APPEAL NO. 23-4169

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA BATES,

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, in his official capacity as Director of the Oregon Department of Human Resources, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 2:23-cv-00474-AN

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Jessica Bates is an individual.

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JURISDICTIONAL STATEMENT

Jessica Bates sued the named appellants in the United States District Court for the District of Oregon under 42 U.S.C. § 1983, alleging violations of her First and Fourteenth Amendment rights. The district court exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On November 14, 2023, the district court denied Bates' motion for a preliminary injunction. 1-ER-54. Bates timely filed her appeal notice on December 13, 2023, within the 30-day period established in 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). 3-ER-424. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

An Oregon Department of Human Services policy requires some—but not all—prospective foster and adoptive parents to "accept" and "support" a child's traits and beliefs—including spiritual beliefs, disabilities, cultural identities, and sexual and gender identities. Under this policy, prospective caregivers must agree to affirm certain beliefs about LGBTQ issues by committing to using a hypothetical child's chosen pronouns, taking a hypothetical child to events like gay-pride parades, and refraining from expressing contrary views. But Oregon does not require caregivers to affirm children's other beliefs or traits this way. And Oregon allows caregivers to decline children based on some traits, like sex and disability.

Jessica Bates wants to adopt a sibling pair and will accept and love any child placed with her. Oregon excluded her under its policy because she will not speak or act in ways that violate her religious beliefs about human sexuality. This appeal raises three questions:

1. Whether Oregon's exclusion of Bates violates the First Amendment by compelling or restricting her speech.
2. Whether Oregon's exclusion of Bates violates the First Amendment by treating her worse than secular comparators.
3. Whether Oregon's policy is facially overbroad.

PERTINENT STATUTES AND REGULATIONS

Per Circuit Rule 28-2.7, an addendum is attached to this brief, identifying the pertinent constitutional provisions, statutes, regulations, and rules at issue in this appeal and cited throughout the brief.

INTRODUCTION

Jessica Bates desires to offer kids in foster care a forever home. Like many, she is inspired to do so by her faith. But in Oregon, those who hold the religious belief that God created each person immutably male or female cannot adopt any child. Period. This categorical exclusion violates the constitutional rights of countless prospective religious parents like Bates and harms countless children who need a forever home.

Oregon's Department of Human Services requires prospective foster and adoptive parents to agree to use a hypothetical child's self-selected pronouns, affirm a child's self-professed identity, and take children for cross-sex hormone shots. This means Oregon categorically excludes people like Bates from caring for *any* child—even an infant who does not know what pronouns are or a devout religious teenager who embraces Bates' religious views. While child-welfare agencies typically seek to diversify their applicant pool to increase the odds that every child finds a loving home, Oregon elevates its hostility toward Bates' religious views over these children's best interests.

Oregon's policy violates the First Amendment. To become eligible to adopt, Bates must agree to express one view—Oregon's—about human sexuality even though it violates her religious beliefs. The policy prohibits her from, for example, discussing her religious beliefs in her own home, even while the Department accommodates other conscience-

based objections that inevitably arise when placing diverse children with diverse families. Muslims need not agree to hang a crucifix in their home. And abortion advocates need not attend the March for Life. Oregon demands more only of those who share Bates' beliefs about God's design for human sexuality.

Below, the district court correctly applied strict scrutiny but downplayed the many exemptions to Oregon's policy, upholding it based on speculative harms: the possibility that a child *might* someday identify as LGBT, that exposure to Bates' religious beliefs *might* someday upset a child, that alternatives used by other states *might* be ineffective. To the court, those possibilities justified the certain burden on Bates' rights and the inevitable loss for children waiting for a loving home. That is not how heightened scrutiny works.

To justify its prophylactic policy, Oregon must prove that Bates' religious views—reasonable views held by millions of Americans—imminently and inevitably harm *every* child, rendering her categorically unfit to parent. Oregon cannot make that showing. Quite the opposite, Oregon's policy hurts children who need homes. Oregon can protect children of different beliefs and identities, maximize placements, and protect constitutional rights by matching children with compatible families, just as the federal government and many states do. This Court should reverse and enjoin Oregon's unconstitutional policy.

STATEMENT OF THE CASE

Oregon's foster-care system

Oregon's foster-care system needs capable caregivers. In 2022, nearly *8,000* children spent at least one day in Oregon's system. 3-ER-390. While Oregon's Department of Human Services tries to establish permanency quickly, children who left foster care in 2022 spent a median of nearly two years in state custody. 3-ER-391. The median time to adoption was nearly three years. *Id.* And over 300 children left the system without a permanent home in 2022, most upon turning 18. 3-ER-392.

The Department also seeks to place foster children in the least restrictive (or most family-like) setting possible. *See* Or. Admin. R. (OAR) § 413-010-0180(1). One way child-welfare agencies do this is by placing children with relatives and by placing sibling groups together. 3-ER-392; OAR § 413-010-0180(3) (providing foster children with the right "[t]o visit and maintain contact with siblings"). So the Department recruits families to care for sibling groups, as well as families who can care for diverse children. 3-ER-392; OAR § 413-120-0246 (requiring Department to evaluate adoption placements to ensure the child can maintain "his or her identity, cultural, religious, and spiritual heritage").

Jessica Bates and her faith

Jessica Bates is a loving mother of five and a part-time ultrasound technician in rural Oregon. 3-ER-316. Her Christian "faith permeates [her] life." 3-ER-315. She was inspired to adopt after hearing a Christian radio broadcast. 3-ER-316. Bates feels her family has a common bond with children who have experienced loss because she lost her husband in a tragic car crash in 2017. 3-ER-316. Adoption has special meaning to her family because the Bible describes God as "father to the fatherless and a protector of widows." 3-ER-317.

To follow the Christian tradition of helping orphans, her family desires to adopt a sibling pair under the age of ten (nine when she filed this lawsuit). 3-ER-317. Bates is eager to welcome these children into her home quickly because she wants her older children to act as role models to her adopted children. 3-ER-316–17.

Bates will accept and love any child, regardless of the child's race, ethnicity, spiritual beliefs, sexual orientation, or gender identity or expression. 3-ER-317. Bates "always strive[s] to conform [her] behavior to [her] religious beliefs, and [she] will not say or do anything that contradicts [her] Christian faith." 3-ER-316. This includes her beliefs about human sexuality. Bates believes that the biological differences between men and women are spiritually significant and that people should not seek to change their bodies or deny their sex. 3-ER-321.

Because her faith informs how she raises her family, Bates cannot speak or act in certain ways. She cannot use words like self-selected pronouns to convey that a biological male can be a girl or vice-versa. 3-ER-326. Bates cannot support a child's desire to express themselves contrary to their sex. 3-ER-328. And Bates will not display symbols like the rainbow flag or pink triangle in her home or take children to events like gay-pride parades. *Id.*

Bates also seeks to do certain things because of her Christian faith, like sharing her religious convictions, conducting family Bible studies, and attending church. 3-ER-324–325. But Bates does not use "coercive tactics on [her] children (or anyone) when it comes to sharing [her] faith." 3-ER-325. Instead, she seeks to "model [her] Christian faith by example." 3-ER-331. Bates would never exclude or punish a child because they disagree with her beliefs. She would always seek to love and treat her adopted children like her own, regardless of how they identify. 3-ER-344. She would tell all her "children that they are made in the image of God … and are worthy of equal respect and love, no matter their sexual or gender identity." 3-ER-331. Bates wants her children to speak openly with her about their lives, and she would love and support them "no matter what they are going through and no matter how they identify." *Id.*

The home study process and relevant policies

In 2022, Bates applied to adopt. 3-ER-318. Prospective Oregon parents seeking to adopt or foster must first obtain an approved home study. Or. Rev. Stat. § 109.276(7)(a); OAR § 413-120-0220(1). For those interested in adoption, the home study evaluates the applicant's ability to "meet the minimum standards for adoptive homes," OAR § 413-120-0000(40), "rather than the applicant's suitability for a specific child." 1-ER-4. For foster parents, it similarly evaluates the applicant's ability "to provide safe and appropriate care" for a child. OAR § 413-200-0260(25). Applicants must complete training, undergo background checks, pass a home inspection, and complete interviews. 3-ER-318. At the placement or matching stage, the Department holistically evaluates a placement, in part, on the caregiver's "knowledge, skills, and ability to meet … the current and lifelong needs of the child." OAR § 413-120-0246(1)(b).

This appeal concerns the Department regulation requiring that applicants must agree to:

> Respect, accept and support the race, spiritual beliefs, sexual orientation, gender identity and gender expression, disabilities, national origin, cultural identities, immigration status and socioeconomic status of a child or young adult in the care or custody of the Department, and provide opportunities to enhance the positive self-concept and understanding of the child or young adult's heritage[.]

OAR § 413-200-0308(2)(k) (the Rule). Relevant here, the Department also requires applicants to "be open to any child, regardless of race, ethnicity and cultural identity, sexual orientation, gender identity, and gender expression." 3-ER-343.

