

No. 23-4169

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**In the United States Court of Appeals for the Ninth Circuit**

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JESSICA BATES,

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, IN HIS OFFICIAL CAPACITY AS  
DIRECTOR OF THE OREGON DEPARTMENT OF HUMAN RESOURCES, *ET AL.*,

Defendants-Appellees.

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

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**BRIEF *AMICI CURIAE***  
**OF MICHAEL AND JENNIFER LASCHE**  
**IN SUPPORT OF APPELLANTS AND REVERSAL**

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RAY D. HACKE

OREGON STATE BAR NO. 173647

PACIFIC JUSTICE INSTITUTE

317 COURT ST. NE, STE. 202

SALEM, OR 97301

PHONE: (503) 917-4409

E-MAIL: RHACKE@PJI.ORG

THOMAS RAWLINGS

GEORGIA STATE BAR NO. 595795

TAYLOR ENGLISH DUMA LLP

1600 PARKWOOD CIR., STE. 202

ATLANTA, GA 30339

PHONE: (774) 434-6868

E-MAIL:

TRAWLINGS@TAYLORENGLISH.COM

*Counsel for Amici Curiae*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici are private individuals.

/s/ RAY D. HACKE

RAY D. HACKE

OREGON STATE BAR NO. 173647

PACIFIC JUSTICE INSTITUTE

317 COURT ST. NE

SALEM, OR 97301

PHONE: (503) 917-4409

E-MAIL: RHACKE@PJI.ORG

Dated: January 18, 2023

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## INTRODUCTION

This *amicus* brief is intended to assist the Court in understanding the conflict between Oregon’s Department of Human Services (ODHS) and Appellant, prospective foster parent Jessica Bates, in the context of federal and state child welfare law, policy, and practice, including especially the policies and practices of ODHS. That context is important as the Court determines key factors in Ms. Bates’ appeal: whether the Oregon regulation used to deny her application to become a foster parent is a neutral rule of general applicability lacking an individualized exemption mechanism; whether the rule was applied to Ms. Bates’ case to discriminate against her on the basis of her religious beliefs while treating comparable secular issues among foster care applicants more favorably; and, crucial to this case, whether ODHS had before it less restrictive, more narrowly-tailored options that would have allowed Ms. Bates to serve her faith both by holding to its tenets and by serving vulnerable children as a foster parent. The brief will show that (1) Oregon child welfare policy and practice allows for individualized exemptions for individual foster parent applicants; (2) Oregon’s child welfare agency treated Ms. Bates differently than secular foster parent applicants on the basis of her religious beliefs; and (3) ODHS could easily have addressed this issue in a way that respects Ms. Bates’ First Amendment Rights simply by following its legally-mandated procedures

when matching a specific foster child's needs to a specific foster parent's capacities.

### **INTEREST OF THE *AMICI* AND AUTHORITY TO FILE**

*Amici* Michael and Jennifer Lasche<sup>1</sup> are New Jersey residents who, like Appellant Jessica Bates, were denied their right to participate fully as foster parents and provide a loving home to children whom a state child welfare agency had determined were in need of alternative care. They filed federal and state civil rights claims in New Jersey courts, which were removed to the District of New Jersey, Civil Action No.: 18-17552 (FLW)(TJB). They have argued that this denial was improperly based on their religious beliefs and that the State of New Jersey and its child welfare system officials had violated their First Amendment Rights.

Like Ms. Bates, the Lasches lost their ability to serve as foster parents because they answered a hypothetical ideological question in a way that the State of New Jersey didn't like. New Jersey child welfare officials inquired of the Lasches regarding their position on an issue of sexual ethics. The Lasches responded that, based on their Christian beliefs, they believe that homosexual conduct is sinful. The State of New Jersey determined this was a "problem" and suspended their foster care license.

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<sup>1</sup> This brief is filed with the express consent of counsel for both parties to the appeal. Neither amici nor counsel have received compensation for this contribution to the Court's deliberations.

The State also removed a child in foster care from their home based on the *supposition* that the Lasches would not support this particular child *if* she ever decided to explore her sexuality. Notably, this child already shared the Lasches' religious beliefs on sexuality, a belief she held *before* she was placed in their home. This child wished to remain with the Lasches, and the Lasches were willing to adopt her. But she was removed from their home and both she and the Lasches were denied the ability to form a family.

