religion and regularly files statements of interest and amicus briefs in cases that implicate religious liberties. The United States filed a statement of

interest in the proceedings below (Doc. 22)[1] and filed a merits-stage amicus brief in *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), which presented a question similar to the one here and was the basis for this Court's August 5, 2020, order granting plaintiffs' motion for an emergency injunction pending appeal.

INTRODUCTION AND STATEMENT OF THE ISSUE

Plaintiff A.H. resides in a Vermont school district that lacks a public high school. In furtherance of their Catholic religious beliefs, A.H. and her family decided that A.H. would attend high school at Rice Memorial High School (Rice), a school run by the Roman Catholic Diocese of Burlington. Because of her choice to attend Rice, A.H. later was deemed ineligible to participate in Vermont's Dual Enrollment Program, which would have provided public funding for her to take up to two college-level courses at a postsecondary institution as a high school junior or senior. Unlike A.H., students in her school district who attend an approved secular independent or public school or opt for home study generally are eligible to participate in the Dual Enrollment Program. A.H., her family, and the Diocese of Burlington sought a preliminary injunction to permit A.H. and her Catholic high

[1] "Doc. __" refers to the document as recorded on the district court docket sheet. "J.A. __" refers to pages of the parties' Joint Appendix. "Appellants' Br. ___" refers to page numbers in plaintiffs-appellants' opening brief.

school to participate in the Dual Enrollment Program pending further proceedings below. The district court denied the motion.

The United States addresses the following question only:

Whether A.H., her parents, and the Diocese of Burlington have shown a clear likelihood of success on the merits of their claim that A.H.'s exclusion from the Dual Enrollment Program, which is open to similarly situated secular schools and students attending such schools, on the basis of Rice's religious affiliation violates the Free Exercise Clause of the United States Constitution.[2]

STATEMENT OF THE CASE

1. Vermont's Dual Enrollment And Town Tuition Programs

a. Vermont's Dual Enrollment Program allows eligible high school students who have completed the tenth grade to take up to two college-level classes at certain public or private postsecondary institutions, at public expense. Vt. Stat. Ann. tit. 16, § 944 (2020). This Dual Enrollment Program is part of Vermont's "Flexible Pathways Initiative," the goals of which are to: (1) "encourage and support the creativity of school districts" in offering "high-quality educational experiences"; (2) "promote opportunities for Vermont students to achieve postsecondary readiness"; and (3) "increase the rates of secondary school

[2] The United States take no position on any other question presented in this appeal.

completion and postsecondary continuation in Vermont." Vt. Stat. Ann. tit. 16, § 941(a)(1)-(3) (2020). The State pays tuition directly to postsecondary institutions that offer courses through the Dual Enrollment Program; no funding goes to participating students' high schools. Vt. Stat. Ann. tit. 16, § 944(f) (2020).

Among other things, eligibility for the Dual Enrollment Program depends on the type of high school in which the student is enrolled. Vt. Stat. Ann. tit. 16, § 944 (2020). Broadly speaking, students are eligible to participate if they attend a public school, an "approved independent school in Vermont to which the student's district of residence pays publicly funded tuition on behalf of the student," or if they engage in "home study." Vt. Stat. Ann. tit. 16, § 944(b)(1)(A) (2020).

b. As relevant here, for students and families such as A.H. and her parents who reside in school districts that do not have a public high school (known as "sending districts"), eligibility to participate in the Dual Enrollment Program is linked to funding criteria in Vermont's Town Tuitioning Program. See Vt. Stat. Ann. tit. 16, § 822 (2020). Under that program, sending districts may pay tuition for students to attend public high schools in other school districts or at approved independent schools chosen by students' families. Vt. Stat. Ann. tit. 16, § 822(a)-(b) (2020). Under state law, approved independent schools are those that satisfy certain academic standards and Vermont Board of Education rules. Vt. Stat. Ann.

tit. 16, § 166(b) (2020). Determinations about whether to publicly fund tuition at approved independent schools rest with school districts. J.A. 533.

