

# 26-1416

## IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

MID VERMONT CHRISTIAN SCHOOL, on behalf of itself and its students and its students' parents; O.P., by and through his father and natural guardian, Nathan Partington; and NATHAN PARTINGTON, individually,

*Plaintiffs-Appellants,*

T.S., K.S., by and through their parents and natural guardians, Nathaniel and Dawna Slarve, NATHANIEL SLARVE, individually, DAWNA SLARVE, individually, A.G., M.G., by and through their parents and natural guardians, Chris and Bethany Goodwin, CHRISTOPHER GOODWIN, individually, BETHANY GOODWIN, individually,

*Plaintiffs,*

v.

ZOIE SAUNDERS, in her official capacity as Secretary of the Vermont Agency of Education and in her individual capacity; JENNIFER DECK SAMUELSON, in her official capacity as Chair of the Vermont State Board of Education and in her individual capacity; and WAITS RIVER VALLEY (UNIFIED #36 ELEMENTARY) SCHOOL BOARD,

*Defendants-Appellees,*

(caption continued on inside cover)

---

On Appeal from the United States District Court for the District of Vermont  
Case No. 2:23-cv-00652

---

### **BRIEF OF AMICUS CURIAE THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF APPELLANTS AND REVERSAL**

---

Josh Dixon  
Courtney Corbello  
jdixon@libertycenter.org  
ccorbello@libertycenter.org  
*Counsel for Amicus Curiae*

CENTER FOR AMERICAN LIBERTY  
2145 14<sup>th</sup> Avenue  
Suite 8  
Vero Beach, FL 32960  
(703) 687-6212

*and*

HEATHER BOUCHEY, in her official capacity as Interim Secretary of the Vermont Agency of Education, CHRISTINE BOURNE, in her official capacity as Windsor Southeast Supervisory Union Superintendent, Hartland School Board, RANDALL GAWEL, in his official capacity as Orange East Supervisory Union Superintendent, JAY NICHOLS, in his official capacity as the Executive Director of The Vermont Principals' Association,

*Defendants.*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
CORPORATE DISCLOSURE STATEMENT .....	1
STATEMENT OF INTEREST .....	2
FED. R. APP. P. 29 STATEMENT .....	3
INTRODUCTION .....	4
SUMMARY OF THE ARGUMENT .....	6
ARGUMENT.....	9
I.    VERMONT FORCES PARENTS LIKE THE PARTINGTONS TO CHOOSE BETWEEN PUBLIC EDUCATION BENEFITS AND THEIR CHILDREN’S RELIGIOUS FORMATION .....	9
A. A Law that Substantially Interferes With Parents’ Right to Direct Their Child’s Religious Education Triggers Strict Scrutiny.....	9
B. Because Vermont Delivers Education Through Parental Choice, Excluding Every Religious School Penalizes the Religious Exercise the Free Exercise Clause Protects .....	12
C. Vermont’s Ordinary Spending Choices Do Not Implicate <i>Mahmoud</i> .....	14
II.   VERMONT CANNOT JUSTIFY BURDENING THE PARTINGTONS’ RIGHT TO DIRECT THEIR SON’S RELIGIOUS EDUCATION UNDER STRICT SCRUTINY .....	16
A. Vermont’s Asserted Interests are Insufficient to Override Parents’ Right to Direct the Religious Education of their Child .....	17
B. Vermont Can Pursue its Interests Without Forcing Religious Parents to Surrender the Benefit, so the Exclusion is not Narrowly Tailored .....	18
III.  SECTION 21’S BURDEN FALLS ON RELIGIOUS FAMILIES ACROSS VERMONT AND THREATENS TO SPREAD BEYOND IT.....	19
CONCLUSION .....	23

