No. 26-1416

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MID VERMONT CHRISTIAN ACADEMY ET AL.,

Plaintiff-Appellants,

v.

ZOIE SAUNDERS ET AL.,

Defendant-Appellees.

On Appeal from the United States District Court

for the District of Vermont

No. 2:2023-cv-00652

BRIEF OF LIBERTY JUTICE CENTER'S PARENTS INITIATIVE, KOLLENE CASPERS, VALERIE MEICHTRY, JESSICA BAKER, AND MICHELE OROSZ AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS

Timothy Kilcullen*
Counsel of Record
Timothy R. Snowball
PARENTS INITIATIVE OF THE
LIBERTY JUSTICE CENTER
1629 K Street N.W.
Suite 300
Washington, D.C. 20006

*Admission application pending

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The PARENTS Initiative is a project of the Liberty Justice Center (LJC), a nonprofit, nonpartisan public-interest litigation firm that defends and advances individual liberties and limited, accountable government. This work includes pursuing strategic, precedent-setting litigation aimed at protecting student and parental rights and ensuring educational freedom. LJC has filed amicus briefs on similar educational issues, including in *Carson v. Makin*, 596 U.S. 767 (2022).

LJC is currently representing Kollene Caspers, Valerie Meichtry, Jessica Baker, Michele Orosz, and their children (Amici Parents and Children) in a state-based lawsuit in Vermont challenging Act 73 on state constitutional grounds. A successful outcome for Appellants in this case would vindicate Amici Parents and Children's First Amendment rights and ensure the children's educational freedom. Therefore, Amici Parents and Children have a direct interest in the outcome of the instant case.

INTRODUCTION

For the reasons discussed below in addition to those briefed by the Appellants, the district court should be reversed and the Appellants' motion for a preliminary injunction granted.

First, while Act 73 may have been recently enacted, its discriminatory policies are not new. Instead, Act 73 is the latest instance in a long list of actions targeting religious schools in Vermont for exclusion from generally applicable town tuitioning. Second, Act 73's discrimination has real consequences for families. Act 73 infringes the constitutional rights of Amici Parents and Children, just as it injures the Appellants. And the same is true for families across Vermont who seek nothing more than securing the highest quality education for their children. Last, considered under Vermont's Common Benefits Clause—the basis for Amici Parents and Children's currently pending claims against Act 73 in Vermont state court—the only logical explanation for Act 73 is not the Legislature's stated goal of improving Vermont's education system, but to discriminate against religious schools and families.

The district court should be reversed and the Appellants' motion for a preliminary injunction granted.

II. ARGUMENT

A. Vermont has long championed state subsidized school choice—for everyone but religious families.

A decade before the framing of the U.S. Constitution, Vermont's founders chose to include a right to education in Vermont's first Constitution of 1777, the only governmental service included in the charter. *Caspers v. State*, No. 26-CV-01324, First Amended Complaint (FAC) ¶ 86 (Vt. Super. Ct., Washington Unit, Civ. Div. May 8, 2026).

Under the resulting Education Clause, "Vermont children have a fundamental right to education." *Vitale v. Bellows Falls Union High Sch.*, 217 Vt. 611, 623 (Vt. 2023). And since 1869, one of the primary means used to achieve this constitutional right was Vermont's town tuition system. *Caspers*, No. 26-CV-01324, FAC at ¶ 88. According to some commentators, this system is the longest-running public tuitioning system in the country, if not the world. *Id.* at ¶ 10. Prior to the passage of Act 73, in nearly 40 percent of Vermont towns children could attend approved independent schools with publicly-funded town tuition assistance. *Id.* at ¶¶ 11, 48.

Unfortunately, this benefit was long denied to religious families. Beginning in 1961, Vermont largely prohibited town tuitioning from

being spent at religious schools, first based on an erroneous reading of the Establishment Clause, and later under an incorrect interpretation of the Vermont Constitution. *See* ECF No. 105-1, at 11. Fortunately, the Supreme Court's decision in *Carson v. Makin*, 596 U.S. 767 (2022) made clear that, going forward, such policies were unconstitutional. From then on, Vermont and other states could no longer exclude religious schools without running afoul of the First Amendment.

