

APPEAL NO. 23-4169
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

JESSICA BATES,

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, in his official capacity as Director of the
Oregon Department of Human Resources, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of Oregon
Case No. 2:23-cv-00474-AN

**BRIEF OF *AMICI CURIAE* JEWISH COALITION FOR RELIGIOUS
LIBERTY AND ISLAM AND RELIGIOUS FREEDOM ACTION TEAM IN
SUPPORT OF APPELLANT**

Ian Speir
COVENANT LAW PLLC
13395 Voyager Pkwy. #130-732
Colorado Springs, CO 80921
(719) 464-7357
ian@covtlaw.com

Howard Slugh
JEWISH COALITION FOR RELIGIOUS LIBERTY
2400 Virginia Ave N.W., Apt. C619
Washington, DC 20037
(954) 328-9461
hslugh@jcurl.org

Counsel of Record for *Amici Curiae*

CORPORATE DISCLOSURE STATEMENT

Jewish Coalition for Religious Liberty is a nonprofit corporation recognized as tax-exempt under § 501(c)(3). It issues no stock and has no parent corporation.

The Islam and Religious Freedom Action Team is part of the Religious Freedom Institute. The Religious Freedom Institute is a nonprofit corporation recognized as tax-exempt under § 501(c)(3). It issues no stock and has no parent corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

 I. Allowing religious parents to participate in the adoption system plays an essential role in ensuring the best outcome for religious children. 4

 II. Oregon’s rule excludes many faithful Jewish and Muslim parents from becoming adoptive parents and thus reduces diversity and uniquely harms children who adhere to minority faiths. 6

 A. Due to the complexity of Jewish and Muslim religious obligations, catering to the needs of children who are accustomed to practicing those faiths requires deep familiarity with their dictates—a familiarity that religious parents are uniquely suited to provide. 8

 B. Religious diversity in the pool of adoptive parents is a strength of the system, not a weakness. 11

 III. Oregon’s rule unconstitutionally interferes with parents’ religious obligation to adopt and care for children in need. 13

 A. History’s lessons show that separation of religious children from their faith community causes irreparable damage to both. 15

 B. Denying a Jewish or Muslim parent the opportunity to adopt a child into a home reflecting their shared faith tradition weakens religious communal life. 19

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITES

Cases

<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021).....	15
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015).....	3
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 582 U.S. 449 (2017).....	3
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	7
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	8, 11, 14, 19

Statutes

25 U.S.C. § 1901(4).....	18
25 U.S.C. § 1902.....	5

Rules and Regulations

Fed. R. App. P. 29(a)(4)(E).....	1
OAR § 413-120-0246(1)(b).....	1, 4, 5
OAR § 413-200-0308(2)(k).....	2

Other Authorities

Adoption in Halacha, DINONLINE.ORG, Jan. 3, 2020, http://tinyurl.com/4ttxbuz6	13
B. TALMUD BAVA BATRA 21a.....	20
B. TALMUD KETUBOT 67a-67b.....	20
Barna Group, <i>5 Things You Need to Know About Adoption</i> (Nov. 4, 2013), https://bit.ly/338bvvg	13

MUHAMMAD IBN ISMAIL AL-BUKHARI, <i>MANNERS IN ISLAM (AL ADAB AL MUFRAD)</i> (Rafiq Abdur Rahman trans., Dar al-Kotob al-Ilmiyya, Beirut, 2015).....	14
John Dart, <i>Tale Retold to Show Pope’s Feeling for Jews</i> , L.A. TIMES (Aug. 29, 1987).....	17
Hasan Dudar, <i>Muslim Kids Lost in Michigan Foster Care System for Lack of Muslim Homes</i> , DETROIT FREE PRESS, Aug. 8, 2017, http://tinyurl.com/23x9ff24 ...21	
Ronald L. Eisenberg, <i>Shabbat’s Work Prohibition</i> , MYJEWISHLARNING.COM, http://tinyurl.com/4b7rb62f	9
Halal Food Council USA, <i>Halal vs. Haram: What Foods Are Prohibited In Islam?</i> , Aug. 29, 2023, http://tinyurl.com/3rwvjv6f	10
Holocaust & Human Rights Educ. Ctr., <i>Stanley Berger</i> , https://bit.ly/2OzadWC	16
IslamWeb.net, <i>Praying in a House Where a Dog Lives</i> , http://tinyurl.com/58yub72a	10
Islam Question & Answer, <i>How to Establish a Mahram Relationship by Breastfeeding</i> , http://tinyurl.com/5n6fypaz	11
Dana E. Johnson, <i>Adoption and the Effect on Children’s Development</i> , 68 EARLY HUM. DEV. 39 (2002).....	5
DAVID I. KERTZER, <i>THE KIDNAPPING OF EDGARDO MORTARA</i> (1997).....	16
Lowcountry Digital Hist. Initiative, <i>Enslaved and Freed African Muslims: Spiritual Wayfarers in the South and Lowcountry</i> , http://tinyurl.com/3f8prrkw	18
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> (1785).....	6
My Jewish Learning, <i>Mitzvah: A Commandment</i> , MYJEWISHLARNING.COM, http://tinyurl.com/ycxhmt2z	2
Naila Masood, <i>The Role of Parents in Training Their Children</i> , AL JUMUAH MAG., http://tinyurl.com/4f8ufpnz	2

