**State of Vermont**

**Superior Court** **Civil Division**

**Washington Unit** **Case No.: 26-CV-01324**

**Kollene Caspers, on behalf of herself and her child, C.C.2;**
**Valerie Meichtry, on behalf of herself and her child, C.M.;**
**Jessica Baker, on behalf of herself and her child J.B.;**
**Michele Orosz, on behalf of herself and her children N.O. and B.O.**
**Plaintiffs,**
**v.**

**State of Vermont;**
**Zoie Saunders, in her official capacity as Vermont Secretary of Education**
**Defendants**

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**Plaintiffs' Combined Opposition to Motion to Dismiss and Reply to Opposition to Motion for Preliminary Injunction**

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## I. INTRODUCTION

The Court should deny Defendants' Motion to Dismiss, and grant Plaintiffs' Motion for Preliminary Injunction.

Plaintiffs' First Amended Complaint alleges facts showing they are entitled to relief under the Common Benefits Clause and satisfies Vermont's low notice-pleading standard. Vt. Const. Ch. I, Art. 7. But for Act 73, Plaintiffs and their children would, like other similarly situated families, have the ability to freely use their town tuition vouchers at whichever qualified school they chose. Instead, Act 73 creates a double standard based on arbitrary *math, geography, and prior recipient status*-based distinctions between Vermont families.

This unequal treatment is unconstitutional.

The irreparable injuries flowing from the State's unconstitutional conduct form the basis for Plaintiffs' motion for a preliminary injunction. At its core, the Common Benefits Clause functions as a prohibition on government favoritism and the distribution of benefits based on political preferences. Act 73 applies a double standard to Vermont families and fails this requirement. Plaintiffs, and the Court, have only a matter of months to secure preliminary relief before the new school year begins. Protecting constitutional rights is in the public interest, and any burden placed on the government by maintaining the status quo would be minimal to none. Plaintiffs are entitled to the requested preliminary relief.

For its part, Defendants' motion to dismiss and opposition to Plaintiffs' motion for preliminary injunction misses the point. Contrary to a large part of Defendants'

motion, *e.g.*, Defs' Mot. at 1, this case is not a rehash of *Vitale v. Bellows Falls Union High School*, 2023 VT 15 (2023). Whereas *Vitale* sought in relevant part to secure a judicial determination concerning the alleged constitutional right of Vermont children to the educational opportunities available in independent schools, this case does not concern educational outcomes. Instead, Plaintiffs seek equal treatment in regard to the free use of their town tuitioning vouchers. The educational opportunities or lack thereof between different schools is irrelevant.

When it comes to the merits of Plaintiffs' claims under the Common Benefits Clause, the only question before the Court is whether treating Plaintiffs differently in their ability to freely use their town tuition vouchers bears a reasonable *and* just relation to the Legislature's stated goal of creating "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive."[1] It does not, and Defendants post hoc justifications concerning future contingent actions the State plans to take to improve administration of Vermont's education system are meaningless. What the State plans to do in the future makes no difference to whether what they have already done passes constitutional muster.

For the reasons stated in Plaintiffs' Motion for Preliminary Injunction and set forth herein, the Court should deny Defendants' Motion to Dismiss, and grant Plaintiffs' Motion for Preliminary Injunction.

[1]2025 Vt. Acts & Resolves No. 73, § 1(a)(6).

## II. FACTUAL BACKGROUND

Act 73, codified in 16 V.S.A. § 828, creates new distinctions based on math, geography, and prior recipient status to restrict how certain Vermont families can use their town tuition vouchers. FAC ¶ 14. While some families are allowed to use their vouchers freely and attend whichever schools they want, hundreds or potentially thousands of other Vermont families are subject to a double standard denying them this ability. *Id.* at ¶ 15.

Act 73's math-based distinction prevents some Vermont families from using their town tuition vouchers at any school which did not have "at least 25 percent of [their] student enrollment composed of students attending on a district-funded tuition . . . during the 2023–2024 school year." *Id.* at ¶ 16. In other words, if an independent school had 24.9 percent public funded enrollment in 2023–2024, the doors are barred against new students using town tuition. *Id.* at ¶ 17. But if a school had 25 percent or more public funded enrollment in 2023–2024, the school is open to new students using town tuition vouchers. *Id.* at ¶ 18.