But the Vermont Legislature was not about to let a little thing like the First Amendment stand in its way. The result was Act 73.

Act 73's math-based cut-off prevents Vermont families from using their town tuition vouchers at any school which does 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 (quoting V.S.A. § 828(a)(2)(D)). Of course, 2023 being selected as the baseline was not a coincidence. Since the 2023–2024 school year was the last with a pre-*Carson* class, and town tuitioning was not yet available for students to use at religious schools, the tuitioning population at independent religious schools was under 25 percent.

Under Act 73, religious schools are automatically excluded from future town tuitioning. This is akin to a segregated school district in the 1950s advising black children that they are free to attend an integrated school, but that it must be based on the level of integration directly prior to the ruling in *Brown v. Board of Education*, 344 U.S. 1 (1952). This would, for all intents and purposes, disregard the Supreme Court's holding on equal protection and install a loophole to continue segregation forever.

Act 73 is precisely this kind of loophole. V.S.A. § 828(a)(2)(D). By freezing in place the pre-*Carson* regime, Act 73 enables Vermont to continue discriminating on the basis of religion in the use of town tuitioning. And Appellants, Amici Parents and Children, and potentially thousands of Vermont families are directly harmed by it, in direct contravention of the *Carson* decision.

The district court should be reversed and the Appellants' motion for a preliminary injunction granted.

B. Act 73 negatively impacts families across the state, and the equities weigh in the public's favor.

Act 73 not only negatively impacts the Appellants, but families across the state who want nothing more than for their children to be treated equally under the law and for them to have the same educational

opportunities as their neighbors.

Take, for example, amicus Kollene Caspers and her daughter, C.C.2. *Caspers*, No. 26-CV-01324, FAC ¶ 25. Casper's other child (C.C.2.'s brother) C.C.1 is a sophomore at Rice Memorial High School, a religious school in Burlington, Vermont. *Id.* at ¶ 26. C.C.1 utilized town tuitioning in the brief space between *Carson* and Act 73, and can thus continue to do so under Act 73's grandfather clause. *Id.* at ¶ 26. But because Rice was excluded from town tuitioning before *Carson* due to its religious nature, it cannot meet Act 73's 25 percent-in-2023 threshold. *Id.* at ¶ 27. Therefore, C.C.2—who just graduated eighth grade—is unable to use her town tuitioning at Rice Memorial because of Act 73. *Id.*

Another example are amici Valerie Meichtry and her daughter, C.M. *Caspers*, No. 26-CV-01324, FAC ¶ 31. Meichtry's elder children (C.M.'s elder siblings) 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. However, like Rice

Memorial, Grace Christian was excluded from town tuitioning before *Carson* due to its religious nature and thus cannot not meet Act 73's 25 percent-in-2023 threshold—meaning C.M. is not permitted to use town tuitioning to attend it. As a result, like Kollene Casper's daughter C.C.2., Act 73's religious discrimination denies C.M. the public benefit given to her siblings. *See id.*

A third example are amici Jessica Baker and her son, J.B. *Caspers*, No. 26-CV-01324, FAC ¶ 36. 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 town tuition vouchers at Rice Memorial. *Id.* at ¶ 39. But, like the other Vermont students described above, J.B. is excluded because Rice Memorial's religious character prevents it from reaching Act 73's anti-religious school 25 percent-in-2023 cut-off.

Finally, there are amici Michele Orosz and her children N.O. and B.O. *Id.* at ¶ 41. Orosz's eldest son is a junior at Rice Memorial, where he has received—and will continue to receive—school tuitioning. *Id.* at ¶ 42. Both N.O. and B.O. were 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. However, like C.C. 2. and J.B., religious prejudice excludes them from this public benefit. *See id.*

Absent this Court's intervention, Amici Parents and Children's stories will play out for parents and children across the state. 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," *Starbucks Corp. v. McKinney*, 602 U.S. 339, 346 (2024) (quoting *University of Tex. v. Camenisch*, 451 U. S. 390, 395 (1981)), the weight of the equities weighs in favor of Appellants, and other negatively impacted Vermont citizens. 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.").

