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 SERVICES, ET AL.,
DEFENDANTS-APPELLEES,

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON, NO. 23-CV-474, HON. ADRIENNE C. NELSON, PRESIDING

BRIEF OF CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Concerned Women for American does not have a parent corporation, it is not a publicly traded company, and no publicly held corporation owns 10% or more of its stock.

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Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with about half a million supporters in all 50 states. CWA advocates for traditional values that are central to America's cultural health and welfare. CWA is made up of people whose voices are often overlooked—average American women whose views are not represented by the powerful or the elite. Because the State's action below discriminates against this type of person, CWA has a substantial interest in this case.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. All parties consented to this brief.

INTRODUCTION

Strict scrutiny is the most demanding test known to constitutional law and invalidates government action in all but the most extraordinary cases. Under this test, the government has the burden—even at the preliminary injunction stage—to show an interest of the highest order and that its means are the least restrictive to further that interest. Any evidentiary failure or ambiguity is held against the government, which must show that its interest applies specifically to the claimant and that no other means would be feasible. When other jurisdictions use less restrictive means in similar regulatory schemes, the government necessarily fails to pass strict scrutiny.

Though the district court purported to apply strict scrutiny to Oregon's blanket ban on Mrs. Bates's adopting any child in the State, it erred significantly in that effort. First, it repeatedly acknowledged that Oregon's evidence underscoring its putative compelling interest was deficient or inapposite. The court was right about that—the two "studies" discussed below lacked scientific rigor and did not even address the stated focus of Oregon's rejection, that Mrs. Bates would not commit to sex-modification procedures to transition a hypothetical child's gender. But the court inexplicably held that the lack of evidence meant that the government satisfied strict scrutiny. That is backwards. It makes no difference *why* the government could not meet its burden to show a compelling interest—all that matters is that it failed to do

so, and therefore, it cannot satisfy strict scrutiny. The court also failed to address all the ways in which Oregon's scheme is over- and under-inclusive, which precludes any assertion that disqualifying Mrs. Bates as an adoptive parent is tied to a compelling interest. Even as it improperly balanced away the government's burden, the court (and Oregon) did not address the very real harms of unblinking "affirmation"—including sterilization of children who would otherwise realign with their birth sex. Nor did the court consider whether the government showed that disqualifying Mrs. Bates from adopting *any* child—and thus keeping some children in foster care—would promote its stated interests.

Though the court's failure to properly apply the compelling interest test is reason enough for reversal, the court also botched the separate least-restrictive means requirement. Against a showing that many other states manage to protect children without disqualifying all parents like Mrs. Bates, the court reasoned that it was "obvious" these real-world alternatives would not be quite as effective in "affirming" children. But again, the court conceded that Oregon presented no sound evidence on this point, and regardless, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011). Because the district court misapplied strict scrutiny, this Court should reverse.

ARGUMENT

I. The district court failed to require Oregon to show a compelling interest.

The district court erred gravely in its compelling government interest analysis. The court identified various purported interests, including" "(1) ensuring the health, safety, and welfare of the LGBTQ+ children who are entrusted to ODHS care"; "(2) protecting LGBTQ+ children in ODHS's care from the severe harms that arise from parental rejection"; (3) "protecting the physical and emotional well-being of youth"; and, (4) "respect[ing]" the administrative "rules that identify the rights of foster children in Oregon." *Bates v. Pakseresht*, No. 2:23-cv-00474-AN, 2023 WL 7546002, at *18–19 (D. Or. Nov. 14, 2023). Each of these interests is insufficient here to disqualify Mrs. Bates from adopting any child in Oregon.

Going in reverse order, adherence to a state's statutory or regulatory regime cannot be a compelling interest sufficient to justify a constitutional violation. The federal Constitution is supreme over state law. *See* U.S. Const. art. VI, cl. 2. And when strict scrutiny applies, a state must justify its apparent constitutional violation by reference to a compelling interest that is more than just complying with the law that gave rise to the violation. Otherwise, every government could do what the district court here appeared to do: "take[] the effect of the statute and posit []that effect as the State's interest." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). "If accepted, this sort of circular defense

[would] sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Id.* "[S]uch deference is fundamentally at odds with [constitutional] jurisprudence." *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005).

