UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

A.M., et al., Plaintiffs, v. Daniel M. French, et al., Defendants.	)	CASE NO. 2:19-cv-00015-cr

UNITED STATES' STATEMENT OF INTEREST IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The State of Vermont's own concessions demonstrate that Plaintiffs A.M., E.M., and their parents have plausibly pled a Free Exercise claim under the Supreme Court's recent landmark decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The State concedes that, for "residents of a school district that does not maintain a public high school," its Dual Enrollment Program is open to students attending "public schools" in another district, "home study students," and "private school students" attending secular private schools. Defs.' Mot. To Dismiss 8, 23 (Dkt. No. 14). The State further concedes that the Dual Enrollment Program is closed to one group—and only one group—of students who reside in such districts: those "who choose to attend a religious independent school." *Id.* at 8. In other words, by its own admission, the State categorically bars students who are otherwise "fully qualified" from participating in its "generally available" Dual Enrollment Program because of their religious exercise. *Trinity Lutheran*, 137 S. Ct. at 2024.

The State thus "imposes a penalty on the free exercise of religion": it forces students who are otherwise eligible for the Dual Enrollment Program to choose between "participat[ing] in [the] program or remain[ing] [enrolled at] a religious institution." *Id.* at 2021-22, 2024. The State may engage in this religious discrimination against students only if it satisfies "the most rigorous scrutiny." *Id.* at 2024 (citation omitted). But the State has failed to identify an interest "of the highest order" to justify its discrimination, much less to explain how this discrimination is narrowly tailored to achieve that interest. *Id.* at 2019 (citation omitted). Accordingly, Plaintiffs have plausibly pled a First Amendment claim, and the Court should deny the State's motion to dismiss.[1]

INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States."

This case involves the right of individuals under the Free Exercise Clause of the First Amendment to be free from discrimination based on religion, and raises important questions about the scope of the United States Supreme Court's decision in *Trinity Lutheran*. The United States has an interest in the proper interpretation of the Free Exercise Clause, and more generally in enforcing the various protections for religious freedom under the Constitution and federal civil rights laws. The Attorney General in 2017 issued comprehensive guidance on these protections.

[1] The United States addresses only the claims of A.M., E.M., and their parents under the Free Exercise Clause of the United States Constitution. It takes no position on their claim under the Equal Protection Clause of the Fourteenth Amendment or the claims of the other plaintiffs.

See Memorandum from the Attorney General, Re: Federal Law Protections for Religious Liberty (Oct. 6, 2017), available at https://www.justice.gov/opa/press-release/file/1001891/download.

STATEMENT OF FACTS

The State's Dual Enrollment Program provides public funds for eligible high school students to take up to two college courses "at public or private postsecondary institutions." Compl. ¶¶ 36, 39; Vt. Stat. Ann. tit. 16 § 944(f). The Dual Enrollment Program is part of the State's "Flexible Pathways Initiative," which has three stated purposes. The first is to "encourage and support the creativity of school districts as they develop and expand high-quality educational experiences that are an integral part of secondary education in the evolving 21st Century classroom." Compl. ¶ 31; Vt. Stat. Ann. tit. 16 § 941(a)(1). The second is "to promote opportunities for Vermont students to achieve postsecondary readiness through high-quality educational experiences that acknowledge individual goals, learning styles, and abilities." Compl. ¶ 32; Vt. Stat. Ann. tit. 16 § 941(a)(2). The third is "to increase the rates of secondary school completion and postsecondary continuation in Vermont." Compl. ¶ 33; Vt. Stat. Ann. tit. 16 § 941(a)(3).

To be eligible for the Dual Enrollment Program, a high school student must, among other things, either (i) attend "a Vermont public school," "a public school in another state or a private school" designated as the high school for the student's school district, or "an approved independent school to which the student's district of residence pays publicly funded tuition on behalf of the student," or (ii) be "a home study student." Vt. Stat. Ann. tit. 16 § 944(b)(1)(A)(i)-(iii). Under Vermont law, only secular private schools, and not religious private schools, may qualify as schools eligible for the Dual Enrollment Program and the Town Tuitioning Program. *See id.*; *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999); Compl. ¶¶ 45-

46. Accordingly, as the State acknowledges, for "residents of a school district that does not maintain a public high school," only students who attend a "public school" in another district, "home study students," and students who attend secular "private school[s]" are eligible for the Dual Enrollment Program—but students "who choose to attend a religious independent school" are not. Defs.' Mot. To Dismiss 8, 23. Thus, the State has singled out "students at private religious schools" in such districts and declared them ineligible to "participate in the Dual Enrollment Program." Compl. ¶ 47.

