

24-1704

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; A.G. and M.G., by and through their parents and natural guardians, Christopher and Bethany Goodwin; CHRISTOPHER GOODWIN, individually; and BETHANY GOODWIN, individually,
Plaintiffs-Appellants

v.

ZOIE SAUNDERS, in her official capacity as Interim Secretary of the Vermont Agency of Education; JENNIFER DECK SAMUELSON, in her official capacity as Chair of the Vermont State Board of Education; CHRISTINE BOURNE, in her official capacity as Windsor Southeast Supervisory Union Superintendent; HARTLAND SCHOOL BOARD, Executive Director of The Vermont Principals' Association,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Vermont
No. 2:23-cv-652

BRIEF OF AMICUS CURIAE NATIONAL EDUCATION ASSOCIATION,
PUBLIC FUNDS PUBLIC SCHOOLS, NATIONAL SCHOOL BOARDS
ASSOCIATION, AND AMERICAN FEDERATION OF TEACHERS, IN
SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amid have no parent

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INTEREST OF AMICI CURIAE ¹

Amici are committed to ensuring that public education remains the cornerstone of our nation's social, economic, and political structure, and that children of all backgrounds have the right to a public education that gives them a meaningful opportunity to succeed in school and in life.

The National Education Association ("NEA") is the largest union in the country,

Center (“ELC”) and the Southern Poverty Law Center (“SPLC”). ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that pursues justice and equity for public school students by enforcing their right to a high-quality education in safe, equitable, non-discriminatory, integrated, and well-funded

public education and to educational opportunity for all. AFT's K-12 members are committed to providing their students with the highest quality public education consistent with the standards set by the local, state, and federal government. AFT frequently submits amicus briefs in cases that directly impact public school education.

All parties have consented to the filing of this brief.

ARGUMENT

I. Introduction

This case asks the Court to decide whether a voluntary association of Vermont schools that protects student-athletes' right to "participate in [its] activities in a manner consistent with their gender

allowing student-athletes to compete in voluntary activities without discrimination

nondiscrimination rule does not require participating schools to organize their own teams in any particular way. Mid Vermont Christian was free to exercise its own beliefs regarding the composition of its teams, choice of coaches, and instruction of its own players. In VPA competitions, however, teams may not refuse to compete against another team based on the identity of the players on the opposing team.

Because Mid Vermont Christian did just that by refusing to play against a team whose roster included a transgender girl, the VPA—after proceeding through its internal procedures and appeals—terminated Mid Vermont Christian’s membership. Mid Vermont Christian subsequently joined a different interscholastic athletic association, the New England Association of Christian Schools, and is fielding teams in that association’s competitions. Compl. ¶¶ 236-37, ECF No. 1. Yet, Mid Vermont Christian brought this lawsuit seeking to compel the VPA to reinstate Mid Vermont Christian’s membership in the VPA, despite the school’s refusal to abide by the VPA’s non-discrimination rule.

It requires no extended analysis to show that a voluntary association like the VPA may set and enforce its own rules and, indeed, is protected by the First Amendment in doing so. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (state may not compel “the organization to accept members where such acceptance would derogate from the organization’s expressive message”); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574, 581 (1995). Mid Vermont

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do not apply to nonmember schools.

IV. Vermont's Antidiscrimination Laws and Policies, Including those Governing Extracurricular Activities Such as Athletics, Further the Critical Goal of Providing Quality Education

A. Vermont is constitutionally committed to equitable educational opportunities

Providing public education is “perhaps the most important function of state and local governments.” Brow42t47B4 sr(o)5.3 (v)dr(o).037 Twc 0.07 8.983(ow42t47n)4

guarantees of political and civil rights. Further, the right to education is fundamental for the success of Vermont's children in a rapidly-changing society and global marketplace as well as for the State's own economic and social prosperity." Vt. Stat.

activities and programs that promotes respect for and appreciation of racial, gender, sexual orientation, religious and ethnic differences” and is “disability aware.” *Id.* The VPA’s provisions further Vermont’s goal of ensuring that students participating in extracurricular programs have the opportunity to do so without facing discrimination. Put differently, Vermont’s antidiscrimination laws and policies, embodied in the VPA’s Athletic Policies, guarantee that the VPA

Vermont Christian's membership. The Court cannot rule otherwise without jeopardizing scores of civil rights and the laws protecting them.