## TABLE OF AUTHORITIES

### Cases

<i>A.H. ex rel. Hester v. French</i> , 985 F.3d 165 (2d Cir. 2021).....	4, 21
<i>Antonucci v. Winters</i> , 767 F. Supp. 3d 122 (D. Vt. 2025).....	2
<i>Antonucci v. Winters</i> , No. 25-514, 2026 WL 623319 (2d Cir. Feb. 25, 2026).....	2
<i>Carson v. Makin</i> , 596 U.S. 767 (2022).....	16, 21, 22
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	19
<i>Doe v. Weiser</i> , No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025).....	2
<i>Doe v. Weiser</i> , No. 25-1037 (10th Cir. Jan. 31, 2025) .....	2
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990).....	4, 9
<i>Fulton v. City of Philadelphia</i> , 593 U.S. 522 (2021).....	17, 18
<i>In re A.H.</i> , 999 F.3d 98 (2d Cir. 2021).....	4, 21
<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025).....	passim
<i>Mahoney v. U.S. Cap. Police Bd.</i> , No. 21-2314 (JEB), 2024 WL 4235429 (D.D.C. July 31, 2024) .....	2

<i>Mahoney v. U.S. Cap. Police Bd.</i> , No. 24-5207 (D.C. Cir. Sept. 13, 2024) .....	2
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	9
<i>Mirabelli v. Bonta</i> , 607 U.S. 492 (2026).....	11, 14
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 591 U.S. 732 (2020).....	13
<i>Pierce v. Soc’y of Sisters</i> , 268 U.S. 510 (1925).....	6, 10, 14, 20
<i>Regino v. Staley</i> , 133 F.4th 951 (9th Cir. 2025).....	2
<i>Rusfeldt v. City of New York</i> , 806 F. Supp. 3d 417 (S.D.N.Y. Oct. 2, 2025).....	2
<i>Rusfeldt v. City of New York</i> , No. 25-2825 (2d Cir. Nov. 4, 2025) .....	2
<i>St. Dominic Acad. v. Makin</i> , 744 F. Supp. 3d 43 (D. Me. 2024).....	22
<i>St. Dominic Acad. v. Makin</i> , No. 24-1739 (1st Cir. Aug. 16, 2024) .....	22
<i>St. Mary Cath. Par. v. Roy</i> , No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) .....	22
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 582 U.S. 449 (2017).....	14
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	6, 10

*Wisconsin v. Yoder*,  
406 U.S. 205 (1972).....6, 7, 10, 14, 17, 19

**Statutes**

16 V.S.A. § 822(a)(1) .....12, 14, 20

16 V.S.A. § 828.....4

Act 73 § 21 .....4

**Other Authorities**

D’Auria, Peter, *Where in the World Is Vermont’s Public Tuition Money Going?*,  
VTDigger (Mar. 20, 2022), available at: <https://bit.ly/4eEUn71> .....21

**Rules**

Fed. R. App. P. 29(a)(2).....3

## **CORPORATE DISCLOSURE STATEMENT**

The Center for American Liberty is a nonprofit corporation with no parent corporation. It has no stock, and no publicly held corporation owns 10% or more of it.

**STATEMENT OF INTEREST**

The Center for American Liberty is a 501(c)(3) nonprofit law firm dedicated to protecting free speech and civil liberties. CAL has represented litigants across the country, including in this Court, in cases seeking to vindicate individuals' religious freedom, free speech, and parental rights against oppressive state action. *See, e.g., Rusfeldt v. City of New York*, 806 F. Supp. 3d 417 (S.D.N.Y. Oct. 2, 2025), *appeal docketed* No. 25-2825 (2d Cir. Nov. 4, 2025); *Mahoney v. U.S. Cap. Police Bd.*, No. 21-2314 (JEB), 2024 WL 4235429 (D.D.C. July 31, 2024), *appeal docketed* No. 24-5207 (D.C. Cir. Sept. 13, 2024); *Antonucci v. Winters*, 767 F. Supp. 3d 122 (D. Vt. 2025), *opinion vacated, appeal dismissed*, No. 25-514, 2026 WL 623319 (2d Cir. Feb. 25, 2026); *Regino v. Staley*, 133 F.4th 951 (9th Cir. 2025); *Doe v. Weiser*, No. 1:24-CV-2185-CNS-SBP, 2025 WL 295015 (D. Colo. Jan. 24, 2025), *appeal docketed* No. 25-1037 (10th Cir. Jan. 31, 2025).

