25-678

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIAN WUOTI, *et al.*,

Plaintiffs-Appellants,

v.

CHRISTOPHER WINTERS, in his official capacity as Commissioner of the Vermont Department for Children and Families, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Vermont, No. 2:24-cv-614

BRIEF OF *AMICUS CURIAE*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Supp. of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice, LLC v. Paxton*, Nos. 22-555 & 22-277 (Dec. 6, 2023); *Texas A&M Queer Empowerment Council v. Mahomes*, --- F. Supp. 3d. ---, 2025 WL 895836 (S.D. Tex. Mar. 24, 2025).

FIRE has observed government officials across the country advance legislation and regulations intended to protect minors from harm allegedly caused by free expression. While the reasons are almost always political, this troubling trend is present in "red" and "blue" states alike.

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, their members, or their counsel contributed money intended to fund this brief's preparation or submission. All parties have consented to the filing of this brief.

In states like Texas and Florida, government officials are banning books in school libraries;[2] in states like California, the governments are strictly regulating minors' access to social media.[3] Conservative officials have cancelled drag queen story hours in libraries, and their liberal counterparts have refused to host a Christian alternative.[4]

Examples abound, each demonstrating the troubling willingness of government censors to punish—or push—specific views in the name of protecting minors. In those cases, in this case, and in others, FIRE seeks to vindicate First Amendment rights without regard to speakers' views and to protect against imposition of government-mandated viewpoints. *See, e.g.*, *Novoa v. Diaz*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022); *Amicus Curiae* Brief of FIRE in Support of Plaintiff-Appellant and Reversal,

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[2] *See* En Banc Brief of *Amicus Curiae* FIRE in Support of Plaintiffs-Appellees and Affirmance, *Little v. Llano Cnty.*, No. 23-50224 (5th Cir. Sept. 20, 2024); *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, 711 F. Supp. 3d 1325 (N.D. Fla. 2024).

[3] *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024).

[4] *See FAQ: Libraries, bookstores, and free speech*, FIRE, https://www.thefire.org/research-learn/faq-libraries-bookstores-and-free-speech (last visited Jan. 17, 2024); *see also* Aaron Terr, *America's public libraries must not take up arms in the culture war*, FIRE (June 30, 2023), https://www.thefire.org/news/americas-public-libraries-must-not-take-arms-culture-war.

Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 23-3630 (6th Cir. Dec. 23, 2024).

SUMMARY OF ARGUMENT

Vermont's Licensing Rules for Foster Families 201, 301, and 315 (the "Vermont Rules" or the "Rules") unconstitutionally condition receipt of a government license to foster children on citizens' promise to be a mouthpiece for the government's preferred message. These rules incorporate elements of the Department of Children and Families' ("DCF") Policy 76, which seeks to encourage families, regardless of their views, to support young people's gender expression. As relevant here, the Rules require that applicants seeking licensure as foster parents must pledge to "use a transgender foster child's preferred name or pronouns" and to affirm a child's sexual and gender expression. JA221, DCF 2/6/2024 Notice of Decision (recommending revocation of Gantts' foster license in part under Rule 301 because they stated their beliefs prevented them from using a transgender foster child's preferred name or pronouns); JA289, Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. (admitting the Rules require Appellants to "respect[] a child's chosen

pronouns"). The DCF does not grant any variances from the Rules under any circumstances. *See* Rule 35.

Applicants cannot be licensed as foster parents in Vermont unless they can vow, without qualification, that they agree to use gender-affirming language and preferred pronouns for a future foster child, should that hypothetical child identify as LGBT. Under the Rules, any applicant who refuses to express the State's preferred viewpoint, regardless of other qualifications, is banned from becoming a foster parent. Those who held licenses but could not comply with the Rules' requirements because of conflicts with their deeply held religious beliefs, such as Appellants, lost their foster licenses.

