

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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**RESPONSE IN OPPOSITION TO MOTION TO DISMISS**

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## INTRODUCTION

Melinda Antonucci and Casey Mathieu are a married couple who were licensed to participate as a foster family in Vermont’s foster-care system. As part of the licensing process, the Vermont Department for Children and Families found that Melinda’s and Casey’s home was a loving one that was suitable for foster children. But when the Department learned Melinda objected to schools socially transitioning students without informing their parents, the Department began an investigation into their license. In that investigation, Melinda and Casey would not commit—up front and in advance to placement of a transgender-identifying foster child in their home—to facilitate “gender-affirming care” on transgender-identifying foster children. Despite the fact the non-discrimination provisions of the Department’s Policy allows exemptions for various reasons, the Department revoked Melinda’s and Casey’s license based on their speech regarding transgender-identifying children.<sup>1</sup> In so doing, the Department violated Melinda’s and Casey’s First and Fourteenth Amendment rights.

Defendants have moved to dismiss Melinda’s and Casey’s Complaint on technical grounds, asking the Court to (1) abstain from hearing Melinda’s and Casey’s claims for equitable relief under *Younger v. Harris* and (2) dismiss Melinda’s and Casey’s nominal-damages claims for various reasons. The Court should deny Defendants’ motion in full.

*Younger* abstention is not appropriate for several reasons—foremost among them that Melinda and Casey have withdrawn their appeal to the Vermont Human Services Board. As a result, there is no longer a pending state proceeding to which this Court could defer. But even if

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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.

that appeal were still pending, it was not the type of proceeding that falls within the *Younger* doctrine because *Melinda and Casey* initiated the appeal—not the state. Moreover, *Younger* does not apply where, as here, the Policy is “flagrantly and patently unconstitutional.” Further, because § 1983 does not have an exhaustion requirement, Melinda and Casey may seek relief in this Court rather than the Vermont state courts. Accordingly, *Younger* does not apply here.

As for Melinda’s and Casey’s claim for nominal damages, Defendants argue the Complaint fails to allege individual involvement by Commissioner Winters, Deputy Commissioner Radke, and Director Edmunds. But a plaintiff need not allege individual involvement by all defendants when seeking equitable relief against a formal policy. And even for damages claims, a plaintiff states a claim against a government official by alleging the official adopted the offending policy. Because each of the Defendants were either responsible for adopting or enforcing the Policy, they are each liable for damages.

Defendants argue the Court should dismiss Melinda’s and Casey’s First Amendment retaliation claim because they failed to allege a causal connection between Melinda’s speech and the license revocation. But the Complaint plainly alleges that Melinda’s February 2024 Facebook post was the catalyst for the Department’s inquiries into her and Casey’s views on “gender-affirming care” and that her statements in that inquiry caused the Department to revoke their license.

Finally, Defendants invoke the defense of qualified immunity, but a ruling on that defense is premature, especially considering Defendants failed to make any specific arguments in connection with Melinda’s and Casey’s claims. Without such arguments, Defendants have necessarily failed to satisfy their burden of demonstrating they are entitled to this defense. Moreover, this case does not involve split-second decision-making by a government actor. Instead,



the offending government action here is the result of many months of deliberation and consideration by the Department. And clearly established principles support each of the constitutional rights that Melinda and Casey invoke: the government may not treat the exercise of religion less favorably than similar secular conduct; compelling speech under the guise of ensuring non-discrimination is impermissible; the government may not make a license contingent on viewpoint conformity; retaliating against citizens for exercising their First Amendment rights is unconstitutional; and Defendants' actions violate principles of equal protection.

In short, the Complaint alleges sufficient facts to state plausible claims for equitable relief and damages on each of their causes of action against Defendants. The Court should therefore deny Defendants' Motion in full.

### **LEGAL STANDARD**

When considering a motion to dismiss under Rule 12(b)(6), the Court must accept “as true all factual allegations in the complaint and draw[] all reasonable inferences in the plaintiff's favor.” *Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016). The plaintiff need only plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The “factual content” in the complaint must simply “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 99 (2d Cir. 2024). The standard under rule 12(b)(1) is “substantively identical.” *Seemann v. USPS*, No. 2:11-CV-206, 2012 WL 1999847, at \*1 (D. Vt. June 4, 2012).

### **ARGUMENT**

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

Defendants argue the Court should abstain from exercising its jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971). This contention is without merit.