Joanna Beata Michlic, *What Does a Child Remember*, in JEWISH FAMILIES IN EUROPE, 1939-PRESENT (Joanna Beata Michlic ed. 2017), <https://bit.ly/2LVO9n0>.....17

Office of Assemblyman Gary Schaer, *Schaer Bill Maintains a Child’s Religious Upbringing in Adoption or Foster Care*, <http://tinyurl.com/4xkru4ua>.....21

J. Patrick Pepper, *New Law Brings Amer Family Some Justice*, PRESS & GUIDE, Feb. 13, 2011, <https://archive.ph/dSaXs>.....20

Jennifer Sartori & Jayne K. Guberman, *Boundaries of Identity*, 89 J. JEWISH COMMUNAL SERV. 46 (2014).....13

Menachem M. Schneerson, *Part II Reproduction – Chapter VII: Adoption*, CHABAD.ORG, <https://bit.ly/31cndmu>.....20

Elaine Sciolino & Jason Horowitz, *Saving Jewish Children, but at What Cost?*, N.Y. TIMES (Jan. 9, 2005).....17

M. Seligsohn & Lewis N. Dembitz, “Orphan,” JEWISHENCYCLOPLEDIA.COM, <http://tinyurl.com/22skvuy5>.....14

Laura J. Schwartz, *Religious Matching in Adoption: Unraveling the Interests Behind the “Best Interests” Standard*, 25 FAMILY L.Q. 171 (1991-92).....15

Peter Steinfelds, *Soviet Jews Seeing Fruit of Efforts*, N.Y. TIMES, Dec. 22, 1989.....17

George Washington, Letter to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790).....6

What is Kosher, CHABAD.ORG, <http://tinyurl.com/3p946zt6>.....9

INTEREST OF AMICI CURIAE

The Jewish Coalition for Religious Liberty is an incorporated organization of rabbis, lawyers, and communal professionals concerned with the current state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists and of all religious adherents nationwide.

The Islam and Religious Freedom Action Team is part of the Religious Freedom Institute, a Washington, D.C.-based nonprofit organization dedicated to promoting religious freedom as a fundamental human right. The Action Team serves as a Muslim voice for religious freedom for all, grounded in the traditions of Islam, and to that end, engages in research, education, and advocacy.

Amici have a deep interest in the free exercise of religion, the role that religion plays in public life, and the need for state decisionmakers to understand and accommodate the religious practices of everyone they serve—especially members of minority faiths.¹

SUMMARY OF ARGUMENT

Oregon recognizes the need to preserve and nurture an adopted child’s “cultural, religious, and spiritual heritage,” OAR § 413-120-0246(1)(b)(G), and to

¹ Consistent with Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel for each set of parties granted consent to the filing of this brief.

support a child's "spiritual beliefs," OAR § 413-200-0308(2)(k). This is especially important to the Jewish and Muslim faith communities. From a very early age, children who adhere to these religions are taught to lead their lives in accordance with their faith and the theological rules that govern what they must and must not do. My Jewish Learning, *Mitzvah: A Commandment*, MYJEWISHLearning.COM, <http://tinyurl.com/ycxhmt2z>; Naila Masood, *The Role of Parents in Training Their Children*, AL JUMUAH MAG., <http://tinyurl.com/4f8ufpnz>. Such children are acclimated to living in a religiously observant household.