The Town Tuitioning Program is silent as to whether sending districts may fund tuition for students and families who choose to attend religious high schools. In *Chittenden Town School District* v. *Department of Education*, the Vermont Supreme Court construed the Compelled Support Clause of the Vermont Constitution—which provides in Chapter I, Article 3 that "no person ought to, or of right can be compelled to * * * support any place of worship"—to prohibit the public payment of tuition to a sectarian school "in the absence of adequate safeguards against the use of such funds for religious worship." 738 A.2d 539, 541-542 (Vt.), cert. denied, 528 U.S. 1066 (1999). The district court concluded that in the wake of the 1999 *Chittenden Town* decision, "unnecessary confusion" exists as to the ability of school districts to pay tuition to religious schools. J.A. 535. Appellants here contend that "the Vermont Supreme Court has held[] the State's 'current statutory system' for public tuition 'violates' the Compelled Support Clause of the Vermont Constitution." Appellants' Br. 4-5 (quoting *Chittenden Town*, 738 A.2d at 563). Thus, according to appellants, "not a single religious-school student may receive public tuition unless some official makes a mistake." Appellants' Br. 5.

No religiously affiliated high school currently participates in the Dual Enrollment Program. J.A. 296. Indeed, a coordinator for the Dual Enrollment Program and counsel for the Vermont Agency of Education have stated that the Dual Enrollment Program is not open to religious schools and their students. J.A. 534-535 (explaining that in response to a parent's inquiry the Dual Enrollment Program coordinator "advised: 'The law does not provide dual enrollment to Christian/parochial schools * * * and [they] are not eligible for Dual Enrollment") (brackets in original).[3]

2. Relevant Factual And Procedural Background

a. Plaintiffs in this action—four students attending Rice Memorial High School and their parents, including A.H. and her parents, and the Roman Catholic Diocese of Burlington—sued Daniel M. French, the Secretary of the Vermont Agency of Education, under the Free Exercise and Equal Protection Clauses of the United States Constitution based on their alleged exclusion from the Dual

[3] Although it is undisputed that no religiously affiliated high school currently participates in the Dual Enrollment Program, Vermont proffered evidence below that "'at least [twenty-two] different independent secondary schools that have an apparent or declared religious affiliation' located both within and outside of Vermont have received public tuition funds from 'at least [thirty-three] separate Vermont school districts' since 2001." J.A. 534 (alterations in original) (quoting J.A. 297). As of fiscal year 2017-2018, Vermont had 276 total school districts. J.A. 198. Appellants contend (Br. 36) that such funding is "inconsistent with Agency policy and *Chittenden* [*Town*]."

Enrollment Program. See generally J.A. 96-115 (Am. Compl.).[4] Plaintiffs allege that, based on the operation of the Town Tuitioning Program, they are rendered ineligible for participation in the Dual Enrollment Program because of the religious nature of their high school. J.A. 100-104. As to the plaintiff students and families, in particular, they allege that their decision to attend a religious high school—and not a public high school, publicly funded private secular school, or home school—requires them to forgo a public benefit for which they otherwise qualify (namely, the Dual Enrollment Program).[5] J.A. 97, 104-109.

A.H.—the only student expressly covered by the motion for preliminary injunction that is the subject of this appeal—is a rising senior at Rice, a private Catholic high school that is a ministry of the Roman Catholic Diocese of Burlington, Vermont. J.A. 532-533. A.H. lives in South Hero, Vermont, which is part of the Grand Isle Supervisory Union School District (Grand Isle). J.A. 533. Grand Isle lacks its own high school such that it is a sending district and thus pays tuition for students to attend other public high schools or approved independent

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[4] Plaintiffs filed their amended complaint following a December 2019 district court order granting leave to amend the complaint and granting in part and denying in part defendant's motion to dismiss. Doc. 65; J.A. 96-115. The United States filed a statement of interest urging the district court to deny the motion to dismiss with respect to plaintiffs' Free Exercise claim. Doc. 22.

