No. 23-4169

United States Court of Appeals

for the

Ninth Circuit

JESSICA BATES,

Plaintiff-Appellant,

v.

DIRECTOR FARIBORZ PAKSERESHT, *et al.*,

Defendants-Appellees.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Supp. of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice, LLC v. Paxton*, Nos. 22-555 & 22-277 (Dec. 6, 2023); Brief of FIRE as *Amicus Curiae* in Supp. of Pls.-Appellants and Reversal, *TGP Comms., LLC v. Sellers*, No. 22-16826 (9th Cir. Dec. 16, 2022).

FIRE has observed government officials across the country advance legislation and regulations intended to protect minors from harm allegedly caused by free expression. While the reasons are almost always political, this troubling trend is present in "red" and "blue" states alike.

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[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

In states like Texas and Florida, government officials are banning books in school libraries;[2] in states like California, states are strictly regulating minors' access to social media.[3] Conservative officials have cancelled drag queen story hours in libraries, and their liberal counterparts have refused to host a Christian alternative.[4]

Examples abound, each demonstrating the troubling willingness of government censors to punish—or push—specific views in the name of protecting minors. In those cases, in this case, and in others, FIRE seeks to vindicate First Amendment rights without regard to speakers' views and to protect against imposition of government-mandated viewpoints.

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[2] *See* Brief of FIRE as *Amicus Curiae* in Support of Plaintiffs-Appellees and Affirmance, *Book People, Inc. v. Wong*, No. 23-50668 (5th Cir. Sept. 20, 2023); *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 3:23CV10385-TKW-ZCB, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024).

[3] *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023), *appeal docketed*, No. 23-2969 (9th Cir. Oct. 23, 2023).

[4] *See FAQ: Libraries, bookstores, and free speech*, FIRE, https://www.thefire.org/research-learn/faq-libraries-bookstores-and-free-speech (last visited Jan. 17, 2024); *see also* Aaron Terr, *America's public libraries must not take up arms in the culture war*, FIRE (June 30, 2023), https://www.thefire.org/news/americas-public-libraries-must-not-take-arms-culture-war.

See, e.g., *Novoa v. Diaz*, 641 F.Supp.3d 1218 (N.D. Fla. 2022); Brief of FIRE as *Amicus Curiae* in Support of Plaintiff and Reversal, *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 23-3630 (6th Cir. Oct. 10, 2023).

SUMMARY OF ARGUMENT

Oregon's Administrative Rule § 413-200-0308(2)(k), hereafter the "Oregon Rule," conditions receipt of a government license to foster children on pledging to be the government's mouthpiece. As relevant here, it requires that applicants seeking licensure as foster parents must pledge to "[r]espect, accept, and support the . . . sexual orientation, gender identity, [and] gender expression . . . of a child or young adult in the care or custody of [the state]." An applicant cannot make this pledge unless he or she expressly agrees to use gender-affirming language and preferred pronouns for a future foster child, should that hypothetical child identify as LGBT. Under this Rule, if you refuse to express the State's preferred viewpoint, you are banned from becoming a foster parent. Full stop.

This threshold requirement violates the Free Speech Clause of the First Amendment for several reasons. Under the Oregon Rule, any

would-be foster parent must commit to affirming a prescribed viewpoint on gender, even before receiving a license to foster and receiving a foster assignment. The Rule thus discriminates against viewpoints on gender with which Oregon disagrees by compelling foster parents to speak in a prescribed way around their foster children, even if it violates their beliefs, and by restricting foster parents from speaking the way they otherwise would around their foster children.

The district court justified this overreach by purporting to apply strict scrutiny by finding a compelling interest in protecting children that it deemed could only be met by compelling speech in a viewpoint discriminatory way. This approach not only misapplies strict scrutiny, it ignores that the Supreme Court has held viewpoint discriminatory laws are presumptively invalid without undertaking strict scrutiny analysis. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023). In any event, the Oregon Rule fails proper application of strict scrutiny, because it is not the least restrictive means of achieving Oregon's interests. And that is the case even crediting Oregon's invocation of child welfare, as the Supreme Court has repeatedly held such asserted interests do not automatically satisfy strict scrutiny. *See*, *e.g.*, *Brown v. Ent. Merchs.*

Ass'n, 564 U.S. 786 (2011); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

Oregon fares no better attempting to justify its overreach by characterizing foster parent speech with or around their foster children as "professional speech." Initially, common sense counsels that foster parents are not "professionals"—they are, essentially, volunteers. In any event, the Supreme Court rejected Oregon's expansive view of "professional speech" in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (*NIFLA*).