These two policies do not apply in some situations. They do not apply to those seeking to adopt or care for children outside of the Department's custody, *e.g.*, when someone seeks an "independent adoption" (often, birth parents who want to place their child with someone). OAR § 413-200-0308(2)(k) (applying to children "in the care or custody of the Department"). And even when these policies apply, applicants may still express a preference for or against certain children. For example, prospective adoptive parents must generally complete an Adoptive Family Information and Placement Preference form. OAR § 413-120-0220(3)(c). They may express an age preference (3-ER-414), sex preference (*id.*); preference against children who display "sexual behaviors" that are "inappropriate" (*id.*), and a preference against children who have mental, learning, emotional, or physical disabilities. (3-ER-413).

Jessica Bates' application and rejection

In her application process, Bates completed a Resource and Adoptive Families Training (RAFT) training course. 3-ER-318–19. The course included a section on OAR § 413-200-0308(2)(k) entitled "Affirming Homes" focused on sexual orientation, gender identity, and

gender expression (SOGIE). 3-ER-319, 347. During the class, the instructor explained that parents must agree to use children's chosen pronouns and take children to events like gay-pride parades. 3-ER-319. Training materials encouraged families to display the rainbow flag, "pink triangle," or other "symbols indicating an LGBTQ-affirming environment" in their home, and to celebrate "diversity in all forms." 3-ER-370–71. Families must support a child's "self-expression" via clothes, jewelry, and room decorations according to the child's gender identity or expression. 3-ER-371. And parents cannot require children to attend other events, "including religious activities … that are … unsupportive of people with diverse SOGIE." 3-ER-370.

Bates reasonably feared that the Department policy conflicted with her religious beliefs. 3-ER-318. After the RAFT training, Bates emailed her Department certifier (Cecilia Garcia) and explained that she could not use self-selected pronouns or support someone's desire to reject their sex. 3-ER-340. She explained that she has "no problem loving [children] and accepting them as they are," regardless of their sexual orientation or gender identity, but she would "not encourage" or affirm behavior that went against her Christian belief that "God gives us our gender/sex and it's not something we get to choose." *Id.*

In response, Garcia called Bates and asked if she would take a child to receive cross-sex hormone shots as part of a "gender transition."

3-ER-333. When Bates said no, Garcia explained that Bates' application would be put on hold for non-compliance with Department policy. *Id.*

The Department eventually sent an official denial letter. 3-ER-343–44. It acknowledged that Bates "would love and treat [children] as [her] own," but cited her inability to "support [a] lifestyle or encourage any behavior related to their sexual orientation or gender identity or expression" that went against her beliefs, including her inability to take children to "hormone shot appointments." 3-ER-344.

Procedural history

Bates sued Department officials in March 2023, arguing that Oregon's policy violated her free-speech, free-exercise, and equal-protection rights. 3-ER-383–84. She quickly sought a preliminary injunction to protect her First Amendment rights. 3-ER-433.

The district court denied Bates' motion. First, it held that Oregon's policy was neutral and generally applicable because "[r]especting a child's beliefs and identities does not necessarily require disavowing one's own beliefs." 1-ER-20. And it concluded that exemptions to Oregon's policies—like permitting parents to decline children based on sex or disabilities—did not undermine Oregon's interests. 1-ER-20.

Second, the court determined that the policy restricted and compelled Bates' speech based on content and viewpoint. 1-ER-27–28, 30. As the court noted, "the Rule operates on plaintiff by compelling positive speech," like self-selected pronouns, "while simultaneously

restricting negative speech," which the court deemed to include Bates' religious beliefs about human sexuality. 1-ER-31.

Third, the court upheld Oregon's policy and its exclusion of Bates under strict scrutiny. 1-ER-51. Although Oregon did not submit evidence showing that Bates would be matched with LGBT children (much less harm them), the court invoked the abstract need to prophylactically protect LGBT children as grounds for excluding her. 1-ER-38. The court also allowed Oregon to disregard other less restrictive alternatives Bates proposed because "it appear[ed] obvious to the Court"—though Oregon provided no proof—that these alternatives would not "serve the government's interest with the same level of effectiveness." 1-ER-50.

Bates timely appealed. 3-ER-424.

SUMMARY OF ARGUMENT

The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech" or religious exercise, "even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (cleaned up); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462–63 (2017). But in Oregon, the state requires people to profess the State's preferred views on sexual ethics and gender identity to become licensed to foster or adopt any child—of any age, identity, or faith.

This puts devout parents like Jessica Bates to a choice: renounce your beliefs or give up adopting or fostering any child. Bates sued the Department because she wants the same chance to adopt as everyone else: without being discriminated against because of her protected speech or religious exercise.

Oregon's actions violate the First Amendment for four reasons. First, excluding Bates compels and restricts speech based on content and viewpoint. The policy facially requires caregivers to "support" certain views about sexual orientation, gender identity, and gender expression. And Oregon excluded Bates for refusing to use words (like pronouns) and symbols (like Pride flags) to affirm a child's desire to live contrary to their sex. Similarly, because Oregon requires caregivers to be "supportive" of views prioritizing identity, Oregon does now allow

applicants to speak contrary views, including their religious beliefs. In sum, Oregon compels and restricts speech based on content (topics related to sexual orientation and gender identity) and favors one view (prioritizing perceptions about identity) over another (prioritizing biology).

Second, excluding Bates burdens her religious exercise through a non-neutral and exemption-riddled policy. Oregon says it must protect all its foster children and thus requires applicants to be "open to any child" and to universally "support" children's spiritual, cultural, sexual, gender, and other identities. But Oregon frequently makes exceptions. Parents need not be open to children with disabilities or of a certain sex. Parents need not support spiritual or cultural practices with which they disagree. And Oregon does not apply its policies to people petitioning to adopt children outside state custody—although Oregon must protect these children too. Oregon does not enforce its interests consistently.

Third, Oregon's categorical exclusion uses a sledgehammer when the First Amendment demands a scalpel, so strict scrutiny is not satisfied. Oregon cannot exclude Bates from adopting any child when it does not claim that her beliefs make her an unfit parent. That is why the federal government and most other states avoid categorical exclusions and match specific children with compatible families. Nor can Oregon justify excluding as prospective parents the hundreds of thousands of Oregonians who share Bates' religious views about human

sexuality. Exposure and adherence to these views causes no harm. Including people like Bates maximizes the number of families available to adopt children in need and increases the odds every child eventually finds a loving home.

Finally, Oregon's policy is facially overbroad. It elevates the state's views of sexual ethics above all other concerns, harming countless applicants and children. Because of this rule, people who express views like Bates cannot foster or adopt religious teenagers who share their views, newborns with no concept of SOGIE, or even orphaned grandchildren who want to be raised by close relatives. This policy achieves nothing but serves only to violate the First Amendment and harm kids in need of homes.

STANDARD OF REVIEW

This Court reviews preliminary-injunction denials for abuse of discretion and the underlying legal principles de novo. *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 934 (9th Cir. 2022). But in First Amendment cases, this Court reviews even factual findings de novo. *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1115 (9th Cir. 2023).

To win a preliminary injunction, Bates must show likely success on her First Amendment claims; then the remaining factors fall into place. *Id*. For these claims, Bates need only show "colorable" claims, "at which point the burden shifts to the government to justify the

restriction." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxic*s, 29 F.4th 468, 477–78 (9th Cir. 2022) (cleaned up).

ARGUMENT

Bates deserves her requested injunction because (I) Oregon's exclusion compels and restricts speech based on content and viewpoint, (II) Oregon's policy is not neutral or generally applicable, and (III) the policy cannot survive any level of heightened review. (IV) The policy is also overbroad, and (V) Bates satisfies the remaining injunction factors.

I. Oregon compels and restricts Bates' speech based on content and viewpoint.

Laws trigger at least strict scrutiny when they compel speech or restrict it based on its content or viewpoint. *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 791 (9th Cir. 2022). Here, Oregon's policy does both: it forces Bates to speak messages she disagrees with and silences her religious expression.

1. Start with the policy's text. It requires applicants to "respect, accept and support" various traits and beliefs, including SOGIE. Under these plain terms, "accept" means "to regard and hold as true," or to "believe in." Webster's Third New Int'l Dictionary (Webster's Third) 11 (1993). And to "support" means to "defend as valid, right, just," to "advocate" for or "to actively promote the interests or cause of." Webster's Third 2297; *see* 1-ER-25 (same).

And in application, Oregon required Bates to use certain words, symbols, and expression. Bates' training instructor emphasized the importance of using chosen pronouns inconsistent with a child's sex. 3-ER-319. So did the training materials. 3-ER-371, *see also* 3-ER-380 ("[U]sing a person's chosen name and pronouns is essential to affirming their identity[.]"). Documents instructed parents to use "acceptable," "appropriate[,] and inclusive language," to fly the rainbow flag or "pink triangle" in their home, and to display other "symbols indicating an LGBTQ-affirming environment." 3-ER-359, 370–71. On the flip side, class handouts instructed caregivers to avoid taking children to certain events, including "religious activities" like church or temple, that are "unsupportive" of a child's SOGIE. 3-ER-370.

