25-678

In the United States Court of Appeals for the Second Circuit

BRIAN WUOTI, ET AL.,
Plaintiffs-Appellants,

v.

CHRISTOPHER WINTERS, ET AL.,
Defendants-Appellees.

BRIEF OF FLORIDA, THE ARIZONA LEGISLATURE, AND 20 STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS

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

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June 6, 2025

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INTEREST OF *AMICI* STATES AND SUMMARY OF ARGUMENT[1]

Foster parents represent the best of society: local citizens who give back to their community by helping the State raise children that have fallen into its care. Whether children enter the foster-care system through parental death, abuse, or abandonment, foster parents provide the critical role of offering loving homes for children in need. Unfortunately, foster-care systems are in crisis across the nation as states deal with a shortage of foster homes.[2]

Vermont's brusque approach to foster care has only exacerbated that crisis. *See* JA006–08 ¶¶ 26–39. Draping itself in the façade of child welfare, Vermont forces would-be foster parents to make a Hobson's choice: swear to affirm their child's perceived gender and sexual orientation no matter the parents' genuinely held beliefs, or forgo the licensure necessary to serve as a foster parent ("Policy 76"). JA035–36 ¶¶ 137–46.

Two sets of loving foster parents, the Wuotis and the Gantts (Appellants), have persuasively argued that Policy 76 violates their First Amendment rights and thus must survive heightened scrutiny. *Amici* states respectfully submit this brief to explain why

[1] As States, *Amici* may file this brief "without the consent of the parties or leave of the court." Fed. R. App. P. 29(a)(2). They are not required to file a disclosure statement under Federal Rule of Appellate procedure 29(a)(4)(E) or a certificate of interested persons. See Fed. R. App. P. 26.1(a), 29(a)(4)(E).

[2] Dr. John DeGarmo, *The Foster Care Crisis: The Shortage of Foster Parents in America*, American Society for Positive Care of Children, https://americanspcc.org/the-foster-care-crisis-the-shortage-of-foster-parents-in-america/.

Policy 76 flunks that standard. *Amici* states support foster programs that simultaneously promote the best interests of children and protect the constitutional rights of foster parents. They thus have a strong interest in ensuring that courts do not sanction foster-care policies that are overly burdensome on foster parents.

Vermont asserts a state interest in maximizing foster-child welfare by placing children in homes suitable to their unique needs. JA300–01. That interest is no doubt compelling, but Policy 76 is far from the least-restrictive means available to advance it. States like Florida, Oklahoma, and Idaho, whose foster systems are highlighted in this brief, employ foster-care programs that achieve the same interests through means that do not disqualify scores of good-hearted citizens with genuinely held religious and political views: by matching like-minded parents with like-minded children. Those tailored matching programs both ensure that foster children find suitable homes and respect the constitutional rights of foster parents. And because those systems prove that Vermont can achieve its compelling state interest without commanding foster parents to check their constitutional rights at the door, Policy 76 cannot withstand scrutiny. The Court should reverse.

ARGUMENT

Policy 76 fails strict scrutiny because it is not the least-restrictive means of achieving Vermont's compelling state interest.

To serve as a foster parent, Vermont requires parents to be licensed by the state. JA269. For years, that licensure process was relatively non-controversial: it included a

background check, a regulatory compliance evaluation, collecting third-party references, and other typical safety measures. JA028–029 ¶¶ 87–88, 177. Sometime after 2018, though, Vermont began enforcing Policy 76. JA036 ¶ 146. That policy requires would-be foster parents to abide by Vermont's guidance on supporting a child's sexual orientation, gender identity, and gender expression ("SOGIE"). JA035 ¶ 138. In particular, Vermont requires "all parents [to] demonstrate that they can support any hypothetical child's SOGIE" to be licensed foster parents, JA037 ¶ 154, by "abid[ing] by Policy 76's terms." JA036 ¶ 146. Failure to meet that standard disqualifies the candidate from licensure. JA038 ¶ 165.

As Appellants ably argue, Policy 76 burdens foster parents' free speech and free exercise rights and must therefore satisfy "the most rigorous scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *see also United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). To do so, Policy 76 must "advance[] interests of the highest order and [be] narrowly tailored to achieve those interests." *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). If Vermont "can achieve its interests in a manner" that does not burden foster parents' rights, Policy 76 fails strict scrutiny. *Fulton*, 593 U.S. at 541. That demanding standard will be satisfied only in "rare cases." *Church of Lukumi*, 508 U.S. at 546; *Playboy*, 529 U.S. at 818.