CAL has an interest in ensuring that courts apply the correct constitutional standard when state education policies burden parents' right to direct the religious upbringing and education of their children. That interest is especially strong here. Vermont's Act 73 does not merely exclude religious schools from public benefits. It burdens parents like the Partingtons, who seek religious education for their children because their faith requires it.

**FED. R. APP. P. 29 STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), amicus curiae seeks leave of the Court to file this brief. Appellants consented to the filing of this brief, and Appellees take no position.

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person other than amicus curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

## INTRODUCTION

The district court found that a Vermont law burdens the Partingtons' exercise of religion. SA.23. It then asked the wrong question. That law, Section 21 of Act 73,<sup>1</sup> educates the children of Vermont's sending towns by paying tuition to the school their parents select, then defines eligibility so that no religious school qualifies. Treating the burden it imposes as governed by *Employment Division v. Smith*, 494 U.S. 872 (1990), the court asked only whether the law is neutral and generally applicable, concluded that it is, and applied rational-basis review. But the Supreme Court has held that a law substantially interfering with a parent's religious direction of his child triggers strict scrutiny "regardless of whether the law is neutral or generally applicable." *Mahmoud v. Taylor*, 606 U.S. 522, 565 (2025). Having found the burden, the court was bound to apply that rule. It did not, and that error is enough to require reversal.

The parties dispute whether Section 21 discriminates against religious schools. This brief addresses a narrower and independently sufficient ground for reversal: the burden Section 21 places on parents. Vermont educates the children of its sending towns by paying tuition to the school their parents select, which makes

---

<sup>1</sup> This Court previously held that Vermont violated the Free Exercise Clause by excluding religious schools and their students from the Dual Enrollment Program, *A.H. ex rel. Hester v. French*, 985 F.3d 165 (2d Cir. 2021) (*French I*) and State's Town Tuition Program, *In re A.H.*, 999 F.3d 98 (2d Cir. 2021) (*French II*). To continue the exclusion, Vermont enacted Act 73, a comprehensive education-reform statute, in 2025. Section 21 of that Act redefined which schools are eligible for town tuition. *See* Act 73 § 21; 16 V.S.A. § 828 (codified). This brief refers to the challenged provision as "Section 21."

the parent's choice the mechanism through which the benefit is received. For the Partingtons, sending their son to a school that will educate him in the Christian faith is not a preference but a religious obligation. Yet Section 21 tells them that they may have the benefit Vermont makes available to families who choose eligible secular options only if they send their son somewhere their faith forbids. The Free Exercise Clause regards that requirement as suspect, warranting the application of strict scrutiny even if Section 21 were neutral and generally applicable.

On the correct standard of scrutiny, Section 21 cannot survive. The administrative interests the Supreme Court has twice held insufficient to override parents' right to bring up their children in their faith are all Vermont offers here. And the consequences of this conclusion extend well beyond one family. Section 21 forecloses every religious school in the State to every family that would choose one. If upheld, it would hand other States a method for accomplishing by indirection what the Free Exercise Clause forbids them to do by name. This Court should recognize the same burden the district court did, apply the strict scrutiny *Mahmoud* requires, and reverse.

## SUMMARY OF THE ARGUMENT

The right of parents to direct the religious upbringing of their children extends over a century of constitutional tradition—from *Meyer* and *Pierce* through *Yoder* and *Troxel*—that the Supreme Court recently reaffirmed in *Mahmoud v. Taylor*. *Mahmoud* supplies the rule that governs the Partingtons’ claims. A law “substantially interfer[ing] with the religious development of . . . children” triggers strict scrutiny “regardless of whether the law is neutral or generally applicable.” 606 U.S. 522, 565 (2025) (cleaned up). Vermont delivers public education in its sending towns through the school each parent selects, so the parent’s choice is the mechanism of the benefit, not a preference layered atop it.

By redrawing eligibility to exclude religious schools, Section 21 confronts the Partingtons with the choice the Free Exercise Clause forbids: forgo the benefit Vermont makes available to families who choose eligible secular options or send their son to a school their faith does not permit. The district court concluded that Section 21 burdened the Partingtons’ religious exercise but analyzed that burden under *Smith*. That was error. The burden the district court identified triggers strict scrutiny, and the analysis should have begun, not ended, there.