The district court interpreted the policy the same way—as requiring Bates to use "affirming" words and symbols and to avoid conveying her own views.[1] *See also Blais v. Hunter*, 493 F. Supp. 3d 984, 990–91 (E.D. Wash. 2020) (interpreting Washington's similar

[1] 1-ER-10 (concluding Bates "demonstrates a lack of understanding of the importance of providing [LGBT children] with the holistic support and care required to produce well-rounded and confident adults"); 1-ER-23 ("Speech that does not respect a child's LGBTQ+ identity is barred under the rule"); 1-ER-41 (opining that "the totality of plaintiff's statements indicates a lack of understanding about the unique support and care that LGBTQ+ children require"); 1-ER-47 (holding Oregon's categorical exclusion necessary to avert alleged harms of exposing a child to "an environment where their identity is unsupported or unaffirmed").

policy to require caregivers to actively support a child's sexual or gender identity).

By requiring Bates to affirm views on SOGIE that Oregon supports while banning views it dislikes, the policy compels speech and commits textbook viewpoint and content discrimination. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *accord Green,* 52 F.4th at 784 (forcing pageant to express identity-based rather than biology-based view of womanhood both compelled and hindered pageant's expression); *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021) (punishing professors for using identity-based or biology-based pronouns would "categorically silence dissenting viewpoints").

2. While this viewpoint and content discrimination justifies strict scrutiny, the district court downplayed the problems with the Rule. According to that court, Oregon's Rule merely requires applicants to stay neutral with their speech and to "provide space for the child to express" their identities (1-ER-27), without requiring Bates to "openly state that she agrees with [a child's] self-expression" about her gender identity (1-ER-30). There are three problems with this.

First, it contradicts the policy's plain terms. This policy does not merely require Bates to respect (i.e., "refrain from interfering with") a child's desired behavior and professed identity. Webster's Third 1934. It requires her to "accept" and "support," which includes speech that

conveys acceptance and support. *See Brunetti*, 139 S. Ct. at 2302 (refusing to reinterpret law to remedy its viewpoint discrimination).

Second, the district court's approach contradicts the undisputed facts. Oregon *categorically* excluded Bates because she would not:

- "support this behavior"
- "encourage them in this behavior"
- "support their lifestyle"
- "encourage any behavior"

3-ER-343–44 (denial letter). Oregon officials did not ask if Bates would "give children space." Bates would do that. Oregon categorically excluded Bates for refusing to affirmatively express views supporting certain behavior and beliefs even though Oregon knew she had "no problem loving … and accepting [children who identify as LGBT] as they are." 3-ER-340; *accord* 3-ER-319 (instructor explained Bates "must affirm a child's sexual or gender identity"); 3-ER-332–33 (certifier explained Bates was ineligible because she could not comply with Department regulations).

Further, Oregon defended its Rule below even though it knew that Bates never uses "coercive tactics" on her children but lets them reach their conclusions "of their own accord." 3-ER-325, 331. And rather than arguing its Rule does not require the speech that Bates wants to avoid, Oregon defended its decision; arguing its Rule justifiably regulates a "person's childcaring conduct that implicates their speech as a

caregiver." Defs.' Resp. to Mot. for Prelim. Inj. (Defs.' Resp.) 16, ECF No. 25; *see id.* at 18 (arguing the Department's regulations "will likely have a greater overall impact … on the person's speech and association" than regulations on doctors and lawyers because "that is the nature of the job"). The record is clear: Oregon demands affirmation, not neutrality.

Third, the district court's reading of the policy contradicts the court's own findings. The court agreed that: "using a child's preferred pronouns goes hand in hand with creating an affirming environment" (1-ER-29); that "[s]peech that does not respect a child's LGBTQ+ identity is barred under the rule" (1-ER-23); and that Bates' inability to speak the required views demonstrated her inability to understand the "unique support" that LGBT children require (1-ER-41).

Simply put, Oregon's policy demands speech in support. Applicants must use words and symbols to affirmatively express certain ideological views about SOGIE and avoid expressing different views—all on a topic of immense cultural, political, and religious significance. That warrants strict scrutiny many times over.

II. Oregon burdens Bates' religious exercise through a policy that is not neutral or generally applicable.

To satisfy the First Amendment, Oregon's policies must be "applied in an evenhanded, across-the-board" manner. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). A system for granting

individualized exemptions undermines a policy's general applicability. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993). So do categorical exemptions. *Id.* at 535–36. And treating "*any* comparable secular activity more favorably than religious exercise" means the state action is not generally applicable *or* neutral toward religion. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam); *Lukumi*, 508 U.S. at 531 ("Neutrality and general applicability are interrelated[.]"). Oregon's policy grants both individualized and categorical exemptions, elevates secular exemptions above religious ones, and violates the free-exercise clause. This too triggers strict scrutiny. *Id.* at 546.

A. Oregon's policy creates a system of individualized assessments.

1. To evaluate whether Oregon enforces its Rule evenhandedly, this Court must first determine what that policy requires. Again, start with the plain text. The Rule requires applicants to agree to "[r]espect, accept[,] and support" a child's various traits and beliefs, including their "spiritual beliefs." OAR § 413-200-0308(2)(k). The term "spiritual" means "of or relating to religious or sacred matters" or "concerned with religious values." Webster's Third 2198. So the plain language requires applicants to support children's religious practices and accept their religious beliefs "as true."

If a criminal or civil law required citizens to "accept and support" their neighbor's spiritual beliefs, that law would clearly violate the First Amendment. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone *to support … religion or its exercise*[.]" *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (emphasis added).

The same conclusion applies to licenses too. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). "[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran*, 582 U.S. at 463 (citation omitted). *Cf. Fulton*, 141 S. Ct. at 1878 (applying same principles to contract). That includes "condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith … thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981).

2. The district court avoided this obvious constitutional problem by interpreting support for "a *child's* spiritual beliefs" (1-ER-8) to merely require tolerance and respect, and hence parents need not abandon their own religious exercise (1-ER-20). On this reading, Muslim families need only ensure Catholic children "have access to a rosary," not that they must pray the rosary themselves. 1-ER-12.

Again, the district court overlooks the Rule's text, which demands support, not mere respect or toleration. And again, the district court overlooks the undisputed facts, which show what "support" means—actively approving a child's gender expression (or religion), promoting their behavior (or religious practice), accepting the child's stated gender identity (or religion) "as true," and refraining from speech or behavior communicating disagreement with the child's belief system. *Supra* § I. Indeed, the district court emphasized that Bates' desire to avoid speech and actions that violate her conscience transgresses the Rule. 1-ER-38–39; *see also* 1-ER-30 (explaining that the Rule in application "compel[s] plaintiff's speech in a manner that would violate her sincerely held religious beliefs").

The district court's analysis is internally inconsistent: it interprets "support" for a child's SOGIE to mean something different than "support" for a child's "spiritual beliefs" and other listed traits. But the same word in a policy "cannot change with the [policy's] application." *United States v. Santos*, 553 U.S. 507, 522–23 (2008). By moving the "level of generality" in its interpretation of support, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1739 (2018) (Gorsuch, J., concurring), the district court manages to punish Bates—excluding her for her religious beliefs even though she is willing to love and care for any LGBT child, while accommodating those who cannot support spiritual or cultural practices that violate their conscience.

Compare, *e.g.*, 1-ER-29 ("[U]sing a child's preferred pronouns goes hand in hand with creating an affirming environment[.]"), *with* 1-ER-26 (finding a "supportive and affirming environment" could "easily be created with no impact on speech at all").

The district court and Oregon cannot have it both ways. Either the policy facially requires applicants to speak in support of a child's SOGIE *and* other traits like spiritual beliefs (which runs headlong into the First Amendment), or the policy treats Bates' conscience-based conflict worse than others' (which makes the policy non-neutral).

3. The district court's inconsistent textual interpretation confirms that the Rule allows individualized exemptions, opening it up to discriminatory enforcement "only against those messages the [State] … dislikes." *See Berger v. City of Seattle*, 569 F.3d 1029, 1045–46 (9th Cir. 2009) (holding city's narrow reading of "an otherwise clear, though overbroad," regulation on street performers made it vague and subject to discriminatory enforcement). That makes the policy not generally applicable *or* neutral because it treats some secular objections to the policy more favorably than religious ones. *Masterpiece*, 138 S. Ct. at 1730–31.

The Ninth Circuit applied these principles recently in *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education* (*FCA*), 82 F.4th 664, 688 (9th Cir. 2023). There, a school district did not want to recognize a Christian student group because its

policies on sexual conduct violated the district's "All-Comer's" nondiscrimination policy. *Id.* The district asserted an interest like Oregon's—ensuring equal access and prohibiting discrimination. *Id.* at 689. But the district still allowed groups like the "Girls' Circle" and "Big Sister/Little Sister" to exclude boys. *Id.* And the board itself had an "equity policy," allowing it to consider race, gender, and other traits to distribute resources. *Id.* at 687–88. These exemptions rendered the policy not neutral or generally applicable. *Id.* at 688–89.

Oregon, too, employs a system of individualized exemptions. Like the All-Comer's policy in *FCA*, Oregon requires parents to be "open to any child" (3-ER-343) and to "[r]espect, accept[,] and support" children's various traits and beliefs like spiritual beliefs and cultural, sexual, and gender identities. OAR § 413-200-0308(2)(k). "[T]he aim of the Rule" is that *any* child that could be placed in *any* caregiver's home "will *feel* loved and supported." 1-ER-11 (citing Department's "policies promoting the health, safety, and welfare of all children in ODHS custody"). Indeed, the State "has the same obligation to place children with certain spiritual or cultural beliefs in affirming homes as it does to place children with LGBTQ+ identities in affirming homes." 1-ER-51.