The government's treatment of gender identity, like social media use and library books, is a hotly contested issue. Ordinary Americans disagree strongly, for a variety of reasons. It does not violate the First Amendment for Oregon to have a position. But it does violate the First Amendment for Oregon to deny a government license to a private citizen solely because she disagrees with the State's position and refuses to affirmatively say otherwise. Because "a desirable end cannot be promoted by prohibited means," *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), the Oregon Rule should have been enjoined.

ARGUMENT

I. The Oregon Rule Violates the First Amendment Because It Discriminates Against Disfavored Viewpoints.

The Oregon Rule unconstitutionally requires prospective foster parents to pledge to verbally affirm the State's view on gender identity with future foster children as a prerequisite to receiving a license. That pledge, if taken, would require Mrs. Bates to both express views she does not believe, by using preferred pronouns, and prevent her from saying things she does believe, like opining amongst family on the immutability of sex and gender. The Rule thus discriminates against those who do not share Oregon's viewpoint, and that alone makes it unconstitutional, without need to resort to a strict scrutiny analysis. The rule accordingly must be enjoined.

A. The Oregon Rule violates precedent that holds compelled speech particularly offends the First Amendment.

As the district court recognized, the Oregon Rule compels Mrs. Bates' speech by requiring her to use "a child's preferred pronouns [even if they] are at odds with their sex assigned at birth." *Bates v. Pakseresht*, No. 2:23-CV-00474-AN, 2023 WL 7546002 at *17 (D. Or. Nov. 14, 2023) (district court opinion). That should have been the beginning and the end

of the free speech analysis. The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). For that reason, the Supreme Court has repeatedly rejected attempts to compel speech "because such compulsion so plainly violates the Constitution." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

For example, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court rejected the "compulsion of students to declare a belief," and held that forcing minor students to participate in a mandatory flag salute violated the First Amendment, because it required them to "forego any contrary convictions of their own." *Id.* at 631, 633. *Barnette* made abundantly clear that under the First Amendment, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

That last clause—"force citizens to confess by word or act their faith therein"—is particularly important here, as it eloquently expresses our constitutional contempt for forcing Americans to speak that which they do not believe. The Supreme Court elaborated on this principle in *Janus*.

There, the Court called the prohibition on compelled speech the First Amendment's "cardinal constitutional command" and for compelled speech to be "universally condemned." *Janus*, 138 S. Ct. at 2463. As *Janus* explained, while restrictions on speech violate the Constitution because they undermine "our democratic form of government" and "the search for truth," compelled speech inflicts the "additional damage" of coercing individuals "into betraying their own convictions." *Id.* at 2464. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.* For that reason, "[t]he Speech Clause has no more certain antithesis" than forcing an approved government message or banning a disfavored one. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (citing *Barnette*, 319 U.S. at 642).

Just last Term, the Court reemphasized that compelled speech violates the First Amendment, even when the asserted interest is combatting discrimination. In *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), the Court reviewed Colorado's application of state antidiscrimination law to require that a businesswoman "either speak as the State demands or face sanctions for expressing her own beliefs," if

she chose to speak by putting her work into the marketplace. *Id.* at 589. The Court held "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'" *Id.* at 586 (quoting *Hurley*, 515 U.S. at 574, and *Snyder v. Phelps*, 562 U.S. 443, 456 (2011)). It accordingly rejected Colorado's attempt to compel speech to combat discrimination based on sexual orientation, holding "the First Amendment's protections [do not] belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive." *Id.* at 595.

