No. 25-678

In the United States Court of Appeals for the Second Circuit

BRIAN WUOTI, KAITLYN WUOTI, MICHAEL GANTT, AND REBECCA GANTT,

Plaintiffs-Appellants,

v.

CHRISTOPHER WINTERS, ARYKA RADE, AND STACEY EDMUNDS,

Defendants-Appellees.

On Appeal from the United States District Court
For The District of Vermont
No. 2:24-cv-00614-wks, Hon. William K. Sessions III

BRIEF OF *AMICUS CURIAE* FIRST LIBERTY INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

INTEREST OF AMICUS CURIAE

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.[1] First Liberty provides pro bono legal representation to individuals and institutions of all faiths — Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

As an amicus, First Liberty maintains an interest in preserving the freedom of all faith traditions to live according to their faith in all areas of public life. The individuals and institutions that we represent seek the freedom to operate in their communities and participate in publicly available programs without religious discrimination. One of the core features of the First Amendment is that the government must not discriminate against religious individuals and entities without satisfying the highest level of scrutiny.

[1] Attorneys from First Liberty Institute authored this brief as amicus curiae. No attorney for any party authored any part of this brief, and no one apart from amicus curiae made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief and were timely notified.

SUMMARY OF ARGUMENT

The Free Exercise Clause of the First Amendment guarantees that individuals can live according to their faith. It protects their ability to perform acts according to their faith as well as abstain from acts that would violate their faith. The Clause further guarantees that the government cannot discriminate based on religion when it operates government programs. And that includes the licensing of foster parents.

In performing its analysis under the Free Exercise Clause, the district court below held that Vermont's foster parent licensing scheme was generally applicable and thus subject to a low standard of scrutiny. But that was wrong. The court failed to complete a thorough analysis under the Supreme Court's free exercise jurisprudence, and this Court should rectify that problem.

First, the district court did not apply the appropriate analysis to determine whether Vermont's licensing scheme was generally applicable. Generally applicable laws are subject to rational basis review, but if a governmental policy is not generally applicable, strict scrutiny is triggered. Under a thorough examination of the Supreme Court's

precedent in *Sherbert*, *Fulton*, and *Tandon*, Vermont's licensing scheme is not generally applicable and thus subject to strict scrutiny.

Second, because the district court determined that the foster parent licensing scheme was generally applicable, it did not perform an appropriate analysis under strict scrutiny. Strict scrutiny requires the court to hold the government to a heightened burden, and here, Vermont fails to meet that burden.

Because the district court did not apply the appropriate Free Exercise Clause analysis, this Court should reverse.

ARGUMENT

The United States Constitution's Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const., amend. I. "The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). Generally, the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid

and neutral law of general applicability . . . ." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quotation omitted). But when the government burdens religious exercise through a policy that is not neutral or generally applicable, strict scrutiny applies. *Fulton v. City of Philadelphia, Pa.*, 593 U.S. 522, 533 (2021).

A government policy can fail to be neutral or generally applicable, thereby subjecting it to strict scrutiny, in several ways. First, "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* (citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 636–39 (2018) and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). Second, a governmental policy fails to be generally applicable when it "has in place a system of individual exemptions." *Fulton,* 593 U.S. at 534 (citing *Smith*, 494 U.S. at 884). Finally, a policy lacks general applicability when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534; *see also Tandon v. Newsom*, 593 U.S. 61, 62 (2021). If the policy fails to be neutral or generally applicable in any of

these ways, "the government has the burden to establish that the challenged law satisfies strict scrutiny." *Tandon*, 593 U.S. at 62.

Vermont's foster parent licensing scheme lacks general applicability and is thus subject to strict scrutiny. Further, Vermont cannot satisfy strict scrutiny and has thus violated the Wuotis' and Gantts' free exercise rights. Because the district court did not apply the appropriate analysis under the Free Exercise Clause, this Court should reverse the decision of the district court.

I. Vermont's foster parent licensing scheme is not generally applicable under the Free Exercise Clause and thus warrants strict scrutiny.

Vermont's foster parent licensing scheme lacks general applicability in two ways. First, the licensing scheme invites the government "to consider the particular reasons for a person's conduct by providing a 'mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). Second, the licensing scheme fails to be generally applicable because it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *id.* at 534, treating "comparable secular activity more favorably than religious exercise." *Tandon*, 593

U.S. at 62. Because the licensing scheme is not generally applicable, the government must satisfy strict scrutiny.

A. The licensing scheme is not generally applicable because it creates a system of individual exemptions under *Sherbert* and *Fulton*.