The absurdity of this approach can be seen quickly in an example. No one would have "assumed" that Topeka's Board of Education had a compelling interest in complying with Kansas law or local policy by segregating its schools, even though that is how the Board justified segregation:

> [T]he Kansas legislature has simply recognized that there are situations where Negroes live in sufficient numbers to create special school problems and has sought to provide a law sufficiently elastic to enable Boards of Education in such communities to handle such problems as they may, in the exercise of their discretion and best judgment, deem most advantageous to their local school system under their local conditions.

Brief for Appellees 16, *Brown v. Bd. of Educ. of Topeka*, Nos. 1, 2, 4, 10, 1952 WL 87553 (Dec. 8, 1952); *id.* at 31–32 ("This was the method provided by the legislature of the State of Kansas"). "It is not up to" "the very government entities whose [discriminatory] practices" the courts "must strictly scrutinize" "to determine what interests qualify as compelling under the Fourteenth Amendment." *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 765 (2007) (Thomas, J., concurring).

Turning to the district court's second stated interest—a broad interest in child welfare—it is too general to work in this challenge focused on Mrs. Bates's fitness

as a potential adoptive parent. The government may as well assert a compelling interest in "equality" or "freedom." "[T]he First Amendment demands a more precise analysis." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); *see NAACP v. Button*, 371 U.S. 415, 438–39 (1963) (rejecting Virginia's "attempt to equate" the NAACP's litigation activities with prohibited legal activities and thereby define the relevant government interest at a high level). Oregon's burden on strict scrutiny is to show that "it has such an interest" specifically "in denying" any and all certification to Mrs. Bates. *Fulton*, 141 S. Ct. at 1881. And the court below "d[id] not doubt the sincerity of [Mrs. Bates's] willingness to love a child placed in her home," or her fitness as a parent. 2023 WL 7546002, at *22.

The primary interests argued by Oregon and analyzed below were "protecting LGBTQ+ children in ODHS's care from the severe harms that arise from parental rejection" and otherwise ensuring their "health, safety, and welfare." Recall that under strict scrutiny, discriminatory regulations of speech (or religious exercise) "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This "stringent standard is not watered down but really means what it says." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (cleaned up). Laws "will survive

strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "[O]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (cleaned up). Oregon must demonstrate *specifically* that "application of the [legal] burden to [Mrs. Bates] represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (cleaned up). Oregon must also "specifically identify an actual problem" and show that restricting "speech [is] actually necessary to the solution." *Brown*, 564 U.S. at 799 (cleaned up). And even at the preliminary injunction stage, the government must shoulder these heavy burdens. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004).

The district court failed to hold the government to its burdens. Instead, it approached the compelling interest inquiry as a balancing test deferential to the government, finding the analysis "complicated, in part because of the competing rights at stake." 2023 WL 7546002, at *19. But there is no deferential "balancing" of this kind under the First Amendment, for the Constitution "has struck the balance for us." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). Instead, the court should have decided whether the government would likely meet its extraordinarily high burden of proving that its blanket ban on Mrs. Bates is a necessary means of furthering an interest of the highest order.

Rather than undertaking that inquiry and forcing the government to prove its case, the court bent over backwards to accommodate its failures of proof. The government trotted out a study and a "factsheet" purporting to provide evidence that "'[h]igher rates of family rejection were significantly associated with poorer health outcomes.'" 2023 WL 7546002, at *20. The court cited two studies, but they are the same basic study with slightly different analyses in two publications.[2] We'll get to the studies in a moment—they're worth no more than their electronic ink. Also ignore for now that the studies say nothing about Mrs. Bates's particular circumstances. Even the studies' conclusion sentence makes their most obvious limitation clear: they can only show "association." Incredibly, the district court recognized that limitation (the studies "show only correlation," *id.* at *21), yet held that "at this stage of the case and with the research currently available, the government has presented sufficient evidence that a disaffirming home environment can negatively impact an LGBTQ+ youth's mental health and health outcomes." *Id.*

This is insufficient: a lack of quality evidence supporting this proposition is not some mere technical failure of proof. It means that not only may there be no

[2] The original study was published in 2009. *See* 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) (hereinafter Ryan Pediatrics). The follow-up study was published the next year, using the same dataset and basic methodology. *See* Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. Child & Adolescent Psychiatric Nursing 205 (2010) (hereinafter Ryan Nursing).

causative relationship at all between an "affirming" environment and health outcomes, any causative relationship may in fact be precisely the opposite of the one claimed by Oregon. In other words, the government's study cannot even rebut the proposition that an "affirming" home environment *harms* children. Nor can the "stage of the case" save the government's deficiency, for the government always has the burden on heightened scrutiny, even at the preliminary injunction stage. And on strict scrutiny, the government "bears the risk of uncertainty," and "ambiguous proof will not suffice." *Brown*, 564 U.S. at 799–800.