These cases are the rule, not the exception. The Supreme Court has never affirmed a government-compelled speech requirement that applies to a private citizen in her own home. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (even when regulating unprotected speech like obscenity, a state regulation cannot "reach into the privacy of one's own home"). The

very concept is shocking, and the district court's upholding of it even more so.[5]

The speech compelled by Oregon is even more extreme than that in *Barnette* and *Janus*. Its Rule not only forces a private citizen to pledge to speak contrary to her own beliefs, it forces her to comply with that pledge by speaking chosen pronouns and other gender-affirming language within the sanctity of her own home, any time she speaks around her foster children. Oregon's unconstitutional compulsion is thus akin to those in *303 Creative* and *Wooley*. Like Colorado in *303 Creative*, Oregon requires that Mrs. Bates "speak as the State demands or face sanctions," *i.e.*, be refused a license to foster children. 600 U.S. at 589. And like New Hampshire in *Wooley*, Oregon seeks to force Mrs. Bates "to participate in the dissemination of an ideological message" on "private property." 430 U.S. at 713. The First Amendment does not abide such compelled

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[5] The Supreme Court has permitted compelled speech in extremely narrow circumstances, none of which apply here. *See, e.g.*, *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985) (allowing the state to compel disclosures of "purely factual and uncontroversial information" in potentially deceptive advertising); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, (2006) (allowing compelled speech in law school recruiting emails that was "plainly incidental to the . . . regulation of conduct").

violation of a person's own convictions. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714. For this reason alone, the district court should have enjoined the Oregon Rule.

B. The Oregon Rule discriminates against disfavored views on gender.

The Oregon Rule also violates the First Amendment because its compulsion to use gender-affirming language and its ban on expressing other views constitute viewpoint discrimination. The Rule attempts to stifle dissent and impose conformity on one of the most hotly contested topics of our time: gender identity. But whether a particular opinion is held by a silent majority, a vocal minority, or a dissenting few, the government may not quell or compel speech based on the viewpoint it expresses. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538 (1980). By mandating that foster parents verbally affirm a favored viewpoint to receive a government license, Oregon

unconstitutionally puts its finger on the scale of a current national debate.

Under the First Amendment, government actors "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *accord Matal v. Tam*, 582 U.S. 218, 243 (2017). When officials nonetheless forge ahead on that basis, they engage in viewpoint discrimination, "an egregious form of content discrimination," *Rosenberger*, 515 U.S. at 829.

Viewpoint discrimination cannot be excused simply because it is intended to stamp out "bad" or "offensive" ideas. Indeed, "[g]iving offense is a viewpoint," and is therefore protected speech. *Tam*, 582 U.S. at 243. Determining what is moral, proper, or decent necessarily "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). It is firmly within private citizens' rights to make such distinctions in their daily lives and in their homes,

and it accordingly violates the First Amendment for the government to make and impose those same decisions for them. "The government may not discriminate against speech based on the ideas or opinions it conveys." *Id.* at 2299. Because that is exactly what the Oregon Rule does, the Rule is presumptively invalid under the First Amendment.

C. Viewpoint discrimination is unconstitutional, regardless of strict scrutiny.

Viewpoint discrimination is prohibited under any circumstances, and the district court was wrong to attempt to apply strict scrutiny to the Oregon Rule at all. The court relied heavily on *Brown* for its strict scrutiny analysis, but *Brown* involved a "restriction [based] on the content of protected speech," 564 U.S. at 799, while viewpoint discrimination is far more insidious, and thus unconstitutional by default.

The Supreme Court has never upheld a viewpoint discriminatory law or regulation. To the contrary: It has repeatedly held that viewpoint discriminatory laws and regulations violate the First Amendment without needing to undertake strict scrutiny analysis. *See, e.g.*, *303 Creative LLC*, 600 U.S. at 588 (invalidating law that seeks to "excise certain ideas or viewpoints from the public dialogue" without reference

to strict scrutiny) (cleaned up); *Wooley*, 430 U.S. at 717 (invalidating compelled speech without referencing strict scrutiny); *Hurley*, 515 U.S. at 578 (same); *see also Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (holding "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited"); *Tam*, 582 U.S. at 243 ("[W]hat we have termed 'viewpoint discrimination' is forbidden.").

The Court spoke most forcefully in *Wooley* when it rejected a viewpoint discriminatory law requiring a New Hampshire man to display the state motto, "Live free or die," on his license plate. After observing that the law "forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," the Court held "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." 430 U.S. at 717. That is true regardless of strict scrutiny. The Oregon Rule seeks to disseminate the State's preferred ideology on matters of gender identity, and it discriminates against other viewpoints on the issue. That alone violates the First Amendment.

