IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

TRAVIS ALLEN, et al., *Plaintiffs,* v. **LAYNE MILLINGTON,** et al., *Defendants.*	Civil Case No. 2:22-cv-00197-cr

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO JOIN THE STATE OF VERMONT AS A REQUIRED PARTY

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INTRODUCTION

Plaintiffs filed this suit to challenge disciplinary actions that Defendants have taken against them because of constitutionally protected speech and to invalidate as overly broad and unconstitutionally vague the school board policy that Defendants used to punish Plaintiff Blake Allen. Because Defendants adopted that policy based on the Vermont Secretary of Education's model harassment, hazing, and bullying policy in compliance with Vermont law, Defendants argue that the State of Vermont is a required party and that Plaintiffs' failure to name it as a defendant requires dismissal of the Complaint. Defendants are wrong on both counts.

First, the State of Vermont is not a required party under Rule 19. Plaintiffs seek to enjoin *Defendants'* policy, not the State's—so the Court *can accord* complete relief among existing parties. Fed. R. Civ. P. 19(a)(1)(A). And Defendants have no risk of inconsistent obligations because an injunction here would still allow them to regulate unlawful harassment consistent with Vermont law. *See id.* 19(a)(1)(B). To the extent the State of Vermont has an interest in this case, it remains free to move to intervene under Rule 24 or file an amicus brief. *See Am. Trucking Ass'n v. N.Y. State Thruway Auth.,* 795 F.3d 351, 359 (2d Cir. 2015) (holding that New York's interest "in defending the validity of its own laws" is not an interest that makes the state a necessary party under Rule 19).

Second, joinder—not dismissal—is the proper remedy for the absence of a required party under Rule 19(a). The text of the rule itself makes that clear: "If a person has not been joined as required, the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2). Indeed, the Second Circuit has recognized that "[f]ederal courts are extremely reluctant to grant motions to dismiss based on nonjoinder and, *in general, dismissal will be ordered only when the defect cannot be cured* and serious prejudice or inefficiency will result." *Am. Trucking Ass'n,* 795 F.3d at 357 (quoting 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1609 (3d

ed. 2015)) (emphasis added). Here, Defendants make no argument that joinder is infeasible or that they meet the requirements for dismissal when a party cannot be joined. *See* Fed. R. Civ. P. 19(b).

For these reasons, this Court should deny Defendants' motion to dismiss.

FACTUAL BACKGROUND

I. Defendants apply their HHB policy to punish Blake for objecting to a male using the girls' locker room.

Plaintiff Blake Allen is in ninth grade at Randolph Union High School (RUHS). Verified Compl. ¶ 13. She plays on the RUHS girls' volleyball team. *Id.* ¶ 32. Before an away game on September 21, 2022, RUHS girls' volleyball team members, including Blake, were changing in the girls' locker room. *Id.* ¶ 39. Prior to September 21, RUHS had given "no notice to members of the girls' volleyball team or their parents" that it permitted males who identified as females to use the girls' locker room, "including while girls in the locker room were in a state of undress or showering"—despite T.S., a ninth-grade "male who identifies as a female," playing on the team. *Id.* ¶¶ 35–37. But on that day, T.S. entered the locker room while the girls were "in various states of undress, with some shirtless or without pants." *Id.* ¶ 40. Blake and other girls asked T.S. to leave, but T.S. refused and remained in a position to observe the girls while they were changing. *Id.* ¶¶ 41–45. Blake left the locker room upset and called her mom. *Id.* ¶ 45.

The next day, Blake discussed the issue with three classmates in French class—a class that T.S. is not in. *Id.* ¶ 54. Blake explained that T.S. "literally is a dude" and said that "he does not belong in the girls' locker room." *Id.* ¶ 55. After this comment was reported to their office, RUHS co-principals Defendants Lisa Floyd and Caty Sutton advised Blake's family that they had received information that Blake may have "misgendered" a student and that they were opening a harassment, hazing, and

bullying investigation ("HHB") investigation under the school's HHB policy. *Id.* ¶¶ 57, 59.