Once the Court applies the correct standard, Section 21 fails. A burden on parents’ religious upbringing of their child may be justified only by interests of the highest order, narrowly tailored, and measured against the specific exemption sought

rather than the State's general aims. Vermont offers only its general interests in consolidating districts, achieving economies of scale, and equalizing educational opportunity. The Supreme Court has twice held that these types of administrative interests are insufficient to override parents' right to direct the religious education of their child. In *Yoder*, the State's interest in compulsory education had to give way, and in *Mahmoud*, the school board's interest in managing its own curriculum did the same. Nor is Section 21 narrowly tailored. Vermont can pursue its stated interests without denying town tuition to religious families, and it already funds the same category of education for families that choose eligible secular schools, often at greater cost. The denial of a benefit the State freely extends to all comparable secular families cannot be essential to any compelling interest.

That failure is not confined to the Partingtons. Because Vermont built its benefit to run on parental choice, redrawing the menu to remove every religious option intrudes on religious upbringing more deeply than a simple refusal to fund religion would. It turns a program designed to expand families' options into an instrument for narrowing them. The burden falls on religious families across the State who would choose those schools—among them every Catholic school in the Diocese of Burlington—and it falls hardest in the rural sending towns where a religious school is often the only one a family's faith allows. And if Section 21 succeeds, it will not stay in Vermont; it will give every State with a choice program

a blueprint for interfering with parents' right to raise their children in their faith. The Constitution protects substance, not semantics. This Court should reverse.

## ARGUMENT

### I. VERMONT FORCES PARENTS LIKE THE PARTINGTONS TO CHOOSE BETWEEN PUBLIC EDUCATION BENEFITS AND THEIR CHILDREN’S RELIGIOUS FORMATION

The district court denied relief on the ground that Section 21 is neutral and generally applicable and therefore subject only to rational-basis review. SA.32–33. It reached that result through the *Smith* framework. Specifically, the court concluded that Section 21 burdens the Partingtons’ free exercise, then treated the law’s supposed neutrality and general applicability as dispositive to the standard of constitutional review. SA.23. But *Smith* does not govern this claim. Instead, *Mahmoud* holds that a law substantially interfering with parents’ right to direct their child’s religious education triggers strict scrutiny “regardless of whether the law is neutral or generally applicable.” 606 U.S. at 565 (cleaned up). Having concluded that such a burden existed, the court was required to apply that rule. The district court’s error requires reversal independent of the court’s neutrality analysis.

#### A. A Law that Substantially Interferes With Parents’ Right to Direct Their Child’s Religious Education Triggers Strict Scrutiny

The right of parents to guide the religious formation of their children is among the most firmly rooted in our constitutional tradition. Over a century ago, the Supreme Court held that the Constitution protects “the power of parents to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Two years later, the Court struck down a law compelling public-school attendance,

explaining that “[t]he child is not the mere creature of the State” and that parents possess the “high duty” to “direct [the child’s] upbringing and education.” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925). In *Wisconsin v. Yoder*, the Court later recognized that the parental right has special salience as applied to children’s religious education, holding that the State could not compel Amish parents to send their children to school until the age of sixteen because doing so posed “a very real threat of undermining the Amish community and religious practice.” 406 U.S. 205, 218 (1972). The Court has since called the parental right “perhaps the oldest of the fundamental liberty interests” protected by the Constitution. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.).

*Mahmoud* restates that tradition in modern free-exercise terms. “At its heart,” the Court there explained, the Free Exercise Clause “protects the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of religious acts.” 606 U.S. at 546 (citation omitted). For “many people of faith,” there are “few religious acts more important than the religious education of their children.” *Id.* at 547. “Indeed, for many Christians, Jews, Muslims, and others, the religious education of children is not merely a preferred practice but rather a religious *obligation*.” *Id.* (emphasis added). Thus, the Free Exercise Clause protects “the choices that parents wish to make for their children outside the home.” *Id.* The government burdens that right when its actions carry “a very real threat of

undermining the religious beliefs and practices that the parents wish to instill in their children.” *Id.* at 553 (citation omitted). And critically, when a law imposes a burden of that “character,” strict scrutiny applies “regardless of whether the law is neutral or generally applicable.” *Id.* at 565.