This is not that rare case. Vermont asserts a compelling interest in maximizing foster-child welfare by placing children in homes suitable to their unique needs. JA300–01. But Vermont has sought to achieve that end through the blunt instrument of barring

from its foster system any parent whose genuine beliefs prevent him from promoting certain gender views and sexual orientations. JA038 ¶ 165. Florida, Oklahoma, and Idaho have proven that states can protect both foster children *and* the First Amendment rights of foster parents by creating a robust matching scheme that places children in foster homes well-suited to their needs. Because a substantially similar system in Vermont would adequately address its compelling state interest, Policy 76 fails strict scrutiny.

A. Other states adequately protect both foster children and First Amendment liberties by effectively matching like-minded children with like-minded parents.

Policy 76 categorically bars would-be parents from fostering children if the parent is unwilling to yield their genuinely held views on gender identity and sexual orientation. Yet other states take a far more tailored approach: they license broader swaths of foster parents based on typical standards like fitness and safety, and then match those parents with children that will flourish in the parents' chosen family value structure. Those focused matching policies place children in homes suitable to their unique needs at a high rate without violating the constitutional rights of foster parents, and are thus equally effective as, yet far less restrictive than, Policy 76.

Florida. Florida's foster-care system presents a prime example. Like Vermont, Florida licenses foster parents on the front end before matching them with a child.[3] Yet unlike Vermont's policy, Florida's licensure policy focuses far less on a given foster parent's specific beliefs and values. Rather, the licensure scheme serves mainly as a gate-keeping function to ensure that the foster family candidate can provide a physically safe home for a foster child. *See Foster Home Licensing*, CFOP 170-11 Ch. 12 (Sep. 8, 2020) (licensing requirements limited to primarily physical safety). The licensing requirement therefore increases the potential pool of safe foster families available to house foster children while ensuring that those parents are generally suitable guardians for children.[4]

Once licensed, Florida implements a tailored matching program that considers the values of both the parent and the child. Indeed, the Florida Department of Children and Families (DCF) is statutorily required to ensure that children are "placed in a home where the . . . foster caregiver is aware of and understands the child's history, needs, and risk factors." Fla. Stat. § 39.4085(1)(j). Florida strives to "treat foster parents . . . with dignity, respect, and trust" while also protecting "the best interest of the child." *Id.* § 39.4087(1). Going to great lengths to match children with suitable foster

[3] *How Do I Become a Foster Parent?*, Florida Department of Children and Families, https://tinyurl.com/4r9cxybz (outlining the licensing requirements that must be met in order to get matched).

[4] *Foster Care Overview*, Florida Department of Children and Families, https://tinyurl.com/yc6x6dhm ("The more diversity we have in foster homes, the better our professional team can match your families' unique strengths with the needs of our kids.").

parents allows those parents to make a "reasonable and prudent" assessment of the needs of their foster children. *Id.* § 409.145(2)(b)2. When foster parents are well-matched to their foster children, those assessments will promote the "emotional and developmental growth" of their kids. *Id.* §§ 39.4091(1)(d), (2)(c), (3)(b)4., 409.145(2). And, in the unfortunate event of a mismatch, caregivers are empowered to "request the removal of a child from the home" to further protect the "best interests of the child" and the "safe[ty] [of] the caregiver." *Id.* § 39.4087(1)(i). The same goes for foster children, who can "raise grievances with the department over the care they are receiving from their caregivers." *Id.* § 39.4085(1)(r).

That program specifically accounts for the religious views of the parent and child. For example, Florida conducts a home study assessment as part of its procedure to grant an initial license. Fla. Admin. Code Ch. 65C-45.003(3). Among other factors considered in the assessment, staff are instructed to consider how the foster parent will "respect and honor any child's culture, religion, and ethnicity." *Id.* at (3)(f)5. The home study also analyzes how the foster parents could adapt to the religious beliefs of the child's biological family. *Id.* at (j)6. If the caregiver's own religion would impede their ability to raise a child of another background, the staff member is *not* instructed to deny the license. Instead, the staff member simply explains the "limitations" and how those limitations "could impact children placed in their home" to streamline the subsequent matching process. *Id.* at (f)5.

That nuanced process does not treat would-be parents with deeply held religious views as lepers, but matches them with children of a similar mind. That ensures that foster parents are well-suited to make "reasonable and prudent" decisions, Fla. Stat. § 409.145(2)(b)2., that achieve "the best interest of the child," while also "treat[ing] foster parents . . . with dignity, respect, and trust." *Id.* § 39.4087(1).

Oklahoma. Like Florida, Oklahoma first determines which potential foster homes are suitable for licensing by identifying safe homes. Okla. Admin. Code § 340:75-7-18(a). To do so, Oklahoma Human Services (OKDHS) conducts a background check, *id.* § 340:75-7-18(b), reviews the "weapon safety" of the home, *id.* § 340:75-7-18(c), and determines how many children already live in the home, *id.* § 340:75-7-18(d). Unlike Vermont, Oklahoma's process does not meaningfully implicate parents' deeply held religious or political views at the licensure stage.

That happens at the matching stage. During matching, Oklahoma "provide[s] [foster children] with both information about a foster family" and "an opportunity to meet the foster parent . . . before placement occurs." Okla. Stat. tit. 10a., § 1-9-119.1.A.1.g. When conducting Child Placement Interviews, foster children are encouraged to attend.[5] Foster children in Oklahoma are also permitted an introduction to their potential foster family and the life they might be placed into, so foster children and foster parents can test out whether they will be a good match for each other and

[5] *See Child-Placement Process beginning Feb. 1*, Oklahoma Human Services (last modified Feb. 8, 2021), https://tinyurl.com/43s5n6pm.

make their own determination about whether the placement is in their mutual best interest.[6]

That detailed matching process extends to parents' and children's religious faith as well. Case managers try to "select[] a person, agency, or institution governed by persons of the same religious faith" as either that of the child's biological parents or that of the child. Okla. Admin. Code § 340:75-6-49. A foster child has the right to "freely exercise [his or her] own religious beliefs," which includes the right to "refus[e] to attend any religious activities and services," Okla. Stat. tit. 10a., § 1-9-119.1.A.3.b., and can "report a potential violation of personal rights without fear of . . . retaliation," *id.* § 1-9-119.1.A.2.e., if the child feels they no longer are a good fit in their foster home. Thus, much like Florida, Oklahoma respects parents with deeply held beliefs by linking them with the children who share those beliefs.

Idaho. Idaho is in accord. Like Florida and Oklahoma, Idaho uses the licensure process to create a pool of homes that are safe and stable. To do so, applicants are subject to minimum age and income requirements, Idaho Admin. Code 16.06.02.201., background checks, *id.* 16.06.02.202., and initial and ongoing evaluations, *id.* 16.06.02.203.

And just like Florida and Oklahoma, Idaho understands that a tailored foster placement program after licensure leads to more successful and long-lasting placements.

[6] *Id.*

Like Oklahoma's policy of allowing foster families and foster children to meet and accept each other before placement, foster families in Idaho "may mutually accept the placement of children into the home." *Id.* 16.06.02.242. And to ensure that a placement continues to promote the development of the child, foster parents are instructed to report "information concerning a child's progress and problems" and "[p]rovide notification to the child's agency of the need for a child to be moved" if the child's and parent's interests diverge. *Id.* 16.06.02.204.02, 205.02, 205.03.

Idaho case managers also "prioritize [child] placement with a [parent] of the same religious faith or tradition," because it is the best way to both protect foster parents and encourage the development of foster children. Idaho Code § 16-1648(3). That is why case managers "may consider whether a person shares the same religious or faith tradition as a foster . . . child when considering placement of the child." *Id.*

Not only does Idaho employ matching systems similar to Florida and Oklahoma, but it also explicitly protects the constitutional rights of foster parents from retaliatory discrimination. By statute, Idaho's Department of Health & Welfare (DHW) "shall not take any discriminatory action" against foster parents "on the basis" that a foster parent "provided or declined to provide any . . . foster care service . . . in a manner consistent with a sincerely held religious belief." Idaho Code § 16-1648(2). Foster parents are further protected when they "guide[], instruct[], or raise[] a child . . . in a manner consistent with a sincerely held religious belief." *Id.* § 16-1648(3).

The results bear out the effectiveness of these policies. Last year, DHW set out to increase their ratio of foster homes to foster children from 0.75 to 1.5.[7] Part of this effort included codifying the constitutional protections identified above to "reduc[e] the number of children entering the system and increas[e] the number of foster homes."[8]

Fortunately, Idaho was successful. It increased the foster-care ratio from 0.75 to its current level at 0.9, which has allowed Idaho to end a temporary housing program for youth in foster care.[9] And with a foster-care system focused on placement rather than restrictive licensing, Idaho ensured that less than sixteen percent of its foster children experienced two or more placement changes in 2024.[10] This bests the yearly national average by twenty percent.[11] Idaho therefore presents an exemplary model of a state effectively protecting foster children while also protecting constitutional rights.

B. The district court erred in holding that Policy 76 survives strict scrutiny.

Despite these less restrictive, yet equally effective foster-care methods, Vermont withholds licensure from foster parents who decline to affirm a gender policy that both conflicts with their constitutional rights and affirmatively harms the children in their

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[7] *DHW successfully ends temporary housing program for youth in foster care*, Idaho Dep't of Health & Welfare (Nov. 12, 2024), https://tinyurl.com/fse6a97r.

[8] *Id.*

[9] *Id.*

[10] *Annual Foster Care Report*, Idaho Dep't of Health & Welfare (Jan. 2025), https://tinyurl.com/2z7b6b47.

[11] *Children in Foster Care with More Than Two Placements in United States*, The Annie E. Casey Foundation (last updated Apr. 2023), https://tinyurl.com/ak887jxc.

care when allowed to continue.[12] Because those less-restrictive alternatives are available, Vermont's Policy 76 fails strict scrutiny. *Playboy*, 529 U.S. at 816.

The lower court erred in holding otherwise. Construing Vermont's licensing restriction to combat "the *potential* for a child to be placed and, post-placement, change their sexual identity in a material way," the court found that Vermont could not be less restrictive and therefore the policy satisfied strict scrutiny. JA658–59 (emphasis added). That was wrong for two reasons.

First, that conclusion is bald speculation "insufficient to satisfy strict scrutiny." *Fulton*, 593 U.S. at 542. Vermont has offered no evidence that any current foster children who identify as LGBTQ are trapped in the loving home of a religious parent. JA313–14 ¶ 22–28. By the state's own admission, it would be "impossible for the Department to ensure any placed child is or is not LGBTQ or does or does not identify as LGBTQ." JA314 ¶ 28. That is why Policy 76 notes that "[i]t is *expected* that children's identities may evolve and change over time," without citing any examples of foster children whose changed identity caused a placement mismatch and without a showing that threat is impending at all. JA346. That leaves only speculation as to whether a future child will "change their sexual identity in a material way." JA658–59.

[12] *See Transgender Interventions Harm Children: No Evidence that Transgender Interventions are Safe for Children*, American College of Pediatricians (retrieved June 2, 2025) https://tinyurl.com/y53uneab; *see also* Mayo Clinic Staff, *Puberty blockers for transgender and gender-diverse youth*, Mayo Clinic (June 14, 2023) https://tinyurl.com/44zjd7j2.

Second, even if a state could speculate its way to strict scrutiny, the least-restrictive resolution would be to empower the child to request a transfer and to place the child in a new foster home, exactly as Florida, Oklahoma, and Idaho do. Instead, Vermont chose to bar religious couples from its foster-care program entirely. Not only does that force foster parents to choose between their constitutional rights and their desire to help their community, it also prevents religious foster children from finding a home suitable for their needs. This self-defeating approach prevents loving parents, motivated by faith to improve their community—the very people that should be encouraged to pursue foster care—from opening their homes to children in need. The policy is disturbingly overbroad and dangerous.

The least-restrictive means of ensuring that the child is placed in a home suitable to his or her unique needs is to allow for more tailored matching, rather than to completely prohibit one type of foster home. Because other states have proven that such matching systems are workable and effective, Vermont's policy cannot survive strict scrutiny.

CONCLUSION

This Court should reverse the lower court's denial of Appellant's preliminary injunction.

Dated: June 6, 2025

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I certify that on June 6, 2025, I electronically filed this document with the Clerk of Court using the Court's ACMS system, which will send a notice of docketing activity to all parties who are registered through ACMS.

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