On October 21, Defendants Floyd and Sutton informed Blake that she had violated the policy by "engag[ing] in verbal and physical conduct directed at a student on the basis of the targeted student's gender identity." *Id.* ¶ 112. As punishment, Defendants prescribed two days of out-of-school suspension, participation "in a restorative circle with . . . [their] Equity Coordinator and at least two students who can help [Blake] understand the rights of students to access public accommodations . . . in a manner consistent with their gender identity," and "submi[ssion] [of] a reflective essay." *Id.* ¶ 114. If Blake didn't complete the "restorative circle" or reflective essay to Defendants' satisfaction, she would be required to serve an additional three days' suspension. *Id.* ¶ 115.

II. Blake files a lawsuit challenging Defendants' unconstitutional HHB policy.

Blake filed a lawsuit challenging Defendants' actions and policy related to the locker room incident.[1] Blake sued Defendants Orange Southwest School District Board, district superintendent Layne Millington, Floyd, and Sutton. Verified Compl. ¶¶ 14–21. Among the claims, Blake argues Defendants' HHB policy violates the First and Fourteenth Amendments "facially and as applied." *Id.* ¶¶ 156, 167.

Defendants' HHB policy "prohibit[s] unlawful harassment" and "bullying." Verified Compl. Ex. 3 at 3. The policy provides lengthy definitions of both "harassment" and "bullying":

> "Harassment" includes "an incident or incidents of verbal, written, visual, or physical conduct . . . based on or motivated by a student's or a student's family member's actual or perceived . . . gender identity . . . that has the purpose or effect of objectively and substantially

[1] Blake's father, Travis Allen, also sued because Defendants terminated him for making a Facebook post about the locker room incident. *See* Verified Compl. ¶ 6. Defendants have made no argument against his claims.

> undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating[,] hostile, or offensive environment." *Id.* Ex. 3 at 5–6.
>
> "Harassment" also includes (A) "sexual harassment"—"verbal, written, visual or physical conduct of a sexual nature" and (B) "conduct directed at the characteristics of a student's or a student's family member's actual or perceived . . . gender identity and includes the use of epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, taunts on manner of speech, and negative references to customs related to any of these protected categories." *Id.* Ex. 3 at 6.
>
> "Bullying" involves "any overt act or combination of acts . . . directed against a student by another student . . . and which: (a) [i]s repeated over time; [and] (b) [i]s intended to ridicule, humiliate, or intimidate the student . . . ." *Id.* Ex. 3 at 4.

Defendants adopted their policy from the Vermont Secretary of Education's model harassment, hazing, and bullying policy developed pursuant to Vermont law. *See* Dkt. 22-2; Vt. Stat. Ann. tit. 16, § 570(b).

Defendants' HHB policy violates the First Amendment's Free Speech Clause because it is facially overbroad. Verified Compl. ¶ 159. The policy's definitions of "harassment" and "bullying" "reach a substantial amount of constitutionally protected speech." *Id.* ¶ 160. Defendants' policy fails for overbreadth "[b]y defining 'harassment' to include a single 'incident' of 'verbal' conduct [including 'comments'] motivated by any of numerous characteristics, including 'gender identity,' that has the effect of creating an 'offensive environment,' among other things." *Id.* ¶¶ 161–62; *see Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999) (highly "unlikely" that "a single instance" of harassment could "be serious enough to have the systemic effect of denying the victim equal access to an educational program"). Its definition of "'bullying' to include 'any overt act' that is 'repeated over time' and 'intended to ridicule, humiliate or intimidate' a student, among other things" also extends to punish a substantial amount of constitutionally protected speech. Verified Compl.

¶ 163; *see Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216–17 (3d Cir. 2001) (Alito, J.) (invalidating on First Amendment grounds a school anti-harassment policy that prohibited "verbal or physical conduct . . . based on one's actual or perceived personal characteristics" and that either "substantially interfer[es] with a student's educational performance" or "creat[es] an intimidating hostile, or offensive environment").

Defendants' HHB policy is unconstitutionally vague because it "utilize[s] terms that are inherently subjective and elude any precise or objective definition" and gives "school officials unbridled discretion in deciding what constitutes 'gender identity,' 'harassment,' 'harassment on the basis of gender identity,' and 'bullying.'" Verified Compl. ¶ 151; *see Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182, 1184 (6th Cir. 1995) (holding unconstitutionally vague harassment policy that prohibited "verbal . . . behavior that subjects an individual to an intimidating, hostile or offensive educational . . . environment"). Defendants' policy is also vague because it "prohibit[s] both 'sexual harassment' and 'harassment on the basis of gender identity' which, as defined by Defendants, are inherently in conflict." Verified Compl. ¶ 152. For example, by allowing a male to use the girls' locker room and watch Blake while she undresses, Defendants subject Blake to "sexual harassment." *Id.* ¶ 153.