Yet Oregon does not do this. While Oregon requires parents "to affirmatively *support* a youth's LGBTQ+ identity" by, for example, using a child's pronouns (1-ER-47 (emphasis added)), Oregon merely requires parents to *respect* a child's religious beliefs—giving them space

"to practice their own unique faith," and not "forc[ing] the child to engage in [religious] prayer." 1-ER-12, 20. In this spiritual context, passive "support" can satisfy the Rule without "necessarily requir[ing anyone to] disavow[their] own beliefs."[2] 1-ER-20; *see Blais*, 493 F. Supp. 3d at 999 (finding similar policy requiring a holistic assessment that was not "not one size fits all" was not generally applicable). Not so in the SOGIE context.

Oregon similarly allows parents to accommodate different cultural needs without affirmation. Though dining with meat eaters offends some vegans, "a meat-eating family would not need to cease eating meat to support a vegan child; they would merely need to provide the child with vegan food." 1-ER-20. These and other potential conflicts "would be assessed at the placement stage," just like Bates asks Oregon to do for her. 1-ER-19.

Neither Oregon nor the district court explained this discrepancy. For good reason. There's no textual basis to treat objections to supporting religious and cultural identities differently from objections to using a child's self-selected pronouns. After all, it's the same policy with the same text that demands support for each identified trait. Oregon is simply prioritizing some applicants over Bates based on "which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 141

[2] Indeed, that *must* be the case or the Rule compels applicants to support religious practices against their beliefs.

S. Ct. at 1879. That comes down to which protected characteristic is at play, which is not a "constitutionally acceptable distinction." *FCA*, 82 F.4th at 689.

B. Oregon also grants categorical exemptions and fails to consistently enforce its interests.

1. Oregon also makes categorical exemptions in its certification process. Recall that Oregon requires parents to "be open to any child regardless of race, ethnicity and cultural identity, sexual orientation, gender identity, and gender expression." 3-ER-343. Though Bates will gladly accept any child into her home, the Department wrongly assumed she would not accept LGBT children because she could not speak or act against her beliefs. *Id.* (invoking this requirement in denial letter). That alone shows hostility to Bates' religious beliefs because the Department accommodates caretakers with conscience-based objections to various spiritual beliefs and cultural practices.

Next, Oregon's policy does not actually require families to be open to *any* child. Indeed, parents may decline to take children based on sex or age (3-ER-414), physical or mental disabilities (3-ER-413), or "inappropriate sexual activity" (3-ER-414). If Oregon can accommodate these preferences, surely it can accommodate Bates' religious beliefs.

Oregon's sex-based exemption illustrates the problem. Prospective parents may not want a girl because the child will share a room with their son. Elsewhere, Oregon argues that "sex-based discriminatory

actions," like sex-specific bathrooms and dress-codes, discriminate based on gender identity. Br. of Amici Curiae Cal. et al. at 10, *State of Tenn. v. Dep't of Educ.*, No. 22-5807 (6th Cir. Dec. 12, 2022). But here, Oregon wants to distinguish the two—allow a sex preference and forbid the gender-identity one. The Constitution prohibits that.

No doubt, Oregon *should* allow some sex-based preferences in child-placement decisions. Similar to the girls-only clubs in *FCA*, "[i]ndividual preferences based on certain characteristics and criteria [can] serve important purposes," like accommodating a family whose daughter experienced sexual trauma. 82 F.4th at 689. But "it makes equal sense" to accommodate Bates. *Id.* If *all* caregivers must be equally prepared to care for *all* children—the standard Oregon applies to Bates—then Oregon must apply that standard uniformly. By allowing overt status-based discrimination elsewhere, Oregon concedes that this standard is not realistic and that it is needlessly disqualifying capable parents. Bates, too, can lovingly care for children in need, even if she is not the best fit for every child.

Oregon's "inappropriate sexual activity" exemption creates similar problems. 3-ER-414. Presumably, this vague exemption allows applicants not to accept children who have sexually assaulted others. But other "inappropriate sexual behavior" often turns on subjective judgments. While Oregon may be fine with children expressing same-sex romantic behavior, a devout Muslim or Catholic family may not be.

So under Oregon's policy, state officials get to include and exclude based on their subjective judgments—even though "[a] principled rationale for the difference in treatment … cannot be based on the government's own assessment" of vague concepts like inappropriateness or "offensiveness." *Masterpiece*, 138 S. Ct. at 1731.

2. In response to all these exemptions, the district court closed its eyes to the record. For example, the court dismissed some exemptions (like the sex-based preference) as occurring "at the *placement* stage, not the certification stage." 1-ER-20. According to the district court, "[i]nherent" in the initial certification approval "is the understanding that" parents accept children "regardless of their gender." *Id*. But neither Oregon's Rule nor its denial letter to Bates mention a requirement to accept children regardless of their sex. OAR § 413-200-0308(2)(k); 3-ER-343. And Oregon admitted that "an applicant can indicate that they are *not interested* in adopting or providing foster care for a boy [or a girl] because they are not prepared or well situated to care for someone of the male [or female] sex." 3-ER-414 (emphasis added) (complaint); 2-ER-90 (answer). So parents may discriminate up front based on sex. Oregon just exempts that discrimination when it wants to.

The district court also faulted Bates for not identifying "the specific regulation" referencing the sexual-behavior exemption. 1-ER-12–13. But Oregon admitted this policy exists in its answer and never

disputed it in its briefing. 3-ER-414 (complaint); 2-ER-90 (answer). That is enough. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (statement in an answer is a judicial admission "binding on appeal").

In *FCA*, for example, the district court similarly discounted a girls' club that discriminated based on sex because the club had submitted paperwork with boilerplate non-discrimination language. 82 F.4th at 689. This Court held that the district court "clearly erred" in doing so because everyone agreed the club admitted only women. *Id.* The district court did the same here because Oregon has admitted to allowing applicants to decline children based on traits like sex, age, disability, and inappropriate sexual behavior.

3. Oregon also inconsistently pursues its interests by not applying its policy to all adoptions—such as independent adoptions where someone adopts a child outside the foster care system. OAR § 413-200-0308(2)(k) (applying to children "in the care or custody of the Department").

The district court waved this off, saying Oregon "shared" its responsibility in independent adoptions "in part, with the biological parent." 1-ER-18. But that's not always true. Independent adoptions need not involve biological parents at all. OAR § 413-140-0000(11)

(defining independent adoptions as a subset of adoptions involving children "not in the custody of the Department").[3]

The district court also misconstrued the test. Whether foster-care and independent adoptions are comparable "must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62. "Comparability is concerned with the risks various activities pose" to that interest. *Id.*

The district court conceded that for both independent and foster-care adoptions, "the government maintains the same interest." 1-ER-18. Indeed, under its default protocol, the Department (or a private agency) conducts home studies for independent adoptions to test whether the petitioner can meet the Department's "minimum standards." OAR §§ 413-140-0033 (minimum standards), -0035(1) (requiring a home study for every adoption unless waived by the Department). Yet because the Rule is "not even a requirement for independent adoption home studies" (1-ER-18), these prospective parents need not satisfy the obligations imposed on Bates.

[3] The district court may have assumed that independent adoptions always involve a biological parent because a regulation allows home study waivers for adoptions involving a biological parent. OAR § 413-140-0032(2) (giving DHS discretion to waive home study requirement for certain independent adoptions). But that provision allows waivers for adoptions in other circumstances too. *Id.* (allowing waiver when the petitioner "qualifies as a relative").

If Oregon believes people who hold religious beliefs like Bates pose unacceptable risks to children, it should exclude them from independent adoptions, too. Instead, Oregon excludes Bates from Departmental adoptions while allowing others who hold similar secular or religious views to obtain independent adoptions. That discrepancy is "neither tolerant nor respectful" of Bates' religious views. *Masterpiece*, 138 S. Ct. at 1731. And it violates the First Amendment.

III. Oregon's actions are subject to strict scrutiny, and they fail any level of heightened review.

Because Oregon's exclusion must satisfy strict scrutiny, Oregon must meet a "demanding standard." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (citation omitted). It must show that its policy advances compelling interests in the most tailored way possible; a statute fails if it is overinclusive, underinclusive, or sidesteps less restrictive alternatives. *Id.*

Oregon's policy flunks every step. First, Oregon's policy is overinclusive and harms kids by excluding Bates when she can adequately care for many children in foster care. Second, the Rule does not advance the State's interests as applied to Bates because the Rule targets disfavored ideas rather than actual harms. Third, the Rule is underinclusive, revealing that even Oregon does not think its interests are worth consistently enforcing. Accordingly, Oregon's outlier, overbroad rule cannot meet any level of heightened review. *See Junior*

Sports, 80 F.4th at 1117 (even intermediate scrutiny requires law to materially advance substantial interests in tailored way).

A. Oregon's policy is overinclusive, categorically excluding Bates from helping any child.

Narrow tailoring requires precision; the Rule must "focus on" the evil sought to be eliminated and do so without "restricting a substantial quantity" of protected activity "that does not create the same evils." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011). Oregon's policy cannot meet this standard because (1) it restricts too much harmless activity; (2) prophylactic policies of this nature are invalid in every context, including adoption and foster care; (3) Oregon's policy undermines its own interests; and (4) Oregon has many less restrictive ways to achieve its goals.

1. Oregon's policy restricts too much protected and harmless activity.

1. Oregon's policy is overbroad in two respects. First, the policy excludes Bates based on the content and viewpoint of her expression, not its mode, medium, or duration. *See supra* § I. And it uniformly forbids expression of certain views, no matter the form, duration, or content. Bates cannot adopt if she wants to encourage her child to play on a sports team according to their sex rather than their gender identity. Nor can she adopt if she wants to share her belief that children should seek to cherish, rather than change, their God-given bodies.

Bates cannot even take her child to a religious event teaching that God designed marriage as the union of one man and one woman.

Any speech, action, or event that Oregon deems "unsupportive" bars an applicant from adoption, even if it occurs just one time, and even if the beliefs are expressed in loving, respectful, and caring ways. Oregon has a blanket rule: no promotion of certain views allowed, ever. "The mere fact that the ordinance covers so much speech raises constitutional concerns." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165 (2002).

Second, the policy excludes Bates from adopting any child—from 10-day-old infants to teenagers who share her religious beliefs to close relatives. But Bates is fit to care for countless children. Millions of Americans share Bates' religious beliefs about human sexuality; they are "based on decent and honorable religious or philosophical premises." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). Even Oregon does not think otherwise. After all, Oregon has not tried to remove Bates' biological children for fear her beliefs will harm them. *Cf. Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011) (law banning the sale of violent video games to minors was fatally underinclusive because children could still access materials).

2. Rather, Oregon excluded Bates for fear that placing LGBT children with her would harm *only* those children. 1-ER-11 ("[T]he government argues that the Rule is designed to address the severe

harm that LGBTQ+ children in foster care face when they lack necessary parental support."). But Oregon excluded Bates from adopting *any* child of *any* age and of *any* identity. That mismatch is far "too imprecise" to carry Oregon's burden. *Comite de Jornaleros*, 657 F.3d at 944.

Comite de Jornaleros is instructive. There, a city banned solicitation on all streets to prevent traffic problems. *Id.* at 949. But solicitation only caused these problems in a few "major streets," and the city never presented evidence about any other streets. *Id.* This Court "cannot simply assume" that the protected speech would cause problems in these other areas. *Id.*

Likewise, Oregon presents no evidence that the situations about which it is concerned will occur—or even that there is anything more than an extremely remote possibility they will occur. Oregon never even established how many children identify as LGBT in its foster system. It could be a small number; we simply don't know.

To be sure, the district court cited surveys estimating that 30% of foster-care children identify as LGBT. 1-ER-42–44. But none of these surveys purported to provide accurate or representative numbers about children in foster care. None of them surveyed children in Oregon or children in the age range Bates wants to adopt (under ten). 1-ER-45.

Citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986), the district court dismissed these flaws, saying Oregon could

invoke out-of-state surveys. But *Renton* applied intermediate scrutiny, not strict scrutiny. Here, Oregon's "burden is much higher." *Brown*, 564 U.S. at 799–800 (explaining how strict scrutiny requires more proof). And unlike the studies in *Renton*, the surveys cited here do not address any alleged problem caused by Bates. Even if adolescents and teenagers in foster care disproportionately identify as LGBT, that figure cannot be extrapolated to infants, toddlers, and others under the age of ten (the age group Bates seeks to adopt). And even if 30% of foster children identify as LGBT, that still means Oregon's fears do not cover 70% of kids in its system. So for the majority of placements, applying Oregon's Rule has "no connection to the [State's] asserted" interests. *Berger*, 569 F.3d at 1045–46. Such an onerous policy "to root out the occasional bad apple" does not satisfy intermediate scrutiny any way. *Id.* Bates should not be categorically excluded when there are children in foster care she can care for.

3. Equally troublesome, the district court's surveys never address how likely it is that any foster child who does not identify as LGBT now will do so in the future. Or how likely a foster child with no concept of SOGIE (like an infant) will later identify as LGBT. Absent any such evidence, Oregon has no basis to bar Bates from these children.

The district court papered over these deficiencies, saying this information is "unavailable or inherently unreliable." 1-ER-45. For the district court, "precisely because the government cannot know … if a

child does, or will, identify as LGBTQ+," it would not force Oregon to "bear the risk of uncertainty." 1-ER-46–47.

But nothing stops Oregon from doing longitudinal studies to quantify these risks. It could ask representative samples of adult-aged, former foster children whether they identify as LGBT, when they began doing so, whether they ever professed different identities, and whether they ever feared disclosing their identity. Oregon never showed that such means of quantifying the risks were unattainable.

And if information is unavailable, that is Oregon's problem, not Bates'. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Oregon "bears the risk of uncertainty," *Brown*, 564 U.S. at 799–800, so Oregon must do its homework before burdening fundamental rights. And if Oregon cannot obtain evidence to justify regulating Bates, Bates wins. Imagine if the government began listening to every person's phone calls on the theory that the technology does not yet exist to target conversations that incite violence. That logic would not work there. Neither does it here.

Oregon's inability to quantify the risk that its concerns will manifest is a concession, not a defense. By redefining the alleged harm (exposing an LGBT child to Bates' religious beliefs) to a speculative concern (the possibility that Bates might be matched with a child who might one day identify as LGBT), the district court underscores the problem. After all, a policy complies with the First Amendment "only if

each activity within the proscription's scope is [itself] an appropriately targeted evil," and not when "the substantive evil" is "merely *a possible byproduct* of the activity." *Frisby v. Schultz*, 487 U.S. 474, 485–86 (1988) (cleaned up and emphasis added). Here, even under Oregon's flawed views about Bates, she can lovingly and effectively care for most children in most situations, yet Oregon excludes her from adopting these children anyway. That is fatal to its case.

4. Nor can the district court save Oregon's categorical rule because such an overbroad policy provides more certainty. *See*, *e.g.*, 1-ER-46 (worrying that some children may not disclose their identity). That logic would justify every categorical ban. Showing the "chosen route is easier" does not cut it because "the prime objective of the First Amendment is not efficiency." *McCullen*, 573 U.S. at 495. To be sure, it may be possible that an infant placed with someone like Bates may later identify as LGBT later in life. But Oregon did not identify a "*single* instance" of this happening in Oregon. *Junior Sports*, 80 F.4th at 1117 (faulting state under heightened scrutiny for this reason).

Beyond that, "[i]t is no response that [an alternative] may be inconvenient, or may not go perfectly every time." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 824 (2000). In *Brown*, California could not ban selling violent videogames to minors when the state had a narrower alternative: the videogame industry's voluntary rating system. 564 U.S. at 803 n.9. Although that system still allowed 20% of

minors to purchase violent videogames, that did not save the ban. *Id.* "[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* That logic applies even more forcefully here because Oregon never quantified the "gap" in enforcing its interests.

Besides, Oregon cannot guarantee that *any* placement decision will work. Children might become religious after being placed in an atheist home. Healthy children might suffer a disability after being placed with parents who do not want that challenge. Every placement involves risk. But Oregon does not categorically exclude other families because of these and similar risks. Nor can it do so to Bates.

2. Courts reject prophylactic policies like Oregon's in similar contexts.

1. Because Oregon's policy cannot survive heightened review, the district court diluted the standard for the adoption/foster-care context. See 1-ER-46 (distinguishing *Brown* because state there "was not *acting* as a parental authority, nor did it have an independent obligation to protect the children that it argued the law was aimed at serving").

But the district court cited no case supporting that theory. In fact, courts regularly apply standard First Amendment analysis in the adoption and foster context. *See New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 157 (2d Cir. 2020) (applying traditional free-speech analysis to regulation on foster-care agency); *Blais*, 493 F. Supp. 3d at

1000 (invalidating similar policy excluding many religious applicants from foster care and adoption, under strict scrutiny); *cf. Fulton*, 141 S. Ct. at 1878 (rejecting argument that Philadelphia had "greater leeway under the Free Exercise Clause when setting rules for contractors" like foster-care agencies).

In the custody context where parental rights can conflict, courts pursue children's best interests, apply typical strict-scrutiny review, demand particularized facts about a particular child, and condemn prophylactic rules. *E.g.*, *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990) (requiring "competent evidence" that parent's religious exercise would present a "substantial threat of present or future physical or emotional harm *to the particular child or children involved*") (emphasis added).

Even when evaluating situations with a particular child, "courts have rejected speculation by parents and by experts as to potential future emotional harm to a *particular* child based upon the assumption that [some] exposure is *generally* harmful." *Id.* at 1155. For example, courts do not penalize parents with religious objections to blood transfusions without evidence that a particular child was "prone to accidents" or suffered an "affliction that might necessitate a blood transfusion in the near future." *Garrett v. Garrett*, 527 N.W.2d 213, 221 (Neb. Ct. App. 1995). And "[i]n the absence of any probative evidence that a child will be harmed by a parent's religious practices regarding

social activities, the court may not use those beliefs to disqualify the parent." *Pater v. Pater*, 588 N.E.2d 794, 800 (Ohio 1992).

