IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MICHAEL and CATHERINE BURKE,

Plaintiffs,

v.

KATE WALSH, in her official capacity as Secretary of the Massachusetts Executive Office of Health and Human Services, *et al*.

Defendants.

Civil Action
No. 3:23-cv-11798-MGM

PLAINTIFFS' RESPONSE TO DEFENDANTS' PARTIAL MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The individual defendants violated clearly established law, and the claims against them should go forward. "[I]n the context of foster care services, discrimination inflicts [ ] social and dignitary harms on prospective foster parents who have made the deeply personal decision to welcome a vulnerable child into their home."[1] That's the official legal position of Massachusetts. But Defendants have inflicted these same social and dignitary harms on Mike and Kitty Burke. The Burkes pleaded all they need to establish liability.[2]

The Burkes are a loving couple who are willing to foster or adopt hard-to-place children, such as sibling groups and children with special needs. That's important because Massachusetts is in desperate need of more foster homes. It has gone so far as to house children in the Department of Children and Family's (DCF) offices and in hospitals for months on end. Defendants acknowledged the Burkes' significant strengths as potential foster parents. Nevertheless, Defendants denied the Burkes a foster care license solely "[b]ased on this families [sic] beliefs about children who identify as LGBTQIA+[.]" Compl. Ex. 2 at 15. Defendants denied that license because the Burkes are Catholics who believe what the Catholic Church teaches about sex, gender, and marriage. Defendants applied DCF's imprimatur to overt religious discrimination, excluding the Burkes because "their faith is not supportive and neither are they." Compl. Ex. 1 at 12.

This violates state law, DCF policy, and the First Amendment. Defendants' unlawful discrimination not only excluded the Burkes, but would exclude many other religious couples whose beliefs on gender and sexuality would need to be "renounce[d] in order to participate in an otherwise generally available public benefit program, for which [they are] fully qualified." *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 466 (2017). Such religious discrimination "is odious to our Constitution." *Id.* at 467. It has long been clearly established that

---

[1] Amicus Brief of Massachusetts, et al. at 19, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5074341, at *19.

[2] "Defendants" refers collectively to the individual capacity defendants.

"discriminat[ing] against some or all religious beliefs" violates the "minimum" protections "of the Free Exercise Clause." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993).

Defendants attempt to sidestep their own discrimination, along with most of the Burkes' claims. First, Defendants incorrectly claim improper group pleading. But the unlawful action at issue, the denial of the Burkes' foster care license, was the joint decision of Defendants' License Review Team (LRT). Nine of the ten named individual defendants were members of the LRT, and one of those nine personally gave the final sign off. The Burkes have pleaded more than enough to give each individual defendant notice of the claims against them. Second, Defendants raise qualified immunity, but fail to even offer an argument on four of the Burkes' five claims—ignoring the First Circuit's admonition that qualified immunity is claim-specific. Their motion should be denied on four of the claims for that reason alone.

Regardless, on all the Burkes' claims, the law is clearly established. Before Defendants' decision, the unanimous Supreme Court had already prohibited the exclusion of religious foster agencies because of their religious practices on marriage and sexual orientation. Indeed, under *Fulton v. City of Philadelphia* and other clearly established law, DCF's policies are not neutral or generally applicable because they are riddled with discretion, exceptions, and individualized assessments. Here, they were applied with rank religious discrimination. This "fall[s] well below the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543.

Defendants do not need a case with perfect factual parallels to tell them that government officials can't engage in religious discrimination. The Supreme Court has repeatedly prohibited such discrimination. The motion should be denied and the case permitted to proceed in full.

STATEMENT OF FACTS

Michael (Mike) and Catherine (Kitty) Burke are lifelong residents of the Springfield, Massachusetts area. Compl. ¶ 33. They have known each other since childhood, when they met in a "mommy and me" swim class. *Id.* As an adult, Kitty went on to work as a substitute teacher and as a paraprofessional, where she helped children with special needs. Compl. ¶ 34. Mike served in the Marine Corps and was honorably discharged after a deployment in Iraq. Compl. ¶ 37. Mike

and Kitty have found purpose, meaning, and comfort in their shared Catholic faith. Compl. ¶¶ 36, 39. Both were raised in the Catholic Church, and they hold Catholic teachings close to their hearts. *Id.* Mike is an organist, and Kitty a cantor, or vocalist, for the Diocese of Springfield. *Id.*

Due to various health challenges, the Burkes knew it could be difficult for them to have children, and they decided to pursue adoption. Compl. ¶¶ 42-43. They completed a home study through a private adoption agency, and the agency recommended that they be approved as adoptive parents. Compl. ¶¶ 43-44. But private adoption proved too expensive, and the Burkes had to discontinue the process before they could be matched with a child. *Id.* ¶ 35. So the Burkes explored becoming foster parents through DCF. Compl. ¶ 45.

Mike and Kitty did their homework. They learned about the child welfare system and the purpose behind foster care. Compl. ¶ 46. They understood that, as foster parents, they would seek reunification of the family, and they were willing to accept their role as temporary caregivers. *Id.* But the Burkes were also open to adopting children that could not be reunited with their birth families, including groups of siblings. Compl. ¶ 47. And they were happy to welcome children of any racial, cultural, or ethnic background, as well as children with certain special needs. Compl. ¶¶ 50-51. In all respects, the Burkes were an ideal foster family.

Massachusetts desperately needs more foster families. For some time, Massachusetts has not had sufficient foster care homes or facilities to meet the needs of the children in its care. DCF has repeatedly had to house children in its own offices—which are not equipped for overnight stays—because there were not enough loving homes. Compl. ¶ 58. DCF has sometimes resorted to keeping children in hospitals for months on end, even when they were not sick, because they had no other place to go. Compl. ¶ 55.