The U.S. Third Circuit Court of Appeals upheld the viability of the Lasches' federal complaint alleging violation of their religious freedom rights in *Lasche v. New Jersey*, 2022 U.S. App. LEXIS 5364 (3d Cir. Mar. 1, 2022), The Third Circuit held that “With respect to belief, the Lasches identify their religious opposition to same-sex marriage as constitutionally protected. That is correct: the Free Exercise Clause provides an absolute right to hold religious beliefs.” *Lasche v. New Jersey*, No. 20-2325, 2022 WL 604025, at \*4 (3d Cir. Mar. 1, 2022). The Third Circuit also held that the Lasches alleged a “plausible claim of retaliation for sharing their views on same-sex marriage with Foster Child 1. The Supreme Court has invalidated governmental regulation of faith-inspired action that is not neutral and generally applicable,” and New Jersey's actions in removing the child and suspending the Lasches' foster license. *Lasche v. New Jersey*, No. 20-2325, 2022 WL 604025, at \*5 (3d

Cir. Mar. 1, 2022). Their case remains pending in the District Court for the District of New Jersey.

Although the case at hand addresses Oregon child welfare law and policy, it is important to understand that child welfare law and policy in the United States is consistent across the states because of the significant body of federal child welfare law that governs the use of federal tax dollars to support state efforts to provide “safety, stability, and permanency” for children who have suffered abuse or neglect. Over the years, Congress has passed numerous laws regulating state child protection and welfare systems. These include The Child Abuse Prevention and Treatment Act of 1974, Pub. L. 93-247; The Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272; and the Adoption and Safe Families Act of 1997, Pub. L. 105-89.<sup>2</sup> Many of these federal laws comprise Part IV-E of the Social Security Act and are codified at 42 USC § 670 *et seq.*, and they govern how states spend much of the approximately \$15 billion in child welfare funds the federal government provides annually.<sup>3</sup>

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<sup>2</sup> See also *Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption* (Child Welfare Information Gateway, 2019), available at <https://www.childwelfare.gov/resources/major-federal-legislation-concerned-child-protection-child-welfare-and-adoption/> (last accessed 13 Jan 2024).

<sup>3</sup> Child Trends, *Child Welfare Financing SFY 2020: Title IV-E* at 1, available at [https://cms.childtrends.org/wp-content/uploads/2023/05/ChildWelfareFinancingSFY2020\\_TitleIV-E.pdf](https://cms.childtrends.org/wp-content/uploads/2023/05/ChildWelfareFinancingSFY2020_TitleIV-E.pdf) (last accessed 13 Jan 2024).

The American Bar Association has recognized child welfare law as a specialty, defining it as “the practice of law representing children, parents or the government in all child protection proceedings including emergency, temporary custody, adjudication, disposition, foster care, permanency planning, termination, guardianship, and adoption.”<sup>4</sup> The authoritative work in the field is the “Red Book” published by the National Association of Counsel for Children, upon which the national exam for becoming a board-certified child welfare law specialist is based. See *Child Welfare Law and Practice: Representing Children, Parents, and Agencies in Neglect, Abuse, and Dependency Cases*, 4th Edition (NACC, 2023).

With the exception of Maine, Oklahoma, Pennsylvania, and West Virginia, all state bars will certify their members as child welfare law specialists on the basis of this national exam.<sup>5</sup> As a result of this national consistency in child welfare law, the issues faced by foster families like the Lasches in New Jersey have much in common with Ms. Bates’ experiences in Oregon, and the Lasches’ experiences will be instructive

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<sup>4</sup> More information on the certification process is provided by the National Association of Counsel for Children and is available online at <https://nacchildlaw.org/cwls-certification/>

<sup>5</sup> See <https://nacchildlaw.org/cwls-certification/#:~:text=CWLS%20certification%20is%20currently%20available,%2C%20Pennsylvania%2C%20and%20West%20Virginia>

to this Court as it makes a decision that will affect child welfare policy and practice in many states.

### STATEMENT OF ISSUES

1. The District Court erred in finding that *OAR § 413-200-0308(2)(k)* is a neutral regulation of general applicability, both facially and as applied [Slip. Op. at 16].