**A. There is no pending state proceeding.**

*Younger* abstention is only appropriate when a parallel state proceeding is “pending.” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 81 (2013). Here, there is no state proceeding pending. On September 16, 2024, Melinda and Casey withdrew their appeal to the Human Services Board (the “Board”). See Notice of Hearing Cancellation (attached as MTD Opp’n Exhibit A). Because there is no ongoing state proceeding, *Younger* does not apply. *Id.*; *Pathways, Inc. v. Dunne*, 329 F.3d 108, 114 (2d Cir. 2003) (holding *Younger* not applicable when “the state proceedings . . . are no longer pending”). Moreover, the fact that Melinda and Casey withdrew the appeal before the Board adjudicated it does not change this conclusion. See *Thomas v. Tex. State Bd. of Med. Exam’rs*, 807 F.2d 453, 457 (5th Cir. 1987) (holding abstention not proper where plaintiff withdrew appeal in state proceeding); *Tran v. Concannon*, No. 99-227-B-H, 2000 WL 761975, at \*2 (D. Me. Jan. 6, 2000) (same). Accordingly, *Younger* does not apply.

**B. Melinda’s and Casey’s appeal to the Board was not the type of proceeding to which *Younger* applies.**

Even if Melinda’s and Casey’s appeal were still pending, abstention would still be unwarranted because that appeal was not the type of proceeding to which *Younger* applies.

In general, “federal courts have a virtually unflagging obligation to exercise their jurisdiction.” *Niagara Mohawk Power Corp. v. Hudson River–Black River Regulating Dist.*, 673 F.3d 84, 100 (2d Cir. 2012) (cleaned up). While courts may sometimes “abstain from exercising [their] jurisdiction out of respect for certain state court functions, . . . abstention is the exception, not the rule.” *Cavanaugh v. Geballe*, 28 F.4th 428, 432 (2d Cir. 2022) (cleaned up); see also *Niagara Mohawk*, 673 F.3d at 100 (noting that “abstention is generally disfavored”). Courts must take care to avoid interpreting the abstention doctrine broadly lest they impermissibly impose an exhaustion requirement on § 1983 claims. See *CECOS Int’l, Inc. v. Jorling*, 895 F.2d 66, 72 (2d

Cir.1990) (noting that “§ 1983 reflects Congress’ aim ‘to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief” (quoting *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982) (holding § 1983 has no exhaustion requirement))); *see also Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 260 (1st Cir. 1987) (same). Accordingly, where a federal defendant invokes abstention, “the balance is heavily weighted in favor of the exercise of jurisdiction.” *Niagara Mohawk*, 673 F.3d at 100 (cleaned up).

Defendants contend *Younger* abstention is warranted under the three factors first set forth in *Middlesex County Ethics Commission v. Garden State Bar Association*. Defs.’ Mem. at 6 (quoting *Ohio C.R. Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986) (citing *Middlesex*, 457 U.S. 423 (1982))). But in *Sprint*, the Supreme Court held the *Middlesex* factors apply *only* if the pending state proceeding falls into one of three narrow categories. 571 U.S. at 81 (holding that the “*Middlesex* conditions . . . [are] not dispositive; they [are], instead, *additional* factors” courts may consider once determining whether the proceeding is the type contemplated in *Younger*). Specifically, under *Sprint*, *Younger* applies only to (1) “‘state criminal prosecutions,’ (2) ‘certain civil enforcement proceedings,’ and (3) ‘civil proceedings involving certain orders uniquely in furtherance of the state courts’ ability to perform their judicial functions.’” *Falco v. Justices of the Matrim. Parts of the Supreme Ct. of Suffolk Cnty.*, 805 F.3d 425, 427 (2d Cir. 2015) (quoting *Sprint*, 571 U.S. at 78).

The first and third of these categories plainly do not apply here. Melinda’s and Casey’s appeal to the Board was not a criminal proceeding, nor did it involve orders that are uniquely in furtherance of the state courts’ ability to perform their judicial function.

Melinda’s and Casey’s appeal to the Board also did not fall within the second category. As the Supreme Court explained in *Sprint*, the second category applies to proceedings that, while civil

