

No. 23-4169

**In the United States Court of Appeals
for the Ninth Circuit**

JESSICA BATES,
Plaintiff-Appellant,

v.

Director FARIBORZ PAKSERESHT, in his official capacity as Director of the Oregon Department of Human Services; Deputy Director LIESL WENDT, in her official capacity as Deputy Director of the Oregon Department of Human Services; APRILLE FLINT-GERNER, in her official capacity as Interim Director of the Oregon Department of Human Services Child Welfare Division; REBECCAGARRISON, in her official capacity as certification supervisor for the Oregon Department of Human Services office in Malheur County; CECILIA GARCIA, in her official capacity as certification officer for the Oregon Department of Human Services office in Malheur Count,
Defendants-Appellees.

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

BRIEF OF THE CONSCIENCE PROJECT, NANCY HARMON, DIANA JOHNSON, SCOTT FREEMAN, AND COLLEEN FREEMAN AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Andrea Picciotti-Bayer
Counsel of Record
The Conscience Project
1350 Beverly Road, Suite 115
McLean, VA 22101
(571) 201-6564
amariepicciotti@gmail.com
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The Conscience Project is a nonprofit, tax-exempt organization that does not issue stock and has no parent corporation.

DATED: January 16, 2024

/s/ Andrea Picciotti-Bayer
Andrea Picciotti-Bayer
Counsel of Record

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE.....	14
SUMMARY OF ARGUMENT	19
ARGUMENT	19
I. The Foster Care and Adoption Crisis in America Demands an “All-Hands-on-Deck” Approach.....	19
II. Many Couples Have Been Inspired to Become Foster or Adoptive Parents by Their Religious Faith	22
III. Participation in Child Welfare Services Should Not be Governed by Specious Hypotheticals that Violate Religious Belief or Compel Speech....	24
A. Violation of Religious Freedom.....	24
B. Unconstitutional Compelled Speech.....	27
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE.....	31
CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

Cases

<i>303 Creative LLC v. Elenis</i> , 143 U.S. 2298 (2023)	28, 29
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	29
<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021).....	25
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.</i> , 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)	29
<i>Janus v. ACFSCME</i> , 585 U.S. __ (2018)	29
<i>New Hope Family Services, Inc. v. Poole</i> , 5:18-CV-01419 (MAD/TWD) (Sept. 7, 2022)	10
<i>NIFLA v. Becerra</i> , 585 U.S. __ (2018)	29
<i>West Virginia Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943)	28

Statutes

OAR § 413-120-0246(1)(b)(A)-(B), (D), (F)-(G)	15
OAR § 413-200-0308(2)(k)	15

Other Authorities

Mary Ellen Cox, Cheryl Buehler, and John G. Orme, <i>Recruitment and Foster Family Service</i> , <i>Journal of Sociology & Social Welfare</i> , 29:3, 2002, https://doi.org/10.15453/0191-5096.2832	23
---	----

- Department of Health and Human Services, Administration for Children and Families, 45 CFR Part 1355 RIN 0970-AD03, Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B (Notice of Proposed Rulemaking), Federal Register, Vol. 88, No. 187, September 28, 2023, <https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21274.pdf>..... 25, 26
- Libby Dowsett, *Lack of Placement Stability for Oregon Foster Youth Causes Traumatic Disruptions*, Street Roots, Oct. 13, 2021, <https://www.streetroots.org/news/2021/10/13/placement-stability> 20
- Sean Hughes, *Why Foster Children are Sleeping in Offices and What We Can Do About It*, American Enterprise Institute Report, Apr. 2023, <https://www.aei.org/wp-content/uploads/2023/04/Why-Foster-Children-Are-Sleeping-in-Offices-and-What-We-Can-Do-About-It.pdf?x91208>20
- Byron Johnson, Stephen Cranney, Shaykh Mohammed Amin Kholwadia, Abdullah bin Hamid Ali, Ahmed Soboh, Mark Regnerus, Fr Paul Sullins, Eric Patterson, Thomas F. Farr, and Catherine R. Pakaluk, *Religious Foster Care Plays a Vital Role for Our Most Vulnerable Children*, Deseret News, Jun. 18, 2021, <https://www.deseret.com/opinion/2021/6/18/22540149/religious-foster-care-plays-a-vital-role-supreme-court-fulton-catholic-social-services>27
- Sonya J. Leathers, Jill E. Spielfogel, Jennifer Geiger, James Barnett, Beth L. Vande Voort, *Placement Disruption in Foster Care: Children’s Behavior, Foster Parent Support, and Parenting Experiences*, Child Abuse Neglect, May 2019, <https://pubmed.ncbi.nlm.nih.gov/30889437/>21
- Naomi Shaefer Riley, *Fixing Our Child Welfare System to Help America’s Most Vulnerable Kids*, Independent Women’s Forum Policy Report, Dec. 2022, <https://www.aei.org/wp-content/uploads/2022/12/policy-focus-fixing-our-child-welfare-system-to-help-americas-most-vulnerable-kids.pdf?x91208>21
- Naomi Schaefer Riley, *How Churches Can Make a Difference in the Lives of Children Who Need Foster Care*, Deseret News, Oct. 31, 2023, <https://www.deseret.com/2023/10/31/23938647/foster-care-churches-training-black-families-gallup-poll>23