In order to avoid unnecessary and painful disruptions, whenever possible, the state should seek to pair a religious child with adoptive parents who can provide religious continuity and facilitate his continued religious exercise. The harm of religious disruption is especially acute for older children who, already facing the traumatic loss of their biological parents, must face a second trauma of placement into a home where their faith is not observed. Hence, when possible, children from Jewish and Muslim backgrounds should be placed into families who can rear them in accordance with their respective faiths. Unfortunately, the regulation at issue in this case makes that ideal outcome less likely, if not outright impossible.

It is antithetical to the best interest of an adopted child to purposefully add a disruption of his religious life to the other traumas he has faced. For this very reason, many states explicitly allow or require adoption agencies to consider the religion of

the child’s birth parents in choosing an appropriate placement. Simply put, Oregon *needs* religious people—especially religious minorities—to step up and adopt in order to serve the best interest of religious children. Without them, the state cannot match religious children to homes where their communal, cultural, and religious identities are maintained and advanced.

The regulation at issue in this case works directly against that important interest. The rule bars parents *at the threshold* if they cannot affirm certain ideas about sexual orientation and gender identity. This will disqualify many potentially ideal Jewish and Muslim candidates who maintain traditional views on sex, gender, and marriage—views the Supreme Court has called “decent and honorable.” *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

Oregon’s rule is thus doubly harmful. Parents who hold traditional religious beliefs cannot be certified to adopt, which in turn means that children with traditional religious backgrounds either will not be adopted or will be placed in homes where it will be exceedingly difficult or impossible to maintain their religious heritage. Potential adoptive parents and children are excluded and denied participation in a state-run program precisely because of their religious exercise. Not only is this terrible policy, it is also prohibited by the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017) (the exclusion of

religious people from a governmental program solely because of their faith “is odious to our Constitution ... and cannot stand”).

Additionally, religious parents may view adopting needy children as an expression of their faith. Oregon’s rule burdens such religious exercise and is therefore subject to First Amendment scrutiny. *Amici* agree with Appellants that strict scrutiny should apply because the regulation is not generally applicable. However, even if the court declines to apply such heightened scrutiny, the regulation is incompatible with any tier of First Amendment scrutiny because it undercuts the state’s purported interest in maintaining adoption and foster care systems that further the best interests of the children they serve.

ARGUMENT

I. Allowing religious parents to participate in the adoption system plays an essential role in ensuring the best outcome for religious children.

In approving an adoption, Oregon decisionmakers seek to ensure that the adoptive parents can “meet, without agency oversight, the current and lifelong needs of the child.” OAR § 413-120-0246(1)(b). This requires examining all facets of a child’s life and varies from child to child. In many cases, allowing a child to maintain his accustomed religious practices will represent an important part of this equation. The state makes a serious error by barring religious parents—who could provide the ideal home for some children—from participating in the system simply because they may not be the ideal choice for others.

Adoption can be a time of intense trauma for a child as she tries to fit in to a new and unfamiliar home. Dana E. Johnson, *Adoption and the Effect on Children's Development*, 68 EARLY HUM. DEV. 39, 49 (2002). Placing a child into a family compatible with her preexisting religious principles minimizes the ways in which she will find her new household alien and unfamiliar, and it maximizes her opportunity to find the home comforting and welcoming. The exact outlines of this compatibility will vary from faith to faith and circumstance to circumstance. At minimum, creating a religiously hospitable environment requires making a sincere effort to avoid placing that child in a home that is radically inconsistent with her faith. As we explain below, for Jewish and Muslim children, this may require placing them with coreligionists.

The need for such compatibility is why, in 1978, Congress enacted the Indian Child Welfare Act, which recognized that “the placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture” is necessary “to protect the best interests of Indian children and to promote the stability and security of Indian ... families.” 25 U.S.C. § 1902. And it is why Oregon insists that an adoptive home fulfill a child’s need for “[c]ontinuity and familiarity” and maintenance of “his or her identity, cultural, religious, and spiritual heritage.” OAR § 413-120-0246(1)(b)(C), (G).