in nature, are nevertheless “akin to a criminal prosecution.” 571 U.S. at 79 (cleaned up). To be “akin to a criminal prosecution,” the proceeding generally must be “initiated [*by the state*] to sanction the federal plaintiff . . . for some wrongful act.” *Id.* (cleaned up). By contrast, *Younger* does not apply when *the federal plaintiff* initiated the state proceedings. *Brown ex rel. Brown v. Day*, 555 F.3d 882, 893 (10th Cir. 2009) (holding *Younger* inapplicable where the plaintiff “initiated a challenge to . . . state action by requesting a hearing before [the hearing board]”); *Devlin v. Kalm*, 594 F.3d 893, 895 (6th Cir. 2010) (holding *Younger* inapplicable where the state proceedings “were initiated by [the plaintiff]” (cleaned up)); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 522 (1st Cir. 2009) (holding “proceedings initiated by the plaintiffs are not the type to which deference under *Younger* applies”). Abstaining from proceedings initiated by the plaintiff runs the risk of impermissibly importing an exhaustion requirement into § 1983 through the back door. *See Kercado-Melendez*, 829 F.2d at 260 (“The crucial distinction between [cases where *Younger* abstention is proper] and *Patsy* is that in *Patsy* the state proceeding was an option available to the federal plaintiff on her own initiative . . .”).

Melinda’s and Casey’s appeal to the Board was not “akin to a criminal prosecution.” Melinda and Casey initiated the appeal, not Defendants, and Melinda and Casey were not required by state law to file the appeal. This renders the appeal unlike a criminal prosecution. *Sprint*, 571 U.S. at 79; *Brown*, 555 F.3d at 893; *Guillemard-Ginorio*, 585 F.3d at 522; *Kercado-Melendez*, 829 F.2d at 260. Accordingly, *Younger* does not apply to the appeal.

To the extent the Department contends the relevant proceeding is not Melinda’s and Casey’s appeal to the Board but the Notice of Decision it issued on July 1, 2024, that argument is wrong. As an initial matter, as the Complaint alleges, the Department *de facto* revoked Melinda’s and Casey’s license on or about May 10, 2024, when it stopped sending them notifications of new

placement opportunities. Compl. ¶ 108. That decision was final on that date and is thus no longer “pending” as required by *Younger*. Moreover, the Notice of Decision is no longer “pending” either. The Notice of Decision provided that if Melinda and Casey did not file an appeal with the Board, the formal “revocation of [their] foster care license [would] be effective on August 1, 2024.” Compl. Ex. S. Because the Notice of Decision “automatically” terminated Melinda and Casey’s license unless they initiated an appeal, and because Melinda and Casey have now withdrawn that appeal, the Notice of Decision represents the culmination of the administrative proceedings within the Department. Agency action that takes effect automatically constitutes a final decision, leaving nothing further to be enjoined. *Guillemard-Ginorio*, 585 F.3d at 523 (holding *Younger* did not apply to administrative decision that “was to become final within 20 days of its issuance, unless plaintiffs requested an administrative hearing”); *see also Weinberg v. Dep’t of Revenue, Servs.*, 596 F. Supp. 3d 386, 403 (D. Conn. 2022) (holding agency action that automatically took effect did not “preclude[] federal jurisdiction under *Younger*”). To require Melinda and Casey to prosecute that appeal would impermissibly create an exhaustion requirement under § 1983.

**C. The Policy is “flagrantly and patently” unconstitutional.**

Even if Melinda’s and Casey’s appeal were still pending and the appeal were a proceeding to which *Younger* applied, *Younger* does not apply to laws that are “flagrantly and patently violative of express constitutional prohibitions.” *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 366 (1989) (quoting *Younger*, 401 U.S. at 53–54). For the reasons explained in Melinda’s and Casey’s Memorandum in Support of their Motion for Preliminary Injunction, the Policy is flagrantly and patently unconstitutional. Thus, *Younger* is inapplicable.

**D. *Younger* is not as broad as the Department asserts.**

Finally, even if *Younger* applied (and it does not), *Younger* is not as broad as Defendants assert. First, contrary to Defendants’ request for dismissal “of this case,” Mem. at 6, *Younger* applies only to claims for declaratory and injunctive relief, not claims for damages. *Kirshner v. Klemons*, 225 F.3d 227, 238 (2d Cir. 2000) (“*Younger* abstention is not appropriate with respect to [a] claim for money damages[.]”). Even if *Younger* applied, it would not apply to Melinda’s and Casey’s claims for damages.

Second, the Department asks the Court to abstain to “allow the state administrative *and judicial appeals process* to proceed.” Mem. at 6 (emphasis added). But even if Melinda and Casey’s appeal to the Board were subject to *Younger*, Melinda and Casey would not be required to exhaust their remedies in the Vermont state court system. Rather, now that they have withdrawn their appeal, they are permitted to pursue the claims for injunctive and declaratory relief in this Court. *CECOS Int’l*, 895 F.2d at 72 (holding plaintiff may choose between petitioning state court for review of agency decision and filing federal § 1983 claim). As with the Department’s *Younger* argument generally, a holding otherwise would impermissibly create an exhaustion requirement under § 1983. *Id.*

For these reasons, *Younger* abstention is not appropriate here.

## **II. MELINDA AND CASEY DO NOT NEED TO ALLEGE INDIVIDUAL INVOLVEMENT TO RECOVER DAMAGES STEMING FROM ENFORCEMENT OF A POLICY**

Defendants argue the Court should dismiss all damages claims against Commissioner Winters, Deputy Commissioner Radke, and Director Edmunds because the Complaint does not allege these defendants were “personal[ly] involve[d]” in Melinda’s and Casey’s license revocation. Mot. to Dismiss at 9–11. Defendants do not seek dismissal of Licensing Officer

Catherine on this ground. Nor does this argument apply to Melinda’s and Casey’s claims for declaratory and injunctive relief. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (observing that personal involvement is required only when “monetary damages are sought” (citation omitted)). Regardless, Melinda’s and Casey’s damages claims against Commissioner Winters, Deputy Commissioner Radke, and Director Edmunds are not subject to dismissal on this ground.

It is true that personal involvement by a government defendant is “a prerequisite to an award of damages under [42 U.S.C.] § 1983.” *Brandon v. Kinter*, 938 F.3d 21, 36 (2d Cir. 2019). But a plaintiff can satisfy this requirement at the pleading stage by alleging the defendant “created a policy or custom under which unconstitutional practices occurred” or “allowed the continuance of such a policy or custom.” *Id.* (citation omitted).<sup>2</sup> Such is the case here.

Commissioner Winters, Deputy Commissioner Radke, and Director Edmunds are the Vermont officials responsible for “creat[ing]” and implementing the Policy. *Id.* As Commissioner of the Department, Commissioner Winters “is ultimately responsible for the adoption and implementation of all Department policies, including but not limited to policies that govern the foster-care program, and for all licensing decisions made in connection with the Department’s foster-care program.” Verified Compl. at ¶ 13. Similarly, as Deputy Commissioner of the Department and Head of the Family Services Division, Deputy Commissioner Radke “oversees

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<sup>2</sup> In *Tangreti v. Bachmann*, the Second Circuit held that *Iqbal* abrogated circuit precedent creating special rules for supervisory liability in the Eighth Amendment context when a prison official was “grossly negligent” in supervising her subordinates or “fail[ed] to act on information” indicating the inmate was at risk for abuse. 983 F.3d 609, 614 (2d Cir. 2020). *Tangreti* did not purport to undermine *Brandon*’s conclusion that a supervisor could be liable for “creat[ing] a policy or custom under which unconstitutional practices occurred.” *See, e.g., Stone #1 v. Annucci*, No. 20-CV-1326 (RA), 2021 WL 4463033, at \*8 (S.D.N.Y. Sept. 28, 2021) (holding, post-*Tangreti*, that a defendant can be personally liable if he “created a policy or custom under which unconstitutional practices occurred” (cleaned up)).

implementation of the Department’s foster-care program, including licensing decisions.” Verified Compl. ¶ 14. And as the Director of the Department’s Residential Licensing and Special Investigations Unit, Stacy Edmunds “oversees implementation of the Department’s foster care licensing decisions.” Verified Compl. ¶ 15. Because the Complaint alleges these Defendants “created” the Policy or “allowed [it] to continue,” it alleges they were personally involved in the deprivation of Melinda’s and Casey’s rights.

Defendants do not dispute the Complaint’s allegations that these individuals created and implemented the Policy. Instead, Defendants cite several cases involving § 1983 claims where the alleged injury did not flow from the creation or implementation of a government policy or custom. *See* Mot. to Dismiss at 9–11. Rather, in those cases, the plaintiff alleged a government actor violated their constitutional rights in some way not authorized by policy or custom, and the plaintiff tried to extend the liability to the government actor’s supervisor despite the fact the supervisor was not involved in the deprivation. *See, e.g., Kravitz v. Purcell*, 87 F.4th 111, 129 (2d Cir. 2023) (failing to allow Jewish prisoner to observe Shavuot); *Taranto v. Putnam Cnty.*, No. 21-CV-2455, 2023 WL 6317270, at \*14 (S.D.N.Y. Sept. 28, 2023) (wrongful arrest); *Warren v. Quick*, No. 19-CV-10989, 2020 WL 7647220, at \*3 (S.D.N.Y. Dec. 23, 2020) (failing to pick prisoner for internal committee)). But none of these cases involved a challenge to an unconstitutional *policy or custom*, like the claims here. Verified Compl. ¶ Prayer for Relief A–D. And because all the injurious actions Defendants took here were in furtherance of implementing the Policy, each defendant is responsible for each claim that Melinda and Casey assert.

Moreover, even putting aside Director Edmunds’ involvement with the creation and implementation of the Policy, she—along with Licensing Officer Catherine—signed the Notice of Decision dated July 1, 2024. Compl. ¶ 111 and Ex. S. That Notice, which informed Melinda and



Casey that their license would be revoked absent an appeal, represented the Department’s final action and caused a deprivation of Melinda’s and Casey’s rights. Because Director Edmunds—no less than Licensing Officer Catherine—was personally involved in that deprivation, she is liable for damages. *Brandon*, 938 F.3d at 36 (noting that supervisor may be liable when he or she “participated directly in the alleged constitutional violation” (citation omitted)).

### **III. MELINDA AND CASEY HAVE STATED A FIRST AMENDMENT RETALIATION CLAIM**

Defendants seek dismissal of Melinda’s and Casey’s retaliation claim because, they assert, “the facts of the Complaint do not support any causal connection between the alleged protected speech and the revocation.” Mot. to Dismiss at 14. According to Defendants, the Complaint alleges only that the “basis for the revocation” was Melinda’s and Casey’s “unwilling[ness] to comply with DCF’s Licensing Rules and Policies,” not their protected speech. *Id.* This argument is also incorrect.

A plaintiff states a First Amendment retaliation claim when he alleges three elements: “(1) he has a right protected by the First Amendment; (2) the defendant’s actions were motivated or substantially caused by his exercise of that right; and (3) the defendant’s actions caused him some injury.” *Rupp v. Buffalo*, 91 F.4th 623, 634 (2d Cir. 2024) (citing *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013)). Defendants do not argue that Melinda’s speech—a Facebook post wherein she advocated for public schools to inform parents before socially transitioning their children at school and her statements to the Department regarding the way she and Casey would care for a transgender-identifying child, Compl. ¶¶ 3, 92–94, 129–130—was unprotected by the First Amendment. Nor do Defendants dispute that the revocation of Melinda’s and Casey’s license constitutes injury. Instead, Defendants argue only that the Complaint inadequately alleges that Melinda’s speech caused Defendants to revoke her and Casey’s license.

To allege causation, the plaintiff must set forth sufficient facts to give rise to the “reasonable inference” that the protected speech “was a substantial motivating factor in the adverse . . . action.” *Posr v. Court Officer Shield # 207*, 180 F.3d 409, 418 (2d Cir.1999); *Specht v. N.Y.C.*, 15 F.4th 594, 605 (2d Cir. 2021). Under this standard, the adverse action may have more than one cause, and “[e]vents leading up to a formal decision will [often] be relevant to the analysis of causation.” *Nagle v. Marron*, 663 F.3d 100, 110 (2d Cir. 2011). Moreover, “[a] plaintiff can establish a causal connection to support a retaliation claim by showing that the protected activity was closely followed in time by the adverse . . . action.” *Id.* (cleaned up); *see also Specht*, 15 F.4th at 605 (noting that “passage of up to six months between an adverse action and protected activity sufficient to permit an inference of causation”). And while “a defendant can rebut a prima facie showing of retaliation by demonstrating by a preponderance of the evidence that it would have taken the same adverse . . . action even in the absence of the protected conduct,” *Nagle*, 663 F.3d at 111, such a determination is a “highly fact-intensive” inquiry that is “not appropriate” for resolution at the Rule 12 stage, *Severin v. New York City Dep’t of Educ.*, No. 119CV00775MKVRWL, 2021 WL 1226995, at \*8 (S.D.N.Y. Mar. 31, 2021) (collecting cases).

Here, the Complaint plausibly alleges Melinda’s speech—both her initial Facebook post and her subsequent conversations with the Department—was a substantially motivating factor in the Department’s decision to revoke their license. Melinda made her Facebook post in February 2024. Verified Compl. ¶ 92. On April 1, 2024, the Department contacted Melinda when it became aware of the post, informing Melinda that the post was “concerning” considering the Department’s view that foster parents must “affirm transgender-identifying children.” *Id.* ¶ 95. This led to an additional conversation later that day regarding Melinda’s and Casey’s views on “gender affirming care.” *Id.* ¶¶ 96–102. On April 4, 2024, the Department emailed Melinda to inform her that she

and Casey could not “move forward with fostering” given the views Melinda expressed in that conversation. *Id.* ¶ 103. On or about May 10, 2024, the Department stopped sending Melinda and Casey emails regarding new placements. *Id.* ¶ 108. And on July 1, 2024, the Department sent Melinda and Casey the Notice of Decision, informing them that their license would be revoked because they would not commit to facilitating the transition of a hypothetical foster child. *Id.* ¶ 112. On these facts, Melinda and Casey have plausibly alleged that Melinda’s protected speech was a “substantial motivating factor” for the Department’s actions.

Not only did Defendants retaliate against Melinda and Casey, but they have an explicit policy of retaliating against foster families based on their speech. Specifically, if foster families refused to commit up front and in advance to facilitating “gender-affirming care” on foster children in their care, Defendants would revoke their license. Because of this policy, all Defendants—and not just Licensing Officer Catherine—are liable for the retaliation. *See Lozman v. Riviera Beach*, 585 U.S. 87, 100 (2018).

To the extent Defendants argue that it revoked Melinda’s and Casey’s license based on Melinda’s statements to the Department on April 1, 2024—and not based on her Facebook post—that argument is directly contrary to the Complaint, which alleges the Department’s actions were based on *both* Melinda’s Facebook post *and* her statements on April 1, 2024. *Id.* ¶¶ 129–30, 133–34. Moreover, the Complaint plainly raises a reasonable inference that the Facebook post was at least a “substantial motivating factor” for the Departments’ actions. The Department contacted Melinda less than two months after she made the post, and the Department informed her that the post was “concerning” to the Department considering the Department’s policy that foster parents must be “affirming.” *Id.* ¶ 95. These facts easily raise a plausible inference of causation. Defendants seem to suggest that they would have taken the same action against Melinda’s and

Casey’s license even if Melinda had not made the Facebook post, Mot. at 15, but that is a defense to Melinda’s and Casey’s retaliation claim that may not be resolved at this stage in the proceedings. *Severin*, 2021 WL 1226995, at \*8. Accordingly, the Complaint states a viable retaliation claim.

#### **IV. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY**

Though Melinda and Casey seek only nominal damages, Defendants nonetheless invoke qualified immunity. Mot. to Dismiss at 11–13. Defendants have not demonstrated that they are entitled to this defense.

“Qualified immunity [is] an affirmative defense on which the defendant . . . bear[s] the burden of proof.” *Vincent v. Yelich*, 718 F.3d 157, 166 (2d Cir. 2013). To establish this defense, the defendant must show the plaintiff’s asserted right at issue was not “clearly established” at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). “A right is clearly established when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Vincent*, 718 F.3d at 166; *see also Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006). And in cases not involving split-second decision-making by law enforcement officers, “a general constitutional rule already identified in the decisional law may apply with obvious clarity” to put the government actor on notice that their conduct was unlawful, even in novel situations. *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (cleaned up).

“Usually, the defense of qualified immunity cannot support the grant of a [Rule] 12(b)(6) motion for failure to state a claim.” *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (cleaned up). Here, there are no unique circumstances that would take this case out of the ordinary rule. Indeed, Defendants did not present their argument on a claim-by-claim basis but instead asserted only a generalized entitlement to qualified immunity. Even assuming Defendants preserved the defense, *cf. McCardle v. Haddad*, 131 F.3d 43, 51 (2d Cir. 1997) (noting that “qualified immunity

. . . can be waived . . . by failure to raise it with sufficient particularity” (citations omitted)), Defendants’ generalized argument is categorically insufficient to demonstrate dismissal is proper.

In any event, Melinda’s and Casey’s constitutional rights were all well established at the time of Defendants’ unlawful conduct. As a result, Defendants are not entitled to qualified immunity.

**A. Melinda’s and Casey’s free exercise rights were clearly established.**

Melinda’s and Casey’s free-exercise rights were clearly established at the time of the violation here. The Policy contains almost the same constitutional deficiencies the Supreme Court rejected just a few terms ago in *Fulton v. City of Philadelphia*. There, a city refused to allow a Catholic foster-care agency to participate in the city’s foster-care program because it would not place children with gay couples based its religious views. 593 U.S. 522, 530 (2021). The city argued it could exclude the agency from the program because the agency’s refusal to certify gay couples violated the city’s anti-discrimination policy. *Id.* at 535.

The Supreme Court disagreed. It noted that a regulation is not generally applicable, and is therefore subject to strict scrutiny, “where the State has in place a system of individual exemptions” that apply for secular reasons but not religious reasons. *Id.* at 534 (quoting *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990)). The city’s anti-discrimination policy was not “generally applicable” because it allowed the city “to grant exemptions” from the policy for secular reasons, but not for cases of “religious hardship.” *Id.*

The same conclusion applies here. 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 foster

family to sacrifice a significant amount of time or spend a significant amount of money. Defs.’ Opp’n to Mot. for Prelim. Injunc. 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 the exercise of their religion. Accordingly, under *Fulton*, Defendants cannot satisfy their burden of showing Melinda’s and Casey’s free exercise rights were not clearly established. *Burke v. Walsh*, 3:23-cv-11798, Order Denying Motion to Dismiss (ECF 85), at \*13–17 (D. Mass. June 5, 2024) (holding qualified immunity unavailable in challenge to similar foster-care regime); *see also Blaise v. Hunter*, 493 F. Supp. 3d 984 (E.D. Wash. 2020) (holding similar foster-care regime violated Free Exercise Clause even before *Fulton*).

**B. Melinda’s and Casey’s free speech rights were clearly established.**

Melinda’s and Casey’s free-speech rights were also clearly established.

**Compelled Speech.** The prohibition against compelled speech is well established. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding government may not compel speech under the guise of preventing discrimination); *Boy Scouts of Am. v. Dale*, 530 U. S. 640, 660–661 (2000) (same); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bost., Inc.*, 515 U.S. 557 (1995) (same); *Emilee Carpenter, LLC v. James*, 107 F.4th 92 (2d Cir. 2024) (same); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020) (same). Indeed, the Supreme Court recently rejected the same type of up-front and abstract commitment required by the Policy. In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 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 same is true here. The Policy 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. In other words, the Department seeks to force all foster families to “utter what is not in [their] mind” about a question of political and religious significance before they are allowed to participate in the program. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). And if at any point a foster parent deviates from this commitment, their license is revoked. This falls squarely within the Supreme Court’s compelled-speech cases.

**Viewpoint Discrimination.** The prohibition against viewpoint discrimination is well established. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.”); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 31 (2d Cir. 2018) (similar). And it is settled that the government may not make a license contingent on viewpoint compliance. *Wandering Dago*, 879 F.3d at 31 (holding government “engage[d] in viewpoint discrimination when [it] denied [food truck application] solely because the [plaintiff’s] truck [was] branded with ethnic slurs”).

Yet that is exactly what the Policy does here. For many of the same reasons the Policy impermissibly compels speech, it also discriminates based on viewpoint. Defendants do not want foster families to participate in the program if they do not support the Department's position on "gender-affirming care." When Defendants find out a foster family does not support those views, it will revoke their license even though the foster family is unlikely ever to be in a position to facilitate such forms of care. These actions violate clearly established constitutional rights.

**Retaliation.** Finally, the prohibition against retaliation based on speech is well established. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (noting that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for their speech); *Friend v. Gasparino*, 61 F.4th 77, 91–93 (2d Cir. 2023) (similar). As discussed, Defendants applied the Policy against Melinda and Casey because it did not approve of their views on "gender affirming care." These actions violated Melinda's and Casey's clearly established First Amendment rights.

**C. Melinda's and Casey's equal protection rights were clearly established.**

Melinda and Casey's rights under the Equal Protection Clause are also clearly established. The Equal Protection clause prohibits the government from discriminating against an individual through "classifications affecting fundamental rights." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). This includes discriminating against an individual for exercising their rights under the First Amendment. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding government may not discriminate among those exercising fundamental rights under the First Amendment). Because Defendants revoked Melinda's and Casey's license in response to their exercise of their speech and free-exercise rights, Defendants have impermissibly discriminated against them in violation of the Equal Protection Clause. Such discrimination was clearly prohibited at the time of the revocation.



**D. It is clearly established that the Policy violates strict scrutiny.**

The Policy also fails strict scrutiny under clearly established caselaw. Defendants' purported interests cannot be defined at a high level of generality and must instead be focused toward achieving a specific interest. Here, that interest must justify denying Melinda and Casey a narrow exemption from the Policy so they can exercise their free speech and free exercise rights. *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).

Given the low likelihood that Melinda and Casey will ever be in a position where they must facilitate a foster child's "gender-affirming care," Defendants cannot show that it was not clearly established that denying them an exemption would undermine the purported interested at stake. This is especially true in light of the *Cass Review*, which significantly undermines any argument that the state has a compelling interest in facilitating a foster child's "gender-affirming care" at all, including social transitioning. But even if it did, Defendants still cannot show it was not clearly established that denying Melinda and Casey an exemption was necessary to achieve this objective given that the Department routinely finds new placements for foster children when the existing placement simply isn't working. Indeed, as Melinda and Casey explain in their Reply in Support of their Motion for Preliminary Injunction, the Department had no problem allowing them to find an alternative placement with the child they briefly fostered in February of this year. *See* Pls.' Reply Supp. Mot. Prelim. Injunc. at 17. On these facts, Defendant cannot show it was not clearly established that the Policy fails strict scrutiny. *See, e.g., Blaise*, 493 F. Supp. 3d at 998–99; *Burke*, 3:23-cv-11798, Order Denying Motion to Dismiss (ECF 85), at \*13–17.

**V. MELINDA AND CASEY DO NOT ASSERT DAMAGES CLAIMS AGAINST OFFICIAL CAPACITY DEFENDANTS**

Finally, Defendants assert the Court should dismiss Melinda’s and Casey’s “claims for damages against official-capacity defendants.” Mot. to Dismiss at 8. But Melinda and Casey do not assert any such claims. Instead, they assert claims for nominal damages against Defendants in their personal capacities only. For the reasons set forth above, those claims are not subject to dismissal.

**CONCLUSION**

For the forgoing reasons, the Court should deny Defendants’ Motion to Dismiss in full.

Respectfully submitted,

Dated: September 25, 2024.

by:

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# EXHIBIT A

**KAPLAN AND KAPLAN**

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September 16, 2024

VIA EMAIL - (AHS.COHSBContact@vermont.gov; Marie.Codling@vermont.gov)

Marie Codling  
Legal Hearing Support Specialist  
Human Services Board  
6 Baldwin Street, Suite 305  
Montpelier, VT 05633-4302**Re: Withdrawal of Appeal #B-07/24-661**

Dear Ms. Codling:

This firm represents Vermont residents Melinda Antonucci and Casey Mathieu. On July 31, 2024, Ms. Antonucci and Mr. Mathieu filed a notice of appeal and request for fair hearing before the Vermont Human Services Board regarding the unlawful revocation of their foster care license by the Vermont Department for Children and Families.

Ms. Antonucci and Mr. Mathieu submit this notice of voluntary withdrawal of that appeal so they may more effectively pursue their legal remedies in federal court. See Antonucci, et al., v. Winters, et al., No. 2:24-cv-00783-wks (D. Vt.). Ms. Antonucci and Mr. Mathieu respectfully request the Board terminate all pending deadlines and close out this proceeding.

If you would, please confirm receipt of this correspondence and that the appeal has been withdrawn by responding to me at rkaplan@kaplanlawvt.com. If I need to do anything else to accomplish the withdrawal, please let me know what that is.

Thank you.

Very truly yours,

KAPLAN AND KAPLAN



Robert J. Kaplan

RJK/hm

cc: Timothy Connors, Esquire  
Joshua Dixon, Esquire  
Eric Sell, Esquire

Wednesday, September 25, 2024 at 14:04:37 Eastern Daylight Time

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**Subject:** RE: Withdrawal of Appeal  
**Date:** Monday, September 16, 2024 at 11:28:48 AM Eastern Daylight Time  
**From:** AHS - CO HSB Contact  
**To:** Mulhair, Hanna, AHS - CO HSB Contact, Codling, Marie  
**CC:** Connors, Timothy, Eric Sell (Liberty Center), Josh Dixon (Liberty Center), Robert Kaplan  
**Attachments:** image001.jpg

This matter has been removed from the scheduling docket, Friday, September 20, 2024 at 9:00 a.m.  
This matter is closed and withdrawn per your below email request.

Carolyn C. Desch  
*Administrative Services Technician II*  
*Human Services Board*  
6 Baldwin Street, Suite 305  
Montpelier, VT 05633-4302  
(802) 828-2536  
(802) 828-3068 (Fax)

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**From:** Mulhair, Hanna <[hmulhair@kaplanlawvt.com](mailto:hmulhair@kaplanlawvt.com)>  
**Sent:** Monday, September 16, 2024 9:49 AM  
**To:** AHS - CO HSB Contact <[AHS.COHSBContact@vermont.gov](mailto:AHS.COHSBContact@vermont.gov)>; Codling, Marie <[Marie.Codling@vermont.gov](mailto:Marie.Codling@vermont.gov)>  
**Cc:** Connors, Timothy <[Timothy.Connors@vermont.gov](mailto:Timothy.Connors@vermont.gov)>; [esell@libertycenter.org](mailto:esell@libertycenter.org); [jdixon@libertycenter.org](mailto:jdixon@libertycenter.org); Robert Kaplan <[rkaplan@kaplanlawvt.com](mailto:rkaplan@kaplanlawvt.com)>  
**Subject:** Withdrawal of Appeal

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Please see attached.

**KAPLAN AND KAPLAN**  

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