APPEAL NO. 23-4169

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA BATES,
Plaintiff-Appellant,

v.

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

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

There are hundreds of children in Oregon's foster system awaiting forever homes. Yet Oregon has excluded Jessica Bates—and all those similarly situated—from adopting *any* child because of her religious beliefs.

Like the city in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), Oregon claims the foster context gives it the power to discriminate. In this context, the State says that speech is conduct, parents are medical professionals, private actors are government employees, unpaid licensees are subsidized speakers, and vague exemptions are lawful discretion. No court has accepted these theories. Instead, courts—including the Supreme Court—apply traditional First Amendment rules. That maximizes the number of diverse adoptive families, promotes children's best interests, and protects free speech and religious freedom.

Oregon's position leads to unplaced children and constitutional dead-ends. Under its theory, a state could exclude adoption applicants for teaching LGBT equality, advocating for affirmative action, defending critical race theory, supporting climate change, or endorsing Palestinian independence. State officials have often wrongfully excluded capable parents to shield children from views those officials deemed harmful. *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984) (overturning custody award trying to shield child from "social

stigmatization" of placement in interracial home); *In re Adoption of E*, 279 A.2d 785, 789 (N.J. 1971) (reversing exclusion of atheist adoption applicants to protect child from being "exposed to [their] views"). Oregon repeats that mistake.

Oregon has better options. Most states and the Biden administration reject Oregon's approach, accept applicants like Bates, and match them with the children that fit best. Oregon never considered this alternative or any other, much less proved any of them unworkable—as the district court conceded. The Constitution demands much more when the state burdens fundamental freedoms and leaves children without families who will love them. This Court should reverse the district court and direct it to enter a preliminary injunction.

ARGUMENT

Oregon's Rule (Or. Admin. R. (OAR) § 413-200-0308(2)(k)) regulates speech based on viewpoint, as applied and facially. It also burdens Bates' religious exercise, which triggers and flunks strict scrutiny. Because Bates will likely win on the merits, she deserves a preliminary injunction.

I. The Rule regulates Bates' protected speech.

Although the district court held otherwise, Oregon says it can exclude Bates without triggering any First Amendment scrutiny. But when regulations compel or restrict speech based on viewpoint, they

regulate speech directly, not incidentally. And Bates merely seeks a license to care for vulnerable children—not a subsidy or employment.

A. The Rule regulates Bates' speech, not conduct, based on viewpoint.

1. The Department interprets and applies its Rule to regulate Bates' speech, like requiring her to speak particular words (pronouns) and attend expressive activities (pride parades), while forbidding her from speaking other words (biblical teachings) or attending other expressive events (church). Appellant's Opening Br. (Opening Br.) 21, 28, ECF No. 8.1[1]. Whether it's using the "written or spoken word[ ]" or flying the pride flag, it's all speech. *Hurley v. Irish–Am. Gay, Lesbian and Bisexual Grp. of Bos.,* 515 U.S. 557, 569 (1995).[2]

Oregon at times concedes that it "requires some speech and restricts other speech." Appellees' Br. (State's Br.) 39, ECF No. 62.1. Indeed, Oregon rejected Bates' application for this reason. 3-ER-340 (Bates' email explaining her objection to pronouns); 3-ER-343 (denial letter). The district court agreed, acknowledging that using certain

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[1] Page number references to documents filed in this case refer to the ECF Bates stamp, not the original document page.

[2] While Oregon thinks Bates did not appeal her free-association claim (State's Br. 17 n.5), she did. Opening Br. 18, 70 (noting her desire to attend church with her children). Oregon overlooks the analytical overlap between her speech and association claims. *E.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000) (applying *Hurley* to analyze expressive-association claim).

pronouns goes "hand in hand" with what Oregon requires of prospective parents (1-ER-29) and that "[s]peech that does not respect a child's LGBTQ+ identity is barred under the rule" (1-ER-23).

The Rule also regulates speech based on viewpoint—requiring Bates to speak Oregon's message about human sexuality and to refrain from expressing her different, religious view. Opening Br. 29. Oregon does not contest this. And the court below again agreed, recognizing that the Rule "as applied … requires positive speech and restricts negative speech in the context of gender and sexual orientation." 1-ER-31.

2. In response, Oregon says its Rule regulates conduct and imposes only an "incidental" speech burden. State's Br. 40; *see also id.* at 45–47 (arguing Rule merely regulates professional conduct). That's wrong facially, *infra* § II, but also as applied to Bates. Even laws that facially regulate conduct warrant heightened scrutiny when they either "alter the [speaker's] expressive content" (*Hurley*, 515 U.S. at 572) or the "triggering" activity "consists of communicating a message." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); *accord Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (applying *Holder* to conclude that license requirement regulated speech when applied to educational programs).

