25-678

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIAN WUOTI; KAITLYN WUOTI; MICHAEL GANTT; AND REBECCA GANTT,
Plaintiffs-Appellants,

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-Appellees.

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

BRIEF OF AMICI CURIAE

PROFESSOR DAVID SMOLIN,
VERMONT FAMILY ALLIANCE,
AND JOANIE PRAAMSMA

IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici have no parent corporations and no stock.

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IDENTITY AND INTEREST OF AMICI[1]

Professor David Smolin is the Harwell G. Davis Professor of Constitutional Law and Director of the Center for Children, Law and Ethics at Samford University's Cumberland School of Law.[2] As an expert in the areas of adoption, foster care, and children's rights, he believes that meeting the complex needs of vulnerable children in the child welfare system requires a broad and diverse inclusion of persons and organizations, working together with governments. Hence, Professor Smolin also was an *amicus* in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), in support of the petitioners. Professor Smolin believes that the Court's holdings in *Fulton*, requiring inclusion of religious agencies that would not serve married same-sex couples when there were ample means for such couples to become foster parents requires, in this case, inclusion of religious foster parents whose views of certain LGBTQ issues may differ from that of Vermont, given that the needs of LGBTQ children, like other children, are best met at the matching stage. Professor Smolin believes that this trend of excluding religious foster

[1] No party or its counsel had any role in authoring this brief. No person or entity—other than Amici Curiae and their counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] Professor Smolin submits this brief in his individual capacity, not as a representative of Samford University or the Cumberland School of Law.

parents from fostering any child, based on an examination of their views on certain LGBTQ issues, exacerbates existing shortages of foster homes, to the harm of all children in foster care systems, including LGBTQ children.

Vermont Family Alliance (VFA) is a volunteer organization in Vermont representing traditional family values. VFA supports the placement of children in need into loving homes that adhere to traditional, faith-based beliefs about gender and sexual morality. VFA opposes any government policy that discriminates against people of faith.

Joanie Praamsma was a case worker and resource coordinator for a licensed foster child-placing agency in Vermont, Family Life Services (FLS), from 1992 until 2003. During that time, Vermont's Department for Children and Families (DCF) referred children in state custody to FLS for placement in foster homes. Ms. Praamsma assisted FLS in recruiting, training, and supporting Christian families as foster families. All FLS foster families were Christian families who agreed with the FLS Christian statement of faith, but they cared for each foster child well and treated each child with respect regardless of the child's beliefs or behaviors. During this time, Ms. Praamsma and her husband also fostered a child for about a year.

After FLS dissolved in 2003, Ms. Praamsma began working for Bethany Christian Services, a Vermont child-placing agency for adoption. In 2016 she met

with DCF to discuss licensing Bethany to provide foster care in Vermont. At that meeting, Ms. Praamsma learned that the state was introducing new policies that would prohibit individuals who believed homosexuality was wrong from becoming foster parents. State officials reportedly believed that such individuals would be unable to treat children who identified as homosexual with respect. Ms. Praamsma expressed her concern that this policy would drastically reduce the number of good foster parents in the state and explained that she had worked with many Christian foster families who provided a therapeutic and loving environment for foster children who had beliefs and behaviors that did not align with their own Christian faith. Ms. Praamsma is highly aware of the need of foster families in Vermont and is saddened to know that loving, willing Christian families who would like to provide foster care may be unable to do so solely because of their Christian beliefs.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The outcome of this case is dictated by *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). Plaintiffs-Appellants' Free Exercise claims are subject to strict scrutiny because the challenged DCF policy is not a neutral law of general applicability. Rather, like all foster care systems, the policy describes an intricate system of highly individualized assessments involving the exercise of discretion by government actors throughout its various stages.

According to the Supreme Court's reasoning in *Fulton*, the challenged policy cannot survive strict scrutiny because DCF has no compelling interest in refusing to match Plaintiff-Appellants with one of the many children in need of homes in the same way it matches all other prospective foster parents with foster children. Neither is the policy narrowly tailored to any government interest. "Narrow tailoring," in this case, would simply require DCF to do the same type of individual matching of children to families that it normally performs. There is simply no reason to completely banish prospective foster families from the system when their beliefs concerning the LGBTQ lifestyle do not correspond to the government's own ideology.

Amici submit that the challenged policy not only falls short of the strict scrutiny standard that applies to it due to its completely unjustified burden upon

religious exercise; it cannot even survive rational-basis review. It is the epitome of an irrational policy.

In *Fulton*, the Supreme Court and all parties acknowledged what *amici* maintain must be the paramount state interest of any foster care system: the best interest of *all* children. Any interest DCF claims as justification for its burden on religious exercise must be examined within the context of this paramount state interest. But Vermont's disqualification of all prospective foster parents who do not share the state's LGBTQ philosophy *harms* children by drastically reducing the number of families able to foster children in need. This will exacerbate an existing crisis of insufficient families for these children—a crisis that DCF has acknowledged. It will exacerbate this crisis while doing *nothing* to further the asserted government interest of increasing the number of LGBTQ-affirming families.

The tragedy of the situation is compounded by the fact that the harms this policy causes to real children in need of foster care are absolutely unnecessary to achieve the state's asserted interest. State foster care systems, including Vermont's, necessarily involve highly individualized, case-by-case assessments of the suitability of particular families for particular children. DCF already has all the tools it needs to match LGBTQ children with the foster families it deems most

suitable for them, just as it also matches all other children with the most suitable available foster families.

In this context, the state's policy is not merely unwise and unnecessary. It is not merely irrational and unfair to people of faith. It is unconscionable.

ARGUMENT

I. Foster care systems, including Vermont's, are inherently *not* "neutral laws of general applicability," because they all necessarily entail individualized, case-by-case determinations.

The beleaguered principle of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), is that where a neutral, generally applicable state law imposes an incidental burden on religion, it will not be subject to strict scrutiny under the Free Exercise Clause of the First Amendment. However, where a law invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions, it does not fall under the rubric of "generally applicable," and strict scrutiny still applies. *Fulton*, 593 U.S. at 533 (citing *Smith*, 494 U.S. at 884).

In explaining the precedential basis and rationale for the rule established in *Smith*, Justice Scalia pointed to *United States v. Lee*, where an Amish employer

sought exemption from collection and payment of social security taxes because the Amish faith prohibits participation in government support programs. *Smith*, at 880 (citing *United States v. Lee*, 455 U.S. 252, 258-61 (1982)). Justice Scalia pointed out that a system allowing individuals to opt out of particular tax payments based upon religious objections to particular government expenditures would be completely unworkable. *Id.* He contrasted the neutral, generally applicable tax code and similar laws with state unemployment compensation rules like those considered in *Sherbert v. Verner*, 374 U.S. 398 (1963), which must be justified by a compelling government interest when they burden religious exercise.

> The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment…

Smith, 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.)). Thus, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (citing *Roy*, *supra*, at 708).

It makes sense to require the state to satisfy strict scrutiny when it makes exemptions to a law for secular reasons but refuses to accommodate religious

exercise. Not only is the expectation of a religious accommodation more reasonable in a context where individual assessments and exemptions are already being made, but it is also more likely that a refusal of government officials to make an accommodation for religious exercise in this context is veiling animosity toward religious individuals or their faith.

Smith is often criticized as relegating the Free Exercise Clause to second-class status among First Amendment freedoms or reducing it to a non-discrimination requirement.[3] In fact, in *Fulton*, three Justices called for overturning *Smith*, (Concurrence of J. Alito, joined by Justices Thomas and Gorsuch) and two additional Justices found the "textual and structural arguments" against *Smith* to be "compelling" (Concurrence of Justice Barrett, joined by J. Kavanaugh), but found it unnecessary to reach the question of whether to overrule the case. Hence, a majority of the current Court has cast severe doubt on the viability and reasoning of *Smith*. To the degree *Smith* has survived, it has done so because the Court, as in *Fulton*, typically finds that the rule or law at issue falls into one or another exception to *Smith*, and thus applies strict scrutiny in spite of *Smith*. As a result, very few laws burdening religious exercise are deemed "neutral laws of general applicability" requiring only rational-basis review under modern precedents.

[3] For a good discussion of the problems with and criticisms of the *Smith* ruling, see, generally, David Smolin, *Kids are Not Cakes: A Children's Rights Perspective on Fulton v. City of Philadelphia,* 52 Cumb. L. Rev. 79 (2021/22).

Hence, courts should be quite cautious in concluding that *Smith* requires the rational basis test.

That said, *amici* submit that the case at bar is not a close call. Strict scrutiny is clearly the appropriate standard for the challenged policy here, because it is, through and through, a policy of individualized assessments and case-by-case determinations as opposed to a "neutral law of general applicability." In fact, the policy is nothing like a "law" in the sense required by *Smith*, let alone a neutral law of general applicability.

As the District Court described, the "foster care license application asks self-assessment questions, in which applicants are asked to rate on a scale of 1 to 5 their agreement with various statements, including: 'My family would be accepting and supportive of an LGBTQ child.'" *Wuoti v. Winters*, 2025 U.S. Dist. LEXUS 31293, *5-6 (D. Vt. 2025). Defendant Stacey Edmunds explained, "applicants who rate themselves at the low end of the self-assessment scale often do so because they do not know what it means to be supportive, or because they do not know much about LGBTQ youth." *Id.* at *6. The State then seeks to "help those applicants better understand the requirement…" *Id.* As in this case, this requires state actors to extensively interrogate applicants about their personal beliefs, including religious beliefs, and weigh them against the State's idea of acceptable

views. This is ideological re-education, not a rule or law in the sense required by *Smith*.

While *Smith* allows completely objective, blanket laws to escape strict scrutiny even if they burden religious exercise, Vermont's policy requires a type and degree of subjective evaluation of individuals' religious beliefs that absolutely requires strict scrutiny under *Smith*. The policy is the very type that raises the risk of the veiled religious discrimination that strict scrutiny is designed to prohibit. This is not even a close case.

According to DCF policy, prospective foster parents begin the licensing process by submitting an application and undergoing background checks.[4] If the applicant passes the background checks, a family services worker is assigned to perform an intensive evaluation process, which includes inspecting the applicant's home, interviewing family members, discussing any areas of non-compliance with regulations and how compliance might be achieved, collecting third-party references, and ultimately issuing a report and recommendation as to licensing.[5] DCF may limit a foster care license by "age, gender, and developmental needs" of the children to be placed in the home based on individual circumstances.[6] In

[4] Vt. Dep't for Child. And Fams., Fam. Servs. Div., *Family Services Policy Manual*, Policy 221, 6-7 (Policy 221), https://perma.cc/5EBF-85CM.
[5] *Id.* at 8.
[6] *Id.*

making placement determinations, Vermont's system requires DCF to "emphasize the suitability of the family and the child for each other."[7]

Federal law *requires*, as a condition of federal funding, that Vermont's foster care system involve individualized assessments to match children with the most suitable homes for them. It requires the state to place children "in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]" 42 U.S.C. § 675 (5)(A).

DCF may grant an exemption from licensing requirements at its discretion, and with the exception of the policies related to children deemed to be LGBTQ, DCF may grant variances from licensing requirements.[8] DCF policy also provides that staff "must determine the appropriate resources and supports for LGBTQ children and youth on a case-by-case basis, informed by the individual child's needs," and that DCF will place children who identify as transgender in homes "consistent with their individualized needs and preferences."[9] These children are to

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[7] Vt. Dep't for Child and Fams., Fam. Servs. Div., *Licensing Regulations for Child-Placing Agencies in Vermont* (Child-Placing Agency Regulations) at 29, https://perma.cc/E54N-A6VJ.
[8] Vt. Dep't for Child and Fams., Fam. Servs. Div., *Licensing Rules for Foster Homes in Vermont* (Licensing Rules) at 4, https://perma.cc/VZ7U-ZCLD.
[9] Vt. Dep't for Child and Fams., Fam. Servs. Div., *Family Services Policy Manual*, Policy 76, pp. 4-6, https://perma.cc/4CG9-DE68.

be reassessed at least monthly.[10]

According to statements by DCF officials, they take the time to consider many different attributes of each foster care home in order to find the best match.[11] These include the precise location of the home in relation to the child's school and any interests or extracurricular activities of the child.[12]

The decision about whether a particular home is suitable for a particular foster child involves the use of subjective assessment and decision-making on the part of the foster parents as well as DCF officials. Officials encourage foster families to consider whether a particular child is a good match for their family before accepting a placement.[13] Among other factors, DCF encourages families to consider the child's gender, age, religion, disabilities, ethnic and cultural practices, safety concerns, and the potential impact on other children in the home.[14] DCF assures prospective foster parents that they are always free to decline a particular placement and should not feel pressured to accept any situation that would make

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[10] *Id.*
[11] Complaint at 15, Para. 106, 108, *Wuoti v. Winters*, 2025 U.S. Dist. LEXIS 31293 (D. Vt. 2025) (No. 2:24-cv-614).
[12] *Id.*
[13] Vt. Dep't for Child and Fams., Fam. Servs. Div., *A Guide for Foster & Kinship Foster Families in Vermont* at 5, https://perma.cc/76L2-4Q8N.
[14] *Id.* at 8-10.

them uncomfortable.[15] Child-placing agencies are required to "respect the right of an applicant to refuse a placement without prejudice."[16]

The regulatory system includes labeled "exemptions" specifically allowing foster parents to decline placement of children due to age or special needs.[17] The existence of these explicit exceptions alone would be enough to trigger strict scrutiny under *Smith*. But the larger reality is that the *entire operation* of Vermont's foster care placement system—like that of every other state—is a system of subjective, highly-individualized determinations aimed at matching particular children with the best possible foster family environment for them. This is simply nothing like the sort of "neutral law of general applicability" that evades strict scrutiny when it burdens religious exercise under *Smith* and its progeny.

If there were any doubt about whether strict scrutiny applies, it is eliminated by *Fulton*. 593 U.S. 522 (2021). There the Court held that Philadelphia's foster care system did not fall under the neutral, generally applicable classification because it included a provision that allowed for a discretionary exemption. No exemption had ever been granted, the City said it would not grant such an exception, and a contradictory provision in the policy stated that no exceptions would be granted. *Id.* at 535-37. And yet, the Supreme Court found that the mere

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[15] *Id.* at 10.
[16] Child-Placing Agency Regulations, *supra* note 7, at 19.
[17] Licensing Rules, *supra* note 8, at 8.

existence of a mechanism for making an exception was sufficient to take the policy outside of the *Smith* "neutral law of general applicability" framework. *Id.* at 537. The analysis and result in this case should be the same. As outlined above, Vermont's system of licensing foster parents is even *less* like a "neutral law of general applicability" than the Philadelphia policy struck down in *Fulton*.

The district court below employed a blinkered means of analysis that ignored the reality of foster care systems in order to find that the challenged policy was "neutral and generally applicable." It vested undue significance in the fact that the particular policy requiring adherence to the state's LGBTQ ideology does not include an explicit exemption. *Wuoti*, 2025 U.S. Dist. LEXUS at *5-8. But in doing so, the district court completely ignored the glaring fact that the *entire* foster care program administered by DCF, including the evaluation of applicants for foster care licenses, is a system of individualized assessment and case-by-case determinations involving subjective evaluations by government officials. This system of evaluating foster family applicants, and matching children with foster families, is about as far away from a *Smith*-like law prohibiting use of a specific drug as one can imagine. Self-assessments on a one to five scale, followed by discussions of ideologically-charged issues between applicants and government officials, which ultimately are subjectively evaluated by government officials for

sufficient conformity, are not remotely close to a "neutral law of general applicability.

A review of Vermont's foster care rules, policies, and regulations reveals a broader reality that courts should acknowledge: *all* government foster care schemes necessarily involve individualized, case-by-case determinations of which placements are most suitable for foster children and families. Therefore, state foster care systems are inherently outside the scope of *Smith's* "neutral law of general applicability" framework.

"The very processes of evaluating families as prospective foster parents and matching foster children with foster homes intrinsically involves consideration of protected categories like family structure, gender, disability, religion, and race." David Smolin, *Kids are Not Cakes: A Children's Rights Perspective on Fulton v. City of Philadelphia,* 52 Cumb. L. Rev. 79, 85 (2021/22). As Professor Smolin points out, foster care systems are not neutral laws of general applicability for the same reasons the Court rejected the argument made in *Fulton* that a foster care system is a public accommodation:

> Certification as a foster parent . . . involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "existing family relationships, attitudes and

> expectations regarding the applicant's own children and parent/child relationships."

593 U.S. at 539-40.

Every foster care placement involves an analysis of how a prospective foster family's ability to provide care aligns with the particular needs or attributes of the child who needs a home. Sensitive traits that tend to be subject to non-discrimination policies, like sexual orientation, are actually important considerations that may implicate the need for very different types of foster families—some like Plaintiff-Appellants as well as some who align with DCF's LGBTQ ideology. Any state foster care system that tried to make its policies "neutral laws of general applicability" would be undermining the best interests of the child, the protection of which must be the state's paramount goal. An attribute-blind, one-size fits all approach simply does not work in this context.

Consider an example cited by Professor Smolin:

> LGBTQ+ advocates argued in *Fulton* and elsewhere that LGBTQ+ persons or couples can make particularly suitable foster or adoptive parents for LGBTQ+ children. The point is well taken and underscores the need for recruiting LGBTQ+ persons and couples as foster and adoptive parents. However, the point assumes that the government can take account of sexual orientation and/or gender identity at the matching stages of foster care and adoption, as appropriate in individual cases. The non- discrimination policy as to sexual orientation and gender identity give way to the best interests of the child, as foster or adoptive parents are favored or disfavored based on sexual orientation or gender identity in order to best meet the needs of particular children. From a policy viewpoint, this is appropriate;

> from a constitutional standpoint, this means that any non-discrimination policy must have secular exceptions in the context of foster care and adoption.

Smolin, at 113-14.

Because foster care systems should—and do—make individualized assessments of the suitability of a particular family for a particular child, they must extend the same flexibility to prospective foster parents who adhere to traditional religious beliefs about sexual orientation and gender as they do to other prospective foster parents, matching them with children who share those beliefs or are otherwise well-suited to placement in their homes.

II. The challenged DCF policy fails under strict scrutiny or rational-basis review, because it harms children and defeats the overall purpose of the state's foster care system.

A. The policy cannot survive strict scrutiny, because DCF has no compelling interest in denying licenses to people of faith, and such denial is not narrowly tailored to any government interest.

The challenged policy cannot possibly survive strict scrutiny in light of the Supreme Court's decision in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). In *Fulton*, the Court reviewed Philadelphia's policy of refusing to enter into a foster care contract with Catholic Social Services (CSS) due to the charity's refusal to certify same-sex married couples. Significantly, there were other agencies that would certify these couples, so same-sex married couples could and did become

foster parents. The Court considered multiple interests the city claimed to be "compelling," including maximizing the number of foster parents, protecting the city from liability, and ensuring equal treatment of prospective foster parents and foster children. *Id.* at 541. But the Court explained that the question was "not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS." *Id.*

Through this lens, the Court found the city's asserted interests insufficient. *Id.* The Court first pointed out that including CSS in the program would increase, rather than reduce, the number of available foster parents. *Id.* at 542. It went on to find that the city had "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *Id.*

Fulton thus dictates that a reviewing court in this case should examine not the importance of DCF's claimed interest in providing affirming homes for children who identify as LGBTQ, but rather the importance of its refusal to license prospective foster parents whose religious beliefs forbid them to affirm the LGBTQ lifestyle.

The district court below defined DCF's asserted interest as "adequately accept[ing] and provid[ing] for LGBTQ youth in Vermont's foster care system." *Wuoti v. Winters*, 2025 U.S. Dist. LEXIS 31293, *24 (D. Vt. 2025). Citing the

well-established principle that the government has a compelling interest in protecting minor children, the court concluded that "the Rules and Policies . . . serve the compelling interest of protecting the health and welfare of LGBTQ youth and are narrowly-tailored to necessarily address that interest." *Id.* at *28-29.

But following the Supreme Court's reasoning in *Fulton*, it is apparent that DCF has no compelling reason for completely barring foster parents who cannot provide the state's preferred type of care for LGBTQ children, while licensing foster parents who cannot or do not choose to care for children of a certain age or certain needs, or parents who decline to foster other children for any number of reasons. And that is the relevant question under *Fulton*.

While the court below expressed concern that a child might "be placed and, post-placement, change their sexual identity in a material way," that same possibility exists for many characteristics of children.[18] *Id.* at 26. Even the traits subject to DCF's explicit exceptions—special need status and age—can and do change during the child's placement. DCF has not justified its willingness to accommodate families regarding those traits, but not to accommodate religious beliefs that conflict with DCF's LGBTQ ideology.

[18] *Amici* will explain further, in Part B, below, why this is an unlikely scenario with regard to LGBTQ status, but also presents no more of a challenge to address, if it should arise, than any number of changes that occur in children.

It is even clearer that the policy is not "narrowly tailored" to achieve any legitimate government interest. DCF claims that refusing to license foster parents because they will not affirm the LGBTQ lifestyle is its means of achieving more affirming homes for foster children who identify as LGBTQ. That is akin to a farmer who refuses to harvest apples from his orchard because he wants more oranges to grow. It is irrational.

In *Fulton*, removing CSS from the foster care system did nothing to increase the number of agencies serving LGBTQ married couples, but rather removed an agency particularly situated to increase the participation of religious foster families. Similarly, here, the removal of Plaintiffs-Appellants and other religious individuals from the system does nothing to increase the number of foster families who can provide optimal homes for LGBTQ children; it only decreases the pool of foster families overall, harming all foster children, including LGBTQ foster children.

When DCF needs to place LGBTQ children in foster homes, nothing precludes it from placing those children in homes where the prospective foster parents' ideology aligns with the government's ideology about the needs of LGBTQ children. That is precisely what DCF and agencies like it are expected to do on a regular basis: match children in need of foster care with a family that will provide the optimal care for them. No one benefits, and many are harmed, as a

result of a policy that paints with such a broad brush as to simply ban people of faith like the Plaintiffs-Appellants from providing loving, stable homes for children who would thrive in them.

In fact, DCF policies, including the application process for prospective foster care parents, are all aimed at matching a child in need of foster care with the most suitable foster family. It is only the challenged policy of completely banning people of faith who cannot affirm the LGBTQ lifestyle that appears to completely ignore the concept of "tailoring." There are undoubtedly children for whom families with the religious beliefs of the Plaintiff-Appellants would be the optimal environment. Rather than simply matching those children and families, and matching children who identify as LGBTQ with families supporting those views, DCF removes families with certain religious beliefs from the system altogether. This policy not only fails the narrow tailoring analysis; it has no logical relationship to the asserted state objective.

B. DCF has no rational basis for the challenged policy, which undermines its paramount interest in maximizing the number of safe, caring foster families for children and does not advance its asserted interest in "provid[ing] for LGBTQ youth."

Denying foster care licenses to applicants who can provide safe, loving homes for children who need them is not even rationally related to the asserted

interest in protecting LGBTQ youth. It does absolutely nothing to help LGBTQ youth. It simply deprives more children of safe, loving homes, thereby *harming* the population of foster children, as a whole. Again, it is akin to a farmer who decides to harvest fewer apples because he wants more oranges to grow.

Context matters in determining the rationality of a government policy that burdens individuals' religious exercise. In *Fulton*, the Supreme Court and all parties agreed that maximizing the number of foster families was an important goal. 593 U.S. at 541-42. The DCF policy is irrational in and of itself, but it is even more so in light of the paramount government interest here: maximizing the number of safe, caring homes for the wide variety of children who need them in a state with a dire shortage of foster homes.

The facts outlined in the Complaint reveal a foster care crisis in Vermont. The number of licensed foster homes in Vermont fell from 1,429 in 2020 to only 834 in 2023.[19] In 2023, there were 985 children in DCF custody.[20] So in 2023, Vermont had over 150 more children in need of placement than licensed foster

[19] Complaint, *supra* note 11, at 6 (citing Building Bright Futures, *The State of Vermont's Children: 2023 Year in Review* at 15 (*2023 Year in Review*) (2024), https://perma.cc/A457-YL6P, and 2022 AFCARS Report, https://perma.cc/P6TP-6RWH).

[20] *Id.*, citing *2023 Year in Review*, *supra* note 2, at 15.

homes. DCF has publicly proclaimed a "critical need to place children."[21] In fact, the foster parent shortage in Vermont has grown so critical that the state is known to have sought out unlicensed families to take in children immediately and to have placed children in police departments or emergency rooms, and even outside their own districts.[22]

Given that DCF began exploring the Wuotis' views of LGBTQ issues as early as 2022, and that Vermont made *amicus* Joanie Praamsma aware of its plans to implement new policies as early as 2016, the State's adoption and implementation of these policies may have significantly contributed to the significant decline that has already occurred.[23] The negative impact of such policies is not merely upon those, like the Plaintiff-Appellants, who apply initially or for renewal of a license, and are rejected. Rather, the system of close interrogation and possible rejection under uncertain, subjectively-applied procedures, creates a clear disincentive for prospective foster families to ever apply. Many will fear that their views of LGBTQ issues, however mainstream,

[21] *Id.* at 7, citing April Barton, *Children in state care need a home, assistance after flooding. Here's how you can help*, Burlington Free Press, July 20, 2023, https://perma.cc/4A6Q-XN76.
[22] *Id.*, citing Barton, *supra* note 4; Melissa Cooney, *Vermont in need of more foster parents,* WCAX, May 30, 2023, https://perma.cc/S4BR-NJUX.
[23] Complaint, *supra* note 11, at 24.

might not meet a purist ideological viewpoint of LGBTQ equality espoused by the State.

Hence, if the policy is upheld and continued, it will compound the critical shortage of licensed foster homes. Many applicants for foster care licenses seek to open their homes to children in need based on their sincerely-held religious beliefs. *See Fulton*, 593 U.S. at 547 (Alito, J., concurring). People of faith and faith-based organizations are prolific recruiters of foster parents, and they are indispensable to the state's ability to appropriately place children of all religious backgrounds.[24] In fact, the Plaintiff-Appellants once partnered with another local church to host a Foster Awareness Night, which resulted in eleven families signing up to foster children.[25] According to one study, more than 90% of people reported being "highly aware" of a religious mandate to care for orphans and of the need for foster and adoptive families in their community after being contacted by a faith-based child welfare organization.[26]

While polling data is not comprehensive, Professor Smolin estimates that if a state were to exclude individuals who held religious beliefs that were not sufficiently affirming of the state's LGBTQ ideology, it would disqualify 35-60%

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[24] Smolin, at 149.
[25] Complaint, *supra* note 11, at 11.
[26] Mitchell Howell-Moroney, *On the Effectiveness of Faith-Based Parntership in Recruitment of Foster and Adoptive Parents*, J. of Pub. Management & Social Policy, No. 19, Vol. 2, 176 (2013).

of prospective foster parents, given public views of issues like transgender participation in youth sports and pediatric medical transition.[27] It is irrational for Vermont to decimate its pool of foster homes in this way to promote a policy that completely fails to achieve the stated goal of caring for LGBTQ children. Vermont's policy cannot produce more LGBTQ-affirming foster parents, and—given the uncertainties over what that even means for applicants—it might even scare away some that meet most, if not all, definitions of such.

As with other children, the way of ensuring a supportive home for LGBTQ children is through the matching process. Against that obvious, and indeed constitutionally-required, solution, Vermont raises hypothetical possibilities: that there might be unknown or evolving identities or orientations that emerge after matching and placement. But the certainty of harms to all children, including LGBTQ children, caused by reducing the number of licensed foster homes, outweighs these hypothetical harms.

Further, these hypothetical risks are significantly mitigated by the length of foster care placements and the ages of children in foster care. Foster care is designed to be temporary; as of 2022, the mean length of foster care placements was under 20 months, with the median under 15 months.[28] So there is a very

[27] Smolin, at 149.
[28] 2022 AFCARS Report, at 2, https://perma.cc/P6TP-6RWH.

limited time for gender identities or sexual orientations to emerge within a particular placement. As of September 30, 2024, about half of the children in protective custody in Vermont were younger than age nine.[29] Some of the issues of concern to Vermont, such as same-sex dating or pediatric medical transition, are unlikely to arise for most children in the newborn to eight-year-old category during their limited time in foster care.

Moreover, all children develop or begin to self-disclose in various expected and unexpected ways over time. The risk of unexpected situations impacting the appropriateness of a placement are just as likely to occur for all children. Matching is not perfect, but it is the required and best approach for securing safe and appropriate placements for children. By contrast, reducing the number of available foster families is guaranteed to make it more difficult to meet the known and unknown needs of all foster children, including LGBTQ children. A reduced pool of foster families not only means there are not enough families to provide a licensed foster family for all children in need, but it also means a reduced pool from which to locate an appropriate placement for each child.

On the other hand, the vast majority of children in foster care have significant special needs, which many prospective foster parents are unequipped or

[29] Building Bright Futures, *The State of Vermont's Children: 2024 Year in Review* at 11 (*2024 Year in Review*) (2024), https://www.buildingbrightfutures.org/our-new-report-the-state-of-vermonts-children-2024-year-in-review/.

unwilling to invite into their homes.[30] This makes it particularly nonsensical for DCF to ban families like Plaintiff-Appellants, who are willing to care for children with special needs, simply because they do not align with the government's ideology on the needs of LGBTQ children.

In short, pursuant to the challenged policy DCF is removing licenses from successful foster families, some of whom are willing and able to care for hard-to-place special needs children, and refusing to license new foster parents of similar views. Eliminating an entire pool of foster parent applicants based on their perceived unsuitability to serve LGBTQ children harms *all* foster children, including LGBTQ children, by putting them all in competition for a smaller, insufficient universe of families. As a result, more children—including more LGBTQ children--will be sent to police departments, emergency rooms, unlicensed homes that do not face *any* of the screening process, or homes farther from the children's families of origin, which makes re-unification more difficult and causes additional trauma to children by removing them from known surroundings and support networks.

The program purports—and fails—to address hypothetical harms to LGBTQ children, while creating real harms to all the real children, including LGBTQ

[30] *Id.*, citing Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILD. 74, 83 (2004).

children, in the foster care system. Vermont's policy hurts children in such a profound way as to be irrational and hence unconstitutional under any standard of review.

CONCLUSION

The challenged policy is part of an intricate system of subjective, individualized assessments aimed at matching children in need with the best possible foster family. It is nothing like a "neutral law of general applicability." Therefore, strict scrutiny applies to the refusal of DCF to license prospective foster parents due to their sincerely-held religious beliefs. The policy cannot survive strict scrutiny, nor even rational-basis review, because it harms all Vermont foster children, including LGBTQ children, by dramatically reducing the number of available, caring foster homes, while doing nothing to achieve its goal of providing more supportive homes for children who identify as LGBTQ.

Dated: June 6, 2025

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Second Circuit Rule 29.1(c) because it contains 6,256 words, excluding the parts of the brief exempted by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word Version 16.97.2 in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: June 6, 2025

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