Affording religious parents and children this opportunity is not discriminatory. It is the opposite. It reflects the best of America’s pluralistic tradition. James Madison, architect of the federal Constitution and Bill of Rights, envisioned a nation that is a “beacon” to the world, “offering an Asylum to the persecuted and oppressed of every Nation and Religion.” *Memorial and Remonstrance Against Religious Assessments* (1785). George Washington, writing five years later, affirmed that religion in the United States is not merely “tolerated” but is an “exercise of [people’s] inherent natural rights,” Letter to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), available at <https://goo.gl/P2GPw7>.

This noble vision is scuttled, however, if religious communities cannot impart the teachings of their faith to the next generation, establish homes where those teachings are lived and modeled, and connect children to the broader religious community of which they are part. Oregon has erected a threshold bar against parents who hold traditional religious views, thereby restricting the prospective parent pool and making it more likely the state cannot place children from traditional religious backgrounds in a manner that is maximally consistent with the best-interest standard.

II. Oregon’s rule excludes many faithful Jewish and Muslim parents from becoming adoptive parents and thus reduces diversity and uniquely harms children who adhere to minority faiths.

It is eminently sensible for religious Jewish and Muslim parents to seek to welcome into their homes adoptive children who have been raised as practicing

members of their faith. Doing so allows the children to continue following the tenets of their faith. The alternative, seeing a coreligionist—a young and vulnerable one at that—thrust into a home that cannot offer a conducive religious environment, is as intolerable to the prospective parents as it is to the child. Such parents and children should have the opportunity to be matched together, ensuring the child is raised in accordance with the cultural, religious, and communal heritage to which she is accustomed. Additionally, biological parents who may have to place their children up for adoption will face an even more difficult and painful experience if they know that doing so means their child may be lost to the faith.

One need not accept a conservative Christian, Orthodox Jewish, traditional Muslim, or any other specific religious view to defend a more basic principle: the government must not impose its own views regarding what is “orthodox in politics, nationalism, religion, or other matters of opinion” on vulnerable children. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This is especially true where, as here, effectuating such an imposition comes with the added harm of preventing children from being placed with an adoptive family maximally qualified to provide them a forever home. Leading a righteous life means different things to people of different faiths. A religiously pluralistic society must respect such differences. What matters is whether a particular community that sincerely holds certain religious tenets should be free to practice them and raise children in

conformity with them. The Constitution and the history of this country answer this question in the affirmative. To answer it otherwise hurts all religious communities, but minority religions such as Orthodox Judaism and traditional Islam are particularly harmed if the government excludes devout religious parents from the adoption pool.

- A. Due to the complexity of Jewish and Muslim religious obligations, catering to the needs of children who are accustomed to practicing those faiths requires deep familiarity with their dictates—a familiarity that religious parents are uniquely suited to provide.**

The right of Amish parents in *Wisconsin v. Yoder* was grounded in beliefs and practices “they and their forbears have adhered to for almost three centuries.” 406 U.S. 205, 215 (1972). Jews and Muslims can point to even older traditions. Indeed, the Jewish way of life is not three centuries, but three millennia old. These ancient faiths contain a set of beliefs, practices, and rituals that can be complex, unfamiliar, and even seemingly peculiar to outsiders. Raising an observant Jewish or Muslim child requires familiarity with religious dictates and strong communal bonds—resources that only observant religious parents can provide.

Of course, if there is no alternative, society should honor and praise a nonreligious parent who chooses to adopt a religious child and engages in heroic efforts to facilitate his religious exercise notwithstanding the difficult circumstances. But Oregon’s rule does not simply celebrate those extraordinary efforts—it goes out of its way to make such difficult situations inevitable.

Even the most well-meaning and dedicated non-religious parents would struggle to meet the needs of a child who had theretofore lived as an Orthodox Jew. If a family does not keep kosher, all of the ovens, dishes, plates, and silverware in their home are not kosher, and would be impermissible for the Jewish person to use. *What is Kosher*, CHABAD.ORG, <http://tinyurl.com/3p946zt6>. In a realistic situation, an adopted child who follows the laws of kosher and is placed with a family that does not, would have to consistently eat a very limited diet of easily prepared foods while using paper plates and plastic utensils. Perhaps it would be possible for a heroic parent to eventually learn and follow the laws of kosher. But even then, well-intentioned mistakes and oversights would inflict stress on the child. And even in such a situation, unless the parents and their other children also kept kosher, there would still be a tangible separation between the child and his parents or siblings at every meal.

