

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

MELINDA	ANTONUCCI;	CASEY	)	
MATHIEU,			)	
	Plaintiffs,		)	Case No.: 2:24-cv-00783-wks
	v.		)	
CHRISTOPHER WINTERS, in his personal			)	
and official capacity as Commissioner of the			)	
Vermont Department for Children and			)	
Families; ARYKA RADKE, in her personal			)	
and official capacity as Deputy Commissioner,			)	
Vermont Department for Children and			)	
Families, Family Services Division; STACEY			)	
EDMUNDS, in her personal and official			)	
capacity as Director, Residential Licensing &			)	
Special Investigations, Vermont Department			)	
for Children and Families; and PAULA			)	
CATHERINE, in her personal and official			)	
capacity as a Licensing Officer, Residential			)	
Licensing & Special Investigations, Vermont			)	
Department of Children and Families,			)	
			)	
	Defendants.		)	

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**PLAINTIFFS' REPLY IN SUPPORT  
OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Defendants’ Opposition confirms that the Department’s Policy is about ensuring ideological compliance, not protecting foster children.<sup>1</sup> Families cannot foster children in Vermont unless they have a state-issued license. As a condition for obtaining and maintaining a license, families must agree to facilitate the provision of “gender-affirming care” to transgender-identifying children. Foster families can only satisfy this requirement if they affirmatively state that they will facilitate a hypothetical foster child’s “gender-affirming” medical treatment, use a hypothetical foster child’s preferred name and pronouns, and—in the case of Melinda and Casey—educate their five-year-old about “they/them pronouns.” If foster families fail to make this commitment up front and in advance of any transgender identifying child being placed in their home, they are branded “discriminatory” and accused of being “unwilling” to foster transgender-identifying children.

The Policy violates the Speech Clause. The Department’s requirement that all foster parents agree *at the licensing stage* to facilitate “gender-affirming care”—as opposed to ensuring individualized commitments in the context of *a specific placement* in the foster family’s home—is a regulation of speech, not conduct. The debate surrounding “gender-affirming care” is one of the most contentious social issues of our day. Because the Policy demands *all* foster families agree to facilitate these controversial forms of care to maintain their license up front and detached from a specific placement, the Policy is, in essence, a state-imposed purity test. The state demands every foster family agree with the prevailing orthodoxy on “gender-affirming care” up front to participate

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<sup>1</sup> Melinda and Casey use the term “Policy” to mean the same thing as Defendants. *See* Defs.’ Opp’n at 2–11. The Policy consists of all rules, regulations, and guidance documents governing placement of transgender-identifying children in Vermont’s foster-care system. This includes, but is not limited to, Rules 35, 200, 200.1, 201, 301, 329–332, and Policy 76.

in the program, even though it is extremely unlikely they will ever house a child who seeks this form of care. This is compelled speech and viewpoint discrimination, which subjects the Policy to strict scrutiny.

The Policy also violates the Free Exercise Clause. Department staff have significant discretion to implement the Policy's exemption to its non-discrimination provision for "age" and "special needs." And Defendants candidly admit that this exemption applies if the foster family simply concludes housing these children would require them to devote significant time or money to raising the child. But the exemption does not allow foster parents to voice an objection to "gender-affirming care" on religious grounds. Moreover, outside of the Policy's class of protected characteristics, parents generally have the right to say "no" to *any* placement for *any* reason. Yet foster families who object to facilitating "gender-affirming care" for religious reasons have no such right. Under *Fulton*, this differential treatment renders the Policy not "generally applicable" and therefore subject to strict scrutiny.

Because the Policy compels speech, discriminates against those who fail to speak the state's preferred message, and is not generally applicable vis-à-vis religion, it is subject to strict scrutiny, which it fails. The state claims the Policy prevents discrimination, but that's wrong. Melinda and Casey do not have discriminatory animus against transgender identifying children; rather, they object only to the requirement that they agree to provide "gender-affirming" treatment to children in their care. What is more, the state cannot show it has a compelling interest in such treatment. The release of the *Cass Review* in April of this year fundamentally changed the landscape of the medical debate surrounding "gender-affirming care," including social transitioning, which Defendants flippantly reduce to merely being "accepting" and "supportive" of children. In response to the *Cass Review*, countries in the United Kingdom have banned or

severely restricted access to many of the medical procedures for minors that the Department seeks to require foster families to facilitate in Vermont. Indeed, none of the major medical organizations in the United States that have previously endorsed these forms of treatment have developed a substantive response to the *Cass Review*. And at least one major medical organization—the American Society of Plastic Surgeons—has now publicly stated its opposition to “gender-affirming” surgery for minors. Yet the Department still requires foster families commit to facilitating such practices as a condition to maintaining a license. Defendants are unable to show any compelling interest in requiring foster families to do so in light of the glaring lack of evidence to support the efficacy of “gender-affirming care.”