[5] Plaintiffs in this action have not challenged the Town Tuitioning Program and do not seek public funding for the tuition of those students in sending districts who choose to attend religious high schools.

schools. J.A. 533. A.H. wishes and is prepared to take science courses at the University of Vermont during her senior year through the Dual Enrollment Program. J.A. 533. A.H.'s family cannot afford to pay for these courses in addition to her Rice tuition. J.A. 533. Rice did not apply to participate in the Dual Enrollment Program in the 2019-2020 school year; had Rice done so, the request would have been denied because the school does not receive public tuition funding. J.A. 532-533.

In an attempt to meet the Dual Enrollment Program's eligibility requirements after Secretary French suggested in litigation A.H. might qualify (Appellants' Br. 8 (citing J.A. 72)), A.H's family requested public tuition funding for her to attend Rice, but Grand Isle denied this request in February 2020. J.A. 533. In so doing, Grand Isle stated that Rice "is a religious school for which we do not pay tuition." J.A. 533 (citing J.A. 347). Accordingly, A.H. may not take college courses through the Dual Enrollment Program because she is a student in a sending district who attends a religious school that her school district will not fund.

b. In March 2020, plaintiffs moved for a preliminary injunction to prevent plaintiffs—specifically, A.H., her parents, and the Roman Catholic Diocese of Burlington—from being denied participation in the Dual Enrollment Program. J.A. 116-132. Plaintiffs argued that they could show irreparable harm, a likelihood

of success on the merits, and that the public interest favored the issuance of the preliminary injunction. J.A. 121.

As to irreparable harm, plaintiffs argued that the failure to grant an injunction would prevent A.H. from availing herself of the Dual Enrollment Program in her final year of high school based on her religious status. J.A. 127-128. This would cause irreparable harm through the violation of A.H.'s and her parents' constitutional rights, and through the Diocese's loss of enrolled students at Rice who might seek to attend independent schools that receive publicly funded tuition and thus meet the Dual Enrollment Program's eligibility requirements. J.A. 128.

As to likelihood of success on the merits, plaintiffs argued that the Dual Enrollment Program's eligibility requirements constitute an "'automatic and absolute exclusion' based on religious character," and thus "'impose special disabilities on the basis of religious status'" in violation of the Free Exercise Clause. J.A. 122 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021-2022 (2017)). Plaintiffs relied primarily on statements of the Agency of Education counsel and Dual Enrollment Program coordinator regarding religious schools' ineligibility, as well as the fact that no religious high schools participate in the program. J.A. 123. To the extent that plaintiffs theoretically might become eligible for the Dual Enrollment Program by securing

public tuition funding after implementation of the "adequate safeguards" described by the Vermont Supreme Court in *Chittenden Town*, plaintiffs asserted such workarounds would constitute unconstitutional burdens that fall only on religious adherents. J.A. 124-125 (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543 (1993), and *Trinity Lutheran*, 137 S. Ct. at 2019). Plaintiffs further argued that the Vermont Secretary for Education controls both admission to and payments through the Dual Enrollment Program, and that Vermont has never articulated or implemented safeguards that would enable qualification for public tuition funding—a necessary prerequisite for qualification in the Dual Enrollment Program for students in sending districts who choose to attend independent schools. J.A. 125.

Because the Dual Enrollment Program's eligibility requirements burden religious exercise, plaintiffs argued that these requirements must "advance interests of the highest order" and be "narrowly tailored in pursuit of those interests." J.A. 125 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 546). Given that the State has not established safeguards to comply with *Chittenden Town*, nor are such safeguards called for with respect to a student's high school where public funding

for the Dual Enrollment Program flows only to postsecondary institutions, plaintiffs argued that the Secretary could not satisfy such showing. J.A. 125.[6]

c. The district court denied the preliminary injunction. J.A. 528-545. As relevant to the issues addressed herein, the court held that plaintiffs could not make the required showing of irreparable harm absent an injunction. J.A. 539-542. The court found that plaintiffs had not shown that the Dual Enrollment Program's eligibility requirements are facially discriminatory toward religious schools and students or that the program was enacted with discriminatory intent. J.A. 540-541. The court did not accept plaintiffs' assertion that the program's eligibility requirements impose "unconstitutional burdens" on religious schools and students, citing evidence that at least some religious schools had managed to receive public funds for student tuition. J.A. 541. Further, the court reasoned that A.H.'s exclusion from the program turned not on any action by defendant but instead on Grand Isle's decision to deny public funding to Rice—a decision A.H. and her family did not appeal. J.A. 541-542.