Act 73's geographic distinction prevents some Vermont families from using their town tuition vouchers at independent schools within supervisory districts or supervisory unions in which public schools are available. *Id.* at ¶ 19. So, if an otherwise qualified school happens to be located in a supervisory district or supervisory union, the boundaries of which are arbitrarily drawn by the state, where there is an available public school, that school can no longer accept town tuition vouchers from students. *Id* at ¶ 20. Moreover, if a qualified school is in a jurisdiction

without a public school, but does not meet the 25 percent cut-off, some Vermont families are *still* prohibited from using town tuition vouchers there. *Id.* at ¶ 21.

Finally, a "grandfather clause" guarantees that those Vermont students already using public tuition dollars at an independent school can continue to do so until they graduate. *Id.* at ¶ 22. But those who have not yet done so, even if they have been relying on their town tuition vouchers to do so this fall and live in the same household as their siblings who are still attending independent schools using town tuition vouchers, are now prohibited from doing so by Act 73. *Id.* at ¶ 23.

Plaintiff Kollene Caspers is the mother of C.C.1 and C.C.2. FAC ¶ 25. C.C.1 is a sophomore at Rice Memorial High School in Burlington, Vermont, where he has used—and will continue to use—public tuitioning. *Id.* at ¶ 26. C.C.2 is in eighth grade at Georgia Elementary & Middle School. *Id.* at ¶ 27. C.C.2 is entering high school this fall and is planning to attend Rice Memorial. *Id.* at ¶ 28. But for Act 73, C.C.2 would, like her brother who lives in the same household, be eligible to use her town tuition vouchers at Rice Memorial this fall. *Id.* at ¶¶ 29–30.

Plaintiff Valerie Meichtry is the mother of L.M., G.M., W.M., and C.M. FAC ¶ 31. L.M., G.M., and W.M. attend Grace Christian School, in Bennington, where they have received—and will continue to receive—public tuitioning. *Id.* at ¶ 32. C.M. will be entering kindergarten this fall and is planning to attend Grace Christian. *Id.* at ¶ 33. But for Act 73, C.M. would, like her siblings living in the same household, be eligible to use her town tuition vouchers at Grace Christian this fall. *Id.* at ¶¶ 34–35.

Plaintiff Jessica Baker is the mother of J.B. FAC ¶ 36. J.B. attends eighth grade

at Mater Christi Middle School. *Id.* at ¶ 37. J.B. will be entering high school this fall and planned to attend Rice Memorial. *Id.* at ¶ 38. But for Act 73, J.B. would be eligible to use their town tuition vouchers at Rice Memorial this fall. *Id.* at ¶ 39.

Plaintiff Michele Orosz is the mother of three children: sixteen-year-old P.O., fifth grader N.O., and third grader B.O. FAC ¶ 41. P.O. is a junior at Rice Memorial, where he has received—and will continue to receive—school tuitioning. *Id.* at ¶ 42. N.O. and B.O. both attend Georgia Elementary & Middle School. *Id.* at ¶ 43. Both N.O. and B.O. are planning to attend Rice Memorial like their older brother. *Id.* at ¶ 44. But for Act 73, N.O. and B.O. would, like their sibling, be eligible to use their town tuition vouchers at Rice Memorial in the future. *Id.* at ¶ 45.

Absent this Court's intervention, Plaintiffs' story will also play out for parents and children across the state. FAC ¶ 47. As noted, children in nearly 40 percent of Vermont towns could previously attend independent schools with town tuition assistance. *Id.* at ¶ 48. But under Act 73, Vermont families who have already been approved for town tuitioning will be barred from using it to attend more than half of Vermont's independent schools. *Id.* at ¶ 49.

## III. ARGUMENT

### A. Defendants' Motion to Dismiss should be denied.

The purpose of a motion to dismiss "is to test the law of the claim, not the facts which support it." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). Thus, because the "threshold a plaintiff must cross in order to meet [Vermont's] notice-pleading standard" is such an "exceedingly low" one, motions to dismiss for failure to

state a claim "are disfavored and should be rarely granted." *Bock v. Gold*, 2008 VT 81, P4 (2008) (quoting *Henniger v. Pinellas County*, 7 F. Supp. 2d 1334, 1336 (M.D. Fla. 1998)); *see also* V.R.C.P. 8(a) (requiring only that pleadings contain a "short and plain statement of the claim showing that the pleader is entitled to relief").