2. The District Court erred in finding *OAR § 413-200-0308(2)(k)* narrowly tailored to meet a compelling state interest and in finding that there were no “alternatives that would further the government's interests with the same effectiveness. [Slip. Op. at 50]

### STANDARD OF REVIEW

This Court reviews preliminary-injunction denials for abuse of discretion and the underlying legal principles de novo. *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 934 (9th Cir. 2022). But in First Amendment cases, this Court reviews even factual findings de novo. *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1115 (9th Cir. 2023). To win a preliminary injunction, Bates must show likely success on her First Amendment claims; then the remaining factors fall into place. *Id.* For these claims, Bates need only show “colorable” claims, “at which point the burden shifts to the government to justify the restriction.” *Cal.*

*Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 477–78 (9th Cir. 2022) (cleaned up).

### SUMMARY OF ARGUMENT

Ms. Bates and her legal team have addressed the broad legal issues in this case. As *amici*, the Lasches will focus on what they perceive as the District Court’s failure to understand the complexities and processes of the US child welfare system. As the arguments below reflect, the Lasches would demonstrate that the District Court failed to understand the processes involved in approving and licensing foster homes, making a placement decision, providing ongoing monitoring of the placement, and providing services to the child and foster family.

As a result, the court committed two significant errors. First, because the Court failed to understand the context in which *OAR § 413-200-0308(2)(k)* is applied in practice, it treated this administrative rule requiring that a foster parent be able to “Respect, accept and support” a *specific* foster child’s self-concepts regarding gender and sexuality as one requiring that *any* prospective foster parent be able to “Respect, accept, and support” *any* foster child regardless of whether the child needed such support. Second, because the Court failed to understand the significant body of law, policy, and practice surrounding placement and supervision of children in foster care and permanency planning for those children, it could not see that the State of Oregon has failed to narrowly tailor its

policy in a way that respects the values of Ms. Bates and other foster families.

## ARGUMENT

### **I. Oregon’s Department of Human Services has weaponized OAR § 413-200-0308 (2)(k) to discriminate against the religious beliefs of potential foster parents such as Ms. Bates while applying a different standard for those foster care eligibility factors that do not implicate religious beliefs.**

Among state human services agencies, each agency’s Board generally adopts general regulations that are then elaborated more thoroughly in detailed policy manuals and procedures. ODHS is no different. Among its numerous regulations governing certification of foster homes is OAR § 413-200-0308 (2), which provides a list of qualifications for individuals who desire to serve as foster parents. These include requirements that a prospective foster parent “Have the physical and mental capacity to care for a child or young adult in the care or custody of the Department” and “Demonstrate an ability to learn and apply effective childrearing and behavior intervention practices focused on helping a child or young adult in the care and custody of the Department grow, develop, and build positive personal relationships and self-esteem.” *OAR § 413-200-0308 (2)(i) and (j)*. This case involves ODHS’ application of subsection (2)(k) of that regulation, which requires that prospective foster parents:

Respect, accept and support the race, ethnicity, cultural identities, national origin, immigration status, sexual orientation, gender



identity, gender expression, disabilities, spiritual beliefs, and socioeconomic status, of a child or young adult in the care or custody of the Department, and provide opportunities to enhance the positive self-concept and understanding of the child or young adult's heritage.

The District Court viewed this requirement as a blanket prohibition: *any* prospective foster parent who could not “respect, accept, and support” *any* child in care is barred from serving as a foster parent. As the following argument demonstrates, ODHS has taken this particular provision out of its appropriate context and weaponized it to completely exclude Ms. Bates from serving as a foster parent simply because ODHS disagrees with her religious belief.

Beginning with the applicable law, the question before this Court on this issue is whether, as the District Court found, the facts suggest a neutral application of a general rule. As this Court *en banc* recently held in *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023), the Court reviews a supposedly “generally applicable” rule or policy to determine if (1) it has a “mechanism for individualized exemptions”; (2) the policy results in the government treating “secular activity more favorably than religious exercise;” and (3) the policy's application demonstrates governmental action hostile to religious beliefs, even if such hostility is demonstrated only by “subtle departures from neutrality.”

