

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

2:23-cv-00474-AN

The Honorable Adrienne Nelson

**BRIEF FOR AMICI CURIAE IDAHO, ALABAMA, ARIZONA
LEGISLATURE, ARKANSAS, FLORIDA, GEORGIA, INDIANA, IOWA,
KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, OHIO, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA,
AND WEST VIRGINIA SUPPORTING PLAINTIFF-APPELLANT AND
REVERSAL**

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INTEREST OF AMICI STATES

In Oregon, anyone wishing to serve as a foster parent must swear an oath to the Oregon Department of Human Services. The foster-parent applicant must pledge to “respect,” “accept,” and “support” the “sexual orientation,” “gender identity,” and “gender expression” of foster children—a pledge that in practice means confessing an ideology that demands everything from preferred pronoun use to active support of chemical and surgical alteration. Many persons of faith cannot make this pledge without violating their core religious beliefs. So they are excluded from serving as foster parents.

Idaho, Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, Texas, Utah, Virginia, West Virginia, and the Arizona State Legislature (“Amici States”) are each signatories to the Interstate Compact on the Placement of Children and are directly impacted by Oregon’s unconstitutional policy excluding, on account of their faith, otherwise qualified and well-suited families from fostering children. Amici States who may send children for placement in Oregon pursuant to the ICPC are concerned that Oregon’s law systematically disqualifies many persons of faith from serving as foster parents. Contrary to the position Oregon seems to have taken, Amici States believe that “devotion to one’s religious beliefs is considered to make one a more ethical, intelligent, useful member of society”—including in serving as foster parents. *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971). Amici States are further concerned that Oregon’s policy will creep and result in broader exclusion of religious persons. Today, Oregon targets

people of faith applying to serve as foster parents. Tomorrow, Oregon’s discriminatory targeting may expand to disqualify others from public service on account of their beliefs or speech. The more widespread policies like Oregon’s become, the more harm they will cause to Amici States and their citizens.

Accordingly, Amici States file this brief in support of Plaintiff-Appellant under Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF ARGUMENT

Oregon has pledged that its “Child Welfare Division stands in support of transgender, non-binary, gender-fluid and other LGBTQIA2S+¹ children, young people and families, including those who are in foster care and those who have been adopted.” OR. DEP’T OF HUM. SERVS., *ODHS stands in support with the LGBTQIA2S+ community and continues its commitment to gender-inclusive policies for all* (Apr. 6, 2023), <http://tinyurl.com/mwaujbdb>. Oregon’s administrative rules also require foster parents to pledge to support “LGBTQIA2S+” foster children and provide them with “safe and supportive environments.” *Id.* These dual support commitments should be

¹ LGBTQIA2S stands for lesbian, gay, bisexual, transgender and/or gender expansive, queer and/or questioning, intersex, asexual, and two-spirit. “The plus symbol is intended as an all-encompassing representation of sexual orientations and gender identities. This can also include (but is not limited to): Pansexual: A person who experiences attraction to a diversity of sexes and/or genders; Demisexual: Often referred to as Demi, this term describes someone who can only experience sexual attraction after an emotional bond has been informed. This bond does not have to be romantic in nature.” *Your Guide to Understanding LGBTQIA2S+ Definitions*, INSTI, <http://tinyurl.com/bdervm5p> (last visited Jan. 17, 2024).

able to coexist harmoniously without requiring systematic exclusion of foster parents with religious convictions. Unfortunately, Oregon has taken a zero-sum approach: foster-parent applicants must either conform their speech and convictions to Oregon's approved forms or be declared unfit to serve as a foster parent, even of a child sharing the same religious convictions.

Religious applicants like Jessica Bates cannot take the required oath while living consistently with their deeply held religious beliefs. The good news for them is that the First Amendment prevents governments from making them choose between their faith and participation in society. No government can deny "religious people . . . the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 698 (1994). Oregon's law flunks this basic precept. And contrary to the district court's holding, the First Amendment protects foster-parent applicants just as much as it protects other members of society. *See* ER-010 (attempting to distinguish *Masterpiece Cakeshop*).

Oregon's law also penalizes people of faith because of their beliefs. It requires applicants to disclose their views on hotly disputed issues, and any applicant expressing a disfavored viewpoint is promptly disqualified from participation. Of course, the First Amendment disallows such retaliation.

There is no limiting principle to either the district court's or Oregon's reasoning. Experiments on liberty that go unchecked become strengthened by exercise and

entangled in precedents. *See* James Madison, *Memorial and Remonstrance* (1785), <https://tinyurl.com/bdds5am8>. Here, it is not difficult to see the next applications of Oregon’s unconstitutional law. Unchecked, it will spread and effectively ostracize people of faith from society. The First Amendment exists to prevent that very thing. And its protections apply against Oregon’s law, which must be enjoined if the First Amendment is to be given force. Amici States show that states can protect minor foster children without discriminating against and excluding religious foster-parent applicants.

ARGUMENT

I. Oregon’s LGBTQIA2S+ Oath Requirement Sidelines People of Faith From Society.

Oregon’s requirement to ally with specific LGBTQIA2S+ views tells religious people to take their faith and stay home. By the district court’s lights, unless these prospective parents change their deeply held beliefs and “defend as valid, right, just, or authoritative” a now-favored ideology, Oregon officials may automatically disqualify them from participating in Oregon’s foster system. *See* ER-025. That is classic viewpoint and religious discrimination. The First Amendment has no tolerance for such State-imposed orthodoxy. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Quite the opposite. The First Amendment specially shields the domain of the mind and heart from government coercion or penalty. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74-76 (1990); *Thomas v. Collins*, 323 U.S. 516, 531 (1945). And it does so in overlapping and complementary ways—“doubly protect[ing]” the religious. *Kennedy v.*

Bremerton Sch. Dist., 597 U.S. 507, 523-24 (2022). The Amendment reminds governments that Americans are free to speak or not speak; *Hurley v. Irish-American Gay, Lesbian Bisexual Group of Boston*, 515 U.S. 557, 573 (1995); they are free to hold moral convictions and act on those convictions; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); and no government can invade the secured jurisdiction that is a man’s conscience—not even by measures exerting subtle pressure on the religious. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 548 U.S. 617, 638-39 (2018). Oregon’s law pays no heed to these principles, and it isn’t subtle about it either.

For example, Oregon openly directs foster parents to provide foster children with “access to a variety of books, movies, and materials” that promote “same-gender relationships” and to display “LGBTQ-affirming” symbols, like pink triangles, rainbows, or ally flags—emphasizing, with bolded lettering, the directive applies “whether or not a youth in [their] care openly identifies as LGBTQ+.” ER-290-291. And foster parents are expressly forbidden from taking their foster children to “religious activities” or “family gatherings” that may be “unsupportive of people with diverse [Sexual Orientations, Gender Identities, and Expressions].” *Id.*

Many believers of major religions cannot accept this canon. Christians like Ms. Bates believe that LGBTQIA2S+ ideology fundamentally rejects God as Creator. ER-401-407 at ¶¶ 118-63. Many Jews recognize laws that mandate male-female union, which are “the paradigm *mitzvot* [(commandments)] because they reflect the uniquely Jewish approach to sanctifying the physical world through *mitzvah* observance.” Rabbi

Avraham Peretz Friedman, *Jewish Sexual Ethics*, Nishmat's Women's Health and Halacha, <http://tinyurl.com/mssa49a8> (last visited Jan. 17, 2024). And many Muslims reject same-sex attractions as sinful. Mobeen Vaid, *Can Islam Accommodate Homosexual Acts? Qur'anic Revisionism and the Case of Scott Kugle*, 34(3) *Am. J. Islam and Soc'y*, 45, 77-78 (July 1, 2017), <http://tinyurl.com/32jdy782>.

Oregon officials aren't winking and nodding with each other behind closed doors to exclude persons of faith. Oregon has instead made it official policy that the faithful cannot participate in a state program unless they set aside their convictions regarding human sexuality. As Ms. Bates's case demonstrates, when Oregon says foster parents must swear "respect," "accept[ance]," and "support," it enforces the oath requirement and won't tolerate anything short of an enthusiastic alliance proved by advance pledges of specific action. *See* ER-343-344 (explaining basis for Ms. Bates's disqualification was her refusal to facilitate cross-sex hormone treatments for children). The obvious outcome is that persons of faith are excluded from the foster care system. *See Blais v. Hunter*, 493 F. Supp. 3d 984, 996 (E.D. Wash. 2020) (explaining that Washington's similar requirements "work to burden potential caregivers with sincere religious beliefs yet almost no others").

But the trajectory of the law is even more alarming. Nothing limits the district court's reasoning from being broadly applied to numerous other state services and effectively sidelining persons of faith from society. Guardians *ad litem*, state medical personnel, and public school teachers all work closely with children and cannot escape

the same logic Oregon has applied against foster parents. And no one should think that anti-discrimination laws will give Oregon any hesitation in going after persons of faith in those fields. By statute, Oregon assures foster-parent applicants that “an individual may not be disqualified from providing child welfare services to a child or ward . . . [o]n the basis of . . . religion.” Or. Rev. Stat. § 418.039. Yet that statute did nothing to protect Ms. Bates from Oregon’s religious intolerance.

The district court believed that Oregon and its officials are not intentionally hostile “toward plaintiff’s religious beliefs; rather they are focused on the welfare of the child.” ER-011. According to the district court, the “plaintiff’s willingness to ‘love and support’ a child” is not “sufficient to ensure that the child will *feel* loved and supported.” ER-010-011 (emphasis in original). But the district court’s speculation about certain children does not justify the blanket disqualification Oregon imposes on religious individuals. And whether intentional or not, Oregon’s law punishes the religious for their beliefs. That runs counter to the whole purpose of the First Amendment, which “requires governments to protect religious viewpoints, not single them out for silencing.” *Archdiocese of D.C. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1200 (2020) (Gorsuch, J., respecting the denial of certiorari). Oregon would do well to remember that Americans “are a religious people whose institutions presuppose a Supreme Being” and that states must not “prefer[] those who believe in no religion over those who do believe.” *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). History need not be consulted long to learn that “a society is only truly free when individuals are left free

from direct or indirect pressure to abandon their own cherished religious beliefs for whatever set of beliefs currently holds government favor.” *Kendrick v. Bowen*, 657 F. Supp. 1547, 1569-70 (D.D.C. 1987).

II. Oregon’s LGBTQIA2S+ Oath Requirement Targets and Discriminates Against People of Faith.

Ms. Bates cannot live out her faith consistently and comply with Oregon’s LGBTQIA2S+ policies. The same is true for numerous other faithful religious adherents. By placing a special burden on Ms. Bates based on her religious identity, Oregon has flouted basic Free Exercise Clause protections.

The Supreme Court has made clear that “the Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (cleaned up). In other words, a State may not deny an individual “a generally available benefit solely on account of religious identity”—doing so “imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.” *Id.* (cleaned up).

Here, Oregon targeted and discriminated against Ms. Bates because of her religious beliefs. The only basis Oregon officials gave for her disqualification was her doctrinal stance on human sexuality. *See* ER-343-344. Moreover, the materials Oregon provides foster parent applicants expressly denounce “religious” systems based on

certain disfavored beliefs. *See* ER-370 (forbidding “religious activities” that are “unsupportive” of “SOGIE”—meaning, “sexual orientation, gender identity, and gender expression”—beliefs). There’s no question that fostering is a “generally available benefit,” and Oregon has denied that benefit solely on account of Ms. Bates’s religious identity. *See Trinity Lutheran*, 582 U.S. at 458. That is why the Court in *Blais* found a nearly identical Washington policy unconstitutional. *Blais*, 493 F. Supp. 3d at 1000. The laws “condition the availability of benefits upon [the applicant’s] willingness to violate a cardinal principle of her religious faith,” which “effectively penalizes the free exercise of her constitutional liberties.” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Thus, Oregon impermissibly imposes a penalty on the free exercise of religion. *Trinity Lutheran*, 582 U.S. at 458.

The district court dismisses these constitutionally significant concerns by finding that “religious beliefs are not the only basis for anti-LGBTQ+ views” and that some religious individuals may believe “that their religion encouraged them to accept LGBTQ+ identities.” ER-015. These varying spectrums of beliefs, the Court found, made it “difficult to parse how the government would be endorsing a secular viewpoint over a religious viewpoint.” *Id.* But the district court misunderstands First Amendment protections. Religious discrimination does not need to impact *only* the religious. And it also does not need to impact *every* religious individual the same.

The district court also wrongly relied on *Employment Division, Department of Human Resources of Oregon v. Smith*. *See* ER-007. Cleverly crafted laws that amount to

religious gerrymanders won't survive just because they're drafted with facial neutrality. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* The policy and its implementing materials aren't covert, but regardless, as the *Blais* court correctly found, such "regulations and policy operate as a religious gerrymander and are thus not neutral." *Blais*, 493 F. Supp. 3d at 998. The *Smith* standard does not open the door for Oregon to "punish the expression of religious doctrines it believes to be false" or to "impose special disabilities on the basis of religious views or religious status." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Oregon has done both here, so the district court's decision should be reversed.

It's important to keep in mind that enjoining the law does not prevent Oregon from protecting children or advancing other important state interests. Amici States, like Oregon, have statutory duties to protect foster children. *See, e.g.*, Idaho Code § 39-1211. But Amici States do this without discriminating against religious individuals and while upholding their constitutional rights. That is why certain Amici States have recently reminded the U.S. Department of Health and Human Services that no government may "force speech on foster parents" by requiring them "to use another's preferred pronouns by government fiat."² Likewise, many states have a "Bill of Rights" that

² Letter from Attorneys General of Alabama, et al. to Aysha E. Schomburg, Assoc. Comm'r, U.S. Dep't of Health and Hum. Servs. (Nov. 27, 2023) <http://tinyurl.com/5f4y5a2b>.

protects foster children, ensuring protection and respect for *every* foster child. *See, e.g.*, Ark. Code Ann. § 9-28-1003; 18 Miss. Code R. § 6-1-A-II-XIV; 26 Tex. Admin. Code § 749.1003. These states have shown that protecting foster children isn't a zero-sum proposition. Respecting the religious rights of foster parents and protecting foster children go hand in hand.

Here, however, Oregon wants to “overbalance” First Amendment rights, so it must demonstrate it has “interests of the highest order.” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). It cannot burden religious rights and hope to benefit from only rational basis review.

III. Oregon’s LGBTQIA2S+ Oath Requirement Retaliates Against People of Faith.

Oregon’s law also amounts to First Amendment retaliation. Oregon welcomed Ms. Bates’s interest to serve as a foster parent and guided her through the application process until she spoke the wrong message. At that point, her services were no longer welcomed and she was immediately disqualified. The First Amendment prohibits that type of speech retaliation.

“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.” *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citation omitted). This means that a government official may not “deny a benefit to a person because of his constitutionally protected speech”—even when “a person has no ‘right’ to a valuable governmental benefit and even though the

government may deny him the benefit for any number of reasons.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). A government need not directly prohibit speech to run afoul of the First Amendment; it is enough if the government effort has a “deterrent, or ‘chilling,’ effect.” *Bd. of Cnty. Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (citation omitted).

Oregon’s law runs headlong into this First Amendment no-no. During the application process, Oregon requires foster parent applicants to disclose their views on LGBTQIA2S+ issues. If they take the oath and speak the right message, they’re allowed to proceed and participate. But if they refuse the oath and speak the wrong message, they are promptly disqualified and denied the benefit. That is textbook First Amendment retaliation. And it also snubs “a bedrock principle underlying the First Amendment”—that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted).

The district court rightly noted that Oregon engaged in content and viewpoint discrimination against Plaintiff. ER-031. The district court therefore properly held that strict scrutiny applied. But the district court erroneously found—at the pleading stage—that Oregon satisfied that demanding standard.

The interest Oregon asserts in protecting LGBTQIA2S+ children is insufficient. *See* ER-032. First, Oregon does not need to exclude all religious dissenters in order to see to it that a significant minority of children have LGBTQIA2S+-supportive

placements. In fact, Oregon’s Department of Human Services states that it “work[s] [with foster parents]” to “decide which child or children are a good fit for [the foster parents’] family,” and so “[b]efore a child comes into [their] home, [foster parents] will be given information about the child to help [them] decide if the placement is right for [them].” *How to Become a Resource Parent*, OREGON.GOV <http://tinyurl.com/4y8xbxbs> (last visited Jan 17, 2024). Accordingly, protection of children appears to be pretextual.

Second, contrary to the district court’s assertion, Oregon’s status of wards of foster children does not give it license to engage in viewpoint discrimination. *See* ER-021-22, 033. A state “cannot silence protected speech by wrapping itself in the cloak of parental authority.” *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 960 (8th Cir. 2003). Oregon’s overbroad requirements—for instance, directing foster parents to expose all children to materials that promote LGBTQIA2S+ views on the one hand and forbidding exposure to environments unsupportive of LGBTQIA2S+ views on the other—is a blatant attempt to “restrict speech in order to control a minor’s thoughts,” which a state may not do. *See Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009).

A final point. Amici States are not minimizing the need to protect children. Indeed, States are principally responsible for the welfare of their citizens. Amici States will be amongst the first to defend laws that properly protect society’s most vulnerable. But pretextual protective measures that have deeply corrosive veins are a cancer to societal welfare. They warrant no deference because their aim is not legitimate

protection. And the consequences of sacrificing foundational liberties can never be justified. First Amendment liberties are sentinels of society, safeguarding and maintaining true citizen welfare. *See* William O. Douglas, Supreme Court Justice, *The One Un-American Act*, Speech to the Author's Guild Council in New York, on Receiving the 1951 Lauterbach Award (Dec. 3, 1952), *in* XXXVIII(4) *Vassar Quarterly*, 2 (Mar. 1953) ("Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us."); *Asbcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end"). Oregon's law cannot withstand First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Date: January 18, 2024

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Circuit Case No.: 23-4169

I am the attorney representing *Amici* State of Idaho et. al.

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/s/ Joshua N. Turner
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Date: January 18, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

/s/ Joshua N. Turner
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Date: January 18, 2024