Blake seeks a "declaratory judgment that Defendants' HHB Policy" is "unconstitutionally vague and unenforceable on its face and as applied to" her and "unconstitutionally overbroad and unenforceable on its face and as applied to" her. *Id.* Prayer for Relief §§ C, D. Blake also requests "[a] preliminary and permanent injunction prohibiting Defendants from enforcing the HHB Policy." *Id.* Prayer for Relief § G.

LEGAL STANDARD

A party may raise the defense of "failure to join a party under Rule 19" by motion. Fed. R. Civ. P. 12(b)(7). Rule 19 of the Federal Rules of Civil Procedure "sets forth a

two-step test for determining whether the court must dismiss an action for failure to join an indispensable party." *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000) (Sotomayor, J.).

(1) "[T]he court must determine whether an absent party belongs in the suit, *i.e.*, whether the party qualifies as a 'necessary' party under Rule 19(a)"—or, to use the current term, "required" under Rule 19. *Id.*; *see* Fed. R. Civ. P. 19(a)(1). "If a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b)." *Viacom*, 212 F.3d at 724. But if a party is required, the court "must order that the person be made a party." Fed. R. Civ. P. 19(a)(2). Only when the court determines that "joinder of the absent party is not feasible for jurisdictional or other reasons" does it proceed to the second step of the analysis. *Viacom*, 212 F.3d at 725.

(2) "[T]he court consults Rule 19(b), which requires courts to consider whether, 'in equity and good conscience,' the party is one without whom the action between the remaining parties cannot proceed—or, in the traditional terminology, whether the absent party is 'indispensable.'" *Am. Trucking*, 795 F.3d at 357 (quoting Fed. R. Civ. P. 19(b)) (cleaned up).

"The cases make it clear that the burden is on the party moving under Rule 12(b)(7) to show the nature of the unprotected interests of the absent individuals or organizations and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence." 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1359; *see Tae H. Kim v. Ji Sung Yoo*, 776 F. App'x 16, 20 (2d Cir. 2019) (holding movant has the "burden of persuasion under Rule 19(b)"); *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 635 F.3d 87, 97 (3d Cir. 2011) (holding movant "bears the burden of showing why an absent party should be joined under Rule 19"). In resolving a Rule 12(b)(7) motion, the court "must accept all factual allegations in the complaint as true and draw inferences in favor of the non-

moving party." 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1359.

ARGUMENT

Defendants move for an Order "dismissing this action and directing that any amended complaint" name the State of Vermont as a defendant or "plead the reasons for which joinder is not feasible." Defs.' Mot. to Dismiss for Failure to Join Vt. as Required Party ("Mot.") at 3. In Defendants' estimation, the State of Vermont is a required party under Rule 19 of the Federal Rules of Procedure. *Id.* at 3–4. Defendants' argument suffers from two fatal flaws:

(I) Neither the State of Vermont nor any state official is a required party under Rule 19(a) of the Federal Rules of Civil Procedure; and

(II) Joinder—not dismissal—is the appropriate remedy. Defendants have not even attempted to—and cannot—explain why joinder of a relevant state defendant is not feasible or why the action cannot proceed without a state defendant.

I. Neither the State of Vermont nor any state official is a required party.

Defendants argue that the State of Vermont is a required party because without it (A) this Court cannot "accord complete relief" among the existing parties; and (B) Defendants and Blake herself will be "subject to substantial risk of inconsistent obligations." Mot. 9. Neither argument is availing. First, Blake seeks injunctive and declaratory relief only as against *Defendants'* HHB policy, independent of any state official's action, so this Court can award complete relief without joining additional parties. Second, no state official has asserted an interest relating to this action and no party has any risk of incurring inconsistent obligations. Awarding relief to Blake will not erase Defendants' HHB policy from their handbook and will still allow Defendants to regulate unlawful harassment, but in a constitutional manner.