The fifteen-year-old studies cited by the district court are, to put it bluntly, unserious. They do not provide probative evidence that would sufficiently support Oregon's claimed interest. The studies, connected to an LGBT advocacy project (the "Family Acceptance Project"), collected individual survey "data" in a single "urban geographic area" at either "community and social organizations that serve LGB young adults" or "clubs and bars serving this group." Ryan Pediatrics, *supra* note 2, at 347, 351; *see id.* at 350–51 ("[O]ur sample is technically one of convenience, and thus shares the limitations inherent in all convenience samples."); Ryan Nursing, *supra* note 2, at 210 ("we cannot claim that this sample is representative of the general population of LGBT individuals"). On average, the study talked to less than one person per venue. *See id.* at 206 ("a sample of 245 LGBT Latino and non-Latino

white young adults from 249 LGBT venues"). Participants were limited to those "who expressed interest in the study." Ryan Pediatrics, *supra* note 2, at 347.

The study excluded Black people. *Id.*; Ryan Nursing, *supra* note 2, at 210 ("The study did not include persons from other ethnic groups because of funding constraints."). The study also excluded everyone under the age of 21 and over the age of 25—excluding children in the age range Mrs. Bates wants to adopt. Ryan Pediatrics, *supra* note 2, at 347. One version excluded transgender people, and neither analyzed that population separately. *Id.* The study's analysis was conducted at a single point in time, with no follow-up. It was conducted based on events "years earlier," which the study acknowledged "may introduce some potential for[] recall bias." *Id.* at 350. The study's analysis relied entirely on self-reporting, a particularly biased form of data gathering,[3] and made no effort to verify the responses provided. And the study's cross-sectional design, including the absence of any control group, precludes it from providing any evidence of causation. The study repeatedly acknowledges this point: "the current study does not determine causality." *Id.* at 350; *see id.* at 351 ("[G]iven the cross-sectional nature of this study, we caution against making cause-effect interpretations from these findings.").

[3] *See, e.g.*, Alaa Althubaiti, *Information bias in health research: definition, pitfalls, and adjustment methods*, 9 J. Multidisciplinary Healthcare 211, 212 (2016) (explaining that "self-reporting bias represents a key problem," including bias "aris[ing] from social desirability, recall period, sampling approach, or selective recall").

The Supreme Court has rejected similar studies that "show at best some correlation" as "not compelling" in this context of First Amendment strict scrutiny. *Brown*, 564 U.S. at 800. According to the Court, this type of evidence is "rejected" for "good reason" because "the research is based on correlation, not evidence of causation." *Id.* This evidence must also be rejected when, as here, it "suffer[s] from significant, admitted flaws in methodology." *Id.*; *see, e.g.*, *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 537 (7th Cir. 1997) (Posner, J.) ("[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation.").

The district court mentioned some of the studies' inherent limitations but justified relying on them anyway because "the Court acknowledges that the amount of academic literature assessing the impact of home environments on LGBTQ+ youth is limited." 2023 WL 7546002, at *21. But the government has the burden of showing evidence to pass heightened scrutiny, and if cannot, it does not matter *why* it cannot. A lack of reliable evidence is no reason to *lower* the government's burden.

All this shows why the district court's conclusion is wrong. According to the court, "[w]hile more thorough research in this area appears to be necessary, at this stage of the case and with the research currently available, the government has presented sufficient evidence that a disaffirming home environment can negatively impact an LGBTQ+ youth's mental health and health outcomes." 2023 WL 7546002,

at *21. As noted, the "stage of the case" and "the research currently available" are irrelevant and do not change the government's burden. And because of the inherent limitations addressed above, the studies cannot lead anyone to accept or reject the hypothesis that "a disaffirming home environment negatively impacts an LGBTQ+ youth's mental health and health outcomes." Again, this study does not contradict the proposition that "a disaffirming home environment" does not affect health outcomes or even that "a disaffirming home environment" *positively* affects outcomes. Given that the government's evidence cannot refute either of these possibilities—much less establish its claims—that evidence cannot suffice under strict scrutiny.