Similarly, the restrictive laws of the sabbath would make it difficult for a sabbath-observant child to thrive in an unobservant home. Ronald L. Eisenberg, *Shabbat's Work Prohibition*, MYJEWISHLARNING.COM, <http://tinyurl.com/4b7rb62f>. It takes years of learning and practice to be confident that one is properly following the laws of the sabbath. If a nonreligious adoptive family engages in many activities on the sabbath, the adopted child will likely be excluded and have to remain home alone. Riding in a car, spending money, and using electricity are all prohibited

on the sabbath. *Id.* If the family even watches TV on the sabbath, an adopted child may feel the need to remain in his room the entire sabbath to avoid transgressing the biblical injunction to honor the sabbath.

While Islam's dietary restrictions are not as complex as those of Judaism and it does not have an analogue to the sabbath, maintaining an Islamically-compliant household would nevertheless prove a challenge to parents who are not observant Muslims. A mainstream interpretation of orthodox Islamic law requires not only the avoidance of pork products, but also the avoidance of beverages and foods that contain alcohol, as well as meat and poultry from any source that is not certified as slaughtered according to Islamic law. Halal Food Council USA, *Halal vs. Haram: What Foods Are Prohibited In Islam?*, Aug. 29, 2023, <http://tinyurl.com/3rwwjv6f>. One of the four major schools of Islamic law also prohibits the consumption of shellfish. *Id.* Moreover, Islamic law prohibits dogs from living in a home with human beings, and deems the saliva, sweat, and urine of dogs to be spiritually unclean substances that invalidate the Muslim's prayer if he has come in contact with them. IslamWeb.net, *Praying in a House Where a Dog Lives*, <http://tinyurl.com/58yub72a>.

Islam also prohibits unrelated males and females from being alone with one another or from seeing one another's private areas uncovered. This adds a significant layer of complexity for the relationship between an adopted child who reaches puberty and members of the adoptive family of the opposite sex. This prohibition

can be avoided by establishing a relationship through breastfeeding while the adopted child is under the age of two, but this again presumes a religious knowledge and commitment by the adoptive parents, which they are unlikely to have unless they are observant Muslims. Islam Question & Answer, *How to Establish a Mahram Relationship by Breastfeeding*, <http://tinyurl.com/5n6fypaz> (last visited Jan. 18, 2024).

Banning a high percentage of religiously observant parents from adopting children, as Oregon does here, is thus contrary to the best interest of observant children.

B. Religious diversity in the pool of adoptive parents is a strength of the system, not a weakness.

In some legal contexts, equality demands uniformity—that everyone be treated according to a uniform standard. In other contexts, however, this kind of uniformity can be unequal and unjust. That is true in the adoption context, where the state’s aim is not to “standardize its children,” *Yoder*, 406 U.S. at 233 (quotation omitted), but to account for their differences and the unique cultural and religious traditions that have shaped them. In the adoption context, equality demands not uniformity but *pluriformity*—a recognition that the pluralism of American life, especially religious pluralism, must be reflected in state-run adoption programs that seek to match families with children.

To place an observant Jewish child in an observant Jewish home and an observant Muslim child in an observant Muslim home whenever possible is to do what religious equality demands. But to treat these homes, these parents, and these children as interchangeable is the opposite—it is inherently unequal and profoundly unjust. To manufacture a situation in which an observant child can only be placed into a non-observant household—because the state effectively has disqualified observant households from participating—is to destroy perhaps the most salient feature of the child’s identity. And it denies religious parents and children a state-conferred benefit—compatibility—that other adoptive families enjoy. Yet these are the inevitable consequences of Oregon’s rule.

Amici do not suggest that a traditional Jewish or Muslim home is necessarily the best place for a child who identifies as gay or rejects religious practice. But it *is* the best home for a child who was raised in a traditional home before his parents tragically died or had to give him up for some reason.

Religious diversity within the pool of adoptive parents is a strength of the system, not a weakness. Oregon’s rule, however, produces the opposite result. It unjustly excludes religious parents from the system, burdens the religious practice of parents who laudably step forward to adopt, and disserves the state’s own interests. Ultimately it is religious children who will bear the brunt of Oregon’s unsound and unconstitutional policy.