Similarly, when the government stands *in loco parentis* in schools, it may only ban speech to avoid substantial disruptions based on an "individualized" assessment of "the particular fact situation," *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972), never "based on disagreement with the viewpoint expressed," *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).[4] "[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 814. *Cf. United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995) ("The widespread impact of the [government] ban … gives rise to far more serious concerns than could any single supervisory decision.").

"Broad prophylactic rules in the area of free expression are suspect," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800–01 (1988) (citation omitted), and the district court had no basis to dilute the heightened standard of review here.

[4] Several other circuits have deemed Justice Alito's *Morse* concurrence controlling. *E.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 309–13 (3d Cir. 2013) (en banc); *Morgan v. Swanson*, 659 F.3d 359, 403 (5th Cir. 2011) (en banc).

3. Oregon's policy hinders the State's goals by harming children who need loving homes.

1. Oregon's laws and regulations require it to promote "the health, safety, and welfare of all children" in foster care. 1-ER-11; Or. Rev. Stat. § 418.201 (noting legislative intent that "each foster child" have rights); OAR § 413-120-0145(1) ("Every child needs and deserves a safe, nurturing, and permanent home."). Oregon advanced this same interest below. Defs.' Resp. 11 (noting "the State and ODHS's interest in … promoting the health, safety and welfare of all children and young adults for whom ODHS has responsibility").

The district court incorrectly narrowed Oregon's interest to only foster children "who are, or may later identify as, LGBTQ+." 1-ER-50 (rejecting state's interest as protecting children generally). This maneuver took "the *effect* of the statute and posited that effect as the State's interest." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). Under this "circular" logic, "all statutes look narrowly tailored"—by definition, a law achieves what it achieves. *Id.* No case holds that a state has a valid interest in protecting only *some* children in foster care. Oregon's only valid interest is to protect *every* child.

2. Given this interest, Oregon's Rule harms Oregon's goals. The Supreme Court noted the same in *Fulton*, 141 S. Ct. at 1874. There, the city stopped referring children to a Catholic adoption agency because

the agency would not certify same-sex couples. *Id.* While Philadelphia said it did so to maximize foster families, it never explained how excluding the agency furthered that goal. *Id.* at 1881. "If anything," continuing to work with religious adoption agencies would "likely … increase, not reduce, the number of available foster parents." *Id.* at 1882.

If states consistently enforced Oregon's Rule, they would likely exclude many prospective homes. Excluding potential caregivers who don't believe in interventions like cross-sex hormones to "transition" a child (as Oregon does) would likely remove *at least* half of the population from eligibility, including many religious Americans. David M. Smolin, *Kids Are Not Cakes: A Children's Rights Perspective on* Fulton v. City of Philadelphia, 52 Cumb. L. Rev. 79, 146–47 (2022). Though Oregon must place religious children in supportive homes (1-ER-51), Oregon removes the very homes these children need. Excluding caregivers like Bates violates those children's best interests.

Nor does Oregon's policy serve the interest of infants, toddlers, and youth under the age of ten. Many of those kids express no preference for or against a religious home like Bates'. Regardless, even for those children, Oregon categorically excludes caregivers like Bates.

The district court viewed this situation as "more complicated, in part because of the competing rights at stake in this case." 1-ER-34. That's a false dichotomy. This case is not about Bates' ability to parent

a child who identifies as LGBT. This case is about Oregon excluding capable parents from opening their homes to *any* child. Of course, not every home is suitable for every child. So ultimately, the potential for religious, cultural, or other conflicts should be "assessed at the placement stage," not the certification stage. 1-ER-19.

4. Oregon has many less restrictive ways to achieve its goals.

Oregon's policy also lacks narrow tailoring because it "has a number of less restrictive means of achieving its stated goals." *Comite de Jornaleros*, 657 F.3d at 949. And under strict scrutiny, even one better alternative dooms Oregon's policy. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Oregon fails this requirement many times over.

1. Oregon could place children who identify as LGBT the same way it places other children: on a case-by-case basis according to the child and the family's unique needs and strengths. Indeed, regulations already require Oregon to holistically evaluate a caregiver's "knowledge, skills, abilities, and commitment … to best meet the current *and lifelong* needs" of a child. 1-ER-48. Rather than categorically exclude every caregiver who cannot champion the state's views on human sexuality, it could match the right parents with the right child. That's a win-win.

Other jurisdictions do exactly this. For example, after a lawsuit like this one, Washington agreed to consider potential conflicts at the

placement stage and to end a categorical policy requiring parents "to express agreement [on] any policy regarding LGBTQ+ issues that conflicts with [their] sincerely held religious views." Joint Mot. for Entry of Perm. Inj. and Final J., Attach. 1 at 2, *Blais v. Wash. State Dep't of Children, Youth & Families*, No. 2:20-cv-187 (E.D. Wash. Jun. 4, 2021), ECF No. 85-1.

Likewise, the U.S. Department of Health and Human Services (HHS) recently issued a proposed rule on federally funded state foster-care agencies and LGBT children.[5] HHS relied on many of the same studies as Oregon but adopted a more narrowly tailored policy: requiring agencies to place children who identify as LGBT with likeminded families, and carving out protections for agencies that could not comply with this requirement.[6] Nineteen states said even this narrower policy violates the First Amendment, showing they operate their foster care systems to respect constitutional rights, unlike Oregon.[7]

Second, Oregon can protect applicants' free-speech and free-exercise rights and require families to be sensitive, loving, and capable

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[5] Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B, 88 Fed. Reg. 66752 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. pt. 1355).

[6] *Id.* at 66761–62.

[7] Comment by Attorneys General of Alabama and 18 other states (Nov. 27, 2023), https://perma.cc/XJF5-WPHN.

of competently handling issues around sexuality and gender if they arise. States like Mississippi and Georgia do this. Miss. Code. § 11-62-5 (prohibiting discrimination against those who "intend[] to guide, instruct, or raise a child based upon … religious belief[s]" in marriage and the immutability of biological sex); Ga. Code § 49-5-281(a)(3) (protecting foster parents' rights to promote their "values and beliefs, so long as the values and beliefs of the foster child and the birth family are not infringed upon").

Third, Oregon can match Bates with children that fit her home—those who share her religious beliefs or those too young to have any conception of SOGIE.

Fourth, Oregon could intervene later in the adoption process to enforce its interests. That could occur by providing more educational resources to parents that instruct them about Oregon's views of SOGIE issues while honoring parents' religious beliefs. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (citing "educational campaigns" as alternative to First Amendment restriction).

2. Faced with these alternatives, Oregon did not prove that it actually considered any of them, much less provided evidence they do not work. Both failures are decisive. *McCullen*, 573 U.S. at 494 (requiring government to show "that it seriously undertook to address the problem" and "considered different methods that other jurisdictions

have found effective"); *Playboy*, 529 U.S. at 824 (courts do "not assume a plausible, less restrictive alternative would be ineffective").

3. The district court said that Bates' alternatives lack "*the same level of effectiveness*" as Oregon's system. 1-ER-49. But that overlooks that Oregon never even *considered*, much less tried, any alternatives. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (faulting school districts that "failed to present any evidence that it considered alternatives"); *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) (interpreting *McCullen* to require government "to *prove* it actually *tried* other methods"). Beyond that, neither Oregon nor the district court provided evidence the alternatives were ineffective. The district court just dismissed them as ineffective because "it appear[ed] obvious." 1-ER-50. That is "mere conjecture," which is never adequate to "carry a First Amendment burden." *FEC v. Cruz*, 596 U.S. 289, 307 (2022) (cleaned up). Nor is the conjecture warranted; HHS and numerous states use the very alternatives the district court discounted.

B. Oregon's policy serves no compelling interests by excluding Bates.

Under strict scrutiny, Oregon must show that "a compelling interest supports *each application*" of its policy. *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 478 (2007) (opinion of Roberts, C.J.). In other words, Oregon must show how "denying an exception to" Bates serves its goals, not how its policy "generally" does so. *Fulton*, 141 S. Ct. at

1881. Even under lower scrutiny, Oregon must show that its policy "materially" advances its goals. *Junior Sports*, 80 F.4th at 1117.

But excluding Bates does not further any legitimate goal. Targeting ideas is never legitimate, much less a compelling interest. Further, Bates would love and accept any child, making Oregon's fears inapposite. And finally, Oregon's evidence does not prove that Bates' desired speech *causes* any harm. Each flaw sinks Oregon's case.

1. Oregon's policy serves no compelling or substantial interest by targeting or compelling particular views.

1. As a "core postulate of free speech law," the "government may not discriminate against speech based on the ideas or opinions it conveys." *Brunetti*, 139 S. Ct. at 2299 (citation omitted). Similarly, Oregon cannot judge religious beliefs to be offensive or invalid. *Masterpiece*, 138 S. Ct. at 1731.

R.A.V. v. City of St. Paul proves the point. 505 U.S. 377 (1992). In defending its ban on racially motivated cross-burning, St. Paul "asserted a similar interest" as Oregon: protecting vulnerable populations from offensive messages considered especially harmful. 1-ER-32; 505 U.S. at 392. But the Supreme Court saw through the fog. That justification sought to prevent harm "caused by a distinctive idea, conveyed by a distinctive message," which revealed that the law tried "to handicap the expression of particular ideas." *Id.* at 393–94; *see also*

Matal v. Tam, 582 U.S. 218, 245–46 (2017) (equating state's interest in "preventing underrepresented groups from being bombarded with demeaning messages" to silencing "ideas that offend," which "strikes at the heart of the First Amendment").