When considering Defendants' Motion to Dismiss, this Court must assume that the facts pleaded in Plaintiffs' First Amended Complaint (FAC) are true and make all reasonable inferences in Plaintiffs' favor. *Mahoney v. Tara, LLC*, 2011 VT 3, P7 (2011). Defendants' motion should only be granted if "it is beyond doubt that there exist no facts or circumstances that would entitle [the plaintiff] to relief," *Powers*, 173 Vt. at 395. The Court should be wary of dismissing novel claims because "[t]he legal theory of a case should be explored in the light of facts as developed by the evidence." *Association of Haystack Prop. Owners, Inc. v. Sprague*, 145 VT 443, 447 (1985).

Here, in order to establish an injury for their claims under Vermont's Common Benefits Clause, Plaintiffs were required to allege facts: (1) defining the part of the community disadvantaged by Act 73; (2) identifying the governmental purpose in excluding a part of the community from the benefit of Act 73; and (3) showing the omission of a part of the community from the benefit, protection, and security of Act 73 does not bear a reasonable and just relation to the governmental purpose. *Baker v. State*, 170 Vt. 194, 212–214 (1999). Plaintiffs successfully do so, and Defendants' Motion to Dismiss should be denied.

### 1. The First Amended Complaint defines the community Act 73 disadvantages.

The community Act 73 disadvantages is composed of Vermont families, parents and children, who are subjected to a double standard under which they are prevented from freely using their town tuition vouchers. FAC ¶ 79. This community is defined by the arbitrary mathematical, geographical, and prior receipt-based statuses Act 73 imposes between Vermont families, some of which benefit from Act 73 by the continued free use of their town tuition vouchers, and some of which are denied this ability. *Id.* at ¶ 80. This disadvantaged community includes Plaintiffs and their children, *id.* at ¶¶ 25–46, and other affected Vermont families, *id.* at ¶¶ 47–59.

Contrary to Defendants' Motion, Defs' Mot. at 4–7, the only similarity this case has with *Vitale v. Bellows Falls Union High School* is that it concerns Vermont's Common Benefits Clause. Unlike *Vitale*, Plaintiffs do not allege a disparity in educational *outcomes*, nor do they seek an equal educational opportunity that depends on showing disparities in educational *outcomes* relative to different schools. Instead, they seek equal *treatment* concerning the freedom to use publicly provided town tuition funding pursuant to the Common Benefits Clause. Defendants' motion obscures the distinction between this case and *Vitale*. Defs' Mot. at 4–7. *Vitale* and its equal educational opportunity arguments are irrelevant to the claims of Plaintiffs here under *Baker* and the Common Benefits Clause.

### 2. The First Amended Complaint identifies the governmental purpose in excluding the disadvantaged community.

As stated in the legislative "findings" section of Act 73, the government's goal in enacting the statute was to create "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive." 2025 Vt. Acts & Resolves No. 73, § 1(a)(6). While Act 73 also contains a subsequent "intent/plan" section regarding the Legislature's intent to take *future actions* in regard to education in Vermont, *see id.* at 1(b)(1); (3)(A), (C), (E), these contingent future ambitions are irrelevant to the specific intent regarding the challenged provisions contained in 16 V.S.A. § 828. FAC ¶ 82.

### 3. The First Amended Complaint shows that the omission of the excluded community does not bear a reasonable and just relation to the governmental purpose.

When considering whether a reasonable and just relation exists between Act 73's exclusionary means and the government's stated ends, Vermont courts consider factors including: "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the part of the community receiving the benefit is significantly underinclusive or overinclusive." *Baker v. State*, 170 Vt. 194, 214 (1999). While weighing these factors, courts look to the "history and traditions from which the state developed as well as those from which it broke." *Id.* at 241. Act 73 fails this standard.

#### *a. Education is a significant historical benefit in Vermont.*

Vermont's founders—long before the framing of the U.S. Constitution—chose to

include a right to education in Vermont's first Constitution of 1777, the only governmental service included in the charter. FAC ¶ 86. Under the resulting Education Clause, "Vermont children have a fundamental right to education." *Vitale*, 2023 VT at P11 (Vt. 2023). And since 1869, one of the primary means used to achieve this constitutional right has been Vermont's town tuition system. FAC at ¶ 88. Vermont's town tuition system is, according to some commentators, considered the longest-running public tuitioning system in the country, if not the world. *Id.* at ¶ 10. In nearly 40 percent of Vermont towns children can attend approved independent schools with publicly funded town tuition assistance. *Id.* at ¶¶ 11, 48. It is thus undisputable that education is an important historic and current benefit the government extends to Vermont families.