Someone who wishes to become a foster, or "resource parent," must apply with DCF. They must undergo hours of training and personal interviews, a home visit and assessment from a social worker, and then be measured on 17 different subjective criteria, all proved "to the satisfaction of the Department." 110 CMR 7.100, 7.103, 7.104, 7.107 (application process). Contractors may perform parts of the study, but the end licensing decision is DCF's. *See id.* After the study, DCF

convenes a meeting of the LRT, which consists of the social worker who assessed the family and several DCF supervisors and managers. *See* Compl. Ex. 1 at 3-5. The LRT decides whether a family should be licensed. *See id.* The LRT then adds their notes and any amendments to the family's file and sends the final version to a supervisor for approval. *See id.*; 110 CMR 7.107(3). Finally, DCF notifies the family of the decision. *See* 110 CMR 7.107(6).

After a family is licensed, DCF enters into a written agreement with the family, which may include "limitations on the identity or individual characteristics of children who may be placed in the foster/pre-adoptive home." *See* 110 CMR 7.111(4). DCF makes decisions about placements, but before any placement occurs, DCF must "provide the prospective foster/pre-adoptive parent[s] with sufficient information about the child to enable the foster/pre-adoptive parent[s] to determine whether to accept placement of the child." 110 CMR 7.112(1).

The Burkes went through the entire application process. At each stage, DCF commended the Burkes for their dedication, resiliency, and strengths as potential foster parents. *See, e.g.*, Compl. Ex. 1 at 3, 12-13, 14; Compl. Ex. 2 at 15. In particular, DCF representatives noted the Burkes' "solid understanding of how trauma can effect [sic] people," Compl. Ex. 1 at 14; their thorough research and understanding of adoption and foster care and their role in reunifying families, *see id.* at 3, 12-13; and their willingness to parent children with a variety of needs, *see id.* at 3.

In October 2022, DCF contracted with 18 Degrees to perform a license study for the Burkes, which included additional in-depth interviews with the couple. Linda-Jeanne Mack, the social worker from 18 Degrees, asked the Burkes several pointed questions about children who identify as LGBTQ. Compl. Ex. 2 at 10-12. In response, the Burkes explained that they adhere to the Catholic Church's teachings regarding gender, marriage, and sexuality. They emphasized that they would love and welcome any child placed in their home but would not change their own religious beliefs. *Id*. at 11-12. Mack noted to DCF that "[t]he couple does have a lot of strengths … and really seems to understand adoption/foster care." Compl. Ex. 1 at 12-13. But she also acknowledged her own "bias" when discussing the Burkes' Catholic beliefs, stating "their faith is not supportive and neither are they." *Id.* Her official report stated that, when it came to LGBTQ

foster children, the Burkes "are heavily involved in their Catholic Church and cite their religious views as their primary reason for seeing LGBTQIA++ individuals in this way," Compl. Ex. 2 at 15. Despite this concern, she ultimately "did recommend approval with conditions, specifically around religion and LGBTQIA++ related issues." Compl. Ex. 1 at 9.

On March 31, 2023, after receiving this report, DCF convened a meeting of the LRT on March 31, 2023. Compl. Ex. 1 at 3-5. Every individual capacity defendant except Laurie Sullivan was part of the LRT and was present at that meeting. Compl. ¶ 134. After that meeting, the LRT added its notations to Mack's report and adopted it as its own. *See* Compl. Ex. 2 at 15. The LRT noted internally that the Burkes' strengths included their "willingness to parent a child w/ moderately significant medical, mental health and behavioral needs, their openness to maintaining birth family connections and resiliency regarding their respective mental health." Compl. Ex. 1 at 3. Despite these many strengths, the LRT decided to deny the Burkes' application, rather than granting it with conditions, as Mack had recommended. Their reason was clear: "Issue(s) of concern for which the couple's license study was denied is based on the couple's statements/responses regarding placement of children who identified LGBTQIA." *Id.* The LRT concluded: "Based on this families [sic] beliefs about children who identify as LGBTQIA+ and after a careful review of this assessment by the regional DCF licensing and training review team, the Department is unable to issue a license for them to foster/adopt at this time." Compl. Ex. 2 at 15. The LRT gave no other reason. Mike and Kitty could be welcoming a foster child into their home today, but Massachusetts has excluded them from fostering *any* children.

LEGAL STANDARD

When reviewing a motion to dismiss, the court must "accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences therefrom in the plaintiff's favor." *Legal Sea Foods v. Strathmore Ins.*, 36 F.4th 29, 34 (1st Cir. 2022) (cleaned up). "Dismissal of a complaint pursuant to Rule 12(b)(6) is inappropriate if the complaint satisfies Rule 8(a)(2)'s requirement of 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 11-12 (1st Cir. 2011). "A 'short and

plain' statement needs only enough detail to provide a defendant with 'fair notice of what the … claim is and the grounds upon which it rests.'" *Id.* As to qualified immunity, on a motion to dismiss, a court must ask "whether the facts alleged, viewed in the light most favorable to the complaining party, show that the [defendants'] conduct violated some constitutional right." *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004).

ARGUMENT

I. The Burkes have sufficiently pleaded individual involvement.

The Burkes have adequately pleaded the personal involvement of each of the nine defendants who were members of the LRT.[3] Like all other claims, a civil rights claim is sufficiently pleaded if it gives each defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The First Circuit recently expressed "doubt" about the "argument that the complaint's failure to specify between the two defendants should necessarily result in dismissal." *Rodriguez-Rivera v. Allscripts Healthcare Sols.*, 43 F.4th 150, 172 (1st Cir. 2022). The court there explained that "[c]ertain information … may often be unavailable to the plaintiff at this early stage of litigation," making more granular allegations impossible, and reiterated "the Supreme Court's call to 'draw on … judicial experience and common sense' as [courts] make a contextual judgment about the sufficiency of the pleadings." *Id.* (first quoting *Ocasio-Hernandez*, 640 F.3d at 16, and then citing *Zond v. Fujitsu Semiconductor*, 990 F. Supp. 2d 50, 53-54 (D. Mass. 2012)). Multiple courts have similarly held that "group pleadings are not, *prima facie*, excluded by Rule 8(a)" and can give each defendant proper notice of the claims against them. *Zond*, 990 F. Supp. 2d. at 53; *see also, e.g.*, *Cota v. U.S. Bank Nat'l Ass'n*, No. 15-cv-486, 2016 WL 922784, at *6 (D. Me. Mar. 10, 2016) (holding group allegations referring to "Defendants" gave sufficient notice of the claims against

[3] Plaintiffs do not oppose the dismissal, without prejudice, of personal capacity claims against Laurie Sullivan, as a supervisor. At this juncture, plaintiffs do not have knowledge sufficient to allege her personal participation in the Burkes' denial.

each defendant). Thus, "[a]t the motion to dismiss stage a complaint generally will only be dismissed where it is 'entirely implausible' or impossible for the grouped defendants to have acted as alleged." *Zond*, 990 F. Supp. 2d at 53. Where "it can be reasonably inferred that each and every allegation is made against each individual defendant," Rule 8(a) is satisfied. *Id.* at 53-54.

The Burkes have met that standard. The complaint alleges that each of the nine Defendants (Anna Moynahan, Theresa Harris, Dawn Sweetman, Tywanna Jones, Caitlyn Levine, Euphemia Molina, Stacy Clark, Luz Estrada, and Angel Emerson) were "member[s] of the Licensing Review Team who made the decision to deny the Burkes' license" and were "directly involved in the Burkes' license denial." Compl. ¶¶ 24-32. Later, the complaint reiterates that each of these nine defendants were a part of the LRT and that, "[a]s members of the LRT, each of these individuals was personally and directly involved in the decision on the Burkes' license." Compl. ¶¶ 134-35. The Burkes attached corroborating documents with information on the decisive LRT meeting and its outcome. *See* Compl. Ex. 1, at 3-5. And Defendants acknowledge that the LRT is responsible for licensing decisions, including the Burkes'. Mot. at 5-6.

This set of facts is a far cry from the cases on which Defendants rely, with a prisoner indiscriminately making "bald assertions" against various police officers, *McCants v. O'Leary*, No. 13-cv-12505, 2013 WL 5726144, at *3 (D. Mass. Oct. 17, 2013), or pleadings that were "incoherent or illogical." *Holmes v. Allstate Corp.*, No. 11-cv-1543, 2012 WL 627238, at *7 (S.D.N.Y. Jan. 27, 2012), *report and recommendation adopted*, No. 11-cv-1543, 2012 WL 626262 (S.D.N.Y. Feb. 27, 2012). Nor does the complaint rely upon respondeat superior. *See* Mot. at 14-15. Here, the LRT was vested with the responsibility to meet as a team, review the Burkes' file, and decide whether the Burkes should be licensed. Compl. ¶¶ 89-94; *accord* Mot. at 5. The Defendants were all members of the LRT. Compl. ¶ 134. The LRT met and recommended denial. Compl. ¶¶ 133, 138; Compl. Ex. 1 at 3. Defendant Moynahan then formally approved the denial. *See* Compl. Ex. 1 at 3. Every reference to the actions of the LRT in the complaint thus refers to

the concerted actions of these nine individuals. *See Zond*, 990 F. Supp. 2d at 53-54.[4]

The Burkes have therefore alleged that each individual defendant, acting as part of the LRT, is responsible for the denial of their license. Compl. ¶¶ 134-35. Each defendant "may argue at a later stage in the litigation that Plaintiffs cannot make the required evidentiary showing" to support individual liability. *Cota*, 2016 WL 922784, at *6. But at this early stage of the litigation, the Burkes have satisfied their burden of giving each individual defendant proper notice of the claims against them for the actions that they took as part of the LRT. *See id.*

II. Defendants failed to raise qualified immunity arguments regarding Counts II-V.

The defense of qualified immunity is "claim-specific." *See Iacobucci v. Boulter*, 193 F.3d 14, 22 (1st Cir. 1999) (holding that the failure to "test the bona fides of" one claim "means that Boulter could not have raised a qualified immunity defense *as to that claim* at the summary judgment stage"); *see also Rivera-Garcia v. Roman-Carrero*, 938 F. Supp. 2d 189, 199 n.10 (D.P.R. 2013) ("'[T]he scope of the protection afforded by the doctrine of qualified immunity is claim-specific,' and no defendant raises it against the other claims; thus, it is not necessary to consider it again." (quoting *Iacobucci*, 193 F.3d at 22)). In *Haley v. City of Boston*, the First Circuit rejected defendants' attempt to make the qualified immunity arguments on one claim apply to a separate claim: "it is the party suing, not the party sued, who enjoys the right to frame the claims asserted in a complaint." 657 F.3d 39, 49 (1st Cir. 2011). The court went on to apply qualified immunity to one claim, but not the other. *Id.* Here, Defendants ask the court to dismiss the individual capacity claims against them, but their only argument concerns the Supreme Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *See* Mot. at 20-22. *Fulton* lays out the constitutional principle for *one* of the Burkes' *five* claims. *Compare* Compl. ¶¶ 155-71 (Count I, *Fulton*-based claim), *with* Compl. ¶¶ 172-211 (Counts II-V, based on other theories).

[4] Defendants misstate the rule of *White v. Pauly*, claiming that allegations must be "'particularized' to each Defendant," Mot. at 19, when in fact the decision says the law must be "'particularized' to the facts of the case." 580 U.S. 73, 79 (2017). For all the reasons discussed below, the Burkes have shown clearly established law particular to the facts and the LRT's actions.

Defendants make no argument regarding any of the Burkes' three other free exercise claims or their free speech claim. They cannot rewrite the claims asserted, or ask this Court to do the analysis for them. "Judges are not mind-readers, so parties must spell out their issues clearly, highlighting the relevant facts and analyzing on-point authority." *Rodriguez v. Mun. of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011). Defendants' failure to offer any argument on why qualified immunity ought to apply to these claims means that their motion fails as to Counts II-V, and those claims must go forward. *See Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667-68 (1st Cir. 1996) (failure to raise qualified immunity defense at pleading would "waive the defense" at that stage (quoting *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir. 1994))); *Watkins v. Healy*, 986 F.3d 648, 667 (6th Cir. 2021) ("By failing properly to assert qualified immunity in his Rule 12(b)(6) motion to dismiss, Healy has forfeited this issue.").[5]

III. Defendants are not entitled to qualified immunity for violating clearly established law.

None of the individual defendants is entitled to qualified immunity because, taking the alleged facts in the light most favorable to the Burkes, each individual defendant violated the Burkes' clearly established First Amendment rights. Qualified immunity protects government officials from personal liability only when (1) they did not violate "a statutory or constitutional right," or when (2) the right was not "'clearly established' at the time of the challenged conduct." *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 43 (1st Cir. 2016).

A "clearly established" right is one that is "sufficiently clear" that "every reasonable official would have understood that what he is doing violates that right." *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "[A] general constitutional rule already identified in the decisional law may apply with obvious

[5] Even if Defendants' argument regarding *Fulton* could be considered a stand-in for each of the Burkes' other free exercise claims, Defendants make no free speech arguments whatsoever. Thus, at a minimum, the Burkes' free speech claim must be allowed to proceed. *Cf. Fulton*, 141 S. Ct. at 1882 ("In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause.").

clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *El Dia v. Rossello*, 165 F.3d 106, 109 (1st Cir. 1999) (cleaned up); *accord French v. Merrill*, 15 F.4th 116, 126-27 (1st Cir. 2021) ("[G]eneral statements of the law may give fair and clear warning to officers so long as, in the light of the pre-existing law, the unlawfulness of their conduct is apparent." (cleaned up)).

Here, the Burkes have properly alleged that Defendants' conduct violated their clearly established First Amendment rights. The Burkes have brought four separate free exercise claims and one free speech claim. *See* Compl. ¶¶ 155-211. For each claim, the Burkes have pointed to Supreme Court precedent laying out the clear and particularized First Amendment law that Defendants violated when they denied the Burkes a license based solely on their religious beliefs.

Supreme Court caselaw establishes several ways in which a policy or government action can transgress the Free Exercise Clause. The *en banc* Ninth Circuit recently explained the law as it applies since *Fulton* and *Tandon* were decided:

> Distilled, Supreme Court authority sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny. First, a purportedly neutral "generally applicable" policy may not have "a mechanism for individualized exemptions." Second, the government may not "treat … comparable secular activity more favorably than religious exercise." Third, the government may not act in a manner "hostile to … religious beliefs" or inconsistent with the Free Exercise Clause's bar on even "subtle departures from neutrality." The failure to meet any one of these requirements subjects a governmental regulation under strict scrutiny.

Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 686 (9th Cir. 2023) (en banc) (internal citations omitted). Those "bedrock" First Amendment principles are the foundations for three of the Burkes' free exercise claims—Counts I-III. For decades, the Supreme Court has described these rules—neutrality and general applicability—as "essential," *Lukumi*, 508 U.S. at 543, "basic principle[s]" that "have long guided" the Supreme Court, *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2254 (2020) (collecting cases). "And here, the individual-capacity defendants do not identify a neutral, generally applicable basis for their treatment of the [Burkes]. Nor is such a reason apparent from the pleadings." *Lasche v. New Jersey*,

No. 20-cv-2325, 2022 WL 604025, at *5 (3d Cir. Mar. 1, 2022) (reinstating claim and remanding for consideration of qualified immunity).[6]

The Burkes' fourth free exercise claim arises from the Supreme Court's repeated admonition that the government cannot "impos[e] 'special disabilities on the basis of religious views'" by conditioning participation in a government program on the abandonment of religious beliefs. *Trinity Lutheran*, 582 U.S. at 460-61; *see also Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022). And the free speech claim relies on what the Supreme Court has long called a "fixed star in our constitutional constellation," which is "that 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). That's especially so in the licensing context, where the Supreme Court has "frequently" "condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity," especially religious speech. *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 96-97 (1972) (collecting cases). As the Supreme Court said just last term, its "cases have recognized time and time again" that "[a] commitment to speech for only *some* messages and *some* persons is no commitment at all." *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023); *see id.* at 601-02 (tracking precedents from "[e]ighty years ago" to today).

Under these Supreme Court precedents, the Burkes' First Amendment rights were clearly established at the time that Defendants denied the Burkes a license. Defendants' decision to discriminate against the Burkes because of their religious beliefs violated every single one of these established principles. Defendants are therefore not entitled to qualified immunity.

A. Defendants' discrimination burdened the Burkes' religious exercise.

The unanimous Supreme Court has held that states must accommodate religious exercise when

[6] Defendants cite the subsequent district court decision in *Lasche*, but that was based upon pre-*Fulton*, pre-*Tandon*, pre-*Carson* caselaw, and was devoid of the *Masterpiece*-style disparagement of religious beliefs seen here. *See Lasche v. New Jersey*, No. 18-cv-17552, 2022 WL 17250731, at *6 (D.N.J. Nov. 28, 2022) ("I cannot find that, in 2018," the defendants violated "clearly established First Amendment rights."). The constitutional violations here happened in 2023.

making discretionary determinations about who may participate in the child welfare system. *Fulton*, 141 S. Ct. at 1877-79. This is true even when the government is determining who may receive a government benefit or license. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding a rule that "forces [an individual] to choose between following the precepts of her religion" and participating in a government program burdens the person's religious exercise—"even though the burden may be characterized as being only indirect."); *Fulton*, 141 S. Ct. at 1876 (holding burden present even when government did not believe it was requiring plaintiff to change or abandon its beliefs in order to participate in the program). By denying the Burkes a foster care license because of their sincere religious beliefs, Defendants unquestionably burdened the Burkes' free exercise of religion. Such burdens are subject to the strictest scrutiny.

B. The law on Count I is clearly established because DCF's licensing process is a system of individualized assessments.

When the government is in the business of applying discretionary, individualized standards, it must accommodate religious exercise where possible. Multiple Supreme Court cases teach that "[a] law 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*, 141 S. Ct. at 1877 (cleaned up) (collecting cases). Where the government uses such a system, it "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Lukumi*, 508 U.S. at 537 (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990)). Defendants are administering just such a system, and they failed to take religious hardship into account here. "The Supreme Court has invalidated governmental regulation" like that many times. *See Lasche*, 2022 WL 604025, at *5.

In *Fulton*, the bedrock case on the issue, the Supreme Court considered a sexual orientation non-discrimination prohibition that had been applied to a religious foster care agency. There, the non-discrimination prohibition "invite[d]" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. The policy allowed the Commissioner of the Department of Human Services to make

exceptions to the policy in her "sole discretion." *Id*. at 1878. The Supreme Court held that the policy had to face strict scrutiny under the Free Exercise Clause because it "d[id] not meet *the requirement* of being neutral and generally applicable." *Id.* at 1877 (emphasis added). Laws are not generally applicable, and thus subject to strict scrutiny, where they employ a "'good cause' standard permitt[ing] the government to grant exemptions based on the circumstances underlying each application." *Id.* "No matter the level of deference" a government receives when administering a program, "the inclusion of a formal system of entirely discretionary exceptions" still fails the general applicability requirement. *Id.* at 1878.

The same was true in *Blais v. Hunter*, a case on all fours with this one that also recognized neutrality and general applicability in foster care are free exercise "requirement[s]." 493 F. Supp. 3d 984, 988 (E.D. Wash. 2020). There, a Washington state agency denied a couple a license to foster their own infant granddaughter after the couple said that, because of their religious beliefs, they would not support medical interventions to assist with a gender transition if the infant later developed gender dysphoria. The couple's beliefs conflicted with Washington's policy of requiring foster parents to support and affirm LGBTQ+ children. *See id.* at 990. The court concluded that Washington's policy was not generally applicable because "[t]he Department encourages licensors to consider an applicant's religious beliefs and stances on LGBTQ+ rights, and a distinctive feature of the foster care licensing process is the licensor's subjective assessment of various criteria." *Id.* at 999.

Much like Philadelphia and Washington, Massachusetts has broad discretion in how to apply its policies. At every stage of the process, DCF makes subjective determinations like a "'good cause' standard" considering "the circumstances underlying each application." *Fulton*, 141 S. Ct. at 1877. DCF considers seventeen different factors when determining whether to license a family, each of which must be demonstrated "to the satisfaction of the Department." 110 CMR 7.104(1). The regulation provides no standard for what would "satisfy" the Department, leaving it entirely to the Department's discretion. DCF has further discretion to license a family subject to conditions about which children are best matched in their home. After making a licensing decision, DCF has

discretion in deciding "limitations on the identity or individual characteristics of children who may be placed in the foster/pre-adoptive home," 110 CMR 7.111(4), and further discretion in making placements. 110 CMR 7.112. That was the option recommended to DCF by its outside contractor. Compl. Ex. 1 at 9.

If anything, the case here is stronger than that in *Fulton* because Defendants have more discretion. There, the city had created a blanket ban on rejecting foster parents based upon sexual orientation, and the agency's policy admittedly violated that ban. But the ban itself permitted exceptions and therefore was not generally applicable. *Fulton*, 141 S. Ct. at 1878-79. Here, DCF's system is not only wholly discretionary, but DCF must also comply with state laws that prohibit it from discriminating based on religion when licensing foster parents. *See* Mass. Gen. Laws ch. 119, § 23C(a)-(b)(ii); 110 CMR 1.09(3). DCF must account for a wide variety of religious beliefs and welcome families of all faiths. Under *Fulton*, DCF's decision to deny the Burkes' license must face strict scrutiny. The law was therefore clearly established that, given the high degree of discretion present in the child welfare system, Defendants could not use their discretion to exclude those with the Burkes' religious beliefs—unless they could pass strict scrutiny.

C. Defendants' actions cannot survive strict scrutiny.

Strict scrutiny is the Defendants' burden, yet they make no strict scrutiny arguments at all. Even setting aside Defendants' waiver, the Burkes have alleged more than enough to show that the Defendants cannot meet it here. "To satisfy strict scrutiny, government action 'must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.'" *Carson*, 142 S. Ct. at 1997 (quoting *Lukumi*, 508 U.S. at 546). "That standard 'is not watered down'; it 'really means what it says.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021). "The question" in a case like this "is not whether the [government] has a compelling interest in enforcing its … policies generally, but whether it has such an interest in denying an exception to [the plaintiffs]" specifically. *Fulton*, 141 S. Ct. at 1881. In *Fulton*, Philadelphia's interest in prohibiting sexual orientation discrimination was "weighty," but ultimately not compelling. *Id.* at 1882.

1. DCF has no compelling interest in excluding the Burkes.

Defendants' actions fail strict scrutiny because DCF has no compelling interest in denying the Burkes a license. Indeed, any claim that DCF has a compelling interest in excluding the Burkes runs headlong into the Department's affirmative obligation under state law to *avoid* discriminating against prospective foster parents based on their religious beliefs. The Foster Parents' Bill of Rights protects "prospective foster … parents during the application process" from discrimination, including "on the basis of religion." Mass. Gen. Laws ch. 119 § 23C(a)-(b)(ii). And state regulations prohibit DCF from "deny[ing] to any person the opportunity to become an adoptive or foster parent, on the basis of the … religion … of the person, or of the child, involved." 110 CMR 1.09(3); *see also* Compl. Ex. 3 at 13 ("The Department does not deny any adult the opportunity to become a foster family on the basis of … religion[.]"). DCF cannot have a compelling interest in excluding the Burkes based upon religious beliefs when Massachusetts has outlawed doing so.

If that weren't enough, DCF's own system of exemptions also belies any claim to a compelling interest in excluding the Burkes. The Supreme Court has explained that "a law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). When a state sets up a system of discretionary exemptions, it necessarily leaves open avenues for undermining its asserted interests. In *Fulton*, for example, "[t]he creation of a system of exceptions … undermine[d] the City's contention that its non-discrimination policies can brook no departures." 141 S. Ct. at 1882. The same is true here. The use of multiple overlapping discretionary factors, as well as express regulatory exemptions, shows that DCF's policy likewise is not compelling as applied to the Burkes. This is particularly true since DCF does not expect every foster family to be able to take on every child, but instead enters into agreements with families about which children should be placed in their home and gives families the option to decline a placement every time one is made. *See* 110 CMR 7.111(4), 7.112.[7] DCF's policies and

[7] Defendants claim that 7.111(4) "has nothing to do with the licensing decision" and is used only for "certain physical aspects of a foster parent's home." *See* Mot. at 6 n.4., 22 n.15. They cite no

its high degree of discretion show that its interest in excluding the Burkes cannot be compelling.

2. DCF's interest in child welfare is furthered by granting the license.

DCF has a weighty interest in providing supportive homes for Catholic foster children, too. As Massachusetts has previously said, "[a] broad and diverse pool of foster parents is critical to meeting each child's needs," and "excluding parents for a particular child solely on the basis of sexual orientation or another protected classification"—such as religion—"may deny the child the match best suited to his or her needs, contrary to the state mandates to focus on the best interest of the child." Amicus Brief of Massachusetts, *supra* note 1, at 18, 25. Excluding the Burkes, as well as families of other faith groups, undermines that interest. It also undermines DCF's interest in "[m]aximizing the number of foster families[.]" *Fulton*, 141 S. Ct. at 1881-82. Licensing the Burkes will "increase, not reduce, the number of available foster parents." *Id.*

3. DCF has not used the least restrictive means.

Even if DCF could show a compelling interest, it would still be required to show that it advanced that interest using the least restrictive means. This means that, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.* Here, DCF had multiple less restrictive alternatives available to it. It could accept the recommendation of the social worker who suggested "approval with conditions" related to LGBTQ children. Compl. Ex. 1 at 9. It could license the Burkes and then enter into a written agreement regarding the placement of LGBTQ children in their care. *See* 110 CMR 7.111(4), 7.112. It could rely upon its list of affirming placements when making decisions. *See* Compl. Ex. 4 at 2 (noting the list of affirming placements). It could take any sensitive issues, such as a child on puberty blockers, into consideration when making a placement decision. *See* 110 CMR 7.112(1)

---

regulatory language supporting that claim. *See id.* They admit that portions of 110 CMR 7.105 can be waived under this provision—but omit that 7.105 is a list of requirements that "a foster/pre-adoptive parent applicant must" meet "in order to be licensed as a foster/pre-adoptive parent." 110 CMR 7.105. In addition, DCF's own contractor suggested licensing with conditions around placement, suggesting that such arrangements are permissible. At this stage, the Burkes have properly alleged that Defendants had other alternatives. Clearly established law required them to use alternatives rather than burden religious exercise. *See Fulton*, 141 S. Ct. at 1881.

(requiring DCF to provide prospective foster parents "sufficient information," including "health" information and "any other special conditions or requirements" prior to placement).

Indeed, Massachusetts emphasizes the use of multiple individual factors in placement: "Such factors range from the proximity of the foster home to the child's family or school to the foster parents' capacity to meet the child's specific needs and attributes of the foster family that may benefit the child. *See, e.g.*, Mass. Gen. Laws ch. 119, § 33 ("In placing a child in family home care, the department, or any private charitable or child-care agency, shall consider all factors relevant to the child's physical, mental and moral health."). Thus, "[t]he Department has not shown that it lacks other ways to achieve its desired goal without imposing a substantial burden on the [Burkes'] exercise of religion." *Blais*, 493 F. Supp. 3d at 1000. It therefore cannot satisfy strict scrutiny. The Burkes have met their burden to show that Defendants' actions violated clearly established law as to Count I. The motion should be denied. Because Defendants did not make arguments about whether the law was clearly established on Counts II-V, those claims cannot be dismissed.

IV. Defendants forfeit dismissal on Counts II-V, but that law is also clearly established.

Defendants have failed to move on all counts and therefore the Burkes' claims under Counts II-V must proceed. To avoid any confusion, Plaintiffs will briefly explain why the law on their remaining counts is also clearly established, and thus qualified immunity does not apply.

A. The law on Count II is clearly established because DCF exempts secular conduct, but not the Burkes' religious beliefs.

The law was also clear that Defendants could not allow exemptions for secular reasons while denying an exemption for the Burkes' religious exercise. As both the First Circuit and the Supreme Court have held, "[a] law is not generally applicable if it 'treat[s] any comparable secular activity more favorably than religious exercise.'" *Lowe v. Mills*, 68 F.4th 706, 714 (1st Cir. 2023) (quoting *Tandon*, 141 S. Ct. at 1296), *cert. denied* 2023 WL 7117039 (Oct. 30, 2023). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296.

Here, the requirement that foster parents "support[] and respect[]" a child's sexual orientation

or gender identity serves two primary interests. First, this requirement works alongside each of the other requirements in the caregiver assessment to ensure that each foster family will provide a safe, stable environment that meets all of a child's needs. *See* 110 CMR 7.104. Second, DCF is responsible for protecting both foster families and foster children from discrimination. *See* Compl. Ex. 4 at 2; Mass. Gen. Laws ch. 119 § 23C(a)-(b)(ii).

DCF has proscribed the Burkes' religious beliefs while "permitting secular conduct that undermines" both of its interests "in a similar way," thus triggering strict scrutiny. *Fulton*, 141 S. Ct. at 1877. DCF regulations contain waiver provisions for multiple secular qualities considered in the caregiver assessment—including home capacity limitations, *see* 110 CMR 7.104(5) (citing *id.* at 7.105); *see also id.* at 7.105(12)(b), and legal resident status, *see id.* at 7.104(6); *see also id.* at 7.105A (waiver provision). And Defendants have admitted that, in agreements relating to child placement, they can waive at least some mandatory requirements of licensure. *See supra* n.6 (citing 110 CMR 7.111, 7.105). But DCF regulations make no similar exceptions for those whose religious exercise is deemed to conflict with standards in the caregiver assessment.

These limitations are part of the same regulation and go to the same interests as the requirement to "support[ ] and respect[ ]." Capacity limitations further the safety and well-being of children by ensuring a "family is able to meet each placed child's needs as well as those of other household members." *Id.* at 7.105. Legal status requirements further the interest in ensuring that children have a stable, secure environment that is unlikely to be disrupted by external factors, such as a foster parent's immigration status. But DCF recognizes that in some circumstances, those limitations might be waived. Thus, DCF permits waivers for secular conduct that undermines this interest, but not for the Burkes' religious beliefs.

DCF also allows secular conduct that undermines its nondiscrimination interest. Indeed, DCF (including Defendants) already works with families who may not be listed as "affirming placements" for LGBTQ children. The LGBTQIA+ nondiscrimination policy states "The Department matches children to foster families who can best meet their needs and maintains an electronic record of affirming placements that can best support the needs of LGBTQIA+ children."

Compl. Ex. 4 at 2. The fact that DCF keeps such a list demonstrates that DCF recognizes that all licensed families are not equivalent. The decision to license some families it deems not to be "affirming placements," but exclude the Burkes, is thus subject to strict scrutiny.

Defendants' actions undermine DCF's nondiscrimination interest in a second way. Defendants have multiple statutory obligations not to discriminate on the basis of religion. The Foster Parents' Bill of Rights protects "prospective foster … parents during the application process" from discrimination, including "on the basis of religion." Mass. Gen. Laws ch. 119 § 23C(a)-(b)(ii). Even prior to that bill, state regulations prohibited DCF from "deny[ing] to any person the opportunity to become an adoptive or foster parent, on the basis of the … religion … of the person, or of the child, involved." 110 CMR 1.09(3); *see also* Compl. Ex. 3 at 13 ("The Department does not deny any adult the opportunity to become a foster family on the basis of … religion."). Yet, Defendants determined that an interest in preventing hypothetical discrimination on the basis of sexual orientation outweighed its obligation to avoid discrimination based on religion, thus treating religion worse than its secular counterpart. Under *Tandon*, the law was clearly established that Defendants did not apply a generally applicable policy when they denied the Burkes' license, and therefore their actions must satisfy strict scrutiny—which they cannot do. *See supra.*

B. The law on Count III was clearly established because Defendants cannot engage in overt religious discrimination.

Defendants also engaged in blatant religious discrimination in their denial of the Burkes' application. The Supreme Court has repeatedly "made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Indeed, "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Id.* (quoting *Lukumi*, 508 U.S. at 534). Thus, where "'official expressions of hostility' to religion" accompany government conduct "burdening religious exercise … [courts] 'set aside' such policies without further inquiry." *Kennedy v.*

Bremerton, 142 S. Ct. 2407, 2422 n.1. As the Supreme Court said, "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece*, 138 S. Ct. at 1731; *see also Trinity Lutheran*, 582 U.S. at 467 (exclusion from a "public benefit" based upon religion is "odious to our Constitution … and cannot stand").

Defendants' motion makes no mention whatsoever of *Masterpiece* or the other cases prohibiting express discrimination. It has failed to move for dismissal on this basis, and for good reason. Defendants' overt religious discrimination violated clearly established law. In *Masterpiece*, Jack Phillips, the owner of a bakery in Colorado, refused to bake wedding cakes for same-sex weddings based on his religious beliefs. *Id.* at 1724. When a civil rights complaint was filed against him, members of the Colorado Civil Rights Commission disparaged Phillips' religious beliefs while adjudicating his case. *Id.* at 1729-30. One Commissioner said that Phillips could believe "what he wants to believe" but could not act on his religious beliefs "if he decides to do business in the state," which "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain." *Id.* at 1729. Another commissioner described Phillips' faith as "one of the most despicable pieces of rhetoric that people can use." *Id.* No other commissioners objected to either of these comments. *Id.* "The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires." *Id.* at 1732. This was true even if the law was otherwise neutral and generally applicable—the official decision, combined with hostility toward Phillips' religious beliefs, was a First Amendment violation. *See id.*

Likewise in this case, Defendants were "obliged … to proceed in a manner neutral toward and tolerant of [the Burkes'] religious beliefs" but utterly failed to do so. *Id.* at 1731. The outside social worker who assessed the Burkes acknowledged to DCF that she had a "bias" in assessing the Burkes' answers to her questions about LGBTQ+ children. Compl. Ex. 1 at 13. As she put it, "[the Burkes] are heavily involved in their Catholic Church and cite their religious views as their primary

reason for seeing LGBTQIA++ individuals in this way." Compl. Ex. 2 at 15. She concluded, the Burkes' "faith is not supportive and neither are they." Compl. Ex. 1 at 12.[8]

This report was sent to Defendants. Any government official, seeing an acknowledgement of bias and statements disparaging the beliefs of a particular faith group, has at least a "slight suspicion" of "animosity to religion or distrust of its practices," and therefore "must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece,* 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 547). The Defendants failed in that high duty. Despite her bias and reservations, Mack recommended *approving* the Burkes as a resource couple, with some conditions, "specifically around religion and LGBTQIA++ related issues." Compl. Ex. 1 at 9. The members of the LRT could—and should—have repudiated Mack's statements and approved the Burkes' application. Instead, they adopted the religion-based biases as their own and took them a step further. Despite recognizing the couple's many strengths, the LRT determined, "[b]ased on [the Burkes'] beliefs about children who identify as LGBTQIA+," that the Burkes could not receive a foster care license *at all*. Compl. Ex. 2 at 15; *accord* Compl. Ex. 1 at 3. ("Issue(s) of concern for which the couple's license study was denied is based on the couple's statements/responses regarding placement of children who identified LGBTQIA.").

As in *Masterpiece*, Defendants did not disavow Mack's statements, nor did they amend the study to reflect that such discrimination is prohibited by DCF. Instead, the LRT affirmed Mack's study by adopting it as DCF's own, then compounded the discrimination by excluding the Burkes entirely, on the basis of their "beliefs." *See Masterpiece,* 138 S. Ct. at 1732. The Constitution prohibits that kind of hostility, and the decision must be "set aside" without further inquiry. *Id.*; *Kennedy*, 142 S. Ct. at 2422 n.1. Defendants cannot seriously contend that it was not clearly

[8] DCF prohibits religious discrimination by state contractors: "State contractors' discrimination against potential foster parents not only harms such prospective caregivers, but also hinders the States' efforts to fulfill their obligations to our most vulnerable children." Amicus Brief of Massachusetts, *supra* note 1, at 15.

established in 2023 that government decisionmakers must avoid overt religious bias and disparagement of religious beliefs when weighing an application. But that is what they did.

C. The law on Count IV is clearly established because DCF cannot create a religious gerrymander with its licensing process.

"Clearly established law prohibits the government from conditioning the revocation of benefits on a basis that infringes constitutionally protected interests[.]" *El Dia*, 165 F.3d at 110. More specifically, the Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" by "conditioning the availability of benefits" on the religious observer's beliefs. *Carson*, 142 S. Ct. at 1996-97 (cleaned up) (collecting cases). "A law that operates in that manner … must be subjected to 'the strictest scrutiny.'" *Id.* at 1997 (quoting *Espinoza*, 140 S. Ct. at 2257).

The Burkes have alleged that Defendants violated this clearly established law by excluding the Burkes from the public foster care program because of their religious views about sex, gender, and marriage. The Burkes were otherwise completely qualified to serve as foster parents. DCF's records show that, prior to the meeting of the LRT, feedback regarding the Burkes was positive, highlighting their many "strengths" and "understand[ing of] adoption/foster care." Compl. Ex. 1 at 12; *see also id.* at 14 ("It is anticipated that they will work cooperatively with DCF throughout their adoption journey."). The agency's records reveal no other legitimate concern about the Burkes' license application. The *only* reason Defendants denied the Burkes a license was their religious "beliefs about children who identify as LGBTQIA+." Compl. Ex. 2 at 15; *accord* Compl. Ex. 1 at 3. Excluding an "otherwise eligible" family from the foster system because of their religious beliefs is a "special disabilit[y] on the basis of religious views" that the Free Exercise Clause clearly prohibits. *Trinity Lutheran*, 582 U.S. at 460-61 (quoting *Smith*, 494 U.S. at 877). The Defendants' decision is therefore subject to strict scrutiny, which it cannot pass.

D. The law on Count V is clearly established because Defendants cannot require the Burkes to espouse a certain message.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion

or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. In other words, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *accord 303 Creative*, 600 U.S. at 601-03 (2023) (collecting "[e]ighty years" of precedent).

Defendants' denial violated that core constitutional principle. Defendants determined that there is only one appropriate view to hold when it comes to matters of marriage, gender and sexuality. And because the Burkes disagree with Defendants' viewpoint, they were disqualified from receiving a foster care license. *See* Compl. Ex. 2 at 15 ("Based on this families [sic] beliefs about children who identify as LGBTQIA+ … the Department is unable to issue a license for them to foster/adopt at this time."). The Burkes were given education and materials to study in an attempt to persuade them to espouse DCF's preferred views. *See* Compl. ¶ 105. But they did not do so, and as a result Defendants denied their license to foster any child—regardless of the child's sexual orientation or gender identity. By conditioning the grant of a license on the Burkes' willingness to espouse DCF's preferred view, Defendants sought to unconstitutionally "compel affirmance of a belief with which the [Burkes] disagree[]." *Hurley*, 515 U.S. at 573. Such attempts to compel speech must survive strict scrutiny. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). As explained, Defendants' actions cannot pass that scrutiny here. And that failure was evident based on the law at the time of Defendants' actions. Thus, under clearly established law, Defendants' conduct violated the Burkes' free speech rights.

CONCLUSION

The Court should deny Defendants' partial motion to dismiss.

REQUEST FOR ORAL ARGUMENT

Given the important First Amendment issues in this case, Plaintiffs belief that oral argument would benefit the Court in its consideration of Defendants' motion.

Dated: November 30, 2023

Respectfully submitted,

/s/ Michael Gilleran
Michael Gilleran
BBO No. 192210
Fisher Broyles, LLP
75 State Street
Suite 100
Boston, MA 02109
(781) 489-5680

/s/ Lori Windham
Lori Windham
DC Bar No. 501838
William J. Haun
DC Bar No. 1024405
Benjamin Fleshman
DC Bar No. 1781280
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave, N.W. Suite 400
Washington, DC 20006
(202) 955-0095
lwindham@becketlaw.org

CERTIFICATE OF SERVICE

I certify that this document, filed through the Court's ECF system on November 30, 2023, will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Lori Windham
Lori Windham