But even if performing these treatments on minors furthered a compelling interest, the Department’s Policy is not necessary to achieve it, nor is it narrowly tailored to that goal. If the Department insists “gender-affirming care” is indeed the treatment paradigm it wishes to promote, it could simply allow objecting families to either not accept children who are receiving this treatment or to seek re-placement if a child already in their care comes to want this treatment. Defendants resist this conclusion, arguing continuity of placement is critical, thus allegedly necessitating upfront commitment to “gender-affirming care” from foster families. But the Department allows foster parents to seek re-placement of a child in other situations if the family simply concludes the placement is not going as well as they would like. The reason for this is obvious: no one wins if the placement is not a good fit, whatever the reason. On these facts, the Department cannot show maintaining continuity of care is so important that an up-front commitment to perform “gender-affirming care” is either necessary or narrowly tailored to its asserted interest in preventing discrimination.



While the Policy is subject to (and fails) strict scrutiny, it also fails intermediate scrutiny. The Department has numerous less-restrictive alternatives to achieving its goals than the blanket, up-front requirement contained in the Policy. Indeed, the harm the State seeks to address by the Policy is purely hypothetical, which is insufficient to sustain a prophylactic restriction on (or compulsion of) speech, even if the speech is incidental in the regulation of conduct. Moreover, the Policy is not substantially related to the state’s purported goal of preventing discrimination. Only a small subset of the foster-child population will ever request “gender-affirming care,” meaning there is very little likelihood many foster parents will ever encounter such a placement.

Though Vermont is in a foster care crisis, Defendants refuse to consider the sensible alternatives Melinda and Casey propose, which would ensure all children within the foster system have safe and affirming homes while allowing loving families—like Melinda’s and Casey’s—to participate in the program. The vast majority of children in the Vermont foster-care system do not require the type of “affirmance” that the Department demands and to which Melinda and Casey object. These children would benefit from Melinda’s and Casey’s love, and Vermont would benefit from an additional family willing to care for children in need. But the Department would rather allow its devotion to “gender-affirming care” stand in the way of providing foster kids a loving and caring home. This violates the First Amendment. The Court should grant Melinda’s and Casey’s motion and allow them to participate in the foster-care system during the pendency of this litigation. That would benefit both them and the children who come under their care.

## **ARGUMENT**

### **I. ABSTENTION IS NOT WARRANTED HERE**

As Melinda and Casey explain in their Opposition to Defendants’ Motion to Dismiss, Pls.’ Opp’n to Defs.’ Mot. to Dismiss at 3–8, *Younger* abstention is not warranted here. Melinda and

Casey have withdrawn their appeal of the Department’s Notice of Decision to the Human Services Board, and there is therefore no pending state proceeding. But even if there were, that appeal did not fall within the category of proceedings to which *Younger* applies. Accordingly, abstention is not warranted.

## **II. MELINDA AND CASEY ARE LIKELY TO SUCCEED ON THE MERITS**

### **A. Melinda and Casey are likely to succeed on their free speech claim.**

The Policy implicates the Speech Clause because it compels speech. Moreover, because the Policy requires foster parents to commit to the state’s views with respect to a purely hypothetical set of facts, the Policy regulates speech, not conduct. Further, the Policy discriminates against foster parents who will not speak the state’s preferred message. Accordingly, the Policy is subject to strict scrutiny.

#### **1. The Policy is compulsory.**

As an initial matter, the Policy *compels* speech. When evaluating claims of compelled speech, courts must “consider the context in which the speech is made.” *Evergreen Ass’n, Inc. v. N.Y.C.*, 740 F.3d 233, 249 (2d Cir. 2014) (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988)). Here, the context involves “a public debate over the . . . efficacy of [that form of care, in] which [foster families] regulated by [the Department]” must weigh in. *Id.*

The Policy is compulsory in two ways. First, it requires Melinda and Casey to agree in advance, before any placement is made, that they are willing to facilitate certain forms of controversial treatment that align with ideological views at the heart of an international medical and philosophical debate. *See Riley*, 487 U.S. at 795 (“[m]andating speech that a speaker would not otherwise make” is compulsory). Second, the Policy requires Melinda and Casey to (1) call a transgender-identifying child in their care by their preferred name and pronouns and (2) discuss

“they/them” pronouns with their five-year-old son. Verified Compl. ¶¶ 100, 103–04. As to the latter, Defendants insist that Melinda and Casey advance the state’s views on a sensitive topic with their son despite the fact Melinda and Casey think he too immature for such conversations. *Id.*

The state cannot “seek[] to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 602–03 (2023); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (noting that “[l]aws that compel speakers to utter . . . speech bearing a particular message are subject to [strict] scrutiny”). Yet that is precisely what the Policy does. Accordingly, the Policy *compels* speech.

## 2. The Policy regulates speech, not conduct.

Moreover, the Policy compels *speech*. Defendants argue the Policy only regulates foster parents’ conduct, not their expression. But the Policy requires a commitment to support controversial forms of “care” that some foster parents object to and may never have to facilitate. The Policy therefore ensures ideological conformity—a form of speech—rather than preventing discrimination—a form of conduct.

**a.** Non-discrimination policies regulate speech when they target the “communication of ideas” expressed by the speaker. *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 103 (2d Cir. 2024) (citation omitted); *see also IMS Health Inc. v. Sorrell*, 630 F.3d 263, 277 (2d Cir. 2010), *aff’d*, 564 U.S. 552 (2011) (“Regulations of conduct are permitted, but only if the government interest is unrelated to the suppression of free expression.” (citation omitted)). A regulation that requires abstract commitment to the government’s preferred message or views is not “incidental” regulation of speech, but a direct regulation of it. *See 303 Creative*, 600 U.S. at 596; *see also Nat’l Inst. of Fam. & Life Advocs.(NIFLA) v. Becerra*, 585 U.S. 755, 770 (2018) (holding licensing requirement

abridges First Amendment when it “is not tied to” the targeted conduct). And “when government directly regulates speech by mandating that persons explicitly agree with government policy on a particular matter, it plainly violates the First Amendment.” *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 170 (2d Cir. 2020) (cleaned up) (citing *Agency v. Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213 (2013)). Moreover, the government’s intent is not dispositive: the Supreme Court has routinely held a plaintiff “need adduce no evidence of an improper censorial motive” to establish a First Amendment violation. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 117 (1991) (citation omitted). That is because even “regulations aimed at proper governmental concerns” can “restrict unduly the exercise of rights protected by the First Amendment.” *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592 (1983).

Here, the Policy regulates Melinda’s and Casey’s speech by requiring them to conform to the Department’s views on “gender-affirming care” up front and in advance, prior to any specific placement being made in their home. At that time, however, the Department does not know whether Melinda and Casey will ever foster a transgender-identifying child. Accordingly, the Department “does not seek to impose an incidental burden on speech” to prevent *actual* discrimination against an *actual* foster child. *303 Creative*, 600 U.S. at 596. Instead, it “seeks to force an individual to utter what is not in her mind about a question of political and religious significance”—namely, agreeing to facilitate healthcare interventions to which they object. *Id.* (cleaned up). This is a regulation of speech, not conduct.

*NIFLA* is instructive. There, the Court considered a state law mandating pro-life “crisis pregnancy centers” disclose information about the availability of abortions. 585 U.S. at 761. The state defended the law as a regulation of “conduct,” not speech. *Id.* at 767. The Court rejected that

argument, holding the law regulated “speech as speech” because it was “not tied to a [specific] procedure.” *Id.* at 770. Instead, the law “applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.” *Id.* For this reason, the justification for the law was “purely hypothetical.” *Id.* at 776 (cleaned up). The Court concluded the law regulated speech, not conduct, in violation of the First Amendment.

The Policy does the same. It is “not tied to” a specific placement, and instead applies “to all interactions between a [foster family] and [potential placements],” regardless of whether the family ever houses a transgender-identifying child. *Id.* Accordingly, the Policy requires speech on matters that are “purely hypothetical.” *Id.* at 776. Under *NIFLA*, this is a regulation of speech, not conduct. And the Department’s total inflexibility in acknowledging this fact shows the Policy is nothing more than a requirement that families “pledge their political allegiance” to the state’s prevailing views. *Elrod v. Burns*, 427 U.S. 347, 355 (1976).

**b.** In arguing otherwise, Defendants attack an army of strawmen. Contrary to Defendants’ assertion, Melinda and Casey have never said they were unwilling to foster a transgender-identifying child. Defs’ Opp’n at 1, 17. Instead, they argue only that it is unlawful for the Department to demand all foster families commit to providing “gender-affirming care” to such children in advance, before any placement has been made. On this point, the Policy’s real goal is obvious: Defendants seek to weed out individuals from the foster program who hold views the state doesn’t like, all to avoid an unlikely controversy between foster parents and foster children at some hypothetical point down the road. But the state cannot put its “thumb on the scales of the marketplace of ideas.” *Sorrell*, 630 F.3d at 277. Nor can the state “reduce [an individual’s] First Amendment rights by simply imposing a licensing requirement.” *NIFLA*, 585 U.S. at 773. Yet that is precisely what the Policy does. It compels speech by requiring abstract commitments to “gender-

affirming care” as a condition of maintaining a license. This strikes at the heart of the First Amendment.

Moreover, and again contrary to Defendants’ assertion, Melinda and Casey do not assert the right to “discriminate” against transgender-identifying children. Defs’ Opp’n at 8. To this day, Melinda and Casey stand ready and willing to foster a transgender-identifying child. They simply object to being required to parrot the Department’s loyalty oath, to use a transgender-identifying child’s preferred name and pronouns, and to speak with their son about “they/them” pronouns. For this reason, Melinda and Casey are not “discriminating” against transgender-identifying children by refusing to adhere to the state’s loyalty oath; rather, they are simply voicing their objection to a controversial form of care.