According to the Complaint, Plaintiffs A.M. and E.M. reside in the Georgia School District, which "does not have a public high school." *Id.* ¶¶ 60-61. They attend Rice Memorial High School, "a private Catholic high school." *Id.* ¶ 62. Their attendance at Rice Memorial High School is an "exercise[]" of their religion. *Id.* ¶¶ 65-66. A.M. and E.M. are prepared and otherwise eligible to participate in the Dual Enrollment Program, but the State has determined that they are ineligible due solely to their attendance at a religious private school. *Id.* ¶¶ 67-74. If A.M. and E.M. either were "home study student[s]" or "attended a secular private school," they "would be eligible for the Dual Enrollment Program." *Id.* ¶¶ 75-78.

ARGUMENT

When assessing a motion to dismiss brought under Rule 12(b)(6), a district court must accept all factual assertions in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Starr v. Sony BMG Music Entertm't*, 592 F.3d 314, 321 (2d Cir. 2010). A plaintiff's claim "has facial plausibility"—and survives a motion to dismiss—"when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Free Exercise Clause, as incorporated through the Fourteenth Amendment, prevents states from "prohibiting the free exercise" of religion. U.S. Const. amend. I. The Free Exercise Clause "protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status." *Trinity Lutheran*, 137 S. Ct. at 2019 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)). "Applying this principle," the Supreme Court "has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Id.* (collecting cases).

The State's own admissions establish that Plaintiffs have pled a plausible Free Exercise claim. The State admits that it singles out otherwise eligible students "who choose to attend a religious independent school" and excludes them from its generally available Dual Enrollment Program. Defs.' Mot. To Dismiss 8. The State, moreover, has not even attempted, let alone succeeded, in justifying this discrimination against religious exercise on "the most rigorous scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2024. Accordingly, as explained more fully below, the Court should deny the motion to dismiss.

A. The State's Exclusion Of Students Who Attend Religious Private Schools From The Dual Enrollment Program Discriminates Against Religious Exercise

The Free Exercise Clause prohibits the government from imposing, without sufficient justification, "special disabilities on the basis of religious views or religious status." *Trinity Lutheran*, 137 S. Ct. at 2021 (citation omitted). The Free Exercise Clause further "protects against indirect coercion or penalties the free exercise of religion, not just outright prohibitions." *Id.* at 2022 (citation omitted). Thus, as the Supreme Court announced more than 50 years ago,

"[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Trinity Lutheran*, 137 S. Ct. at 2022. After all, the "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*, 374 U.S. at 405; *see also Trinity Lutheran*, 137 S. Ct. at 2022.

A state places a condition on religious exercise—and triggers its strict scrutiny burden—when it requires a person or religious entity "to renounce [her] religious character" or belief "in order to participate in an otherwise generally available public benefit program" for which the person or entity otherwise "is fully qualified." *Trinity Lutheran*, 137 S. Ct. at 2024. The Supreme Court's decision in *Trinity Lutheran* is directly on point. There, the State of Missouri "offer[ed] state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made of recycled tires." *Id.* at 2017. The Trinity Lutheran Church Child Learning Center was a church-affiliated nonprofit preschool and daycare center that was otherwise eligible to participate in the program and scored highly on the state's criteria for grants under the program. *See id.* at 2017-18. The state, however, deemed Trinity Lutheran "categorically ineligible" to receive a grant due to its religious status. *Id.* at 2018. In particular, the state reasoned that awarding Trinity Lutheran a grant would violate a provision of the Missouri Constitution that prohibited the state from "provid[ing] financial assistance directly to a church." *Id.*

The Supreme Court held that the state's treatment of Trinity Lutheran violated the Free Exercise Clause. *Id.* at 2024-25. The Supreme Court concluded that the state's policy "discriminates against otherwise eligible recipients by disqualifying them from a public benefit

solely because of their religious character." *Id.* at 2021. Indeed, the state's policy "puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22. "[S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 2021; *see also id.* at 2024. Thus, because the state failed to justify its "discriminatory policy" with "a state interest of the highest order," it violated the First Amendment. *Id.* at 2024.

Here as well, the State has required Plaintiffs A.M. and E.M. "to renounce [their] religious character" or belief "in order to participate in an otherwise generally available public benefit program" for which they otherwise are "fully qualified." *Id.* The State itself concedes that students, such as Plaintiffs, who reside in a district that does not maintain a public high school may participate in the Dual Enrollment Program if they attend a "public school" elsewhere, are "home study students," or attend a secular "private school"—but not if they "choose to attend a religious independent school." Defs.' Mot. To Dismiss 8, 23. Plaintiffs allege that they meet all other eligibility requirements and would be permitted to participate in the Dual Enrollment Program but for their attendance at a religious private school. *See* Compl. ¶¶ 68-78. Thus, by putting Plaintiffs to a "choice" between participating in the "otherwise available" Dual Enrollment Program and remaining enrolled at "a religious institution," the State has "impose[d] a penalty on the free exercise of religion." *Id.* at 2021-22, 2024. Accordingly, the State bears the burden to justify this religious discrimination against Plaintiffs with a "state interest of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2024 (citation omitted).

The State attempts to avoid the conclusion that its Dual Enrollment Program discriminates against religion, but both of its proposed distinctions from *Trinity Lutheran* fail. First, the State argues that, unlike the program in *Trinity Lutheran*, the Dual Enrollment Program

is "neutral" toward religion because Section 944, the Vermont statute that spells out some of the eligibility requirements for the Program, "is a neutral law of general applicability" that makes "no reference at all to religious practice." Defs.' Mot. To Dismiss 19 (citing Vt. Stat. Ann. tit.16 § 944(b)(1)(A)(i)(III)). The State ignores that Section 944 spells out a subset, but not *all*, of the eligibility requirements for the Dual Enrollment Program. After all, by its own admission, the State has extended *Chittenden Town School District* to categorically exclude from the Dual Enrollment Program students who reside in a district without a public high school and "choose to attend a religious independent school." Defs.' Mot. To Dismiss 8. Thus, in their totality, the State's eligibility requirements are *not* religion-neutral—and the State cannot escape the Free Exercise Clause merely by pointing to a subset of requirements that are. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2017.

In fact, this was precisely the scenario in *Trinity Lutheran*. On its face, the Missouri program imposed "several [eligibility] criteria" upon grant applicants that were neutral toward religion, "such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling." *Id.* Nonetheless, the Supreme Court held that the program was not religion-neutral, but instead discriminated against religion because the state extended its state constitutional prohibition on directly funding churches to bar religiously affiliated schools from participating in the program. *See, e.g.*, *id.* at 2017-24.

Second, the State compounds its error when it argues that Section 944 is "neutral" but the discriminatory policy in *Trinity Lutheran* was "express." Defs.' Mot. To Dismiss 16-17, 19. The State's policy here is just as "express" as the state's policy in *Trinity Lutheran*: like its counterpart in *Trinity Lutheran*, the State has supplemented the program's religion-neutral criteria by extending a state constitutional rule to disqualify "otherwise eligible recipients . . .

from a public benefit solely because of their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021; Defs.' Mot. To Dismiss at 8, 23. This categorical bar based upon religion triggers "the most rigorous scrutiny" against the State. *Trinity Lutheran*, 137 S. Ct. at 2024.

Because the State's program is not neutral toward religion, the State's collection of cases upholding state programs that did "not distinguish between private and parochial schools" and, thus, *were* "religiously neutral," *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127,137 (5th Cir. 2009) (quoted at Defs.' Mot. To Dismiss at 14); *see also* Defs.' Mot To Dismiss at 11-16, is inapposite. To be sure, "there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis," and a state may decline to extend public educational funds to all private schools. *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21 (1st Cir.), *cert. denied*, 543 U.S. 988 (2004) (quoted at Defs.' Mot. To Dismiss at 12); *see also* Defs.' Mot. To Dismiss at 11-16. But that unremarkable proposition is of no moment where, as here, a state extends public benefit programs to students at *secular* private schools but declines to extend them on equal terms to students at *religious* private schools. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2021-24.

Moreover, because the State's program is not neutral toward religion, Plaintiffs do not bear the burden to show that the "object" of the program "is to infringe upon or restrict practices because of their religious motivation," *Lukumi*, 508 U.S. at 533 (quoted at Defs.' Mot. To Dismiss 17), or that the program "imposes a substantial or undue burden on religious exercise," Defs.' Mot. To Dismiss 21. Rather, Plaintiffs' plausible pleading that the State's program discriminates against religion triggers the State's heavy burden to satisfy strict scrutiny. *See Trinity Lutheran*, 137 S. Ct. at 2024.

B. The State Does Not Even Attempt, And Fails, To Carry Its Strict Scrutiny Burden

As explained above, Plaintiffs have plausibly pled that the State, through the Dual Enrollment Program, has put them to a choice between "participat[ing] in an otherwise available benefit program or remain[ing] [enrolled at] a religious institution." *Trinity Lutheran*, 137 S. Ct. at 2021-22, 2024. Thus, the State's ban on Plaintiffs' participation in the Dual Enrollment Program "imposes a penalty on the free exercise of religion that must be subjected to the most rigorous scrutiny." *Id.* at 2024. "Under that stringent standard, only a state interest of the highest order can justify the [State's] discriminatory policy." *Id.* (citation omitted).