III. Oregon’s rule unconstitutionally interferes with parents’ religious obligation to adopt and care for children in need.

The same principle that led to the exclusion of devout Christians like Ms. Bates from the adoptive parent pool will result, unavoidably, in the exclusion of devout Jewish and Muslim parents. Many such parents consider adopting vulnerable children a religious requirement. Oregon’s rule interferes with that religious exercise and is thus subject to review under the Free Exercise Clause. Appellant correctly maintains that because of the regulation’s secular exceptions, this Court ought to apply strict scrutiny. But in light of the harms the regulation imposes on religious parents, children, and communities, it should fail even rational basis review.

For a host of reasons, people of faith are, on average, more willing to take up the challenge of adoption. *See* Jennifer Sartori & Jayne K. Guberman, *Boundaries of Identity*, 89 J. JEWISH COMMUNAL SERV. 46, 48 (2014) (“American Jews adopt at approximately twice the rate of non-Jews”); Barna Group, *5 Things You Need to Know About Adoption* (Nov. 4, 2013), <https://bit.ly/338bvvg> (“Practicing Christians are more than twice as likely to adopt than the general population.”).

Jewish parents may consider it a religious obligation to adopt and care for orphans. *See* Adoption in Halacha, DINONLINE.ORG, Jan. 3, 2020, <http://tinyurl.com/4ttxbuz6> (“Adopting a Jewish orphan or child whose parents are unable to care for him is thus certainly a great mitzvah.”). An adoptive parent “can participate in building the next generation and may take a part in the eternity of the Jewish People.”

Id. (quotation omitted). “The blessed man ‘that doeth righteousness at all times’ ... is the man who brings up an orphan boy, or girl, until marriage has given him, or her, another home.... He who brings up an orphan in his house is regarded as the orphan’s father.” M. Seligsohn & Lewis N. Dembitz, “Orphan,” JEWISHENCYCLOPEDIA.COM, <http://tinyurl.com/22skvuy5> (citations omitted).

Likewise, caring for orphans is strongly encouraged in Islam as a path to God’s good pleasure. The Prophet Muhammad said, “The best house among the Muslims is the house in which orphans are well treated. The worst house among the Muslims is the house in which orphans are ill treated. I and the guardian of the orphan will be together in Heaven like this,” holding up his two fingers. MUHAMMAD IBN ISMAIL AL-BUKHARI, MANNERS IN ISLAM (AL ADAB AL MUFRAD) 146–47 (Rafiq Abdur Rahman trans., Dar al-Kotob al-Ilmiyya, Beirut, 2015).

The Supreme Court recognized the important First Amendment interests at stake here in *Yoder*, 406 U.S. 205. The Court there highlighted “the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.” *Id.* at 232. The Court also noted that “intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom.” *Id.* at 231. That sort of intrusion is exactly what is occurring in this case. Oregon is prohibiting religious parents from adopting children—even ones who share their faith—simply because the state fears that those

parents may choose to “guide the religious future and education” of those children in a manner that conflicts with the state’s own views.

Given that Oregon’s rule allows for secular exceptions, Aplt.’s Op. Br. at 15, 25-33; *id.* at 26 (“Oregon, too, employs a system of individualized exemptions”), the state’s decision to deny Jewish and Muslim parents a similar accommodation that would allow them to fulfill this religious obligation is subject to strict scrutiny. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In light of the rule’s harmful effects on religious parents and children, the unlikelihood that the ills the rule seeks to combat will arise in any given case, and the way it undermines the state’s own focus on the best interests of children, the rule ought not pass rational basis review, let alone strict scrutiny.

A. History’s lessons show that separation of religious children from their faith community causes irreparable damage to both.

Historically, persecution of religious minorities often took the form of denying religious parents the right to raise children in their own faith. “Jews, as a result of their historical experience as a minority, are particularly sensitive to ‘losing’ their children via out-of-culture adoption. Jewish history is replete with instances of such loss.” Laura J. Schwartz, *Religious Matching in Adoption: Unraveling the Interests Behind the “Best Interests” Standard*, 25 FAMILY L.Q. 171, 187 (1991-92).