II. Even If Strict Scrutiny Applies, the Oregon Rule is Unconstitutional.

Even assuming strict scrutiny applies to Oregon's viewpoint discriminatory foster-parent licensing requirements, the Rule cannot withstand constitutional review. To survive strict scrutiny, "[t]he State must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799 (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822–23 (2000), and *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)). "When a plausible, less restrictive alternative is offered to . . . a speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816; *see also id.* at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible."). The Oregon Rule violates the First Amendment because, at a minimum, several alternatives to protect LGBT foster children in Oregon are already in place.

A. The interest in child welfare does not automatically satisfy strict scrutiny.

The district court erroneously held the Oregon Rule satisfies strict scrutiny almost exclusively on grounds that it seeks to protect LGBT

children and youth by "ensuring the[ir] health, safety, and welfare" and protecting them from "parental rejection." *Bates*, 2023 WL 7546002, at *18. But the First Amendment requires more than simply invoking child welfare. As the Supreme Court has repeatedly made clear, a compelling interest in shielding children from harm does not alone immunize state action from constitutional scrutiny.

In *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), the Court invalidated a ban on Catholic schools. It held that while Oregon had compelling interests in "regulat[ing] all schools," and in requiring "all children of proper age attend some school" and that "nothing be taught . . . manifestly inimical to the public welfare," *id.* at 534, those interests did not outweigh "the right of parents to choose schools where their children will receive appropriate mental and religious training," and in "selecting reputable teachers and places." *Id.* at 532, 534; *accord Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (overruling compulsory education law as applied to the Amish because a compelling interest in child education, "however highly we rank it," is still subject to constitutional review "when it impinges on fundamental rights and interests," particularly First Amendment rights); *Meyer v.*

Nebraska, 262 U.S. 390, 401 (1923) (invalidating ban on teaching German in schools) ("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.").

Moving beyond the context of education, the Court, for example, invalidated a restriction on minors' access to assertedly violent video games, recognizing that while the government "possesses a legitimate power to protect children from harm," it does not wield "a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794. It held that "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." *Id.* at 804–05; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975) (ordinance that purported to protect children from obscene content at drive-in movie theaters still violated the First Amendment). Recently, several states have repeated the mistakes of *Brown*, *Erznoznik*, and other cases by banning and regulating minors' use of social media platforms, allegedly to protect them from harm. At least one such law has been enjoined in this Circuit for violating the First Amendment. *See*

NetChoice, LLC v. Bonta, No. 22-CV-08861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023), *appeal docketed*, No. 23-2969 (9th Cir. Oct. 23, 2023).

The Oregon Rule is no different. Compelling ideological statements from those who disagree with the State's preferred orthodoxy as a threshold condition to receiving a government license is not a legitimate means to pursue child welfare, particularly when that means is not narrowly tailored.

B. The Oregon Rule is not the least restrictive means to achieve the welfare of LGBT children and youth.

"If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813. The Oregon Rule is not the least restrictive means to protect LGBT foster children because it would be far less restrictive of protected speech, and at least equally as effective, to publicize and enforce existing foster child protection laws that guard against cruelty by foster parents.

Several laws and regulations already protect Oregon foster children without compelling foster parent speech as a threshold requirement for licensure. For example, as authorized under state law, *see* OR. REV. STAT. § 418.201, Oregon publishes a Foster Children's Bill of Rights that the Oregon Department of Human Services distributes to all children and

youth in foster care. *Oregon Foster Children's Bill of Rights*, OR. DEP'T OF HUM. SERVS. (July 2017), https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/de9014a.pdf. That Bill of Rights assures foster children and youth they are entitled to wear "[c]lean and appropriate clothes that fit [them] and correspond to a gender identity of [their] choice," to "determine and express [their] gender and sexual identity for [themselves]," and to "call the Foster Care Ombudsman Office (free from retaliation from [their] foster parents or anyone else) if [their] rights are violated or [their] needs are not being met." *Id*. This both informs LGBT foster children and youth of their rights, and of how to complain or have their placement moved if a foster parent does not provide that environment.