*b. The omission of the excluded community does not promote Act 73's stated goals.*

The exclusion and differential treatment of some Vermont families and students under Act 73 does not promote the government's stated goal of creating "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive." 2025 Vt. Acts & Resolves No. 73, § 1(a)(6). Instead, the arbitrary distinctions Act 73 creates between Vermonters based on math, geography, and prior receipt status *undermine* Act 73's stated goals. FAC ¶ 89; *see Baker*, 170 Vt. at 219.

Act 73 reduces the ability of Plaintiff schoolchildren to enjoy substantially equal educational opportunity and *reduces* the ability of Plaintiff schoolchildren to access "robust services and programs." VT LEGIS 73 (2025), 2025 Vermont Laws No.

73 (H. 454). Act 73 also does not reduce the benefit across the board, but does so arbitrarily, creating even greater disparities in student opportunity from community to community, household to household, and sometimes *even within the same family*. Instead of creating a stable system, Act 73 operates erratically: preventing parents from using public tuition for their children who intended to follow their siblings to the same independent schools. *Id.* at ¶ 90. Instead of education being decoupled from residency, Act 73 reinforces the link between a student's home address and their educational options. *Id.* at ¶ 92. Thus, Act 73's exclusion of the prohibited community does not create an exceptional education system; it undermines an exceptional education system that has been operating for over 150 years by arbitrarily treating similarly situated parents and children differently. *Id.* at ¶ 96.

*c. The part of the community receiving the benefit of Act 73 is significantly underinclusive.*

Weighing the relevant factors, the community of parents and children Act 73 benefits who retain the ability to freely use their town tuition vouchers is hopelessly underinclusive. FAC ¶ 94. The only substantive difference between the parents and children Act 73 harms and those it benefits are the arbitrary lines the government has drawn. *Id.* at ¶ 59. Paradoxically, some of Plaintiffs' children actually *benefit* from Act 73 by being left alone, while others in the same household are *excluded* from that same benefit. *See, e.g.*, FAC ¶ 34.

Regarding Act 73's math-based double standard, parents and students who wish to use their public tuition dollars at an independent school are *prohibited* from doing so if that school's publicly funded enrollment was below 25 percent during the 2023–

2024 academic year. *Id.* at ¶ 52. However, parents and students who wish to use their public tuition dollars at an independent school are *permitted* to do so if that school's publicly funded enrollment was 25 percent or higher during the 2023–2024 academic year. *Id.* at ¶ 53. This mathematical distinction bears no reasonable and just relation to Act 73's stated goals to create "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive."

Regarding Act 73's geographic double standards, parents and students are barred from using town tuition vouchers at an independent school that is in the same district as a public school, even if that student does not live in the district. *Id.* at ¶ 52. They are also barred from using town tuition vouchers at an independent school if a qualified school is in a supervisory district or union without a public school, but does not meet the 25 percent cut-off, otherwise eligible families are prohibited from using town tuition vouchers there. *Id.* These geographic distinctions bear no reasonable and just relation to Act 73's stated goals to create "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive."

Regarding the double standard contained in Act 73's grandfather clause, a child who has already used town tuition at an independent school can *continue* to do so. FAC ¶¶ 23, 57. A child who has not already used town tuition at an independent school is *prohibited* from doing so—even if other children living in the same household are allowed to use their town tuition vouchers at the same independent school. *Id.* at

¶ 57. This prior recipient distinction bears no reasonable and just relation to Act 73's stated goals to create "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive."

The legal benefits and protections flowing from the fundamental right of education in Vermont "are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned." *Baker*, 170 Vt. at 221–222. Act 73's double standards deny equal benefits to Plaintiffs and other excluded Vermont families. FAC at ¶ 97. The affected communities are no differently situated with respect to educating their children than their counterparts allowed to use town tuition assistance freely, and even if the State's decision to exclude them was based on some larger future goal to improve Vermont's education system (it is not), it would still fail on the question of basic justice.

Defendants' motion to dismiss should be denied.

**4. None of Defendants' justifications for Act 73's double standard are sufficient to satisfy the "reasonable and just" test.**

To the degree that Defendants' motion actually addresses Plaintiffs' Common Benefits Clause claim, the arguments are still wide of the mark. Any one of the distinctions Act 73 creates that Plaintiffs allege are unconstitutional would be sufficient for this Court to deny the motion to dismiss and grant the requested motion for a preliminary injunction.

*a. Defendants supply post hoc contingent future legislative goals in place of Act 73's actual stated purpose.*

The most glaring deficiency in Defendants' motion is their representation regarding the stated goals of the challenged portion of Act 73. Defendants do not address the stated goals of Act 73 head on, preferring instead to insert post hoc goals concerning "achieving economies of scale, reducing costs, and providing state support for needed capital investment," and to "increase school district size, improve staffing ratios, and reduce administrative costs." The problem, of course, is that *none* of those goals appear in the legislative "findings" section concerning the actual goals of Act 73. 2025 Vt. Acts & Resolves No. 73, § 1(a)(6). Instead, Defendants' motion borrows from the "intent; plan" section which discusses the future contingent intent of the legislature to take further actions. 2025 No. 73 § 1(b)(1); (3)(A), (C), (E).

When it comes to this case and Plaintiffs  Common Benefits Clause claims, the Court should consider the *actual* stated goal of the Legislature for this specific statute, not what they *hope* to accomplish in the future through additional actions. Further, what Act 73 actually does—apply a double standard to Vermont students and families—has no discernable cost benefit to the State. In either event—whether a student attends a public school or an independent school—the State is on the hook for the cost. *See* FAC ¶¶ 11–12 (explaining how town tuitioning works). Nor do Defendants address any educational or cost difference between supplying the tuition to independent schools above the 25 percent threshold compared to those below.

*b. Act 73's grandfather clause does not bear a reasonable and just relation to creating an exceptional education system.*

Although Defendants are correct that the Legislature may choose to address legislative goals incrementally, Defs' Mot. at 7–8, this principle alone is not enough to render Act 73's grandfather clause constitutional.

Instead of engaging with the necessary tension between collective societal interests and those of the individual Plaintiffs, *see Baker*, 170 Vt. at 215 ("The balance between individual liberty and organized society which courts are continually called upon to weigh does not lend itself to the precision of a scale."), Defendants simply threaten to take restrict the use of town tuitioning for all Vermont students, Defs' Mot. at 9. But not only would this result not be the necessary outcome of the Court granting all Plaintiffs requested relief, which includes striking down the math and geographic-based distinctions, doing so would not address the issue. The best way to minimize the disruption to students, Defs' Mot. at 11, is to not carve them up into different groups with different rights based on arbitrary distinctions.

At no point in their motion do Defendants explain why, even if grandfather clauses can generally be permissible, *see* Defs' Mot. at 8–9, Act 73's *specific* grandfather clause justifiably treats children under the same roof differently. The Common Benefits Clause functions as a prohibition on government favoritism and the distribution of government benefits based on political preferences. *Baker*, 170 Vt. at 208. The Defendants cannot simply waive away Plaintiffs' concerns regarding the unequal treatment as part and parcel of the legislative prerogative. While there is no reasonable and just relation to the government's stated goals in letting some Vermont

students use town tuitioning freely but excluding others, there is even less justification to divide people *in the same household*. This is especially true given Plaintiffs' long-held plans for their younger children to attend the same schools as their older siblings, and the reliance issues at stake.

*c. Act 73's 25 percent cutoff does not bear a reasonable and just relation to creating an exceptional education system.*

In their treatment of the math-based cutoff under which independent schools that do not have at least 25 percent town tuition funded student enrollment are now closed to town tuition students, Defendants' motion does even more to show the arbitrary nature of the cutoff than the number itself. *Id.* at 11. Defendants justify the 25 percent cutoff as a means to create economies of scale and reduce administrative costs. *Id.* But what is missing is the justification for the specific 25 percent number. Whether the 25 percent cutoff is reasonably related to creating "an exceptional educational system" depends directly on the basis for that number. Why 25 percent is any more or less reasonable than 24 percent, 20 percent, or 10 percent in creating an exceptional education system are questions the Court should ask.