Further, and yet again contrary to Defendants’ assertion, Melinda and Casey do not assert the right to “dictate or control a foster child’s medical treatment.” Defs.’ Opp’n at 3. Melinda and Casey acknowledge that, if they chose to foster a transgender-identifying child, they would be required to comply with the Department’s policies and care plan for that child. Rather, Melinda and Casey argue only that the Department may not revoke their license based on (1) their failure to agree, before a transgender-identifying child is placed in their home, to provide a hypothetical child “gender-affirming care,” (2) their failure to accept placement of a transgender-identifying child under the condition of facilitating “gender-affirming care,” or (3) their decision to seek replacement of a child who comes to have a transgender identity and seeks to obtain “gender-affirming care” (including social transition) while in their care.

While Defendants liken the Policy to a requirement that foster parents provide children vaccines or refrain from using intimidating language, Defs.’ Opp’n at 1, 21 such requirements are easily distinguishable. For one thing, unlike “gender-affirming care,” vaccinating a child does not

require foster families themselves to engage in speech, whether by using a transgender-identifying child's preferred pronouns or requiring families to speak with their children about pronouns. Moreover, there is widespread agreement that vaccines and refraining from using intimidating language is beneficial to *all* children. "Gender-affirming care," by contrast, is something that implicates only a small subset of children and is highly controversial among mental health providers. Accordingly, unlike the Policy's loyalty oath, vaccine mandates and policies that require foster families refrain from using intimidating language are consistent with the First Amendment.

c. The cases Defendants cite in support of their argument that the Policy regulates conduct and not speech are also distinguishable. In *Arcara v. Cloud Books, Inc.*, the Supreme Court concluded that a "conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment." 478 U.S. 697, 706 (1986). But unlike the regulation at issue in *Arcara*, which "neither limited what Plaintiffs may say nor required them to say anything," *Clementine Co., LLC v. Adams*, 74 F.4th 77, 87 (2d Cir. 2023) (cleaned up), the Policy requires foster families to confirm their agreement with the state's view on "gender-affirming care," provide treatment in the form of speech, and speak with their children about the issue. Thus, contrary to Defendants' assertion, Defs.' Opp'n at 8, the Policy does not merely impose a conduct-based requirement that foster families provide a safe home to transgender-identifying children. Instead, it compels speech.<sup>2</sup>

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<sup>2</sup> It is also worth pointing out that the Supreme Court has cited *Arcara* only five times since it was decided in 1986, the most recent of which was in a concurring opinion in 1994. *See Waters v. Churchill*, 511 U.S. 661, 691 (1994) (Scalia, J. concurring). This suggests the proper test for regulations with an incidental burden on speech is not *Arcara* but the test originally announced in *United States v. O'Brien*. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407 (2024) (quoting *O'Brien*, 391 U.S. 367, 377 (1968)) (observing that under intermediate scrutiny, the restriction "must further a substantial governmental interest that is unrelated to the suppression of free expression." (cleaned up)).

Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, a federal statute required law schools receiving federal funds to allow military recruiters onto campus. 547 U.S. 47, 60 (2006). The Supreme Court rejected the law schools’ claim that this required hosting compelled them to speak, concluding that “accommodating the military’s message does not affect the law schools’ speech” because “the schools are not speaking when they host interviews and recruiting receptions” and the “accommodation does not sufficiently interfere with any message of the school.” *Id.* Here, by contrast, foster parents are not merely passive bystanders accommodating the government’s speech as a condition of receiving funding. Instead, foster parents are themselves required to engage in speech. By forcing families to profess a willingness to engage in controversial acts they find objectionable—and that many foster kids will never need—the Policy enlists these families into the state’s ideological regime. Thus, the Policy seeks to compel the expressive message of foster parents who do not agree with such forms of “care.”

**d.** Even if the Policy did not target expression as such and had only an “incidental” burden on speech, it would still implicate the First Amendment. *See White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 169 (2d Cir. 2007) (holding regulation “that is not enacted for the purpose of suppressing expression [is still] subject to the four-factor test for expressive conduct set forth in” *O’Brien*). For the reasons outlined above, the Policy, at the very least, has an incidental burden on Melinda’s and Casey’s speech. Moreover, Melinda’s and Casey’s refusal to commit to facilitating “gender-affirming care” is also core expressive conduct. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding conduct expressive when the speaker had “[a]n intent to convey a particularized message,” and the “likelihood was great that the message would be understood by those who viewed it.”). That refusal was based their objection to what they believe is a harmful practice that the state demands they facilitate to keep their license. Verified Compl. ¶¶ 79–80.



Because this refusal is “sufficiently imbued with elements of communication,” it falls “within the scope of the First . . . Amendment[.]” *Johnson*, 491 U.S. 397, 404.

3. The Policy discriminates against Vermonters with dissenting views.

Defendants barely attempt to rebut Melinda’s and Casey’s argument that the Policy discriminates based on viewpoint. And it plainly does. If a foster family refuses to engage in the compelled speech the Department demands, they are not allowed to participate in the program. Yet if a foster family agrees with the state’s preferred message, they are allowed to participate. This is viewpoint discrimination. *See Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (holding compelled ideological speech as condition of public employment unconstitutional even if “no right” to public employment); *see also Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007) (holding school policy that requires students be “good citizens” violates First Amendment). Those with dissenting views are cut out entirely. Such one-sided rules benefiting the state’s preferred views is inconsistent with the First Amendment.

**B. Melinda and Casey are likely to succeed on their free exercise claim.**

The Policy is also subject to strict scrutiny under the Free Exercise Clause because it is not generally applicable vis-à-vis religion. Rule 200.1’s exemption from Rule 200’s non-discrimination requirement renders the Policy not generally applicable because Rule 200.1 does not contain an exemption for religious exercise. Moreover, Rule 35’s generalized exemption also renders the Policy not generally applicable.<sup>3</sup>

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<sup>3</sup> The Policy is also not neutral and imposes an unconstitutional condition on religious exercise for the reasons set forth in Melinda’s and Casey’s Memorandum in Support of their Motion for Preliminary Injunction. Defendants’ Opposition barely addresses these arguments. Accordingly, Melinda and Casey rest on their Memorandum on these points.

Defendants argue the Policy is generally applicable despite the exemptions contained in Rules 200.1 and 35. Defendants are wrong on both fronts.

First, Defendants argue Rule 200.1 is not an exemption at all. According to Defendants, Rule 200.1 simply clarifies that “parents who are unable to foster [certain] children . . . will not be denied a license for that reason.” Defs.’ Opp’n at 27. But Defendants’ own admissions defeat this argument. By its text, Rule 200.1 provides foster families may refuse placement of children “based on an inability to care” for children due to their “age” or “special needs.” The Rule does not define what an “inability to care” means, but Defendants candidly admit it includes situations in which caring for such a child would require the family to sacrifice a significant amount of time or spend a significant amount of money. Defs.’ Opp’n at 10 (conceding that a foster family could deny a placement based on age or special needs that required the family to undertake “higher than usual time commitments” or acquire “special equipment”). Yet just like sacrificing significant time or spending a significant amount of money, requiring foster families to violate their religious beliefs by committing to provide “gender-affirming care” burdens their exercise of religion. Because Rule 200.1 allows an exemption for time-based concerns and financial reasons—but not religious exercise—the Policy is not generally applicable. *See Fulton v. City of Phila.*, 593 U.S. 522, 534 (2021) (noting that policy is not generally applicable “where the State has in place a system of individual[ized] exemptions” that do not apply “to cases of religious hardship” (cleaned up)).

Moreover, as discussed, Melinda and Casey do not assert the right to “discriminate” against transgender-identifying children, as Defendants misleadingly claim. Defs’ Opp’n at 8. Melinda and Casey are willing to foster a transgender-identifying child. But they are unable to do so consistent with their religious exercise if the Department requires them to commit to providing “gender-affirming care” to such children. Thus, Melinda and Casey seek the exact same exemption

from Rule 200 that is provided under Rule 200.1—that is, not a free pass to discriminate, but a ruling that “parents who are unable to foster [transgender-identifying] children [because of their religious beliefs] will not be denied a license for that reason.” Defs.’ Opp’n at 10. Because the Policy affords families an exemption that allows them to keep their licenses despite failing to accept certain children in the protected class based on time and monetary considerations—but not based on religious exercise—the Policy is not generally applicable.

Second, Defendants fail to dispel the concern that Rule 35’s generalized variance provision renders the entire licensing program one big “individual government assessment” in which Department staff may grant exemptions from certain requirements if they deem it appropriate. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). It does not matter that Melinda and Casey’s license was revoked under the non-discrimination policy. The entire licensing regime is infected with impermissible discretion that allows exemption for secular reasons but not religious reasons. This is impermissible unless it satisfies strict scrutiny *Blaise v. Hunter*, 493 F. Supp. 3d 984, 998–99 (E.D. Wash. 2020); *Burke v. Walsh*, 3:23-cv-11798, Order Denying Motion to Dismiss (ECF 85), at \*13–17 (D. Mass. June 5, 2024).

### **C. The policy does not satisfy any potentially applicable level of scrutiny.**

The Policy compels speech, discriminates based on viewpoint, and burdens religious exercise while exempting the same secular conduct. It is therefore subject to strict scrutiny, which it fails. Moreover, even if the Policy were a regulation of conduct, not speech, its incidental burden on speech subjects it to intermediate scrutiny under the Speech Clause, which it also fails.

#### **1. The Policy Fails Strict Scrutiny**

Defendants argue the Policy satisfies strict scrutiny because it is necessary to prevent discrimination against “LGBTQ+ youth” in the foster system. Defs.’ Opp’n at 32. And according

to Defendants, “because it is not possible to know which children are or will be LGBTQ,” the only way to do that is through an up-front commitment like the Policy. *Id.* Defendants, however, have not satisfied their burden of proof on these points.

While the prevention of discrimination can be a compelling interest in certain situations, simply asserting it is not talismanic. Rather, the government must specifically link its anti-discrimination interest to the provision at issue. *See Fulton*, 593 U.S. at 534 (holding that government does not satisfy strict scrutiny by proffering government interest at a “high level of generality”); *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 792 (9th Cir. 2022) (same). Here, this means Defendants may not rely on a general interest in preventing discrimination; rather, they must demonstrate they have a specific interest in “denying an exemption” to Melinda and Casey. *Fulton*, 593 U.S. at 541 Defendants cannot make this showing.

As an initial matter, the odds that Melinda and Casey will ever be in a situation where they are fostering a transgender-identifying child is extremely low. *See Verified Compl.* ¶ 24 (“Nationwide, approximately 1.4% of youth ages 13-17 years old identify as transgender.” (citation omitted)). Defendants contend this number is likely to be higher among children in its foster care system, observing that “[u]p to 30% of youth in foster care nationally identify as LGBTQ compared to about 10% in the general population.” Defs.’ Opp’n at 13. But, of course, this 30% number includes children who are lesbian, gay, and bisexual, not to mention transgender-identifying or gender-questioning children who may not wish to transition. Even if the number of transgender-identifying children in Vermont’s foster care system is three time greater than the 1.4% national rate, the rate of 4.2% is still very low.

Moreover, Defendants cannot show that “gender-affirming care” is beneficial to children. Indeed, the release of the *Cass Review* in April of this year prompted a national reckoning in

England and the rest of the United Kingdom.<sup>4</sup> The U.K. has banned the prescription of puberty blockers to minors, severely restricting the very type of “gender-affirming” medical care that the Department requires foster families to commit to facilitating.<sup>5</sup>

Seeking to side-step the devastating impact of the *Cass Review* on the efficacy of “gender-affirming care,” Defendants contend “the Cass Review focuses on medical interventions, not non-discrimination and non-acceptance, which are the harms the LGBTQ Policy primarily seeks to address.” Defs.’ Opp’n at 30. But even putting aside the fact the Policy does not distinguish between medical and social transition, this is simply incorrect. The *Cass Review* devoted an entire chapter to social transition, concluding that it was an “active intervention” in the lives of children and observing that there was a startling lack of evidence of its purported benefits in youth. *See Cass Review* (ECF 1-4) Ch 12. While Defendants wish to characterize the Policy as merely ensuring “non-discrimination” and preventing “non-acceptance,” the reality is the practices Defendants ask foster families to facilitate are powerful forms of psychological intervention with little evidence that they are beneficial. *Id.*

Defendants contend that “nearly every major medical organization in the United States with a position on the matter” has “voiced support for the availability of gender-affirming care.” Defs.’ Opp’n at 30. But none of these “major medical organizations” have substantively responded to the *Cass Review*. And just last month, the American Society of Plastic Surgeons came out

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<sup>4</sup> Ingrid Jacques, *‘Extreme caution’: Cass Review raises red flags on gender-affirming care for trans kids*, USA Today (April 22, 2024), <https://www.usatoday.com/story/opinion/columnist/2024/04/22/transgender-care-cass-review-puberty-blockers-kids/73355213007/>; Hillary Cass says U.S. Doctors are ‘out of date’ on trans medicine, New York Times (May 13, 2024), <https://www.nytimes.com/2024/05/13/health/hilary-cass-transgender-youth-puberty-blockers.html>.

<sup>5</sup> *See, e.g., Matt Fox, Puberty Blocker ban extended to Northern Ireland*, BBC, (Aug. 23, 2024), <https://www.bbc.com/news/articles/cwy3l8pnld9o>

against “gender-affirming” surgery because of its lack of “confidence that the benefits outweigh the harm.”<sup>6</sup> It is too late in the day to attempt to maintain the façade of a “medical consensus” surrounding “gender-affirming care.”

Even assuming Defendants had a compelling interest in refusing to give Melinda and Casey an exemption, the Policy is not necessary or narrowly tailored to achieve that interest. Defendants argue that, despite the small number of transgender-identifying children, an up-front commitment to facilitate “gender-affirming care” is necessary “because it is not possible to know which children are or will be LGBTQ” and re-placement is not a viable option “[b]ecause of the need for stability” in placements. Defs.’ Opp’n at 32. But the Policy does not prohibit re-placement by rule, and even if it did, Rule 35 would allow for exceptions from that rule on a case-by-case basis. Moreover, the Department regularly allows re-placement in other situations. Indeed, for the brief period Melinda and Casey had a license, they fostered an eight-year-old child that the Department placed in their home. Supp. Antonucci Decl. ¶ 7. After a couple of weeks, Melinda and Casey realized the situation was a “bad fit” and asked the Department to find an alternative placement for the child. *Id.* ¶ 8. The Department complied with the request and the placement ended. *Id.* ¶¶ 9–14. Because the Department regularly allows re-placement on grounds such as the family’s conclusion that the placement is a “bad fit,” the Policy is underinclusive to the asserted need for “stability.” *Church of Lukumi*, 508 U.S. at 532 (holding law underinclusive when banning religious conduct while allowing identical secular conduct); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting underinclusive regulations undermine “the government’s rationale for restricting speech in the first place”).

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<sup>6</sup> Anna Kutz, *Plastic Surgeon group renounces gender surgery for minors*, News Nation (Aug. 13, 2024), <https://www.newsnationnow.com/health/plastic-surgery-society-gender-affirming-care/>

In sum, the up-front commitment the Policy demands is not necessary to assure foster families will properly care for any given child. If that were the case, the Department could merely impose this requirement when a transgender-identifying child is placed in the home rather than at the time of licensing. *Blais*, 493 F. Supp. 3d at 1000. That would allow families who disagree with the state’s view on “gender-affirming care”—whether on religious or secular grounds—to maintain that objection without undermining the state’s goals of ensuring that transgender-identifying youth have “affirming” homes. Instead, the Department requires what is effectively a loyalty oath up front, when it is speculative (at best) that a family will ever need to “affirm” a foster child’s transgender identity. The Policy does not satisfy strict scrutiny.

## 2. The Policy Fails intermediate scrutiny.

Even if the Policy regulated conduct and not speech, it still has an incidental burden on speech, and the conduct plainly has an expressive element. Accordingly, the Policy must at least satisfy intermediate scrutiny. *White River*, 481 F.3d at 169. That is, the Policy must “further[] an important or substantial government interest” and “the restriction [on speech must not be] greater than is essential.” *Id.*; see also *NIFLA*, 585 U.S. at 776 (noting that regulations that “incidentally” compel speech cannot be “unjustified or unduly burdensome”). The Policy fails this test.

Under intermediate scrutiny, a “broad prophylactic rule” will not survive unless the harm it seeks to remedy is “potentially real” and “not purely hypothetical.” *NIFLA*, 585 U.S. at 776. Here, as discussed, the Policy compels speech to remedy a “purely hypothetical” harm—*i.e.*, the potential “outcome” of a transgender-identifying child being in a non-affirming household when they seek to transition. Defs.’ Opp’n at 32. But as discussed, the likelihood that any given foster family will have a transgender-identifying child in their care is extremely low. Because the chances

that a foster child might identify as transgender presents a “purely hypothetical” scenario, it is not a sufficient basis upon which to force families to agree to facilitate “gender-affirming care.”

Moreover, for the same reasons the Policy is not narrowly tailored under strict scrutiny, it is not essential to the state’s anti-discrimination purpose. The Department could allow foster families to “opt out” at the placement stage or find re-placement in the unlikely scenario it becomes necessary once the child is already in the home. While intermediate scrutiny does not require the least restrictive means, Defendants have failed to meet their burden to show these are not viable alternatives that are less burdensome of foster parents’ First Amendment rights.

### **III. THE OTHER INJUNCTION FACTORS WEIGH DECIDEDLY IN MELINDA’S AND CASEY’S FAVOR**

Defendants argue constitutional violations do not automatically give rise to irreparable harm. While that may be true in situations where the plaintiff has not demonstrated a likelihood of success on a constitutional claim, when a plaintiff has made such a showing, he has necessarily established irreparable harm. *See Frey v. Nigrelli*, 661 F. Supp. 3d 176, 207 (S.D.N.Y. 2023) (“[B]ecause the violation of a constitutional right is the irreparable harm asserted, the two prongs of the preliminary injunction threshold merge into one and in order to show irreparable injury, plaintiff must show a likelihood of success on the merits.” (cleaned up)); *see also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (“The loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury.”). Because Melinda and Casey have demonstrated a likelihood of success on the merits, they have also demonstrated irreparable harm.

In addition, Melinda and Casey have demonstrated they will suffer “adverse factual consequences” absent an injunction. Defs.’ Opp’n at 33. Melinda and Casey want to foster children in their home. The state requires Melinda and Casey to have a license before they can do so. Melinda and Casey have been deprived of that license. Thus, they are unable to foster children.



Further, Melinda and Casey want their young son to experience the benefits of having a foster sibling. Compl. ¶¶ 88, 123. Every day that passes, they are unable to foster children, and their son loses the benefits that a foster sibling would give him. *Id.* On these facts, Melinda and Casey are suffering “adverse factual consequences” from the Department’s decision to revoke their license.

For their part, Defendants will not be harmed by a preliminary injunction. Because Melinda and Casey are likely to succeed on the merits, the state will suffer no harm by being unable to enforce the Policy against them during the pendency of this litigation. *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (noting that “[t]here can be no irreparable harm to [the government] when it is prevented from enforcing an unconstitutional statute” (cleaned up)). And while Defendants argue that, if Melinda and Casey prevail, the Department “would be forced to place children with foster parents who refuse to support a child’s sexual or gender identity,” Defs.’ Opp’n at 33 (emphasis added), that is not the relief Melinda and Casey seek. Instead, Melinda and Casey seek the modest relief of allowing them—and *only* them—“to opt-out of fostering transgender-identifying children (1) at the placement stage and (2) if a child comes to have a transgender identity while in their care.” Mot. for Prelim. Injunc. at 2. Granting Melinda and Casey this narrow relief during the pendency of this litigation would harm no one.

Finally, granting Melinda’s and Casey’s motion is in the public interest. The Department has already concluded that—but for the Policy’s unconstitutional provisions—Melinda’s and Casey’s family is a loving one that is suitable for housing foster children. Especially considering the current foster-care crises, the public has an interest in foster children being placed with loving parents like Melinda and Casey. Accordingly, all the injunction factors weigh in their favor.

## CONCLUSION

The Court should grant Melinda’s and Casey’s motion for preliminary injunction.

Respectfully submitted,

Dated: September 25, 2024.

by:

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UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

MELINDA ANTONUCCI; CASEY )  
MATHIEU, )

Plaintiffs, )

v. )

CHRISTOPHER WINTERS, in his personal )  
and official capacity as Commissioner of the )  
Vermont Department for Children and )  
Families; ARYKA RADKE, in her personal )  
and official capacity as Deputy )  
Commissioner, Vermont Department for )  
Children and Families, Family Services )  
Division; STACEY EDMUNDS, in her )  
personal and official capacity as Director, )  
Residential Licensing & Special )  
Investigations, Vermont Department for )  
Children and Families; and PAULA )  
CATHERINE, in her personal and official )  
capacity as a Licensing Officer, Residential )  
Licensing & Special Investigations, Vermont )  
Department of Children and Families, )

Defendants. )

Case No.: 2:24-cv-00783-wks

**SUPPLEMENTAL DECLARATION OF  
MELINDA ANTONUCCI**

I, Melinda Antonucci, hereby declare:

1. I am one of the plaintiffs in this matter. I am over the age of 18, and I make this declaration from my own personal knowledge. If called upon to testify to the contents below, I could and would do so competently.
2. In 2023, my husband Casey Mathieu and I decided to become foster parents to assist children in our community who need it.
3. We made this decision because we concluded our religious beliefs compelled us to become foster parents.

4. Throughout the year, we completed an application with the Vermont Department for Children and Families, and we subsequently completed all necessary training and background checks to obtain a license.

5. The Department's rules and training do not inform foster families that they may not decline a placement without jeopardizing their license.

6. In January 2024, we obtained a license from the Department to foster.

7. In February of 2024, the Department informed us of an eight-year-old child (male) who needed a foster home. Because Casey and I want to foster a child close to the same age as our five-year-old son, we thought this might be a good fit for our home. The Department informed us that the child needed a home immediately, so we agreed to become his foster parents.

8. Soon after we began fostering the child, we realized the situation was a bad fit. The child was overly aggressive with our son, causing us to fear for his safety.

9. About a week after the placement began, we informed the Department of our concerns and that we did not think the placement was a good fit. At least one Department staff member I spoke with encouraged us not to continue with a placement if we felt uncomfortable. This staff person assured us that the Department wanted to make sure every placement is a good fit, and if the situation simply did not work—for whatever reason—foster parents could seek re-placement of the child.

10. I understood this to be the Department's policy—that if, for whatever reason, a foster family did not think a placement would work, that they could either decline the placement or, if the child is in already the home, seek re-placement of the child, without such a decision affecting the status of the foster family's license.



11. Over the next week, we tried to make the placement work, but the situation did not improve despite our efforts.

12. After about two weeks with the child in our home, we informed the Department that the situation did not improve and that we thought it best for the Department to find the child a new home. The Department agreed with us and found an alternative home for the child.

13. The Department assured us that our license would not be affected by our decision to seek re-placement for the child.

14. Though we were disappointed that our first placement did not lead to a long-term arrangement, we appreciated the Department's flexibility and assurances that we had the right to refuse any placement if we did not think it would be a good fit and that we had the right to seek re-placement if the placement was not working out as expected.

15. Casey and I stand ready and willing to foster any child the Department asks us to consider, regardless of any protected status, including gender identity.

16. We simply object to facilitating a transgender-identifying foster child's transition to a new gender identity through "gender-affirming care," including facilitation of social and medical transitioning.

17. We object to these practices on moral, philosophical, and religious grounds.

18. We also believe that there is a strong scientific basis to support our skepticism regarding the efficacy of "gender-affirming care."

19. We remain ready to assist the state of Vermont in caring for children in need and hope the Department will allow us to continue participating in the program.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25<sup>th</sup> day of September 2024

  
MELINDA ANTONUCCI