That holding controls here. A law that substantially interferes with parents’ right to direct their child’s religious education necessarily draws strict scrutiny, not because it singles out or discriminates against religion, but because of the “special character” of the burden it imposes. *Id.* Moreover, *Mahmoud* is not limited to school curriculum that is inconsistent with parents’ religious views. In *Mirabelli v. Bonta*, the Supreme Court applied *Mahmoud* beyond the curricular setting, concluding that strict scrutiny attaches to *all* state action that “substantially interfere[s] with the right of parents to guide the religious development of their children.” 607 U.S. 492, 496 (2026) (per curiam) (quoting *Mahmoud*, 606 U.S. at 559).

Under *Mahmoud*, strict scrutiny thus turns on the character of the burden the State places on parents’ right to direct their child’s religious education, not on the form the State’s action takes. In other words, to require application of strict scrutiny, the burden need not take the form of a classroom lesson. Instead, strict scrutiny applies whenever the government substantially burdens parents’ right to guide the religious education of their children.

**B. Because Vermont Delivers Education Through Parental Choice, Excluding Every Religious School Penalizes the Religious Exercise the Free Exercise Clause Protects**

Act 73 inflicts the burden *Mahmoud* condemns. A funding-eligibility rule that forecloses every religiously acceptable school substantially burdens parents' right to direct the religious education of their children.

In a sending district, Vermont does not operate a public high school and then regulate who may attend. It discharges its obligation to educate resident children by paying tuition to a school "selected by the parents or guardians of the student." 16 V.S.A. § 822(a)(1). The parent's choice is therefore not a preference layered atop a state-run education. It is the mechanism by which the State delivers the benefit. Vermont has chosen to educate O.P. through his parents' selection of a school.

For the Partingtons, that selection is an act of religious obligation, not consumer preference. They believe the Bible commands them to raise their children "to share [their] Christian faith, follow Jesus Christ, and live according to a Christian worldview." JA.453 (Partington Decl. ¶ 3). They believe that sending O.P. to a non-religious school would expose their son to "worldly influences and ideas that are contrary to [his] religious beliefs" and would "substantially interfere with [their] ability to direct [O.P.'s] religious upbringing." *Id.* (Partington Decl. ¶¶ 4, 6). And they chose Mid Vermont because it "share[s] and teaches the same Christian beliefs" they seek to instill in their son. JA.454 (Partington Decl. ¶ 11). *Mahmoud* protects

that choice—it is among the “choices that parents wish to make for their children outside the home” regarding their religious education, 606 U.S. at 547—which reflects a conviction the Supreme Court has recognized across faiths. “Religious education is vital to many faiths practiced in the United States.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 754 (2020).

By rendering Mid Vermont—and every other religious school in the State—ineligible for town tuition, Act 73 substantially burdens the Partingtons’ right to direct the religious education of their child. They may obtain the benefit Vermont makes available to every sending-district family, but only if they send O.P. to a school their faith does not permit; or they may keep faith with their religious obligation and forfeit the benefit. JA.454–55 (Partington Decl. ¶¶ 17–18, 21). That is not a marginal inconvenience. It is a penalty laid directly on the exercise of religion.

Vermont may contend that Act 73 is non-compulsory because the Partingtons remain free to send O.P. to Mid Vermont and pay for it themselves. *Mahmoud* rejects that view. The school board there argued that parents could teach their faith at home or educate their children elsewhere. 606 U.S. at 561. The Court was unpersuaded, explaining that because “[p]ublic education is a public benefit, . . . the government cannot condition its availability on parents’ willingness to accept a burden on their religious exercise.” *Id.* (cleaned up). The Free Exercise Clause “protects against

indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017) (citation omitted). Telling religious parents that they must pay for the education their faith requires—while families who choose eligible secular options receive public support—burdens their religious exercise. The fact that the burden is indirect does not change the analysis.

### **C. Vermont’s Ordinary Spending Choices Do Not Implicate *Mahmoud***

Vermont may protest that treating the failure to fund tuition at religious schools as a cognizable free-exercise burden is a slippery slope that will result in strict scrutiny applying to every spending choice that happens to disadvantage a religious option. *See Mahmoud*, 606 U.S. at 593 (Sotomayor, J., dissenting). That concern is misplaced, however, because the rule that decides this case is narrow and administrable.