Oregon treads the same path as St. Paul. It "requires positive speech and restricts negative speech in the context of gender" identity. 1-ER- 31. No matter how altruistic Oregon thinks that goal, regulating speech "to produce a society free of the corresponding biases" is a "decidedly fatal objective." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578–79 (1995).

The district court avoids that conclusion by distinguishing *R.A.V.* because St. Paul "*desired* to protect its citizens with marginalized identities," whereas Oregon "has a *responsibility* to protect the children in its care." 1-ER-33. But St. Paul also had a compelling interest to protect "members of groups that have historically been subjected to discrimination." *R.A.V.*, 505 U.S. at 395. That still did not justify singling out "particular biases" for worse treatment. *Id.* at 396.

Thankfully, the First Amendment protects everyone, including those who disagree with Bates. After all, governments may take different positions on human sexuality, not to mention topics like politics, race, and religion. One state might try to exclude those who oppose abortion for being sexist. A different state might exclude applicants who promote critical-race theory for being racist. No doubt,

these and other views may offend or distress *some* children in foster care. But "learning how to tolerate diverse expressive activities has always been part of learning how to live in a pluralistic society." *Kennedy*, 597 U.S. at 541 (citation omitted). And giving officials carte blanche to deem caregivers unfit because of their views reduces the pool of eligible families and takes away opportunities for children to find homes. Better "to avoid these ends by avoiding these beginnings." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

2. While courts closely scrutinize laws that restrict speech based on viewpoint, courts demand "*even more* immediate and urgent grounds" for laws that compel speech. *Green*, 52 F.4th at 791. No such ground exists here.

In fact, the district court concluded that "the Rule's impact on [Bates] is similar to the plaintiffs in *Barnette* [*v. West Virginia*] and *303 Creative* [*v. Elenis*]." 1-ER-30. That should doom Oregon's case. Like the anti-discrimination law in *303 Creative LLC v. Elenis*, Oregon's policy forces Bates "to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from [Oregon's] own." 600 U.S. 570, 598 (2023). To allow this would be "truly novel." *Id*. Oregon's actions should fall just like the government actions in *303 Creative* and *Barnette*.

2. Oregon's evidence about alleged harms says nothing about Bates.

Oregon did not establish a compelling interest in excluding Bates because its evidence failed to prove that she will harm anyone. Religious caregivers like Bates often care for children who identify as LGBT while staying true to their beliefs. These parents work through disputes, stay respectful, and lovingly support their children in innumerable ways. Oregon's surveys do not prove otherwise.

1. Start with the undisputed fact that Bates has "no problem loving [children who identify as LGBT] and accepting them as they are." 3-ER-340. Oregon even conceded in its denial letter that Bates "would love and treat [an LGBT child] as [her] own but would not support their lifestyle or encourage any behavior" that violated her beliefs. 3-ER-344. Such "disagreement does not equate to disparagement." 1-ER-38. Indeed, most parents quickly learn that they and their children may disagree on many issues, from bedtime and screentime to politics and religion.

Oregon cannot show that someone must hold its approved views on human sexuality to capably raise children who identify as LGBT (much less any other children). In fact, Oregon below did not cite "a single case" where a loving and respectful religious home caused any harm to any child—despite the fact that the federal government and many states allow religious applicants like Bates to adopt and provide

foster care. *Cruz*, 596 U.S. at 307 (discounting government's alleged anti-corruption interest because government failed to identify past example of corruption banned by law).

2. Consider Oregon's evidence. It submitted one factsheet alleging that LGBT people experience higher rates of adverse health outcomes like anxiety and depression due to discrimination. 1-ER-35. Oregon also "rel[ied] heavily on two studies conducted by Dr. Caitlin Ryan," one purporting to show a link between family rejection and negative health outcomes for LGBT adults, *id.*, the other purporting to show a link between positive family experiences and lesser negative health outcomes for LGBT adults, 2-ER-301.

But these surveys did not evaluate children (LGBT or not) growing up in religious households generally, much less evaluate how children fared in religious homes that love and care for them despite holding different views on human sexuality. In fact, it's difficult to discern what the surveys purport to say at all because they do not exhaustively identify what they considered to be "rejecting" or "affirming" behaviors.[8]

[8] Oregon did not even submit the Ryan study on family rejection to the district court, resting instead on the Ryan study on positive family experiences. 2-ER-300. The district court appears to have retrieved the former study on its own to cite some of its statistics. 1-ER-36.

One thing is certain: Bates would not reject any child merely because of a disagreement. 3-ER-340, 344. This distinction makes the Ryan surveys and Oregon's other cited evidence irrelevant.

The district court rejected this distinction, saying that "'rejection' takes many forms," and that Bates' respectful parenting could not validate certain children's identities "even if [she] does not outright reject [them]." 1-ER-38. Indeed, the court saw Bates' faith-based parenting as "equivalent [to] denying a child's LGBTQ+ identities," revealing "a misunderstanding of what it means to respect and support a child's identities." 1-ER-39. That's wrong for two reasons.

First, the district court doubled down on its inconsistent reading of Oregon's Rule. *Supra* §§ I, II.A. For example, to avoid free-speech problems, the court said that supporting a child's SOGIE need not "impact … speech at all" (1-ER-26), and that parents need not "attend affirming events alongside the child" (1-ER-27). But in its strict-scrutiny analysis, the district court determined the policy means what it says—that Bates' inability to use self-selected pronouns or to bring her child to pride parades violates the policy and undermines its goals. 1-ER-39 (citing Bates' beliefs on these topics).

Second, the district court's conclusion ignores the record. None of the surveys purport to measure whether a child who identifies as LGBT would perceive Bates' style of parenting as rejection. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001)

("psychological studies" on video games did not support restriction on sales to minors because there was "no indication that the games used in the studies [we]re similar to those in the record").

If anything, the surveys support Bates. As Caitlin Ryan, the lead author of the cited surveys explained, "[p]arents and families *can* support their LGBT child … by simple actions that don't require them to accept a 'behavior' or 'identity' they don't condone." 2-ER-107 (emphasis added). This includes the very things Bates would do: speaking respectfully with her children, requiring others to treat them well, and advocating for them if someone mistreated them. *Compare id. and* 2-ER-272 (describing these types of activities), *with* 3-ER-331–32 (explaining Bates' desire to speak openly with her children, love and accept them, and be by their side no matter what). And Bates would never abuse, harass, exclude, or denigrate a child in any way because of how they identify. *Compare* 2-ER-271 (describing these types of activities), *with* 3-ER-331–32 (explaining Bates would tell all her children they are made in God's image and "are worthy of equal respect," and Bates would never vilify or denigrate a child for any reason). If the survey participants who scored "low" on the family-acceptance score experienced these types of behaviors, the survey cannot apply here.

The district court selectively cited some parenting activities that Bates cannot do. 1-ER-39 (recommendation that parents "bring their

child to LGBT organizations or events" and "support [their] child's gender expression") (cleaned up). But those actions do not occur in a vacuum or cancel out the countless ways Bates will support her children. While the district court believes attending a pride parade supports an LGBT child, that is not the *only* way—as even Ryan concludes. Oregon should listen to its own expert: "Parents don't have to choose between their faith and their LGBT kids." 2-ER-105.

3. Oregon's evidence also suffers from serious methodological flaws.

Brown is again helpful. There, California defended its law against selling violent videogames to minors by citing studies showing that such games are "significantly linked to increases in aggressive behaviour[.]" *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 963 (9th Cir. 2009), *aff'd sub nom. Brown*, 564 U.S. 786. But that significant link did not satisfy strict scrutiny because the studies did "not prove that violent video games *cause* minors to *act* aggressively." *Brown*, 564 U.S. at 800.

Oregon's evidence suffers from similar methodological flaws. For example, one of the Ryan surveys tries to show the negative impact of "a disaffirming family environment … on LGBTQ+ youth." 1-ER-37. But Oregon's studies do not disaggregate home environment from other factors—like bullying at school—that can affect children's mental health. Rather than hold Oregon to a reliable regression analysis, the

district court embraced the studies because they did not "indicate that the impact of a child's home environment is 'small or indistinguishable' when compared to other sources." *Id.* But that flips the burden—forcing Bates to disprove Orgon's evidence when heightened scrutiny requires Oregon to provide sufficient evidence. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

Nor can Oregon carry its burden by making a "predictive judgment" based on "ambiguous proof." *Brown*, 564 U.S. at 799–800. At most, Oregon's studies showed "correlation, not evidence of causation[.]" *Id.* at 800. That alone means Bates should have won. But the district court excused Oregon's evidentiary failings because the academic literature is "limited," and Oregon did the best it could "with the research currently available." 1-ER-37. That is not how heightened scrutiny works. Oregon's speculation means Bates wins.

C. Oregon's policy is underinclusive.

Oregon also fails to consistently enforce its interests, making its policy underinclusive. When regulations single out one type of protected activity for disfavored treatment, while leaving comparable sources of harm untouched, that "is alone enough to defeat it." *Brown*, 564 U.S. at 802.