To analyze whether this subsection of the administrative rule is truly neutral or has been applied in a way hostile to Ms. Bates' religious

freedoms requires placing the rule in the context of state and federal child welfare law, policy, and practice. Such an evaluation shows that ODHS' position that this is a neutral rule, neutrally applied, with no room for individual exemptions stands in complete contradiction to Oregon's own actions and responsibilities under Oregon and federal child welfare law, policy, and practice.

### **A. Caring for Children Requires a Wide Range of Foster Families and Providers.**

Like every other state, Oregon needs a variety of foster families. Between 2019 and 2023, the number of licensed foster homes in Oregon decreased by almost 30% (from 4,220 to 2,959), reflecting similar declines in other states.<sup>6</sup> Oregon's Department of Human Services (ODHS) in 2022 told a press outlet that it needs additional families so that "When we have more than enough resource families, we can find the best match to support every child and family touched by foster care."<sup>7</sup> With such a need for foster parents, the State's own materials suggest it's easy to become certified to volunteer for children needing a home. At the point

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<sup>6</sup> Who Cares: A National Count of Foster Homes and Families (The Imprint Youth and Family News, December 2023), available at <https://www.fostercarecapacity.com/data/total-licensed-foster-homes> (last accessed 13 Jan 2024).

<sup>7</sup> Amanda Arden, "More foster parents needed in Portland metro area" (August 30, 2022) KOIN News, available at [https://www.koin.com/local/more-foster-parents-needed-in-portland-metro-area/#:~:text=\(KOIN\)%20%E2%80%93%20Across%20Oregon%2C,%2C%20a%20Portland%2Dbased%20nonprofit](https://www.koin.com/local/more-foster-parents-needed-in-portland-metro-area/#:~:text=(KOIN)%20%E2%80%93%20Across%20Oregon%2C,%2C%20a%20Portland%2Dbased%20nonprofit) (last accessed 13 Jan. 2024).

of being generally approved to be a “resource parent” or other foster parent, Oregon DHS’ own materials indicate the requirements are fairly simple. On its Foster Care “Frequently Asked Questions” website, in response to the question “Who can be a resource parent,” ODHS supplies the following response:<sup>8</sup>

Resource parents must:

- Be at least 21 years old
- Have enough income to support your family
- Be able to physically care for a child
- Have room for the child in your house or apartment
- Pass a child abuse and criminal background check
- Demonstrate good judgment and a responsible, stable and emotionally mature lifestyle

Otherwise, there are no specific restrictions on who can be a resource parent. Families of every race, culture and ethnicity are needed. Applicants are considered regardless of race, ethnicity, gender, religion or sexual orientation. Older adults, people with or without children and people who are single, married or domestic partners can all be resource parents. You can work inside or outside your home. Couples in which both partners work are also considered.

The State of Oregon realizes that different children and youth in care have different needs and therefore a specific child may need a specific placement. Therefore, in addition to its general call for foster parents,

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<sup>8</sup> <https://www.oregon.gov/odhs/foster-care/pages/faq.aspx>

the State recruits foster families who specifically wish to care for LGBTQ+ children and youth.<sup>9</sup> On its “frequently asked questions” about foster care page, ODHS reminds the public that it has a high need for foster parents who will care for sibling groups, teens, and children from Latino and African American backgrounds.<sup>10</sup> The ODHS Child Welfare Procedure Manual reiterates that “it is important to recruit, train, certify and retain a pool of qualified foster parents to provide safe and protective care for children who are placed in the Department’s care and custody.”<sup>11</sup>

**B. General foster parent eligibility requirements such as OAR § 413-200-0308 (2) are merely a preliminary step in the foster/adoption matching process.**

Immediately following the above statement, ODHS in its Procedure Manual reminds case managers that having a general pool of qualified foster parents is only the first step. When placing a child in a specific home, “priority must be given to ensuring that the particular foster family is able to meet the needs of that specific child.”<sup>12</sup>

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<sup>9</sup> Sam Pape, “Basic Rights Oregon Wants You to Think About Fostering Queer Youth.” *Portland Mercury* (Sept 25, 2023), available at <https://www.portlandmercury.com/lgbtq/2023/09/25/46741133/basic-rights-oregon-wants-you-to-think-about-fostering-queer-youth> (last accessed 13 Jan 2024).