The State has not even attempted to satisfy that standard. Rather, doubling down on its assertion that the Dual Enrollment Program is neutral toward religion, the State argues that the eligibility requirements pass constitutional muster because they are "rationally related to legitimate government interests." Defs.' Mot. To Dismiss 22. But, of course, the assertion that the State's eligibility requirements are neutral toward religion is fatally flawed, *see supra* Part A, so strict scrutiny, rather than rational basis scrutiny, applies here. *See Trinity Lutheran*, 137 S. Ct. at 2024.

In all events, none of the interests that the State identifies is "of the highest order" as required to justify religious discrimination. *Id.* The State's interest in "skating as far as possible from religious establishment concerns" and in extending its state-law prohibition on directly funding churches to the Dual Enrollment Program is inadequate. *Id.* Nor can the State rely upon the purported cost of extending the Dual Enrollment Program to students enrolled in religious private high schools, its "funding preference for students who depend, to some extent, on the taxpayer-funded public education system," or its interest in "control[ling] curriculum as it sees

fit." Defs. Mot. To Dismiss 20, 22. On their face, these interests do not appear to be "of the highest order," *Trinity Lutheran*, 137 S. Ct. at 2024—and even if they were, the State has not shown how its religious discrimination against students such as Plaintiffs is narrowly tailored to achieve those interests. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (in Free Exercise cases, Court looks "beyond broadly formulated interests" supporting infringements on religious exercise and instead scrutinizes reasons for infringing religious exercise of "particular religious claimants."). On Plaintiffs' well-pleaded Complaint, the State's exclusion of students who attend religious schools from the Dual Enrollment Program violates the Free Exercise Clause.

C. Allowing Students Who Attend Religious Private Schools To Participate In The Dual Enrollment Program On Equal Terms Would Not Violate The Establishment Clause

Finally, the State has not argued that permitting students who attend religious private schools to participate in the Dual Enrollment Program on equal terms would violate the Establishment Clause. Nor could it do so, since such a program would comport with the First Amendment. The Establishment Clause does not prevent students in religious schools from participating in widely available secular educational programs provided by the State—even if, unlike the Dual Enrollment Program, those programs are provided on the grounds of their religious schools. *See Agostini v. Felton*, 521 U.S. 203 (1997) (state funding of teachers of remedial education at parochial schools did not violate Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (state provision of sign language interpreter to deaf student in religious school did not violate Establishment Clause).

Moreover, it would not violate the Establishment Clause to allow students choosing to attend religious private schools to participate in the State's Town Tuitioning Program, which

uses the same eligibility requirements as the Dual Enrollment Program and pays private school tuition on behalf of eligible students who reside in a district that does not maintain a public high school. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (voucher program that permitted payments to religious schools was constitutional where it was "neutral with respect to religion" and the flow of government aid to religious schools resulted from individuals' "own genuine and independent private choice"); *see also Moss v. Spartanburg County Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012) (recognizing that "private religious education is an integral part of the American school system" and that public schools accepting credits for religious courses "sensibly *accommodates* the genuine choice among options private and public, secular and religious"); *Freedom from Religion Found. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (holding that reimbursing religious substance abuse program based on number of beneficiaries choosing that system involved a system of genuine and independent private choice under *Zelman*); *compare Chittenden*, 738 A.2d at 319 (leaving Establishment Clause question open). In addition to there being no Establishment Clause violation for students to use Town Tuitioning Program funds for general education at a religious school, there is in fact no Establishment Clause bar even on using a neutrally available state scholarship program to train for the ministry, *see Locke v. Davey*, 540 U.S. 712, 719 (2004) ("[T]he link between government funds and religious training is broken by the independent and private choice of recipients.")—although a state does not violate the Free Exercise Clause when it declines to make public funds available in the very specific circumstance of students who wish to use those funds to train for the ministry. *See id.*; *Trinity Lutheran*, 137 S. Ct. at 2022-23 (the plaintiff in *Locke* sought funding for an "essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit,"

and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses) (quoting *Locke*, 540 U.S. at 721-22).

In sum, the State's discrimination in the Dual Enrollment Program against students who attend religious private schools violates the Free Exercise Clause and is not compelled by the Establishment Clause.

CONCLUSION

The Court should deny the motion to dismiss.

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Respectfully submitted,

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