If the court grants the motion, the benefits to Appellants 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 A.H. v. French*, 985 F.3d 165, 184 (2d Cir. 2021) ("denial of a constitutional right

ordinarily warrants a finding of irreparable harm, even when the violation persists for 'minimal periods' of time."). The district court should be reversed and the Appellants' motion for a preliminary injunction granted.

C. Act 73's 25 percent cut-off is best explained as animus.

Even without considering the legislative history the district court disfavors, ECF No. 143, at 30–33, the *effects* of Act 73 show its animus toward religious independent schools. Amici's state-based lawsuit is premised on the Common Benefits Clause of the Vermont Constitution, which Act 73 violates just as surely as it violates the U.S. Constitution's First Amendment. But more to the point, the analysis under that Clause further pulls back the curtain on the motivation for Act 73.

Under the Common Benefits Clause, the benefits and protections the State confers are for the common benefit of the community. Vt. Const. Ch. I, Art. 7; *Baker v. State*, 170 Vt. 194, 212 (1999). In order to establish an injury under the Clause, Amici must, in relevant part, allege facts showing that 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. *See id.* at 212–214; *State v. Ludlow Supermarkets*, 141 Vt. 261, 265 (Vt. 1982). It doesn't.

A 25 percent cut-off with the effect of excluding religious schools—and religious students—from the benefits of town tuitioning has nothing to do with Vermont's stated goal of enacting Act 73, namely, 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." VT LEGIS 73 (2025), 2025 Vermont Laws No. 73 (H. 454).

Instead of creating a stable system, Act 73 operates erratically: parents are prevented 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. *Caspers*, No. 26-CV-01324, FAC at ¶ 92. Thus, Act 73's exclusion of the prohibited community undermines an education system that has been operating for over 150 years by arbitrarily treating similarly situated parents and children differently based on their preference for a religious education. *Id.* at ¶ 96.

To the extent that Vermont's purpose in enacting Act 73 was to pursue the stated goal of creating an exceptional education system (it was not), the statute's 25 percent cut-off actually *undermines* Act 73's stated goals. *Caspers*, No. 26-CV-01324, FAC ¶ 89; *see also Baker*, 170 Vt. at 219. Act 73 reduces the ability of Amici Parents and Children's to enjoy substantially equal educational opportunity. VT LEGIS 73 (2025), 2025 Vermont Laws No. 73 (H. 454). Act 73 excludes many Vermont families who are no different from those that Act 73 benefits with respect to these objectives. But for Act 73, Plaintiff and Amici Parents and Children, like other similarly situated individuals (including several of Amici Children's siblings), would have the ability to use their tuition dollars at whichever qualified school they chose. *See, e.g. Caspers*, No. 26-CV-01324, FAC ¶¶ 29–30.

Given that the 25 percent cut-off bears no reasonable or just related to the stated goals of Act 73, and in fact undermines them, the best explanation is Vermont's continued animus to religious schools' and students' participation in the town tuition program. The only substantive difference between the parents and children Act 73 harms and those it benefits are the lines the government has drawn, *id.* at ¶ 59: lines that

discriminate against religious schools and religious students in direct violation of *Carson*. *See* V.S.A. § 828(a)(2)(D) (the 25 percent-by-2023 threshold). The district court should be reversed and the Appellants' motion for a preliminary injunction granted.

III. CONCLUSION

For the reasons discussed above in addition to those briefed by the Appellants, the district court should be reversed and the Appellants' motion for a preliminary injunction granted.

Dated: July 1, 2026

Respectfully submitted,

/s/ Timothy Kilcullen

Timothy Kilcullen*
Counsel of Record
Timothy R. Snowball
PARENTS INITIATIVE OF THE
LIBERTY JUSTICE CENTER
1629 K Street N.W.
Suite 300
Washington, D.C. 20006

*Admission application pending

Certificate of Compliance

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. In compliance with Federal Rule of Appellate Procedure 29(b)(4), the foregoing brief contains 2,253 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), because it has been prepared using Microsoft Word Century Schoolbook 14-point font.

Dated: July 1, 2026 LIBERTY JUSTICE CENTER

By: ***/s/ Timothy Kilcullen***

Timothy Kilcullen

Attorney for Liberty Justice Center and Amici Parents & Children