<sup>10</sup> <https://www.oregon.gov/odhs/foster-care/pages/faq.aspx>

<sup>11</sup> *Child Welfare Procedure Manual* (ODHS, revised 9 Jan 2024), p. 1591, available at <https://www.oregon.gov/odhs/rules-policy/Documents/cw-procedure-manual.pdf> (last accessed 13 Jan 2024).

<sup>12</sup> *Id.* At 1592.

Matching a child in care to a foster or adoptive family is a fact-specific inquiry, and the more foster families of every characteristic available, the easier it is to comply with ODHS' obligations under Oregon law to make a *specific* foster care placement that is in the best interests of the child after considering such required factors as “The ability of the person being considered to support the efforts of the department to implement the permanent plan for the child or ward” and “The ability of the person being considered to meet the child or ward’s physical, emotional and educational needs, including the child or ward’s need to continue in the same school or educational placement.” *ORS § 419B.192 (4)(b), (c); ORS § 419B.337 (1)*. These child-specific placement decisions are made by ODHS but subject to the oversight of the juvenile court, which has limited “veto” authority over a placement deemed not to be in a child’s best interests. *ORS § 419B.349*. These state-level procedures are themselves required by the federal law governing eligibility for federal foster care funding, including 42 USC § 671 (a). That law specifically requires that Oregon assure its foster care standards are in line with national standards (*42 USC § 671 (a)(10)*); that “before a child in foster care under the responsibility of the State is placed with prospective foster parents, the prospective foster parents will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child, that the preparation will be continued, as necessary, after the placement of the child” (*42 USC § 671 (a)(24)*); and that an appropriate case plan is

developed for the child (*42 USC § 671 (a)(16)*). The child's case plan, furthermore, must address why the specific placement is appropriate for meeting the child's needs and what services are being provided in that home to meet the child's needs. *42 USC § 675 (1)*.

Federal and Oregon law as well as ODHS' own publications and Procedure Manual demonstrate that being licensed as a foster parent is intended to be an easy step. As long as a person is of age, reasonably stable, has a clean background, and demonstrates good judgment, there are "no specific restrictions on who can be a resource parent."<sup>13</sup> Interpreting this subsection (k) to exclude as a foster parent anyone with religious beliefs "offensive" to ODHS flies in the face of Oregon's own laws and policies, guided by federal law, that are designed to provide a wide diversity of foster carers who can then be specifically matched based on an individual child's needs.

**C. The context further shows that ODHS does not generally interpret subsection (2) to require that every foster parent be capable of caring for every child.**

ODHS points to subsection (2)(k) as a disqualification for any individual who may not be able to affirm a hypothetical foster child's gender identity or sexual orientation due to the individual's religious beliefs. But it does not appear that ODHS uses the other factors of *OAR § 413-200-0308 (2)* to similarly exclude other foster parents who, for more secular reasons, may not be able to adequately care for a range of

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<sup>13</sup> See *supra* fn. 8.

hypothetical children. To interpret the regulation as creating a general bar to anyone who would not agree to, for example, take a hypothetical child to a pride parade or use a child's preferred pronouns, would require a showing that other provisions of the regulation are used in a similar manner to bar eligibility for any prospective foster parents. *OAR § 413-200-0308 (2)(i)* requires a determination that the prospective foster parent has "the physical and mental capacity to care for a child or young adult in the care or custody of the Department." There are no doubt deaf and hearing-impaired children in Oregon's foster care system. It does not appear that ODHS refuses to license foster parents who lack the ability to use sign language for a deaf child based on the possibility that such a child might need a foster home. Similarly, it does not appear that ODHS would refuse to license an older foster parent who said she would not feel capable of safely caring for a six-foot five teenager with severe autism, even though prospective foster parents must "Demonstrate an ability to learn and apply effective childrearing and behavior intervention practices focused on helping a child or young adult in the care and custody of the Department grow, develop, and build positive personal relationships and self-esteem." *OAR § 413-200-0308 (2)(j)*. Similarly, does ODHS refuse to license foster parents who work full time because their work schedule might prohibit them from fostering a medically fragile child who requires around-the-clock care?