Strict scrutiny attaches here because three features of Section 21 converge. First, the benefit pertains to children’s *education*, the same setting in which *Meyer*, *Pierce*, *Yoder*, *Mahmoud*, and *Mirabelli* arose. Second, Vermont delivers that benefit *through the parent’s selection of the child’s school*. 16 V.S.A. § 822(a)(1). Parental choice is thus the mechanism through which the benefit is delivered and not just an incidental preference. Third, Section 21 defines eligibility so that *no school consistent with the parent’s faith remains*, leaving religious parents unable to obtain

the benefit without surrendering their child’s religious formation to the State. *See* Appellants’ Br. 22–24 (no religious school qualifies; 75% of secular schools do). The confluence of these three features—an education benefit, delivered through parental choice, redrawn to foreclose every religiously acceptable option—forces the unconstitutional choice.

So confined, the rule leaves the State’s ordinary spending power unencumbered. Non-educational public benefits—like general welfare programs—do not implicate parents’ right to direct their children’s religious education. Similarly, benefits that do not run through a parent’s selection of a child’s school do not implicate the parental right. A State that declines to subsidize private education altogether offers no benefit to condition. And a funding rule that leaves parents other funded paths consistent with their faith imposes no comparable forced choice. The principle reaches only what Vermont has done: take a benefit it delivers through parental choice and engineer the menu so faithful parents alone must choose between the subsidy and their child’s religious formation.

That is the analysis *Mahmoud* requires, but the district court did not undertake it. The court rightly concluded that “[t]he denial of payment makes it more difficult for [Mr. Partington] to practice his faith, thereby placing a burden on his free exercise.” SA.23. The court then asked whether Section 21 is neutral and generally applicable and, finding that it is, applied rational-basis review. SA.23, 28–33. But

*Mahmoud* does not condition strict scrutiny on neutrality or general applicability. It conditions strict scrutiny on the character of the burden. 606 U.S. at 565. Because Section 21 substantially interferes with the Partingtons’ right to direct O.P.’s religious upbringing, it triggers strict scrutiny.

Vermont cannot escape strict scrutiny by recasting its exclusion of religious schools as a neutral eligibility rule. The Free Exercise Clause protects substance, not semantics, and a benefit structure that forecloses every religiously acceptable school burdens parents’ right to direct their child’s religious education no matter how the criteria are labeled. *See Carson v. Makin*, 596 U.S. 767, 784 (2022).

## **II. VERMONT CANNOT JUSTIFY BURDENING THE PARTINGTONS’ RIGHT TO DIRECT THEIR SON’S RELIGIOUS EDUCATION UNDER STRICT SCRUTINY**

Appellants ably demonstrate that Section 21 fails strict scrutiny when measured against the burden it places on Vermont’s religious schools. *See* Appellants’ Br. 61–64. The conclusion is the same when the Court measures Section 21 against the burden it places on religious *parents*. The two analytic pathways are mutually reinforcing: a law that cannot survive scrutiny as a restriction on religious schools fares no better as a penalty on parents’ religious upbringing of their child.

Because the parental right to direct a child’s religious formation lies “at [the] heart” of the Free Exercise Clause, *Mahmoud*, 606 U.S. at 546, only “interests of the highest order” that are “narrowly tailored” can justify burdening it, *id.* at 565 (citation omitted). And the inquiry is concrete, not hypothetical. The question is not

whether Vermont has a compelling interest in its education reforms in general, but whether it has such an interest in “denying [the] exception” from its general laws to the Partingtons specifically. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). Vermont cannot make that showing.

**A. Vermont’s Asserted Interests are Insufficient to Override Parents’ Right to Direct the Religious Education of their Child**

Vermont defends Section 21’s exclusionary criteria by invoking its interest in public-school consolidation, “economies of scale,” and providing “substantially equal educational opportunities.” JA.496, 543. Those may be legitimate aims. But the Supreme Court has twice confronted similar arguments and held that they cannot override parents’ right to direct the religious education of their child.