Even if the 25 percent cutoff was reasonably related to the statute's stated goal (it is not), there remains the separate question of justice to Vermont students and families required by the Common Benefits Clause. If an independent school had 25 percent or more town tuition students two years ago, there is no restriction; if a school had less than 25 percent, the doors are barred. There is no just reason why Vermonters should be treated so differently from their neighbors in their ability to freely use a public benefit. The argument that Plaintiffs and other Vermont families

should be grateful the number is set at 25 percent instead of 51 percent, Defs' Mot. at 11, is akin to saying that a person should be grateful that the legal double standard being applied to them is less egregious than it otherwise might have been. Of course, the point is the unfair treatment, full stop.

*d. Act 73's geographic distinctions do not bear a reasonable and just relation to creating an exceptional education system.*

Finally, Defendants' motion skips over the two bases for Plaintiffs allegations that Act 73's geographic distinctions are arbitrary and unconstitutional. FAC at ¶¶ 19–21. Prior to Act 73, the location restriction was only for the family receiving town tuitioning. In order to qualify for the subsidy, the family was required to be in a supervisory district or union without a public school. Now, under Act 73, this rule also applies to the location of the school itself, as students are barred from using town tuitioning at an independent school if it is in the same district as a public school.

But what the Defendants fail to explain is what reasonable relation there is between creating "an exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive," and treating Vermonters differently based on where the State has drawn the lines between educational jurisdictions.[2] For example, but for Act 73, C.C.2 and C.M. would be receiving substantially the same educational opportunity this fall as their siblings. FAC at 5–6. Solely because Rice Memorial and Grace Christian happen to be incorporated near a public school—public schools that neither C.C.2 nor C.M.

[2] Nor do they explain how these stated goals are reasonably related to the arbitrary nature of the 25 percent cutoff, which itself functions as a form of geographic discrimination between Vermonters. *Id.* at 21.

reside in the district of—these two children are robbed of the equal treatment the Vermont Constitution's Common Benefits Clause requires.

Defendants' Motion to Dismiss should be denied.

**B. Plaintiffs' Motion for Preliminary Injunction should be granted.**

The Court should grant Plaintiffs' motion for preliminary injunction if it is convinced: (1) Plaintiffs face a threat of irreparable harm; (2) that the potential harm to Plaintiffs outweighs the potential harm to other parties; (3) granting the motion is in the public interest; and (4) Plaintiffs have a likelihood of success on the merits of their Common Benefits Clause claims. *See Taylor v. Town of Cabot*, 2017 VT 92, P19 (2017). Vermont courts consider the "potential harm to other parties" and the "public interest" as part of the same analysis. *See e.g., Town of Pawlet v. Banyai*, 2021 Vt. Envtl. LEXIS 4, *6–7 (Vt. Super. Ct., Env't Div. Jan. 21, 2021).

Plaintiffs successfully meet these requirements. And to be clear, Plaintiffs seek to preliminarily and permanently enjoin not only those parts of Act 73's double standards that Defendants' highlight in their motion, Defs' Mot. at 10, but *all* the arbitrary distinctions identified in their FAC that operate to deny them equal treatment under the Common Benefits Clause. This includes not only the math-based 25 percent cutoff, but also the geographic distinctions *and* the grandfather clause.

**1. Plaintiffs face imminent irreparable constitutional harm.**

The Common Benefits Clause of the Vermont Constitution is intended to ensure that the benefits and protections the State confers are for the common benefit of the community. *Baker*, 170 Vt. at 212. The Clause achieves this goal by ensuring "not

only that everyone enjoy equality before the law . . . but also that everyone have an equal share in the fruits of the common enterprise." *Id.* at 208–09. Thus, at its core, the Common Benefits Clause "expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage." *Id.* At its core, then, the Clause functions as a prohibition on government favoritism and the distribution of government benefits based on political preferences. *Id.* at 208. Thus, the chief right the Clause protects is the right of inclusion. *Id.*

It is undisputable that the "violation of a plaintiff's constitutional rights is itself a sufficient irreparable injury to support a preliminary injunction." *Taylor*, 2017 VT at P41; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional freedoms for even minimal period of time constitutes irreparable injury); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744 (2d Cir. 2000) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). So, the only question before the Court on this issue is whether Plaintiffs and other Vermonters face an imminent loss of their constitutional rights under the Common Benefits Clause. They do.

Instead of equal treatment concerning the enjoyment of public benefits, Act 73 excludes Plaintiffs and other Vermont families from the ability to freely use their public tuition vouchers based on arbitrary distinctions based on *math, geography, and previous receipt status*. But for the intervention of this Court, Plaintiffs and their children will, this fall, be denied the very equal treatment concerning public benefits the Common Benefits Clause is designed to protect. Kollene Caspers's child, C.C.2, is

in eighth grade and will be prohibited from using her town tuition vouchers at Rice Memorial this fall, even though her sibling will continue to do so. *Id.* at ¶ 63. Valerie Meichtry's child, C.M., is entering kindergarten this fall and will be prohibited from using her town tuition vouchers at Grace Christian this fall, even though her siblings will continue to do so. *Id.* at ¶ 64. Jessica Baker's child, J.B., is in eighth grade and will be prohibited from using his town tuition vouchers at Rice Memorial this fall. *Id.* at ¶ 65. Michele Orosz's children, N.O. and B.O., hope to attend Rice Memorial in the future, but will be prohibited from using their town tuition vouchers at Rice, even though their older sibling will continue to do so. *Id.* at ¶ 67.

As noted above, absent this Court's intervention, Plaintiffs' story will also play out for parents and children across the state. FAC ¶ 47. Children in nearly 40 percent of Vermont towns could previously freely use their town tuition vouchers as they chose. *Id.* at ¶ 48. Of course, not all students are legally excluded from freely using their town tuition vouchers. *Id.* at ¶ 51. Some students will be allowed to use their funding at those same schools based solely upon the arbitrary questions of where that school is located and the publicly funded enrollment at those schools two years ago. *Id.* at ¶ 52. Additionally, a parent or child who has already used public tuitioning at an independent school can continue to do so. *Id.* at ¶ 57. A parent or child who has not already used public tuitioning at an independent school is prohibited from doing so—even if other children living in the same household are allowed to use their town tuition vouchers at the same independent school. *Id.* at ¶ 58.

Plaintiffs face imminent irreparable constitutional harm.

**2. The balance of equities favors Plaintiffs.**

Because the function of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held," *Swanson v. Vill. of Woodstock*, 2025 Vt. Super. LEXIS 162, *4 (Vt. Super. Ct., Aug. 7, 2025) (quoting *Starbucks Corp. v. McKinney*, 602 U.S. 339, 346 (2024)), the 'other parties' and 'public interest' issues often weigh in favor of injunctions seeking to pause drastic changes in government policy that are alleged to be unlawful. *Id.* at *4–5.

This is especially true where, as here, constitutional rights are at stake. *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (public interest concerns are implicated when a constitutional right has been violated, "because all citizens have a stake in upholding the Constitution."); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."). The impact of the injunction will benefit the public beyond just the named plaintiffs. *See Manchester Cap. Mgmt. LLC v. Beresford*, 2025 Vt. Super. LEXIS 156, *9 (Vt. Super. Ct., Bennington Unit, Civ. Div. Aug. 7, 2025) (when "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant.") (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009)).

If the court grants the motion, the benefits to Plaintiffs and the Vermont public will be massive, while the comparable burden on the government will be minimal. *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (the government cannot be harmed "when it is prevented from enforcing an unconstitutional statute");

*see also de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (when the ability to enforce otherwise invalid laws is hindered, no government interests are harmed). Plaintiffs and other affected Vermont families have a constitutional right to equal treatment under the Common Benefits Clause, and Act 73 will directly undermine this right in a matter of months. A preliminary injunction will allow them their constitutional right to equal treatment while this case is litigated on the merits. Without this relief, the harm is imminent and will doubtlessly occur without the Court's intervention.

On the other hand, the motion's effect on the government will only require it to maintain the long-standing status quo and continue operating Vermont's already existent town tuitioning system. Even if this presents some administrative inconvenience to the state, mere "inconvenience" does not compare to the hardship imposed by "the potential loss of a constitutionally protected right." *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 62 F. Supp. 3d 1129, 1143 (N.D. Cal. 2014); *see also Swanson*, 2025 Vt. Super. LEXIS at *4–5 (acknowledging an injunction would burden the government but issuing it nevertheless to preserve the status quo during public interest litigation).

The balance of equities favors Plaintiffs.

**3. Plaintiffs have a likelihood of success on the merits.**

*Baker v. State* supplies the rule and primary framework for assessing Plaintiffs' likelihood of success on the merits. There, the Court articulated the three-part test described above, *supra* at 6, which can be summed up as identifying: who is excluded,

the government purpose of the exclusion, and whether the exclusion bears a "reasonable and just" relation to the stated government purpose. *Baker*, 170 Vt. at 206. While Plaintiffs respectfully direct the Court to the detailed discussion of these requirements above, *supra* at 6 – 11, several points from *Baker* as compared to these claims are worth discussing.

In *Baker*, the plaintiffs were three same-sex couples who were excluded from the publicly provided benefit of a marriage license, per state law restricting the legal definition of marriage to opposite sex couples for the supposed benefit to children. 170 Vt. at 198. At issue in *Baker*, as it is here, was the question of government favoritism and the distribution of government benefits based on political preferences, as balanced against individual rights to equal treatment under the Common Benefits Clause. *Id.* at 208. Ultimately in *Baker*, the Court found the marriage statutes failed this test because there was little relevant difference between the opposite sex couples and same sex couples concerning the goals of the statutes "to legitimize children and provide for their security." *Id.* at 218–219. In other words, sexual orientation was not sufficiently related to the State's objective of children being successfully raised.

Act 73 thus introduces a similar double standard to that at issue in *Baker*. *Math, geography, and prior receipt status* have nothing to do with Vermont families' ability to successfully participate in an "exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of education they receive." VT LEGIS 73 (2025), 2025 Vermont Laws No. 73 (H. 454). To the extent that the State's purpose in enacting Act 73 was to pursue these stated

goals, Act 73 excludes many Vermont families who are no different from those Act 73 benefits with respect to these objectives. But for Act 73, Plaintiffs and their children would, like other similarly situated families, have the ability to use their tuition dollars at whichever qualified school they chose.

Instead, Act 73, like the marriage statutes at issue in *Baker*, makes arbitrary distinctions between Vermonters that have no reasonable and just relation to the stated purpose. And like *Baker*, the result is an undermining of the goals of the statute, as the exclusion of similarly situated families from the legal benefits of Act 73 exposes them to the precise risks that the State argues Act 73 is designed to secure against. *See Baker*, 170 Vt. at 219; *supra* at 10–11.

This principle was reiterated in *State v. Ludlow Supermarkets*, 141 Vt. 261, 265 (Vt. 1982). There, the Supreme Court struck down a restriction on most, but not all, commercial businesses being open on certain holidays because the "exceptions" to the law—a form of unequal treatment—were not "consistent" with the Legislature's objective of creating a "common day of rest." *Ludlow Supermarkets*, 141 Vt. at 263. Thus, in a case like this one, courts are "not required to accept as underpinning for any law a purpose that, through wide-ranging exceptions or other emasculating devices, the legislature has reduced to a sham or deceit." *Ludlow*, 141 Vt. at 266. Likewise, here, Act 73 does not mandate a standard applicable to *all* Vermonters in seeking its stated goal to create an "exceptional educational system that is stable and predictable and where a student's home address does not dictate the quality of

education they receive," but carves up the populace into disparate chunks under which some benefit while others suffer unequal treatment.

Plaintiffs have a likelihood of success on the merits, and their Motion for Preliminary Injunction should be granted.

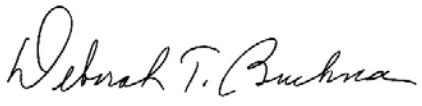
## IV. CONCLUSION

The First Amended Complaint satisfies Vermont's low notice-pleading standard by supplying facts showing Plaintiffs are entitled to relief under Vermont's Common Benefits Clause. Vt. Const. Ch. I, Art. 7. Additionally, Plaintiffs are entitled to the relief requested in their motion for preliminary injunction. In a matter of months, Act 73's double standard will irreparably harm Plaintiffs when the new school year soon begins. Plaintiffs have a likelihood of success on the merits of their claims, and the equities and public interest weigh in their favor.

For these and the reasons discussed above, the Court should deny Defendants' Motion to Dismiss, and grant Plaintiffs' Motion for Preliminary Injunction.

Dated: May 13, 2026

Respectfully Submitted,



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