A government policy or practice is not "generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a 'mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). In *Fulton*, the City of Philadelphia violated a Catholic adoption agency's free exercise rights by conditioning the agency's contract on its willingness to certify same-sex couples for foster care against its Catholic beliefs. *Id.* at 532. There, the city stated that it had never granted an exemption, nor did it intend to do so, and a separate contractual provision "independently prohibit[ed] discrimination in the certification of foster parents." *Id.* at 537. Even so, the city's anti-discrimination policy was not generally applicable because it allowed discretionary exemptions. *Id.* at 535.

Sherbert v. Verner contained a similar system of discretionary individualized exemptions. 374 U.S. 398 (1963). There, a woman was denied unemployment benefits because she could not work on Saturdays

due to her religious beliefs. *Id.* at 399–401. When the State denied her application for benefits, it explained that she "failed, without good cause . . . to accept available suitable work." *Id.* at 401. In distinguishing *Sherbert*, the *Smith* court explained that the "good cause" standard permitted the government to use its discretion and grant exemptions based on each applicant's circumstances. *See Smith*, 494 U.S. at 884. Thus, the policy triggered strict scrutiny. *See id.*

In interpreting this Supreme Court precedent, the Ninth Circuit has applied strict scrutiny even though the exemptions were not apparent on the face of the government policy. For example, in *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, the Ninth Circuit held that a school district's non-discrimination policies were not generally applicable because the district maintained a system of discretionary exemptions. 82 F.4th 664, 687 (9th Cir. 2023). There, the district had "broad and comprehensive policies forbidding discrimination on the basis of race, sex, sexual orientation, religion, and other criteria," but did not apply these policies without exception. *Id.* (quotations omitted). Instead, the district maintained discretion to grant exemptions to the policy, justifying the exceptions by claiming that doing

so ensured students "got what they needed" and supported "high-quality outcomes for students." *Id.* (cleaned up). The court reasoned that this authority allowed the district "'to decide which reasons for not complying with the policy [were] worthy of solicitude' on an ad hoc basis," thus rendering the policy not generally applicable. *Id.* (quoting *Fulton*, 593 U.S. at 537). The court further interpreted *Fulton* to hold that "the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise." *Id.* at 687–88.

The Third Circuit has similarly interpreted *Fulton* to hold that inherent discretion renders a policy not generally applicable. In *Smith v. City of Atlantic City*, the city's fire department had a no-beard grooming policy and denied both medical and religious exemption requests. No. 23-3265, 2025 WL 1537927, at *2 (3d Cir. May 30, 2025). Yet the court held that the policy was not generally applicable, thus triggering strict scrutiny, because "the grooming regime ha[d] built-in discretion." *Id.* at *4. Captains were allowed to "deviate" from the policy and permit an exemption at their discretion. *Id.* Despite there being no record that any such exemption had been granted, the court held that the "mere creation

of an exception mechanism that permits undermining the City's interest destroys general applicability." *Id.*

The Third Circuit further requires a court to consider whether the government is "deciding that secular motivations are more important than religious motivations," even when the exemptions are categorical and not individual in nature. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). In *Newark Lodge*, the Newark Police Department imposed a "Zero Tolerance" policy for wearing a beard, unless they had "medical clearance." *Id.* at 361. The plaintiffs requested to wear beards for religious reasons and were denied the accommodation, despite the department allowing medical exceptions to the "zero tolerance" policy. *Id.* The court drew from *Lukumi*, stating that "categorical exemptions for individuals with a secular objection but not for individuals with a religious objection" was particularly concerning. *Id.* (citing *Lukumi*, 508 U.S. at 542) ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.") Because the department provided medical exemptions but not religious exemptions, the court applied strict scrutiny.

Here, Vermont's foster parent licensing scheme creates a similar system of exemptions. First, the entire system by which Vermont licenses foster parents is inherently built on discretion and individualized assessments. Indeed, "a distinctive feature of the foster care licensing process is the licensor's subjective assessment of various criteria." *Blais v. Hunter*, 493 F. Supp. 3d 984, 999 (E.D. Wash. 2020). Licensors must make subjective determinations about whether prospective foster parents demonstrate sound judgment, knowledge of child and adolescent development, healthy patterns of social and interpersonal relationships, and various other criteria. Vermont applied this discretion in denying foster parent licenses to the Wuotis and the Gantts, stating that they had not demonstrated knowledge of childhood development and were not able to meet the physical, emotional, developmental, and educational needs of each foster child (despite having been found to do so in the past). This type of ad hoc determination of subjective, discretionary criteria is exactly what *Fulton*, in the same foster care context, described as rendering a policy not generally applicable.