Just as significantly, these studies have nothing to say about the issue focused on by Oregon—Mrs. Bates's speech and beliefs about gender identity. Oregon's interview and rejection letter fixated on what Mrs. Bates would do "if the agency requested you to take the child or youth to medical appointments regarding hormone shot appointments" as a treatment for gender dysphoria. 2023 WL 7546002, at *3. But the district court's studies were mainly about sexual orientation—one version specifically *excluded* transgender individuals, and the other lumped in a very small number of transgender persons (twenty-one) with LGB participants and did not analyze them separately. *See* Ryan Pediatrics, *supra* note 2, at 347 ("Because of the small number of transgender participants, we only report here on outcomes from 224 LGB respondents."); *see also* Ryan Nursing, *supra* note 2, at 209 (analyzing

transgender status only as a background characteristic, not with respect to "family acceptance").

But sexual orientation is different from gender identity.[4] Neither Oregon nor the district court provided any reason to think that the same (meaningless) "correlation" findings would be reached on some analogous study of gender-identity issues. So why or how the cited studies could be relevant to Oregon's main justification under strict scrutiny for disqualifying Mrs. Bates is wholly unclear.

Perhaps worse still, the studies and the district court's discussion of them elide the actual question before the district court: can the government show that it would be better for every child to remain in the state's foster care system than to be placed in what even the district court conceded was Mrs. Bates's loving home? Put another way, does the government have a compelling interest in trapping every child in foster care to avoid Mrs. Bates's home? Needless to say, the government presented no evidence at all that would answer that question, much less in the affirmative. No study purports to address that question.

Even while the district court balanced away Oregon's obligation to prove a compelling interest, it refused to balance—or even address—the potential *harms* that

[4] *See, e.g.*, Am. Psychological Ass'n, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression* 2 (2011), https://perma.cc/28P5-X5B9 ("Gender identity and sexual orientation are not the same. . . . Transgender people may be straight, lesbian, gay, bisexual, or asexual, just as nontransgender people may be." (cleaned up)).

would come from blind "affirmation" of gender incongruence. Oregon did not address it either. The district court claimed that "the harm arises from how plaintiff's actions are *perceived* by the child, not from her personal intent." 2023 WL 7546002, at *21. Put aside that this extravagant definition of harm would justify excluding every potential parent who promises to appropriately discipline their child. After all, what child immediately "perceives" discipline (*i.e.*, disaffirmation of certain behavior) in a positive light? A bigger problem is that the district court's understanding of harm does not consider the possibility of a child's gender identity evolving. And on *that* point, solid evidence shows that the court (and Oregon) was wrong.

Take a child who exhibits gender incongruence. According to the American Psychiatric Association's definitive DSM-5, rates of persistence of gender dysphoria (*i.e.*, continuing a transgender identity) for biological males range "from 2.2% to 30%" and from "12% to 50%" for biological females. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 455 (5th ed. 2013). This means that between 97.8% and 70% of boys and between 88% and 50% of girls suffering from gender dysphoria will see their dysphoria resolve by the time they reach adulthood. In other words, the vast majority of gender dysphoric children will eventually desire their gender identity to be consistent with their sex.

But if every parent of a child with gender incongruence did as Oregon demands—immediately affirm, with follow-up puberty blockers and cross-sex

hormones—these children who would have otherwise realigned with their birth sex will be forever prevented from fully doing so. The harm to these children—again, the vast majority of children—would be immense. Children who take puberty blockers then cross-sex hormones—the near-universal transitioning pathway—are expected to become sterile.[5] They will also suffer many other negative repercussions.[6] To take just one example, the President of the World Professional Association for Transgender Health recently admitted "that 'really about zero' biological males who block puberty at the typical Tanner 2 Stage of puberty (around 11 years old) will go on to ever achieve an orgasm."[7]

Both Oregon and the district court overlooked these potential harms of unblinking "affirmation," and even the possibility that familial affirmation might lead to a suboptimal course of treatment that would sterilize some number of children who would otherwise realign with their birth sex. Instead, the court relied almost exclusively on one researcher's fifteen-year-old data set about sexual orientation of 25-year-olds at gay bars. This evidence is grossly insufficient to prove a compelling government interest.

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[5] Stephen Levine, *Reconsidering Informed Consent*, 48 J. Sex & Marital Therapy 706, 711, 713 (2022), https://tinyurl.com/2s4x67ks.

[6] *See, e.g.*, *id.* at 709, 713; *L.W. v. Skrmetti*, 83 F.4th 460, 489 (6th Cir. 2023) (explaining the "considerable evidence about the risks of these treatments and the flaws in existing research").

[7] David Larson, *Duke Health emerges as Southern hub for youth gender transition*, Carolina J. (Aug. 31, 2022), https://perma.cc/8KVP-GCY8.

On top of all that, Oregon's approach is fatally underinclusive. "A law does not advance an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Espinoza*, 140 S. Ct. at 2261 (cleaned up); *see Reed*, 576 U.S. at 172 (same). Here, Oregon (wisely) does not force parents *writ large* to "affirm" any sign of gender incongruence or immediately begin chemical castration on children with this incongruence. Nor did Oregon present any evidence below that it requires follow up with adoptive parents to ensure they are adhering to their prior promise to be "affirming." Whatever the reasons for this divergence, "[t]he consequence is that [Oregon's] regulation is wildly underinclusive when judged against its asserted justification." *Brown*, 564 U.S. at 802. That "is alone enough to defeat it." *Id.* Because the same putative interest is at stake in these other contexts—protection of LGBT+ children—Oregon failed to prove a compelling need to exclude parents like Mrs. Bates from the adoption process.[8]

Finally, the district court's compelling interest analysis would pave the way for government censorship writ large. How easy, how inevitable for a government to next regulate speech of biological parents, or speech in schools, or speech on

[8] To the extent Oregon tries to invoke its statutory or regulatory framework to point out a purported difference in interest in the foster care context, that effort fails for the reasons explained above. A state cannot manufacture justifications under strict scrutiny. And again, despite the State's interest in protecting children within its foster system, Oregon makes no apparent effort to follow up with adopted children to ensure that an "affirming" environment is being provided.

television, or speech in churches, to ensure an appropriately "affirming" environment as to the classification *du jour*. The government will say, *à la* the district court, that "certain messaging creates a holistically supportive environment for LGBTQ+ children, while other messaging creates a harmful environment." 2023 WL 7546002, at *23. And this underscores the danger: Oregon's interest in an "affirming" environment is nothing more than an interest in suppressing speech (and religious exercise), purportedly for the protection of listeners. But there is no legitimate (much less compelling) interest in "the suppression of expression." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). The same is true for speech to minors: speech "cannot be suppressed solely to protect the young from ideas . . . that a legislative body thinks unsuitable for them." *Brown*, 564 U.S. at 795 (cleaned up). The government's rule here simply suppresses expression—that is its point. Oregon failed to show a compelling government interest in banning Mrs. Bates from adopting any child.

II. The district court failed to apply the least-restrictive means test.

The district court's least-restrictive means analysis fails for many of the same reasons. The least-restrictive means test is "exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). Under this test, if a less restrictive alternative would serve the government's purpose, the government "*must* use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). "Precision must be the touchstone when it comes to regulations

of speech" (or religion). *Nat'l Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (cleaned up). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the [State] thought to try." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

First, as noted, the State is content to let all other children's parents generally take the approach they deem best about sexual orientation or gender identity issues. Whatever constraints the State places on these parents appear to be less restrictive than the outright ban on Mrs. Bates. "In light of this underinclusiveness," Oregon cannot meet its "burden to prove that [the law] is narrowly tailored." *Reed*, 576 U.S. at 172.

A blanket ban on Mrs. Bates is also vastly overinclusive, as she explains. At a bare minimum, the government could have limitations or conditions on Mrs. Bates's placements or continued provision of care. While this approach is unnecessary, it would be a less restrictive way for the government to satisfy its purported interest—meaning that the government's current blanket ban fails strict scrutiny.

The district court's responses to this overinclusivity point are mystifying. First, the court (urged on by Oregon) fixated on the potential percentage of children who identify as LGBT+. *See* 2023 WL 7546002, at *24–25. Of course, as long as that percentage is not 100%, Oregon's worries would not apply in every case.