**D. The context demonstrates that ODHS does in fact have a system through which the agency makes individualized exceptions for certain prospective foster parents based upon those foster parents’ work schedules, physical capacities, and training or education.**

It is clear from ODHS’ own policies and procedures that this regulation is not intended to act as ODHS claims. Rather, all individuals are welcome to go through the process of becoming a foster parent so long as they meet the minimum guidelines described on the agency’s own website. It is at the placement stage that child’s needs and the foster family’s capacities are considered on an individual basis – a process that allows for individual exemptions, exceptions, and accommodations. For example, if a child comes into care needing around-the clock medical attention, under ODHS’ Placement Services Policy the case manager would have options including finding a foster parent with medical training who does not need to work full-time or providing a working foster family with an in-home aide and with transportation services to take the child to medical appointments.<sup>14</sup> Under the State’s argument and applying the District Court’s interpretation, however, one could argue that to license a foster parent who could not immediately fill each of the above-described roles would not serve the “government’s compelling interest with the same level of effectiveness,” as the District Court found.

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<sup>14</sup> See *Child Welfare Procedure Manual* (ODHS, revised 9 Jan 2024), Ch. 5, Sec. 2, pp. 734ff, available at <https://www.oregon.gov/odhs/rules-policy/Documents/cw-procedure-manual.pdf> (last accessed 13 Jan 2024).



It appears the State of Oregon has taken this broad position regarding this one subsection -- (k) -- because it desires to prevent individuals such as Ms. Bates, whose religious beliefs ODHS finds offensive, from becoming foster parents to *any*. In practice, the agency would not and could not apply all of the general requirements of *OAR § 413-200-0308(2)* to every foster parent. As a matter of common sense, not every foster parent is capable of meeting the needs of every child in care. In practice, it appears the agency does not in fact screen every prospective foster parent to ensure each would be capable of caring for a child's needs in every hypothetical situation. Those decisions are and should be made when matching a child's needs with a foster parent's capacities and gifts. Yet in this case, the State has decided that this particular provision – *OAR § 413-200-0308(2)(k)* – should be applied to ban Ms. Bates from serving merely because her Christian beliefs might not make her the best placement for a small percentage of children and youth who may both enter Oregon's foster system and become free for adoption.

As a result, the regulation at issue is not a neutral one of general applicability. Rather, it is part of a system of foster care licensing and placement matching in which individualized accommodations are made on a daily basis. Here, however, a small section of the regulation has been used to bar Ms. Bates from serving any child, simply due to her religious beliefs. At the same time, other, more “secular” factors such as an individual's physical and mental capacity, education, and training are

not used to bar a prospective foster parent but rather are considered after licensing, when considering an actual placement of a real, living child. This dissimilar treatment of similar characteristics cannot stand. *Tandon v. Newsom*, \_\_\_ US \_\_\_, 141 S. Ct. 1294, 1296 (2021).

**II. OAR § 413-200-0308(2)(k) is not narrowly tailored to adequately respect and fulfill Ms. Bates’ right to serve as a foster parent while maintaining her First Amendment rights.**

While claiming a compelling interest in “ensuring the health, safety, and welfare of the LGBTQ+ children who are entrusted to ODHS care” and “protecting LGBTQ+ children in ODHS’s care from the severe harms that arise from parental rejection,” Oregon does so in a way that fails to honor Ms. Bates’ desire to serve while maintaining the tenets of her faith. Significantly, ODHS claims that it has no “less restrictive” ways of ensuring that the rights of these young people are protected. But given (1) the District Court’s finding that strict scrutiny applies here and (2) the above argument that this regulation is not a neutral one of general applicability, it is incumbent upon ODHS to demonstrate that it could not accomplish its aims via a narrowly tailored, less restrictive approach. *See Fellowship of Christian Athletes*, 82 F.4th at 694. Indeed, in a similar case in Washington, decided prior to *Tandon*, *Fellowship of Christian Athletes*, and *Fulton*, the district court looked at Washington’s justifications for its similar policy and determined that “The Department has not shown that it lacks other ways to achieve its desired goal without

imposing a substantial burden on the Blaises' exercise of religion." *Blais v. Hunter*, 493 F. Supp. 3d 984, 1000 (E.D. Wash. 2020).

