

25-514

UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

MELINDA ANTONUCCI, CASEY MATHIEU,
Plaintiffs-Appellants,

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, PAULA CATHERINE, in her personal and official capacity as a
Licensing Officer, Residential Licensing & Special Investigations, Vermont
Department for Children and Families,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Vermont

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellees (the “Department”) fail to rebut Appellants’ arguments that the Guidelines violate the First Amendment by burdening religious exercise and compelling speech. On the free exercise claim, the Department’s contention that the Guidelines are generally applicable and facially neutral fails under precedent and real-world application. The Guidelines target religious families, were enforced against Appellants only after their religious objections, and operate through discretionary judgments and exceptions, all of which demonstrate they are neither generally applicable nor neutral. The Guidelines’ operation—who gets denied, when, and why—reveals that they target religious viewpoints and allow selective enforcement via broad terms and individualized exceptions.

On the speech claim, the Department’s attempt to frame the Guidelines as a regulation of conduct fails because they compel speech and regulate expressive conduct. The Guidelines require foster parents to “affirm,” “support,” and “voice” the State’s stance on gender identity, dictating specific words and viewpoints while punishing dissent. The record confirms the Department revoked Appellants’ license for failing to “shift” their “affirming attitudes,” a clear First Amendment violation.

Strict scrutiny applies to both claims, and the Department cannot meet it or any level of heightened scrutiny. The Department’s assertion of a broad interest in children’s well-being does not set forth a concrete need to deny Appellants an

exemption from the Guidelines, especially given the foster home shortage and viable alternatives like self-selection or re-placement. Moreover, the Department allows self-selection and re-placement for other reasons, so denying these alternatives for religious objectors cannot be narrowly tailored or the least restrictive means.

The remaining preliminary injunction factors also favor Appellants. The constitutional violations here are causing Appellants irreparable harm, and the equities and public interest counsel against enforcing a policy that reduces the number of foster homes in a time of crisis without proven benefits. This Court should reverse and remand the denial of preliminary injunctive relief to allow Appellants to foster children during the pendency of this litigation.

ARGUMENT

I. THE DEPARTMENT’S LABELS CANNOT CURE A VAGUE POLICY THAT INVITES EXEMPTIONS AND BURDENS RELIGIOUS PRACTICE.

General applicability and neutrality turn on how a policy operates in the real world—not on the government’s labels or assurances. Here, the Guidelines are shot through with discretionary judgments and formal or de facto exceptions, which defeats general applicability. And by their very nature, the Guidelines disfavor religious objections and were enforced only after Appellants voiced one, both of which are hallmarks of non-neutrality. Given these facts, the Guidelines are neither generally applicable nor neutral.

A. The Guidelines are not Generally Applicable.

The Guidelines’ discretionary enforcement mechanisms, selective exemptions for secular preferences, and disproportionate burden on religiously motivated conduct render them not generally applicable. The Department’s counterarguments are not persuasive.

1. As an initial matter, the Department asserts that, because it revoked Appellants’ license under Rule 200, the Court need only consider whether that Rule—and no other—is generally applicable. Appellees’ Br. (“Department Br.”) at 49. This argument is wrong for several reasons.

First, the Department’s argument ignores that (1) Rule 200 is an anti-discrimination Rule and (2) “Appellants do not assert the right to discriminate against transgender-identifying children” in violation of that Rule. Appellants’ Br. (“Antonucci Br.”) at 28. Instead, Appellants are unable to provide certain specific forms of healthcare treatment to foster children in their care that is contrary to their religious beliefs, as the Guidelines demand. *Id.* at 28–29. These demands, as well as the Department’s assessments, conversations, and decision-making process in deciding Appellants’ certification, are set forth throughout the Guidelines, not just Rule 200. Therefore, the Guidelines as a whole, not just Rule 200, burden Appellants’ religious exercise.

Second, the Department’s own evidence contradicts its argument that Rule 200 is the only Rule at issue. As RLSI Director Stacey Edmunds stated, the Department has denied license applications over “concerns surrounding meeting licensing requirements for caring for LGBTQ foster children” because the applicants in question “could not meet *the Licensing Rules*, including Licensing Rules 200, 201, 301, and 325.”¹ JA300 (emphasis added). Thus, the Department’s claim that Rule 200 is the only Rule violated by foster parents who object to the Guidelines’ requirements regarding transitioning transgender-identifying children is belied by its own prior statement that such objections “[do] not meet *the Licensing Rules*” as a whole. *Id.*

Third, the record contains numerous examples of how the Department expects foster parents to comply with Rule 200 in the context of transgender-identifying foster children by reference to other Rules and provisions of the Guidelines. Foster parents must, for example, be “affirming” and “support[ive]” of a transgender-identifying foster child, JA200, and have the sort of “beliefs and attitude about the child’s sexual or gender identity” that the Department deems are not “danger[ous],” JA179. Because these other provisions of the Guidelines inform the way in which

¹ Ms. Edmunds makes clear elsewhere in her declaration that she uses the term “Licensing Rules” as synonymous with Appellants’ use of the term “the Guidelines.” *See* JA295–297.

the Department interprets Rule 200’s anti-discrimination provision, the Court must consider the Guidelines as a whole in evaluating the meaning of that Rule.