Regardless, the court again wrongly flipped the burden of heightened scrutiny from the government to Mrs. Bates. The court acknowledged that "the government has not provided evidence of the percentage of children in ODHS care, within the age range that she seeks to adopt, that identify as LGBTQ+, nor has the government provided evidence of the 'odds' that a child in that age range may identify as LGBTQ+ in the future." *Id.* at *25.

Rather than hold that these failures doomed *the government's* argument, the court held that Mrs. Bates could not "fault[] the government for failing to provide data on information that she herself acknowledges is not readily available." *Id.* But because it is *the government's* burden to satisfy heightened scrutiny, the court was required to "fault" the government for failing to prove its case. Its narrow tailoring argument hinged on these statistics, and it failed to produce relevant statistics. (The statistical studies Oregon *did* produce had many of the same methodological errors discussed above and did not even pertain to Oregon. *See id.* at *24–25.) Though the district court said that "the government has provided reliable evidence that is reasonably related to the problem it is seeking to address," *id.* at *25, that is rational-basis language, not an application of the demanding least-restrictive means test.

The district court next claimed "that addressing plaintiff's appropriateness for housing an LGBTQ+ youth at the placement stage, rather than the licensing stage, would not be as effective at promoting the government's interests." *Id.* at *27; *see*

also id. at *28 (asserting that alternatives "do not plausibly serve the government's compelling interest *with the same level of effectiveness*" (emphasis in original)). For support, the district court cited only a Supreme Court case that conspicuously did *not* apply strict scrutiny or its least-restrictive means test. *See id.* (citing *McCullen v. Coakley*, 573 U.S. 464 (2014), which held that the law there "need not be analyzed under strict scrutiny" and thus "need not be the least restrictive or least intrusive means," *id.* at 485–86).[9]

Under the strict scrutiny that *should* have been applied below, by contrast, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 564 U.S. at 803 n.9. And the district court pointed to no competent evidence—say, experiences from other states with different policies—that children could not be sufficiently protected at the placement stage.

On that point, that many other states allow people like Mrs. Bates to adopt children requires Oregon to "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt v. Hobbs*, 574 U.S. 352, 369 (2015); *see*

[9] Plus, the Court in *McCullen* ruled against Massachusetts even on intermediate scrutiny because Massachusetts "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals," and "it is not enough for Massachusetts simply to say that other approaches have not worked." 573 U.S. at 494, 496. The same is true here, so Oregon's draconian approach fails any heightened scrutiny.

Bates, 2023 WL 7546002, at *27 (acknowledging other states' policies that differ from Oregon's). But the district court once again flipped the burden, asserting that "plaintiff does little to explain how these alternatives would be as effective at furthering the government's compelling interest in protecting the LGBTQ+ youth in its care." *Id.* But it is *the government's* burden to show that these other states have created a crisis of child acceptance through their adoption policies, and that allowing Mrs. Bates to adopt any child would create a similar crisis. Understandably, the government "failed to make that showing here," *Holt*, 574 U.S. at 369, and no evidence supports it. *See also Ramirez v. Collier*, 595 U.S. 411, 429 (2022) (holding that a state that failed to "explore any relevant differences between [its] process and those of other jurisdictions" flunked strict scrutiny).

The district court seemed to agree "that the government has not provided evidence that [other] alternatives would not work" as well but disregarded this failure because "it appears obvious to the Court." 2023 WL 7546002, at *28. For good measure, the court accused Mrs. Bates of "a lack of understanding about the unique support and care that LGBTQ+ children *require*"—as if Oregon's inadequate studies somehow prove what every child of any diverse sexual orientation, gender identity, or "+" classification "*requires*." *Id.* at *22 (emphasis added); *see also id.* at *28 ("the Court has already discussed at length the type of harm this poses").

Needless to say, "it's obvious" is not sufficient proof of narrow tailoring, especially when it comes to such distinctly *non*-obvious questions like how to raise a child with some degree of gender incongruence. The strict scrutiny standard cannot be satisfied by a district court's personal views, particularly when those views have no apparent footing beyond a couple of old, badly designed studies. "In the absence of proof, it is not for the [c]ourt to assume" that Oregon is right. *Playboy*, 529 U.S. at 824. The least-restrictive means test requires far more than what Oregon provided below.

CONCLUSION

Because Oregon did not satisfy either strict scrutiny requirement, the Court should reverse.

Respectfully submitted,

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9th Cir. Case Number(s) 23-4169

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