Start with Oregon's system of individualized assessments. Oregon requires caregivers to support children's SOGIE, but merely requires respect for their religious or cultural practices, even though the policy

does not distinguish the two. *Supra* § II.B; *see* 1-ER-51 (noting Oregon's obligation to all children). In addition, the policy only reaches some traits and characteristics, leaving out many others. *See R.A.V.*, 505 U.S. at 391 (noting city's ordinance only covered disfavored topics, but not others like political affiliation or union membership). These exemptions undermine any contention that Oregon's policy "can brook no departures." *Fulton*, 141 S. Ct. at 1882.

Oregon also grants categorical exemptions, allowing discrimination based on traits like sex and disability. *Supra* § II.B. The last one undermines the Rule itself. OAR § 413-200-0308(2)(k) (protecting disability). This sort of "[u]nderinclusiviness raises serious doubts" that Oregon "is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 801–02.

Bates does not object to allowing sex-based preferences. But allowing this exemption means Oregon must extend one to Bates. For Bates, sexual differences are not just biological, but spiritual. 3-ER-321. Yet Oregon treats secular beliefs and practices related to sexuality "as legitimate," while treating Bates' religious beliefs "as illegitimate," reinforcing that Oregon simply does not like her beliefs. *Masterpiece*, 138 S. Ct. at 1730.

Finally, Oregon must promote the best interests of all children within the state, including children in independent adoptions. *Supra* § II.B. But Oregon "does not extend [the policy] to everyone … despite

contending that [SOGIE] discrimination warrants the serious step of infringing on First Amendment rights." *IMDb.com Inc.*, 962 F.3d at 1127 (law prohibiting IMDb from disclosing personal information was underinclusive because it only applied to paid subscribers and not everyone). That makes Oregon's policy "woefully underinclusive." *Id.* And a rule "cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 576 U.S. at 172 (citation omitted).

IV. Oregon's policy is facially overbroad.

Oregon's policy not only improperly regulates Bates but also chills the speech of many others. "[A] statute is facially invalid if it prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008).

The district court construed the policy to regulate conduct because it "appears to regulate the type of environment" children experience when placed in homes. 1-ER-25. But that environment necessarily includes speech. Parents parent through words. Dictionaries confirm this; they define "support" to mean advocating or promoting the child's interests or cause. *Supra* § I. And this Court has already interpreted "promote" to cover speech. *United States v. Rundo*, 990 F.3d 709, 717 (9th Cir. 2021) (per curiam) (interpreting statute making it illegal to "promote, encourage, participate in, or carry on a riot"). Context bolsters this conclusion. Provisions near the policy also regulate speech

by banning "derogatory remarks" and threats to remove a child from the home. 1-ER-25–26. Even the district court embraced this conclusion at times; it conceded that "using a child's preferred pronouns goes hand in hand with creating an affirming environment[.]" *E.g.*, 1-ER-29; *see supra* § I. This confirms Bates' point that supporting a child's SOGIE entails words to a substantial degree.

Since the policy plainly reaches speech, the question becomes whether "its applications to protected speech … swamp[s] its lawful applications." *United States v. Hansen*, 599 U.S. 762, 774 (2023). It does. As Bates explained above, Oregon's policy covers all kinds of protected speech, from respectful dinner conversations to everyday pronoun usage to Sunday church visits. *See supra* §§ I, III.A.1. Parents express their views on human sexuality to their children in countless ways. *Id.* The policy also applies to every caregiver of any child in foster care, including someone seeking to adopt their grandchild (kinship placements), someone providing an infant respite care for a few hours, and someone fostering a 17-year-old who wants to be a missionary. *See also* § III.A.3. Yet Oregon's policy excludes applicants from providing care in all these instances.

In fact, Oregon's policy excludes entire religious communities, like Muslim or Orthodox Jewish families who observe sex-specific dress requirements, social events, and religious rituals. For children who are themselves Muslim or Jewish, the families' religious beliefs would

provide common ground, not conflict. But Oregon excludes these families too, harming children from these religious communities. Oregon cannot justify these far-ranging burdens on speech.

V. Bates satisfies the other preliminary-injunction factors.

Bates satisfies the remaining preliminary-injunction factors because she will likely prevail on her First Amendment claim. "It is axiomatic that [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *FCA*, 82 F.4th at 694 (cleaned up). Merely showing a "colorable First Amendment claim" is sufficient to show a likelihood of irreparable injury. *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019). And for Bates, this injury is not abstract. She wants her adopted children to bond with her biological children before they leave her home.

Moreover, raising "serious First Amendment questions compels a finding that … the balance of hardships tips sharply in Plaintiff['s] favor." *Id.* (cleaned up). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (citation omitted). This Court has enjoined laws designed to combat online sex trafficking that violate free-speech rights. *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (explaining state could "employ other methods" to pursue its interests). Likewise, there is a "significant public interest in upholding First Amendment principles" here. *Id.*

CONCLUSION

This Court should reverse the district court and remand with instructions to enter the requested preliminary injunction.

Respectfully submitted,

Dated: January 11, 2024 By: */s/ John J. Bursch*

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STATEMENT OF RELATED CASES

Plaintiff-Appellate is unaware of any related cases currently pending in this court.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2024, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
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January 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPEAL NO. 23-4169

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA BATES,

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, in his official capacity as Director of the Oregon Department of Human Resources, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 2:23-cv-00474-AN

ADDENDUM TO APPELLANT'S OPENING BRIEF

ADDENDUM TABLE OF CONTENTS

413-200-0308. Personal Qualifications of Applicants and Certified Resource Families

(1) Applicants have the burden of proving they possess the required qualifications to be approved as a certified resource family or as a potential adoptive resource.

(2) Applicants must, as determined by the Department pursuant to OAR 413-200-0274 to OAR 413-200-0298:

(a) Exercise sound judgment and demonstrate responsible, stable, emotionally mature behavior;

(b) Manage the home and personal life;

(c) Possess the ability to apply the reasonable and prudent parent standard when determining whether to allow a child or young adult in the care or custody of the Department to participate in extracurricular, enrichment, cultural, and social activities;

(d) Maintain conditions in the home that provide for the safety, health, and well-being for the child or young adult in the care or custody of the Department and be able to meet the safety, health, and well-being needs for that child or young adult;

(e) Have supportive relationships with adults and children living in the household and with others in the community;

(f) Have a lifestyle and personal habits free of criminal activity, and abuse or misuse of alcohol or drugs;

(g) Have adequate financial resources to support the household; financial resources are not limited to income from employment.

(h) Be willing to participate in the assessment process that includes a comprehensive inquiry into the personal and family history including family dynamics;

(i) Have the physical and mental capacity to care for a child or young adult in the care or custody of the Department. Upon request, be willing to provide copies of medical reports from a health care professional, and be willing to participate in an expert evaluation and authorize the Department to obtain a report from the evaluator;

(j) Demonstrate an ability to learn and apply effective childrearing and behavior intervention practices focused on helping a child or young adult in the care and custody of the Department grow, develop, and build positive personal relationships and self-esteem;

(k) Respect, accept and support the race, ethnicity, cultural identities, national origin, immigration status, sexual orientation, gender identity, gender expression, disabilities, spiritual beliefs, and socioeconomic status, of a child or young adult in the care or custody of the Department, and provide opportunities to enhance the positive self-concept and understanding of the child or young adult's heritage; and

(L) Assure that all members of the household, excluding a child or young adult in the care or custody of the Department:

(A) Exercise sound judgment and demonstrate responsible, stable, emotionally mature behavior, within the individual's developmental and cognitive abilities;

(B) Do not pose a risk to the safety, health, and well-being needs of a child or young adult in the care or custody of the Department;

(C) Have a lifestyle and personal habits free of criminal activity, and abuse or misuse of alcohol or drugs; and

(D) Cooperate with the Department's assessment of the household.

(3) To maintain certification, in addition to continuing to meet the personal qualifications listed in sections (2) of this rule, a certified resource family must:

(a) Incorporate into the family's care-giving practices positive non-punitive discipline and ways of helping a child or young adult placed with the certified resource family build positive personal relationships, self-control, and self-esteem;

(b) Ensure the child or young adult placed with the certified resource family is taught age appropriate health and hygiene practices and is given the opportunity to practice good hygiene;

(c) Ensure the child or young adult placed with the certified resource family has regular, ongoing opportunities to engage in age-appropriate or developmentally-appropriate activities, including extracurricular, enrichment, cultural, and social activities;

(d) Respect and support the Department's efforts to develop and maintain the relationships of the child or young adult placed with the certified resource family with their birth family, their siblings, their relatives, and any other significant individual in the life of the child or young adult;

(e) Work in partnership with the Department to identify the strengths and meet the needs of each child or young adult placed with the certified resource family;

(f) Follow Department direction and comply with prescribed services and activities in the case plan, including, but not limited to supervision plans, personal care services plans, visitation plans, transition plans, and restrictions for - each child or young adult placed with the certified resource family, as applicable to that child or young adult;

(g) Follow through with any placement support plan; and

(h) Use reasonable efforts to prevent anyone from influencing any child or young adult regarding allegations in a judicial or administrative proceeding in which the family or legal guardian of the child or young adult or another individual may be involved.