The State also maintains discretion in how it applies its non-discrimination policies in licensing foster parents. When prospective

foster parents rate themselves on the lower end of the scale on whether they would be accepting and supportive of an LGBTQ foster child, licensors work with those families, and "many such applicants are ultimately licensed." *Wuoti v. Winters*, No. 2:24-CV-614, 2025 WL 569909, at *2 (D. Vt. Feb. 20, 2025). Licensors similarly "worked with" the Wuotis and the Gantts to determine whether and how they could "increase their responses to a four or a five." *Id.* at *3. Licensors ultimately determined that they should not be licensed. Despite the State's assertion that the reasons for the applicant's discomfort with LGBTQ children are not considered, licensors necessarily must make discretionary and case-by-case assessments to determine whether that applicant meets the anti-discrimination requirement. Some applicants are ultimately licensed, and some are not. Licensors ultimately "'decide which reasons for not complying with the policy are worthy of solicitude' on an ad hoc basis." *FCA*, 82 F.4th at 687 (quoting *Fulton*, 593 U.S. at 537).

The licensing scheme, on its face, also includes a system of individualized exemptions. The licensing rules state that foster parents cannot discriminate against a foster child based on race, religion, color,

national origin, sex, sexual orientation, gender identity, age, or disability. But directly below that rule, the policy clarifies that applicants cannot be denied a license based on their inability to care for children of a certain age or disability. The licensing scheme thus makes exceptions to its own anti-discrimination rule, picking and choosing which characteristics applicants can "discriminate" against and which ones they cannot. This provision creates "categories of selection [that] are of paramount concern," *Lukumi*, 508 U.S. at 542, allowing the State to "decid[e] that secular motivations are more important than religious motivations," *Newark Lodge*, 170 F.3d at 365. In other words, the State has decided that granting secular exemptions based on a foster child's age or disability is acceptable while granting religious exemptions based on a foster child's sexual orientation or gender identity is not. So despite including "broad and comprehensive policies forbidding discrimination," *FCA*, 82 F.4th at 687, the licensing scheme nevertheless does not do so without exception. And while "[a]nti-discrimination laws and policies serve undeniably admirable goals, [] when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned." *Id.* at 695.

The licensing scheme also, by its terms, allows general variances for all but three specifically listed rules (one of which is the anti-discrimination rule, but see above). The district court stated that because the variances do not apply to "the Rules that formed the basis for Plaintiffs' license denials," those exemptions are not relevant to the generally applicable inquiry. But the district court discounted the fact that the anti-discrimination rule, despite explicitly not allowing for a variance, has its own exceptions. The court also failed to consider that the general variance rule demonstrates an overall system of exemptions contemplated by the foster parent licensing scheme. And as discussed below, the general variance provision undermines the State's asserted interest in protecting the health and welfare of foster children. *See infra* p. 18.

Because Vermont's foster parent licensing scheme contains a mechanism for individual exceptions, it is not generally applicable and thus subject to strict scrutiny.

B. The licensing scheme is not generally applicable because it treats a comparable secular activity more favorably than religious exercise under *Tandon*.

Government policies or practices are not generally applicable when they "treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original). When courts determine comparability between religious and secular activity, the activities must be "judged against the asserted government interest that justifies the regulation at issue." *Id.* "Comparability is concerned with the risks various activities pose . . . ." *Id.* Thus, religious and secular acts are "comparable" if they "undermine[] the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534.

The Supreme Court's decision in *Church of Lukumi Babalu Aye v. Hialeah* illustrates this analysis. There, the City of Hialeah adopted several ordinances prohibiting animal sacrifices—a practice of the Santeria faith. *Lukumi*, 508 U.S. at 527. The City's asserted interest in enacting the ordinances was to protect "the public health, safety, welfare, and morals of the community." *Id.* at 528. But the ordinances did not regulate other secular activities that undermined that interest in a similar way. For example, the ordinances did not regulate hunters'

disposal of their kills or improper garbage disposal by restaurants, both of which presented a similar risk. *Id.* at 544–45. Because the ordinances treated secular conduct more favorably than comparable religious activity, the Court concluded that the ordinances were not generally applicable.

The Court performed a similar analysis in *Tandon v. Newsom*. In *Tandon*, the State of California regulated in-home gatherings during the COVID-19 pandemic, limiting gatherings to three households. *Tandon v. Newsom,* 992 F.3d 916, 917 (9th Cir.), *disapproved in later proceedings*, 593 U.S. 61 (2021). When California residents challenged the laws barring them from meeting in their homes for religious purposes, the Ninth Circuit held that the regulations were generally applicable because they applied to all in-home gatherings, whether religious or secular. *Id.* at 925. But the Supreme Court disagreed, pointing out that the State regulated commercial, secular gatherings with a less restrictive standard. *Tandon,* 593 U.S. at 63. This, the Court reasoned, undermined the State's interest in protecting against COVID-19 transmission. *Id.* at 63–64. The Court explained that the regulations must be "judged against the asserted government interest that justifies the regulation at issue,"

meaning "the risks various activities pose, not the reasons why people gather." *Id.* at 62. Thus, the Court concluded that the regulations were not generally applicable.

Vermont's foster parent licensing scheme treats comparable secular activity more favorably than religious exercise. As stated above, the licensing rules expressly prohibit foster parents from discriminating against foster children based on race, religion, color, national origin, sex, sexual orientation, gender identity, age, or disability. The rules further claim that there are no exceptions from this rule. But directly below this rule, an exception exists—applicants shall not be denied a license solely based on inability to care for children of a certain age or children with special needs. Thus, the rules expressly place a potential foster parent's inability to house foster children of a certain age or special need ahead of other types of inabilities. In other words, the State treats these secular inabilities more favorably than a religious inability to affirm a foster child's sexual orientation or gender identity.

These two activities undermine the State's asserted interest in similar ways. The district court below identified interests in "the protection of minor children" and "the health and welfare of foster

children . . . ." *Wuoti*, 2025 WL 569909, at *8. The State attested that "[r]emoval of an LGBTQ foster child from their placement specifically because of their LGBTQ identity is extremely damaging to their psychological and physical safety, mental health, well-being, and normalcy." *Id.* at *9. Because of this assertion, the court focused primarily on a child's health and welfare due to *removal* of the child after placement, stating that focusing on original placement "ignore[d] the potential for a child to be placed and, post-placement, change their sexual identity in a material way." *Id.* But the court failed to consider that foster children may be removed from their foster homes due to other characteristics. For example, foster parents may originally take in a child, only to discover later that the child had a latent special need they could not accommodate. According to the licensing rules, the inability to support the child with a special need would not bar the applicants from receiving a license. But the inability to support a child's sexual orientation or gender identity would bar them from receiving a license. Both situations pose a similar risk to the child's mental health and well-being, *see Tandon,* 593 U.S. at 62, but only the secular exception is acceptable under the licensing scheme.

The State's asserted interests are also undermined by the secular exemptions contained in the general variance rule. Again, the general variance rule allows the state licensing authority to grant a variance from almost any specific rule. This includes rules related to whether the licensee has been convicted of a criminal offense, the number of foster children that can be placed in one home, the age of the caregivers, and child discipline. The State has even shown a willingness to place foster children in homes that were not licensed at all, thereby making even the requirement to be licensed subject to discretion. This pattern of exemptions undermines the State's asserted interests in protecting the health and welfare of foster children in the same way—if not more so—as granting a religious exemption to the anti-discrimination rule.

To the extent the State attempts to narrowly define its interest as protecting LGBTQ youth specifically, or distinguish comparators, it still loses under *Tandon*. There, in finding the COVID-19 gathering restrictions generally applicable, the Ninth Circuit stated that in-home gatherings and public, commercial gatherings were not comparable. *Tandon*, 992 F.3d at 925. It attempted to distinguish them based on the degree of alleged severity of potential COVID-19 transmission, stating

length of conversation and time might be more prolonged in a residential setting than a commercial setting. *Id.* But the Supreme Court rejected these distinctions. It looked more broadly at the greater interest of preventing COVID-19 transmission and how the commercial exceptions undermined this interest. *Tandon*, 593 U.S. at 63. The Court also stated that the Ninth Circuit "did not conclude that [the commercial] activities pose[d] a lesser risk of transmission than *applicants'* proposed religious exercise at home." *Id.* (emphasis in original).

So too here. The district court did not address the comparator issue and whether allowing exceptions under the other rules would pose a lesser risk to the health and safety of foster children than allowing the Wuotis and the Gantts an exemption. And under *Tandon*, the court must require the State to explain why it could not safely permit these specific plaintiffs an exemption while allowing the other exemptions. *See id.* at 64. The State cannot "assume the worst" when people engage in religious exercise, but "assume the best" when people engage in secular conduct. *See id.*

While only one secular comparator is needed to trigger strict scrutiny under *Tandon*, the litany of examples show how flexible the

foster parent licensing authority can be in accommodating individual applicants—except for the Plaintiffs. As *Tandon* explains, the relevant comparison is between the impact on the State's asserted interests, not the reasons why one applicant may require an exemption from any particular rule. Many licensing rules from which the State allows exemptions or variances are considered important: "discriminating" based on age or disability, how to discipline a child, the criminal history of the applicant, the capacity of the foster home, and whether the home is licensed at all. And yet in all of these contexts, the State recognizes that foster parenting is not one-size-fits-all, and thus permits secular exceptions. Because Vermont's foster parent licensing scheme treats secular conduct more favorably than religious conduct, the scheme is not generally applicable and thus triggers strict scrutiny.

II. Vermont's foster parent licensing scheme fails strict scrutiny under the Free Exercise Clause.

"A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.* The

government cannot "rely on broadly formulated interests" "at a high level of generality," but must specify "the asserted harm of granting specific exemptions to particular religious claimants." *Id.* (citing *Gonzales v. O Centro*, 546 U.S. 418, 431 (2006)). In other words, the question is not whether the State has a compelling interest in enforcing its non-discrimination policy generally, but whether it has such an interest in denying an exception to the Wuotis and the Gantts specifically. *See id.*

The district court, without much discussion, accepted that the government has a compelling interest in the protection of minor children. *Wuoti*, 2025 WL 569909, at *8. In so doing, the court cited a case rooted in the Due Process Clause, not the Free Exercise Clause. *Id.* (citing *Wilkinson ex. rel. Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999)). While this broadly stated interest may be compelling in a Due Process Clause analysis, the Supreme Court has explicitly rejected such a broadly stated interest in the Free Exercise Clause context. In *Fulton*, for example, the Supreme Court rejected the City's broadly-asserted interests in "maximizing the number of foster families, protecting the City from liability, and ensuring equal treatment of prospective parents and foster children." *Fulton*, 593 U.S. at 541. While acknowledging some

of these interests as "weighty," the Court concluded that the City had failed to show how granting an exception to the Catholic adoption agency would put those goals at risk, especially in light of the system of exemptions already in place. *Id.* at 541–42. Thus, the interests were not sufficiently compelling.

So too here. Again, the State simply asserts broad interests in "the protection of minor children" and "the health and welfare of foster children . . . ." *Wuoti*, 2025 WL 569909, at *8. While these are certainly "weighty" goals, they are insufficiently compelling in this context. Under *Fulton*, the State is required to show how granting an exemption to the Wuotis and the Gantts undermines these interests more than granting the exemptions and variances already in place. The district court below did not hold the State to that burden.

Vermont's foster parent licensing scheme also fails the narrow tailoring requirement to satisfy strict scrutiny. "The least-restrictive-means standard is exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Holt v. Hobbs*, 574 U.S. 352, 364–65 (2015) (cleaned

up). Put another way, if "the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541.

Completely excluding from becoming foster parents those who cannot affirm a child's sexual orientation or gender identity for religious reasons cannot be the least restrictive means for any legitimate interest. The State could implement alternative methods of achieving its interests that do not burden the Wuotis' and Gantts' religious exercise. For example, the State could address these concerns at the placement stage rather than the licensing stage. *See Blais*, 493 F. Supp. 3d at 1000. The foster child placement mechanism already allows the State to make individual assessments to ensure it places children with the best-suited foster parents. Thus, the State does not have to give blanket refusals of foster parent licenses to applicants like the Wuotis and the Gantts. It could simply place foster children with those who are the best fit, like it does within the usual placement process. For example, it could only place infants and toddlers with them who do not require affirmation of gender identity or sexual orientation. But ultimately, it is Vermont's burden to show "alternative measures . . . would fail to achieve the government's

interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The court must require them to do so.

Further, the previously discussed system of exceptions shows the underinclusivity of the licensing scheme. Underinclusiveness "is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact compelling." *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022) (quotations omitted). The licensing scheme not only grants general variances to the vast majority of licensing rules—including whether to require a license at all to house a foster child—the scheme also allows exemptions to the anti-discrimination rule. *See supra* pp. 16–18. This overall system of exemptions makes the denial of a foster parent license in this situation underinclusive, requiring a determination that the government fails strict scrutiny.

Because the district court did not hold Vermont to the appropriate level of scrutiny, and Vermont fails to meet that burden, this Court must reverse.

CONCLUSION

For these reasons, the Court should reverse the district court decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tiffany D. Dunkin, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,688 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f);
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font, size 14.

June 5, 2025

/s/ Tiffany D. Dunkin

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2025, this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

June 5, 2025

/s/ Tiffany D. Dunkin

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