UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
WINDHAM DIVISION

BRIAN WUOTI; **KAITLYN WUOTI**; **MICHAEL GANTT**; and **REBECCA GANTT**,

Plaintiffs,

v.

CHRISTOPHER WINTERS, in his official capacity as Commissioner of the Vermont Department for Children and Families; **ARYKA RADKE**, in her official capacity as Deputy Commissioner of the Family Services Division; and **STACEY EDMUNDS**, in her official capacity as Director of Residential Licensing & Special Investigations,

Defendants.

Case No. 2:24-cv-614

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Oral Argument Requested

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INTRODUCTION

Brian and Katy Wuoti and Bryan and Rebecca Gantt are two couples who faithfully served vulnerable children in Vermont's foster-care system for years. They heeded Vermont's call to help at a time of desperate need, cared for children from difficult backgrounds, and adopted five children between them. Because of their faith, the Wuotis and the Gantts served and loved hurting children no matter what they experienced or how they identified. Even Vermont considered them model foster parents for years—until the State imposed a new gender-ideology litmus test on foster families. Vermont then revoked the Wuotis' and the Gantts' foster-care licenses because of their Christian and commonsense belief that boys cannot become girls or vice versa. The result: these families can no longer help children in need, no matter their age, identity, or beliefs. This unnecessary revocation violates the Constitution, disregards children's best interests, and deprives children of loving homes where they could be cherished.

Vermont's Department of Children, Youth and Families ("Department") recently implemented its new ideological test: to foster or adopt, families must now agree to use a child's stated pronouns, take children to events like pride parades, and unconditionally affirm progressive views about human sexuality. Families must agree *not* to express the view that sex is fixed and cannot be changed. Families must now be "holistically affirming and supporting" of a child's gender expression, "even if the foster parents hold divergent personal opinions or beliefs." Verified Compl. ("Compl."), Ex. D at 2–3, Doc. 1-4 ("Sept. 8 Email"). In Vermont, it isn't enough to care for children. Parents must walk in lockstep with Vermont's ideological vision on a topic of immense nationwide debate.

But children should not be ideological props. And Vermont must respect different religious views—views held by millions of Americans. States cannot leverage licenses, benefits, or privileges to punish citizens for their constitutional

rights. Yet, as-applied, Vermont's policies infringe on citizens' free-speech rights by compelling them to speak the State's views while prohibiting them from expressing their religious views. The policies burden free-exercise rights by forcing citizens to choose between caring for vulnerable kids or staying true to their faith. Vermont's policies are also unconstitutionally vague; allowing officials to exclude capable parents because of their religious or political viewpoints rather than their ability to care for children.

State officials have long sought to penalize parents in child-placement disputes because they had the "wrong" beliefs or viewpoints. *In re Adoption of E*, 279 A.2d 785, 789 (N.J. 1971) (protecting adoptive parents who were atheists); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (protecting parent in interracial marriage). Vermont repeats the same mistake, invoking its duty to protect children to mask its hostility toward views and beliefs it disfavors.

While Vermont officials virtue signal, children in foster care suffer. Vermont says there is a "[d]esperate need" for more homes. Compl., Ex. A, Doc. 1-1. Families like the Wuotis and the Gantts stand ready and able to answer the call. But Vermont prefers children have no home than to place them with families who hold certain religious views. This court should remind the State of its constitutional and moral obligations, preliminarily enjoin the State's illegal policies, and allow the Wuotis, the Gantts, and those who are similarly situated to help children in need.

SUMMARY OF FACTS

Vermont's foster-care licensing and placement processes

Individuals and couples in Vermont must obtain a state-issued license to care for children in foster care. Compl. ¶ 85, Doc. 1. The process is individualized to each applicant. *Id.* ¶¶ 95–129. For example, officials may grant a discretionary "variance," or exemption, from many of the Department's regulations. *Id.* ¶¶

130–134. The Department can limit a license to children of a certain age, gender, or developmental and physical need. *Id.* ¶ 93.

The Department also individualizes the placement process to match children with homes that are well-suited for them. *Id.* ¶¶ 95–129. Parents may not discriminate based on protected characteristics. *Id.* ¶ 121. Still, families may decline a placement if they feel it would not be a good fit. *Id.* ¶¶ 116–21. Families can decline to take children if they feel they cannot adequately care for a child because of the child's sex, age, disability, or other traits. *Id.* ¶¶ 120–129.

At issue are the following Departmental Rules for foster parents:

> **Rule 037**: A license may be denied or revoked if the applicant or licensee fails to meet any licensing rules.
>
> **Rule 201**: Applicants and foster parents shall exhibit… 201.2 Knowledge of child and adolescent development and the needs of children.
>
> **Rule 301**: Foster parents shall meet the physical, emotional, developmental and educational needs of each foster child, in accordance with the child's case plan.
>
> **Rule 315**: Foster parents shall support children in wearing hairstyles, clothing, and accessories affirming of the child's racial, cultural, tribal, religious, or gender identity.

Vt. Dep't for Child. & Fams., Fam. Servs. Div., *Licensing Rules for Foster Homes in Vermont* at 5, 8, 10–11 ("Licensing Rules," "Rules," or "Rule XX" to refer to a specific Rule), https://perma.cc/VZ7U-ZCLD.

The Department also maintains a policy for staff on "Supporting and Affirming LGBTQ Children & Youth." *See* Pls.' Mot. for Prelim. Inj. ("MPI"), Ex. A, Doc. 17-6 ("Policy 76"). Policy 76's terms state that it applies to Department staff. *Id.* It also provides guidance for staff dealing with families who are insufficiently "supportive" of a child's sexual orientation or gender identity ("SOGIE"). *Id.* The policy instructs staff to encourage families to "[s]upport children's identities even if

it feels uncomfortable;" "[b]ring young people to LGBTQ organizations and events in the community;" and "[s]upport young people's gender expression." *Id.* at 10. Sometime in the last three to four years, the Department began to enforce Policy 76—contrary to its plain terms—as requirements on foster parents, rather than suggestions, through the above-stated Rules ("SOGIE Mandate" or "Mandate").

The Wuotis and the Gantts

Brian and Kaitlyn (Katy) Wuoti are Christians. Decl. of Kaitlyn Wuoti in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 2–3, Doc. 17-3 ("Wuoti Decl."). Their faith informs every aspect of their life. *Id.* ¶ 9. Brian is the pastor of a nondenominational church, and Katy homeschools their five children and helps lead two Bible studies. *Id.* ¶¶ 6, 13. Their faith inspired them to care for vulnerable kids in foster care. *Id.* ¶¶ 21–26. They became foster parents in 2014, have two adopted children from foster care, and have three biological children. *Id.* ¶¶ 4, 31.

Bryan and Rebecca Gantt are also Christians. Decl. of Michael Gantt in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 2–3, Doc. 17-4 ("Gantt Decl."). Bryan serves as the pastor of a local church and Rebecca dedicates her time to raising their seven children. *Id.* ¶¶ 5–6. They began fostering in 2016 and have a special heart for children born with drug dependencies or with fetal alcohol syndrome. *Id.* ¶¶ 25, 32–48. They have three adopted children, together with their four biological children. *Id.* ¶ 4. Department officials have praised both the Wuotis and the Gantts for their faithful service to children in need. *Id.* ¶¶ 50–70. Wuoti Decl. ¶¶ 61–65.

The Department implements its SOGIE mandate to revoke licenses

The Wuotis' license is revoked | In May 2021, the Wuotis applied to renew their license. Wuoti Decl. ¶ 59. Christopher Murphy, a Department official, visited their home. *Id.* ¶ 66. His only concern was an updated fire-escape plan. *Id.* ¶ 67. Afterward, he sent the Wuotis a new form asking them to rate on a scale from one to five whether they agreed that their "family would be accepting and supportive of

an LGBTQ foster child." *Id.* ¶¶ 58–71; MPI, Ex. E at 11, Doc. 17-10 ("Wuoti Emails"). Brian and Katy each put a "three." Wuoti Decl. ¶ 75. Murphy asked "what might be needed to increase that answer to a 4 or 5[,]" and the Wuotis explained that they would love and accept any child, but they also could not encourage a child to pursue same-sex romantic behavior or to "transition[]" to the opposite gender. *Id.* ¶¶ 121–25; Wuoti Emails at 10. Murphy responded that they were ineligible to renew their license and suggested they withdraw their application. Wuoti Emails at 9. The Wuotis refused. *Id.* And the Department later revoked their license citing Rules 201.2 and 301. MPI, Ex. C, Doc. 17-8. The Wuotis filed an administrative appeal and lost. Wuoti Decl. ¶¶ 132–33.

The Gantts' license is revoked | In September 2023, the Department asked the Gantts if they would adopt a baby boy about to be born to a woman suffering from drug addiction. Gantt Decl. ¶¶ 82–86. The Department told the Gantts they would be "the most qualified" and they "were the unanimous choice" for this child. *Id.* ¶ 85. On September 8th, the Gantts received an email stating that "Eligibility for licensure is dependent on … support[ing] youth who identify as … (LGBTQI+) even if the foster parents hold divergent personal opinions or beliefs." Sept. 8 Email at 2. Soon after, the Gantts told a Department official that they would take the baby boy. Gantt Decl. ¶¶ 156–57. They also expressed concern about the Department's new policy. *Id.* ¶¶ 158–60. Later, the Gantts spoke to Murphy. *Id.* ¶ 164. They explained that they would love any child no matter how they identified but could not use inaccurate pronouns or take children to pride parades because of their faith. *Id.* ¶¶ 165–66. The Department told the Gantts they could no longer adopt, and it revoked their license, citing Rules 301, 315, and Policy 76. MPI, Ex. D, Doc. 17-9. The revocation letter stated that the Gantts could "meet the needs of some foster children, [but] rule 301 requires licensees to meet the 'needs of *each* foster child.'" *Id.* at 4.

The Wuotis' and Gantts' desire to keep providing foster care

The Wuotis and Gantts are ready and able to reapply for a license immediately. Wuoti Decl. ¶¶ 136–37; Gantt Decl. ¶¶ 190–91. The Gantts fear that their window for caring for young children is closing fast. Gantt Decl. ¶ 202. But the Department's SOGIE Mandate precludes them from being licensed. *Id.* ¶¶ 191–200; Wuoti Decl. ¶¶ 138–60.

ARGUMENT

To obtain an injunction, the Wuotis and the Gantts must show likely success on the merits, irreparable harm, and that the balance of the equities and the public interest favor an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[I]n First Amendment cases the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020) (citation omitted). Plaintiffs can show that (I) they are likely to succeed on their free-speech and free-exercise claims, (II) the rules are unconstitutionally vague, and (III) the remaining factors favor an injunction.

I. Vermont's Mandate infringes Plaintiffs' free-speech and free-exercise rights.

Vermont's Mandate burdens Plaintiffs' speech and expressive association based on viewpoint and their free-exercise rights through a policy that is not neutral or generally applicable. These infringements trigger and fail strict scrutiny.

A. The Mandate compels and restricts speech based on viewpoint.

1. A regulation compels speech if it mandates some form of protected expression and the regulation affects the speaker's message. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) ("[T]he government may not compel a person to speak its own preferred messages."). So forcing a parade to include an LGBT banner compels speech when the organizers object to the banner's message. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574–75 (1995). And forcing

a pregnancy center to provide information about obtaining abortions compels speech when the center objects to abortions. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014).

Courts have long applied these principles to scrutinize government attempts to withhold government licenses and other benefits "because someone refuses to give up constitutional rights." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (describing unconstitutional conditions doctrine). So it makes sense that the Second Circuit has applied these free-speech principles in the foster-care and adoption context. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 178, 180 (2d Cir. 2020); *see also Blais v. Hunter*, 493 F. Supp. 3d 984, 997 (E.D. Wash. 2020) (applying free-exercise principles to scrutinize a policy like Vermont's).

New Hope is helpful. There, New York tried to shut down a Christian adoption agency because of its religious desire to place children according to the "biblical model of marriage as one man married for life to one woman." *New Hope*, 966 F.3d at 149. The Second Circuit recognized that the agency engaged in much speech, like counseling, instruction, evaluating adoption applicants, and filling out paperwork. *Id.* at 171. The court also recognized that the agency's entire purpose was to "speak on the determinative question for any adoption: whether it would be in the best interests of a child to be adopted by particular applicants." *Id.* But New York tried to compel the agency to say something it did not believe: "that adoption by unmarried or same-sex couples would ever be in the best interests of a child." *Id.*

Vermont's Mandate similarly compels speech. Start with Policy 76's plain language. It says staff should encourage caregivers to use "appropriate pronouns, preferred name[s]," and "[s]upport young people's gender expression[.]" Policy 76 at 10–11. These terms are mandatory, not optional. Exploring SOGIE topics is "part of the standard licensing and renewal processes." Sept. 8 Email at 3. And *all* parents must be "fully embracing and holistically affirming" of a child's gender expression.

Id. The primary way to communicate support and affirmation is through speech. Whether it's using a child's stated name and pronouns, "[a]dvocat[ing]" for the child to access opposite-sex facilities at school, or just talking about their gender identity (Policy 76 at 10), parenting is "laden with speech." *New Hope*, 966 F.3d at 171.

Department practice confirms that Policy 76 applies categorically. After the Gantts sought clarity about the September 8th email, Murphy asked whether they would use inaccurate pronouns. Gantt Decl. ¶ 165. When they said no, Murphy suggested "remedial interventions" to help them change their views. MPI, Ex. D at 4. They declined, so the Department revoked their license. *Id.* And in doing so, the Department cited their religious objection to using inaccurate pronouns, to taking a child to "pride parades," and to supporting a child's gender expression, relying on Policy 76 to explain why that was a problem. *Id.*

These policies force the Wuotis and the Gantts "to utter what is not in [their] mind[s]." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Plaintiffs believe biological sex is an immutable characteristic that cannot change. But the Department's Policies require them to say something they don't believe: that a boy can be a girl, a girl can be a boy, or a child need not be any particular sex at all. When the Wuotis explained to Murphy that they could not encourage a child to "transition[]" to the opposite sex, Murphy said their inability to "encourage and support children in their sexual and gender identity" disqualified them. Wuoti Emails at 9. As the Department explained in its September 8th email, parents must speak the State's message "even if the foster parents hold divergent personal opinions or beliefs." Sept. 8 Email at 2. If forcing an adoption agency "to recommend same-sex couples … as adoptive parents" compels speech, forcing parents to constantly mouth the State's ideological message must do so too. *New Hope*, 966 F.3d 171.

2. Moving from prescriptions to proscriptions, Vermont's Mandate also restricts speech as applied. When the speaker's desired message triggers the rule's

application, that is a direct regulation of speech. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) (law against materially supporting terrorism-regulated speech as applied when the "triggering" event was "communicating a message").

Start again with the policies' texts. Parents must affirm a child's professed identity and gender expression. Policy 76 at 10. In fact, they must be "fully embracing and holistically affirming" in all aspects of their life—which must include their speech. Sept. 8 Email at 3. The negative implication is that they cannot express a different view about a child's professed identity or gender expression.

That prohibits the Wuotis and the Gantts from politely sharing their biblical worldview. Discussions about sexual ethics, gender identity, men in women's sports, and more, regularly come up at home, at church, during Bible study, or around the dinner table. Bryan Gantt, for example, preaches the Christian perspective about creation and the differences between men and women at his church. Gantt Decl. ¶¶ 126–27. And Katy Wuoti suffered from gender dysphoria as a child. Wuoti Decl. ¶ 91. She would seek to share that experience with a child who similarly struggles to accept their biological sex, but would "never" force her beliefs on anyone. *Id.* ¶¶ 103–04, 111, 124, 149; Wuoti Emails at 10. But neither of them can say any of these things to any foster child, particularly if the child identifies as transgender or non-binary. That would not be "fully embracing and holistically affirming" of the child's beliefs. Sept. 8 Email at 3.

The Department's past practice confirms that caregivers can't share these views. When the Wuotis expressed that they "would encourage(not force)" a child to live according to God's design for sex and the human body, the Department said that was not "identity-affirming." MPI, Ex. C at 3. Similarly, when Gantts asked to care for children consistent with their faith, the Department revoked their license. Gantt Decl. ¶¶ 166–175.

The Mandate infringes on children's rights as well. After all, at least *some* children want to go to religious homes, attend religious services, and hear religious teachings about how to live out the faith. *See* Wuoti Decl. ¶ 57. But the State ignores their needs by categorically excluding families with the "wrong" views about sexual and gender identities. States do not have "a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011). If schools cannot confine students to hearing "officially approved" messages in school, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), how much more does that principle protect foster children in a foster parent's own home? In neither situation can the state justify isolating future citizens from views the state considers offensive.

3. By requiring speech favoring progressive views on human sexuality, while prohibiting speech expressing different views, Vermont's Mandate discriminates based on viewpoint—"an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

A policy regulates based on viewpoint when it targets speech "based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). Vermont does exactly that—requiring pro-LGBT messages it views as "positive," while prohibiting religiously informed messages that it views as "offensive," or "derogatory." *Id.* In Vermont, "only one perspective" about human sexuality is "acceptable." *Husain v. Springer*, 494 F.3d 108, 127 (2d Cir. 2007). Foster parents must speak in "affirming" ways of a child's desired pronouns and gender expression but cannot state that gender is fixed and children should seek to cherish rather than reject their biological sex.

The Wuoti and the Gantt's faithful service to Vermont's children shows that this case is really about ideological disagreements. Department officials regularly praised both families. Wuoti Decl. ¶¶ 63–65; Gantt Decl. ¶¶ 50–65. Both couples

have successfully adopted five children from Vermont's foster care system between them, and the Gantts skillfully cared for children with special needs that are harder to place. Gantt Decl. ¶¶ 33–36, 43–45, 61–63. Even Murphy had "no doubt that [they] would be welcoming" to children placed in their home. Wuoti Emails at 9. That proves their loving care wasn't the problem; their religious viewpoint was. Viewpoint-based restrictions are almost always unconstitutional; at the very least, they trigger strict scrutiny. *Iancu*, 588 U.S. at 393 ("Viewpoint discrimination doomed the [law]."); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018) (same).

B. The Mandate compels and restricts association based on viewpoint.

Vermont's Mandate infringes on Plaintiffs' freedom of association. Plaintiffs' "freedom to speak[and] to worship" have a "correlative freedom to engage in group effort toward those ends," as well as the "freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). Mirroring their free-speech claim, Plaintiffs must show that they engage in "some form of expression" and that the regulation "affects in a significant way [their] ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). "[S]evere burdens on associational rights" trigger strict scrutiny. *Slattery v. Hochul*, 61 F.4th 278, 287 (2d Cir. 2023) (citation omitted).

Vermont's Mandate compels foster parents to associate with activities promoting the State's message about human sexuality. Beginning with the text, Policy 76 says parents should "[b]ring young people to LGBTQ organizations and events in the community." Policy 76 at 10. Since children need chaperones, parents must attend these events too. The Department seems to agree; it cited the Gantts' unwillingness to attend a "gay pride event" in their revocation letter. MPI, Ex. D at 3. Events like pride parades are expressive; people "march[] to make a point."

Hurley, 515 U.S. at 568. In this case it's to express "pride." *Latino Officers Ass'n, N.Y., Inc. v. City of New York*, 196 F.3d 458, 466 (2d Cir. 1999) (discussing affinity groups in parades). Indeed, sometimes a group's affinity *is* the message, like a gay softball league excluding heterosexual players to maintain its "gay identity." *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1162 (W.D. Wash. 2011). And because foster parents must be "holistically affirming," Vermont forbids them from associating with activities expressing a different view about human sexuality. Sept. 8 Email.

Forcing the Wuotis and the Gantts to attend events like pride parades "impair[s]" their ability to "express those views, and only those views" they want to express. *Dale*, 530 U.S. at 648. *Slattery* is instructive. There, New York tried to regulate a pro-life pregnancy center's hiring practices. 61 F.4th at 288. The Second Circuit recognized that only employees who shared the center's pro-life views would be "reliable advocate[s]" for its mission. *Id.* So forcing the center to employ personnel who "engaged … in conduct antithetical to those views" undermined its message. *Id.*

If the Constitution protects an employer's right to hire employees aligned with the organization's mission, it must also protect families who just want to worship and parent consistent with their beliefs. *See also New Hope*, 966 F.3d at 180 (explaining that "requiring [adoption agency] to associate with unmarried and same-sex couples for the purpose of providing services leading to adoption" could impair agency's expressive association). Like pregnancy centers advocating their "life-affirming" views through pregnancy counseling, the Wuotis and the Gantts share their body-affirming views through their parenting. *Slattery,* 61 F.4th at 288. They want to attend church every Sunday with their willing children, conduct Bible studies at home, and talk about their beliefs over the dinner table. Wuoti Decl. ¶¶ 149–55; Gantt Decl. ¶¶ 121–27, 200–201. There is no doubt that

"religious worship and discussion …. are forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). But Vermont forbids both discussions and homilies that are not "holistically affirming." Sept. 8 Email at 3. Plus, the Wuotis and the Gantts cannot "sincerely and effectively convey" the spiritual significance of biological sex to their children while taking them to see pride parades with floats, banners, and flags saying that children can be any gender they want. *Slattery*, 61 F.4th at 290 (citation omitted); *see New Hope*, 966 F.3d at 178. Forcing the Wuotis and the Gantts to attend expressive activities diametrically "opposite of the message [they are] trying to convey," while preventing them from attending church as a family and speaking about the Gospel, "would severely burden" their First Amendment rights, triggering strict scrutiny. *Slattery*, 61 F.4th at 289–90.

C. The Mandate burdens religious exercise via individualized assessments that are neither generally applicable nor neutral.

1. Plaintiffs can prove their free-exercise claim by showing that Vermont "burdened [their] sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kravitz v. Purcell*, 87 F.4th 111, 127 (2d Cir. 2023) (citation omitted). The burden need not be "substantial." *Id.* But there's little doubt that putting religious observers "to a choice" between "participat[ing] in an otherwise available benefit," or staying true to their religious faith, *is* a substantial burden on religious exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); *see Blais*, 493 F. Supp. 3d at 1000 (enjoining policy like Vermont's for violating prospective foster parents' free-exercise rights). And because the SOGIE Mandate is neither generally applicable nor neutral, it triggers strict scrutiny. *Kravitz*, 87 F.4th at 127.

Start with Vermont's system of individualized assessments. In *Fulton v. City of Philadelphia*, the city violated a Catholic adoption agency's free-exercise rights by

conditioning the agency's contract on its willingness to certify same-sex couples for foster-care against its Catholic beliefs. 593 U.S. 522, 532 (2021). The city's anti-discrimination policy was not generally applicable because it allowed discretionary exemptions. *Id.* at 535. It did not matter that the city had never granted an exemption, or that a separate contractual provision "independently prohibit[ed] discrimination in the certification of foster parents." *Id.* at 537.

The Department also has a "formal mechanism for granting exceptions." *Id.* Licensing Rule 35 allows the State to "grant a variance from a specific rule" whenever the Department thinks a "licensee will otherwise meet the goal of the rule."[1] That is decisive because it "invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537 (cleaned up). And Vermont cannot "refuse to extend that exemption system to cases of 'religious hardship' without compelling reason." *Id.* at 535 (citation omitted).

Vermont may argue that Rule 35 does not apply here because it prohibits variances "from rules 200, 201, or 315." But that argument fails for at least two reasons. First, these rules already contemplate individualized assessments. Indeed, "subjective assessment[s]" are "a distinctive feature of the foster care licensing process." *Blais*, 493 F. Supp. 3d at 999. Take Rule 201. It requires families to show:

- Healthy patterns of social and interpersonal relationships;
- Knowledge of child and adolescent development and the needs of children;
- Realistic expectations regarding the behavior of foster children; and
- Sound judgment.

These types of subjective and individualized inquiries lend themselves to uneven enforcement. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court evaluated an animal cruelty provision that punished "whoever unnecessarily

[1] The Rules are available at the link above (*supra* 3) or in the Vermont Code. Compl. ¶ 147 n.13.

kills any animal." 508 U.S. 520, 537 (1993) (cleaned up). Activities like "hunting" and "euthanasia" were necessary, but religious sacrifice was not. *Id.* That made the ordinance not generally applicable. *Id.* Here too, "[t]he problem" is how the State applies its criteria—approving families with progressive ideas about child development while penalizing families with religiously informed views. *Id.*

Second, exemptions for activities "outside the scope of the [challenged] ordinances" can still create underinclusivity problems. *Id.* at 545. What matters is whether the exempted conduct "undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534 (citation omitted). For example, in *Lukumi* the Court found that religious sacrifice, hunting, and restaurant garbage disposal all created similar health risks from "improper disposal of animal carcasses." 508 U.S. at 544. But the animal cruelty ordinance only applied to religious sacrifice, making it underinclusive. *Id.*; *accord Brown*, 564 U.S. at 801 (holding law prohibiting sale of violent video games to minors was underinclusive for failing to regulate "Saturday morning cartoons"). Here, officials can exempt all manner of regulatory requirements related to safe home environments, appropriate care, and even discipline. *See generally* Rules 35, 301–15, 324–28. Those Rules are at least as important for protecting children as the Rules Plaintiffs purportedly violated. Add in the Department's practice of placing children in homes that are not even licensed. Compl. ¶¶ 29–31; *id.*, Ex. C. In fact, the Department placed infants with both the Wuotis and the Gantts *before* they had received their licenses—in the Gantts' case less than 24 hours after they sent in their application. Wuoti Decl. ¶ 45; Gantt Decl. ¶¶ 33–34. A freewheeling exemption from *every* Rule must undermine the State's interests in strictly enforcing three of them.

3. Moving to neutrality, the Constitution prohibits religious discrimination "which is masked, as well as overt." *Lukumi*, 508 U.S. at 534. Courts must look at all the circumstances to uncover any "animosity to religion or distrust of its

practices." *Id.* at 547; *see New Hope*, 966 F.3d at 163 (court must look at "the totality of the evidence"). Vermont shows its hostility in at least two ways.

First, the State's system of individualized assessments shows that Vermont judges certain beliefs to be false. Progressive views on gender are praised, while religiously informed views are "treated [ ] as illegitimate." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 637; *see also Lukumi*, 508 U.S. at 537–38 (municipality devalued "religious reasons for killing by judging them to be of lesser import than nonreligious reasons"). But "it is not … the role of the State or its officials to prescribe what shall be offensive." *Masterpiece*, 584 U.S. at 638.

Second, Vermont's policies "proscribe more religious conduct than necessary to achieve their stated ends." *Lukumi*, 508 U.S. at 538. In *Blais*, for example, a district court enjoined a similar Washington state policy that required parents to support a child's hypothetical desire for "hormone therapy" and use the child's hypothetical "preferred name." 493 F. Supp. 3d at 990. Like Policy 76, that policy facially "applie[d] only to Department staff, not foster care applicants." *Id.* at 996. Like Policy 76, it applied "only to a child or youth who *identifies* as LGBTQ+." *Id.* And Washington did not have to exclude religious parents at the door to comply with the policy's text. *Id.* Neither does Vermont. It has "many available alternatives" to ensure that children go to loving homes. *Id.* at 997 (listing alternatives); *see also infra* § I.D.2 (same). But like Washington, Vermont excludes couples like the Wuotis and the Gantts anyway—just because it does not like their religious views.

New Hope is again helpful. There, the Christian adoption agency had faithfully served vulnerable children for decades consistent with its beliefs by referring same-sex couples to other agencies. 966 F.3d at 155–58. But New York couldn't explain why this previous practice no longer worked. *Id.* at 167. Vermont could similarly accommodate Plaintiffs by placing children who actually identify as

LGBT with parents who share the Department's progressive views about gender. The State's "abrupt … change of mind" toward working with families who faithfully served children for years is one more sign of its hostility to their beliefs. *Id.* (explaining implementing regulation forcing agencies to certify same-sex couples showed hostility when statute merely permitted same-sex couples to adopt).

D. The Mandate fails any level of heightened review.

Because the Mandate regulates speech based on viewpoint and burdens religious exercise without being neutral or generally applicable, it must be "narrowly tailored" to advance "a compelling governmental interest." *Lukumi*, 508 U.S. at 531–32. But Vermont's Mandate undermines rather than promotes children's best interests. And the State has better ways to achieve its interests while still respecting constitutional rights. As a result, Vermont's Mandate fails any level of heightened scrutiny. *See Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 261 (2d Cir. 2014) (explaining intermediate scrutiny requires laws to "directly advance[] a substantial governmental interest" and not be "overly restrictive").

1. Vermont's Mandate harms rather than helps foster children.

While Vermont is tasked with promoting foster children's best interests, Compl. ¶¶ 97–99, the Mandate undermines that interest in at least four ways. First, to maximize children's chances of finding a loving home, the State should seek to maximize the pool of loving caregivers. But excluding families like the Wuotis and the Gantts reduces that pool. "Six-in-ten U.S. adults say that whether a person is a man or a woman is determined by their sex assigned at birth."[2] And less than half say it's "important" to use a person's desired pronouns.[3] Excluding over half of all adults from eligibility only takes away opportunities for kids to find

[2] Kim Parker, et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, Pew Research Center (June 28, 2022), https://perma.cc/U3SU-B8FQ.
[3] *Id.*

loving homes. *See Fulton*, 593 U.S. at 542 (noting city's contract with Catholic agency was "likely to increase, not reduce, the number of available foster parents").

Second, the Mandate undermines Vermont's ability to place each child in a home that suits the child's unique needs. After all, neither children nor families are fungible. This is why Vermont's placement process is individualized to the child. Compl. ¶¶ 97–114 (explaining individualized placement process). But Vermont's categorical policy excludes entire faith communities and many other caregivers whose beliefs do not accord with the State's. *See* Gantt Decl. ¶¶ 103–11. Vermont takes away any opportunity for children who share the Wuotis' and Gantts' religious views to find like-minded, faithful homes.

Third, Vermont's Rules are underinclusive, and "a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (cleaned up). For example, the Department requires Plaintiffs to show they could meet the needs of "*each*" child that could potentially be placed in their home. MPI, Ex. D at 4. But it does not require other parents (who agree with its ideology) to show they can meet the needs of "*each*" and every child. The Department's own policies state parents "shall not be denied a license" if they cannot care "for children of a certain age or children with special needs." Compl. ¶ 121. And parents can decline to take children based on sex or other traits that might make the placement a poor fit. *Id*. ¶¶ 111–27; Wuoti Decl. ¶¶ 36–41. Why some parents must meet this standard but not others is a mystery.

As already explained, the Department also has discretion to grant exemptions from dozens of Rules and sometimes places children in homes that are not even licensed. *Supra* 15. If the Department can place children in homes that have not passed *any* of the licensing requirements, it's hard to see why its "policies can brook no departures" here. *Fulton*, 593 U.S. at 542. The Wuotis and Gantts

have already demonstrated their bona fides and received much praise from Department officials. Wuoti Decl. ¶¶ 63–65; Gantt Decl. ¶¶ 50–65. They merely disagree with the State about "hotly-debated issues of sex and gender identity" in which even courts take different positions. *United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020) (declining to use female pronouns to address male litigant).

Fourth, Vermont's policies do not even "materially advance" its interest in protecting children who identify as LGBT. *Alexander v. Cahill*, 598 F.3d 79, 91 (2d Cir. 2010) (explaining intermediate scrutiny). Vermont asserts that agreeing with its views is critical to a transgender or non-binary child's well-being. But that's false. Instead, evidence increasingly shows the opposite. A recent systematic review of studies on this topic concluded that there was "no clear evidence that social transition in childhood has any positive or negative mental health outcomes" and that "[t]here are no high-quality studies using an appropriate study design that assess outcomes of puberty suppression in adolescents experiencing gender dysphoria/incongruence."[4] The State's responsibility to vulnerable children calls for extra scrutiny of policies pushing experimental interventions, not deference.

2. The Mandate is not narrowly tailored, and Vermont has less restrictive alternatives to serve children in foster care.

If "the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton,* 593 U.S. at 541. Vermont must show that excluding caregivers like the Wuotis and the Gantts is "actually necessary" to promote children's welfare. *Brown*, 564 U.S. at 799. It cannot clear this high hurdle.

Start with the State's up-front, categorical exclusion. To justify a total ban, Vermont must show that families who believe in the spiritual significance of biological sex are categorically unqualified to care for *any* child. That has no basis in

[4] Hilary Cass, *The Cass Review: Independent Review of Gender Identity Services for Children and Young People: Final Report* (April 2024), https://perma.cc/5B27-EU66.

fact or law. Millions of Americans share Plaintiffs' views on human sexuality "based on decent and honorable religious or philosophical premises." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). And Vermont has already conceded that the Wuotis and the Gantts are loving, capable parents. One supervisor described the Wuotis as "AMAZING" and said she "could not hand pick a more wonderful foster family." Wuoti Decl. ¶¶ 63, 65. Even Murphy thought they could "offer warmth and compassion to *any* child who entered [their] home." Wuoti Emails at 9 (emphasis added). And when the Department needed a family to adopt a child soon to be born with special needs, the Gantts "were the unanimous choice" and "the most qualified." Gantt Decl. ¶ 85. As the Department wrote in the Gantt's revocation letter, they can at least "meet the needs of some foster children." MPI, Ex. D at 4.

There is also a long history of officials and litigants seeking to punish parents because of "the reality of private biases and the possible injury" to children. *Palmore*, 466 U.S. at 433. Fifty years ago, some courts excluded atheists to protect children from being "exposed to [atheistic] views." *Adoption of E*, 279 A.2d at 789. Forty years ago, it was the "social stigmatization" of interracial homes. *Palmore*, 466 U.S. at 431. Less than ten years ago, it was discomfort "with homosexuality due to [a child's] religious upbringing." *In re Marriage of Black*, 392 P.3d 1041, 1050 (Wash. 2017) (en banc). Now, Vermont supposedly seeks to protect children from religious beliefs about gender. This exclusionary policy reveals the State's deep "distrust" of Plaintiffs' religious practices. *Masterpiece*, 584 U.S. at 639.

Further, the State cannot evoke its duty to protect children to demand deference to its policies. In the custody context where parental rights can conflict, courts pursue children's best interests, apply typical strict-scrutiny review, demand particularized facts about a particular child, and condemn prophylactic rules punishing parents because of their religious exercise. *E.g.*, *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990) (requiring "competent evidence" that parent's

religious exercise would present a "substantial threat of present or future physical or emotional harm to the particular child or children involved"). For example, courts have rejected attempts to penalize parents who object to blood transfusions without evidence that a particular child was "prone to accidents" or suffered an "affliction that might necessitate a blood transfusion in the near future." *Garrett v. Garrett*, 527 N.W.2d 213, 221 (Neb. Ct. App. 1995). And without individualized evidence that "religious practices regarding social activities" will harm a particular child, "the court may not use those beliefs to disqualify the parent." *Pater v. Pater*, 588 N.E.2d 794, 800 (Ohio 1992).

Lots of children could be placed with families like the Wuotis and Gantts. The Department could, for example, match the Wuotis and the Gantts with children who share the same faith tradition or attended the same church. Or it could match them with newborns and infants who don't know how to speak or use pronouns—like the four newborns the Department already placed with the Wuotis and the Gantts. Wuoti Decl. ¶¶ 45–52; Gantt Decl. ¶¶ 33–48. Or it could match these families with toddlers who don't know what gender identity is. Or it could license the Wuotis and the Gantts for respite care, allowing them to care for children for short periods of time like a day or a week. In these contexts, the risk of any alleged harm because of their beliefs "is next to zero." *Doe v. Cnty. of Centre*, 242 F.3d 437, 451 (3d Cir. 2001) ("blanket policy" disfavoring foster parents with an HIV-positive child was insufficiently individualized under ADA because at least some children "face[d] negligible risk from an HIV-positive child"). But the State excludes them anway. Further, some children have special needs and are harder to place. Gantt Decl. ¶ 62. Given the State's "[d]esparate need" for homes, Compl., Ex. A, there is likely an even more acute need for families like the Gantts who are willing to care for children suffering from neonatal abstinence syndrome or autism. These children do not need more unnecessary obstacles to finding a loving home.

Rather than categorically disfavor certain religious beliefs, Vermont can target actual harm by requiring parents to be respectful and accepting of children regardless of their sexual or gender identity. *See Lukumi*, 508 U.S. at 539 (government's method must be tied to the specific interest, "not a religious classification that is said to bear some general relation to it"). West Virginia, for example, requires caregivers to "be sensitive to a child's gender identity and sexual orientation."[5] And the Wuotis and the Gantts would unconditionally love a child who identified as LGBT. Katy Wuoti, for example, struggled with gender dysphoria as a child, which motivates her to show compassion to children struggling to accept their bodies. Wuoti Decl. ¶¶ 91–105; *see Blais*, 493 F. Supp. 3d at 997 (faulting state's exclusion of parents who "had not actually discriminated against any child … but instead simply answered hypothetical questions about hypothetical children").

None of this prevents Vermont from "address[ing] LGBTQ+ concerns at the placement stage, rather than at licensing." *Blais*, 493 F. Supp. 3d at 1000. Vermont can still place LGBT children in homes with progressive views about sexual and gender identities. That's the federal government's position. It recently issued final regulations requiring federally funded agencies to notify LGBT-identifying foster youth that "safe and appropriate placement[s]" are available, while still protecting faith-based foster-care agencies to operate consistent with their beliefs.[6] That alternative shows Vermont has other options to achieve its goals.

Finally, this Court can look to other states to see what works. *See Ramirez v. Collier*, 595 U.S. 411, 429 (2022). Arizona, Idaho, Mississippi, and Tennessee explicitly prohibit government officials from discriminating against foster or

[5] W. Va. Dep't of Health and Hum. Servs., Office of Child. & Adult Servs., Home Finding Policy at 57, https://perma.cc/7CY7-NBKG.
[6] *Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children*, 89 Fed. Reg. 34818, 34,819 (April 30, 2024) (to be codified at 45 C.F.R. § 1355).

adoptive parents because they intend to raise a child consistent with their faith.[7] They seek to protect *all* of their children, just without unnecessarily trampling on constitutional rights. *E.g.*, 18 Miss. Code R. § 6-1-A-II-XIV (providing children the right "[t]o fair treatment, whatever my gender, gender identity … or sexual orientation"). And it's Vermont's burden to show "alternative measures … would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

In fact, Vermont need not look elsewhere; it already operated a system that successfully allowed the Wuotis and the Gantts to adopt five children from foster care. Other states and the federal government recognize that families like Plaintiffs can readily care for children. That proves Vermont's Mandate is as unnecessary as it is unconstitutional.

II. Vermont's Mandate is vague as applied to the Plaintiffs.

An as-applied vagueness claim centers "on the text of the challenged" regulation. *United States v. Houtar*, 980 F.3d 268, 276 (2d Cir. 2020). There are two steps. Courts first ask if the rule gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Rubin v. Garvin*, 544 F.3d 461, 468 (2d Cir. 2008). Second, courts must "consider whether the law provides explicit standards for those who apply it." *Id.* "The degree of vagueness tolerated … varies,"

[7] Ariz. Rev. Stat. § 8-921 (prohibiting discrimination against any foster or adoptive parent who "intends to guide, instruct or raise a child in a manner consistent with the person's religious belief or exercise of religion"); H.B. 578, 67th Leg., 2nd Reg. Sess. (Idaho 2024) (same); Miss. Code. § 11-62-3, -5 (prohibiting discrimination against anyone who "intends to guide, instruct, or raise a child" consistent with their religious beliefs that sex is an "immutable" characteristic); S.B. 1738, 113th Gen. Assem., 2024 Leg. Sess. (Tenn. 2024) (prohibiting the state from requiring foster parents "to affirm, accept, or support any government policy regarding sexual orientation or gender identity that conflicts with the parent's sincerely held religious or moral belief"); *see also* Ga. Code § 49-5-281(a)(3) (protecting foster parents' rights to promote their "values and beliefs, so long as the values and beliefs of the foster child and the birth family are not infringed upon").

with rules infringing on constitutional rights demanding the greatest specificity. *Id.* at 467.

Here, the "plain meaning" of Vermont's policies do not give an ordinary person notice about ideological litmus tests. Rule 201.2, for example, requires "[k]nowledge of child and adolescent development and the needs of children," while Rule 301 requires the ability to meet a child's "physical, emotional, developmental and educational needs." Neither Rule says anything about a parent's views on sexual and gender identities, let alone their willingness to speak certain pronouns or to attend events like gay-pride parades. To be sure, Policy 76 covers these topics, but it facially requires only employees, not foster parents, to speak these words and attend these events. Policy 76 at 10 ("resource families should be encouraged to" use pronouns, attend LGBT events, and support a child's "gender expression").

One hint is that the Rules apply differently depending on a person's religious or ideological views about "sensitive political topics"—not their ability to parent. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 914 (2018). If less than half of the U.S. population even agrees with Vermont's views (*supra* 17), even less would understand that *only* parents with progressive views about gender can be knowledgeable parents.

The Department's prior interpretation of its Rules shows that they don't provide any guardrails for licensing decisions either. *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (explaining courts may evaluate enforcement standards by looking at enforcement authority's interpretation). As already explained, the Department happily licensed the Wuotis and the Gantts for years while praising their faithful service. Then, it began to exclude families who believe in biblical marriage and biological sex. *Smith v. Goguen*, 415 U.S. 566, 582 n.31 (1974) (explaining vagueness analysis may depend on "enforcement history"). This shows that Vermont's policies promote "discriminatory enforcement" by

allowing the Department to target disfavored messages at its whim. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

No "person of ordinary intelligence" would understand regulations about good parenting to encompass culture-war topics like pronouns and gay-pride parades. *VIP of Berlin*, 593 F.3d at 186. Vermont's SOGIE Mandate is unconstitutionally vague as applied to the Wuotis and the Gantts and should be enjoined.

III. The remaining preliminary injunction factors favor Plaintiffs.

"[I]n First Amendment cases the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Agudath Israel*, 983 F.3d 620, 637 (2d Cir. 2020) (cleaned up). There is a "presumption [that] irreparable injury ... flows from a violation of constitutional rights." *Id.* at 636. And the Gantts fear that their window to foster or adopt is closing as they age. Gantt Decl. ¶ 202. "No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Agudath Israel*, 983 F.3d at 637 (cleaned up). And permitting the Wuotis and the Gantts to pursue their foster-care license will increase the State's capacity to provide loving homes for vulnerable children without restricting its ability to match children with homes that are well-suited for them. *Supra* § I.D.2. So while the Mandate burdens *only* Plaintiffs and "disproportionately burden[s] religious exercise," granting Plaintiffs' requested injunctive relief burdens no one. *Agudath Israel*, 983 F.3d at 637. Constitutional violations of this nature "weigh[] heavily in favor of granting injunctive relief." *Id.*

CONCLUSION

The Wuotis and the Gantts respectfully request that this Court grant their motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

Dated: July 1, 2024

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