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 capacity as Director of Residential Licensing & Special Investigations,

Defendants-Appellees.

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

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INTRODUCTION

Plaintiffs the Wuotis and the Gantts want to provide a loving home for any child in need, regardless of the child's age, race, ethnicity, creed, disability, or LGBT status. Yet Vermont categorically discriminates against and excludes these families from helping *any* foster child because of the families' Christian beliefs about human sexuality. To justify this categorical exclusion, the State demeans Plaintiffs' religious beliefs as "rejection." But Plaintiffs "would never reject a child" because of how he or she identified; Plaintiffs' faith calls them to provide unconditional love to any child. JA509–10. That makes Vermont's Policy as unnecessary as it is unconstitutional. This Court should reject it.

Vermont repeats the district court's error in characterizing its viewpoint-based speech regulation as a mere prohibition of conduct. But in the same breath, Vermont concedes its Policy requires foster parents "to say or refrain from saying certain things" depending on the topic discussed and the viewpoint expressed. Appellees' Br. ("Opp'n") 49, Doc. 95.1. That compels and censors speech. To say otherwise would let states compel or censor *any speech* in the foster-care system. No court (except the court below) has embraced this theory, and the Ninth Circuit recently rejected it. *Bates v. Pakseresht*, 146 F.4th 772, 798 (9th Cir. 2025). As that court explained: the foster-care system "is not a constitutional law dead zone." *Id.* at 783.

Vermont also says that it treats religious and secular conduct the same because parents need only "agree to support and accept any child." Opp'n 3. Not so. Vermont has special requirements for "supporting" only LGBT identities, which force families to violate their conscience in this context while accommodating them in others. Vermont even agrees that its licensing system hinges on its discretion, "creat[ing] the distinct possibility of uneven application" and "an undue risk" of religious "discrimination." *Bates*, 146 F.4th at 797.

For these reasons, the Policy triggers and fails strict scrutiny. Vermont's response is to mount a see-no-evil defense, ignoring its Policy's many defects while criticizing Plaintiffs for not disproving the Policy's efficacy. But Vermont carries the burden here, not Plaintiffs. And Vermont fails to explain how its Policy helps rather than harms foster children, or why less-restrictive options used by the Biden Administration and other states won't work here.

Vermont's half-hearted defense reveals a policy rooted in ideology rather than respect for First Amendment freedoms and concern for vulnerable children. Foster children and foster families deserve better. This Court should avoid creating a circuit split, align itself with the Ninth Circuit, and reverse the decision below.

ARGUMENT

I. The Policy regulates speech, not conduct.

Vermont replays the district court's conduct-not-speech argument. Opp'n 48. But recasting viewpoint-based speech restrictions as conduct regulation does not work. To be sure, the State may regulate genuinely harmful actions and even speech. But it cannot do so by targeting disfavored viewpoints. Nor is it a solution for Vermont to tell Plaintiffs to voice their beliefs elsewhere—the Constitution protects "religious speech and practice as a way of life and not merely as private thought." *Bates*, 146 F.4th at 790.

a. The Policy directly regulates speech. The Wuotis and the Gantts want to avoid using words like chosen pronouns, which communicate a harmful lie about the nature of the human body. JA128, 143. And they want to share their beliefs about marriage and the sanctity of the family with their children in a loving, respectful, age-appropriate manner. JA125, 144–45.

The Policy prohibits all this. Opening Br. of Appellants ("Pls.' Br.") 18–21, Doc. 37.1. As Vermont concedes, it "require[s] Plaintiffs to say or refrain from saying certain things to a foster child, like respecting a child's name or chosen pronouns." Opp'n 49. And it prohibits Plaintiffs from sharing their view that sexual expression is properly ordered between one man and one woman. *Id.*

This speech regulation is far from "incidental." *Contra* Opp'n 47. *303 Creative*, *Holder*, *Hurley*, and *Cohen* all rejected attempts to launder compelled speech or censorship under the false front of regulating conduct. Pls.' Br. 22–24. Even if a law "*generally* functions as a regulation of conduct," it can still regulate speech in application. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27–28 (2010). Vermont doesn't even mention these binding Supreme Court cases.

Vermont also overlooks the Ninth Circuit's recent decision in *Bates*, despite its undeniable salience here. 146 F.4th at 785. *Bates* addressed Oregon's analogous policy, which likewise required prospective foster and adoptive parents to "respect, accept, and support" a child's gender identity. *Id.* at 776. The Ninth Circuit held that policy directly regulated speech (not conduct) by requiring the plaintiff to use "gender-neutral language" and chosen pronouns while prohibiting her from "espous[ing] disaffirming or negative views about a child's LGBTQ+ identities." *Id.* at 785–86.

So too here. Pls.' Br. 18–21. "[V]irtually by definition," Vermont's Policy "requires positive speech and restricts negative speech in the context of gender and sexual orientation." *Bates*, 146 F.4th at 785. That is textbook viewpoint discrimination that dispels any pretext of regulating mere conduct. *Id.* at 788; Pls.' Br. 19–21 (citing *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019)).

Vermont misses these parallels in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). Not every aspect of teaching a course is "undisputably protected speech." *Contra* Opp'n 51; *see Meriwether*, 992 F.3d at 508 (explaining speech must be on a matter of public concern). But punishing a professor for failing to use chosen pronouns "silenced a viewpoint" "about the nature and foundation, or indeed real existence, of the sexes." *Id.* at 506, 508. Pronouns "convey a message," *id.* at 508, and "no government may interfere with [a speaker's] desired message," *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) (cleaned up).

The regulation at issue in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ("*FAIR*"), stands in stark contrast. 547 U.S. 47, 62 (2006). It regulated conduct—and only conduct—by requiring schools to give "equal access" to campus buildings without "limit[ing] what law schools may say nor requir[ing] them to say anything." *Id.* at 51–53, 60. Schools could still "express whatever views they may have." *Id.* at 60. But Plaintiffs here would "not remain free to express [their] views on sexual orientation and gender identity" under Vermont's Policy. *Bates*, 146 F.4th at 788 (Oregon's policy was "not comparable" to policy in *FAIR*); *see also 303 Creative*, 600 U.S. at 596 (distinguishing *FAIR* from a regulation that affects the "speaker's message"); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 179 (2d Cir. 2020) (distinguishing *FAIR* because adoption agency was not "free to voice

their religious beliefs about the sorts of marriages and families that they believe best serve the interests of adopted children").

Vermont's gesture to the speech-integral-to-illegal-conduct doctrine fails for the same reasons. Opp'n 47. That doctrine allows the government to regulate illegal conduct that is "in part … carried out" through speech. Opp'n 47 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). But this exception applies to words that are used to achieve an illegal act, like speech conspiring to illegally restrain trade, 336 U.S. at 502, and speech "discriminating in hiring," *FAIR*, 547 U.S. at 62; Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1011 (2016) (state cannot label "speech itself" illegal; "[r]ather, it must help cause or threaten *other* illegal conduct").

There's no "separately identifiable" illegal act here; just messages Vermont doesn't like. Pls.' Br. 24–25 (quoting *Cohen v. California*, 403 U.S. 15, 18 (1971)). As Vermont conceded below, it prohibits parents from expressing "certain views," JA289, and agrees now that these views are prohibited, *see* Opp'n 49. These "special prohibitions on … speakers who express views on disfavored subjects" violate the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

b. Vermont suggests it can regulate Plaintiffs' speech because Plaintiffs can still speak freely "to others outside the home." Opp'n 52. On this theory, Plaintiffs need not "hide [their beliefs] from the

public"—they just need to expunge them from their house and family life. But telling Rev. Wuoti and Rev. Gantt to preach one message from the pulpit while they promote the opposite message as parents would make them "hypocrites." *Slattery v. Hochul*, 61 F.4th 278, 290 (2d Cir. 2023) (cleaned up) (rejecting similar argument).

New York tried that move in *New Hope* when it told the Christian adoption agency that it was "free to espouse its beliefs about marriage and family … outside the contours of its … adoption services." 966 F.3d at 176 (cleaned up). But "that concession [was] meaningless" because the agency wanted to speak consistently with its beliefs *as* an adoption agency. *Id.* The same is true here, and this Court should so hold.

Just like in *New Hope*, Plaintiffs here must "express a State view with which [they] disagree[ ]," otherwise they can't be licensed. Opp'n 51–52 (quoting *New Hope*, 966 F.3d at 174). And this case is easier than *New Hope* because it involves only words, i.e., pure speech. If forcing an adoption agency to certify same-sex couples plausibly compels the agency to communicate views it disagrees with, so does forcing individuals to speak words conveying objectionable ideas. And whether this compelled speech entails "outward communication of ideas to the public" makes no difference. *Contra* Opp'n 51–52. The First Amendment protects "a group's ability to advocate public *or private* viewpoints." *New Hope*, 966 F.3d at 179 (cleaned up and emphasis added); *cf. United States v. Alvarez*, 567 U.S. 709, 722–23 (2012) (holding law prohibiting

lies was overbroad because it regulated speech inside the home). *New Hope* controls here.

c. Vermont claims its Policy is akin to other "conduct-based" regulations prohibiting "demeaning or intimidating" language by foster parents. Opp'n 50. But the analogy immediately breaks down because Vermont's Policy does not simply restrict but compels a wide variety of speech. That imposes "additional damage" and demands even greater "grounds" for justification. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 893 (2018) (cleaned up).

Beyond that, Vermont's sample restrictions are permissible not because they regulate conduct but because they target unprotected speech (like true threats) or the form, mode, or manner of speech, instead of "the underlying message expressed." *R.A.V.*, 505 U.S. at 386; *see* Pls.' Br. 25; *see also Virginia v. Black*, 538 U.S. 343, 360 (2003) ("true threats" are beyond First Amendment protection). In applying a ban on demeaning forms of communication, the State could prohibit parents from screaming at children that their religion is "inferior." Opp'n 50. But it can't prohibit parents from respectfully explaining that they believe Christianity is the one true faith while compelling them to state that all religions are equal (or vice-versa). Those are protected viewpoints. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) ("both … theistic and an atheistic perspective[s]" are protected viewpoints). Vermont's Policy is different; it specifically

targets certain views, no matter how respectful or polite the conversation.

"[C]haracterizing speech as conduct is a dubious constitutional enterprise" that is "susceptible to manipulation." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1276, 1279 (11th Cir. 2024) (cleaned up) (law prohibiting mandatory workplace instruction promoting "diversity, equity, and inclusion" regulated based on content and viewpoint). Vermont's cursory attempt to defend its Policy's speech restrictions as "conduct regulation" is no exception. This Court should uphold First Amendment protections for different viewpoints, not just Vermont's.

II. The Policy is not neutral or generally applicable.

A policy burdening religious beliefs must be neutral and generally applicable or else withstand strict scrutiny. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). "[F]ailure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Contrary to Vermont's arguments, the First Amendment prohibits less favorable treatment regardless of whether religion is the object. So whether "Plaintiffs' revocation would have occurred even absent any mention of Plaintiffs' religious beliefs" isn't controlling. *Contra* Opp'n 35; *see also id.* at 43 (arguing Vermont does not "inquire into prospective foster parents' beliefs or motivations"). "[G]overnment

regulations are not neutral and generally applicable … whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). And comparability turns on the "risks" to the government's interests, not the government's rationale for the restriction. *Id.* "[T]argeting is not required[.] Instead, favoring comparable secular activity is sufficient." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* ("*FCA*"), 82 F.4th 664, 686 (9th Cir. 2023) (en banc).

Here, Vermont violates the First Amendment for two related reasons: it treats secular conduct more favorably than religious exercise, and it employs a system of individualized assessments that also raises the specter of less favorable treatment.

A. Vermont treats religious exercise worse than comparable secular conduct.

One way to show that a policy treats comparable secular conduct more favorably is to show the policy is underinclusive. Vermont enforces its interests haphazardly on at least three fronts. Pls.' Br. 27–31.

First, start with Vermont's purported interest in ensuring that foster parents can meet the needs of "*each* foster child." Pls.' Br. 28. While foster parents must unequivocally support and affirm a child's LGBT identity, families need *not* support or affirm a child's religious or cultural identity. *Id.*

Vermont downplays this disparate treatment by arguing that it "does not require foster parents to abandon their beliefs," Opp'n 52; they "simply must not reject a child based on any aspect of the child's identity," Opp'n 42; *see also id.* ("Nothing in the Policy requires foster parents to change their beliefs …."). But Plaintiffs will love and respect any child, regardless of how the child identifies or what the child believes. JA125–26, 145–47. And under Vermont's reasoning, a secular atheist, too, rejects a child based on religious identity if the atheist will not support and affirm the child's religion.

Equally problematic, Vermont continues to exclude Plaintiffs for refusing to say what they do *not* believe. Plaintiffs must be "holistically affirming and support[ive]" of a child's LGBT-related behavior and values notwithstanding their "divergent personal opinions or beliefs." JA070–71. In fact, Vermont admitted to revoking Plaintiffs' license because they are "unable to encourage and support children in their sexual and gender identity." JA233; *see also* JA229.

Vermont can't have it both ways. *See also* Pls.' Br. 40–41 (refuting district court's similar argument). Perhaps the State wants foster parents to embrace cognitive dissonance by saying one thing and believing something else. But that "violates [the] cardinal constitutional command" that the government can't force someone to say something they don't believe. *Janus*, 585 U.S. at 892.

Second, consider how Vermont undermines its antidiscrimination interest. On paper, it "does not permit a foster parent to refuse to care for children based on age or disability status," or any other protected trait, for any reason. Opp'n 43; *see also id.* at 18 (same). So Vermont prohibits both "benign" discrimination ("drawing distinctions that are relevant") and "pejorative" discrimination ("withholding advantages … under the influence of irrational bias[es]"). *Costin v. Glens Falls Hosp.*, 103 F.4th 946, 954 (2d Cir. 2024). "DCF requires all foster parents to be willing to accept *any* child." Opp'n 17.

Yet in practice, Vermont lets families categorically decline to care for children all the time based on protected statuses like age, sex, and disability. *See* Pls.' Br. 29. Vermont and Amici argue it's "not discriminatory to be unable to care for children," Opp'n 42, while Plaintiffs are "foster parents who discriminate," Br. of Religious and Civ.-Rights Orgs. as Amici Curiae Supp. Defs.-Appellees and Affirmance ("Religious.Org.Amici") 20, Doc. 96.1. But Plaintiffs are willing to care for any child. *E.g.*, JA117. Perhaps Amici confused this case with a different one, because Vermont did *not* exclude either couple for violating Rule 200 (prohibiting discrimination). As the Wuotis' licensor recognized, Plaintiffs would "offer warmth and compassion to *any* child," and there is "no doubt that [they] would be welcoming."

JA233 (emphasis added).[1] The *only* problem is that Plaintiffs cannot "encourage and support children in their sexual and gender identity." *E.g.*, JA416.

In reality, what counts as a "genuine inability" rests solely on the State's say-so. Opp'n 43; Religious.Org.Amici 29. It's like when New York called some businesses "essential" and gave them exemptions from COVID-19 restrictions "while imposing greater restrictions on 'non-essential' activities and religious worship." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 632 (2d Cir. 2020). The state tried to argue that "essential" businesses like grocery stores presented less transmission risk, but this Court saw through the fog. *Id.* "[T]he only explanation for treating religious places differently seem[ed] to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces." *Id.* (citation omitted).

[1] Here and below, Vermont mischaracterizes the basis for Plaintiffs' exclusion. The Wuotis would *not* "reject a child's sexual orientation or gender identity as though those things were the same thing as feelings of pedophilia." *Compare* Opp'n 43, *and* Religious.Org.Amici 5, 32, *with* JA418 (denying this and explaining that DCF mischaracterized their statements). Plaintiffs merely want to share their religious beliefs with a child if the child was willing to listen or if a "child … wanted to speak … about their feelings." *E.g.*, JA419. Moreover, Plaintiffs seek to reapply for their license *without* violating their conscience in the ways Vermont requires. Vermont continues to exclude them on these grounds and defends this exclusion now. *See also* JA483.

Vermont plays the same labeling game by calling some parents "unable" and some parents "discriminatory." Opp'n 42. Vermont never explains how it determines which is which. There is no objective criteria or even a list; it's just whatever Vermont arbitrarily decides. Objections based on inconvenient "medical appointments," vague "physical limitations," and even subjective judgements that boys or girls would be a better fit, are all legitimate.[2] Opp'n 43; *see* JA118 (¶¶ 37–41). At the same time, "conscience-based objection[s]" rooted in the Christian faith are always "illegitimate." *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018). That "devalues religious reasons … judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38; *Cf. Bates*, 146 F.4th at 795 (finding similar Oregon policy was not neutral toward Christian applicant's religious beliefs).

At the placement stage, Vermont even explicitly allows discrimination. Foster parents "have the right to say no" to a specific child for *any* reason, including because of religious or cultural practices. JA118; JA180–81 (encouraging parents to ask: "What is [the child's] religion?"). And Vermont admits that it does not "inquire into

[2] Amici suggest, without support, that sex-based preferences are related to special constraints, like availability of bedrooms. Religious.Org.Amici 29 n.4. But that's incorrect. In the proceedings below, Vermont "[a]dmitted that foster parents can express a preference for children of a particular gender." JA448. And Vermont does not argue anywhere that sex-based preferences are so limited.

prospective foster parents' beliefs or motivations" for saying no. Opp'n 43. This blind eye to discrimination is a massive hole allowing parents to pick or reject children based on their faith, culture, or even race and ethnic background.

Vermont says that discrimination at the placement stage is different because the State has already determined that foster parents "comply with all applicable rules." Opp'n 45. But again, Rule 200 doesn't distinguish between harmless and invidious discrimination. "[A] foster family may not prospectively refuse a placement based solely on the child's sex, religious beliefs or practices, sexual orientation, or gender identity," for any reason. Opp'n 18. So letting foster parents merely consider a child's protected status means allowing discrimination based on status.

This is another labeling game arbitrarily calling some types of preferences good and others bad. It also places the State in a bind. Failing to ask foster parents about their motivations at the placement stage means allowing benign discrimination. *Cf. Bates*, 146 F.4th at 797 (explaining that failing to "affirmatively confirm [a person's] willingness to … support a child's sexuality and gender identity" suggests that the state only enforces it "when parents object, which will most likely be in the form of a religious objection"). But asking parents to explain the "why" means that the State can punish religious motivations. Neither door leads to a generally applicable policy.

If Vermont can accommodate families *unwilling to care* for girls, boys, children with disabilities, etc., it can easily accommodate Plaintiffs. Plaintiffs are *willing to care* for any child. They just don't want to violate their conscience.

Third, the Department grants exemptions to other Licensing Rules, undermining its broader interest in promoting children's safety and welfare. Pls.' Br. 29–30. Vermont argues that is irrelevant because there is no variance for the Rules at issue here. Opp'n 39–40. That's both factually incorrect (see below) and substantively wrong. *See* Pls.' Br. 30–31. Underinclusivity turns on how the State enforces its interests in practice, not arbitrary lines conjured up in its policy. *Lukumi*, 508 U.S. at 545 (looking at conduct "outside the scope of the [challenged] ordinances").

Ultimately, placing children in unlicensed homes and institutions shows the Policy is indefensible. *See* Pls.' Br. 6–7. Vermont says that Plaintiffs waived this argument. Opp'n 38 n.14. No; Plaintiffs made the argument below, twice. JA101 (explaining that Vermont places children in unlicensed placements and citing more details in the complaint); JA483 (same). Next, Vermont insists that staffing has "nothing to do with the … LGBTQ Policy." Opp'n 38–39 n.14. But as just explained, the State can't arbitrarily pick and choose which exemptions are comparable. Exemptions that undermine the State's interests are relevant no matter where they appear. *Lukumi*, 508 U.S. at 544. So

placing children in unlicensed homes or institutions that have not been vetted to comply with *any* of the Rules, including the Policy, is an incomparably greater risk to children's welfare than granting a religious exemption to loving families like the Wuotis and the Gantts.

Vermont undermines its own interests on many fronts by treating secular conduct better than religious exercise. That makes the Policy underinclusive and therefore not neutral or generally applicable.

B. Vermont allows individualized assessments.

Vermont concedes that its licensing process involves "subjective [and] discretionary determinations" to license foster parents. Opp'n 41. That is decisive because "the mere existence of government discretion is enough to render a policy not generally applicable." *FCA*, 82 F.4th at 685 (citing *Fulton*, 593 U.S. at 537); *see* Pls.' Br. 32–33.

Vermont says there's no individualized exemption applicable in this case. Opp'n 40. That's wrong. Rule 301 plainly allows for exemptions. Pls.' Br. 32.

Next, Vermont says that mere discretion isn't an issue; the ability "to favor secular motivations over religious ones" is. Opp'n 41. But that ability inheres in the very nature of "ad hoc decision making based on non-objective criteria." *Bates*, 146 F.4th at 797. A "supposedly neutral policy cannot leave officials with the discretion to decide when the policy applies." *Id.* at 796.

Again, *Bates* is on point. Oregon's policy did not define "[w]hat count[ed] as enough support, acceptance, and respect for sexual orientation and gender identity" to satisfy the state. *Id.* at 797. That gave it subtle power to disfavor religious applicants. *Id.* And it did not matter whether the challenged regulations contained an "explicit carve-out" because "strict scrutiny-triggering discretion" includes subjective "case-by-case" evaluations like Oregon's or Vermont's. *Id.* at 796–97. Vermont's empty assurances don't remove the risk of covert discrimination here. *Id.* at 797.

Vermont also invokes medical exemptions for vaccines, but this point supports Plaintiffs. *See* Opp'n 44. An exemption process is generally applicable if there is an "objectively defined category of people to whom the … requirement does not apply." *We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 151 (2d Cir. 2023) (citation omitted). But Vermont's Policy and licensing regulations contain no objective criteria at all. They allow families to decline to care for certain categories of children based on age, disability, or even sex based on whether it's a good fit. *Supra* 12–14. These individualized assessments give Vermont much discretion with few guardrails. Because that discretion "can raise the prospect of religious discrimination," strict scrutiny applies. *Bates*, 146 F.4th at 796, 798.

III. The Policy fails heightened scrutiny.

A. The Policy fails to advance Vermont's legitimate interests.

Vermont says that its Policy protects children from the "demonstrated harms of rejection." Opp'n 55. But categorically excluding loving families harms foster children. And neither the Wuotis nor the Gantts would reject any child. There is no compelling or even significant interest here, only unconstitutional obstacles to loving families that want to help children in need.

1. Vermont's categorical exclusion harms foster children.

Vermont asserts a compelling interest in safeguarding children. Opp'n 53–54. But "phrases like 'protecting children'" are not "a talisman against deep thought." Matthew D. Bunker et. al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 Comm. L. & Pol'y 349, 369 (2011). "[T]he government must justify its conduct by demonstrating not just its general interest, but its particularized interest in burdening the individual plaintiff in the precise way it has chosen." *Williams v. Annucci*, 895 F.3d 180, 190 (2d Cir. 2018); *accord Fulton*, 593 U.S. at 541 (rejecting reliance on "broadly formulated interests"). And Vermont fails to show that a categorical exclusion of "AMAZING" foster families, JA120–21, whose faith

precludes active encouragement of LGBT behaviors and identities, serves the "welfare of children" in its care, Opp'n 53–54.

Vermont does not deny that such exclusions *worsen* its shortage of families to care for children in the system. *See* Opp'n 58. So it tries to narrow that harm by claiming that children being staffed "are older youth … and not the infants or young children … that Plaintiffs request be placed with them." Opp'n 58. That's doubly wrong. First, the child advocate's report doesn't say anything about these children being "older." *Contra id.* The report documents how Vermont "staffed" "a six-year-old with significant developmental disabilities" for 19 days. Add.008. Second, even if these children are often older, the Gantts and Wuotis want the opportunity to serve kids of any age, whether in foster care for toddlers and newborns or adopting an older youth from their church. *E.g.*, JA512 (¶¶ 34–37). And it should not be lost that Plaintiffs have already adopted five children from foster care. JA115, 133.

So it's possible that Vermont could have placed the aforementioned six-year-old with a family like the Gantts. After all, they specialize in caring for children with these types of challenges and already adopted two kids who were exposed to drugs in the womb. JA135–36. Yet Vermont implies that these children are better off in "a hotel, sheriff's office, or other location, with no access to education, treatment, peer interactions, or community engagement." Add.008. In reality, Vermont's Policy is failing its children by rigidly refusing to

accept families like Plaintiffs that are eager to provide a loving home for any child.

Vermont next attempts to justify its categorical exclusion of Plaintiffs by making an apples-to-oranges comparison to families who engage in corporal punishment. Opp'n 58. But excluding parents engaged in corporal punishment objectively serves the State's interest in promoting children's welfare because corporal punishment inflicts certain physical harm on *all* children, regardless of whether parents believe it's justified.

Here, there's only speculative harm to a subset of foster children that may never materialize and that Vermont failed to prove. Pls.' Br. 54–60. Even under Vermont's view of the facts, most children would experience no harm; they would only benefit from the loving home Plaintiffs seek to provide. Pls.' Br. 49. The State's flawed analogy is further evidence that Vermont's Policy comes from a deep mistrust of Plaintiffs' commonly held Christian viewpoint rather than its legitimate interests in child welfare.

2. The Policy rests on conjectural harms.

Vermont's Policy assumes that Plaintiffs' beliefs and desired speech would cause harm. Pls.' Br. 54. Yet Vermont says almost nothing to prove that's the case, even though Vermont "bears the risk of uncertainty." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799–800

(2011). So this Court *should* "presume[ ] … that non-affirming foster placements are *not* harmful to youth." Opp'n 58 (emphasis added). After all, Christian families lovingly care for their children who identify as LGBT all the time and Vermont does not try to remove these children from their homes just because of a disagreement. Viewpoint-based speech regulations "are presumptively invalid … and the Government bears the burden to rebut that presumption." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000) (citation omitted).

Vermont doesn't even try. It says that its Policy was based on "years of study and analysis," and "the demonstrated harms" of rejection. Opp'n 55. But that evidence did not support viewpoint-based speech regulations and categorical exclusions. Pls.' Br. 55–56. That evidence was not specific to loving families like Plaintiffs. Pls.' Br. 54–57; *see Bates*, 146 F.4th at 798 (reviewing some of the same studies and concluding that "[n]one … speak to the risks associated with children residing in a home like Bates's"). None of the evidence even proved that so-called "rejecting" behavior *causes* any negative outcomes in LGBT children. *See* Pls.' Br. 58–59 (citing *Brown*, 564 U.S. at 800). This speculation upon speculation fails any level of heightened scrutiny. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (cleaned up) (intermediate scrutiny "is not satisfied by mere speculation or conjecture").

The district court's opinion can't save Vermont either. *Contra* Opp'n 60. It didn't grapple with the deficiencies in Vermont's studies. *E.g.*, SA024–27. And this Court cannot defer to the district court's findings regardless. *A.H. ex rel. Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021) (Court reviews constitutional facts de novo).

Rather than offer any defense of its Policy, Vermont faults Plaintiffs for not undertaking a comprehensive review of its flawed studies. Opp'n 55. But again, it's Vermont's burden to justify its Policy, not Plaintiffs'. *Brown*, 564 U.S. at 799. Still, Plaintiffs *rebutted* Vermont's studies with *more* compelling studies, including a systematic review of the evidence. *See* JA541. That review looked at the highest quality studies available and concluded they failed to prove anything. *Id.*[3] Vermont can't plug the holes in its sinking ship by arguing that Plaintiffs' attack could have been more effective.

B. Vermont ignores less-restrictive alternatives.

Vermont fails to disprove Plaintiffs' many examples of narrower options that could achieve the State's goals. Instead, it resorts to more

[3] Vermont agrees that facilitating "gender-affirming [medical] care is not an issue in this case" since that was not a ground for excluding either family. Opp'n 56. Rather, Vermont excluded Plaintiffs because of their religious objections to speaking certain words, refraining from certain conversations, and encouraging various forms of social "transitioning."

speculation and conjecture. That is insufficient to carry the State's burden.

1. Less-restrictive alternatives disprove the need for a prophylactic policy.

Vermont fails to explain why less-restrictive alternatives won't work, like tailoring Plaintiffs' licenses to children of a certain age or allowing them to provide respite care. Pls.' Br. 43. Vermont even concedes that placing infants and toddlers with Plaintiffs "will not present issues related to sexual orientation or gender identity." Opp'n 58. That is decisive because it shows that there is at least "[o]ne plausible, less restrictive alternative" that won't undermine the State's interests at all. *Playboy*, 529 U.S. at 809, 823 ("It was for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective[.]").

Or, Vermont could require families to be respectful, kind, and considerate of a child's gender identity and gender expression the same way it requires families to be respectful of a child's religious or cultural beliefs. Pls.' Br. 44. After all, "conflict between parents and children regarding identity can and will arise in any relationship." Opp'n 59. If Vermont can accommodate "analogous nonreligious conduct," it can accommodate Plaintiffs, too. *Annucci*, 895 F.3d at 191 (holding refusal to provide religious accommodation failed strict scrutiny because of "unexplained disparate treatment").

Vermont denies, without proof, that it could allow children to choose "affirming" families rather than exclude families because of their religious beliefs. Opp'n 61. According to Vermont, foster children "might not even know themselves," meaning they cannot make informed decisions. *Id*. This argument fails for three reasons.

First, it is Vermont's burden to show "that it seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). Vermont fails to show that it tried different methods that the federal government and other states employ. Pls.' Br. 45–47. Indeed, the Biden Administration reviewed Vermont's studies and concluded that States cannot reject religious providers for "holding particular views about sex and gender." 89 Fed. Reg. 34,818, 34,840 (Apr. 30, 2024); *see* Pls.' Br. 57–58. Vermont's opposition does not explain why the Biden administration's solution is untenable.

Second, Vermont can't justify its exclusionary policies based on insufficient information. *Contra* Opp'n 61. For example, Vermont could give every child the chance to go to an "affirming" home, regardless of whether the child self-identifies as LGBT. That was the Biden Administration's tack: it required states to give "[a]ll children age 14 and over," as well as some younger children an opportunity to choose their home. 45 C.F.R. § 1355.22(b)(2). Vermont could similarly give children options *without* requiring disclosure of their identity to the

State. And those who might be "too young" to "know themselves" (Opp'n 61) would "not present issues related to sexual orientation or gender identity" anyway. Opp'n 58. This could conceivably address *every* LGBT child's needs; we just don't know because Vermont hasn't tried to inform children about the availability of "affirming" homes or tried to collect basic demographic data about its children. *See Coakley*, 573 U.S. at 494 (holding government's unsupported assertion that it had "tried" other approaches failed intermediate scrutiny).

Third, Vermont says that licensing Plaintiffs "would exacerbate the problem," because children would be "more fearful" of disclosing their identities. Opp'n 61. But Vermont provides no support for this, only speculation to which courts cannot defer. *Annucci*, 895 F.3d at 189. The State simply cites a declaration stating that children "do not reliably disclose their identities to the Department." JA314. But that declaration does not explain why, let alone suggest that the issue would be worsened rather than ameliorated by increasing a child's role in placement decisions.

Vermont also frets about having families "demand" to give children back to the State. Opp'n 62. But Plaintiffs will love and respect any child and would never ask the State to remove a child because of how they identify. *E.g.*, JA510 ("we would never reject them, abandon them, or tell Vermont to take the child back because they identified as LGBT"). The only conceivable risk is that *Vermont* tries to remove a

child merely because it does not like the family's religious beliefs, regardless of whether there's a conflict. But Vermont never proved this hypothetical harm would arise from licensing Plaintiffs for respite care or that it couldn't effectively eliminate this risk by collecting demographic information, giving children choices, and matching children with loving families well suited for them.

2. Speculative fears cannot justify First Amendment burdens.

Rather than present evidence that less-restrictive alternatives won't work, Vermont plays up fears of the unknown. But the Supreme Court has never accepted mere conjecture as a justification for curtailing constitutional rights. And an underinclusive, viewpoint-biased policy reveals that Vermont's fears are overblown.

Plaintiffs previously deconstructed the speculative nature of Vermont's fears. Pls.' Br. 50–52. In response, the State presents no "hard evidence of how widespread or how serious the problem … is," nor any "proof as to how likely any child is to" experience rejection if they are placed in loving religious homes that just happen to disagree with Vermont's worldview. *Playboy*, 529 U.S. at 819. Vermont's failure to "articulat[e] the true nature and extent of the risk" it seeks to avoid means it cannot "justify a regulation as sweeping as this" one. *Id.*

The irony is that Vermont claims to have engaged in "careful, data-driven policymaking process" while asking this Court to excuse its

lack of basic data. *Compare* Opp'n 35, *with* Pls.' Br. 49 (explaining how Vermont could have collected demographic information). Vermont asserts that it "detailed the studies, reports, focus groups, and feedback that it relied on," which was good enough for the district court. Opp'n 60. But documentation isn't enough at this stage; strict scrutiny requires actual proof. *Playboy*, 529 U.S. at 819; *Brown*, 564 U.S. at 799–800. And the district court never engaged with Plaintiffs' arguments and is not entitled to any deference. *Supra* 23.

Moreover, Vermont never shows why Plaintiffs "should be singled out" when it allows other types of conduct "that is no less noxious." *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 68 (2d Cir. 1997) (finding ban on "crime trading cards" underinclusive because children could access public library books depicting violence). Here, Vermont's viewpoint bias feeds the Policy's underinclusiveness, like two streams converging into a torrent of constitutional error. After all, it is "impossible" to predict a child's future religious or cultural identity. Opp'n 61. Yet Vermont's logic would mean that this uncertainty justifies excluding vegans who can't affirm meat eaters, atheists who can't affirm Christians, Democrats who can't affirm Republicans, and vice-versa. Pls.' Br. 53–54.

But in fact, Vermont's interests are to promote diversity to maximize the chances of a successful placement. Pls.' Br. 39. Nevertheless, Vermont admits that it selectively "eliminate[d] one

source of future conflict" involving only LGBT identities. Opp'n 60; *cf.* *R.A.V.*, 505 U.S. at 391 (invalidating policy protecting racial groups but not political groups). And it did so in an area "implicat[ing] uniquely religious matters that prove most problematic for parents who view these issues through a traditional religious lens." *Bates*, 146 F.4th at 795. This selectivity is akin to "remov[ing] a few grains of offensive sand from a beach of" potentially harmful conduct. *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 99–100 (2d Cir. 1998).

Rather than grapple with this underinclusive and viewpoint-discriminatory defect, Vermont tries to justify it by arguing that the Policy prohibits a "particularly harmful source of identity rejection." Opp'n 60. The government made the same argument in *R.A.V.*, where it argued that its ban on racially motivated cross-burnings was aimed at "particular injuries that are qualitatively different from other injuries." 505 U.S. at 392 (cleaned up). But "[t]he First Amendment cannot be evaded that easily." *Id.* at 393. Regulations aimed at harms "caused by a distinctive idea, conveyed by a distinctive message" are really aimed at ideas. *Id.*

The Supreme Court has never found viewpoint discrimination necessary to achieve a compelling government interest. *E.g.*, *id.* at 396 ("An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect."). This type of bias is anathema to the First Amendment, even when the State's interests "are

compelling" and even when a law "can be said to promote them." *Id.* at 395. This Court should not be the first to break new ground, giving the State awesome new powers to compel and restrict speech.

Failing all else, Vermont repeats baseless allegations that Plaintiffs would reject or be "unwilling[ ] to accept a child's identity." Opp'n 59–60. But Plaintiffs merely disagree with the State's views "on these intensely debated issues in our society." *Bates*, 146 F.4th at 785. They've stated many times that they "would never reject a child or treat a child disrespectfully because the child hypothetically identified as LGBT." JA509; *see also* JA516 ("It goes without saying that we would never treat a child disrespectfully[or] reject a child … because they identified as LGBT.").

Vermont could again look to the Biden Administration, which acknowledged that religious families unwilling to promote pro-LGBT views should not be labeled "unsafe." Pls.' Br. 46. It rejected enforced conformity in favor of diversity, reminding states they cannot exclude providers with religious objections "on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular" provider—exactly what Vermont does. 89 Fed. Reg. at 34,840.

Plaintiffs would not reject a child's identity any more than an atheist "rejects" a child's Christian identity by respectfully explaining that they don't believe in God. But Vermont welcomes the atheist and banishes the Christian. The First Amendment forbids such favoritism.

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The Supreme Court has only upheld a law under strict scrutiny "once" in "the First Amendment context." *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2310 (2025). And that was an "unusual" case involving special deference to the government in "national security and foreign affairs. *Id.* (citing *Holder*, 561 U.S. at 33–34). There's no special deference here or proof sufficient to carry the State's burden. For these reasons, Vermont's Policy fails strict scrutiny.

IV. Plaintiffs satisfy the remaining injunction factors.

Plaintiffs have shown that Vermont's incantations of harm rest on conjecture, not evidence. And contrary to what Vermont claims, Plaintiffs do not seek relief forcing Vermont to place children with anyone. *Contra* Opp'n 63. There is no claimed right to care for a child, let alone a child who identifies as LGBT. Rather, Plaintiffs ask for the chance to obtain their license without speaking against their beliefs. And as already demonstrated, the Department could place many children with loving Christian families with no risk to those children. Plaintiffs have met the factors for an injunction.

CONCLUSION

This Court should follow *Bates*, reverse the district court's ruling, and grant Plaintiffs' requested injunction.

Dated: September 19, 2025

Respectfully submitted,

s/Johannes Widmalm-Delphonse

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains 6,999 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: September 19, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate ACMS system. I certify that all participants in the case are registered ACMS users, and that service will be accomplished by the ACMS system.

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