A. This Court can award complete relief among the existing parties because Blake seeks relief against *Defendants'* policy.

A person is a required party if "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1). As its plain text reveals, "Rule 19(a)(1) is concerned only with those who are already parties." *MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 385 (2d Cir. 2006). "[T]he term complete relief refers only 'to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought.'" *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985) (quoting 3A J. Moore, *Moore's Federal Practice* ¶ 19.07–1[1], at 19–96 (2d ed. 1984)).

Defendants speculate that—even with an injunction against their policy—the Vermont Human Rights Commission could still enforce the terms of the model policy within the school district. Mot. 10. But Blake seeks an injunction and declaratory judgment against "*Defendants'* HHB Policy." Verified Compl. Prayer for Relief §§ C, D (emphasis added); *accord id.* Prayer for Relief § G. The court's issuance of such an injunction and judgment against that policy will provide her all the relief requested. She did not bring a claim against the model policy or the statutory definitions of harassment, so complete relief as against those already parties does not include a judgment or injunction against the model policy and statutory definitions. "The possibility that a successful party may have to defend its rights . . . in a subsequent suit brought by the State does not make [the State] a necessary party to this action." *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, Known as The Sindia*, 895 F.2d 116, 122 (3d Cir. 1990).

Moreover, Defendants' out-of-district cases are inapposite. In one, the non-parties controlled the entities against which the plaintiffs sought an injunction. *See* Mot. 10 (citing *Westchester Disabled on the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 475 (S.D.N.Y. 2004)). In that case, the plaintiffs moved for an injunction to make polling places ADA compliant. *Westchester*, 346 F. Supp. 2d at 479. But the plaintiffs

had not sued the municipalities, which the court found "likely own[ed] or otherwise control[led] many of the actual or potential polling places." *Id.* at 480. So the court could not accord complete relief because its order would not bind the entities that had the power to make the polling places ADA complaint. *See id.* In the other case, the plaintiff sought a declaration that the city's "rent stabilization ordinance [wa]s unconstitutional," but did not sue the entities whose action it challenged—the city and rent stabilization board. *See Troy Towers Tenants Ass'n v. Botti*, 94 F.R.D. 37, 38–39 (D.N.J. 1981); Mot. 11–12 (citing *Troy Towers*). But here Blake seeks an injunction and judgment against Defendants' policy—and enforcement of that policy is exclusively within Defendants' control. "The absence of [a state defendant] would not prevent Plaintiffs from receiving the declaratory and injunctive relief requested relative to the [Defendants'] actions." *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 314 (W.D.N.Y. 2007).

B. Neither the State of Vermont nor any state official has asserted an interest in this action and resolving this case does not leave a party at substantial risk of incurring inconsistent obligations.

A person can also be a required party if "that person claims an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). This subsection requires Defendants to meet a "threshold requirement." *Wash. Nat'l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 135 (2d Cir. 2020). "It is the absent party that must 'claim an interest.'" *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir. 1996).

Neither the State nor any state government official has claimed any interest relating to this action. Rather, Defendants—a local school board and its officials—have attempted to speak for Vermont by pointing to a general state interest in preventing harassment in state schools. Mot. 11 (citing Vt. Stat. Ann. tit. 16,

§ 570(a)). But the state's model policy also purports to have an interest in "enforce[ment] . . . consistent with student rights to free expression under the First Amendment." Dkt. 22-2 at 2. Blake does not challenge Defendants' ability to prohibit unlawful harassment. For example, she does not claim that Defendants cannot proscribe harassing "physical conduct." Verified Compl. Ex. 3 at 5. She just seeks to make clear that protected speech cannot be harassment—something the model policy purports (but fails) to protect. *See* Verified Compl. ¶¶ 161–63.