Oregon has not shown its existing regulations, like the Foster Children Bill of Rights, are inadequate to protect LGBT foster children and youth from the concerns to which the Oregon Rule is addressed. *See Playboy*, 529 U.S. at 816 ("When the Government restricts speech, [it] bears the burden of proving the constitutionality of its actions."). When "a plausible, less restrictive alternative is offered," such as those above,

"it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.*

The onus, in this respect, is on Oregon to educate both minors under its care and foster parents about minors' rights "with adequate publicity." *Id.* Oregon may not shirk this obligation in favor of adopting a viewpoint discriminatory threshold requirement for foster parents. "[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Id.* at 814; *see also supra* II.A. Because Oregon has a less restrictive alternative already in place, but has not shown it to be ineffective, the Rule fails strict scrutiny.

III. Foster Parent Speech Is Not Professional Speech

Oregon argued below that its Rule is subject to rational basis review because a foster parent's conversations with and around her foster children are professional speech. They are not. The district court recognized that, and this Court should disregard any arguments from Oregon that claim otherwise.

Simply put, foster parents are not professionals merely because they must be licensed by the State. The Supreme Court expressly rejected

precisely that view in *NIFLA* when it overruled this Court's earlier formulation of the "professional speech" doctrine. The Supreme Court rejected the idea that "[a]ll that is required to make something a 'profession' . . . is that it involves personalized services and requires a professional license from the State." 138 S. Ct. at 2375. This would give States "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* The Supreme Court thus rejected the expansion of "professional speech" regulations beyond those professions—like law and medicine—that have "persuasive evidence . . . of a long . . . tradition" of being regulated. *Id.* at 2372. Accordingly, every regulation of "professional speech" cited approvingly by the Court in *NIFLA* involved a traditional paying profession.[6] This Court's recent decision in *Tingley v. Ferguson* is to the same effect. *See* 47 F.4th 1055, 1071 (9th Cir. 2022) (holding licensed health care

[6] *See, e.g.*, *Zauderer*, 471 U.S. 626 (regulating law); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (same); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (same); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (regulating medical profession); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (regulating interactions between doctors and pharmaceutical manufacturers).

providers' conversion therapy qualifies as regulable "professional speech").[7]

Assume fostering *were* treated as a profession, and conversations between foster parents and foster children as "professional speech" (they aren't). Even then, the Oregon Rule would still face—and flunk—strict scrutiny, because the State is clearly regulating speech, not conduct, and the Supreme Court's "precedents have long protected the First Amendment rights of professionals." *NIFLA*, 138 S. Ct. at 2374. The Supreme Court therefore would permit Oregon to regulate foster parenting as "professional speech" only if it were incidental to the regulation of professional conduct. *Id.* at 2373; *accord Tingley*, 47 F.4th at 1076. But the Oregon Rule plainly targets speech as *speech*, not conduct, professional or otherwise. The Rule does not, for example, regulate advice to a patient, like the conversion therapy in *Tingley*, nor does it regulate speech "incidental" to a professional act. *Tingley*, 47 F.4th at 1076. Instead, it targets any statement made by a foster parent in the

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[7] Black's Law Dictionary similarly defines a professional as "[s]omeone who belongs to a learned profession or whose occupation requires a high level of training and proficiency." *Professional*, BLACK'S LAW DICTIONARY (11th ed. 2019).

presence of her foster child, in any setting, so long as the content of that statement communicates a viewpoint on gender with which the State disagrees. Speech targeted for its message is subject to strict scrutiny, and as discussed *supra* at Section II, the Oregon Rule fails it. It is thus unconstitutional, and this Court should order the district court to enjoin it.

CONCLUSION

For all these reasons, this Court should reverse the district court and remand with an order to enjoin the Oregon Rule.

Dated: January 18, 2024

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Date: January 18, 2024

/s/ Ronald G. London

LEAD ATTORNEY
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

CERTIFICATE OF SERVICE

The undersigned certifies that on January 18, 2024, an electronic copy of the Foundation for Individual Rights and Expression Brief of *Amicus Curiae* was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: January 18, 2024

/s/ Ronald G. London

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