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,

Defendant-Appellees.

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

BRIEF OF PROFESSORS MARK REGNERUS, LOREN MARKS, CATHERINE PAKALUK, AND JOSEPH PRICE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Brennan A.R. Bowen
Counsel of Record
Holtzman Vogel Baran Torchinsky & Josefiak PLLC
2575 East Camelback Road, Suite 860
Phoenix, Arizona 85016
(602) 388-1262
Bbowen@holtzmanvogel.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are social science scholars who have researched and written extensively about family and human sexuality, as well as parental and household distinctions and their association with developmental outcomes in children. Their expertise in these fields will assist the Court's consideration of the issues presented by these cases. *Amici* are following scholars:

- Mark D. Regnerus (Ph.D., Sociology, University of North Carolina) is a Professor of Sociology at the University of Texas at Austin.
- Loren D. Marks (Ph.D., Family Studies, University of Delaware) is a Professor in the School of Family Life at Brigham Young University.
- Catherine R. Pakaluk (Ph.D., Economics, Harvard University) is an Associate Professor of Political Economy at the Busch School of Business at The Catholic University of America.
- Joseph Price (Ph.D., Economics, Cornell University) is a Professor of Economics at Brigham Young University.

[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.

SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly held that free speech may not be curtailed on an assumption—even a logical probability—that actions implicating the First Amendment will have a deleterious impact on others' health and wellbeing.[2] "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard."[3] More than just showing the existence of an "actual problem," the government must "show a direct causal link between [the acts being regulated] and harm to [be avoided] . . . . [A]mbiguous proof will not suffice."[4]

The challenged policy here flouts these principles. Specifically, the Oregon Department of Human Services ("ODHS" or the "State") is enforcing an overreaching eligibility policy for foster care adoption that—under the guise of reducing the potential risk of children feeling rejected over their potential sexual or gender self-identity—demands that many Christian and other religious parents change or suppress their longstanding reasonable belief systems in service to a new

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[2] *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) ("California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.")

[3] *Id.* at 799 (citations omitted).

[4] *Id.* at 799–800.

governmentally-imposed orthodoxy.[5] But the State's claims of potential risk are premised on dated and empirically-challenged research, rooted in biased samples and measures. Such bad science cannot possibly satisfy what the First Amendment demands.

As a result of this ill-founded policy, Christian parents—who have long shouldered a disproportionate share of the burdens in adopting children in need—are now forced to choose between their religious freedom and their laudable desire to open their households to children in need of loving homes. Indeed, it is a preventable tragedy that rests on faulty social science whose obvious methodological flaws *Amici* explain here.

ARGUMENT

I. The ODHS Is Overreaching By Enforcing Rules About Cultural Norms That Have No Empirical Basis In Social Science Research.

The lower court ruled against Plaintiff Jessica Bates in her effort to adopt a child from the foster program overseen by the ODHS.[6] This is because while Ms. Bates insists that she will love and accept any child placed with her—a fact which seems congruent with her experience of raising five of her own children—she

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[5] Under Oregon law, prospective adoptive parents must first obtain a home study ("Home Study") from either ODHS or an Oregon licensed adoption agency. Or. Rev. Stat. § 109.276(7)(a); Or. Admin. R. ("OAR") § 413-120-0220(1).

[6] *Bates v. Pakseresht*, No. 2:23-cv-00474-AN, 2023 U.S. Dist. LEXIS 203533, at *2 (D. Or. Nov. 14, 2023).

maintains that she would not be able to support demands by the State that she respond in particular ways to possible LGBTQ self-identity claims that might be made at some point by a child placed with her.[7] Thus, the State ruled that she is unfit for placement certification or adoption because of *possible* future harm produced by *potential* future conflict should a child placed with her self-identify as LGBTQ and feel rejected as a result.[8]

Plaintiff attested that she "had 'no problem loving [children] and accepting them as they are,"[9] regardless of any elective, developmental, or natal trait or characteristic—including those at issue in this case. The State takes pains to point out how exactly Ms. Bates's religious beliefs are anticipated to be in conflict with its policy on requiring applicants to "[r]espect, accept and support the…sexual orientation, gender identity, gender expression…of a child or young adult in the care or custody of [the State]…"[10] Yet the State is entirely unreflective about their own guidelines, which are themselves the product of unempirical claims about such things as the power of "preferred pronouns," the emotional states somehow fostered by seeing flags in various color schemes, and the endorsement of the purported ability to change one's dimorphic sex via invasive medical treatments in the pursuit

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[7] *Id.* at *4–8.
[8] *Id.* at *8–10.
[9] *Id.* at *8.
[10] *See id.* at *6, *8–10.

of calming gender dysphoria.[11] Rather than make an empirical case, the State—as well as the District Court—repeats borrowed notions that the performance of particular acts is what affirms, and hence soothes, a child's (paramount) identity concerns rather than love, attention, and embeddedness within the life of a family.[12]

The District Court's decision is self-contradicting and based on suspect social science. For example, it observed that "nowhere in the Rule is there a requirement that applicants agree to use a child's preferred pronouns."[13] Yet, at the same time, the District Court opined that "using a child's preferred pronouns goes hand in hand with creating an affirming environment for the child, because intentionally using a child's incorrect pronouns could not be understood as respecting the child's gender identity."[14] Until perhaps a decade ago (or less), talk of personal pronouns was largely unheard of. How can it so quickly become essential? Only by an ideological move rather than studied practice.

But both the State and the District Court fail to acknowledge that capable adoptive parents vary widely in how exactly they have supported their children. Parental support has long been understood to be the ample provision of material

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[11] *See id.* at *6–7.

[12] *See id.* at *58–73 (finding that the State had a compelling interest in requiring parents to "affirm" a child's self-selected gender identity, based primarily on social science cited by the State).

[13] *Id.* at *49 (referring to Or. Admin. R. ("OAR") § 413-200-0308).

[14] *Id.* at *53.

support, physical security, love, and a commitment to the provision of education and ample socialization. Yet now the State purports to add to these fundamentals an ideological component in which parents must abide by what the child asserts. This new turn seems far more attuned to discerning "the applicant's suitability for a specific child" than the "minimum standards for adoptive homes" that the Home Study is intended to assess.[15]

It is widely acknowledged that adopted children tend to have more difficulties than children living with their biological families. Even among children adopted as infants, mental health and behavioral disorders can manifest at double the rates of nonadopted children.[16] From depression, anxiety, and psychiatric needs[17] to behavioral disorders and substance abuse disorders,[18] adoptees tend to experience greater challenges and risks than the non-adopted—even a higher risk of suicidality exists among adoptees.[19] While children adopted out of foster care commonly experience socioeconomic benefits and greater parental investment in the provision

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[15] *See id.* at 5.

[16] Margaret A. Keyes, PhD, et al., *The Mental Health of US Adolescents Adopted in Infancy*, 162(5) Arch. Pediatrics & Adolescent Med. 419–25 (2008).

[17] Sandra Melero, et al., *Mental Health and Psychological Adjustment in Adults Who were Adopted During their Childhood: A Systematic Review*, 77 Children and Youth Services Review 188–96 (2017).

[18] Yolanda Sánchez-Sandoval & Sandra Melero, *Psychological Adjustment in Spanish Young Adult Domestic Adoptees: Mental Health and Licit Substance Consumption*, 89(6) Am. J. Orthopsychiatry 640–53 (2019).

[19] Margaret A. Keyes, et al., *Risk of Suicide Attempt in Adopted and Nonadopted Offspring. Pediatrics*, 132(4) Am. Acad. Pediatrics 639–46 (2013).

of needs (*e.g.*, medical, educational, etc.), their experience of increased health and behavioral difficulties are often not attenuated by their adoption.[20]

Given these longstanding associations, how could the State ever isolate causal effects on (suboptimal) child outcomes from the absence of a narrow range of parental affirmations? It cannot.

II. The State Uniquely Privileges Sexual And Gender Identities, Even While Claiming The Authority To Enforce Parenting Norms Across An Entire Spectrum Of Concerns.

The litany of identities, statuses, and expressions listed in the District Court's—and the State's regulation—decision no doubt result in all manner of lived combinations.[21] And yet the State is suggesting a rank-ordering of sexual orientation, gender identity, and gender expression above the spiritual beliefs and cultural identities of the child. This case is not about race, ethnicity, national origin, immigration status, disabilities, and socioeconomic status (the State's grouping of concerns notwithstanding). Does the Home Study offer guidance about how to support other identities noted (*i.e.*, a child's immigration status, socioeconomic status, or national origin) in such a way as to suggest that if parents fail to comply, their child could become anxious, depressed, and even suicidal?

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[20] Nicholas Zill & Matthew D. Bramlett, *Health and Well-being of Children Adopted from Foster Care*, 40 Child. & Youth Serv. Rev. 29–40 (2014).
[21] *See Bates*, 2023 U.S. Dist. LEXIS 203533, at *5–6.

At bottom, there is little consistent empirical evidence about the costs or benefits for children when adoptive parents "respect, accept, and support" a child's identities—which themselves vary in their age-graded uptake. Therefore, it is straightforward to conclude that this is State overreach—not into how parents love, care for, protect, and provide for their adopted children—but into the details of encouraging particular attitudes and behaviors believed to be consonant with particular identities, whether native to the child upon adoption or developing at some later point. Many, if not most, of us were not "allowed to dress and groom"[22] exactly as we pleased, and it was not considered poor parenting. This level of detail falls outside of the State's proper purview.

As recently as 2012, the U.S. Department of Health and Human Services, Administration on Children, Youth and Families ("ACYF") endorsed a framework that "identifie[d] four basic domains of well being: (a) cognitive functioning, (b) physical health and development, (c) behavioral/emotional functioning, and (d) social functioning. "[23] The focus was both on factors "internal to the child" but also his maturing response to the "ecological environment that encompasses" him.[24]

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[22] *Id.* at 61 (citing OAR § 413-200-0352(1)(d)).

[23] Informational Memorandum from U.S. Department of Health and Human Services, Administration on Children, Youth and Families, ACYF-CB-IM-12-04, at 2 (Apr. 4, 2024), available at https://www.acf.hhs.gov/sites/default/files/documents/cb/im1204.pdf (hereafter, "ACYF Memo").

[24] H.N. Taussig & T. Raviv, *Foster Care and Child Well-being: A Promise Whose Time Has Come*, 2 Handbook of Child Maltreatment 393–410 (2014).

Newly proposed (Federal) foster care rules are narrower than the State of Oregon's because the former does not require all foster homes to be certified as an "LGBTQI+ safe and appropriate" placement, thus allowing for some religious exemptions.[25] However, homes for LGBTQI+-identifying children must be certified as "safe," meaning the foster parent(s) must create "an environment free of hostility, mistreatment, or abuse based on the child's LGBTQI+ status."[26] Although the ACYF's previous framework was eminently reasonable, the new rules reach beyond this to demanding and prescribing specific actions that purportedly affirm a child's sexual orientation or gender identity. This will invariably exclude many capable family providers.

Today the state actors—from federal to local—appear increasingly invested in demanding a far more extensive set of household norms, rules, and regulations of parents, even while failing to document that such new norms demonstrably improve the lives of children. How does censuring Plaintiff's behavior—by denying her application to become a foster mother—not signal a creeping willingness on the part of the State to revoke "non-affirming" biological parents of their custodial rights to their own LGBTQ+ child in their home? *Amici* do not discern how the one is unconnected to the other.

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[25] *See* Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, 88 Fed. Reg. 66752 (Sept. 28, 2023) (to be codified at 45 C.F.R. 1355).
[26] *Id.*

Fundamentally, this case is about demanding evidence of ideological behavior from would-be foster and adoptive parents, when what is needed is their sacrificial love—something no state can provide a child. A family is itself a small society. And families together comprise communities (or polities) but are not themselves simply subservient to the same. In American society, governments do not have the first and last word on how families love, instruct, form, and care for their children[27]. The polity exists for the sake of its families and is to respect rather than dominate them.

III. The District Court's Decision Implies Unscientific Claims About The Fixedness Of Child Characteristics, Regardless Of Age.

OAR § 413-200-0308(2)(k) plainly provides that would-be parents' actions—particularly but not exclusively in speech—are to "[r]espect, accept and support the . . . spiritual beliefs . . . of a child or young adult. . . ." This implies that a child's beliefs—regardless of their age—are fixed, developed, and amply discernible for a foster parent to reinforce but never to shape or challenge. This is not simply unreasonable but developmentally nonsensical. Children change. Identities, interests, and beliefs are taken up and discarded, influenced by many sources. Parents naturally shape how their children think about religious and spiritual matters,

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[27] *See Obergefell v. Hodges*, 576 U.S 644, 687–88 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.")

including but not limited to the practices they exhibit. It will not be otherwise, regardless of state guidance, suggestions, and/or demands made of parents.[28]

The same is true of sexuality. No provision is made by the State for how the manifestation of sexual development varies by age. How does one support an 11-year-old who self-identifies as asexual or bisexual? Do they understand the meanings of such terms in the same way a post-pubertal adolescent or adult would? Of course not.

The District Court refers to "an LGBTQ+ child"[29] as if gender and sexual identity are discernible, fixed statuses regardless of age. This is not how biological and social reality works. For example, some gender dysphoric children desist. Others do not. Some seek invasive physical procedures, while others do not. Such nuance is absent in this case. Instead, the court seems to presume that the child is an adolescent—indeed, one with an elevated awareness of self and sexual and/or gender identity—but does not clearly state so. In support of its claim that the failure to "respect a child's LGBTQ+ identity imposes collateral harm on the child's development, safety, and physical well-being", the District Court leaned—at

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[28] Mark Regnerus, et al., *Social Context in the Development of Adolescent Religiosity* 8 Applied Dev. Sci. 27–38 (2004).

[29] *See, e.g.*, *Bates*, 2023 U.S. Dist. LEXIS 203533, at *16.

length—on findings from two data collection efforts: the Trevor Project and the Family Acceptance Project.[30] Put charitably, this was misguided.

A. The Trevor Project Is A Simple Convenience Sample, But It Is Not Designed To Answer Questions About LGBTQ Self-Identity And Suicidality.

Sexual minority youth report higher rates of suicidal ideation than their heterosexually-identified peers.[31] That fact is not at issue here. The relevant question is why and, in particular, what (if any) role parental behavior and home environment have to do with it. The District Court described the Trevor Project as "a survey of approximately 34,000 LGBTQ youth aged 13-24."[32] Nevertheless, the Trevor Project's research design is poorly suited for answering questions about a population of people. Rather, it is designed to suggest what *might* be occurring within a population, or what is popular among a group of people whose representativeness is unknown.[33]

When social scientists wish to understand what's going on in the United States, they design population-based studies. Given recent growth in the *population*

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[30] *E.g.*, *id.* at *17 n.3.
[31] Alexandra H. Bettis, et al. *Prevalence and Clinical Indices of Risk For Sexual and Gender Minority Youth in an Adolescent Inpatient Sample*, 130 J. Psychiatric Research, 327–332 (2020).
[32] *Bates*, 2023 U.S. Dist. LEXIS 203533, at *17 n.3.
[33] *See generally*, 2022 National Survey on LGBTQ Youth Mental Health, Trevor Project (2022), https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf (hereafter "Trevor Project 2022 Survey").

of LGBTQ-identified persons in the past decade, the Trevor Project's having resorted to advertising its survey, to dramatically boost its sample size, is poor form. It is both unnecessary—the population is not that small to prompt a turn away from representative designs—and it caters to activists by advertising in media spaces whose content more politically-motivated persons consume. This approach is akin to marketing a survey about, say, exercise and fitness habits to patrons of a national gym chain. Such would obtain a biased sample that would yield a skewed perspective. The same is true of the Trevor Project. Forty-eight percent of its respondents identified as transgender or nonbinary, a figure far larger than the wider population of LGBTQ.[34]

As for suicidal ideation ("SI") and attempts ("SA"), these were already on the rise, with children's hospitals witnessing a two-fold increase in SI/SA visits between 2007 and 2015.[35] And in October 2021, the major children's medical associations (including the American Academy of Pediatrics) all declared a national emergency in child and adolescent mental health because the existing mental health challenges among minors were so severe.[36] Indeed, any survey aimed at documenting

[34] Trevor Project 2022 Survey, at 3.

[35] Brett Burstein, et al., *Suicidal Attempts and Ideation Among Children and Adolescents in US Emergency Departments, 2007-2015,* 173(6) JAMA Pediatr., 598–600 (2019).

[36] Rachel Cafferty, et al., *Children and Adolescents with Suicidal Ideation and the Emergency Department*, 331(3) JAMA 193–94 (2023).

psychological distress that was fielded in 2021 was invariably confounded with the pronounced, historically unprecedented experience of COVID-era shutdowns, schools going virtual, etc.

Despite this, two-thirds of the Trevor Project report's "Key Findings" concerned suicidality.[37] While fears about children's suicide are understandable and ought never to be dismissed, such fears should not utterly supplant scholarly evaluations of suicidality. Too often, suicidal ideation is simply equated with attempted suicide. In reality, the association between the two varies notably in subpopulations.[38] Population-based data, also collected during the COVID-19 era, complicates matters further, given that young adults ages 18–24 reported suicidal thoughts in the past month at rates 12 times higher than that of respondents age 65 and over, and six times that reported by those between 45 and 64 years old (25.5, 3.8, and 2.0 percent, respectively).[39] Based on thoughts of suicide, then, it could be said that there is a crisis of suicidality among the young. But the crisis of *actual* suicide affects older Americans to a far more significant degree.[40]

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[37] Trevor Project 2022 Survey, at 4.
[38] Beth Han, et al., *Prevalence and Correlates of Past 12-Month Suicide Attempt Among Adults With Past-Year Suicidal Ideation in the United States,* 76(3) J. Clinical Psychiatry 295–302 (2015).
[39] Mark É. Czeisler, et al., *Mental health, substance use, and suicidal ideation during the COVID-19 pandemic — United States*, 69(32) MMWR Morb Mortal Wkly Rep. 1049–57 (2020).
[40] Holly Hedegaard, et al., *Suicide Mortality in the United States, 1999–2019*, Center for Disease Control and Prevention, NCHS Data Brief, No. 398 (Feb. 19, 2021).

The CDC did not track suicide among youth identifying as transgender but did note elevated rates among individuals identifying as lesbian, gay, or bisexual. Suicides and attempted suicides among the self-identified transgender population are indeed higher than those in the population at large.[41] While it's difficult to determine this subpopulation's risk of completed suicide with accuracy, it's not impossible: analyses of data from the UK's Tavistock gender clinic revealed an estimated annual suicide rate of 13 per 100,000.[42] While the rate is 5.5 times greater than the overall adolescent suicide rate, it pays to retain perspective. The actual proportion of patients who died by suicide was only 0.03%, which the author describes as "orders of magnitude smaller than the proportion of transgender adolescents who report attempting suicide when surveyed."[43] Exaggerating the actual suicide risk, the author concluded, is irresponsible and could exacerbate trans-identifying teens' risk of self-harm. Meanwhile, suicide rates have increased strikingly in the general population over the past decade.[44]

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[41] Brian C. Thoma et al., *Suicidality Disparities Between Transgender and Cisgender Adolescents*, 144(5) Pediatrics (2019).
[42] Michaeal Biggs, *Suicide by Clinic-Referred Transgender Adolescents in the United Kingdom*, 51(2) Archives of Sexual Behavior, 685–90 (2022).
[43] *Id.* at 688.
[44] Jeanne Whalen, Youth Suicidal Behavior is on the rise, Especially Among Girls, Wall St. J. (May 16, 2018), https://www.wsj.com/articles/youth-suicidal-behavior-is-on-the-rise-especially-among-girls-1526443782.

An extensive, longitudinal "chart study" of all 8,263 adult, adolescent, and child referrals to an Amsterdam gender clinic between 1972 and 2017 documented that 41 natal men (0.8 percent) and 8 natal women (0.3 percent) died by suicide.[45] Among the former, suicide deaths had decreased over time, while it did not change in natal women. Only four suicide deaths were observed among patients referred to the clinic before the age of 18 (0.2 percent), which was a lower risk than among adult patients (0.7 percent).

Does parental response exacerbate risk among young people? Does failure to endorse and affirm the identity interests of LGBTQ youth elevate suicidality among them? Even among this population, "suicide is extremely rare"[46] and is "rarely caused by a single circumstance or event."[47] Indeed, implying or reporting a presumed cause leaves the public with a simplistic and often misleading understanding of suicide. Such a practice, implied by the State by imputing to Plaintiff the risk of subsequently heightening an adoptive child's proneness to

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[45] The median age at first visit, however, was 25. *See* C. M. Wiepjes et al., *Trends in Suicide Death Risk in Transgender People: Results from the Amsterdam Cohort of Gender Dysphoria Study (1972–2017)*, 141(6) Acta Psychiatrica Scandinavica 486–91 (2020).
[46] *Evidence Base: Psychosocial Difficulties*, Gender Identity Development Service, https://gids.nhs.uk/evidence-base (last visited Jan. 18, 2024).
[47] *Risk and Protective Factors, Suicide Prevention*, Centers for Disease Control, https://www.cdc.gov/suicide/factors/index.html (last visited Jan. 18, 2024).

suicide, is inconsonant with commonly understood ways of understanding and preventing suicide contagion.

In an impressive study of 6,423 adolescents ages 12–17 who visited 14 emergency rooms and who completed an assessment of suicide risk and protective factors, researchers found that "[d]epression, bullying victimization, and sexual abuse" were the most prominent risk factors, while "parent-family connectedness and positive affect" were the strongest protective factors *against* suicidal ideation and suicide attempts among sexual minority youth.[48] Note that while these data are from a cross-sectional study and hence cannot document causation, the self-reports are coming directly from obviously troubled sexual minority youth. They didn't simply report about their situation online at the prompting of a social media ad. They had already gone to the hospital. And even the State would agree that Plaintiff in this case would earnestly seek to develop "parent-family connectedness" and display "positive affect" toward any child placed in her custody and care.

[48] Adam G Horwitz, et al., *Risk and Protective Factors for Suicide Among Sexual Minority Youth Seeking Emergency Medical Services,* 279 J. Affective Disorders 274–81 (2020).

B. Like The Trevor Project, The "Family Acceptance Project" Wields Influence In This Decision That Far Outpaces Its Quality And Design.

The District Court relied heavily on a series of studies by Caitlin Ryan that draw on the Family Acceptance Project (hereafter, "the Project").[49] The Project's data show "clear links between family acceptance in adolescence and health status in young adulthood" and that "young adults who reported low levels of family acceptance had scores that were significantly worse for depression, substance abuse, and suicidal ideation and attempts."[50]

The claims and recommendations of the State in their guidance—what to do and what not to do to support your "LGBT child"—appear to be reinforced by the Project.[51] In a key paragraph from Ryan's *Pediatrics* 2009 study, the authors conclude that "[h]igher rates of family rejection were significantly associated with poorer health outcomes."[52] In particular:

> …LGBTQ+ young adults who experienced higher levels of family rejection during adolescence "were 8.4 times

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[49] *See Bates*, 2023 U.S. Dist. LEXIS 203533, at *67–73.
[50] Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23(4) J. Child & Adolescent Psychiatric Nursing 205, at 208 (2010) (hereafter "Family Acceptance").
[51] *See Oregon Department of Human Services Child Welfare Procedure Manual*, ODHS, pp. 1081, 1632, 1812, 1815, http://www.dhs.state.or.us/caf/safety_model/procedure_manual/Oregon-DHS-Child-Welfare-Procedure-Manual.pdf (last visited Jan. 18, 2024).
[52] Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in Ehite and Latino Lesbian, Gay, and Bisexual Young Adults*, 123(1) Pediatrics, 346–52 (2009).

> more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse."[53]

How confident should the State be in the Project's findings? Not confident at all. The Family Acceptance Project is a survey data collection effort that interviewed 245 young adults courted from LGBT organizations and bars within 100 miles of San Francisco. It appears to have concluded not more recently than 2005[54]—19 years ago—and plays an outsized and unmerited role in this case. This study's sample, which carries significant weight in the court's decision, includes no children at all. Everyone is at least 21 years old, and "half [of the sample] were from clubs and bars serving this group."[55] It would not include anyone presently in foster care.

Therefore, the court's empirical findings largely hinge on a survey of adults who were sampled from San Francisco-area gay community organizations and bars. No doubt these 245 people—a woefully small sample size—had no idea how influential the time they spent filling out a survey would eventually be nearly 20 years later. It is empirically irresponsible to cite such a study in a very consequential legal case concerning the adoption of children.

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[53] *Id.* at 346.

[54] Russell B. Toomey et al., *High School Gay–Straight Alliances (GSAs) and Young Adult Well-being: An Examination of GSA Presence, Participation, and Perceived Effectiveness*, 15(4) Applied Dev. Sci. 175–85 (2011).

[55] Ryan et al., (2009), at 347.

The Court's decision notes that "the government has presented evidence that an affirming home environment can mitigate the harm that other factors cause to an LGBTQ+ youth's mental health and outcomes."[56] As stated, to "mitigate" means that an affirming home can lessen, salve, or reduce the harm that other factors have on the mental health of LGBTQ youth. Statistically, this statement implies that affirmation works to make other harmful factors "better" or less damaging. That is an implausible claim.

The problem with the Project runs far deeper than what it claims to have learned, though. An examination of how its measures of family affirmation and rejection were developed further undermines confidence in it to teach anything except that which its principal investigators and its participants hold to be true. This is because it is the product of what's called "participatory action research,"[57] which means the data collection and analyses are—from start to finish—designed and advised by parties interested in the outcomes and in fostering social change as a result of the project.

While some degree of bias is unavoidable in the conduct of research, participatory action research *invites* bias—personal perspectives—to shape a study's very design rather than merely color the subsequent interpretation of data:

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[56] *Bates*, 2023 U.S. Dist. LEXIS 203533, at *68–69.
[57] Fran Baum, et al., *Participatory Action Research*, 60(10) J. Epidemiology and Comm. Health, 854–57 (2006).

> This study used a participatory research approach that was advised at all stages by individuals who will use and apply the findings—LGBT adolescents, young adults, and families—as well as health and mental health providers, teachers, social workers, and advocates. Providers, youth, and family members provided guidance on all aspects of the research, including methods, recruitment, instrumentation, analysis, coding, materials development, and dissemination and application of findings.[58]

This bias that participatory action research invites can be illustrated by using Plaintiff as an example. Plaintiff is an evangelical Christian. But social scientists of organized religion know that to understand how such Christians think and act, you should not just seek them out in churches or other organized forms of Christianity like small group Bible studies or prayer groups. There are many such Christians who aren't active in this manner. But if *Amici* wished to shed positive light on such a group, participation action research is one way to nearly guarantee it. Likewise, the Project's sample is hardly random and not reflective of the population of LGBTQ young adults, to say *nothing* of LGBTQ children and adolescents—the focus of this case.

The Project's survey was designed by consulting with 53 self-identified LGBT adolescents and their families who live in California. These 53 (very influential) interviewees were the source of the "list of 55 positive family experiences" that "assessed the presence and frequency of each accepting parental

[58] Ryan et al. (2010), at 206.

or caregiver reaction to participants' sexual orientation and gender expression when they were teenagers (ages 13–19)."[59] In other words, this is the source of the affirmative actions demanded of Plaintiff in the Home Study. Fifty-five is a lot of boxes to check for a would-be foster parent.

Furthermore, "family acceptance scale scores were calculated as the sum of whether each event occurred," using a 4-point scale (0 = never, 3 = many times).[60] Despite this, Ryan and her co-authors then elected to "lose information" by dichotomizing each of these affirmative actions as either *never* having happened (0) versus *ever* having happened (1). Consistency of action is not required.

Then Ryan and her coauthors simplify even further, calculating "a categorical indicator of family acceptance, dividing the distribution into even thirds" (that is, low, moderate, and high levels of family acceptance).[61] No matter what a parent does, they may well find themselves categorized as "low" on acceptance if two-thirds of the respondent's peers thought their own parent(s) did more.

Hence, on the basis of a non-representative convenience sample, yielding cross-sectional data whose measures were constructed in congruence with interested and motivated advocates and whose thresholds are arbitrary, Ryan and her

[59] *Id.* at 207.
[60] *Id.*
[61] *Id.*

colleagues go on to inform families everywhere about what to do and not to do to support the wishes of LGBTQ+-identified children in families.

Ryan's measures of family support, however, are far more ideological than they need to be. In a study analyzing New Mexico Youth Risk and Resilience Survey data, researchers noted that gender minority students "experienced higher rates of violence and self-harm and lower levels of support than cisgender students."[62] Family support, however, was associated with lower odds of self-harm and sexual violence. That makes sense.

But the New Mexico study's measures of family support were nothing like those in the Family Acceptance Project. Instead, family support was measured by the response to three questions:

- In my home, there is a parent or some other adult who is interested in my school work.
- In my home, there is a parent or some other adult who believes that I will be a success.
- When I am not at home, one of my parents/guardians knows where I am and who I am with.[63]

This is a fundamentally different type of family support than Ryan—and with her, the State of Oregon—is pushing for. Plaintiff's Home Study demonstrated her

[62] Danielle E. Ross-Reed et al., Family, School, and Peer Support Are Associated With Rates of Violence Victimization and Self-Harm Among Gender Minority and Cisgender Youth, 65(6) J. Adolescent Health 776–83 (2019).
[63] *Id.* at 778.

clear commitment to the kind of family support that *actually mattered* for curbing self-harm among gender minority students. The State's vision of an affirming environment seems more about endorsing identities than the kind of care that actually keeps children from risk and self-harm.

CONCLUSION

Christians in America have a long history of exhibiting interest in adopting children.[64] While there is no "right" to a foster child, the State should not create unnecessary and discriminatory barriers to certifying foster and adoptive parents who seek to provide stable, loving homes—households that have long varied widely (and over time) in quality of support, attentiveness, and care. It is in the best interests of children to be placed.

Oregon's statutes and viewpoint discrimination affect one of the largest potential sources of placement, and none too subtly suggest that Christian would-be-adoptive-parents should change their beliefs. Thus, many Christians, not to mention others with similar faith beliefs (such as Muslims or Orthodox Jews), would be conscientious objectors to this policy.

[64] Samuel L. Perry, *Growing God's Family: The Global Orphan Care Movement and the Limits of Evangelical Activism* (NYU Press 2017).

But unlike in other domains, conscience is not permitted by the State of Oregon. And yet even Caitlin Ryan—whose activist research methods undergird the State's key empirical claims in this case—admits that

> People of deep faith live their lives grounded by their religious beliefs and need to understand how they can support their LGBT child in the context of their deeply-held values. An important aspect of our work is helping parents and families understand that they can support their LGBT child even if they believe that being gay or transgender is wrong.[65]

Plaintiff Jessica Bates has no doubt demonstrated her parental competence to the State. What has changed is not the fitness of mothers like Jessica but the shift in understanding the State as parent—a role it has never been competent at, because states cannot love.

If the Court is to privilege rigorous tests of causation, then the State's showcasing of research on the associations between parental endorsement and mental health outcomes among LGBTQ+-identified children in their care comes up far short of a standard of confidence. As in *Brown v. Entm't Merchs. Ass'n*, so it is here: the cited research is "'based on correlation, not evidence of causation, and most of the studies suffer from significant . . . flaws in methodology.'"[66]

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[65] Caitlin Ryan, *Generating a Revolution in Prevention, Wellness, and Care for LGBT Children and Youth*, 23(2) Temp. Pol. & Civ. Rts. L. Rev. 331–44 (2014).
[66] *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800 (2011) (citation omitted).

Participatory action research ought never be the basis for scientific studies of cause-and-effect, or even reliable correlations. This is the fatal flaw in the main research relied upon by the District Court. But the court here opined that the "concerns about the quality of the research" in *Brown* "do not arise in this case."[67] *Amici* could not disagree more. Remarkably, the Court even "acknowledges that the amount of academic literature assessing the impact of home environments on LGBTQ+ youth is limited."[68] This is compounded by the reality that faulty perceptions of parental support may be a result, rather than a cause, of poor mental health among some adolescents.[69]

Of course home environment can "impact" a youth's health. But the court must do better than show that a "disaffirming home environment can negatively impact an LGBTQ+ youth's mental health and health outcomes."[70] "Can" or "might," are too speculative an altar on which to sacrifice the sacrosanct protections of the First Amendment.

In this particular case, we need to know with confidence that failure to *consistently* affirm adopted children in *particular* ways demonstratively incurs

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[67] *Bates*, 2023 U.S. Dist. LEXIS 203533, at *67.
[68] *Id.* at *68.
[69] Belinda L. Needham, et al., *Sexual Orientation, Parental Support, and Health During the Transition to Young Adulthood. Journal of youth and adolescence,* 39 J Youth Adolesc. 1189–98 (2010).
[70] *Bates*, 2023 U.S. Dist. LEXIS 203533, at *68.

negative impacts (and even then, such should be weighed against the impact of not being placed at all). It is true "that state is not required to demonstrate a scientific certainty to support compelling interest."[71] But there is considerable space between "can" and "does." That something "can" occur is able to be documented by anecdotal evidence. But to issue a sweeping rejection of applicants because of undemonstrated risk of uncertain outcomes is an overreach. That is what has occurred in this case.

Plaintiff seems like an ideal candidate to adopt in the State of Oregon, having exhibited her capacity to raise her five children in heroic circumstances after the loss of her husband—their father. Now she is hamstrung only because of a series of unclear state speculations about possible future challenges between mother and child. It is not enough that Plaintiff would no doubt never tolerate the bullying of her child and would make every effort to create a loving and secure home environment. No—the State is unsatisfied with Plaintiff's commitment to "love and support" a child placed in her care on her terms, rather than those of the State's new ideological guidelines. But that is how families work. They do the caring, the sacrificing, the supporting, the comforting, and the challenging. States cannot.

Date: January 18, 2024

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[71] *Id.* (internal question marks and citation omitted).

/s/ Brennan A.R. Bowen
Brennan A.R. Bowen
Holtzman Vogel Baran Torchinsky &
Josefiak PLLC

Attorney 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 6,296 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 18, 2024

/s/ Brennan A.R. Bowen
Brennan A.R. Bowen

Attorney for Amici Curiae

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 18, 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 18, 2024

/s/ Brennan Bowen
Brennan A.R. Bowen

Attorney for Amici Curiae