Oregon's own Child Welfare Procedure Manual demonstrates the agency's variety of less restrictive alternatives to a "total ban" on foster parents who hold a Biblical worldview. The agency should assess the child's needs and seek specific caregivers who can meet those needs. *Child Welfare Procedures Manual*, pp. 739-740. If new issues or concerns arise after a particular placement, those can be addressed during the agency's initial "30-day assessment." If necessary, the agency can provide additional services to the child or the foster caregiver. *Child Welfare Procedures Manual*, pp. 747-748. As described above, under Oregon (and federal) law, the agency is required to perform ongoing assessments of the child's needs, recommend necessary services, and consult with the Court. Through these processes, the agency can address any concerns or conflicts that may arise between a child's gender identity or sexual orientation needs and a caregiver's beliefs and capacity to support the child in those areas.

Oregon's approach in this case is more restrictive of religious exercise than that of virtually every other state, and more restrictive than the approach proposed by the federal government. Recently, the U.S. Department of Health and Human Services (HHS), through its Administration for Children and Families (ACF), proposed additions to 45 CFR § 1355, which provides regulatory guidance to state child welfare

systems. *See* 88 Federal Register 66752 (September 25, 2023). In proposing a new 45 CFR § 1355.22, HHS seeks to add requirements that each state assure youth identifying as LGBTQI+ are placed with foster providers who will establish a hostility-free environment for the child, who are trained in issues of gender identity and sexual orientation, and who will facilitate the child’s access to services and activities that support their sexual orientation or gender identity.

At the same time, the proposed rule requires only that each state “recruit and identify providers and foster families that the state or tribe could designate as safe and appropriate placements for a LGBTQI+ child to ensure that the totality of their child welfare system includes enough safe and appropriate placements to meet the needs of LGBTQI+ children in care.” 88 Federal Register 66763.

The proposal does not require any state to do what Oregon has done here, that is, to rid its system of any placement that Oregon fears might not be ideal to meet the needs of LGBTQI+ children. In fact, HHS recognized the potential free exercise objections to the proposal. HHS has signaled that, to the extent a state or tribe imposes a substantial burden on a foster parent’s First Amendment rights, the agency will use its oversight authority to determine, under the rubric of the Religious Freedom Restoration Act (42 USC § 2000bb et seq) whether the state or tribe is using the least restrictive means of pursuing its interest in accommodating the needs of this population. As the guidance clarifies,

the burden of having sufficient providers for the LGBTQI+ population is not on providers or on foster families but rather is on the state child welfare agency. 88 Federal Register 66761. Specifically, HHS's ACF recommends that states not use selection criteria that disadvantage faith-based organizations. 88 Federal Register 66762.

This individualized analysis, rather than Oregon's blunderbuss approach, is more consistent with overall federal and state child welfare policy as well as state practice: the State agency certifies as many diverse providers and foster families as possible then selects the placement most appropriate to the individual child. At the placement stage, the agency can narrowly tailor accommodations, consider religious viewpoints of the child and foster parent, and ensure that the foster care placement is a good "fit" for both child and foster family. ODHS' argument that OAR § 413-200-0308(2)(k) requires all licensed foster parents to share the agency's approach to LGBTQI+ children flies in the face of its own practice and of federal guidance, as does its argument that the rule is "narrowly tailored" to protect this population.

## **CONCLUSION**

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ RAY D. HACKE

RAY D. HACKE

OREGON STATE BAR NO. 173647

PACIFIC JUSTICE INSTITUTE

317 COURT ST. NE, STE. 202

SALEM, OR 97301

PHONE: (503) 917-4409

E-MAIL: RHACKE@PJI.ORG

THOMAS RAWLINGS

GEORGIA STATE BAR NO. 595795

TAYLOR ENGLISH DUMA LLP

1600 PARKWOOD CIR., STE. 202

ATLANTA, GA 30339

PHONE: (774) 434-6868

E-MAIL:

TRAWLINGS@TAYLORENGLISH.COM

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 4,936 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ RAY D. HACKE

Ray D. Hacke

*Counsel for Amici Curiae*

Dated: January 18, 2024

## CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2024, the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ RAY D. HACKE

Ray D. Hacke

*Counsel for Amici Curiae*

Dated: January 18, 2024