- C. Antidiscrimination laws are critically important and refusing to allow VPA to prohibit discrimination against competing teams and their players would harm students

Antidiscrimination laws and policies improve public education, thus promoting one of the most important functions of state governments. The U.S. Supreme Court has long affirmed the value in keeping schools free from discrimination, writing that “[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). In addition, the Supreme Court has acknowledged that antidiscrimination policies, because they allow all students to participate, promote the goals of education. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 688 (2010). Eliminating discrimination in educational programs sanctioned by the state protects students from discriminatory practices that are antithetical to those democratic values.

By contrast, permitting state-sanctioned discrimination against marginalized students is inimical to the state’s attempts to provide educational opportunities, depriving students of an equitable education and constraining their potential. In particular, LGBTQ+ students are more likely than other students to be targets of

physical or online bullying.⁶ Vermont's own data show LGBTQ+ students are twice as likely as heterosexual cisgender students to be bullied during the past month, are more likely to experience poor mental health and are 3.5 times more likely to have attempted suicide in the past year.⁷

Fully inclusive athletic policies are particularly vital to the wellbeing of LGBTQ+ students. A 2022 study showed that transgender students in states with fully inclusive athletic policies were fourteen percent less likely to have considered suicide in the past year than students in states with no guidance.⁸ Antidiscrimination protections like the VPA's are therefore vital for student safety and educational achievement.⁹ Their importance to students' well-being cannot be diminished,

⁶ Vt. Dep't of Health, 2017 Vermont Youth Risk Behavior Survey, High School Results (May 2018), https://www.healthvermont.gov/sites/default/files/documents/pdf/HSVR_YRBS_HighSchool_2017.pdf, at *9-10, 12, 14-15.

⁷ Vt. Dep't of Health, Statement from Health Commissioner Mark Levine, MD and Interim Secretary of Education Heather Bouchey, Ph.D. on Supporting LGBTQIA+ Youth (Mar. 20, 2024), <https://www.healthvermont.gov/media/news-room/statement-health-commissioner-mark-levine-md-and-interim-secretary-education>.

⁸ Ctr. for Am. Progress, The Importance of Sports Participation for Transgender Youth008 Tw 0 (Q)8 (orTf6.84g(o)8.2/dd)8.p(1)0.5 (t)0.5 (h)]TJD 11 BDC 0 g9 -0 0 32 0 w 104.

regardless of the justification an institution provides for discriminating, and they must not be watered down by broad exemptions.

Forcing the VPA to reinstate a school that explicitly discriminates against transgender students would result in the exclusion of transgender students who attend other schools—including public schools—from participation in a state-sponsored extracurricular opportunity. Mid Vermont Christian has explicitly stated that it does not tolerate transgender students, either in the school environment or outside of it (e.g., during games or athletic events). But Mid Vermont Christian cannot act on its beliefs in a vacuum. By refusing to play any games against teams with transgender students, Mid Vermont Christian seeks to use the athletic competitions organized by VPA to spread its discriminatory and harmful message that transgender students are so objectionable that one cannot even compete in a basketball game with a team that includes any transgender students. That message no doubt has and would continue to socially isolate and ostracize transgender students in other VPA schools, many of which are public schools, both preventing these students from participating in team sports and further socially isolating them. By allowing Mid Vermont Christian to participate in sports programs but “forfeit” (without penalties) 8.5 (5 (d)]TJ0 Tc 0 Tw 1.)0.5 (tr)3.7 (a)123 (de)1-4.4 y is

would be granting Mid Vermont Christian a state forum in which to propagate its harmful views that transgender students should not exist. Mid Vermont Christian has no constitutional right to impose its discriminatory views on other schools, teams, and students. The VPA was entirely within its rights to enforce its neutral and general prohibition against discrimination to prevent Mid Vermont Christian from using VPA athletic contests to spread a message of discrimination and hate.

D. The result sought by Mid Vermont Christian would open the door to other discrimination based on religious beliefs

Permitting Mid Vermont Christian to rejoin the VPA and explicitly discriminate against students at public and other schools on the basis of sexual orientation or gender identity would set a dangerous precedent that would open the door to further discrimination against other vulnerable and protected groups. There is no limiting principle to Mid Vermont Christian's logic, threatening a slippery slope of discrimination up to and including racial discrimination. One can imagine schools refusing to play certain sports against other teams that include transgender players or singling out players on opposing teams for scrutiny and discrimination simply because they are too tall or masculine appearing. Or schools refusing to play teams that include students who may not have been born in the United States. Or even schools refusing to play teams that include students of a different race or ethnic background. The U.S. Supreme Court has categorically forbidden such conduct, see, e.g. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968)

(per curiam), and backsliding on these principles must be diligently avoided. There is no denying this nation's sordid history of racial discrimination in education.¹⁰ Since *Brown v. Board of Education*, the United States has instituted broad legal protections against racial discrimination in schools, including Title VI of the Civil

These principles extend to educational institutions. See *Runyon v. McCrary*, 427 U.S. 160, 161 (1976) (stating that the practice of excluding racial minorities from schools is not protected by the right to freedom of association).

In *Masterpiece Cakeshop*,¹ the Court understood that broad exceptions to antidiscrimination laws would result “in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.” *Masterpiece Cakeshop*, 584 U.S. at 632. The same principle applies here: adopting Appellants’ reasoning threatens to thrust society back into a long-rejected era of discrimination in school activities that was justified by religion. See *Berea Coll. v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), *aff’d*, 211 U.S. 45 (1908) (upholding a law prohibiting integrated schools because “separation of the human family into races, distinguished . . . by color . . . is as certain as anything in nature” and is “divinely ordered”); see also *W. Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (1867) (justifying segregation on railroads because “the Creator” made two distinct races and “He intends that they shall not overstep the natural boundaries He has assigned to them”).

Vermont’s and the VPA’s prohibitions against discrimination are engineered

570, 595 (2023). In this case, Mid Vermont Christian is attempting to “speak” by taking actions on its purported religious commitments at events sponsored by the VPA, a voluntary membership association with its own set of policies. With respect to VPA-organized events, the VPA’s own messaging must prevail to the extent that there is any conflict between the VPA’s and the VPA’s policies. [71.75.6 (t)8ne.3 (wi)d

to prevent precisely this type of discrimination and to ensure the protection of all students participating in the VPA's interscholastic sports and extracurricular programs.

V. Conditioning VPA Membership on Compliance with Nondiscrimination Standards Is Proper

A. The VPA's policies are neutral and generally applicable, and thus subject to rational basis review

It is well established that states have the power to condition public benefits on

whether public or private, religious or not—is prohibited from discriminating on the basis of racial, gender identity, sexual orientation, religious, or ethnic differences. Vermont Principals' Association at 4-5. Simply put, a religious school that discriminates would receive the same treatment as a secular private school that discriminates. Accordingly, Appellants' suggestion that the VPA's antidiscrimination policies cannot be neutral or generally applicable is directly controverted by the policies' plain language. Although Appellants suggest that the VPA's policies perpetuate religious discrimination, Appellants' Opening Br. at 49, its policies in fact explicitly prohibit discrimination on the basis of religion.

25, 26 (2d Cir. 1999) (quoting *Smith*, 494 U.S. at 878-79).

In short, the VPA may restrict membership to those schools that comply with the VPA's neutral and generally applicable antidiscrimination policies.

B. The VPA's antidiscrimination policies survive strict scrutiny

Even if this Court finds that the VPA's policies are not neutral or generally applicable, the VPA's decisions at issue here should still be upheld because they pass strict scrutiny.

Vermont's interest in eliminating discrimination in the VPA's sports and other extracurricular activities is compelling. As demonstrated above, *supra* Section III, there can be no dispute that states have a compelling interest in eliminating discrimination. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982) (finding states have a "substantial interest" in protecting their citizens from "the political, social, and moral damage of discrimination"); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (eliminating discrimination "plainly serves compelling state interests of the highest order").

Moreover, Vermont has a compelling interest, under the education clause of the state constitution, Vt. Const. ch. II, § 68, in ensuring that students are adequately educated free from discrimination. See *Vitale*, 2023 VT 15, ¶ 10, 217 Vt. at 622 ("[T]he state must ensure substantial equality of educational opportunity throughout Vermont." (emphasis and citation omitted)). An essential component of the state's

affirmative constitutional duty is the guarantee that public education benefits are open to all children. *Id.* ¶ 20, 217 Vt. at 627 (“The Common Benefits Clause is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons who are a part only of that community.” (internal quotation marks and citations omitted)). Thus, the VPA’s nondiscrimination requirements further Vermont’s compelling interest.

Dated: October 22, 2024

Respectfully Submitted

/s/ AdamJ. Hunt

CERTIFICATE OF COMPLIANCE

I certify that his brief complies with the type-volume limitation of Rule 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Second Circuit Rule 29.1(c) because it