In *Yoder*, the State pressed its interest in compelling school attendance—a core governmental function the Court treated as weighty. Yet even that interest could not “overbalance” the Amish parents’ religious objection to secular schooling. 406 U.S. at 215, 234. If the State’s interest in compulsory education *itself* gave way to the parents’ claim, Vermont’s interest in *how it administers and consolidates* its system cannot justify the far heavier burden here—effectively foreclosing every school consistent with the Partingtons’ faith.

*Mahmoud* confirms the point. The school board there asserted genuine pedagogical and administrative interests in its chosen curriculum and in administering that curriculum without the burden of opt-outs. *Mahmoud*, 606 U.S.

at 565–66. The Court held those interests insufficient. *Id.* Vermont’s asserted interests are no weightier. A desire to consolidate districts and standardize delivery is an administrative interest of the same species as the curricular-management interest *Mahmoud* rejected. Whatever force these interests carry as general policy, they are not “interests of the highest order” sufficient to deny *the Partingtons* the benefit Vermont extends to every other sending-district family. *Fulton*, 593 U.S. at 541.

**B. Vermont Can Pursue its Interests Without Forcing Religious Parents to Surrender the Benefit, so the Exclusion is not Narrowly Tailored**

Even if Vermont’s interests qualified as compelling, Section 21 would fail because excluding religious schools—and the families who choose them—does nothing to advance those interests and is not the least restrictive means of pursuing them.

Vermont can consolidate its public-school districts, raise its quality standards, and pursue equal educational opportunity directly, through measures aimed at the schools and students those interests actually concern. None of that work requires telling religious parents that they must forfeit public tuition to keep faith with their religious obligations. The point is confirmed by Vermont’s own program. Vermont already funds the same category of education for families that select eligible secular schools, and, as Appellants show, funding O.P. at Mid Vermont would cost the State less than nearly every eligible alternative. *See* Appellants’ Br. 36–37. The denial of

a benefit the State extends to all other comparable families cannot be essential to any interest of the highest order.

States that have concerns about administrative ease or educational quality must pursue those concerns directly, “stopping far short of” foreclosing the religious exercise of the families caught in its path. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993); *see also Yoder*, 406 U.S. at 214–15. Vermont has done the opposite. It has taken a benefit it delivers through parental choice and engineered the eligibility rules so that the one group of parents who choose religious schools—and only that group—must choose between the benefit and their constitutional rights. The Free Exercise Clause does not permit a State to purchase administrative tidiness at that high price.

### **III. SECTION 21’S BURDEN FALLS ON RELIGIOUS FAMILIES ACROSS VERMONT AND THREATENS TO SPREAD BEYOND IT**

The stakes of this appeal reach well past the Partingtons. Vermont built a public-education benefit that runs on parental choice, then recalibrated the rules so the choice no longer includes a single religious school. That design raises a question larger than one family’s unequal treatment. It asks whether a State may use the architecture of a public benefit to steer an entire community of religious families away from the schools their faith requires, and whether other States may copy the method. The answer to both is no.

Begin with the character of the burden, because it explains why Section 21 is

more harmful to religious exercise than an ordinary refusal to fund religion. Vermont's town-tuition program is not a grant the State distributes on its own terms and for its own projects. In a sending district, the State does not operate a high school and regulate attendance. It discharges its duty to educate resident children by paying tuition to the school "selected by the parents." 16 V.S.A. § 822(a)(1). The parent's judgment is the operative act, and the State's role is to fund it. When Vermont defines eligibility to remove every religious school, it does not simply decline to subsidize religion. It takes the choice it created and tilts it away from religion, so that religious parents exercising the very option the program putatively extends is told the State will honor their decision only if they choose against their faith.

The Supreme Court condemned that type of intrusion into the family over a century ago. A State may not "standardize its children by forcing them to accept instruction from public teachers only," for "[t]he child is not the mere creature of the State." *Pierce*, 268 U.S. at 535. Vermont has not compelled public schooling by command. It has used the design of a funding benefit to accomplish the same end, and the parental right that *Pierce* protects "extends to the choices that parents wish to make for their children outside the home." *Mahmoud*, 606 U.S. at 547. That right is no less burdened when the lever is money rather than a truancy charge.