One episode that still generates friction between the Jewish community and the Catholic Church is the Mortara case of the late 1850s. *See generally* DAVID I. KERTZER, *THE KIDNAPPING OF EDGARDO MORTARA* (1997). In that case, Edgardo Levi Mortara, a Jewish boy suffering from an illness, was secretly baptized by his nanny who intended to save the boy's soul should he die from his condition. Once the boy recovered, police seized him and spirited him out of his parents' home to be raised a Catholic. Pope Pius IX's refusal to return the boy caused significant damage to the Catholic-Jewish relationship in Italy. This episode made it significantly more difficult for the Jews to continue to reside there, despite the fact that the Pope, the Church, and Italy as a whole were beginning to shed the medieval prejudice against the Jews. That as a result of his upbringing in the Church, Edgardo ultimately forsook his birth religion and became a Catholic priest only added to the anguish of his family and the Jewish community, both in his town of Bologna as well as in Italy and Europe at large. *See generally id.*

In contrast, one of the many reasons the worldwide Jewish community enjoyed a warm relationship with Pope St. John Paul II was that (in addition to his many other actions) while a priest in post-war Poland, he refused to baptize a Jewish child who was saved from the Holocaust. *See* Holocaust & Human Rights Educ. Ctr., *Stanley Berger*, <https://bit.ly/2OzadWC>. To this day, the Jewish community views this as a highly commendable action because, although by that point the child was

no longer in *physical* danger, by refusing to baptize him, Father Wojtyla saved the child as a *Jewish* child. See John Dart, *Tale Retold to Show Pope's Feeling for Jews*, L.A. TIMES, at 28 (Aug. 29, 1987). This action is viewed as so laudable because it stands in such contrast to countless other episodes where Jewish children who survived the Holocaust were lost to the Jewish community forever and were in turn deprived of their own roots. See Elaine Sciolino & Jason Horowitz, *Saving Jewish Children, but at What Cost?*, N.Y. TIMES, at A6 (Jan. 9, 2005) (discussing “one of the most painful episodes of the postwar era: the refusal to allow Jewish children who had been sheltered by Catholics during the war to return to their own families and communities”). In part as a result of these policies, thousands of children throughout Europe were never able to rejoin their families and religious communities, which contributed to the continued loss of Jewish communal life across the continent even after the killing had stopped. See, e.g., Joanna Beata Michlic, *What Does a Child Remember*, in JEWISH FAMILIES IN EUROPE, 1939-PRESENT (Joanna Beata Michlic ed. 2017), <https://bit.ly/2LVO9n0>.

Soviet Jewry dealt with similar persecution. As a result of state-sponsored antisemitism and virulently anti-religious (and specifically anti-Judaism) policies, “many Soviet Jews had little knowledge of their cultural or religious heritage.” Peter Steinfels, *Soviet Jews Seeing Fruit of Efforts*, N.Y. TIMES, at A11, Dec. 22, 1989. Likewise, Muslims enslaved in the American South were prevented from passing

their faith on to their children because “[s]lave sellers and slaveholders systematically tore people apart from those they shared a language and culture with; they separated parents from children so that specific religious heritage was often impossible.” Lowcountry Digital Hist. Initiative, *Enslaved and Freed African Muslims: Spiritual Wayfarers in the South and Lowcountry*, <http://tinyurl.com/3f8prrkw> (last visited Jan. 18, 2024). This phenomenon of separating children from their communities, which happened against a background of racism, discrimination, and sometimes annihilation of those communities, has been repeated time and again. Thus, Native American children have been separated from their families and culture as a result of “removal, often unwarranted, ... from the[ir families] by nontribal public and private agencies.” 25 U.S.C. § 1901(4).

None of this is to suggest that Oregon is seeking to physically eliminate or culturally eradicate any minority religious or ethnic group. However, it is difficult for a religious group to maintain its unique identity if it is prohibited—*for whatever reason*—from passing down its beliefs, language, and practices (however “peculiar” they might be) to the next generation. The resultant assimilation, with its attendant loss of cultural identity, is a harm to the children who are deprived of the link with their past, to the community that is deprived of an ability to self-sustain, and ultimately to society at large that is dispossessed of the vibrancy that the diversity of faiths and ethnicities brings. Policies, even ones adopted with the

best intentions, that do not take into account the complex nature and particular requirements of the religious communities, ultimately contribute to the diminution of such communities, especially where the religious obligations of a specific minority group are not easily understood or followed by the public at large.