This threshold requirement violates the Free Speech Clause of the First Amendment for several reasons. Under the Vermont Rules, any would-be foster parent must commit to affirming a prescribed viewpoint on gender, even before receiving a license to foster and receiving a foster assignment. There are no exceptions; there are no variances available for any reason. The Rules thus discriminate against viewpoints on gender with which Vermont disagrees by compelling foster parents to speak in a prescribed way around their foster children, even if it violates their

beliefs, and by restricting foster parents from speaking the way they otherwise would around their foster children. The district court justified this overreach by holding that the Vermont Rules do not regulate speech at all but rather that they regulate only conduct.

The court's approach is wrong. First, it ignores that the Vermont Rules require applicants (and existing licensees) to promise that they will support a child's gender identity, which necessarily involves using a child's preferred pronouns. As a district court examining a similar rule determined, such rules compel speech on matters of personal conviction and belief when applied, even if they do not facially regulate speech. *See Bates v. Pakseresht*, No. 2:23-cv-00474, 2023 WL 7546002, at *17–18 (D. Or. Nov. 14, 2023). Instead of regulating conduct, they necessarily compel speech on matters of personal conviction and belief while simultaneously restricting speech the government disfavors. The district court's decision that the Rules regulate conduct alone cannot stand.

By skirting the speech issues involved, the district court evaded core Supreme Court precedent that compelled speech and viewpoint discriminatory laws are presumptively invalid without the need to apply further constitutional scrutiny. *See, e.g.*, *303 Creative LLC v. Elenis*, 600

U.S. 570, 589 (2023); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The government's treatment of gender identity, like social media use and library books, involves matters of contentious public debate. Ordinary Americans disagree strongly about these matters for a variety of reasons. It does not violate the First Amendment for Vermont to have a position. But it does violate the First Amendment for Vermont to deny a government license to a private citizen solely because she disagrees with the State's position and refuses to affirmatively say otherwise. Because "a desirable end cannot be promoted by prohibited means," *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), the Vermont Rules should have been enjoined.

ARGUMENT

The Vermont Rules unconstitutionally require existing and prospective foster parents to pledge to verbally affirm the government's view on gender identity with future foster children as a prerequisite to receiving a license. That pledge, if taken, would require the Wuotis and Gantts, to both express views they do not believe, by using preferred pronouns, and prevent them from saying things they do believe, like

opining amongst family on the immutability of sex and gender. The Rules thus compel speech and discriminate against those who do not share the government's viewpoint about gender identity, and that alone makes them unconstitutional, without need for further constitutional analysis. The rules accordingly must be enjoined.

I. The Vermont Rules Violate Precedent That Holds Compelling Speech Particularly Offends the First Amendment.

Although the district court failed to recognize it, the Vermont Rules compel the Appellants' speech by requiring them to use a child's preferred pronouns, even if those pronouns are at odds with the child's sex assigned at birth. Although the Rules do not facially compel any particular speech, their application requires use of preferred pronouns, for example. *See* JA289. Another district court recognized that a similar licensing regime compelled speech because it would, in effect, require foster family applicants to promise to use a child's preferred pronouns. *Bates*, 2024 WL 7526002, at *17–18 (observing that "using a child's preferred pronouns goes hand in hand with creating an affirming environment for the child, because intentionally using a child's incorrect pronouns could not be understood as respecting the child's gender identity").

Under the Vermont Rules, which, like the rule at issue in *Bates*, require that a foster parent meet a child's "physical, emotional, developmental and education needs," applicants must agree, for example, to use a child's preferred pronouns as a condition of receiving a license. The district court waved that away as "based upon research and feedback regarding outcomes for LGBTQ youth." JA648. But that is an argument why a speech regulation may satisfy judicial scrutiny—it is not something that means it reaches only conduct and/or only incidentally burdens speech. JA648–49. And here, it is ultimately irrelevant, because a law that compels speech—like Vermont's present regulation—does not proceed to strict (or intermediate) scrutiny that examines the support for the governmental interest and whether the regulation is properly tailored to advance it.

Rather, because the Vermont Rules compel speech, that should be the end of the constitutional analysis. The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). For that reason, the Supreme Court has repeatedly rejected attempts to compel speech "because such compulsion so plainly violates the Constitution." *Janus v.*

Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 892 (2018).

For example, in *West Virginia Board of Education v. Barnette*, the Court rejected the "compulsion of students to declare a belief," and held that forcing minor students to participate in a mandatory flag salute violated the First Amendment, because it required them to "forego any contrary convictions of their own." 619 U.S. at 631, 633. *Barnette* made abundantly clear that there is a Pole Star in the firmament of constitutional jurisprudence: "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*. at 642.

That last clause—"force citizens to confess by word or act their faith therein"—applies with particular force here. It unflinchingly announces our constitutional contempt for any attempt to force Americans to speak that which they do not believe, no matter the reason. The Supreme Court elaborated on this in *Janus*. There, the Court called the prohibition on compelled speech the First Amendment's "cardinal constitutional command" and for compelled speech to be "universally condemned."

Janus, 585 U.S. at 892. As *Janus* explained, while restrictions on speech violate the Constitution because they undermine "our democratic form of government" and "the search for truth," compelled speech inflicts the "additional damage" of coercing individuals "into betraying their own convictions." *Id.* at 893. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning … ." *Id.* For that reason, "[t]he Speech Clause has no more certain antithesis" than forcing an approved government message or banning a disfavored one. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (citing *Barnette*, 319 U.S. at 642).

Just two years ago, the Court reemphasized that compelled speech violates the First Amendment even if the state's asserted interest is deemed laudable, such as that in protecting the LGBT community. *303 Creative LLC*, 600 U.S. at 588–92 (discussing, *inter alia*, *Hurley*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617 (2018), *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)). In *303 Creative*, the Court reviewed Colorado's application of state antidiscrimination law to require a businesswoman to "either speak as the State demands or face

sanctions for expressing her own beliefs," if she chose to speak by putting her work into the marketplace. *Id.* at 589. The Court held "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'" *Id.* at 586 (quoting *Hurley*, 515 U.S. at 574, and *Snyder v. Phelps*, 562 U.S. 443, 456 (2011)). It thus rejected Colorado's attempt to compel speech to combat discrimination based on sexual orientation, holding "the First Amendment's protections [do not] belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive." *Id.* at 595.

These Court decisions represent the rule, not an exception. And the Vermont Rules offend the rule to a much greater degree than other instances of compelled speech: The Supreme Court has never affirmed a government-compelled speech requirement like Vermont's that applies to a private citizen in her own home. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (even when regulating unprotected speech like obscenity, a state regulation cannot "reach into the privacy of one's own home"). The

very concept is shocking, and the district court's upholding of it as a regulation solely of conduct makes it even more so.[5]

The speech compelled by Vermont is even more extreme than that in *Barnette* and *Janus*. Its Rules do not only force private citizens to pledge to speak contrary to their own deeply held beliefs. Rather, the state forces prospective foster parents to comply with that pledge by speaking non-biologically-aligned preferred pronouns and other gender-affirming language within the sanctity of their own homes, any time they speak around their foster children.

Vermont's unconstitutional compulsion is thus akin to those in *303 Creative* and *Wooley*. Like Colorado in *303 Creative*, Vermont requires that the Wuotis and Gantts "speak as the State demands or face sanctions," *i.e.*, be refused a license to foster children or have their existing license revoked. 600 U.S. at 589. And like New Hampshire in

[5] The Supreme Court has permitted compelled speech in extremely narrow circumstances, none of which apply here. *See, e.g.*, *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985) (allowing the state to compel disclosures of "purely factual and uncontroversial information" in potentially deceptive advertising); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006) (allowing compelled speech in law school recruiting emails that was "plainly incidental to the … regulation of conduct").

Wooley, Vermont seeks to force Appellants "to participate in the dissemination of an ideological message" on "private property." 430 U.S. at 713. The First Amendment does not abide such compelled violation of a person's own convictions. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714. For this reason alone, the district court should have enjoined the Vermont Rules.[6]

II. The Vermont Rules Violate the First Amendment Because They Discriminate Against Disfavored Viewpoints.

The Vermont Rules also violate the First Amendment because their compulsion to use gender-affirming language—and their logically concomitant ban on expressing other views—constitute viewpoint discrimination. The Rule attempts to stifle dissent and impose conformity on one of the most hotly debated topics of our time: gender identity. But whether a particular opinion is held by a silent majority, a

[6] The district court "held" in a footnote in its discussion of Freedom of Speech that Vermont's Rules would "satisfy strict scrutiny" "both facially and as applied," for reasons "discussed below" in its opinion, JA648, but the only ensuing application of strict scrutiny in the decision is one the court conducts for Appellants' free exercise challenge. JA656–59.

vocal minority, or a dissenting few, the government may not quell or compel speech based on the viewpoint it expresses.

Viewpoint discrimination is anathema to our pluralistic constitutional democracy: "At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 187 (2024). "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538 (1980). By mandating that foster parents verbally affirm a favored viewpoint to receive a government license, Vermont unconstitutionally puts its finger on the scale of a current national debate.

Under the First Amendment, government actors "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *accord Matal v. Tam*, 582 U.S. 218, 243–44 (2017). When officials nonetheless forge ahead on that basis, they engage in viewpoint

discrimination, "an egregious form of content discrimination" abhorrent to the First Amendment. *Rosenberger*, 515 U.S. at 829.

Viewpoint discrimination cannot be excused simply because it is intended to stamp out "bad" or "offensive" ideas. Indeed, "[g]iving offense is a viewpoint," and is therefore protected speech. *Tam*, 582 U.S. at 243. Determining what is moral, proper, or decent necessarily "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." *Iancu v. Brunetti*, 588 U.S. 388, 394 (2019). It is firmly within private citizens' rights to make such distinctions in their daily lives and in their homes, and it accordingly violates the First Amendment for the government to make and impose those same decisions for them. It is a "core postulate of free speech law" that the "government may not discriminate against speech based on the ideas or opinions it conveys." *Id.* at 393. Because that is exactly what the Vermont Rules do, the Rules are presumptively invalid under the First Amendment.

Viewpoint discrimination is prohibited under any circumstances, and the district court's only rejoinder is that "'[w]hile the First Amend-

ment protects the rights of citizens to express their viewpoints … it does not guarantee ideal conditions for doing so … .” JA646 (quoting *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004). Yet the Supreme Court has never upheld a viewpoint discriminatory law or regulation.

To the contrary, the Court has repeatedly held that viewpoint discriminatory laws and regulations violate the First Amendment without needing to undertake strict scrutiny analysis. *See, e.g.*, *303 Creative*, 600 U.S. at 588 (invalidating law that seeks to “excise certain ideas or viewpoints from the public dialogue” without reference to strict scrutiny) (cleaned up); *Wooley*, 430 U.S. at 715, 717 (invalidating compelled speech without referencing strict scrutiny); *Hurley*, 515 U.S. at 578 (same). As the Court held in *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 11 (2018), “restrictions based on content must satisfy strict scrutiny” but “those based on viewpoint are prohibited.” *Accord Tam*, 582 U.S. at 243 (“[W]hat we have termed ‘viewpoint discrimination’ is forbidden.”).

The Court spoke most forcefully in *Wooley* when it rejected a viewpoint discriminatory law requiring a New Hampshire man to display

the state motto, "Live free or die," on his license plate. After observing that the law "forces an individual, as part of his daily life … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," the Court held "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." 430 U.S. at 717. That is true regardless of strict scrutiny. The Vermont Rules seek to disseminate the government's preferred ideology on matters of gender identity, and it discriminates against other viewpoints on the issue, such as those held by the Wuotis and Gantts. That alone violates the First Amendment. Full stop.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand with an order directing the district court to enjoin the Vermont Rules.

Dated: June 9, 2025

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Dated: June 9, 2025

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FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

CERTIFICATE OF SERVICE

The undersigned certifies that on June 9, 2025, an electronic copy of the foregoing was filed with the Clerk of this Court using the CM/ECF system, and that all parties will be served through that system.

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