The Rule does both. It alters the content of Bates' words (compelling her to use certain pronouns) and is triggered when her

words convey certain messages (those affirming people's bodies). After all, the Rule kicks in when speech is "unsupportive" of children's beliefs or behavior. 3-ER-370 (training materials); 1-ER-31 (finding Rule inherently prohibits "negative speech"). As applied to Bates, that means she cannot use words that communicate her body-affirming view on gender identity (3-ER-329), a message of "profound value and concern to the public." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up); *accord Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021).

Even under Oregon's interpretation, the Rule operates like the public-accommodation law in *Hurley*. That law did not "target speech" but regulated speech when applied to alter parade banners. 515 U.S. at 572, 574–75; *id.* at 563 (rejecting incidental-burden argument). Likewise, in *303 Creative LLC v. Elenis*, Colorado's public-accommodation law facially regulated conduct but still regulated speech when applied to compel websites (i.e., speech) celebrating same-sex weddings. 600 U.S. 570, 596–99 (2023). That application imposed much more than "an incidental burden on speech." *Id.* (explaining that the Court has "time after time" rejected the notion that forcing an individual to speak "on weighty issues with which she disagrees … only 'incidentally' burdens First Amendment liberties" (cleaned up)).

While Oregon dismisses *303 Creative* because the parties agreed websites were "expressive" (State's Br. 43), so are the "oral utterance

and the printed word" Bates wants to use. *303 Creative*, 600 U.S. at 587 (cleaned up). Oregon overlooks that government say-so does not transform words into conduct. As more than 80 years of precedent prove, courts consider how laws affect someone's speech as applied, not just whether they are facially "directed at conduct." *Holder*, 561 U.S. at 28; *see Cantwell v. Connecticut*, 310 U.S. 296, 309–310 (1940) (applying breach-of-peace law to playing recording violated First Amendment); *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946) (same for anti-trespass statute applied to literature distribution); *Cohen v. California*, 403 U.S. 15, 20 (1971) (same for breach-of-peace statute applied to words on jacket). Oregon has no response to these seminal cases.

3. Instead, Oregon invokes cases applying the "speech integral to criminal conduct" exception to the First Amendment, *United States v. Stevens*, 559 U.S. 460, 468 (2010), which applies where a course of conduct is "in part … carried out" through speech, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); State's Br. 40. But this exception applies to words "intended to induce or commence illegal activities," like words used to commit conspiracy, solicitation, or restrain trade. *United States v. Williams*, 553 U.S. 285, 298 (2008). In these situations, the law regulates words for achieving a "separately identifiable" illegal act, not for the message they convey. *Cohen*, 403 U.S. at 18. Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1011 (2016) (the State cannot label

the "speech itself" illegal; "[r]ather, it must help cause or threaten *other* illegal conduct").

In contrast here, Oregon's Rule applies because of the *view* that Bates' words convey. Her words do not achieve some other separate conduct. Her viewpoint triggers the Rule. That in turn triggers strict scrutiny.

4. Oregon pivots and invokes its need to regulate "racial slur[s]." State's Br. 42. But Bates would "never" use language that would "vilify or denigrate one of [her] children." 3-ER-332. And Oregon has the power to forbid fighting words like racial slurs and other "personally abusive epithets … likely to provoke violent reaction." *Cohen*, 403 U.S. at 20.

This illustrates that Oregon has many other options to protect children rather than punish disfavored views. Not only can Oregon regulate unprotected speech like threats and fighting words, *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (listing examples), it can regulate the form and manner of how applicants speak to children, or it could try to show that strict scrutiny is satisfied. Other states pursue these options without excluding applicants because of their views. Br. for Amici Curiae Idaho, et al. (Idaho Br.) 15–16, ECF No. 31.1.

5. Oregon next appeals to professional licensing, saying it can regulate Bates' speech as part of her "professional conduct" as a foster parent. State's Br. 45. But Oregon conceded below that Bates is not a "professional" parent. Defs.' Resp. to Mot. for Prelim. Inj. 22, ECF

No. 25. And Oregon cites no case embracing this novel argument. To the contrary, courts apply standard First Amendment principles in this context. Opening Br. 50–51; *accord Lasche v. New Jersey*, No. 20-2325, 2022 WL 604025, at *5 (3d Cir. Mar. 1, 2022) (finding viable First Amendment retaliation claim when state revoked parents' foster license for "sharing their views on same-sex marriage" with foster child); *In re Adoption of E*, 279 A.2d at 794 (reversing adoption denial for violating First Amendment).

