No. 23-4169

In the United States Court of Appeals for the Ninth Circuit

JESSICA BATES,
Plaintiff- Appellant,
v.

FARIBORZ PAKSERESHT, *et al.*,
Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Oregon, No. 2:23-CV-00474-AN
Hon. Adrienne Nelson

BRIEF OF RICHARD W. GARNETT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT JESSICA BATES

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INTEREST OF *AMICUS CURIAE*[1]

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No one other than *Amicus* and its members made monetary contributions to its preparation or submission. All parties consented to the filing of this brief.

Parts of this brief are adapted from Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000).

SUMMARY OF ARGUMENT

The district court held that Appellant Jessica Bates and others who hold similar religious beliefs are unfit to become parents to children in need. The district court's holding presents a broad threat to family rights.

The question here is what sort of harm justifies a state in deeming someone categorically unfit to become a parent for a child in need. That sort of harm should be defined far more narrowly than the district court's opinion envisioned.

ARGUMENT

I. THE DISTRICT COURT HELD THAT PEOPLE LIKE MS. BATES ARE UNFIT TO BECOME PARENTS TO CHILDREN IN NEED.

The district court held that people who hold religious beliefs like Ms. Bates's are categorically unfit to become parents to children in need. Its

holding is not limited to a narrow set of adopt-from-foster-care situations, but would logically extend to adoptions, custody disputes—even potentially the removal of children from loving homes on the basis of whatever orthodoxies are in vogue.

This is no mere hyperbole. The largest state in this circuit has directed its courts to take "temporary emergency jurisdiction" over an in-state child who "has been unable to obtain gender-affirming health care or gender-affirming mental health care." CA SB-107 (2021–22), § 5, ¶ 3424 (a).[2] Other states have gone far in the opposite direction, defining such interventions as child abuse. *See* Letter of Tex. Gov. Greg Abbott to DFPS Comm'r Jaime Masters (Feb. 22, 2022).[3]

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[2] Available at https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220SB107&showamends=false.

[3] Available at https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.

Does the Constitution really allow for a state to deem someone categorically unfit to parent children in need based on differing approaches to these emerging issues? *See* Op. at 40 ("To be clear, the Court does not doubt the sincerity of plaintiff's willingness to love a child placed in her home . . . ."). That can't be so. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, . . . religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Punishing Ms. Bates "for [her] religious beliefs violates the free exercise clause by denying [her] an otherwise publicly available privilege or benefit"—the chance to adopt a child from foster care. *Blais v. Hunter*, 493 F. Supp. 3d 984, 1001 (E.D. Wash. 2020) (per Mendoza, J.).

The denial here is sweeping. To be sure, certification as an adoptive or foster parent "involves a customized and selective assessment." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021). And there is no free-floating right to become an adoptive or foster parent. *See Blais*, 493 F. Supp. 3d at 997. What is more, there is no guarantee that Ms. Bates would be a perfect fit for any imaginable child in need of a home, just as Orthodox Jewish parents may not provide the perfect home for a devout Hindu child who wants a home shrine. *See* Op. at 19; *Fulton*, 141 S. Ct. at 1925 (Alito, J., concurring in the judgment) ("Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers.").

But the State went beyond finding a mismatch between Ms. Bates and a particular child in need. It deemed her categorically unfit to foster any child or adopt *any* child from foster care—based on her religiously guided answers to hypothetical questions. As a district court in this circuit

recently held, "answers to LGBTQ+ hypotheticals cannot serve as the *sole* determining factor when an applicant expresses sincerely held religious beliefs." *Blais*, 493 F. Supp. 3d at 1002. In deciding otherwise, the State and district court here have "eliminate[d]"—not tailor-matched, but categorically eliminated—"a not insignificant cross-section of otherwise qualified persons from serving as potential caregivers based on their faith's stance on sexual orientation and gender identity and whether their religion supports certain issues LGBTQ+ youth might face." *Id.* at 998.[4]

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[4] *Cf. Fulton*, 141 S. Ct. at 1884–85 (Alito, J., concurring in the judgment) ("The [government] has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children. Many people believe they have a religious obligation to assist such children. Jews and Christians regard this as a scriptural command, and it is a mission that the Catholic Church has undertaken since ancient times. . . . [W]ith or without government participation, Catholic foster care agencies in Philadelphia and other cities have a long record of finding homes for children whose

Never mind that Oregon would surely impose no categorical bar on LGBTQ+ activists seeking to adopt foster children on the ground that some kids practice traditional Islam, or might later convert to conservative Evangelical Christianity, and so come to clash similarly with the parents' approaches to sex, gender, language, and dress. Under the guise of ensuring that foster-to-adopt parents are uniformly able to care for children in need, Oregon has drawn—and the district court sanctioned—a "religious gerrymander." *Blais*, 493 F. Supp. 3d at 998. This it may not do. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023) (en banc).

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parents are unable or unwilling to care for them. Over the years, they have helped thousands of foster children and parents, and they take special pride in finding homes for children who are hard to place, including older children and those with special needs.").

Of course, Ms. Bates's rights are not the only ones at issue. Oregon pursues the right of children to be placed in a loving home, too. The best way of honoring both rights is to define narrowly the sort of harm that would categorically exclude Ms. Bates and people like her from becoming parents to children in need.

II. HARM SHOULD BE DEFINED NARROWLY.

The sort of harm necessary to justify denying someone the right to become a parent should be defined narrowly. "The child is not the mere creature of the State," as the Supreme Court recognized in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). The right and duty of rearing up a child belongs to those "who nurture him and direct his destiny."[5] For this reason, the Constitution forbids states from enacting any law that "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children

[5] *Id.*

under their control."[6] The "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."[7] Parental rights over the "care, custody, and control of their children" may in fact be "the oldest of the fundamental liberty interests recognized" by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Parental liberty is not absolutely limitless. It can certainly be regulated through laws requiring a young child to attend school and not undertake employment. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Parents also lack any right to expose a child to "ill health or death." *Id.*

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[6] *Id.* at 534–35.
[7] *Id.* at 535.

Does it follow that a state can forbid someone with certain religious beliefs from becoming a foster or adoptive parent to prevent an analogous, though perhaps less tangible, "harm," such as the hypothetical harm found by the district court? No. Under *Pierce*, state functionaries, guided and restrained by a proper humility about their authority and competence, should not bar someone from becoming a parent on religious grounds simply because they think this would serve the state's notion of the child's "best interests" or its own unbounded definition of harm to a minor.

We have a good idea what physical abuse, and medical neglect of the sort *Prince* considered, look like. We also have some social consensus about how to handle religious-exemption claims when it comes to this sort of harm. Whoever we think is the best decisionmaker when it comes to children's health-care, and whether or not we think the religious beliefs of parents and children may be considered by that decision-

maker, and whatever our general views about the competing claims of religious believers and governments, none of us wants a child to die or to suffer serious physical harm. This helps to explain why people who disagree strongly about the power of the State and the child-rearing rights of parents actually agree as much as they do about the propriety of court-ordered emergency medical treatment. It is not because parents' moral claims evaporate in the health-care context, but rather because, first, no one thinks these claims include an entitlement to do or cause real harm to a child; second, we all agree that death or physical injury is a real harm; and third, we are less worried, because of this agreement, than we might be in other contested contexts about the dangers of statist second-guessing.

Does this reasoning justify Oregon's denial of Ms. Bates's ability to parent? It does not. The content of religious instruction, traditions, or beliefs should not be viewed as harmful in the sense necessary to justify

government forbidding people to become parents to children in need. What children should be taught to believe is simply not a question of fact; it is an inescapably ideological, political, moral, and religious question. Recognizing this, the Supreme Court tells us that part of the liberty protected by the Fourteenth Amendment is parents' "fundamental" right "to guide the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This right has been "zealously protected, sometimes even at the expense of others interests of admittedly high social importance." *Id.* at 214; *cf. Fellowship of Christian Athletes*, 82 F.4th at 695 ("Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned.").

Such precedent—and the constitutional principle behind it—require a narrow definition of "harm" before the states can categorically bar someone from becoming a parent to a child in need. When, if ever, is a religious upbringing "harmful"? Again, in the health-care context, notwithstanding important disagreements, we agree, by and large, that the State may override parents' wishes in order to prevent imminent and non-speculative harm, that physical injury or death is a harm, and that the purpose of medical care is to avoid such harm. But when it comes to government regulation of religious upbringing, the problem turns on the basic problem of identifying "harm." If a state may, in some cases, require medical treatment to prevent serious physical harm, may it also categorically bar someone from becoming a parent in order to protect children from the "harm" of being taught, for example, that the Book of Genesis's six-day creation story is literally true, that extramarital sexual activity is a sin, or that unbelievers are damned? What about being

taught that God commands human beings to live with minimal material trappings and avoid eating meat in order to stop the devastation of climate change? Or, to take this case, what about the "harm" of being taught that the "Bible accurately describes the differences between men and women," "our souls are united with our physical bodies," "a person's God-given sex has spiritual significance," and people "should not seek to change their sex or engage in any behavior or speech to suggest a male can be a female, or vice-versa"?[8] Are such teachings harmful?

The State of Oregon says "yes"; many others believe "no." *See Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."). But it is

[8] Op. at 4.

precisely this kind of inevitable and intractable disagreement that makes it all the more important to examine carefully, and to cabin closely, the State's asserted authority to categorically forbid someone from becoming a parent to a child in need.

These issues are hard enough to parse out in the context of religious *schooling*, the matter that was at issue in *Pierce*. Less common is the district court's bolder claim here that the *parens patriae* power of the liberal state permits or requires it to bar someone from becoming a parent to a child in need based on what they might "teach" to such children outside school—say, at the dinner table and while getting dressed. *See* Op. at 38 (criticizing Ms. Bates's desire to not "use the child's preferred pronouns, refusing to allow the child to dress in a manner consistent with their gender identity, and refusing to provide access to LGBTQ+ communities"). This is a remarkable—and, to many, repellent—assertion. "In *The Republic and in The Laws*, Plato offered a

vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the state. The vision is a brilliant one, but it is not our own." *Bowen v. Gilliard*, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting) (citations omitted).

Here, one might object: "You say that the Government must stay its hand, because 'harm' is hard to define when it comes to religious upbringing. So what if it is? Your standard is too demanding, and it is inconsistent with the importance of education to the public good and with the State's *parens patriae* obligations. It is enough if the experts decide that a particular style of raising a child is or is not, all (non-religious) things considered, in the best interests of children and the community." No, it is not—not if we take *Pierce* seriously.

Today, some argue that one of the things we have to do to ensure happy futures for children is to quite self-consciously create sexually autonomous individuals. In other words, those government actors who decide what children may and should be able to learn from their parents should thereby shape, if not determine, those children's attitudes toward their own and others' gender and sexuality. *See, e.g.*, Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 U. BALT. L. REV. 57, 70 (2016) ("Whatever the motivations and inclination of parents, we argue that the state abdicates its responsibilities on multiple fronts when it tolerates homeschooling. The state fails when it does not effectively educate children about sexual, gender, and other forms of diversity or when it inadequately addresses bullying, harassment, and discrimination. It fails on an even more fundamental level, however, when it concedes an unregulated educational space in which children can be isolated,

shielded from diversity, and, perhaps, conditioned to carry bias and discrimination into their future dealings as adult members of society.").

The underlying view that traditional or minority religious beliefs, religious beliefs not adequately reformed by the premises of modernity, or religious beliefs that are taken seriously and not treated as a hobby, are "harmful" to children, both in their personal development and in their development as citizens, has been around and influential for a long time. In 1871, *Harper's Weekly* wondered

> whether cruelty is not taught or necessarily infused in the doctrines of the Romish Church; whether the triumph of the Jesuits has not condemned the great body of its adherents to become the blind instruments of a persecuting creed. . . . [It cannot] be doubted that such inhuman teaching must fill with savage aspirations the ignorant and fanatical—must arouse the worst instincts of man.[9]

[9] Eugene Lawrence, *Hunter's Point—Compulsory Education*, HARPER'S WKLY., Dec. 23, 1871, at 1197.

In fact, Oregon once undertook a shameful campaign to shield young people from what it considered such backwards, repressive religious views. More than 75 years ago, Oregon voters enacted by initiative the Compulsory Education Act, making it a crime to send one's child to a Catholic school.[10] It is clear that this Act, and others like it, were animated largely by substantive opposition to and suspicion toward the supposedly repressive teachings and institution of the Catholic Church.[11] For the evidently quite progressive majority of Oregon citizens, egged on by the Ku Klux Klan and other anti-Catholic organizations, students

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[10] *See Pierce*, 268 U.S. at 530–31 (discussing the Compulsory Education Act, 1922 Or. Laws § 5259).

[11] See Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1203 (1997) ("[*Pierce*] must be understood in a historical context in which the Justices knew as well as anybody that the Oregon law was, in large part, an effort to destroy Roman Catholicism.").

needed to brought up in a way consistent with common American values and protected from the influence of authoritarian religion.[12]

Given that the Compulsory Education Act was comfortably consonant with the smart-set views of the day, it is perhaps surprising that the Supreme Court, without dissent, struck it down in *Pierce*.[13] The Court

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[12] *See* STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 99 (2000) (noting, for instance, that "the Oregon mandatory public school attendance law . . . had gained substantial support in other states. . . . [and] was supported by populists"); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer*,* Pierce*, and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887, 891 (1996) (noting that the Oregon Act was "the result of complex forces, uniting groups as disparate as the Ku Klux Klan and the progressives, both of which advocated the 'Americanization' of the state's young people"); Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 461 (2000) ("Who would guess that this argument was made on behalf of a hateful law passed at the urging of the Ku Klux Klan for the purpose of closing Catholic schools?").

[13] John Dewey, for example, insisted that parents should not be permitted to "inoculate" their children with the outdated and useless religious beliefs that they "happened to have found serviceable to themselves." STEVEN C. ROCKEFELLER, JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM 260 (1991); *see also* JOHN DEWEY, A COMMON FAITH (1934).

relied on its earlier decision in *Meyer v. Nebraska*, 262 U.S. 390 (1923), which in turn closed by emphasizing: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected." *Id.* at 401. The "fundamental theory of liberty" *Pierce* endorses is no dusty anachronism but is instead one of the more inspiring and truly liberating statements in the United States Reports. *Pierce*, 268 U.S. at 535.

There are those who claim that *Pierce*-style deference to parental religious decisions is inconsistent with a proper focus on the present and future interests of children and who contend that children have a right to be exposed to a sufficiently wide range of ideas and ways of life and to be assisted in developing the capacities necessary to exercise and enjoy meaningful autonomy. Recall the concurring opinion of Justices Black and Douglas in *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971), where

they criticizingly observed that Catholic schools set the same kind of limits Ms. Bates believes to be religiously important: "The children are regimented, and are told what to wear, what to do, and what to think." This critique of *Pierce* insists that certain parental religious regulations are simply beyond the pale. According to this view, *Pierce*'s parental-rights idea is inconsistent with the best interests of children, both because it rests on the dubious presumption that parents will always perceive and act in accord with the best interests of their children, and because it limits the ability of state officials and other experts to correctly identify and advance those interests. What is more, certain religious approaches to parenting are said to be inconsistent with children's future best interests, that is, in their interests in growing up to have certain capacities, experiences, and dispositions that are, in the State's view, associated with autonomy and necessary for flourishing.

The district court's opinion here echoed this critique. It approved of Oregon requiring prospective foster parents "to provide space for the child to express and develop their identities."[14] It found that the State has a compelling interest in protecting the "fundamental rights" of LGBTQ+ youth to be free of "a disaffirming family environment" (as broadly defined by technical experts).[15] The district court approved of the State categorically forbidding Ms. Bates from becoming a foster/adopt-from-foster-care parent unless she would "affirmatively support a youth's LGBTQ+ identity" through actions perceived as such by a hypothetical child—regardless of her "personal intent" in doing otherwise.[16] These would include using the child's preferred pronouns, deferring to the child's choice "to dress in a manner consistent with their

[14] Op. at 26.
[15] *Id.* at 33, 36.
[16] *Id.* at 37, 46.

gender identity," and providing open-ended "access to LGBTQ+ communities."[17]

However, an appropriate respect for the dignity and personhood of children neither undermines *Pierce* nor supplies the liberal state with the legal power or moral right to draw anti-religious gerrymanders around the class of prospective foster parents. It is not enough—though it is surely right—to affirm the human dignity of children. There is still no avoiding the fact that someone is going to make decisions about children's lives, their education, and their religious training; saying it should be (otherwise qualified) parents rather than bureaucrats or activists in no way makes chattel out of children, and saying it should be the State rather than (otherwise qualified) parents shows no greater respect for children's dignity and autonomy.[18] Thus, *Pierce* and parental

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[17] *Id.* at 38.

[18] *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH 536 (2d ed., Libreria Editrice Vaticana, 2019), available at https://www.usccb.org/sites/

rights to bring up children according to their best lights generally are grounded not on archaic and patriarchal prejudices, but on the common-sense, truly child-centered belief that, in Professor Stephen Gilles's words, "parents are more likely to pursue the child's best interest as they define it than is the state to pursue the child's best interest as the state defines it."[19]

There is more to *Pierce* than Gilles's hard-to- dispute predictive judgment. Surely, the attitude toward a child that best reflects an appreciation for her dignity as a human person is not the disembodied paternalism of a government functionary, or even the genuine concern of a well-meaning case-worker, but the love of a parent. A parent who

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default/files/flipbooks/catechism/VI/ (noting both that "[t]he right and the duty of parents to educate their children are primordial and inalienable" and that "[p]arents must regard their children as *children of God* and respect them as *human persons*").

[19] Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940 (1996).

fosters or adopts loves this child; the Government, its experts, and well-meaning third parties, try as they might, most likely do not. A parent who fosters or adopts has a moral obligation to nurture and protect this child, this child who can only be, to the Government, simply a particular manifestation of an abstraction—"children"—whose best interests the State has charged itself with advancing.[20] That chosen commitment reflects a this-child-centered, truly personalist, value, while state control respects the personhood of children only if one believes that there is something dignified about being regarded by a hubristic state as a policy

[20] *See, e.g.*, *Prince*, 321 U.S. at 166 ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce*, 268 U.S. at 535 ("[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

datum to be manipulated by third parties in accord with best-interests generalities.[21]

Pierce is not really about the power of parents over children but about the State's lack of power over its citizens.[22] *Pierce* is a rejection of state omnipotence, not children's personhood. *Pierce* affirms, not that the child is the property of the parent, but that the child is not the property of the State. On this reading, the ability to become a foster parent without being subjected to a religious inquisition is not an anachronistically

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[21] *See* C. S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1952) ("Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. . . . Those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.").

[22] *See In re Custody of Smith*, 969 P.2d 21, 28 (Wash. 1998) ("In answering whether the state visitation statutes at issue serve a compelling state interest we must understand the sources of state power to intrude on family life."), *aff'd sub nom. Troxel*, 530 U.S. 57.

despotic license to control the lives of others, but rather illustrative of the "first principles" of limited, liberal government.[23]

In fact, the ability of people to become foster and adoptive parents, regardless of their religiously motivated approaches to parenting, is genuinely liberating for children. After all, we think of ourselves as free when, among other things, decisions about our best interests are made by us or our agents and not by the Government. What reason is there for thinking that, in contested matters of education, values, and faith, a child's dignity is more respected, and her autonomy better served, when her "best interests" in those matters are determined by the State, rather than by a family that makes the sacrifice to foster or adopt her? *Pierce* promises children that decisions about their best interests will be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their

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[23] *United States v. Lopez*, 514 U.S. 549, 552 (1995).

best interests. *Cf. Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999) ("The government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents.").

Of course, there are all kinds of situations where children might be better off, in a third party's view, or perhaps even in fact, if they were altogether shielded from certain parental values—say, to encourage or permit the child to play soccer rather than baseball, prefer Taylor Swift to Willie Dixon, or read law-review articles rather than the Narnia chronicles. But then, as the Washington Supreme Court has observed, "the authority to raise the child as the parents see fit, except when the state thinks another choice would be [sic] better, is . . . no authority at all."[24] A right to direct the religious upbringing of one's children that is

[24] *Id.* at 28 (citation omitted).

subject to the ability of the State to categorically bar someone from becoming a parent is an empty and ineffectual right.

Should we be cavalier about children's best interests? Of course not. Still, taking *Pierce* seriously does require us to tolerate the fact that some parental beliefs will, in the opinion of most "outsiders," lead parents (biological, foster, and adoptive) to incorrectly perceive and inadequately promote their children's best interests. But the world is full of second-bests. We tolerate imperfection and imprecision all the time, because the "costs" of eliminating them—here, the costs of statist perfectionism—are too great.[25]

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[25] *See* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 670 (1977) ("[I]t is the absence of a substantial societal consensus about the legitimacy of state intrusion on parental autonomy . . . which is the best evidence for holding in check the use of state power to impose highly personal values on those who do not share them."); *cf.* Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 904 (1992) ("Children will sometimes suffer because of their parents' disputes over religion. But we live with such disputes . . . all the time.").

A demanding harm requirement reflects a trade-off; we risk the chance that some parents, sometimes, will fail to act in their child's best interests to ensure that the State does not prospectively disqualify people from becoming parents to children in need whenever their decisions conflict with the ideological commitments, or "rescue fantasies," of government functionaries.[26] To be sure, religion does not absolve parents who actually harm their children, and the Constitution

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[26] Goldstein, *supra*, at 651; *see also* Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973) (noting that the best-interests standard is "a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured"); JOSEPH GOLDSTEIN et al., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 114 (1996) ("In the face of . . . uncertainties and imprecise definitions of 'emotional neglect' and 'serious emotional damage,' neither concept should be used as a ground for modifying parent-child relationships."); *Mich. Ass'n of Intermediate Special Educ. Admin. v. Dep't of Soc. Servs.*, 526 N.W.2d 36, 37, 39 (Mich. Ct. App. 1994) (refusing, for purposes of the State's abuse and neglect laws, to treat "parents' failure to act in conformity with petitioners' opinions regarding . . . children's educational needs" with abuse or "mental injury").

does not entitle them to do so (though it certainly protects their liberty in a manner that enables parents, sometimes, to do badly by their children); it requires only that we should resist the temptation to treat as harmful the transmission of unpopular or illiberal religious beliefs.

Children's best interests, and freedom generally, are best served when the State's ability to scrutinize prospective parents' beliefs—especially in areas involving religion and education—is carefully limited, as it was in *Pierce*, to prevent those who happen to hold power from "eliminat[ing] a not insignificant cross-section of otherwise qualified persons from serving as potential caregivers." *Blais*, 493 F. Supp. 3d at 998.

CONCLUSION

Ms. Bates affirmed that she would "gladly love and accept any child for who they are, regardless of their sexual or gender identity," "include my children in all aspects of my life, no matter their sexual or gender identity," "tell all of my children that they are made in the image of God,

that they have the dignity of a human person, and are worthy of equal respect and love, no matter their sexual or gender identity," "be by my children's side and support them no matter what they are going through and no matter how they identify," and "listen to them, share my heart with them, and most of all love them and encourage them that I will continue to be there for them no matter what." Compl. at ¶¶ 140–44.[27]

She may be right that her religious approach to raising children is best, or she may be wrong. Either way, the Constitution protects her chance at becoming a foster-to-adopt parent from the searching scrutiny conducted by the district court. *Contrast* Op. at 37 ("Plaintiff takes too narrow a view of what it means to support a child's identity."); *id.* at 48–

[27] These promises contrast with some of the behaviors that the district court found pose a threat to LGBTQ+ minors. *See* Op. at 35 (citing Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009)); Ryan et al., *supra*, at 347 (qualifying as "rejecting" behaviors "excluding [an] LGB child from family activities or events" and blaming a child "for any anti-gay mistreatment").

49 ("If plaintiff is not required to respect or support a child's LGBTQ+ identities, she would not be required to provide clothing for the child, or allow the child to wear clothing, that matches the child's gender identity, nor would she be required to facilitate the child's engagement with age-appropriate activities in the LGBTQ+ community.").

By humbling government, and by respecting parents, families, and other "free institutions of civil society," we take a chance.[28] And we tie our own hands when we swear off using government to keep people from becoming parents based on those contested views of the good that a particular majority happens to find most conducive to the development of liberalism's values.[29] The benefit of this tradeoff is that America is "a

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[28] McConnell, *supra*, at 457.

[29] *See* Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 498–502 (1996) (discussing the "self-paternalism" inherent in our Constitution); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1254 (2000) ("Disestablishment of

rich and complex place where all persons are free to think and speak," and practice religion, "as they wish, not as the government demands." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2322 (2023).

This Court should follow *Blais*, 493 F. Supp. at 1002: "If the only factor weighing against an otherwise qualified applicant has to do with their sincerely held religious beliefs, the [State] must not discriminate against a foster care applicant," or adopt-from-foster-care applicant, "based on their creed." It should reverse the decision below.

Respectfully submitted,

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January 17, 2024

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religion meant that democratic politics in America was deprived of a key instrument for social reproduction.").

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on January 17, 2024, he electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the Ninth Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Matthew P. Cavedon
Counsel of Record

Dated: January 17, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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