The court also held that plaintiffs could not show a likelihood of success on the merits. J.A. 542-544. The court acknowledged that pursuant to the Free

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[6] Plaintiffs also argued that an equal protection violation existed, and that an injunction would serve the public interest by preventing an injury to plaintiffs' constitutional rights and by promoting Vermont students' readiness for postsecondary education. J.A. 126-130. The United States does not address this claim.

Exercise Clause, "only * * * a state interest of the highest order" may justify the denial of "a generally available benefit solely on account of religious identity." J.A. 543 (quoting *Trinity Lutheran*, 137 S. Ct. at 2019). Yet the court found that the State need not have a compelling government interest where its policies have "the incidental effect of burdening a particular religious practice." J.A. 543 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 531). The court found that plaintiffs were unlikely to succeed on the merits because they had not attempted to show that the Dual Enrollment Program's eligibility requirements lack any legitimate governmental purpose. J.A. 543. The court did not engage with the specific reason that Grand Isle denied A.H.'s request for public funding for her Rice tuition, which then rendered A.H. unable to participate in the Dual Enrollment Program—*i.e.*, that Rice is a religious school.

d. Plaintiffs timely appealed the district court's order denying their motion for a preliminary injunction. J.A. 546. They sought an emergency injunction pending appeal, which this Court granted on August 5, 2020, after concluding that plaintiffs "have a strong likelihood of success on the merits of their claims" "[i]n light of the Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020)." *Espinoza* was decided on June 30, 2020, approximately a month after the district court's decision.

SUMMARY OF THE ARGUMENT

Plaintiffs A.H., her parents, and the Roman Catholic Diocese of Burlington established a strong likelihood of success on the merits of their Free Exercise claim. Decisions of the Supreme Court, including *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017), and *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), make clear that the Free Exercise Clause prohibits the exclusion of religious schools from generally available public benefits—such as the funding of tuition for postsecondary education—unless the state policy survives strict scrutiny. See, *e.g.*, *Espinoza*, 140 S. Ct. at 2260 (explaining that the Court's precedents have "repeatedly confirmed the straightforward rule" that "[w]hen otherwise eligible recipients are disqualified from a public benefit solely because of their religious character, we must apply strict scrutiny") (citation and internal quotation marks omitted).

The district court here erred in failing to apply the holding of *Trinity Lutheran* to the facts A.H., her parents, and the Diocese presented in support of their motion. This error is even clearer in light of the Supreme Court's decision in *Espinoza*. A.H. and Rice indisputably were excluded from the Dual Enrollment Program because of Rice's religious character, whereas A.H. would have been able to access the program if she attended an approved secular independent school.

Because these plaintiffs were, thus, excluded from the Dual Enrollment Program expressly because of their religious affiliation, the district court should have conducted a strict scrutiny analysis. Under that strict scrutiny analysis, the Dual Enrollment Program's eligibility requirements fail. Conditioning A.H. and Rice's program participation on the receipt of publicly funded tuition does not appear to advance *any* state interest, much less an interest of the "highest order."

ARGUMENT

A.H., HER PARENTS, AND THE ROMAN CATHOLIC DIOCESE OF BURLINGTON DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM THAT THEIR RELIGION-BASED EXCLUSION FROM THE DUAL ENROLLMENT PROGRAM VIOLATES THE FREE EXERCISE CLAUSE

A. The Free Exercise Clause Generally Prohibits The Denial Of Benefits On The Basis Of Religious Status

1. The Free Exercise Clause of the First Amendment protects against religious discrimination by the Federal Government, and the Fourteenth Amendment applies this guarantee to the states. As a general rule, the Free Exercise Clause prohibits laws that disqualify religious entities, because of their religious character, from generally available public benefits. Through the First Amendment's Free Exercise and Establishment Clauses, the Framers of the First Amendment sought to stamp out abuses against religious adherents witnessed in England and the colonies by "protect[ing] against governmental intrusion on religious liberty." *Everson* v. *Board of Educ.*, 330 U.S. 1, 13

(1947). To that end, the Free Exercise Clause denies the government the power to withhold generally available public benefits on the basis of the recipient's religious character.

The Supreme Court's consistent precedents confirm this understanding of the Free Exercise Clause. The Court has explained that a State cannot exclude individuals "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson*, 330 U.S. at 16. Nor may a State "condition the availability of benefits" upon a person's surrender of his "religious faith," *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) (citation omitted), or require a person to "purchase his right" to exercise his religion "by sacrificing" a state-granted privilege, *id.* at 634 (Brennan, J., concurring in the judgment).

The Court also has stated that the government may not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). It has observed that the government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990). It has recognized that the Constitution "protects religious observers against unequal treatment." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*,

508 U.S. 520, 542 (1993) (alteration omitted). And it has remarked that its decisions "have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

2. Most recently, the Supreme Court has applied and elaborated on these Free Exercise Clause principles in the context of funding to religious educational institutions and their students in two recent decisions, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017), and *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

a. In *Trinity Lutheran*, the Court considered a Missouri program that provided grants for schools and childcare centers to resurface their playgrounds, from which church-controlled entities were excluded. 137 S. Ct. at 2017. Missouri claimed its policy was compelled by a state constitutional provision that prohibited state aid to any religious institution as well as preferential treatment based on religion. *Ibid.*

In holding that Missouri's program impermissibly excluded a church-affiliated daycare from participation, the Court explained that the Free Exercise Clause "'protects religious observers against unequal treatment'" and generally prohibits "laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (alteration omitted)

(quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 542). Missouri's policy violated that "basic principle," the Court held, because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2019, 2021. That express exclusion, the Court concluded, imposed a forbidden "penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 2021-2022. The state's "policy preference for skating as far as possible from religious establishment concerns" did not satisfy strict scrutiny, as this antiestablishment aim necessarily is limited by the Free Exercise Clause. *Id.* at 2024.

In reaching this conclusion, the Supreme Court distinguished its decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), which upheld Washington State's refusal to fund degrees in theology as part of a state scholarship program. The *Locke* Court emphasized that Washington had gone "a long way toward including religion in its benefits," and had "merely chosen not to fund a distinct category of instruction." *Id.* at 721, 724. The Court also explained that the state's decision reflected the "historic and substantial state interest" in declining to subsidize the "essentially religious endeavor" of "[t]raining someone to lead a congregation." *Id.* at 721, 725. *Trinity Lutheran* construed *Locke* to mean that where a state denies funds not because of the recipient's religious identity

but instead because of what the recipient "propose[s] *to do*" with those funds—*i.e.*, prepare for the ministry—then the state's antiestablishment interest lies at the "historic core of the Religion Clauses" and may justify a refusal to fund certain "'essentially religious endeavor[s].'" *Trinity Lutheran*, 137 S. Ct. at 2023 (citing *Locke*, 540 U.S. at 721-722). Playground resurfacing triggered no such interest. *Ibid.*

b. Just this year, in *Espinoza*, the Supreme Court reaffirmed these Free Exercise principles in considering—and rejecting—the Montana Supreme Court's application of the state constitution's prohibition on aid to sectarian schools to preclude religious schools and students from participating in a generally available, publicly subsidized scholarship program. 140 S. Ct. 2246.

The Court held, first, that "strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status." *Espinoza*, 140 S. Ct. at 2257. The *Espinoza* Court rejected Montana's assertion that *Locke* should control for two reasons: (1) the Montana Supreme Court's decision restricted funding to religious entities, as in *Trinity Lutheran*, not to a particular category of instruction, as in *Locke*; and (2) while Washington's interest in not funding the training of clergy in *Locke* was "historic and substantial," no such tradition supported Montana's disqualification of religious schools from government aid. *Espinoza*, 140 S. Ct. at 2257-2259 (quoting

Locke, 540 U.S. at 725). Indeed, as to the second of these reasons, history revealed instances of early federal aid to religious schools, with the imposition of state no-aid provisions arising only in the late-19th century as a manifestation of bigotry toward Catholics. *Id.* at 2258-2259

Thus, consistent with *Trinity Lutheran*, *Espinoza* applied the "strictest scrutiny," which requires that "government action 'must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.'" 140 S. Ct. at 2260 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 546). As in *Trinity Lutheran*, the Court noted that the Free Exercise Clause limited and trumped Montana's asserted "interest in separating church and State 'more fiercely' than the Federal Constitution." *Ibid.* (quoting *Espinoza* v. *Montana Dep't of Revenue*, 393 Mont. 446, 467 (Mont. 2018)). The Court rejected, for two reasons, Montana's contention that its no-aid provision protected religious liberty by preventing taxpayer funding of religious entities and safeguarding religious entities' freedom to avoid government entanglement. First, it concluded that any such interests—including any Establishment Clause concerns—are "limited by the Free Exercise Clause." *Ibid.* Second, it concluded that it did "not see how the no-aid provision promotes religious freedom." *Id.* at 2261. To that end, the Court recounted that it repeatedly had upheld government programs that provide equal taxpayer funding to religious

entities, "particularly when the link between government and religion is attenuated by private choices." *Id.* at 2260-2261. As well, "[a] school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program." *Id.* at 2261. The Court doubted, however, "that the school's liberty is enhanced by eliminating any option to participate in the first place." *Ibid.*

The Court found the state's argument all the less convincing because of the breadth of the exclusion—which reached any aid to religious schools—and its impact on both religious schools and the students and families who choose to attend them. *Espinoza*, 140 S. Ct. at 2261. Despite the long-acknowledged parental right to direct children's religious upbringing, which may include education in a religious setting, "the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." *Ibid.*

Lastly, the *Espinoza* Court rejected Montana's claim that the no-aid provision advanced its interest in supporting public education by preventing the diversion of public funds to private schools. *Espinoza*, 140 S. Ct. at 2261. The no-aid provision prohibited the funding of private education at religious schools but not at secular ones, and thus could not "advance 'an interest of the highest order when it leaves appreciable damage to that supposedly vital interest

unprohibited.'" *Ibid.* (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547). The Court concluded by observing that a state "need not subsidize private education," but if it does so, "it cannot disqualify some private schools solely because they are religious." *Ibid.*

B. The District Court Erred In Determining That A.H., Her Parents, And The Roman Catholic Diocese Of Burlington Did Not Demonstrate A Strong Likelihood Of Success On The Merits And Would Not Suffer Irreparable Harm Absent An Injunction

Applying Supreme Court precedent to the facts of this case, the district court should have granted the motion by A.H., her parents, and the Roman Catholic Diocese of Burlington for a preliminary injunction in light of their strong likelihood of success on the merits of their Free Exercise claim. In denying plaintiffs' motion, the court overlooked a crucial aspect of their case: A.H. and Rice's exclusion from the Dual Enrollment Program stemmed directly from the denial of public funding for A.H.'s high school tuition—funding generally available to secular independent schools and students—based solely on her school's religious character. The Supreme Court's repeated holdings, including in *Espinoza*, that religious entities and their adherents cannot be excluded from or disadvantaged under public programs and benefits based on their religious character, make clear that A.H. and Rice's disqualification from the Dual Enrollment Program is impermissible under the Free Exercise Clause.

1. A.H. And Rice Were Excluded From The Dual Enrollment Program Because Of Their Religious Affiliation

As the Supreme Court held in *Espinoza*, when a state chooses to subsidize private education, "it cannot disqualify some private schools solely because they are religious." 140 S. Ct. at 2261. This conclusion flows from the key authority on which the district court purportedly relied, *Trinity Lutheran*, which explained that the Free Exercise Clause "'protects religious observers against unequal treatment'" and generally prohibits "laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (alteration omitted) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 542). *Espinoza* only made the district court's error more glaring.

A.H. and Rice's exclusion from the Dual Enrollment Program violates these clear principles. Under Vermont law, eligibility to participate in the Dual Enrollment depends on whether a student's education is publicly funded—through enrollment in a public school or at a private secular school that receives publicly funded tuition—or is conducted as home study. See Vt. Stat. Ann. tit. 16, § 944 (2020). As a student in a sending district that lacks its own public high school, A.H. could have received public funding to pay for her tuition at a private secular school, which would qualify A.H. and her school to participate in the Dual Enrollment Program. See Vt. Stat. Ann. tit. 16, §§ 822, 944 (2020).

A.H. and her family sought such funding for her Rice tuition from Grand Isle, the school district in which she resides (and which has authority to grant such funding). J.A. 533. The undisputed record is that this request was denied for a single, impermissible reason: Rice "is a religious school for which [the district does] not pay tuition." J.A. 533 (citing J.A. 347)). A.H. and Rice's ineligibility for the Dual Enrollment Program flowed directly from this tainted decision.

It is readily apparent from the face of Grand Isle's decision that Rice's religious character was the reason that A.H. and Rice were excluded from the Dual Enrollment Program. Other aspects of record also support the conclusion that these plaintiffs suffered "special disabilities" not imposed on similarly situated secular students and schools, *i.e.*, students in sending districts who choose to attend private secular schools. Such secular students (if academically prepared) have essentially unfettered access to the Dual Enrollment Program because receipt of publicly funded tuition is the key eligibility criterion, as Vermont imposes only the minimal burden of meeting basic state standards in order for such schools to receive public funding. Vt. Stat. Ann. tit. 16, §§ 166, 822(a)-(b) (2020). In contrast, as of March 2020, no religiously affiliated schools had arrangements to participate in the Dual Enrollment Program. J.A. 296.

Defendant cannot escape the conclusion that A.H. and Rice have been

denied access to the Dual Enrollment Program because of their religion, in violation of the Free Exercise Clause and the clear letter of *Espinoza*, simply because program eligibility requirements are neutral on their face. Because Dual Enrollment Program eligibility hinges on a school's receipt of public funding under the State's Town Tuitioning Program, it necessarily incorporates any unconstitutional limitations on the receipt of funding—such as the exclusion of religious schools, as A.H.'s family was told. Although facially neutral, the operation of the publicly funded tuition requirement to exclude A.H. and Rice from the Dual Enrollment Program flows from an unconstitutional refusal to provide equal funding to Rice solely because of its religious character—a refusal communicated to A.H.'s family in no uncertain terms. Here, A.H. and Rice were clearly, and impermissibly, excluded from the Dual Enrollment Program based on religious status.

In sum, A.H. and her family are left with a choice that the Supreme Court's Free Exercise Clause precedent clearly forbids: (1) having their daughter attend a Catholic high school (*i.e.*, Rice), consistent with their Catholic religious beliefs, and forgoing the benefits of the Dual Enrollment Program; or (2) transferring to a secular private or public school or commencing home study to obtain the benefits of the Dual Enrollment Program. See, *e.g.*, *McDaniel*, 435 U.S. at 626. Although not necessary to resolve this preliminary injunction

appeal, as this case proceeds below, the district court likewise must consider whether defendant has effectively barred all students in sending districts who choose to attend religious schools from the Dual Enrollment Program on the basis of religious adherence.

2. The Dual Enrollment Program's Eligibility Requirements, As Applied To A.H. And The Roman Catholic Diocese Of Burlington, Do Not Survive Strict Scrutiny

Because the Dual Enrollment Program's eligibility requirements imposed a special burden on A.H. and the Roman Catholic Diocese of Burlington, as the owner and operator of Rice, based on their religious character, these requirements are subject to the "strictest scrutiny." *Espinoza*, 140 S. Ct. at 2260. This analysis requires that "government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Ibid.* (citation and internal quotation marks omitted).

The Dual Enrollment Program's eligibility requirements cannot meet this high bar as applied to A.H. and the Diocese. Conditioning A.H. and Rice's program participation on the receipt of publicly funded tuition does not appear to advance *any* state interest, much less an interest of the "highest order." Excluding from the Dual Enrollment Program students in sending districts who choose to attend religious schools cannot be said to serve the antiestablishment goals embedded in Chapter I, Article 3 of the Vermont Constitution, as

discussed in *Chittenden Town*. There, the Vermont Supreme Court recognized—as a matter of state constitutional law—that public funds could flow to religious schools if "safeguards against the use of such funds for religious worship" were first put into place. 738 A.2d 539, 542 (Vt.), cert. denied, 528 U.S. 1066 (1999).[7]

Despite tethering Dual Enrollment Program eligibility to a high school's public status or receipt of public funding—which was withheld in A.H.'s case specifically because of religious status—Vermont makes no payments to high schools at all under the program. J.A. 534. Rather, the State pays tuition for Dual Enrollment Program credits directly and solely to the postsecondary institution that offers the student's coursework. J.A. 534. Thus, limiting access to the Dual Enrollment Program to public and publicly funded high schools and their students is not related to the limitations *Chittenden Town* imposes on the funding of worship (to the extent they survive *Espinoza*'s clarification of the

[7] The vitality of this principle as a matter of federal Constitutional law is not presented in this appeal. The Supreme Court majority in *Trinity Lutheran* (and *Espinoza*) did not "address religious uses of funding," 137 S. Ct. at 2024 n.3; see *Espinoza*, 140 S. Ct. at 2257. Two Justices did address that issue, however, concluding that discrimination based on religious "use" violates the Free Exercise Clause as well. See *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring); *Espinoza*, 140 S. Ct. at 2275-2277 (Gorsuch, J., concurring) (The Free Exercise Clause "guarantee protects not just the right to *be* a religious person * * * [but] also protects the right to *act* on those beliefs," and thus "whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way.").

acceptable interplay between a state no-aid provision and the limitations of the Free Exercise Clause).

For similar reasons, the Dual Enrollment Program's eligibility scheme also finds no support in *Locke* v. *Davey*. In *Locke*, the Supreme Court acknowledged the distinction—reiterated in *Trinity Lutheran* and *Espinoza*—between a state's "historic and substantial" state interest in not funding the training of clergy and impermissibly restricting funding based the recipient's religious identity. *Locke*, 540 U.S. at 720-721. Vermont's Dual Enrollment Program eligibility requirements fall into the latter category because allowing a student to participate in the Dual Enrollment Program does not result in funding to that student or their high school.

Moreover, religiously affiliated colleges that offer religious coursework can and do participate in the Dual Enrollment Program and, thus, receive funding from the State. J.A. 534 n.2. This fact belies any argument that excluding A.H. and Rice from the Dual Enrollment Program because of their religious affiliation promotes any antiestablishment interests identified in *Chittenden Town* or that such interests are of the utmost importance. As noted in *Espinoza*, "[a] law does not advance 'an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.'" 140 S. Ct. at 2261 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547).

Second, conditioning Dual Enrollment Program eligibility for students in sending districts on an independent school's receipt of publicly funded tuition—which resulted in A.H. and Rice's exclusion from the program based on their religious affiliation—does not further Vermont's goals in enacting the program. The State's "Flexible Pathways Initiative," of which the Dual Enrollment Program is a part, has among its aims creating high-quality educational opportunities, preparing students for postsecondary school, and increasing high school completion and postsecondary school continuation rates. Vt. Stat. Ann. tit. 16, § 941(a)(1)-(3) (2020). The public funding requirement has no apparent relationship to these goals. Indeed, the requirement seems to undermine these goals by prohibiting an entire category of Vermont high schoolers—those who do not attend public or publicly funded schools and who are not home study students—from expanding their educational horizons and pursuing higher education through dual enrollment.

Because the Dual Enrollment Program's eligibility requirements do not serve any compelling state aim, they cannot survive strict scrutiny.

CONCLUSION

For the reasons set forth above, and in light of the Free Exercise Clause interests at issue under the U.S. Constitution, this Court should reverse the district court's denial of the preliminary injunction with respect to A.H. and Rice's participation in the Dual Enrollment Program.

Respectfully submitted,

CHRISTINA E. NOLAN
United States Attorney
District of Vermont
P.O. Box 570
Burlington, VT 05402-0570

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney
U.S. Department of Justice
Civil Rights Division
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of 2d Cir. Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 6263 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 19, 2020

CERTIFICATE OF SERVICE

I certify that on August 19, 2020, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney