25-678

United States Court of Appeals for the Second Circuit

BRIAN WUOTI, KAITLYN WUOTI, MICHAEL GANTT, & REBECCA GANTT,
PLAINTIFFS-APPELLANTS,

v.

CHRISTOPHER WINTERS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF VERMONT DEPARTMENT OF CHILDREN AND FAMILIES, ARYKA RADKE, IN HER OFFICIAL CAPACITY AS DEPUTY COMMISSIONER OF THE FAMILY SERVICES DIVISION, STACEY EDMUNDS, IN HER OFFICIAL CAPACTIY AS DIRECTOR OF RESIDENTIAL LICENSING & SPECIAL INVESTIGATIONS,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT, NO. 24-CV-614, HON. WILLIAM K. SESSIONS, III, PRESIDING

BRIEF OF CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Concerned Women for American does not have a parent corporation, it is not a publicly traded company, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with about half a million supporters in all 50 states. CWA advocates for traditional values that are central to America's cultural health and welfare. CWA is made up of people whose voices are often overlooked—average American women whose views are not represented by the powerful or the elite. Because the State's action below discriminates against this type of person, CWA has a substantial interest in this case.[1]

[1] All parties consented to this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Strict scrutiny is the most demanding test known to constitutional law and invalidates government action in all but the most extraordinary cases. Under this test, the government has the burden—even at the preliminary injunction stage—to show an interest of the highest order and that its means are the least restrictive to further that interest. Any evidentiary failure or ambiguity is held against the government, which must show that its interest applies specifically to the claimant and that no other means would be feasible. When other jurisdictions use less restrictive means in similar regulatory schemes, the government necessarily fails to pass strict scrutiny.

Though the district court purported to apply strict scrutiny (in the alternative) to Vermont's blanket ban on the Wuotis and Gantts fostering any child in the State, it erred significantly in that effort. First, it did not critically examine Vermont's evidence underscoring the State's putative compelling interest—it simply deferred to the State's say-so. That is not how strict scrutiny works, especially since the State's evidence lacked scientific rigor. The court glossed over the fact that the State's policy will harm many children, both by excluding foster children from loving families and by requiring premature "affirmation" of identities that otherwise would have changed in the child's natural development. Unblinking "affirmation" could thus subject children to a lifetime of personal devastation. The court also failed

to address all the ways in which Vermont's scheme is over- and under-inclusive, which precludes any assertion that disqualifying these families as foster parents is tied to a compelling interest.

Though the court's failure to properly apply the compelling interest test is reason enough for reversal, the court also botched the separate least-restrictive means requirement. The court simply ignored that many other States protect children without disqualifying families like these. And Vermont did not show that it tried any approach first apart from a blanket ban of these families. Once again, Vermont's evidence fell woefully short of what it needed to show that its drastic ban is narrowly tailored to any compelling interest. Because the district court misapplied strict scrutiny, this Court should reverse.

ARGUMENT

I. The district court did not require Vermont to show a compelling interest.

The district court erred in its fleeting compelling government interest analysis. It did not require Vermont to produce sufficient evidence to show that its policy was necessary to any interest in protecting LGBT children. It ignored evidence that the State's policy will harm many children of all identities. And it disregarded that the State's policy is fatally underinclusive, as it does not require unblinking affirmation by parents in other contexts. Thus, Vermont failed to show a compelling government

interest underlying its policy of excluding families like the Wuotis and Gantts from fostering any child in Vermont.

A. The State does not provide evidence to support a compelling government interest underlying its policy.

To begin, Vermont did not show that its policy furthers any compelling government interest. The district court articulated a couple purported interests, including "protecting the health and welfare of LGBTQ youth" and "the protection of minor children." SA25, SA27. A broad interest in child welfare is too general to work as a compelling government interest in this challenge focused on these families' fitness as potential foster parents. The government may as well assert a compelling interest in "equality" or "freedom." "[T]he First Amendment demands a more precise analysis." *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021); *see NAACP v. Button*, 371 U.S. 415, 438–39 (1963) (rejecting Virginia's "attempt to equate" the NAACP's litigation activities with prohibited legal activities and thereby define the relevant government interest at a high level). Vermont's burden on strict scrutiny is to show that "it has such an interest" specifically "in denying" any and all foster certification to these families. *Fulton*, 593 U.S. at 541. And the court below acknowledged the state administrative board's finding that these parents "are warm, loving, kind, and respectful people who have a history of parenting foster children without raising any concerns." SA10; *see* SA11 ("most qualified" and "unanimous choice"). Speaking about the Wuotis, a local foster supervisor told the

Vermont authorities that "they are AMAZING!!!" and "I probably could not hand pick a more wonderful foster family than them!" JA411–12.

The primary interest argued by Vermont and seemingly accepted without evaluation below was "protecting the health and welfare of LGBTQ youth." SA27. Recall that under strict scrutiny, discriminatory regulations of speech (or religious exercise) "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This "stringent standard is not watered down but really means what it says." *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 484 (2020) (cleaned up). Laws "will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "[O]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (cleaned up). Vermont must demonstrate *specifically* that "application of the [legal] burden to [these families] represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (cleaned up). Vermont must also "specifically identify an actual problem" and show that restricting "speech [is] actually necessary to the solution." *Brown v. Ent. Merchants*

Ass'n, 564 U.S. 786, 799 (2011) (cleaned up). And even at the preliminary injunction stage, the government must shoulder these heavy burdens. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004).

The district court failed to hold the government to its burdens. Instead, it approached the compelling interest inquiry by assuming that Vermont's "rules and policies" "protect the health and welfare of foster children." SA25. But that is the wrong starting assumption. Instead, the court should have decided whether the government would likely meet its extraordinarily high burden of proving that its blanket ban on these families is a necessary means of furthering an interest of the highest order.

Rather than undertaking that inquiry and forcing the government to prove its case, the court just assumed Vermont was right. In the Background section of its opinion, the court noted that "Defendants' memorandum cites research on the importance of family acceptance for LGBTQ youth," and "[s]uch studies reportedly show that 'highly rejected' LGBTQ youth are far more likely to suffer from high levels of depression, attempt suicide, use drugs, and be at risk for sexually transmitted diseases." SA7. Then, for the rest of the opinion, the court appeared to treat what the Defendants said these studies "reportedly show" as proven.

The district court's failure to scrutinize this evidence itself requires reversal. Had the court considered this evidence in any way, it would have found highly deficient evidence that is not nearly enough for strict scrutiny.

Below, Vermont invoked purported "studies and analysis demonstrating that LGBTQ children and young people are overrepresented in the foster care system and experience worse outcomes due to the lack of affirmation they receive." JA301. Let's consider each of those studies—a term used generously—in turn.

First, Vermont noted a 2013 Vermont Youth Risk Behavioral Survey, which found that LGBT youth may be "at higher risk for depression, tobacco, alcohol and other drug use, suicide, and unhealthy sexual behaviors." JA271; *see* JA310. This informal survey has nothing to with foster care or even family "affirmation," and it expresses disclaims any ability to show "why" students provide any responses. Vt. Dep't of Health, *2013 Youth Risk Behavioral Survey* 4, https://perma.cc/Q54X-MGBE.

Next, Vermont invoked a paper published "[y]ears earlier" "in the LGBTQ Policy Journal at the Harvard Kennedy School," with generalized statements about the need for "collaborate policy reform effort[s]." JA271; *see* JA311. This "Student Journal" entry is a glorified op-ed, not evidence, and it does not specifically address any issues in this case. *See* Sarah Mountz, *Revolving Doors: LGBTQ Youth at the Interface of the Child Welfare and Juvenile Justice Systems*, https://perma.cc/

KU6M-6Y87 (JA318–31) ("I argue that efforts toward change should always include supporting the considerable local and national organizing efforts of LGBTQ youths themselves . . . and honoring the fire behind the voices they sustain.").

Next, Vermont invoked a 2013 "position paper" of a medical interest group for the proposition that "[a]ntidiscrimination policies should be implemented to protect LGBTQ youth in foster care settings." JA272; *see* JA311.[2] This generalized policy statement also does not address any specific issue here, much less provide probative evidence.

Seeming to recognize that this policy base is insufficient, Vermont below tried to backfill the record with references to "[o]ngoing research" that supposedly "supports" its policy. JA278; *contra Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (explaining that "[t]he government's justification" cannot be "invented *post hoc* in response to litigation"). These references are also insufficient to carry the government's burden.

First, Vermont noted an online survey and related materials suggesting that LGBT youth "are more likely to experience abuse and neglect" as a general matter.

[2] Soc'y for Adolescent Health & Medicine, *Recommendations for Promoting the Health and Well-Being of Lesbian, Gay, Bisexual, and Transgender Adolescents: A Position Paper of the Society for Adolescent Health and Medicine*, 52 J. Adolescent Health 506, 507 (2013).

JA278–79.[3] Even putting aside the flaws of basing studies on self-reported anonymous online surveys, this survey does not purport to—and could not—provide any evidence about causation. And it appears to contain no reference to foster care.

Second, Vermont trotted out several reports suggesting that "LGBTQ youth are overrepresented in the foster care system." JA279–80. Again, these generalized reports—which do not purport to provide statistical evidence—are not geared toward the issues here.

Finally, Vermont got around to evidence supposedly showing that "[a] parent's refusal to be affirming to an LGBTQ child in their care has a significant impact on the health and well-being of the child." JA280. This evidence fares no better.

Vermont's lead citation is to a booklet produced by an LGBT advocacy group (San Francisco State University's Family Acceptance Project) and aimed at Latter-day Saint families. *Id.* Vermont omitted the subtitle of this report, presumably because it targets Latter-day Saint families.[4] This booklet, however, does no more than restate research by one of its authors, Caitlin Ryan.[5] Vermont goes on to rely

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[3] *See* The Trevor Project, *National Survey on LGBTQ Youth Mental Health 2023*, at 28, https://perma.cc/J8QL-399P (explaining methodology).

[4] See Caitlin Ryan & Robert A. Rees, *Supportive Families, Healthy Children: Helping Latter-day Saint Families with Lesbian, Gay, Bisexual & Transgender Children* (2012), https://perma.cc/4TEF-ALNN.

[5] *See id.* at 4–5.

on the Ryan research for the claim that "[f]amily support and acceptance are associated with a litany of improved outcomes." JA281.[6]

Before getting to this (and similar) studies, note that they say little about *affirmation*. For instance, Vermont's lead booklet never uses any form of that word. Instead, the word "acceptance" is used, which conveys a substantively different reaction than "affirmation." For instance, one can accept a child's current gender identity without affirming it. *See, e.g.*, JA148 (Mr. Gantt explaining that "we would love, accept, and support any child regardless of how they identified," but that does not mean *affirming* every child's expression). And to the extent "rejection" in this research is the opposite of "acceptance," Vermont's evidence is all targeted at the wrong question. These families are not "rejecting" any children, so these studies say nothing about these families' circumstances.

In fact, the lead author of the studies relied on by Vermont—Caitlin Ryan—has repudiated equating failure to "affirm" with rejection:

> Families that are struggling need to understand that they don't have to choose between their LGBT child and their faith. Parents and families can support their LGBT child—even if they believe that being LGBT

[6] Ryan's original study was published in 2009. *See* Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, 123 Pediatrics 346 (2009) (hereinafter Ryan Pediatrics). The follow-up study was published the next year, using the same dataset and basic methodology. *See* Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. Child & Adolescent Psychiatric Nursing 205 (2010) (hereinafter Ryan Nursing).

> is wrong—by simple actions that don't require them to accept a "behavior" or "identity" they don't condone.[7]

In other words, parents can be "accepting" without "affirming" potentially passing identities, an explanation that echoes Mrs. Wuoti's own. *See* JA122 ("[T]here is a difference between accepting and supporting a child versus accepting and supporting something a child says, believes, or does.").

Even if one ignored this context provided by the lead author of the primary studies cited by Vermont and pretended that a lack of "affirmation" equals "rejection," the fifteen-year-old Ryan studies do not provide probative evidence that would sufficiently support Vermont's claimed interest. The studies collected individual survey "data" in a single "urban geographic area" at either "community and social organizations that serve LGB young adults" or "clubs and bars serving this group." Ryan Pediatrics, *supra* note 6, at 347, 351; *see id.* at 350–51 ("[O]ur sample is technically one of convenience, and thus shares the limitations inherent in all convenience samples."); Ryan Nursing, *supra* note 6, at 210 ("we cannot claim that this sample is representative of the general population of LGBT individuals"). On average, the study talked to less than one person per venue. *See id.* at 206 ("a sample of 245 LGBT Latino and non-Latino white young adults from 249 LGBT

[7] Caitlin Ryan, *Parents Don't Have to Choose Between their Faith and their LGBT Kids*, Wash. Post (Jan. 7, 2015).

venues"). Participants were limited to those "who expressed interest in the study." Ryan Pediatrics, *supra* note 6, at 347.

The study excluded Black people. *Id.*; Ryan Nursing, *supra* note 6, at 210 ("The study did not include persons from other ethnic groups because of funding constraints."). The study also excluded everyone under the age of 21 and over the age of 25—excluding children in the age range these families would likely foster. Ryan Pediatrics, *supra* note 6, at 347. One version excluded transgender people, and neither analyzed that population separately. *Id.*[8] The study's analysis was conducted at a single point in time, with no follow-up, based on about 50 questions that the authors made up for the first time. It was conducted based on events "years earlier," which the study acknowledged "may introduce some potential for[] recall bias." *Id.* at 350. The study's analysis relied entirely on self-reporting, a particularly biased form of data gathering,[9] and made no effort to verify the responses provided. And the study's cross-sectional design, including the absence of any control group, precludes it from providing any evidence of causation. The study repeatedly

[8] *See* Ryan Pediatrics, *supra* note 6, at 347 ("Because of the small number of transgender participants, we only report here on outcomes from 224 LGB respondents."); *see also* Ryan Nursing, *supra* note 6, at 209 (analyzing transgender status only as a background characteristic, not with respect to "family acceptance").
[9] *See, e.g.*, Alaa Althubaiti, *Information Bias in Health Research: Definition, Pitfalls, and Adjustment Methods*, 9 J. Multidisciplinary Healthcare 211, 212 (2016) (explaining that "self-reporting bias represents a key problem," including bias "aris[ing] from social desirability, recall period, sampling approach, or selective recall").

acknowledges this point: "the current study does not determine causality." *Id.* at 350; *see id.* at 351 ("[G]iven the cross-sectional nature of this study, we caution against making cause-effect interpretations from these findings.").[10]

Thus, these studies are capable only of showing correlation—and only correlation between the authors' made-up questions and self-reported health outcomes. This lack of quality evidence is not some mere technical failure of proof. It means that not only may there be no causative relationship at all between an "affirming" environment and health outcomes, any causative relationship may in fact be precisely the opposite of the one claimed by Vermont. In other words, the State's studies cannot even rebut the proposition that an "affirming" home environment *harms* children. On strict scrutiny, the government "bears the risk of uncertainty"—"ambiguous proof will not suffice." *Brown*, 564 U.S. at 799–800.

Vermont invoked the opinion of a district court in a similar case (currently on appeal), asserting that "[a]nother federal district court reviewing the research has found it confirms that 'a disaffirming family environment can have a severe impact on LGBTQ+ youth.'" JA301 (quoting *Bates v. Pakseresht*, 2023 WL 7546002, at

[10] The only other original research cited by Vermont likewise had no control group, examining a tiny, unrepresentative sample of 74 transgender youths and finding some correlation between how often their chosen names were used and self-reported mental health measures. *See* Stephen T. Russell et al., *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. Adolescent Health 503, 504–05 (Oct. 2018) (JA281 n.15). The study conducted no long-term follow-up.

*21 (D. Or. Nov. 14, 2023)). Contra Vermont, the court in *Bates* did not say that the research "confirms" anything, but used the weasel word "indicates." *Bates*, 2023 WL 7546002, at *21. And the court in *Bates* did not dispute that the cited studies "show only correlation," acknowledging that "cross-sectional studies measure 'the exposure and the existing or prevalent outcome' at the same point in time, making 'the direction of association' difficult to determine." *Id.* (quoting Gordon Guyatt et al., *Users' Guides to the Medical Literature: Essentials of Evidence-Based Clinical Practices* 197 (3d ed. 2015)). Plus, the court "acknowledge[d] that the amount of academic literature assessing the impact of home environments on LGBTQ+ youth is limited" and that "more thorough research in this area appears to be necessary." *Id.* So while the court in *Bates* erred by deferring to the government in the face of facially deficient studies, it recognized that this body of evidence is weak, at best.

The Supreme Court has rejected similar studies that "show at best some correlation" as "not compelling" in this context of First Amendment strict scrutiny. *Brown*, 564 U.S. at 800. According to the Court, this type of evidence is "rejected" for "good reason" because "the research is based on correlation, not evidence of causation." *Id.* This evidence must also be rejected when, as here, it "suffer[s] from significant, admitted flaws in methodology." *Id.*; *see, e.g.*, *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 537 (7th Cir. 1997) (Posner, J.) ("[A] statistical study that fails to correct for salient explanatory variables, or

even to make the most elementary comparisons, has no value as causal explanation.").

Vermont's remaining sources are either summaries of other research[11] or unscientific Internet surveys that do not even purport to be evidence-based.[12] Vermont also cites sources contained in a U.S. Department of Health and Human Services rule from 2024, *Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children*, 89 Fed. Reg. 34818, but HHS did no apparent original research and draw primarily on the Ryan research discussed above. *See id.* at 34821–22 nn.9–12. More to the point, even after considering the Ryan research, HHS guaranteed "[p]rotections for religious freedom, conscience, and free speech." *Id.* at 34860.

In sum, Vermont's scant evidence cannot suffice under strict scrutiny to show that its policy addresses any compelling government interest in protecting LGBT children.

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[11] *See* Stephen T. Russell & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 Ann. Rev. Clinical Psychol. 465 (2016) (JA281); Sabra L. Katz-Wise et al., *Lesbian, Gay, Bisexual, and Transgender Youth and Family Acceptance*, 63 Pediatric Clinics N. Am. 1011 (Dec. 2016), https://perma.cc/43FS-5653 (JA281 n.14).

[12] *See, e.g.*, The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health*, at 25, https://perma.cc/2SUC-EBT2; *see also* JA280 (referring incorrectly to the "2020 Trevor Survey").

B. The State's policy harms children.

The district court also ignored that the State's policy *harms* children in at least two respects. Not only does that policy deprive children of loving foster parents, but it subjects children to unthinking "affirmation" of identities that would otherwise have potentially changed—leading to long-term harm.

First, both the district court and the studies presented by Vermont above elide the actual question here: can the government show that it would be better for every child to remain in the state's foster care system than to be placed in what even the district court conceded were these families' loving homes? Put another way, does the government have a compelling interest in trapping some children in state care to avoid their homes? Needless to say, the government presented no evidence at all that would answer that question, much less in the affirmative. No study purports to address that question.

For its part, the district court did not dispute the "shortage of foster families in Vermont," and it acknowledged the families' argument that Vermont "is harming foster children" by excluding them. SA25. Yet the court backhanded that argument with this *non sequitur*: "To the extent Plaintiffs are concerned about foster families whose religious beliefs are not consistent with DCF policies, DCF does not compel such families to change or reject their beliefs." SA25–26. The families' point, of

course, was that Vermont *hurts* children by denying them loving foster families. Neither the court nor the State had a response.

The district court also refused to address harms that come from blind "affirmation" of gender incongruence. Vermont did not address them either. But again, the State cannot have a compelling interest in harming children.

Vermont stated below that "the LGBTQ Policy's central premise [is] that sexual and gender identity are fluid." JA303. Vermont officials said that "[j]ust because someone does not identify as LGBTQ now does not mean they never will, and just because someone identifies as LGBTQ now does not mean they always will." JA313. Indeed, according to the American Psychiatric Association's *Diagnostic of Statistical Manual of Mental Disorders*, between 97.8% and 70% of gender dysphoric boys and 88% and 50% of gender dysphoric girls will have their gender incongruence resolve by adulthood absent interventions.[13] In other words, the vast majority of gender dysphoric children—like Mrs. Wuoti, JA234—will eventually desire their gender identity to be consistent with their sex. A recent study likewise found that "gender non-contentedness" declines steadily into a person's twenties.[14]

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[13] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 455 (5th ed. 2013).

[14] Pien Rawee et al., *Development of Gender Non-Contentedness During Adolescence and Early Adulthood*, 53 Arch. Sexual Behavior 1813, 1813 (2024).

But if parents are required to unblinkingly affirm and encourage any LGBTQ expression, there is a real danger of locking children into an identity that they would have otherwise considered and then moved away from. In other words, affirmation is not some neutral (much less necessarily positive) intervention, but can change the child's natural developmental trajectory. The result is that the State will have imposed its own vision of how a child should develop in place of the child's own.

The dangers of this approach can be seen in affirmation of gender identity. There, affirmation first takes the form of social transition, as a child lives out a different gender identity through name, pronouns, dress, and other social conventions. Vermont's official report preceding its policy requires social transition, admonishing that foster system "[a]dults should use the name and pronoun preferred by an individual youth." JA338; *see id.* (same for "dress" and "express[ing] themselves").[15] As the United Kingdom's Cass Report—a seminal review of evidence about childhood gender transition—explained, "it is important to view [social transition] as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning and longer-

[15] *See also* Vt. Dep't for Child. & Fams., Fam. Servs. Div., *Licensing Rules for Foster Homes in Vermont* at 11, https://perma.cc/VZ7U-ZCLD (SA44) (Rule 315: "Foster parents shall support children in wearing hairstyles, clothing, and accessories affirming of the child's . . . gender identity.").

term outcomes."[16] Again, absent interventions, the vast majority of "children with gender dysphoria grow out of it." *Eknes-Tucker v. Governor of Alabama*, 114 F.4th 1241, 1268 (11th Cir. 2024) (Lagoa, J., concurring). But as the Cass Report found, clinicians "are unable to determine with any certainty which children and young people will go on to have an enduring trans identity."[17] Unblinking affirmation of all children, then, changes outcomes. One "study found that 93% of those who socially transitioned between three and 12 years old continued to identify as transgender" five years later.[18]

Harm will result from this early "affirmation" of individuals who would otherwise have returned to their original gender identity. For instance, one "study looking at transgender adults found that lifetime suicide attempts and suicidal ideation in the past year was higher among those who had socially transitioned as adolescents compared to those who had socially transitioned in adulthood."[19]

What's more, affirmation through social transition starts a conveyor belt that sends a child through medical transitioning. As the U.S. Department of Health and Human Services recently explained, several studies "suggest[] the majority of

[16] Hilary Cass, *Independent Review of Gender Identity Services* 158 (Apr. 2024), https://perma.cc/74EA-L76V (hereinafter Cass Report).
[17] *Id.* at 22.
[18] *Id.* at 162.
[19] *Id.* (internal quotation marks omitted).

children who socially transition before puberty progress to medical interventions."[20] Though Vermont tried to gloss over medical transitions below by asserting that they "are covered primarily by other provisions in the licensing rules," JA302, the point is that immediate social "affirmation" *leads to* medical transition.

The first medical transition intervention is typically puberty blockers. While this intervention has been defended as providing a "pause" button, the United States now expresses "considerable concern that pubertal suppression may alter the course of gender identity development, essentially 'locking in' a gender identity that may have reconciled with biological sex during the natural course of puberty."[21] "Several studies have suggested continuation rates from [puberty blockers] to [cross-sex hormones] exceed 90%," making blockers "more like a 'gas pedal' that accelerates medical transition."[22]

Affirmation is thus likely to usher children to irreversible, unproven, and sterilizing sex hormones—and eventually surgeries. *See Eknes-Tucker*, 114 F.4th at 1260–61, 1268–70 (Lagoa, J., concurring). Children who take puberty blockers then cross-sex hormones—the near-universal transitioning pathway—are expected to

[20] U.S. Dep't of Health & Human Servs., *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices* 71 (May 1, 2025), https://perma.cc/A322-8Z8L (hereinafter HHS Report).
[21] *Id.* at 70–71 (internal quotation marks omitted).
[22] *Id.* at 71.

become sterile.[23] They will also suffer many other negative repercussions.[24] To take just one example, the President of the World Professional Association for Transgender Health admitted "that 'really about zero' biological males who block puberty at the typical Tanner 2 Stage of puberty (around 11 years old) will go on to ever achieve an orgasm."[25]

According to the United States, "Every public health authority that has conducted a systematic review of the evidence has concluded that the benefit/risk profile of [pediatric medical transition] is either unknown or unfavorable."[26] Some indeterminate number of children will thus be permanently harmed by affirmation, as they will suffer "irreversible hormonal and/or surgical interventions [and] ultimately [will] not continue to identify as transgender."[27]

Vermont appears to have considered none of this. The State instead adopted a glib "affirmation" versus "rejection" binary, assuming that anything short of full and immediate affirmation is rejection. But full and immediate affirmation of a child's fleeting identity can destroy that child's life. It *has* destroyed children's lives. *See*

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[23] Stephen Levine, *Reconsidering Informed Consent*, 48 J. Sex & Marital Therapy 706, 711, 713 (2022), https://tinyurl.com/2s4x67ks.
[24] *See, e.g.*, *id.* at 709, 713; *L.W. v. Skrmetti*, 83 F.4th 460, 489 (6th Cir. 2023) (explaining the "considerable evidence about the risks of these treatments and the flaws in existing research").
[25] David Larson, *Duke Health Emerges as Southern Hub for Youth Gender Transition*, Carolina J. (Aug. 31, 2022), https://perma.cc/8KVP-GCY8.
[26] HHS Report, *supra* note 20, at 77; *see generally id.* Chapter 5.
[27] *Id.* at 71–72.

Eknes-Tucker, 114 F.4th at 1266–68 (Lagoa, J., concurring) (stories of detransitioners). And it can destroy *other* children's lives. *See* JA312 (Vermont proudly noting that it sanctions biological males who express a female identity "bedroom sharing" with young foster girls). So the State's demand for "affirmation" does not promote any compelling government in protecting children—for many children, that demand will be harmful. Vermont's evidence is grossly insufficient to prove a compelling government interest.

C. The State's policy is fatally underinclusive.

On top of all that, Vermont's approach is fatally underinclusive. "A law does not advance an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Espinoza*, 591 U.S. at 486 (cleaned up); *see Reed*, 576 U.S. at 172 (same). Here, Vermont (wisely) does not force parents *writ large* to "affirm" any identities. Whatever the reasons for this divergence, "[t]he consequence is that [Vermont's] regulation is wildly underinclusive when judged against its asserted justification." *Brown*, 564 U.S. at 802. That "is alone enough to defeat it." *Id.* Because the same putative interest is at stake in this other context—protection of what the State's policy refers to as "LGBTQQIAPP"[28] children—Vermont failed to prove a compelling need to exclude parents like these from the

[28] Defined as "[a] collection of queer identities short for lesbian, gay, bisexual, trans, queer, questioning, intersex, asexual, pansexual, polysexual." JA345.

foster system.

Vermont's policy is underinclusive in other respects too. For instance, the State disqualified these families because they were supposedly unable "to meet the needs of *each* foster child"—suggesting that foster parents must be able to meet every child's needs to be licensed. JA223 (internal quotation marks omitted). But the State does not adhere to this demand for other families, allowing licenses to those who decline "to care for children of a certain age or children with special needs."[29] Vermont tried to excuse this double standard with the claim that sometimes "the State—and many cases the child—will not know whether they are LGBTQ" before placement. JA302. But that is just as true for special-needs children, as those needs often develop after placement. This difference in treatment confirms that Vermont's draconian policy does not promote a compelling government interest.

* * *

The district court's deferential compelling interest analysis would pave the way for government censorship writ large. How easy, how inevitable for a government to next regulate speech of biological parents, speech in schools, speech on television, or speech in churches, to ensure an appropriately "affirming" environment as to the classification *du jour*. The government will say, *à la* the district court, that "protecting the health and welfare of LGBTQ youth" "require[s]"

[29] *Licensing Rules*, *supra* note 15, at 8 (Rule 200.1).

"the provision of an affirming environment." SA26. And this underscores the danger: Vermont's interest in an "affirming" environment is nothing more than an interest in suppressing speech (and religious exercise), purportedly for the protection of listeners. But there is no legitimate (much less compelling) interest in "the suppression of expression." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). The same is true for speech to minors: speech "cannot be suppressed solely to protect the young from ideas . . . that a legislative body thinks unsuitable for them." *Brown*, 564 U.S. at 795 (cleaned up). The government's rule here simply suppresses expression—that is its point. Vermont failed to show a compelling government interest in banning these families from fostering any child.

II. The district court failed to apply the least-restrictive means test.

The district court's least-restrictive means analysis fails for many of the same reasons. The least-restrictive means test is "exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). Under this test, if a less restrictive alternative would serve the government's purpose, the government "*must* use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). "Precision must be the touchstone when it comes to regulations of speech" (or religion). *Nat'l Inst. of Fam. and Life Advocates v. Becerra*, 585 U.S. 755, 775 (2018) (cleaned up). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here

it seems to have been the first strategy the [State] thought to try." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

First, as noted, the State is content to let children's biological parents or other guardians generally take the approach they deem best about sexual orientation or gender identity issues. Whatever constraints the State places on these parents appear to be less restrictive than the outright ban on these families. "In light of this underinclusiveness," Vermont cannot meet its "burden to prove that [the law] is narrowly tailored." *Reed*, 576 U.S. at 172.

A blanket ban on these families is also vastly overinclusive, as they explain. At a bare minimum, the government could have limitations or conditions on their placements or continued provision of care. While this approach is unnecessary, it would be a less restrictive way for the government to satisfy its purported interest—meaning that the government's current blanket ban fails strict scrutiny.

The district court dismissed this possibility because of "the potential for a child to be placed and, post-placement, change their sexual [or gender] identity in a material way." SA26. First, that hypothetical is dubious in many foster contexts, including short-term placements and placements of newborns. And at any rate, such hypothetical concerns are not enough on strict scrutiny: "the government must show that it seriously undertook to address the problem with less intrusive tools readily available to it." *Agudath Israel*, 983 F.3d at 633 (internal quotation marks omitted).

Vermont has never suggested that it tried any less intrusive means before its blanket ban on these families.

What's more, neither Vermont nor the district court pointed to any competent evidence—say, past experience, or experiences from other States with different policies—that children could not be sufficiently protected with a less intrusive approach. Many other States—and the federal government—allow families like the Wuotis and Gantts to foster children. *See, e.g.*, Tenn. Code Ann. § 37-6-102(a) ("The department of children's services shall not require a current or prospective adoptive or foster parent ('parent') 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 beliefs."); Ariz. Rev. Stat. § 8-921 (similar). That reality requires Vermont to "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt v. Hobbs*, 574 U.S. 352, 369 (2015).

But the district court once again flipped the burden, ignoring the experience of other States and instead explaining that a state official's declaration "attests that '[r]emoval of an LGBTQ foster child from their placement specifically because of their LGBTQ identity is extremely damaging to their psychological and physical safety, mental health, well-being, and normalcy.'" SA27 (quoting JA313). This statement in the declaration is backed up by no evidence, even though "[t]he State must specifically identify an actual problem" on strict scrutiny. *Brown*, 564 U.S. at

799 (cleaned up). The state official neither declared some personal experience along these lines nor provided evidentiary support. And the official *certainly* did not show that this problem exists only in Vermont, requiring a uniquely burdensome rule in Vermont. It is *the government's* burden to show that other States have created a crisis of child acceptance through their foster policies, and that allowing these families to foster any child would create a similar crisis. Understandably, the government "failed to make that showing here," *Holt*, 574 U.S. at 369, and no evidence supports it. *See also Ramirez v. Collier*, 595 U.S. 411, 429 (2022) (holding that a state that failed to "explore any relevant differences between [its] process and those of other jurisdictions" flunked strict scrutiny).

"In the absence of proof, it is not for the [c]ourt to assume" that Vermont is right. *Playboy*, 529 U.S. at 824. The least-restrictive means test requires far more than what Vermont provided.

CONCLUSION

Because Vermont did not satisfy either strict scrutiny requirement, the Court should reverse.

Respectfully submitted,

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Dated: June 5, 2025

/s Christopher Mills
Christopher Mills

CERTIFICATE OF SERVICE

I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via the Court's ACMS system.

Dated: June 5, 2025

s/ Christopher Mills
Christopher Mills