Bates v. Pakseresht is instructive. No. 23-4169, --- F.4th ---, 2025 WL 2079875 (9th Cir. July 24, 2025). There, the Ninth Circuit struck down an Oregon policy under which individuals could not be certified to adopt foster children unless they agreed to affirm children’s gender identity and facilitate their “gender-affirming” medical treatment, concluding, among other things, that the policy was not generally applicable. *Id.* at *2.

Here, as in *Bates*, there is no “formal set of criteria by which [the Department] assesses whether parents will comply with [Rule 200].” *Id.* at *19. “What counts as enough support, acceptance, and respect for sexual orientation and gender identity is therefore not definitively spelled out in [that Rule].” *Id.* This unfettered discretion is what allowed the Department to deny Appellants’ license application, “even though [Appellants] represented that [they] would love and accept any child for who they are, regardless of their sexual or gender identity.” *Id.* (cleaned up). Because the Guidelines surrounding Rule 200 give context to “[the Department’s] conception of supporting, accepting, and respecting sexual orientation and gender identity,” they grant “ample discretion” to the Department, thereby rendering Rule 200—and the Guidelines writ large—not generally applicable. *Id.*

In short, the Guidelines as a whole demand the very sort of “case-by-case analysis [that] is antithetical to a generally applicable policy.” *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 688 (9th Cir. 2023).

In addition to the inherent discretion Rule 200 gives the Department, Rule 35 creates yet another layer of discretion through its exemption process. Antonucci Br. at 29. Rule 35 authorizes the Department to grant a variance to foster parents from almost every Rule, including but not limited to the Rules governing the provision of healthcare treatment to foster children. *Id.* (citing Rule 301, JA199, and Rule 329, JA202). Because Appellants do not seek to discriminate against transgender-identifying children in violation of Rule 200—but, instead, seek only not to be forced to facilitate the social and medical transition of children in contravention of their religious beliefs—the Department had the power to apply Rule 35’s variance to Rules 301 and 329 with respect to Appellants’ license. It chose not to. This authority “to decide which reasons for not complying with the policy are worthy of solicitude” on an ad hoc basis renders the policy not “generally applicable.” *Fulton v. City of Phila.*, 593 U.S. 522, 537 (2021).

2. Moreover, Rule 200 itself is not generally applicable because of the exemption built into that Rule via Rule 200.1.

As Appellants pointed out, Antonucci Br. at 31–34, even putting aside the fact that the Guidelines state that foster families may decline children based on “age, gender, and special needs” for any reason, Rule 200.1 contains an exemption from Rule 200 for age, gender, and special needs where the foster family has an “inability to care” for such children based on time or monetary constraints. Thus, Rule 200.1 exempts from Rule 200 conduct with a secular basis—*i.e.*, an “inability to care” for certain children based on time or monetary constraints—while not exempting similar conduct with a religious basis—*i.e.*, an “inability to care” for these children in the way the Department requires for religious reasons.

The Department claims that Rule 200.1 cannot be “characteriz[ed]” as an “exemption” to Rule 200 because it merely allows foster parents to refuse placement when they have a “genuine inability” to handle any “practical realities” with such a placement. Department Br. at 42. The Department also claims that it does not “inquire into prospective foster parents’ beliefs or motivations” once Rule 200.1 has been invoked. *Id.*

But the Department cannot have it both ways. It cannot be that foster parents can only invoke Rule 200.1 where their inability to take a child is “genuine” or based on a “practical” consideration and *simultaneously* that the Department does not inquire into the foster parents’ motivation behind asking for an exemption. Regardless, neither of the Department’s interpretations demonstrate general

applicability. Even if foster parents can determine the “genuineness” of their own inability to care for foster children, Rule 200.1 only allows an exemption for those “practical realities” approved by the Department, which excludes religiously motivated ones. Alternatively, if the Department evaluates what reasons are “genuine,” then it retains unfettered discretion without objective standards.