Given the statute and model policy's competing interests in regulating harassment and recognizing First Amendment rights, it is unclear what position a state official would take here. And no state official has in fact asserted any interest in this action. That is reason alone why neither the state nor any state official can be a necessary party under Rule 19(a)(1)(B). *See Berkley Ins. Co. v. Bouchard*, 2020 WL 7646542, at *5 (D. Vt. Dec. 23, 2020) (denying 12(b)(7) motion because neither absentee had "claimed an interest relating to this action"); *Monbo v. Nathan*, --- F.Supp.3d ----, 2022 WL 4591905, at *45 (E.D.N.Y. Aug. 26, 2022) (collecting cases). Defendants' "self-serving attempts to assert interests on behalf of [Vermont] fall outside the language of Rule 19(a)[(1)]." *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 683 (2d Cir. 1996). And if the State of Vermont wants to assert an interest, it can move to "interven[e] in this action" or file an amicus brief. *Am. Trucking*, 795 F.3d at 360 (holding that State of New York is not required party to suit alleging excessive collection of highway tolls to fund New York's canal system).

Furthermore, Defendants do not have a "substantial risk" of incurring inconsistent obligations, as Rule 19(a)(1)(B) also requires. Defendants argue that they will incur inconsistent obligations because (1) state law requires them to have a compliant HHB policy and (2) they may be at risk of liability from third parties for not remedying actionable harassment. Mot. 7, 11. Defendants also claim Blake will

incur inconsistent obligations from the relief she seeks. *Id.* at 11. None of Defendants' arguments have merit.

First, as Defendants recognize, they have adopted a HHB policy that fulfills their obligation under Vermont law. Mot. 2. None of the relief sought by Blake will erase Defendants' policy from the student handbook. Blake seeks a declaratory judgment and injunction against certain terms of the policy, including its overbroad definition of "'harassment." Verified Compl. ¶¶ 161–62. This Court's judgment and injunction against unlawful provisions of the policy will not render Defendants out of compliance with Vermont law. Such relief simply would mean that Defendants cannot enforce those provisions. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("[A] favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear."); *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021) ("An injunction operates on the enjoined officials; the law, regulation, or agency action remains on the books . . . ."). Accordingly, Blake's requested relief will not force Defendants to violate Vermont law because they have adopted—and continue to have—a statutorily compliant HHB policy, but relief will ensure that it is also one that complies with the Constitution.

Second, Blake's requested relief will not put Defendants at risk of civil liability or administrative enforcement actions. To be actionable under the Vermont Public Accommodations Act, harassment must be "so severe, pervasive, and objectively offensive that it deprive[s] [a student] of access to the educational opportunities or benefits provided by the school." *Washington v. Pierce*, 895 A.2d 173, 186 (Vt. 2005). That is, the Vermont Supreme Court adopted the federal *Davis* standard for harassment claims, which the United States Supreme Court developed with the First Amendment in mind. *See Davis*, 526 U.S. at 649; *id.* at 667 (Kennedy, J., dissenting) ("A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment."); *accord Saxe*, 240 F.3d

at 216–17; *Speech First, Inc. v. Khator*, --- F. Supp. 3d ----, 2022 WL 1638773, at *2 & n.6 (S.D. Tex. 2022) (enjoining anti-harassment policy on First Amendment grounds because it did not comply with *Davis* standard). So Defendants cannot be liable for peer-on-peer harassment unless they could also constitutionally punish that harassment.

The 2011 update to the Public Accommodations Act does not change the calculus. That year, the Vermont Legislature defined the elements of a harassment action under the Act. *Blondin v. Milton Town Sch. Dist.*, 251 A.3d 959, 975 (Vt. 2021) (citing Vt. Stat. Ann. tit. 16, § 570f). Unlawful harassment includes "multiple instances of conduct" that are "so pervasive that when viewed from an objective standard of a similarly situated reasonable person, it substantially and adversely affected the targeted student's equal access to educational opportunities" and "a single instance of conduct" that is "so severe that when viewed from an objective standard of a similarly situated reasonable person, it substantially and adversely affected the targeted student's equal access to educational opportunities." Vt. Stat. Ann. tit. 16, § 570f(c)(2). But *Blondin* did not overrule *Washington*'s standard of actionable harassment. *See Blondin*, 251 A.3d at 974–75. To the extent the statute weakens the *Washington* and *Davis* definition of harassment, it does not pass constitutional muster, as discussed above. Even so, Defendants' policy has a much less stringent definition of harassment than required under section 570f.

Defendants' HHB policy does not adopt the *Washington* harassment (or even the section 570f) standard. Instead, it contains overbroad and vague terms that render it constitutionally infirm. For example, under Defendants' HHB policy, harassment includes even a single "incident" of "verbal" conduct, such as "comments," that has the effect of creating an "offensive environment." Verified Compl. ¶¶ 161–62. But it is highly "unlikely" that "a single instance" of harassment could "be serious enough to have the systemic effect of denying the victim equal access to an educational

program." *Davis*, 526 U.S. at 652–53; *see also* Vt. Stat. Ann. tit. 16, § 570f(c)(2)(B) ("single instance" must be so "severe" as to "objective[ly]," "*substantially*[,] and *adversely* affect[ ] the targeted student's equal access to educational opportunities" (emphasis added)). Blake's requested relief against those terms still allows Defendants to police harassment in line with *Washington* and thus avoid liability under the Public Accommodations Act.

Neither state officials nor private parties can force Defendants to take unconstitutional action. In our system, the Constitution is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. So "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Davis*, 526 U.S. at 649. And "[i]t is difficult to believe that a subsequent tribunal faced with a party under a prior court-ordered injunction will nevertheless order that party to perform the very obligations a prior court has prohibited it from performing." *MasterCard*, 471 F.3d at 388. In short, Defendants have no appreciable risk of inconsistent obligations, much less a "substantial" one.

Defendants also incorrectly claim that Blake herself is at risk of inconsistent obligations because "a harassment victim may seek redress at the Human Rights Commission." Mot. 11. "It is well-established that a plaintiff ordinarily is free to decide who shall be parties to h[er] lawsuit." *Synergy Advanced Pharm., Inc. v. CapeBio, LLC*, 797 F.Supp.2d 276, 287 (S.D.N.Y. 2011) (cleaned up). Defendants cannot raise an interest on Blake's behalf when she—"the party supposedly facing this grave predicament"—"has not advanced the argument that [she] would be prejudiced by [a state official's] absence from this case." *MasterCard*, 471 F.3d at 389.

What's more, Blake has no risk of inconsistent obligations. As Defendants properly concede, the Human Rights Commission enforces the Vermont Public Accommodations Act, which applies to "public accommodations"—not individuals, like Blake, who do not operate a place of public accommodation, like a "school" or

"restaurant." Mot. 7; Vt. Stat. Ann. tit. 9, § 4501(1) ("'Place of public accommodation' means any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public."); Vt. Stat. Ann. tit. 9, § 4501(8) ("'Public accommodation' means an individual, organization, governmental, or other entity that owns, leases, leases to, or operates a place of public accommodation."). Blake's requested relief does not put any party at "substantial risk" of incurring inconsistent obligations.

II. Dismissal is not the remedy.

Not only does Defendants' motion fail because no state defendant is a required party, but joinder—not dismissal—is the proper remedy to a required party's absence. "If a person has not been joined as required, the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2); *see also* Fed. R. Civ. P. 19(b) (threshold requirement for dismissal that required party "cannot be joined"); *Wright Farms Const., Inc. v. Kreps*, 444 F. Supp. 1023, 1028 (D. Vt. 1977) ("Obviously joinder, not dismissal for failure to join, is the proper way to proceed if possible . . . ."). Defendants have the "burden of persuasion under Rule 19(b) of showing that . . . joinder . . . is not feasible." *Tae H. Kim*, 776 F. App'x at 20. Indeed, "[a] party that complains of failure of the adversary to join an indispensable party is required by Rule 19 to explain why the objecting party did not itself bring the indispensable party into the litigation." *Id.* (citing Fed. R. Civ. P. 19(c)).

Defendants' argument for dismissal and citation to a California case, Mot. 12, ignore the plain text of Rule 19 and their burden in the Second Circuit to prove the infeasibility of joinder. *See Tae H. Kim*, 776 F. App'x at 20; *Sunset Homeowners Ass'n v. DiFrancesco*, 386 F. Supp. 3d 299, 307 (W.D.N.Y. 2019) (ordering required party joined when the defendants "provided no reason to conclude that" joinder was "not feasible"). Defendants offer no argument why the State or a relevant state official

could not be joined or why Defendants themselves did not join the State or relevant state official. Indeed, Defendants tacitly concede that joinder *is* feasible by suggesting that the State of Vermont should be "privy to [future] motion practice" in this case. Mot. 3 n.1.