The Barna Group, *Five Things You Need to Know about Adoption*,
Nov, 4, 2013, [https://www.barna.com/research/5-things-you-need-to-know-
about-adoption/](https://www.barna.com/research/5-things-you-need-to-know-about-adoption/) 22

U.S. Department of Health and Human Services, Administration for Children
and Families,
[https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-
29.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf).....19

Claire Withycombe, *Fact check: Are Fewer Children in Foster Care Now Than
When Oregon Gov. Kate Brown Took Office?*, Salem Statesman Journal, Feb.
17, 2022,
[https://www.statesmanjournal.com/story/news/politics/2022/02/17/oregon-
governor-kate-brown-fact-check-state-address-foster-kids/6758379001/](https://www.statesmanjournal.com/story/news/politics/2022/02/17/oregon-governor-kate-brown-fact-check-state-address-foster-kids/6758379001/)20

INTEREST OF *AMICI CURIAE*¹

THE CONSCIENCE PROJECT advances freedom of conscience and the right to practice one’s faith free from interference by the government through public education that includes insightful commentary and legal analysis as well as in filing *amicus* briefs in key religious freedom and free speech cases.

Amici Foster and Adoptive Parents, listed and described below, attest to the crucial role of faith in their decision to welcome children in need into their homes and in strengthening them through difficult times.

NANCY HARMON knows how important a safe and loving home is. Having herself grown up in an abusive home, she fled to foster care as a teenager. Nancy grew up in Minnesota, where she and her husband Jay met when she was just a teen. Married now for 34 years, the Harmons have four biological children.

Nancy grew up in what she calls a dysfunctional home. “Both my parents were alcoholics. And my mom was emotionally and verbally abusive, and also mentally ill.” Nancy put herself into foster care at the age of 13: she lived with her English teacher for a while before moving to live with her father. “I always say that my

¹ *Amici* state that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. All statements made by *amici* foster and adoptive parents are on file with counsel for *amici curiae*.

English teacher who fostered me saved my life. And I always said, ‘Someday I’m going to be like her,’ and that’s one of the reasons why we chose to do foster care.”

Although her father wasn’t abusive, he was not “present” in Nancy’s life. “Like most kids that come from dysfunctional families, I was looking for love,” she remarks. Nancy and Jay began dating when Nancy was 15 and shortly thereafter the two were expecting a child. They married young – Nancy was only 17 – and have been together ever since. Together, the couple have three biological sons and a daughter.

After their third son was born, the Harmons began to foster children. “We got our first call to foster my niece, my brother’s daughter. And then another call to foster my sister’s grandkids.” Over the past 25 years, the Harmons have fostered around 50 children.

Nancy’s commitment to fostering has been nourished by her Christian faith. “When I came to faith in Christ, I wanted to give back,” she says. “There are so many other kids, teenagers that have gone through what I’ve gone through that are looking for love and that need a healthy family, they’re out there. How can we make a difference in those kids’ lives?”

The Harmons are careful to invite their foster children to join them in church activities, not to impose it on them. “It’s not something we make them do,” says Nancy. “I feel like modeling our lifestyle speaks volumes and who we are as people

speaks volumes.” One of the biblical verses she quotes is Matthew 25:40: “Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.” And so, she explains, “ultimately, as we serve these kids in our hearts, we just feel like that’s the way that we serve God.”

In December 2021, three sisters aged 9,10, and 11 moved into the Harmons’ home as foster children. As soon as she arrived and started unpacking her clothes, the 11-year-old girl announced: “My pronouns are they/them. I’m bisexual, emo, gothic, pagan, witch.” And she then looked at Nancy and asked, “Will you adopt me?”

Nancy recalls that she and her biological daughter, aged 14 at the time, looked at each other with wide eyes. “We just said, ‘Wow’. We didn’t really know how to react to that. And we just continued unpacking her clothes with her.”

The three sisters suffered abuse at home prior to coming to the Harmons and were not given any education during the COVID-19 pandemic. Nancy recalls that one of the biggest challenges in fostering the girls was that “they had lived in a home where they felt that they were not loved, and they would go to a place in their mind to cope We had to help them discern what is real and what is fictional. And so, we met with a lot of mental health professionals, we still do today, in helping them walk through that.”

The county hired an adoption agency to facilitate the adoption of the three sisters and the Harmons were contacted to see if they were willing to adopt them. “At first, we just weren’t sure because there were so many needs,” says Nancy. “The minimum number of appointments I take the girls to is 36 a month.” Nancy and Jay weren’t sure they could do it. They prayed about it, agreed they were willing to adopt the sisters and informed the county.

A few weeks later, Nancy opened an email accidentally sent to her from the adoption agency to the county. It asked when the Harmons would be told they were not the “best option to adopt the girls.” Nancy was shocked. She immediately called the case manager from the county, who apologized for the inadvertently sent email. A county representative explained that after several meetings with the staff and the adoption agency they decided the Harmons were not the best option to adopt the girls – “because of our religious beliefs,” says Nancy.

She adds: “Not once did they ask us what our beliefs are. They made an assumption.” Over a Zoom call with the Harmons and their biological daughter, representatives of the county and the adoption agency were adamant that their main priority was “to protect the oldest daughter and her sexual identity.” Nancy’s biological daughter spoke up during the call and asked: “What about the younger two girls? We’ve bonded with these kids and you’re more concerned about the oldest one’s LGBTQ sexual identity? What about the bond we’ve created? What about

splitting up siblings?” A representative from the county asked the Harmons if they would be able to foster the girls “until we can find an appropriate placement for them that will support the oldest girl’s beliefs?”

Nancy was incredulous. “No, we can’t,” she replied. “That doesn’t make any sense. You want us to continue to foster, what, three, six, nine months, and that’s OK, but it’s not OK for us to keep them permanently? In these months, what’s going to happen with our family? We’re going to become even closer, bond even more with them, and then you’re going to take them from our home?” Nancy and Jay felt they had no alternative but to give the county notice that they would no longer foster the girls. “We were devastated,” says Nancy.

When the eldest girl found out that the Harmons could not adopt them, she was also devastated. “She was just sobbing. And she said to me, ‘I’m so sorry. It’s all my fault,’” recalls Nancy. The child then shared that once, when she was angry with Nancy, she described the Harmons’ faith in a “negative way” with a caseworker for the county. The child, remorseful, said that was “a huge mistake.”

A few weeks later, the Harmons were told that the county had decided to separate the girls, sending the eldest sister to live “in a home with somebody that’s going to support her beliefs.” Noting that the Harmons have “bonded with the other two girls,” the county asked whether they would be willing to adopt the two girls.

During all this, Nancy and Jay met with the girls' therapist. He recommended that it was in the best interest that the girls stayed together, that they should not be separated – and the county changed its position, instead recommending the Harmons adopt all three girls. In the midst of this change, a representative from the county contacted Nancy and asked her: “Has anybody ever asked you what you believe and how you would raise her with her beliefs?” Nancy replied that no one had ever asked.

In other words, the earlier decision to remove the oldest girl was based on unsubstantiated assumptions about the Harmons' religious beliefs.

In the fall of 2023, the county approved the adoption of the girls by the Harmons. When Nancy told the girls, “They were all excited. They all had smiles on their faces. They were jumping up and down.” And as for the eldest, Nancy says that once the decision was made “all of the negative behaviors left, the anxiety left. Her mental health case manager is thinking about just closing her case, that she doesn't need it anymore.” Even her friends have remarked, “Oh, she's had a glow-up.” All three were formally adopted this past December.

During the period of fostering, Nancy reached out to the girls' biological grandmother. She lives in a different state and is someone whom they spoke about often. Although the grandmother is unable to care for them personally, the Harmons

have been able to strengthen her ties with the girls. Their own biological daughter has also formed a strong bond with her, having no living grandparents of her own.

When Nancy was asked what the court should know when considering Jessica Bates's case, she responded: "I would ask a question. Do you really know the children and their needs? Do you know their stories? Have you walked their paths? Do you know why they are the way that they are?" She worries that the authorities in the Bates case have been guided by the ideology associated with pronouns and gender identity. As she puts it: "There's way more to these kids than that. To not allow someone to adopt someone on the basis of a pronoun is doing the children an injustice."

DIANA JOHNSON has dedicated her life to children in need of a forever home.

Starting shortly after they were married, Diana and her husband Dave welcomed into their home both biological children and children from adoption and foster care. Joining their three biological children, the couple from Tully, New York have adopted fourteen children and fostered another twelve over the past fifty years. Explaining their interest in adoption, Diana says: "We're a Christian family, and what we saw were children of color, children who were addicted to drugs that were not being adopted. And my husband and I were very pro-life and felt very strongly

that the Lord wanted us to move forward, and take these kids who needed a home. And so, that's what we did."

"Were we wealthy? No," says Diana. Dave, a long-serving fireman with the Syracuse, New York Fire Department who rose up the ranks to become Deputy Fire Chief, died three years ago.

Of their journey as adoptive parents, Diana comments that "in every adoption, there's a story." She mentions "one little boy whose mother was HIV-positive and very badly addicted to drugs and had relapsed." The Johnsons took care of the boy as adoptive parents for a year and a half until his biological mother successfully challenged her prior surrender of parental rights. "For a year and a half, he was gone, and it was the most traumatic thing we ever went through. It tore our family to pieces," says Diana. During the time the Johnson's son was with his biological mother, Diana kept in touch with them. "We had an address of where they were, and I reached out, and I sent him a little package every week." After a year and a half, the child's biological mother called up the Johnsons, telling them: "I'm sicker. I'm not going to live. I'm going to bring him back and can I bring his sister?" Diana recalls: "We said yes. We went through an awful hard time with [the young girl]. She had experienced a mother who was dying, a mother who was a drug addict, who'd had men in and out. We don't know things that have happened to her, but we tried to make her a good home."

In the face of the difficulties, Diana and Dave drew strength from their faith: “The Lord helped us all through this time.”

The Johnsons adopted domestically and fostered through a private adoption agency. New Hope Family Services is a Christian adoption agency working in the Syracuse area. Despite her extraordinary willingness to accept challenges, Diana was always realistic about what was possible. For example, she was unable to take in a child with severe cerebral palsy who requires 24-hour care. “I had probably twelve children at that time. There was no way I could do a good job. It’s not that I didn’t want him. But I had to think about the children I had already brought into my home, and make that decision.”

Diana initially volunteered as a counselor and later worked as an adoption caseworker with New Hope. Dave sat on the agency’s Board of Directors. The Christian nonprofit accepts no government funding and, besides the fees paid by adoptive parents, funds its ministry through support from churches, individual donors, and private grants.

For more than four years, the New York Office of Children and Family threatened to close the nonprofit because of its policy, guided by its religious beliefs, of placing children it serves in homes with a married mother and father. In September 2022, a federal district court permanently enjoined the State of New York from enforcing a state law “insofar as it would compel New Hope to process applications

from, or place children for adoption with, same-sex couples or unmarried cohabitating couples, and insofar as it would prevent New Hope from referring such couples to other agencies.”²

New Hope does not ask whether a family is willing to receive into their home a child who has expressed a gender identity different from their biological sex. And, according to Diana, none of the children she and Dave adopted or fostered expressed such a wish. She thinks that including gender identity into foster care placements is “only bringing confusion to little people who have not even asked themselves this question.” With years of experience, Diana points out that these are “kids who are coming to you already disrupted from a home with problems. It’s a mess.”

Diana is concerned about efforts like those in Oregon to limit the homes available for placing children in need. “I sometimes think there’s more reach-out for finding homes for animals than kids,” she says. With decades of experience caring for children whose family of origin failed to care for them, Diana believes that they need guidance and love to learn how to forgive their past and start over again. “I don’t see that in what the government is providing. I think the

² *New Hope Family Services, Inc. v. Poole*, 5:18-CV-01419 (MAD/TWD) (Sept. 7, 2022), available at <https://adfmmedialegalfiles.blob.core.windows.net/files/NewHopeSJorder.pdf>

government is bringing confusion.” She adds: “I think they’re going to miss out on some great homes if they keep making these regulations.”

Fostering and adopting so many children wasn’t just a benefit for the children, according to Diana. She says that her family – including members of the extended family – were transformed by the experience. Caring for children from different racial and ethnic backgrounds was a particular blessing, in her opinion. “I think what really transformed our life and our extended family was adopting children of different races.... We were able to blend as a family and really learn to love each other.” She adds: “We saw [the children] open their hearts even deeper to people of other colors, which was a neat thing to see. They never had prejudice.”

In thinking about Jessica Bates’s suit, Diana reflects: “It breaks my heart that these kids wait while litigation is going to happen, because that takes forever.” She also hopes that this court will not dismiss the value of faith in helping families care for foster care and adopted children.

SCOTT and **COLLEEN FREEMAN** adore their two-year-old grandson. The Freemans, happily married for over 40 years, have been raising the child of their youngest daughter in their home in Blaine, Washington for the last year. They hope to adopt him soon.

The Freemans’ youngest daughter has struggled with mental health issues and substance abuse for years. During one of her stays in a rehabilitation facility in

Seattle – about 100 miles from Blaine – she became pregnant with twins. “We had no idea that something like this was going to happen. We talked to her about having the babies instead of getting rid of them, and she agreed,” says Scott. The children were born extremely premature, and one of the twins died 13 days after birth. The surviving twin was eventually able to leave the hospital. Colleen recalls: “Our little guy here was in the hospital for three and a half months maybe.” Colleen stayed with her daughter, who does not drive, so that they could go back and forth to the hospital to see the newborn. When the baby was discharged, Colleen stayed a few more weeks until her daughter and grandson “appeared to be stable.”

Scott and Colleen kept in daily communication with their daughter. She was doing really well, says Colleen. “And then she hit a wall.” Scott says that “she got involved with other people and got on drugs again, and it just was going downhill.” On Christmas Eve, 2022, the Freemans’ daughter didn’t return their calls. “I had an apartment key,” says Colleen, “so Scott got in his truck and he drove to Seattle to check that they were OK.” When he arrived, he found their daughter’s apartment “ransacked.” Their daughter and grandson were missing. Scott called 911. Colleen filled out missing persons reports.

A few days later the Sheriff’s Office of a neighboring county contacted the Freemans. Their daughter, suffering from delusions that someone was trying to kill her, had taken the child with her to stay with friends in a remote part of the state.

Emergency services were contacted after she began to have seizures. “There’s nothing we would not do for her,” says Scott, “but our parenting instincts took over and it was all about the grandson at this point.” The Freemans have taken care of their grandson for over a year now in what they understand as “kinship care.” Colleen adds: “I was told he belongs to the state.”

Scott and Colleen would like to begin the process of adopting their grandson. However, “dealing with the state has been so confusing to us,” reflects Scott. “We went into this thinking that, ‘Hey, we’re the grandparents. This should be pretty much of a slam dunk. We’re family.’ He’s been living with us for nearly a year. We’re stable people. We have a house. We do everything for him. We thought this was going to be a process that was going to be quick.” But things have not been even close to a “slam dunk” for the Freemans.

Washington State requires Scott and Colleen to take a series of online courses. According to Colleen, both she and Scott completed all the required courses and submitted certificates of completion for them – but then found themselves confronted by ideology. Scott explains that they were asked “if our grandson wanted to wear a red dress to school, would we support that?” He responded: “That’s not going to happen.” After receiving follow-up questions, Scott said: “You know what? We’re Christians. We don’t believe in that stuff. We can’t take the test and lie about it.”

They have since been assigned an ombudsman to handle their case. “We just told her everything about what we couldn’t do,” says Scott. “She said that, to her knowledge, when people didn’t finish the home study to the approved degree, the child would be taken from the premises.” Reflecting on this, Scott wonders whether the ombudsman was employing scare tactics, or whether it was the plain truth. Colleen worries that it is the latter: “I have a fear that they’re going to go to daycare and just pick him up or something.” She adds: “We just want to love our little grand-baby.”

Scott hopes that when this court reviews Ms. Bates’s case, it will consider the following: “The state is never going to be a good parent. Kids that have the opportunity to have somebody like Jessica are blessed because it’s God taking care of them.”

STATEMENT OF THE CASE

Jessica Bates, a widowed mother of five from Oregon, feels called by her Christian faith to open her home to adoption, offering to adopt a young sibling pair under the age of ten.³ Unconstitutional demands and restrictions imposed by the state of Oregon have prevented Ms. Bates from doing so.

³ Compl. at ¶¶ 20, 22, 34, *Bates v. Pakseresht*, No. 2:23-cv-00474, available at <https://adflegal-live-drupal-files-delivery.s3.amazonaws.com/public/2023-04/Bates-v-Pakseresht-2023-04-02-Complaint.pdf>.

In the spring of 2022, Ms. Bates began the application process with the Oregon Department of Human Services (“ODHS”) to be certified to adopt from the state’s foster care system.⁴ Applicants like Ms. Bates are required to show that they can care for a child’s general well-being,⁵ as well as agree not to discriminate against a child on the basis of a number of characteristics and help a child develop a positive self-concept.⁶

With regard to a child whose “gender identity” differs, or could differ at some point in the future, from their biological sex, Oregon demands prospective adoptive parents agree to very specific parenting decisions. For example, during state-directed training Ms. Bates participated in as part of the application process, she was told that she must agree to use a child’s “preferred pronouns,” take a child to events like “gay-

⁴ *Id.* at ¶ 39.

⁵ Under the state’s rules, applicants must show that they can care for a child’s “[p]hysical and emotional safety and well-being[,]” help the child develop and maintain familial ties, provide “[a]ppropriate social, educational, developmental, emotional, and physical support” and “[s]tability and permanency[,]” and maintain the child’s “identity, cultural, religious, and spiritual heritage.” OAR § 413-120-0246(1)(b)(A)-(B), (D), (F)-(G).

⁶ Applicants must also “[r]espect, 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 [ODHS], 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).

pride parades,” and allow a child to undergo dangerous pharmaceutical interventions like puberty blockers and hormone shots.⁷

Consistent with her Christian faith, Ms. Bates could not agree to the state’s demands.⁸ She did, however, reveal how she would parent should her child’s “gender identity” differ from their biological sex. For example, Ms. Bates would avoid using disfavored – biologically based – pronouns and instead “use only a person’s name.”⁹ She raised the issue with an ODHS employee who, several weeks later, told Ms. Bates that she was ineligible to adopt because of her “objections to affirming a child’s transgender identity.”¹⁰ The official denial letter from ODHS similarly cited Ms. Bates’s failure to comply with state rules requiring her to agree

⁷ Compl. at ¶¶ 105-117.

⁸ Ms. Bates believes that the “Bible provides the truth about our human nature and identity,” *id.* at ¶ 119, and that “every human being is made in the image and likeness of God, that God created humans as male and female, and that our physical manifestation is an indelible part of who we are.” *Id.* at ¶ 121. Ms. Bates also believes that “a person cannot choose his or her gender because a person’s earthly identity is inextricably intertwined with their sex.” *Id.* at ¶ 122. And finally, Ms. Bates believes that “a person should not go by pronouns that contradict or obscure their biological sex and that she should avoid using such pronouns to address other people.” *Id.* at ¶ 124.

⁹ *Id.* at ¶ 124.

¹⁰ *Id.* at ¶¶ 168, 172-185.

to “support [a child’s] lifestyle or encourage any behavior related to their sexual orientation or gender identity or expression.”¹¹

Ms. Bates filed suit in federal district court, arguing that Oregon’s policy violates her First Amendment rights to freedom of speech, association, and assembly; violation of her First Amendment right to free exercise of religion; and violation of the Equal Protection Clause of the Fourteenth Amendment. She also requested a preliminary injunction.

The district court denied Ms. Bates’ motion for preliminary injunction.¹² Throughout the opinion, the court adopts specious assertions about proper parenting.¹³

In rejecting Ms. Bates’s claims of a violation of her free exercise rights under the First Amendment, the court concluded that Oregon’s rule is “neutral, generally applicable, and poses only an incidental burden on plaintiff’s right to freedom of

¹¹ *Id.* at ¶¶ 195-199.

¹² *Bates v. Pakseresht*, No. 2:23-cv-00474-AN, 2023 U.S. Dist. LEXIS 203533 (D. Ore. Nov. 14, 2023).

¹³ See e.g., *Id.* at 6 (“[T]his Court questions whether plaintiff’s willingness to ‘love and support’ a child is sufficient to ensure that the child will *feel* loved and supported.); and *Id.* at 21 (“Plaintiff takes too narrow a view of what it means to support a child’s identity. While the plaintiff is correct that disagreement does not equate to disparagement, the Court also recognizes that the term ‘rejection’ takes many forms, and includes the impact that invalidation can have on an LGBTQ+ youth. Put another way, the harm arises from how plaintiff’s actions are *perceived* by the child, not from her personal intent.”).

religion” and is therefore subject to rational basis review.¹⁴ Applying this minimal level of judicial scrutiny, the court held that Oregon’s rule is “rationally related to the government’s legitimate interest in protecting LGBTQ+ children in ODHS care from harm.”¹⁵

With regard to Ms. Bates’ free speech claim, the court concluded that “[b]ecause the Rule compels and restricts plaintiff’s speech in a content-based and viewpoint-based manner, the Rule is presumptively invalid and strict scrutiny applies.”¹⁶ Despite its obligation to apply an exacting level of judicial review, the court concluded that Oregon could lawfully infringe on Ms. Bates’ rights. Oregon’s stated interests of “ensuring the health, safety and welfare of the LGBTQ+ children who are entrusted to ODHS care” and “protecting LGBTQ+ children in ODHS’s care from the severe harms that arise from parental rejection,”¹⁷ were “sufficiently compelling”¹⁸ and that Ms. Bates “has provided no plausible alternatives that would further the government’s interests with the same effectiveness.”¹⁹

¹⁴ *Id.* at 14.

¹⁵ *Id.*

¹⁶ *Id.* at 18.

¹⁷ *Id.*

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 29.

SUMMARY OF ARGUMENT

There is a foster care and adoption crisis in America. In response, state policies should focus on promoting and encouraging competent prospective parents to open the doors of their homes to children in need. Among some of the most dedicated foster and adoptive parents are people of faith. Religious belief inspires many of them to foster and adopt and also helps address parenting challenges. Hurdles have recently been placed in their way in the form of ideologically driven hypotheticals. Like Jessica Bates, many religious Americans decline to respond in the “correct” manner; to exclude them from fostering or adoption as a punishment adds to the injury suffered by needy children and is odious to the guarantees of our Constitution.

ARGUMENT

I. The Foster Care and Adoption Crisis in America Demands an “All-Hands-on-Deck” Approach.

Close to 400,000 children and youth with a median age of seven are living in foster care in the United States today and are waiting for a “forever home.”²⁰ It is estimated that over 5,000 children are in foster care in Oregon. Almost a tenth of children in foster care in our country live in either group homes or institutional

²⁰ U.S. Department of Health and Human Services, Administration for Children and Families (The “AFCARS Report”), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf>.

placements.²¹ According to an April 2023 report from the American Enterprise Institute, states and counties “are rapidly closing residential treatment and congregate care capacity while struggling to recruit and retain foster homes capable of serving higher-needs foster children.” As a result, foster children across the country are “increasingly being housed in a range of temporary settings, including county and state offices, hospitals, hotels, and shelters.”²²

Oregon is not immune from this crisis afflicting foster care. Local media report that 41 percent of children in foster care have experienced three or more placements during their time in care, including 15 percent with six or more placements.²³

According to a 2019 study by child psychologists, placement instability can “increase risk of behavior problems, contributing to additional moves, limiting the child’s ability to form a secure attachment with an adult, and decreasing chances of

²¹ Claire Withycombe, *Fact check: Are Fewer Children in Foster Care Now Than When Oregon Gov. Kate Brown Took Office?*, Salem Statesman Journal, Feb. 17, 2022, <https://www.statesmanjournal.com/story/news/politics/2022/02/17/oregon-governor-kate-brown-fact-check-state-address-foster-kids/6758379001/>.

²² Sean Hughes, *Why Foster Children are Sleeping in Offices and What We Can Do About It*, American Enterprise Institute Report, Apr. 2023, <https://www.aei.org/wp-content/uploads/2023/04/Why-Foster-Children-Are-Sleeping-in-Offices-and-What-We-Can-Do-About-It.pdf?x91208>.

²³ Libby Dowsett, *Lack of Placement Stability for Oregon Foster Youth Causes Traumatic Disruptions*, Street Roots, Oct. 13, 2021, <https://www.streetroots.org/news/2021/10/13/placement-stability>.

both reunification and adoption. In addition, placement instability potentially increases the risk of poor executive functioning and academic achievement, poor physical health and incarceration in adulthood.”²⁴ Naomi Shaefer Riley, an expert on child welfare and foster care, argues that from the earliest reports of child abuse and neglect to the decisions about where to place foster children, the child welfare system in the U.S. is failing. She asks that “under such circumstances, shouldn’t the foster care system take an all-hands-on-deck approach?”²⁵

Amici Diana Johnson is concerned that Oregon’s unconstitutional imposition of gender ideology on prospective foster and adoptive parents will limit the number of homes available to children in need. “I think they’re going to miss out on some great homes if they keep making these regulations,” she says.

Amici Nancy Harmon agrees, adding that “to not allow someone to adopt someone because they’re not going to refer to them as a pronoun, I just feel like it’s doing the children an injustice.”

²⁴ Sonya J. Leathers, Jill E. Spielfogel, Jennifer Geiger, James Barnett, Beth L. Vande Voort, *Placement Disruption in Foster Care: Children’s Behavior, Foster Parent Support, and Parenting Experiences*, Child Abuse Neglect, May 2019, <https://pubmed.ncbi.nlm.nih.gov/30889437/>.

²⁵ Naomi Shaefer Riley, *Fixing Our Child Welfare System to Help America’s Most Vulnerable Kids*, Independent Women’s Forum Policy Report, Dec. 2022, <https://www.aei.org/wp-content/uploads/2022/12/policy-focus-fixing-our-child-welfare-system-to-help-americas-most-vulnerable-kids.pdf?x91208>.

Amici Scott and Colleen Freeman think it a blessing for the many children whose biological parents are unable to care for them to find someone willing to step in to raise them.

II. Many Couples Have Been Inspired to Become Foster or Adoptive Parents by Their Religious Faith.

Faith is a powerful motivation for people to serve as foster or adoptive parents. Research suggests, for example, that Christians are three times more likely to consider fostering than other Americans and twice as likely to adopt.²⁶ According to researchers at the University of Tennessee, foster parents “who became aware [of the need for foster parents] through churches or other religious organizations fostered for more years than did the average respondent.”²⁷ Faith also helps many families navigate the challenges of foster care. Foster parents report that “faith/church support” was one of the top three factors in successful fostering. And where foster families are connected with religious organizations, they foster an average of 2.6 years longer than those who do not.²⁸

²⁶ The Barna Group, *Five Things You Need to Know about Adoption*, Nov, 4, 2013, <https://www.barna.com/research/5-things-you-need-to-know-about-adoption/>.

²⁷ Mary Ellen Cox, Cheryl Buehler, and John G. Orme, *Recruitment and Foster Family Service*, *Journal of Sociology & Social Welfare*, 29: 3, 2002, <https://doi.org/10.15453/0191-5096.2832>.

²⁸ *Id.*

A growing number of churches and faith-inspired institutions have “revolutionized the way foster and adoptive parents are recruited,” writes Shaefer Riley.²⁹ For example, “pastors have told their congregants that there are children in their ZIP code who need homes tonight.”³⁰ Many of these institutions have also focused on training foster parents by providing additional education for foster parents, including extra classes on how to handle children who have experienced severe trauma as well as creating a support system for foster families by enlisting other families to “help with respite care, deliver meals or simply pray for families doing foster care.”³¹

Amici Diana Johnson, reflecting on almost five decades of serving as a foster and adoptive mother, says that, in the face of the difficulties, she and her husband Dave drew strength from their faith: “The Lord helped us all through this time.”

Amici Nancy Harmon, with over 25 years as a foster and adoptive mother, echoes Diana, noting that “ultimately, as we serve these kids in our hearts, we just feel like that’s the way that we serve God.”

²⁹ Naomi Schaefer Riley, *How Churches Can Make a Difference in the Lives of Children Who Need Foster Care*, Deseret News, Oct. 31, 2023, <https://www.deseret.com/2023/10/31/23938647/foster-care-churches-training-black-families-gallup-poll>.

³⁰ *Id.*

³¹ *Id.*

Amici Scott and Colleen Freeman are committed to raising their grandson and credit their faith with helping them do so.

III. Participation in Child Welfare Services Should Not be Governed by Specious Hypotheticals that Violate Religious Belief or Compel Speech.

Jessica Bates seeks to adopt a pair of siblings under the age of nine and has, up to this point, satisfactorily met all of the standards for adoptive homes except for her unwillingness to agree to “affirm” the gender identity – as defined by Oregon – of a hypothetical infant or child that may be placed in her care.

The state’s demand for “assurances” is nothing other than an ideological snare set to identify and exclude anyone – especially those with religious convictions – unwilling to embrace gender ideology and is odious to the Constitution’s guarantees of religious exercise and free speech. The state of Oregon therefore commits two separate violations of the First Amendment.

A. Violation of Religious Freedom

Oregon is not alone in targeting child welfare services like foster care and adoption with specious demands for ideological conformity.

The City of Philadelphia, for example, was recently rebuked by the Supreme Court when it insisted that Catholic Social Services’ foster care placement agency abandon church teaching on the nature of marriage by agreeing to certify same-sex

couples.³² The Court’s opinion was written by Chief Justice Roberts. Roberts traced the longstanding tradition of the Catholic Church in serving underprivileged children in the U.S., as well as the Supreme Court’s prior cases dealing with government burdens on the free exercise of religion. Since the city had a system of individual exemptions available at the sole discretion of the city’s commissioner of the Department of Health and Human Services, its actions were thus subject to the “most rigorous of scrutiny.”³³ This meant that the Court must concern itself not with whether the city has “a compelling interest in enforcing its non-discrimination policies generally, but with whether it had such an interest in denying an exception to CSS.”³⁴ Thus narrowed, the city’s asserted interests were “insufficient.”³⁵

The Biden administration’s Department of Health and Human Services (HHS) has also proposed a new rule which would require state child welfare agencies to ensure that each child in their care who identifies as LGBTQI+ receives “a safe and appropriate placement and services.”³⁶ Rightly insisting that providers ensure “an

³² *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

³³ *Id.* at 1181.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Department of Health and Human Services, Administration for Children and Families, 45 CFR Part 1355 RIN 0970–AD03, Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B (Notice of Proposed Rulemaking), *Federal Register*, Vol. 88, No. 187, September 28, 2023, <https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21274.pdf>.

environment free of hostility, mistreatment or abuse based on the child’s LGBTQI+ status,” the rule goes on to demand that “to be considered a safe and appropriate placement, a provider is expected to utilize the child’s identified pronouns, chosen name, and allow the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression.”³⁷ The administration, at least on paper, is less restrictive than Oregon, claiming that it “takes seriously” its obligations to comply with laws that support and protect religious exercise and freedom of conscience and that it is “fully committed to thoroughly considering any organization’s assertion that any obligations imposed upon them that are necessitated by this proposed rule as finalized conflicts with their rights under those laws.”³⁸ While not categorically excluding religious providers from fostering children, the rule will nonetheless exclude faith-inspired placement agencies or individual families from serving “LGBTQI+-identifying youth.” The rule has yet to go into effect, but will soon enough be ripe for judicial review.

The assumption that children will be harmed if raised by religious Americans with traditional beliefs on the nature of human sexual identity is a deplorable expression of religious bigotry. Such prejudicial stereotyping ignores the charitable ethic that drives many religious foster and adoptive parents. Additionally,

³⁷ *Id.*

³⁸ *Id.*

research fails to suggest that foster children have worse outcomes when raised in traditional religious homes, but instead points to positive effects on the health of LBTQI+ youth.³⁹

B. Unconstitutional Compelled Speech

Jessica Bates hopes to share her Christian faith with all of her children – biological and those she hopes to adopt. But, crucially, she is opposed to using coercive tactics with any of them when doing so. And although she is unwilling to use “personal pronouns” that conflict with any hypothetical child’s biological sex, she has said she is willing to “use only a person’s name” and avoid contentious pronouns as best as she can. She rightly believes that such a reasonable response is consistent with “accepting” and “supporting” any child who expresses a gender identity different from their biological sex. But Oregon instead insists that Ms. Bates follow its script. Compelled speech of this sort is in clear violation of the First Amendment’s free speech guarantee.

³⁹ Byron Johnson, Stephen Cranney, Shaykh Mohammed Amin Kholwadia, Abdullah bin Hamid Ali, Ahmed Soboh, Mark Regnerus, Fr Paul Sullins, Eric Patterson, Thomas F. Farr, and Catherine R. Pakaluk, *Religious Foster Care Plays a Vital Role for Our Most Vulnerable Children*, Deseret News, Jun. 18, 2021, <https://www.deseret.com/opinion/2021/6/18/22540149/religious-foster-care-plays-a-vital-role-supreme-court-fulton-catholic-social-services>.

The Supreme Court’s decision this past term in *303 Creative LLC v. Elenis* supports this conclusion.⁴⁰ In that case, the Court affirmed longstanding precedent against government-compelled speech. Justice Neil Gorsuch, writing for the Court’s majority, denounced the state of Colorado’s attempt to use a broadly defined state anti-discrimination law to force a local businesswoman to create wedding websites for same-sex weddings against her religious belief in traditional marriage as between a man and a woman. “Laws along these lines have done much to secure the civil rights of all Americans,” wrote Gorsuch.⁴¹ “But in this particular case Colorado does not just seek to ensure the sale of goods and services on equal terms. It seeks to use the law to compel an individual to create speech she does not believe.”⁴²

Justice Gorsuch argued that “this Court’s First Amendment precedents teach otherwise.”⁴³ To illustrate his point, he listed a litany of cases including the Court’s 1943 decision that West Virginia’s attempt to force school children to salute the flag was unconstitutional,⁴⁴ a 1995 decision upholding the right of the organizers of Boston’s St. Patrick’s Day parade to exclude a group of gay, lesbian and bisexual

⁴⁰ 143 U.S. 2298 (2023).

⁴¹ *Id.* at 2307.

⁴² *Id.* at 2308.

⁴³ *Id.* at 2313.

⁴⁴ *Id.* at 2311 (“[i]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas,” citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

individuals from their event,⁴⁵ and a 2000 opinion upholding the Boy Scouts' leadership restrictions for scoutmasters.⁴⁶

As the Supreme Court has repeatedly confirmed,⁴⁷ the Constitution's free speech guarantee isn't just a prohibition against censorship. It also prohibits the government from forcing anyone to speak against his will. This longstanding principle against compelled speech is particularly important for Americans such as Ms. Bates who hold views on the nature of human sexuality that are rejected by newly fashionable ideologies.

⁴⁵ *Id.* at 2311 (“The veterans’ choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share,” citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)).

⁴⁶ *Id.* at 2310 (“The framers designed the Free Speech Clause of the First Amendment to protect the “freedom to think as you will and to speak as you think,” citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 660-661 (2000)).

⁴⁷ See also, *NIFLA v. Becerra*, 585 U.S. ___ (2018) (California’s Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act (FACT Act) requiring licensed pregnancy resource centers to notify women of free or low-cost services, including abortion, and unlicensed centers to notify clients to that effect violates the First Amendment’s guarantee of free speech) and *Janus v. ACFSCME*, 585 U.S. ___ (2018) (union agency fee arrangements in the public sector violate the First Amendment’s free speech guarantee).

CONCLUSION

For the sake of children hoping for a safe and loving home and in order to remedy Oregon's unconstitutional restrictions on foster care and adoption, *amici* respectfully request this Court to reverse the decision below.

Respectfully Submitted,

/s/ Andrea Picciotti-Bayer

Andrea Picciotti-Bayer

Counsel of Record

The Conscience Project

1350 Beverly Road, Suite 115

Mclean, VA 22101

(571) 201-6564

amariepicciotti@gmail.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,888 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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

DATED: January 16, 2024

/s/ Andrea Picciotti-Bayer
Andrea Picciotti-Bayer
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 16, 2024. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 16, 2024

/s/ Andrea Picciotti-Bayer
Andrea Picciotti-Bayer
Counsel of Record