The government cannot even transform speech of actual professionals into conduct. Oregon does not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Kirchmeyer*, 961 F.3d at 1069 (rejecting argument that state could regulate vocational training as conduct by imposing educational-licensing scheme).

This Court's decision in *Conant v. Walters* illustrates the point. 309 F.3d 629 (9th Cir. 2002). There, California prohibited doctors from recommending medical marijuana to patients. *Id.* at 632. While prescribing marijuana involved unprotected conduct ("the dispensing of controlled substances"), recommending marijuana involved protected speech ("the dispensing of information"). *Id.* at 635. Applying this regulation to professionals like physicians targeted "core First Amendment interests of doctors and patients." *Id.* at 636; *cf. Nat'l Inst.*

of Fam. & Life Advocs. v. Becerra (*NIFLA*), 585 U.S. 755, 771 (2018) (explaining that a doctor's "candor is crucial").

Oregon tries the same forbidden tactic here. Oregon did not exclude Bates for threatening to harm a child, applying corporeal punishment, or refusing to provide care. Oregon excluded her for wanting to express certain views and not others. That is a speech regulation. In so doing, Oregon "condemns expression of a particular viewpoint," and "condemnation of particular views is especially troubling in the First Amendment context." *Conant*, 309 F.3d at 637.

Tingley v. Ferguson, 47 F.4th 1055, 1079 (9th Cir. 2022), does not help Oregon. State's Br. 46. There, this Court upheld Washington's regulation of licensed counselors because counseling was akin to "administering treatment itself." *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014). Here, Bates engages in no professional treatment or professional activity. She expresses religious views. No one needs special training for that. Unlike the law in *Tingley*, Oregon's exclusion is "not tied to a procedure" or any specific act but "applies to *all* [verbal] interactions" between Bates and her children. *NIFLA*, 585 U.S. at 770 (emphasis added). Oregon's exclusion is a viewpoint-based regulation of speech.

6. Not only do Oregon's arguments find no doctrinal support; they also make little sense. Whether Oregon treats its Rule as regulating conduct, imposing incidental burdens, or regulating professionals, its

theory would empower states to compel or silence any viewpoint communicated by any professional, licensee, or foster or adoption applicant.

Consider Oregon's logic as applied to adoption and fostering. Its theory would authorize states to prohibit caregivers from using children's desired pronouns and require them to use biologically accurate pronouns. *Meriwether*, 992 F.3d at 506 (making similar point in university context). Or states could prohibit caregivers from exposing kids to books promoting progressive views about sexuality. A state could even prohibit applicants from criticizing the government in front of the children because the state "stands in the shoes of the child's biological parent." State's Br. 28. Oregon's theory even allows states to require parents to force their children to recite the pledge of allegiance. *Contra W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). This Court should reject Oregon's brazen attempt to bulldoze First Amendment rights.

B. The Rule warrants traditional First Amendment scrutiny.

Unable to change speech into conduct, Oregon next pushes to lower the scrutiny level by comparing Bates to subsidized speakers and government employees. But Bates seeks a license, not a subsidy. She wants to parent, not work for Oregon. Nor can Oregon justify lower scrutiny in any context for its categorical, viewpoint-based exclusion.

1. Oregon cannot leverage a license to burden Bates' constitutional rights.

Oregon says Bates has no "First Amendment right to speak to children in [the] state's legal custody." State's Br. 36; *see also id.* at 30–31. But that overlooks the real problem.

Citizens lack a categorical right to many things—free schooling, accessing a marketplace, a license to drive, or a license to operate a foster agency. The government still cannot condition these "benefits" on speaking the State's preferred views or agreeing to stifle one's own speech. *303 Creative*, 600 U.S. at 597–98 (conditioning marketplace access on creating certain speech); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (conditioning liquor license on forgoing certain advertisements); *Wooley v. Maynard*, 430 U.S. 705, 714–17 (1977) (conditioning road usage on displaying government motto on car); *Barnette*, 319 U.S. at 633, 642 (conditioning public school attendance on saying pledge); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 148 (2d Cir. 2020) (conditioning foster-agency license on certifying couples contrary to agency's religious beliefs).

In all these situations, courts applied traditional First Amendment scrutiny because the government exclusively provided a benefit that is "vital." *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926) (rejecting attempt to condition use of state highways). When the government acts as a monopoly, exclusively licensing citizens to receive

valuable benefits and then rejecting applicants because of their viewpoint, courts apply great scrutiny.

So too here. In Oregon, the government decides who gets to adopt. *Infra* p.25–26. That approval carries enormous legal, practical, and emotional benefits. *Blais v. Hunter*, 493 F. Supp. 3d 984, 997 (E.D. Wash. 2020) ("[T]he Department undeniably grants a privilege and benefit to the foster parents who receive a license."). Many people like Bates adopt based on a spiritual duty and calling. Others do so because they cannot have their own biological children and yearn to start a family.

Either way, the government cannot leverage such an important license to punish people for speaking. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). And that's true, even if no one has a "right to" that benefit. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013); *accord Blais*, 493 F. Supp. 3d at 997 (applying First Amendment principles to scrutinize similar policy). With this type of important benefit at stake, courts apply standard First Amendment rules, which here calls for at least strict scrutiny when evaluating Oregon's viewpoint discrimination. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (explaining "viewpoint bias ended the matter").

2. Oregon does not subsidize adoptions and cannot avoid strict scrutiny for its viewpoint discrimination.

Oregon next equates its exclusion to a choice not to subsidize Bates' speech. State's Br. 36–38 (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). Oregon did not make this argument below. For good reason. Its analogy to subsidies fails.

First, Oregon does not generally pay people to adopt and did not offer to pay Bates. *See* Or. Rev. Stat. § 418.330 (providing that the Department *may* pay families for children with "special needs"). If the Department "does not pay money," there is no subsidy. *See Matal v. Tam*, 582 U.S. 218, 240 (2017) (plurality) (distinguishing *Rust* on this ground). In *New Hope*, for example, the Second Circuit rejected the subsidized-speech analogy because the private foster-care agency there did not receive government funding. 966 F.3d at 172.

Second, Bates sued to care for vulnerable children, not to receive any funds. The challenged Rule forecloses her certification; it does not condition access to payments. OAR § 413-200-0308 (listing certification conditions with no mention of funding). Oregon's actions reflect this. The State never gave Bates an option to bridle her tongue and accept funds. Nor did Oregon allow Bates to speak freely, forego funds, and obtain certification. Instead, Oregon categorically excluded Bates up front, regardless of whether she sought funds. The withheld benefit is

the license, not money.[3] *Compare Blais*, 493 F. Supp. 3d at 997 (invalidating similar policy limiting foster-care licenses) *with Rust*, 500 U.S. at 196 (upholding policy conditioning grant receipts).

Third, the Rule coerces Bates to choose between her First Amendment rights and the opportunity to adopt. That's because only Oregon can extend this benefit to Bates, whether subsidized or not. *See supra* p.11. Normally, someone who objects to purse strings can "decline the funds" and still engage in the sought-after activity. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.* (*AOSI*), 570 U.S. 205, 214 (2013). Not so here. There is "no real option but to acquiesce," which makes the condition coercive and triggers greater scrutiny. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012).

This point also distinguishes *Rust*, where the government required doctors to refrain from recommending abortions to program patients if the doctors wanted grants for family-planning services. 500 U.S. at 178. When some providers objected, the Court upheld the condition because the doctors could still speak "separate and

[3] The Department is not statutorily required to pay foster parents either. Or. Rev. Stat. § 418.647 (providing that the Department "*may* provide foster care payments"); State's Br. 37 (stating the Department "will permit" a qualified caregiver to "receive support from the state, including funding"). Historically, the Department has only paid foster parents some of the time. *Lipscomb ex. rel DeFehr v. Simmons*, 962 F.2d 1374, 1384 (9th Cir. 1992) (en banc) (upholding Department's refusal to pay relative resource families).

independent" from the grant program. *Id.* at 196. But here, only Oregon can let Bates adopt; that puts coercive pressure on her to alter her speech. And if she expresses Oregon's message to her adopted children while communicating her religious beliefs to her biological children, she would be a "hypocri[te]." *AOSI*, 570 U.S. at 219 (distinguishing *Rust* for this reason). The Constitution forbids such coercion.

Fourth, even for subsidies, the government cannot "leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214–15. Oregon's foster and adoption programs exist to promote children's best interests. State's Br. 10, 23. To do that, Oregon needs diverse families with diverse viewpoints to care for diverse children. 3-ER-392; OAR § 413-120-0246 (stating adoptive homes must help a child maintain their "cultural, religious, and spiritual heritage"). The Department "cannot recast" the program goal as promoting a particular ideological message. *AOSI*, 570 U.S. at 215.

That would make little sense anyway. Oregon disclaims any desire to suppress particular viewpoints. State's Br. 42 ("the state is not … seeking to excise certain ideas or viewpoints" (cleaned up)). Its goal is to cultivate diverse families rather than a monoculture. Doing the opposite—forcing parents to speak the government's message, rather than be open and honest about their beliefs—"distorts" the parental role. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001). In such a broad program, the government may not seek to compel a "specific"

governmental message, let alone Oregon's controversial views on gender identity. *Id.* at 541.

AOSI illustrates these principles. There, the government required grant recipients for AIDS-related programs to adopt a policy opposing prostitution. 570 U.S. at 208. Yet "[b]y requiring recipients to profess a specific belief," the government did not merely define its message, but tried to "defin[e] the recipient." *Id.* at 218. And "a condition that compels recipients to espouse the government's position on a subject of international debate could not be squared with the First Amendment." *Id.* at 212 (cleaned up).

So too here. Oregon demands that caregivers "adopt—as their own—the Government's view on an issue of public concern." *Id.* at 218. That "by its very nature affects protected conduct outside the scope of the federally funded program" and violates the Constitution. *Id.* (cleaned up).

Fifth, Oregon's Rule regulates speech based on viewpoint. *Supra* p.4. The Supreme Court has allowed that only when the government itself speaks or uses "private speakers to transmit specific information pertaining to its own program." *Velazquez*, 531 U.S. at 541 (cleaned up). But Oregon never calls Bates a government speaker. Nor could it. "The mere fact that government authorizes, approves, or licenses certain conduct does *not* transform the speech engaged therein into government

speech." *New Hope*, 966 F.3d at 171 (rejecting effort to label adoption agency's services as government speech).

Oregon's program does not exist to use applicants to communicate a particular message. Rather, the program permits—and even promotes—a "diversity of views," undercutting the need to exclude Bates. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). Even if Oregon wants to exclude *some* views (like Bates'), it has never said foster or adoptive parents speak for the State. *See Velazquez*, 531 U.S. at 542 (holding legal aid lawyers were "not the government's speaker"). And no one would attribute caregivers' multitudinous voices and messages to Oregon, let alone distill a coherent message from them. *Matal*, 582 U.S. at 236 ("If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently."). Foster and adoptive parents' expressions of their views do not qualify as government speech, and so the Department does not seek "to promote a governmental message." *Velazquez*, 531 U.S. at 542. All of which underscores why Oregon's viewpoint exclusion is unconstitutional, even in a subsidy context.

3. Bates is a parent, not a government employee.

Switching gears, Oregon equates Bates to a government employee. State's Br. 44. But Oregon did not make this argument below either. Again, that's not surprising because the argument is baseless. Oregon

concedes that caregivers like Bates "are not government employees," and it cites no case ever embracing that analogy. *Id.* In fact, courts have rejected it. *Ismail v. Cnty. of Orange*, 693 F. App'x 507, 512 (9th Cir. 2017) (collecting cases saying foster parents are not government actors). That's because adoptive parents are generally unpaid, *supra* § I.B.2, and they do not speak for the government, *id.* Unlike government employees who have "official" speech and "private" speech, caregivers cannot practically segregate their speech as parents from their speech as private citizens. A parent's speech occurs in their own home and happens all the time. And after an adoption, the government's involvement ends. *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 843 (9th Cir. 2010).

The stark difference between Oregon's role as sovereign and its role as manager undermines its argument. The government has "significantly greater leeway" to manage employees than when exercising its "power to regulate or license" ordinary citizens. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598–99 (2008). Countless citizens have "duties … established by state law," State's Br. 44—from drivers to business owners (*supra* p.11) to biological parents who "are bound to maintain their children," Or. Rev. Stat. § 109.010. Adopting Oregon's argument would vest the State with vast discretion to regulate speech in *all* these contexts.

Crucially, the Supreme Court has rejected similar government-as-manager arguments in *Fulton*, 593 U.S. at 535. There, Philadelphia broke its contract with a Catholic foster agency because that agency wanted to certify couples consistent with its beliefs about marriage. *Id.* at 526–27. Like Oregon, Philadelphia invoked its managerial role and its duty to protect foster children to justify its actions. *Id.* at 535. But those rationales did not give it "greater leeway" to burden the agency's rights. *Id.* Surely if the state cannot refuse to contract with Catholic agencies because of those agencies' beliefs about marriage and sexuality, it cannot refuse to license individual parents with similar views. *See id.* at 541–42 (exclusion of Catholic agency would reduce, rather than "maximiz[e] the number of foster parents," and undercut the city's goals).

What's more, Oregon's employer comparison condemns its own Rule. Even in the employee context, categorical polices that restrict speech up front "before it is uttered, based only on speculation that the speech might threaten the Government's interests," carry a much higher burden than post-hoc restrictions. *United States v. Nat'l Treasury Emps. Union* (*NTEU*), 513 U.S. 454, 467 n.11 (1995). Yet Oregon's Rule does exactly this: it categorically excludes based on speculative harms. Opening Br. § III.A–B. So Oregon's Rule would not even survive *NTEU* scrutiny because that standard does not protect categorical, viewpoint-based restrictions like Oregon's. *NTEU*, 513 U.S.

at 468. Such restrictions actually warrant even higher scrutiny, triggering strict scrutiny like other viewpoint-based restrictions do. *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 108 (3d Cir. 2022) (interpreting *NTEU* to require higher scrutiny on viewpoint restrictions on employee speech). No matter what analogy Oregon tries, it cannot justify excluding Bates for her views.

II. The Rule is facially overbroad.

Although the Rule improperly excluded Bates, it facially compels and restricts speech too, sweeping up a substantial amount of protected speech. Opening Br. §§ I, IV.

In response, Oregon recycles its arguments that its Rule regulates the conduct of parenting and that no one has a right to adopt or speak to foster children. State's Br. 27–28. On this latter point, Oregon implies that the overbreadth doctrine cannot apply in this highly regulated context. That is wrong. This doctrine applies whether Oregon's system is a license, subsidy, or even a nonpublic forum. *Brunetti*, 139 S. Ct. at 2302 (finding trademark restriction overbroad without deciding whether the law provided subsidy); *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 573–74 (1987) (regulation overbroad "regardless of the proper standard" or forum analysis); *Clark v. City of Lakewood*, 259 F.3d 996, 1010 (9th Cir. 2001), *as amended* (Aug. 15, 2001) (allowing overbreadth challenge to licensing regime).

Oregon's reliance on the conduct of parenting likewise fails. The State refuses to engage with the text, dictionaries, or cases cited in Bates' opening brief. Opening Br. 27. Requiring parents to "accept and support" various traits (*id.*)—no less than requiring them to "promote" and "encourage" those traits—necessarily covers speech. *E.g.*, *United States v. Hansen*, 599 U.S. 762, 774 (2023) (ordinary meaning of "encourage" might create overbreadth problems); *United States v. Miselis*, 972 F.3d 518, 536–37 (4th Cir. 2020) (enjoining ban on promoting or encouraging a riot by looking to dictionary definitions equating promote and support). Imagine forcing natural parents to "accept and support" their children's espoused gender identity or spiritual beliefs. That would undoubtedly regulate a substantial amount of speech. Indeed, everyone in this case agrees on the Rule's broad reach: Oregon excluded Bates because of her speech, Oregon's training materials interpreting the Rule cover speech, and the district court conceded that the Rule inherently covers speech. Opening Br. 27.

Oregon does not dispute this broad application. Bates identified numerous examples the Rule forbids—from peaceful dinner conversations to Bible readings (Opening Br. 70)—but Oregon does not disclaim any of them. This silence highlights that the Rule excludes applicants who would express commonly held views on many topics (including sexual ethics) in many contexts, taking many forms—even if the speech occurs just once. A grandmother cannot take her one-year-old adopted

granddaughter with her to church just once if Oregon doesn't like the church's views. And a concerned family cannot once discuss with their teenager concerns about the effect of puberty blockers and hormone shots on young children. Br. of Amici Curiae Detransitioners Billy Burleigh, et al. (Detransitioners' Br.) 6–14, ECF No. 29.1 (recounting regret of detransitioners). Such a regulation is overbroad.

III. The Rule infringes Bates' religious exercise.

Oregon fails to grapple with the Rule's system of individualized assessments and categorical exemptions that make the State's policy not neutral, not generally applicable, and hopelessly underinclusive. Bates is "not claiming any entitlement" to adopt. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017). She merely seeks to serve vulnerable children the same as everyone else—without violating her conscience.

A. The Rule uses individualized assessments that treat religious exercise worse than comparable secular conduct.

1. In practice, the Rule provides individualized exemptions for caregivers who cannot support "spiritual beliefs" or "cultural identities" that grate their conscience. OAR § 413-200-0308(2)(k). The Department interprets the Rule's text—which calls for acceptance and support—to merely require respect and tolerance. Opening Br. 33–34. Parents must give children space "to practice their own unique faith" (1-ER-20), but

need not defend the child's religion "as valid" or accept their beliefs "as true" (Opening Br. 27). The district court below read the Rule the same way, giving "the same word, in the same … provision, different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522–23 (2008) (emphasis omitted).

This system of individualized assessments violates the First Amendment by allowing the State "to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537. At the same time, accommodating some caregivers but refusing to accommodate Bates proves the Rule is not neutral or generally applicable. *Id.* at 535. Treating "*any* comparable secular activity more favorably than religious exercise" disfavors Bates' religious exercise. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam).

2. Oregon responds with non-sequiturs and nonstarters. Start with its facial defense—that its Rule does not refer "to an applicant's religion or faith," but only requires caregivers to "support a *child's* religious belief (or nonbelief)." State's Br. 23. That still requires applicants to "support a … religious belief." *Id.* Oregon does not apply this text according to its plain meaning because that would violate the First Amendment. Opening Br. 33. Instead, Oregon licenses caregivers without requiring them to violate their deeply held beliefs about religion. In contrast, the State requires Bates to violate her religious beliefs about sexuality.

Next, Oregon argues it did not enact the Rule to target or disfavor religion. State's Br. 23–24. That's likely false but ultimately irrelevant because, as this Court recently held, "targeting is not required …. Instead, favoring comparable secular activity is sufficient." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* (*FCA*), 82 F.4th 664, 686 (9th Cir. 2023).

Nor does Bates need to produce "evidence that DHS enforces the rule differently" *because* of her religion. State's Br. 24–25. Instead, she can show that the State treats religious exercise worse than comparable secular activity. Opening Br. 42 (explaining comparability in this context). Merely having a "mechanism for granting exceptions" is fatal—even when no "exceptions have been given." *Fulton*, 593 U.S. at 537.

Oregon's denial that anything in statutes, rules, or the record proves these exemptions (State's Br. 27) is false. Oregon already admitted to exemptions that undermine its interests (*infra* p.26). Bates' verified complaint alleged that the Department selectively enforces its Rule. 3-ER-414–15. Both the district court's opinion and Oregon's arguments reveal inevitable and inconsistent applications of its Rule. Opening Br. 36–37. And so do Oregon's training materials, which say much about pronouns and supporting children's sexual orientation and gender identity while saying little to nothing about supporting children's religious beliefs. 3-ER-343–382.

B. The Rule is underinclusive.

1. The Department fails to consistently pursue its interests by granting categorical and other exemptions. Opening Br. § II.B. For example, applicants seeking independent adoptions need not comply with the Rule. Opening Br. at 41. Oregon says these proceedings are governed by different regulations and "often involve a biological parent." State's Br. 28. But *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* forecloses that argument. 508 U.S. 520, 537 (1993). *Lukumi* held that activities "outside the scope of the [challenged] ordinances" undermined the government's interests. 508 U.S. at 545; *accord Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 801 (2011) (holding law prohibiting sale of violent video games was underinclusive because the state did not regulate "Saturday morning cartoons"). What matters is whether the conduct threatens the government's interest "in a similar or greater degree than" the regulated conduct. *Lukumi*, 508 U.S. at 543.

In independent adoptions, the Department has the "same interest" in providing for children. 1-ER-18. Oregon heavily regulates independent adoptions. Opening Br. 42. The State requires home studies. Or. Rev. Stat. § 109.276(7)(a) (requiring home study for all adoptions unless waived). The State sets the minimum qualifications. OAR § 413-140-0033. The State requires notice of the petition to the Department. Or. Rev. Stat. § 109.285(5)(a). And the Department *always* has a chance to object because it must "investigate and file … a placement report" with

"evidence concerning the suitability of the proposed adoption" (unless waived). Or. Rev. Stat. § 109.276(8)(a)(A). Oregon even concedes that independent adoptions do not always "involve a biological parent." State's Br. 28.

Oregon claims that there are "differing interests at stake." State's Br. 28. That might be true at the placement stage, where *someone* must make the individualized assessment necessary to place the child. But this case does not involve the placement stage; rather, it concerns the State's "minimum qualifications" for *all* parents. *Id.* at 13. And if Oregon thinks Bates is categorically unqualified, it ought to enforce the same standards for children in independent adoptions too. Failing to do that gives the game away.

Despite supposedly requiring caregivers to be "open to any child," the State allows caregivers to decline to take children based on sex, age, disability, or inappropriate sexual behavior. Opening Br. 38–40. Oregon argues that Bates did not prove these exemptions. State's Br. 29. But as Bates already explained, the Department made a binding judicial admission that this is its policy. Opening Br. 40–41 (citing complaint and answer).[4] Oregon responds with crickets. And it matters not if that

[4] The district court similarly ignored these admissions. Opening Br. 40. So Bates does allege that the Court made erroneous factual findings. *Contra* State's Br. 19–20. At any rate, this Court reviews the facts de novo. Opening Br. 26.

policy is formally adopted in a "statute or rule." *Contra* State's Br. 29.

The State alternatively hedges that these exemptions do not undermine "the general obligation to respect, accept, and support a child's identity." State's Br. 29. But the Rule omits any reference to sex or age. OAR § 413-200-0308(2)(k). Plus, the Department requires that *all* parents be able and willing "to care for *all* children." Opening Br. 39. If the Department can accommodate preferences for age, disability, "gender, … or faith"—all of which "pose an identical risk to the [Department's] stated interest"— it can accommodate Bates too. *FCA*, 82 F.4th at 689. She will happily love *any* child; she just does not want to violate her faith.[5]

IV. The Rule fails heightened scrutiny.

Because the Rule triggers strict scrutiny, Oregon must justify its Rule with actual evidence and explain why less restrictive alternatives will not work. Opening Br. 26–27. Oregon hardly tries to do that, so Bates need not repeat herself at length. Nineteen states and one state legislature have told this Court that they manage to protect *all* vulnerable children "without discriminating against religious individuals" like Bates. Idaho Br. 15–16. The federal government also rejects Oregon's exclusionary Rule. Opening Br. 56. Instead, it says that

[5] The State asserts that Bates asked her certifier if the State could "give [her] a kid who's not like that?" State's Br. 14 (citing SER-4). Bates never said this. 1-FER-4.

states can inform children to select "appropriate" homes—empowering these children to choose rather than taking away their opportunities to be placed with a loving family.[6]

The record doesn't just reveal better alternatives; it reveals that Oregon's Rule likely causes more harm than good. Bates cited one study revealing the murky ethics of subjecting children to therapeutic or pharmacological interventions (procedures the Department requires parents to facilitate). 2-ER-119–120. Bates cited another article explaining that Oregon's surveys suffer from significant flaws and that the "benefits of gender-affirmative interventions are of very low certainty." 2-ER-128; 2-ER-132 (explaining bias of The Trevor Project survey). While Oregon asserts that it seeks to help children struggling with gender dysphoria (State's Br. 31–33), its methods are actually "controversial." 2-ER-127. Indeed, individuals who have detransitioned from a transgender identity shared their stories illustrating how the State's affirm-at-all-costs method causes significant harm. Detransitioners' Br. 15 (explaining "irreversible effects" of interventions). Oregon provided no contrary evidence below or now. Its silence is telling and gives this Court good reason to strictly scrutinize the State's judgments.

[6] Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B, 88 Fed. Reg. 66752, 66758 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. pt. 1355).

Finally, the State pushes the Court to apply intermediate rather than strict scrutiny. State's Br. 48. But under that standard, the Rule still cannot suppress ideas. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). And even now Oregon says it must regulate Bates' speech because of her ideas. State's Br. 31–33; *see supra* § I.A. So intermediate scrutiny does not apply. *Holder*, 561 U.S. at 27–28. Nor can Oregon characterize the Rule as regulating "[t]he emotive impact of speech on its audience" because it's really regulating the message. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

The Rule also flunks heightened scrutiny because it regulates more speech than necessary. *O'Brien*, 391 U.S. at 377; Opening Br. § IV. Categorically prohibiting Bates from sharing her beliefs about the Bible, manhood, womanhood, marriage, or sex-specific sports without question has a "material impact" on her speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989).

Oregon also "conjecture[s]" that its Rule will materially advance a substantial government goal. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (cleaned up); *see* Opening Br. § III.A.1, B.2. The State argues it need not opt for less effective methods. State's Br. 48. But that is not a panacea for its lack of evidence. Oregon must still show that its policy *materially* advances its goals. *Lorillard*, 533 U.S. at 555. And because Oregon cannot identify "a single instance in which a minor" was harmed by a caregiver like Bates, Oregon's entire argument fails.

Junior Sports Mags. Inc. v. Bonta, 80 F.4th 1109, 1117 (9th Cir. 2023) (lack of evidence showing gun advertisements led to youth violent crime meant advertisements "logically could not have contributed" to violence).

V. Bates deserves her requested injunction.

Because this is a First Amendment case and Bates has shown likely success on the merits, she deserves a preliminary injunction under this Court's caselaw. Opening Br. § V (citing cases). Oregon has no response to these cases yet still asks for a remand to let the lower court consider the other injunction factors. State's Br. 42. But Oregon never explains why or how the lower court could refuse an injunction. *Id.* (citing only *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1227 (9th Cir. 2017), which remanded preliminary-injunction motion that the district court denied as moot).

Oregon had the chance to brief these factors and gives no reason why any factor weighs against Bates. Meanwhile, Oregon has violated Bates' constitutional rights for well over a year, and children have lost the opportunity for a forever home. The Court should direct the entry of an injunction immediately.

CONCLUSION

Bates asks this Court to reverse and instruct the district court to enter a preliminary injunction protecting her constitutional rights.

Respectfully submitted,

Dated: February 29, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2024, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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February 29, 2024

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FOR THE NINTH CIRCUIT

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