The burden is not confined to a single school or a single child. Town tuition is a substantial statewide system: in the 2020–21 school year, Vermont districts paid

roughly \$48 million to send approximately 2,700 sending-town students to independent schools, with about 3,000 more attending public schools on town tuition. See D’Auria, Peter, *Where in the World Is Vermont’s Public Tuition Money Going?*, VTDigger (Mar. 20, 2022), available at: <https://bit.ly/4eEUn71> (reporting Agency of Education data). Act 73 introduced criteria into that system that disqualified every one of the fifteen religious schools that had become eligible after this Court’s decisions in *French I* and *French II* and the Supreme Court’s decision in *Carson*, among them every Catholic school in the Diocese of Burlington. Appellants’ Br. 7; JA.593–600.

Behind those schools stand the families who chose them. And now, each of those families faces the same forced choice. The violation operates categorically. It reaches the religious as a class, sparing the secular. And the injury falls hardest where Vermont’s tuition system matters most, in the rural sending towns that have no public high school of their own and where, for many families, the nearest school consistent with their faith is the only one their convictions allow. JA.453 (Partington Decl. ¶ 10); JA.449.

How Vermont reached that result should concern the Court as much as the result itself. The State arrived at the same destination repeatedly, by a succession of different routes, and each time the method changed while the effect held constant. See *French I*, 985 F.3d at 165; see also *French II*, 999 F.3d at 98. Act 73 is the latest

route, and its most insidious feature is that it never names religion at all. If a facially neutral set of eligibility criteria can accomplish what an express religious exclusion could not, the lesson is that the Free Exercise Clause polices vocabulary rather than effects. The Supreme Court has already rejected that understanding. Free-exercise protection turns “on the substance of free exercise protections, not on the presence or absence of magic words.” *Carson*, 596 U.S. at 785.

Moreover, a ruling in Vermont’s favor would risk nationwide reverberations. States look to one another when designing education-funding rules, and the post-*Carson* effort to disfavor religious schools by indirect means is already a national pattern. After *Carson*, Maine amended its civil-rights law to impose nondiscrimination conditions that exclude the religious schools *Carson* was meant to protect, prompting litigation now pending on appeal. *See St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43 (D. Me. 2024), *appeal docketed* No. 24-1739 (1st Cir. Aug. 16, 2024). Colorado conditioned its universal-preschool funding on quality standards that no faith-based school can satisfy without abandoning its religious character, a maneuver now before the Supreme Court. *See St. Mary Cath. Par. v. Roy*, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026). A decision sustaining Act 73 would provide every State running a choice program a tested template for doing the same—identify the features that distinguish religious schools, write them into facially secular eligibility criteria, and decline to say why. The Free Exercise Clause

does not permit that result, and a ruling that blessed it here would invite it everywhere.

\* \* \*

The Free Exercise Clause secures more than parents' bare ability to educate their children in their faith at their own expense. It secures their equal place in the programs the State opens to everyone else. Vermont has denied that place to every family that chooses a religious school, and it has done so by engineering the terms of a benefit rather than declaring its purpose openly. The Constitution does not countenance that result. More than nominal access for religious schools and families is required. States may not structure public-benefits programs to sideline religious education or penalize parents who want to choose it. Vermont has narrowed parental choice, reduced school availability, burdened religious exercise, and converted a statewide benefit into a mechanism for excluding religious education from publicly supported options. Because that is incompatible with the Free Exercise Clause and the constitutional protection of parental authority, the district court's decision should not stand.

### CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of a preliminary injunction and direct the entry of Plaintiffs-Appellants' requested preliminary injunction.

July 1, 2026

Respectfully submitted,

/s/ Josh Dixon

Josh Dixon

Courtney Corbello

Center for American Liberty

2145 14th Avenue, Suite 8

Vero Beach, FL 32960

(703) 687-6212

jdixon@libertycenter.org

ccorbello@libertycenter.org

*Attorneys for Amicus Curiae*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and LR 29.1(c) because this brief contains 4,961 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

/s/ Josh Dixon  
Josh Dixon  
*Attorney for Amicus Curiae*