Either way, Rule 200.1 allows the Department to grant exemptions from Rule 200 based on secular, but not religious, reasons. And granting exemptions for secular reasons—like a placement that might require a prospective foster family to take a child to regular doctor’s appointments or to put up an interior wall in their home to create another bedroom—but not for religious reasons renders Rule 200 not generally applicable. The Department is, of course, free to create an exemption mechanism for these and other secular considerations, but to avoid strict scrutiny, it must treat religious considerations in the same way.

The Department argues that Rule 200.1 “simply makes clear that a genuine inability to care for specific children is not discrimination by the foster parents.” Department Br. at 42. But whether labelled as an “exemption,” “exception,” or something else, Appellants seek only the same treatment that Rule 200.1 provides for secular considerations. That is, not a license to discriminate, but a determination that a foster family’s “genuine inability to care for specific children” on the terms required by the Department for religious reasons “is not discrimination by the foster

parents.” *Id.* The Department’s word games do not address this real-world difference in treatment between a secular and religious “inability to care” for certain children.

Contrary to the Department’s assertion, Rule 200.1 is not akin to the medical exemptions to vaccination requirements that the Court found to be generally applicable in *We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2682 (2024). This Court did not, as the Department claims, conclude that the vaccine requirements were generally applicable “despite” exemptions. Department Br. at 43. Instead, as this Court explained, the available exemptions “d[id] not give government officials discretion to decide whether a particular individual’s reasons for requesting exemption are meritorious” because, as phrased, they were “mandatory and framed in objective terms.” *We The Patriots*, 76 F.4th at 150 (citation omitted). Here, by contrast, Rule 200.1 is not phrased in mandatory or objective terms. Instead, it gives the Department discretion to determine whether a foster parent has the “genuine inability” to care for a specific child.

In sum, the Guidelines are not generally applicable because they vest the Department with sweeping discretion under both Rule 200 and the Guidelines as a whole, impose secular exemptions while withholding religious ones, and burden religious conduct in ways not applied to comparable secular conduct. This framework is the antithesis of general applicability under the Free Exercise Clause.

B. The Guidelines are not Neutral.

As Appellants explained in their principal brief, to satisfy neutrality, the Free Exercise Clause requires a law to be more than just neutral on its face. Antonucci Br. at 34–35. Indeed, “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *M.A. on behalf of H.R. v. Rockland Cnty. Dep’t of Health*, 53 F.4th 29, 37 (2d Cir. 2022) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“*Lukumi*”). Thus, the neutrality requirement protects against even “subtle departures from neutrality” and laws that amount to the “covert suppression of . . . religious beliefs.” *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Lukumi*, 508 U.S. at 534, 546).

Rather than argue the Guidelines do not subtly depart from neutrality or covertly suppress religious beliefs, the Department argues only that the Guidelines are facially neutral and that this Court should look no further than their express representations and “some” of the historical background to make that assessment. Department Br. at 34–38. These arguments are unavailing.

In assessing whether a policy is neutral towards religion, courts must consider “the totality of the circumstances surrounding its application, including ‘the effect of [the] law in its real operation,’ which ‘is strong evidence of its object.’” *Bates* 2025 WL 2079875, at *14 (quoting *Lukumi*, 508 U.S. at 535, 540). In *Bates*, the

Ninth Circuit did exactly that and, although noting that the policy at issue was neutral on its face, concluded the policy was not neutral for purposes of the Free Exercise Clause. *Id.* at *15. The court explained that, because the policy “specifically references religion as an oppositional viewpoint to the state’s understanding of what it means to respect, accept, and support sexual orientation and gender identity[,]” the policy was not neutral. *Id.* Moreover, the court did not “limit[] [its evaluation] to the statements about religion in the [policy] materials” in concluding neutrality was lacking. *Id.* at *16. Instead, the court examined the totality of the circumstances, including that: (1) the state had only denied the plaintiff’s request for certification after she voiced a religious objection to the policy; (2) the state had not identified “any prospective foster parent who it turned away following a secular objection to [the policy]”; and (3) the policy stood “in opposition to more traditional understanding of sexuality and gender[,] . . . [which] are often held by persons with religious viewpoints,” even though there could be “non-religious objections” to the policy. *Id.* at *16–17; *see also Blais v. Hunter*, 493 F. Supp. 3d 984, 998 (E.D. Wash. 2020) (concluding similar Washington policy was not neutral under the Free Exercise Clause in part because the policy “disproportionately exclude[d] persons who observe certain religious faiths from qualifying as foster parents”).

The Department’s myopic focus on facial neutrality ignores the totality of the circumstances. Contrary to the Department’s contention, a policy is not neutral

simply because religious views are not the *only* reason behind the policy’s creation, Department Br. at 36, or because there are hypothetical secular reasons to oppose the policy, *id.* at 37–38. Such a conclusion would impermissibly ignore that: (1) the Guidelines target religion in practice, Antonucci Br. at 36–37; (2) the Guidelines were motivated, at least in part, because of hostility towards religion, *id.* at 36–37; (3) the Department revoked Appellants’ license only after Appellants voiced a religious-based objection to the Guidelines, JA275–276; and (4) the Department has not identified any licensure revocation that occurred due to prospective foster parents vocalizing secular-based objections to the Guidelines. As set forth in *Bates* and *Blais*, these facts demonstrate that the Guidelines are not neutral. *Bates*, 2025 WL 2079875, at *16; *Blais*, 493 F. Supp. 3d at 996–97.

What is more, the Department’s argument fails even on its own terms. The Department makes much of the fact that the materials it relied on in creating the Guidelines use religion as just one of “*four* ‘themes’ among foster parents’ negative attitudes towards LGBTQ youth.” Department Br. at 36 (emphasis in original). But hostility toward religion need not be the *only* articulated basis for creating a policy for it to lack neutrality. *See, e.g., Bates*, 2025 WL 2079875, at *15 (holding that “specific[] references [to] religion as an oppositional viewpoint” among *other* possible bases for opposition was indicative of a non-neutral policy). The Department’s concession that the Guidelines were based in part on hostility to

“religious views” establishes that the Guidelines reflect at least a subtle departure from neutrality. Department Br. at 36. And it is not just the studies the Department relied upon to create the Guidelines, but the Guidelines *themselves* that invoke religious-based opposition as one type of barrier to the “affirmance” the Department demands. *See* Antonucci Br. at 36 (citing JA178, 185).

Moreover, as *Bates* and *Blais* confirm, the fact that there are possible “secular reasons to oppose [the Guidelines]” does not establish neutrality. Department Br. at 38. Indeed, Vermont has already tried a similar argument that failed in *A.H. by & through Hester v. French*, 985 F.3d 165 (2d Cir. 2021). There, Vermont had a program that required students to demonstrate their high school was publicly funded for them to be eligible to enroll in postsecondary school courses. *Id.* at 170. A student sued after Vermont denied her application into the program on the basis that her high school was “a religious school.” *Id.* at 173. Vermont argued, as the Department argues here, that the law was religion-neutral because “*some* religious school students have obtained public funding.” *Id.* at 182 (emphasis in original). This Court rejected that argument, explaining that “by design” the burden of the program’s requirements fell “on religious school students and almost no others.” *Id.* (citing *Lukumi*, 508 U.S. at 536).

The same is true here. The primary objectors to the Guidelines’ requirement that foster parents must “affirm” transgender-identifying children through social and

medical transitioning will be those with religious viewpoints. *See Antonucci Br.* at 37. As the court in *Bates* correctly observed, the “traditional understandings of . . . gender”—*i.e.*, that children should not undergo a gender transition—“are often held by persons with religious viewpoints.” *Bates*, 2025 WL 2079875, at *17. Thus, the Guidelines are not neutral. *See id.*

II. DRESSING UP COMPELLED SPEECH AND VIEWPOINT DISCRIMINATION AS “CONDUCT REGULATION” DOES NOT SATISFY THE FIRST AMENDMENT.

As Appellants demonstrated, the Guidelines discriminate against them based on their viewpoint and compel them to speak. *Antonucci Br.* at 45–47. The Department sidesteps these arguments completely, choosing instead to insist that it is doing no more than regulating conduct and that any impact on speech is incidental. *Department Br.* at 44–51. But this attempt to characterize Appellants’ speech as conduct is sophistry, dressing up viewpoint discrimination and compelled speech in the guise of neutral regulation.

The Department attempts to bat down Appellants’ arguments by invoking its responsibility to “assure the care and safety of children” in foster care. *Department Br.* at 46–47. Appellants do not minimize that responsibility but having it does not mean the Guidelines primarily regulate conduct. As the Ninth Circuit stated in *Bates*, the responsibility to look out for “the ‘best interest of the child’ . . . does not cloak the state with limitless authority to deny . . . certifications” to qualified foster families. 2025 WL 2079875, at *12. In *Bates*, Oregon argued that its policy was

primarily a regulation of conduct, as the Department does here. *Id.* at *11. But the Ninth Circuit concluded that the policy could not “be so characterized.” *Id.* Because “an overarching thesis of Oregon’s policy is that what a parent says to a child about sexual orientation and gender identity . . . is central to respecting, accepting, and supporting adoptive children,” the court concluded that “it is the regulation of speech that predominates.” *Id.*

So too here. How foster parents can and cannot speak permeates throughout the Guidelines. When fostering a transgender-identifying child, the Guidelines require foster parents to, among other things:

- “support[] [the child] in wearing gender affirming hairstyles, clothing, and accessories,” JA178;
- “[v]oic[e] [their] commitment to inclusion,” JA254;
- “[s]tay[] away from binary language,” *id.*;
- “[c]halleng[e] traditional notions of gender,” *id.*;
- “use the correct name, pronouns, and affirming remarks[, and s]et boundaries with family members and friends who can or will not,” JA256;
- “express acceptance and gratitude . . . when a child comes out [as LGBTQ+],” JA260;
- “express support and affection when children tell them about their identity,” JA184;
- “support children’s identities even if it feels uncomfortable,” *id.*;
- “support young people’s gender expression,” *id.*; and

- “encourage[e] and assist[] youth in identifying positive and permanent relationships with LGBTQ affirming caring adults.” JA185.

In addition, even when revoking Appellants’ license, the Department made clear it would only consider re-licensing them in the future if they gave the Department “assurance of [their] shift in affirming attitudes.” JA266.

This is plainly the regulation of speech. Speech is necessary to “support,” “encourage,” “express acceptance,” “voice commitment,” “use pronouns” and “affirm,” all of which is required for a foster parent to comply with the Guidelines. Thus, the Guidelines “restrict[] certain speech by [foster] parents on the topic of sexual orientation and gender identity, while requiring speech that aligns with the state’s perspective on these intensely debated issues in our society.” *Bates*, 2025 WL 2079875, at *9. Foster parents must espouse speech the Department deems “positive” towards transgender-identifying foster children and refrain from speech the Department deems “negative.” *See id.*

Thus, the Department’s claim that the Guidelines are not “intended to remove a particular set of beliefs from the marketplace of ideas” is demonstrably false. Department Br. at 49. In the “marketplace” at issue here—where foster parents interact and speak to their foster children—certain “ideas” are purposefully being removed. Foster parents who believe, for example, that a child’s gender identity should not be changed, that it is harmful to “affirm” (through pronoun usage or

otherwise) a child’s misconception that they can change their sex, or that puberty blockers, hormone therapy and surgical intervention will cause irreversible emotional and physical damage to a child’s body and mental health are not allowed to espouse those beliefs under the Guidelines. Only those that share the same beliefs as the Department regarding what qualifies as “support” to a transgender-identifying child can survive the approval and placement process.

Contrary to the Department’s assertion, Department Br. at 45–46, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“*FAIR*”) is inapposite. In *FAIR*, a group of law schools brought a First Amendment challenge against a federal law that required them to allow the military to access their campuses for recruiting purposes as a condition of receiving federal funding. 547 U.S. 47, 51–52 (2006). The Supreme Court distinguished the law as a “far cry” from other compelled speech cases because it “d[id] not dictate the content of the [schools’] speech at all.” *Id.* at 62. In fact, the “schools remain[ed] free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy.” *Id.* at 60. Moreover, the only statements the law arguably compelled were “statements of fact”—such as telling students where on campus the recruiters could be found—and not “statements of opinion.” *Id.* at 62. Likening the law to those that prohibit discrimination in employment, which necessarily prevent speech like “White Applicants Only” signs, the Court reasoned the law regulated primarily conduct—

i.e., accommodating all recruiters—not forced speech. *Id.*

The law in *FAIR* is not comparable to the Guidelines, which require foster parents to “voice,” “express,” and “support” a child’s gender identity in the specific way the Department delineates. Unlike the law in *FAIR* and employment discrimination laws, the Guidelines do not leave foster parents free “to express whatever views they may have” or limit the speech they demand foster parents espouse to only “statement[s] of fact.” 547 U.S. at 60, 62. After all, Appellants *did* express their views on gender identity and what their support of a transgender-identifying child would look like and their license was revoked. Thus, because of the specific speech the Guidelines affirmatively require, they “force” Appellants “to utter what is not in [their] mind about a question of political and religious significance.” 303 *Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) (quotation omitted).

The Department does not make a serious attempt to argue that, if the Guidelines regulate speech, they do so based on content and viewpoint. They dedicate only two sentences to attempting to dispute the charge of viewpoint discrimination, which consist of summarily declaring the Guidelines “do not . . . require [Appellants] to promote a viewpoint in favor of ‘gender affirming care.’” Department Br. at 47. As explained above, this is wrong given that the Guidelines prefer one viewpoint regarding gender identity and sexual orientation over all others.

The Guidelines’ requirement that Appellants facilitate the medical transition of a hypothetical transgender-identifying child is no different. For one thing, this requirement is merely one facet of the Guidelines’ broader requirement that foster parents must “respect, accept, and support a child’s . . . gender identity,” which indisputably compels speech. *Bates*, 2025 WL 2079875, at *10 n. 2 (holding that Oregon policy that required adoptive parents to facilitate medical transitioning compelled speech). Because Appellants’ objection to facilitating a hypothetical transgender-identifying child was merely one example of their failure to support a child’s gender identity on the terms demanded by the Department, it falls within the ambit of the Guidelines’ regulation of speech. *Id.*

Moreover, even considered in isolation, facilitating the medical transition of a transgender-identifying child itself is expressive. Conduct is expressive when it “is intended to be communicative” and “in context, would reasonably be understood by the [listener] to be communicative.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). As the parties agree, the Guidelines force foster parents to engage in conduct showing their “support” and desire to “facilitate medical treatment with which they disagree.” Department Br. at 47. In other words, the Guidelines force foster parents to engage in conduct that communicates a message that they agree with the medical transitioning of children.

Loper v. New York City Police Department is similar. There, this Court held that panhandling constitutes expressive conduct protected by the First Amendment because it conveys a message of personal need and desperation, often intertwined with speech. 999 F.2d 699, 704 (2d Cir. 1993). Likewise, a law compelling foster parents to facilitate gender-affirming medical treatment for foster children regulates expressive conduct by compelling them to convey a message of affirmation and support for gender transition. Just as panhandling implicates communicative activity beyond mere conduct—such as signaling indigency—facilitating treatments like hormone therapy or “gender affirming” surgeries involves expressive elements, including verbal assurances, logistical support, and implicit endorsement that communicates agreement with the notion that “gender-affirming” care is appropriate. This compulsion is akin to the prohibited silencing of panhandlers’ messages in *Loper*—it suppresses the foster parents’ own expressive views on gender identity.

In short, the Department cannot escape the First Amendment consequences of its Guidelines by relabeling compelled speech as mere conduct regulation. The text and operation of the Guidelines leave no doubt that they elevate one contested viewpoint while silencing others, imposing a speech code on foster parents under the pretense of neutrality. This Court should not permit the state to do indirectly—

through licensing requirements—what it could never do directly: compel orthodoxy in matters of deeply held belief.

III. THE DEPARTMENT CANNOT MEET ITS BURDEN OF SATISFYING STRICT SCRUTINY USING GENERALIZED INTERESTS AND A REFUSAL TO ENGAGE IN WORKABLE ALTERNATIVES.

Because the Department fails to prove a compelling interest and show that the Guidelines are narrowly tailored and the least restrictive means to achieve that interest, it does not satisfy strict scrutiny.

A. The Department fails to demonstrate a compelling interest

In seeking to demonstrate a compelling interest, the Department makes sweeping invocations of foster children’s safety, health, and dignity.² But this “high level of generality” does not suffice to meet strict scrutiny; instead, “courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants.” *Fulton*, 593 U.S. at 541 (internal citation omitted). Thus, the Department is required to show that it had an interest in “denying an exception *to* [*Appellants*].” *Id.* (emphasis added).

The Department has not made that showing. In fact, the Department presents its interest so broadly that it is not even limited to transgender-identifying youth

² The Department relies on many documents that are not in the record on appeal in arguing that it has an interest in the well-being of LGBTQ+ children. *See, e.g.*, Department Br. at vi-vii (“Other Authorities”), 8, 11-12, 16, 20-25, 35, 47, This Court should “decline to consider [these] extra-record assertions and documents.” *Rana v. Islam*, 887 F.3d 118, 122 (2d Cir. 2018).

despite the fact the Department’s basis for denying Appellants’ license was their failure to “affirm” this specific group of children. Instead, the Department lumps all LGBTQ+ children into one putatively homogeneous group and then professes that the level of support and affirmance they need is all the same. Department Br. at 52–53. But that’s plainly wrong. “Affirming” children who identify as lesbian, gay or bisexual, for example, is far different from “affirming” children who believe their gender does not match their sex and who require significant social and medical interventions for that belief to be “affirmed.”

The Department must specifically “identify the [harm] it seeks to remedy.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 504 (1989) (holding that “generalized assertion” of industry-wide discrimination was not a compelling interest to justify prohibition on discrimination in local industry). But the Department instead relies only on “studies . . . demonstrating that *LGBTQ* children and young people . . . experience worse outcomes due to the lack of . . . support.” Department Br. at 53 (emphasis added). The Department’s reliance on a generalized interest in “LGBTQ+ children” without specifying the type of support transgender-identifying children allegedly need does not suffice. *See Croson*, 488 U.S. at 504; *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 216 (2023) (rejecting asserted compelling interest that relied on

“categories” of students that were “imprecise in many ways” and either “plainly overbroad” or “underinclusive”).

Moreover, as the Ninth Circuit recognized in *Bates*, the “evident need for adoptive parents in [Vermont] and [Appellants’] unchallenged commitment to love and never denigrate a child” undermines the Department’s claims that its interest is compelling. *Bates*, 2025 WL 2079875, at *20. Vermont is in a foster placement crisis. JA19. Most children in the state’s custody wait weeks for a home to become available, and some never find a home at all before leaving the state’s custody. *Id.* Indeed, the Department has been forced to house children in hotels, hospitals, police stations, and other unlicensed, unsafe environments. JA138. These makeshift placements are not only harmful to children but directly undermine the Department’s interest in ensuring safe, nurturing homes.

Tellingly, the Department does not respond to this argument in its brief, nor does it explain why, despite the crisis it is facing, it bars otherwise qualified, loving families based solely on their religious beliefs about sex and gender. The Department also cites no study showing that placing children with religious families causes harm. Instead, the Department’s studies either rely on low-quality data, conflate religious belief with rejection of a child, or ignore the difference between disagreement and non-acceptance. Indeed, “other jurisdictions have demonstrated an ability to balance parents’ First Amendment rights and the interests of children, without having to

exclude altogether parents like [Appellants].” *Bates*, 2025 WL 2079875, at *22. The Department could too—but chooses not to.³

A policy that undermines the State’s true interests fails any level of heightened scrutiny. *See Alexander v. Cahill*, 598 F.3d 79, 91-92 (2d Cir. 2010) (intermediate scrutiny requires policy to “materially advance” state’s interests). Here, there is no justification for sidelining families who would provide loving homes just because they hold different views. Despite this fact, the Department “apparently prefers to risk leaving children without foster parents than to allow” them in families like Appellants’. *Fulton*, 593 U.S. at 550 (Alito, J., concurring). Doing so imposes real harm on vulnerable children who desperately need care, while failing to advance any proven interest. The Department has not demonstrated a compelling interest.

B. The Department fails to show the Guidelines are narrowly tailored or the least restrictive means

The Department also fails to explain how categorically excluding Appellants is “actually necessary” to promote children’s welfare. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011).

³ Many states have laws that protect foster parents from discrimination or exclusion because of their religious beliefs about sex and gender. Ariz. Rev. Stat. § 8-921; Idaho Code § 16-1648; H.B. 2311, 2025-2026 Reg. Sess. (Kan. 2025); Miss. Code Ann. § 11-62-3, -5(3); Tenn. Code Ann. § 37-6-102; Ga. Code Ann. § 49-5-281(a)(3). Even the Biden administration recognized that a family’s “particular views about sex and gender,” or “respectful efforts to communicate with LGBTQ+ children about their status or identities,” were not disqualifying or suggestive that a family was “unsafe.” *Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children*, 89 Fed. Reg. 34,818 (April 30, 2024) (codified at 45 C.F.R. § 1355); *Id.* at 34,826-27, 34,840.

Instead, the Department makes two equally meritless arguments. First, the Department claims Appellants “mischaracterize[]” the Guidelines by asserting that foster parents can decline all children of a particular age or with special needs. Department Br. at 55–56. Yet that is what the Guidelines say. *See, e.g.*, JA150 (“How soon you may be asked to take a child into your home depends on how flexible you are in terms of the age, gender, and special needs of the children you will accept”). In any event, the Guidelines indisputably accommodate foster parents who can only care for children of specific ages, genders, or special needs based on “practical limitations.” JA310-11; *see also* JA150. This flexibility undermines the Department’s assertion that accommodating Appellants’ religious objections to affirming gender transition is impossible. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (holding least-restrictive-means standard is “exceptionally demanding”).

Second, the Department claims that re-placing a child because foster parents are “refusing [to] care” for a child “because of their identity” would cause “harmful impacts.” Department Br. at 57. This is a strawman argument. As Appellants made clear, they “do not harbor discriminatory animus toward transgender-identifying children, and they would be glad to foster a transgender-identifying child.” Antonucci Br. at 49; *see also id.* at 51 (same). Appellants are simply unable to engage in the type of speech and expressive activity the Department demands for

religious reasons. The Department has not introduced a shred of evidence that this type of parenting is harmful to transgender-identifying children.

Moreover, the Department does not preemptively deny foster parents a license based on speculation that a foster child in their care may later develop a special need or that the foster parents' circumstances—housing, family size, personal needs, *etc.*—may alter their ability to continue to care for a foster child of specific age or sex. *See* JA151 (“Some foster parents fear that if they say no, they will not be called again. *That is not the case.*”) (emphasis added). Thus, the Department's own practices belie any claim that it cannot license Appellants based on the speculative possibility that a foster child *might* come to have a transgender identity and that the Department *might* determine the child should be removed from Appellants' home.

Further, the speculative assertion that “harmful impacts” might occur to a child in the future does not satisfy the Department's burden to prove the Guidelines satisfy strict scrutiny. As the Ninth Circuit explained, “[i]t is not narrowly tailored to impose on [Appellants] an extreme and blanket rule that [they] may adopt no child at all based on [their] religious faith, for fear of hypothetical harms to a hypothetical child.” *Bates*, 2025 WL 2079875, at *20. The Department has various ways of protecting transgender-identifying children in foster care short of denying Appellants the opportunity to be a foster parent based on their religious views and speech. The Department could do initial screening to ensure transgender-identifying

children are not placed with Appellants, just as they do with any other foster parent with specific limitations. The Department can also employ any other measures it uses when placing a child with foster parents who have expressed an inability to care for children with special needs or a certain age or sex.

Even if a child were to come to identify as transgender after placement with Appellants, the Department could continue to ensure the child is receiving the care the Department believes he or she needs and, if that type of care is not being provided, to use the variety of options available to it, including interviewing the child to ensure he or she feels welcome, taking the child to appointments for “gender affirming” medical care, or, as a last resort, removing the child from Appellants’ home. Again, this is precisely what the Department already does when foster parents exercise their “RIGHT TO SAY NO,” JA151, to children of a particular age, sex or special need. Indeed, as Appellants explained, the Department regularly allows replacement for other reasons—including that the placement was simply a “bad fit”—without revoking foster families’ licenses. *Antonucci Br.* at 52. Accordingly, the Guidelines are unconstitutionally underinclusive, an argument the Department does not attempt to dispute.

In sum, these types of alternative measures have been found plausible and less restrictive means to achieve the governmental interest of foster children’s well-being by at least two other courts. *See Bates*, 2025 WL 2079875, at *21; *Blais*, 493 F.

Supp. at 998–1001. Because the Department offers no reasons why the same conclusion should not be reached here, this Court should reverse. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) (explaining that “[w]hen a plausible, less restrictive alternative is offered,” “it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals”).⁴

IV. APPELLANTS HAVE SATISFIED THE REMAINING INJUNCTION FACTORS

The Department barely addresses the other preliminary injunction factors. First, the Department claims that the presumption of irreparable harm from a constitutional violation is not “automatic.” Department Br. at 58 (citing *Frey v. Nigrelli*, 661 F. Supp. 3d 176, 207 (S.D.N.Y. 2023)). But as *Frey* explains, the reason irreparable harm does not flow “automatic[ally]” from an alleged constitutional violation is “because the violation of a constitutional right is the irreparable harm asserted” and therefore, “the two prongs of the preliminary injunction threshold merge into one.” *Id.* (quotation omitted). In other words, a party who has made a showing that it is likely to succeed on the merits of its constitutional challenge—as Appellants have done here—has established irreparable harm.

Moreover, even if *some* constitutional injuries do not automatically give rise to irreparable harm, this Court has held that “the loss of *First Amendment freedoms*,

⁴ For all the same reasons set forth in the text, the Department is unable to satisfy intermediate scrutiny as well.

for even minimal periods of time, unquestionably constitutes irreparable harm.” *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added); *see also, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) (same). Because Appellants have made a strong showing that the Department violated their First Amendment rights, they have demonstrated irreparable harm.

In any event, Appellants have demonstrated the actual existence of irreparable harm. Appellants want to foster a child and to have their young son experience the benefits of a foster sibling. JA27–28. The loss of these freedoms is unquestionably not remediable by monetary damages, which is the hallmark of irreparable harm.

The balance of equities and public interest also tilts in Appellants’ favor. Here, the public interest and equities align, and “[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal.” *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020). This is particularly true here considering the Guidelines diminish, rather than expand, the number of licensed foster homes available to provide loving homes for at-risk children. It causes no harm to allow Appellants to maintain their foster-care licenses, while the Guidelines “specially and disproportionately burden [Appellants’] religious exercise,” causing “a direct and severe constitutional violation.” *Id.*

CONCLUSION

For the foregoing reasons, along with the reasons discussed in Appellants' principal brief, the Court should REVERSE the district court's denial of Appellants' Motion for Preliminary Injunction and REMAND with instructions for the district court to preliminarily enjoin the Department's revocation of their license during the pendency of this litigation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) and Circuit Rule 32.1(a)(4)(B) because this brief contains 6,845 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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