No state official is a required party necessitating joinder, *supra* Part I, but Defendants could have joined any responsible officials and this Court could order them joined. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."). Defendants identify "two Vermont agencies"—the Agency of Education and Human Rights Commission—that purportedly "require" them to "adhere" to the model HHB policy in responding to complaints of harassment. Mot. 11–12. But nothing prevents the Secretary of Education and members of the Human Rights Commission from becoming defendants to Blake's facial claims for injunctive and declaratory relief. *See, e.g.*, *In re A.H.*, 999 F.3d 98 (2d Cir. 2021) (adjudicating suit against Secretary of Education sued for injunctive relief in his official capacity). Joining those individuals would prevent their state agencies from enforcing both the statute mandating the model HHB policy and the Vermont Public Accommodations Act against Defendants. *See* Vt. Stat. Ann. tit. 9, §§ 4506(a), (c) (Human Rights Commission enforces Vermont Public Accommodations Act); Vt. Stat. Ann. tit. 16, § 212(5) (Secretary of Education "shall . . . [s]upervise and direct the execution of the laws relating to the public schools and ensure compliance").

Where, as here, "a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b)." *Viacom*, 212 F.3d at 724. Even so, "Rule 19(b) does not authorize dismissal simply because [a required] party cannot be joined." *Jota v. Texaco, Inc.*, 157 F.3d 153, 162 (2d Cir. 1998). Rather, "the court must determine whether, in equity and good

conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b); *see Jota*, 157 F.3d at 162. The movant has the "burden of persuasion" to show that "considerations of 'equity and good conscience' weigh in favor of dismissal." *Tae H. Kim*, 776 F. App'x at 20.

Defendants again make no argument to meet their burden as to why this case cannot proceed. They don't even cite Rule 19(b). So they have waived that argument, and this Court should deny their motion on that basis. *See United States v. Zygmont*, 2013 WL 3246139, at *10 n.3 (D. Vt. June 26, 2013) (declining to address argument when the defendant did not "brief th[e] issue").

Not only have Defendants waived the argument, they also cannot meet their Rule 19(b) burden. As discussed above, no current party would suffer prejudice without a state defendant. *Supra* Part I. Nor would the State suffer prejudice because—as Defendants concede—an injunction and declaratory judgment against Defendants does not bind the State because it is not in "active concert or participation" with Defendants. Mot. 9. To the extent the State has any interest, it "can avoid prejudice by intervening in this action." *Am. Trucking*, 795 F.3d at 360 (cleaned up). And "the potential prejudice to an absent party under Rule 19(b) is mitigated where a remaining party could champion [its] interest." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 134 (2d Cir. 2013) (cleaned up). "Defendants proudly uphold the OSSD HHB Policy," which they "adopted, verbatim, from the Vermont Secretary of Education's Model Policy for the Prevention of Harassment, Hazing and Bullying . . . pursuant to a state statute." Mot. 3, 5. Neither equity nor good conscience favor dismissal.

III. Defendants cannot file another 12(b) motion and must answer the Complaint.

Defendants assert that they "expressly reserve and do not waive other bases for dismissal" that they may raise in further "motion practice." Mot. 3 n.1. But the federal rules explicitly prevent them from doing so. With the exception of a challenge to

subject-matter jurisdiction, a party that makes a 12(b) motion "must not make another motion under" Rule 12(b) "raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). Defendants have therefore "waived" a further 12(b) motion. Fed. R. Civ. P. 12(h)(1); *see Schnabel v. Lui*, 302 F.3d 1023, 1028, 1033 (9th Cir. 2002) (defendant "waived" certain 12(b) defenses by "failing to raise the[m] in its first motion under Rule 12(b)," which motion included a defense "for failure to join an indispensable party"); *Green v. City of Norwalk*, 2016 WL 829864, at *3 (D. Conn. Mar. 1, 2016) ("The Federal Rules of Civil Procedure 'contemplate a single pre-answer motion in which the defendant asserts all the Rule 12 defenses and objections that are then available to him or her.'" (quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1385)). This Court should order Defendants to answer Plaintiffs' Verified Complaint. *See* Fed. R. Civ. P. 12(a)(4)(A).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, I electronically filed the foregoing using the CM/ECF system, which automatically sends an electronic notification with this filing to the following attorneys of record:

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