B. Denying a Jewish or Muslim parent the opportunity to adopt a child into a home reflecting their shared faith tradition weakens religious communal life.

Yoder recognizes how religion can “pervad[e] and determin[e]” a people’s “entire way of life,” 406 U.S. at 216–17, so as to connect parents to children, families to the community, and one generation to the next. For a person to say that she is a Jew, a Muslim, or a Christian is not simply to say something about her identity as an individual. It is a way of linking that identity to a broader community of faith, one that is reinforced through religious practice and social relations. Thus, when religious parents like Jessica Bates seek to participate in the adoption system, they seek not only to welcome a child into their home, but also to connect the child to a religious community of which he may already be part.

There is danger, however, when a religious child is placed in a non-observant home. He may lose the connection to his community, and the community will lose its connection to one of its most vulnerable members. As a result, Jewish sources discourage placing children up for adoption outside of the community. Indeed, Jewish law places the responsibility for the care of orphans and other children in

need on the Jewish communal authorities. *See* B. TALMUD KETUBOT 67a-67b. These authorities, or the guardian(s) they appoint, are obligated to ensure the child receives a Jewish upbringing. B. TALMUD BAVA BATRA 21a. For this reason, Orthodox rabbinic authorities consider an observant household an important prerequisite for adoption of a Jewish child to occur. *See* Menachem M. Schneerson, *Part II Reproduction – Chapter VII: Adoption*, CHABAD.ORG, <https://bit.ly/31cndmu> (last visited Jan. 18, 2024).

These sensitivities are also present with the American Muslim community. In 2011 the Michigan legislature enacted a law requiring the state, in making placement decisions, to prioritize relatives and families of the same religion. The law was named for Ahmed and Rehab Amer of Dearborn, a Muslim couple whose children were taken away from them by the state after the death of their infant son was erroneously blamed on the mother. The children were placed with a Pentecostal Christian family and were converted by their adoptive parents to that faith. Many years later, by the time medical examiners were able to prove that the death of the Amers' son was due to a congenital disease, their children were fully grown and estranged from their birth parents. J. Patrick Pepper, *New Law Brings Amer Family Some Justice*, PRESS & GUIDE, Feb. 13, 2011, <https://archive.ph/dSaXs>. A similar incident involving a Muslim family led New Jersey lawmakers to introduce a bill requiring that agencies seek to place children with families who share their religion,

an effort that has received support from Muslim and Jewish community leaders. Office of Assemblyman Gary Schaer, *Schaer Bill Maintains a Child's Religious Upbringing in Adoption or Foster Care*, <http://tinyurl.com/4xkru4ua> (last visited Jan. 18, 2024).

These cases are far from isolated incidents. Muslim children in foster care systems have reported a deep longing to be placed with Islamically observant, culturally familiar families, yet this is prevented by a shortage of Muslim parents participating in the adoption system. Hasan Dudar, *Muslim Kids Lost in Michigan Foster Care System for Lack of Muslim Homes*, DETROIT FREE PRESS, Aug. 8, 2017, <http://tinyurl.com/23x9ff24>. Oregon's rule only exacerbates this problem by throwing up another barrier to their participation.

CONCLUSION

Amici urge that the decision below be reversed.

s/ Ian Speir

Ian Speir
COVENANT LAW PLLC
13395 Voyager Pkwy. #130-732
Colorado Springs, CO 80921
(719) 464-7357
ian@covtlaw.com

s/ Howard Slugh

Howard Slugh
JEWISH COALITION FOR RELIGIOUS LIBERTY
2400 Virginia Ave N.W., Apt. C619
Washington, DC 20037
(954) 328-9461
hslugh@jcrl.org

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29 because it contains 4,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the requirements of Fed. R. App. P. 32(a) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 (Version 2310) in 14-point Times New Roman.

/s/Ian Speir
Ian Speir

CERTIFICATE OF SERVICE

I certify that on January 18, 2024, the foregoing brief was served on counsel for all parties by means of the Court's ECF system.

/s/Ian Speir
Ian Speir

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains words, including words

manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties.
 - a party or parties are filing a single brief in response to multiple briefs.
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated .
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature Date
(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov