IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MICHAEL and CATHERINE BURKE,

Plaintiffs,

v.

KIAME MAHANIAH, in his 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' REPLY IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants argue the law and the facts as they wish them to be, not the law and the facts as they are. Defendants claim that individuals cannot be held liable for following unconstitutional policies, but that is not the law. The law was clearly established in 2023 that the First Amendment protects the Burkes' religious exercise, speech, and their right not to be treated worse because of their beliefs. Each individual defendant had a clear obligation not to violate the Burkes' rights to free exercise and speech.

The facts establish that Defendants did all that and more. Defendants cannot dispute the key facts underlying each violation. On Count I, they cannot dispute that their licensing decisions are case-by-case and require judgment calls by individual defendants, so they quibble over which synonym for "judgment call" applies. On Count II, they cannot dispute that multiple families were licensed on records that appear to deviate from DCF policies, so they recast all those statements as permissible preferences or limitations and the Burkes' religious beliefs as impermissible discrimination. On Count IV, they cannot dispute that the Burkes' beliefs were openly discussed as a problem and ultimately the stated reason for the denial, so they argue that their policy requires this outcome. On Count III, they cannot dispute the hostile statements in the record, so they attempt to justify them as a matter of law. On Count V, they cannot dispute the facts giving rise to compelled speech, so they ask for a more generous legal standard. They do the same on strict scrutiny, asking the Court to relax the law and overlook inconvenient facts.

This is as clear a case of religious discrimination, hostility, and unequal treatment as this Court is ever likely to see. Summary judgment should be entered for the Burkes.

ARGUMENT

I. Defendants are not entitled to qualified immunity.

Defendants' attempts to muddle the standard for qualified immunity should be rejected. First, Defendants insist that Plaintiffs have taken issue with DCF's policies and not with Defendants' "own individual actions." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see* Defs.Opp.2. That's

wrong. Defendants conflate the *conduct* the Burkes claim was unconstitutional, denying their application because of their religious beliefs; and the *reasons* why Defendants' actions were obviously unconstitutional, which include the constitutional defects in the policies Defendants applied. The Burkes have not contended that the individual defendants drafted DCF's policies, but that they applied DCF's policies in a manner that violated the Burkes' constitutional rights.[1] Pls.Opp.8-9. In doing so, the Burkes demonstrated that all individual defendants personally participated in the licensing decision, that it was the decision of the entire LRT, and that all agreed and none objected to management. Defs.SUMF.Resp. ¶¶ 115, 125-27.

Accordingly, it is no defense to claim that the individual defendants were only "enforcing" or applying DCF policy; indeed, that simply restates the violation. *See Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31, 41 (1st Cir. 2007) ("Defendants are not entitled to rely on [a state statute's] allowance for pre-hearing deprivations because a reasonable official in their position would have known that it violates the Due Process Clause"). Defendants rely on *Doe 1 v. City of Holyoke*, *see* Defs.Opp.3, but that case does not stand for the proposition that individuals carrying out official policy are always protected by qualified immunity; it concerns whether two employees were subject to "supervisory liability" based on their own actions. 725 F. Supp. 3d 115, 129-30 (D. Mass. 2024) (denying qualified immunity where there was evidence of individual conduct).

As the Supreme Court expressly cautioned in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, "upon even slight suspicion" of "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" when "impos[ing]" or administering "laws or regulations." 584 U.S. 617, 638-39 (2018) (quoting *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993)). Since

[1] Consideration of DCF's more "systematic" actions, *e.g.*, other licensing decisions, is relevant precisely because such evidence corroborates individual defendants' admissions on the subjective, case-by-case nature of DCF's policies. *See* Defs.SUMF.Resp. ¶¶ 30-40; *see also* Pls.Br.9-12; Pls.Opp.10 (noting knowledge of individual defendants).

even applications *of statutory law* must be free of religious hostility, it follows, *a fortiori*, that applications of mere agency policy must be as well. *See id.* at 640-42 (Kagan, J., concurring).

Second, Defendants suggest that qualified immunity applies because officials cannot foresee how a court will resolve the strict scrutiny analysis. Defs.Opp.4-5. This inverts the burden: strict scrutiny is a defense, and the Defendants' burden. *See, e.g.*, *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000). If a clearly established right was violated, then Defendants have the chance to assert their various defenses. Qualified immunity does not shift this analysis; in the lone case Defendants rely upon, the Supreme Court said, "[o]n remand, the [California Department of Corrections] will have the burden of demonstrating that its policy is narrowly tailored." *Johnson v. California*, 543 U.S. 499, 515 (2005). Defendants' argument proves too much: if they were correct, a plaintiff could never overcome qualified immunity on any claim involving strict scrutiny. Courts have repeatedly rejected qualified immunity in cases where strict scrutiny applies.[2]

Finally, despite Defendants' arguments to the contrary, Defs.Opp.5-6, "it is not necessary that the particular factual scenario has previously been addressed and found unconstitutional" to clearly establish a right; "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Matalon v. Hynnes*, 806 F.3d 627, 633 (1st Cir. 2015) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). That is so because "'the state of the law'" is sufficiently settled to give Defendants "fair warning that their alleged treatment of [Plaintiffs was] unconstitutional." *Cintron v. Bibeault*, 148 F.4th 37, 52 (1st Cir. 2025). Indeed, it is sufficient "that

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[2] *See, e.g.*, *Jarrard v. Sheriff of Polk Cnty.*, 115 F.4th 1306, 1320-26 (11th Cir. 2024) (denying qualified immunity where "disapproval of [plaintiff's] volunteer ministry application can't survive strict scrutiny"); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 864-67 (8th Cir. 2021) (denying qualified immunity where "individual defendants' selective application of the Human Rights Policy against [a religious student group] was viewpoint discrimination," which "cannot survive strict scrutiny"); *Bible Believers v. Wayne County,* 805 F.3d 228, 253-55, 257-60 (6th Cir. 2015) (denying qualified immunity where defendants' conduct failed "to achieve their ends by using only those means that are the least restrictive with respect to the [plaintiffs'] First Amendment rights"); *Surita v. Hyde*, 665 F.3d 860, 870-74 (7th Cir. 2011) (denying qualified immunity where defendant's action "was a content-based exclusion that had to be narrowly tailored to effectuate a compelling governmental interest.").

under existing Supreme Court case law," it is no longer "arguable that [Defendants'] actions were constitutional." *Eves v. LePage*, 927 F.3d 575, 583 (1st Cir. 2019); *see also Matalon*, 806 F.3d at 636 (even when "precise dimensions" of law "are blurred, that circumstance does not mean every" new situation "must be regarded as arguable"). That is the case here. *See* Pls.Br.12-15.

II. Defendants violated the Burkes' clearly established free exercise rights.

A. DCF uses a system of individualized assessments (Count I).

Defendants claim it was not clearly established, in 2023, that they could not exclude a Catholic couple from participating in foster care because of their Catholic beliefs about marriage and sexuality. *Fulton* is a unanimous 2021 case about excluding a Catholic agency from foster care because of its Catholic beliefs about marriage and sexuality. *Fulton v. City of Philadelphia*, 593 U.S. 522, 526 (2021). *Blais* and *Lasche* prohibited discrimination in foster licensing even before *Fulton*. Pls.Br.12. The First Circuit has held that qualified immunity can be overcome by this combination of Supreme Court precedent stating the rule and out-of-Circuit lower-court precedent applying it in similar circumstances. *See El Dia v. Rossello*, 165 F.3d 106, 110 (1st Cir. 1999).

Plaintiffs identified three reasons why a system of individualized exemptions exists here. First, the policies on their face use vague and malleable criteria, which require case-by-case judgment and have produced conflicting results. Pls.Br.9-10; Pls.SUMF ¶¶ 30-33. Second, DCF allows families to exclude children on the basis of protected statuses at the placement stage. Pls.Br.10-11; Pls.SUMF ¶¶ 36-51. Third, DCF's files reveal widespread departures from its policy. Pfs.Br.11-12; Pls.SUMF ¶¶ 34-75. Defendants fail to refute these points.

First, they do not and cannot dispute the language of the policies themselves. *See* Defs.SUMF.Resp. ¶¶ 18, 30. Defendants claim no exemptions are permitted, but the language used ("satisfaction of the Department") is just as vague and malleable as the language the Supreme Court deems to create a system of individualized exemptions. Pls.Br.9-10; Pls.Opp.6-7. Neither *Sherbert* nor *Lukumi* found the word "exemption" in the challenged statutes themselves. *See Sherbert v. Verner*, 374 U.S. 398, 400-02 (1963) ("failed without good cause"); *Lukumi*, 508 U.S.

at 526-27 ("unnecessarily … kills an animal"). It is the subjective nature of the assessment, and not the magic word "exemption," that matters.

Defendants admit that "that each applicant family is unique and assessed on a case-by-case basis to determine their ability to meet applicable licensing requirements." Defs.SUMF.Resp. ¶ 30. They do not contest that individual defendants testified that the application of DCF's policies is "not an exact science," but "depends on each … person's and each family's circumstance" and is a "judgment call." Defs.SUMF.Resp. ¶¶ 30-32.[3] Instead, Defendants engage in a game of semantics. They try to create a factual dispute on the basis that some deponents did not agree with the term "judgment call," and instead call it a "professional judgment" or "clinical formulation." Defs.SUMF.Resp. ¶ 30.[4] (Sweetman preferred "not always clear cut." Tr.277:6.) And Defendants argue that this judgment is unlike *Sherbert* or *Lukumi* because it is a professional judgment, not a "value judgment." Defs.Opp.14-15. Quibbling over synonyms for "judgment call" is not a dispute of the factual bottom line: to decide if a policy is met, DCF personnel make a case-by-case judgment—or, as they prefer, a case-by-case "formulation."

This leads to the second point: DCF's approval of families with placement preferences. Defendants don't dispute that DCF licensed a parent who "is concerned about her ability" to provide a Black child with "psychological safety," Ex. U; Defs.SUMF.Resp. ¶ 37; and one that "would prefer a child of her own racial background, white." Defs.SUMF.Resp. ¶ 37. Or that DCF

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[3] Defendants dispute that Emerson was referring specifically to policies regarding LGBTQ children, but she also testified that there is "no clear checklist of actions or inactions" to meet the policy, and that is "an assessment" that is "based on all the information gathered" about the family. Emerson.Tr.94:6-17; *see also id.* at 82:1-14 (Q: "And because there are different answers, you are using your best judgment about whether that family's responses meet the policy. Is that correct?" A: "Find with the totality of information, yes.").

[4] Defendants' preferred term, "clinical decision," appears nowhere in the cited paragraph. *See* Defs.Opp.14 (citing Defs.SUMF.Resp. ¶ 30). "Clinical formulation" was defined by DCF as "not just reporting the facts, but integrating the information" and "what is my assessment and recommendation in considering … how it all fits together." Silvia 30(b)(6) Tr.142:3-143:5.

licensed families who wouldn't accept children of a particular sex. *See* Defs.SUMF.Resp. ¶ 40. And multiple others. *See* Defs.SUMF.Resp. ¶¶ 36-51.

Defendants insist that "DCF does not permit foster parent applicants to use preferences or limitations to unlawfully discriminate against foster children." Defs.SUMF.Resp. ¶¶ 35, 37, 40, 44-45, 52.[5] This upends traditional notions of discrimination. Could an employer tell a job applicant that "she would prefer a [candidate] of her own racial background, White"? (Compare Ex. V at 2). Could a teacher refuse to have Black children in her class because she is "concerned about her ability to [teach] a Black child"? (See Ex. U at 2). What is the line between discrimination and a preference or limitation the government allows *and will facilitate* when making placements? "[I]t requires DCF to make a judgment call about whether the family's still in compliance with policy." Peel 30(b)(6) Tr. 47:13-15.

According to Defendants, "DCF evaluates any applicant's preferences or limitations and seeks to understand their reasoning to determine whether the applicant satisfies applicable licensing standards." Defs.Opp.18. In other words, DCF evaluates the particular justification for the applicant's preference or limitation to determine if it is compliant with policy. Compare this with *Lukumi*: "because it requires an evaluation of the particular justification for the [action], this ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Lukumi*, 508 U.S. at 537.

Third, in response to the evidence of widespread failures to ensure all homes are affirming, DCF does not dispute these failures happened. *See* Defs.Opp.16; Defs.SUMF.Resp. ¶ 68. Instead, it argues that this misses the context: new policies were added in 2022 and 2023. Defs.Opp.15-16. But that doesn't solve the problem: the requirement to "support[] and respect[] a child's sexual orientation or gender identity" has been in the CMR since 2009. Ex. XX at 2, 4. DCF repeatedly identifies that requirement as "mandatory for all applicants." Defs.SUMF.Resp. ¶¶ 19, 35-37, 47,

[5] Defendants' only evidentiary support for this claim, Peel 30(b)(6) Tr.45:17-22, makes no mention of "preferences" or "limitations."

57, 110, 124, 141. And this provision, not the newer policies, was the one cited in the Burkes' denial letter. *See* Ex. YY at 1. DCF can't deny widespread exceptions to this "mandatory" rule.

Despite those new policies, records from 2022 and 2023 show a continued lack of affirming homes. Pls.Br.4, 11; Pls.SUMF ¶¶ 66-75. Defendants claim these "affirming" homes are really just families with "special skills" above their unwaivable requirements. Defs.Opp.16. But the 30(b)(6) witness they rely upon here acknowledged that the 2023 recruitment plan "could suggest that" not all families were affirming. Ex. TTT, Deposition of Sharon C. Silvia at 242:19-254:6; Ex. Z; Defs.SUMF.Resp ¶ 73 (not disputing Silvia testimony). And that still doesn't explain the internal DCF messages and Molina's testimony that in March 2023, there was still "[a] huge area of identified need [over] the lack of homes for LGBTQ youth." Ex. Y at 2.[6]

Nor does "context" explain why, in 2023, DCF licensed a family who "[did] not feel equipped to support the needs of a LGBTQ child." Defs.SUMF.Resp. ¶ 36. Defendants argue at length that the parents satisfied the policy because they would be "affirming and supportive" in the moment and only took short-term placements. *Id.* But DCF admits that for long-term and short-term placements, "[i]t's the same license they're being approved for." Morrissey 30(b)(6) Tr. at 217:18-20. Defendants also continue to license the Jones family, who candidly acknowledged they could not agree to the "support and respect" language. *See* Pls.Opp.7.

Defendants have failed to distinguish clearly established law or to dispute the basic facts establishing that DCF uses a system of individualized exemptions.

B. DCF policies disfavor religious beliefs (Count II).

Defendants attempt to reduce the Supreme Court's decisions in *Tandon* and *Lukumi* to prohibitions on religious targeting. *See* Defs.Opp.9, 19. While laws that intentionally target religious exercise do violate the Free Exercise Clause—see below—"*Fulton* and *Tandon* clarify that targeting is not required for a government policy to violate the Free Exercise Clause." *FCA v.*

[6] Defendants cite Molina's statement at Tr. 79:7-15 for the notion that "affirming homes" meant special skills. Defs.SUMF.Resp. ¶ 69. The cited page provides no support for this assertion.

San Jose Unified Sch. Dist., 82 F.4th 664, 686 (9th Cir. 2023) (en banc).[7] Instead, as the Supreme Court has repeatedly explained, a law "lacks general applicability if 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. Thus, the ordinance in *Lukumi* was "underinclusive" because it "did not regulate" activities that posed a similar threat to the city's asserted interests—not solely because it targeted religious exercise. *Id.* And in *Tandon*, the Supreme Court rejected Defendants' precise argument: "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). The law was simply not generally applicable due to the disparity in treatment between religious conduct and secular conduct that undermined the state's asserted interest. *See id.*

Brox v. Woods Hole, 164 F.4th 37 (1st Cir. 2026), only reaffirms this reading of *Tandon* and *Lukumi*. *Contra* Defs.Opp.17. Nowhere in that opinion does the First Circuit reference targeting religion. Rather, it applies *Tandon*'s principle by (1) "determining what the [State]'s asserted interests were" and then (2) "consider[ing] whether the medical and religious exemptions undermine those interests in similar ways." *Brox*, 164 F.4th at 45. In that case, the secular exemption "further[ed] the [State's] asserted interest," rather than undermining it, and was thus not comparable. *Id.* at 48.

In contrast, Defendants' application of DCF policies here actively undermines its interests in (1) "promoting the physical and mental welfare of LGBTQ+ foster children" and (2) promoting placement stability, Defs.Opp.27. In response, Defendants insist that it is not "inherently religious to be unable to support a child's sexual orientation or gender identity." *Id.* at 17. But that's not the

[7] Contrary to Defendants' mischaracterization, Defs.Opp.9 n.6., Plaintiffs don't argue that *FCA* clearly established the law when *it* was decided. Rather, the en banc Ninth Circuit recognized in 2023 that cases like *Lukumi*, *Tandon* and *Fulton* had *already* established the "bedrock" principle that "the government may not 'treat … comparable secular activity more favorably than religious exercise.'" *FCA*, 82 F.4th at 686 (quoting *Tandon*, 593 U.S. at 62); *see also Lowe v. Mills*, 68 F.4th 706, 714 (1st Cir. 2023) (also quoting *Tandon* and *Fulton* for this principle).

question under the Free Exercise Clause. The question is whether the state treats *any* "secular conduct" better than *this* "religious conduct." *Fulton*, 593 U.S. at 534. Here, the state has licensed families who, for secular reasons, deviated from DCF's standards. *See supra* II.A. But the Burkes' religious conduct—"this families [sic] beliefs," Ex. AA at 60—was deemed unsatisfactory. That's precisely what *Lukumi*, *Tandon*, and *Fulton* prohibit.

Second, Defendants insist that it is not an apt comparator where families state preferences for certain types of children (or even inabilities to meet the needs of certain types of children). Defs.Opp.18. But these preferences can result in the same problems Defendants claim would occur when licensing the Burkes. One example demonstrates the point. DCF undisputedly licensed one family who expressed a preference for parenting only youth who were "attracted to males." Ex. NN at 2. But Defendants acknowledge that a youth's sexual orientation can change or emerge at any point, meaning that a female placed with that family could later come out as attracted to females. At that point, the parents' preference may result in a disrupted placement because of the child's emerging sexual orientation—something DCF is perfectly fine with in that context, but not in the context of the Burkes' religious beliefs.

Third, Defendants contend that a family being able to refuse a child for any reason—even for discriminatory reasons—does not undermine its interests in ensuring placement stability and promoting healthy, affirming placements for LGBTQ youth. Defs.Opp.19. Here, again, allowing families to refuse to take children for any reason can lead to the same harms Defendants claim to have been trying to avoid. When the state licenses homes who are not even "willing and able to take LGBTQ youth," that leaves LGBTQ youth without stable placements to go to. DCF has done this for years, including after the Burkes were denied. Ex. Y at 3; *see also* Ex. Z at 5-6. But while DCF claims there would be "conversation" in such cases, Defs.SUMF.Resp. ¶ 57, DCF doesn't claim to automatically refuse to license a family, or automatically revoke their license, if they refuse to take a child—including families who would not "necessarily accept every child with any particular sexual orientation or gender identity." Molina.Tr.55:6-11, 100:11-101:12, 174:18-

175:1; *see also* Morrissey 30(b)(6) Tr. at 116:10-117:2. Defendants cannot "assume the worst" of the Burkes' religious practices but "assume the best" of others who refuse to accept LGBTQ children into their homes for different reasons. *Tandon*, 593 U.S. at 64.

Finally, Defendants suggest that they did not engage in "selective enforcement" of DCF's regulation. Defs.Opp.19. But all they can say is that DCF determined that one of the families the Burkes identified actually met the regulatory requirement, despite telling DCF that she did "not feel equipped to support the needs of a LGBTQ child." Ex. T at 3.[8] Defendants cannot explain away the other examples Plaintiffs identified—such as the Jones family, who have been licensed for years despite holding views that do not align with DCF's preferred ones, *see* Pls.Opp.7; or the eight families recruited by one DCF office in 2023 who would not even consider accepting LGBTQ children into their homes, Ex. Z at 4-6; or the two families who stated that they did not feel equipped to meet the needs of non-white children, Ex. U at 2; Ex. V at 2; or even their official representative's statement that DCF "can't say that we know for a fact that every single family is affirming," Silvia 30(b)(6) Tr. at 109:7-8. But even for that one file Defendants do try to justify, they've only proved the point. DCF can, within its discretion, determine that someone actually *can* satisfactorily meet the needs of LGBTQ youth *even when they say they can't*; yet Defendants refused to license the Burkes even when the Burkes explained that they would love and support any child placed with them and would not engage in any of the harmful behavior Defendants claimed to have been concerned about. *See* Ex. AA at 56. That selective interpretation of the policies treated the Burkes worse because of their religious beliefs, triggering strict scrutiny.

Tandon, *Fulton*, and *Lukumi* had clearly established in 2023 that states cannot "treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The

[8] Defendants make much out of the idea that this is "a single file—out of thousands of DCF licensing decisions." Defs.Opp.19. As explained, this is not the only deviation from policy that Plaintiffs identified. Even so, Defendants omit that this file was provided as part of a sample of 162 files designed to reduce discovery burdens. *See* Ex. UUU, Deposition of Alisha Morrissey (Morrissey 30(b)(6) Tr.) at 53:4-56:19. In other words, Plaintiffs did not find one file in a sea of thousands; they found this file in a batch of 162.

record shows Defendants did just that.

C. DCF's policies create a religious gerrymander (Count IV).

Plaintiffs demonstrated that DCF's policy, as enforced by Defendants, is a classic religious gerrymander: it both "targets religious conduct for distinctive treatment," *Carson v. Makin*, 596 U.S. 767, 781 (2022), and imposes "special disabilities on the basis of religious views," *Trinity Lutheran v. Comer*, 582 U.S. 449, 460 (2017). DCF licenses parents who *will* refuse placement for a variety of secular reasons, but not religious ones. *See supra* Sections IA-B; Defs.SUMF.Resp. ¶¶ 35-54.[9] And DCF licenses parents with malleable religious beliefs that will metamorphose into *its* beliefs, but not the Burkes. Pls.Br.17. Defendants do not dispute that the LRT's stated reason to deny the Burkes was their "beliefs" on LGBTQ issues. Ex. AA at 60; Ex. GG at 2 ("The decision of the team was to deny the initial caregiver assessment based on … the family's views about LGBTQIA+ youth."); Defs.SUMF.Resp. ¶¶ 120-22. Indeed, in the past 22 years, there is *one* case where Defendants can identify the reason for a denial despite an initial recommendation: the denial of the Burkes, because of their beliefs. Defs.SUMF.Resp. ¶ 28. It is not readily apparent what could be a more well-cut gerrymander.

In response, Defendants misstate the law and blink at the facts. Defendants first say this is not a religious gerrymander: *either* a legal scheme is exactly like the one in *Lukumi*; *or*, it is neutral and generally applicable under *Smith*. Defs.Opp.20-21. But *Lukumi* said the laws there "fall well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. Cases since *Lukumi*—like *Trinity Lutheran* and *Carson*, *supra*, which Defendants do not address—have

[9] Defendants insist that these preferences are used for matching, and not licensing, purposes, Defs.SUMF.Resp. ¶¶ 35-54, but as explained, that leads to the same results. *See supra* Sections II.A-B. Moreover, that argument only underscores DCF's ability to license families with conditions around the types of children they will accept in their home and then address those preferences at the matching stage—as the Burkes have argued from the beginning. *See infra* Section II.E.

developed what counts as a gerrymander.[10]

Defendants next try to obscure the copious record evidence that they targeted *the Burkes'* Roman Catholic beliefs. Defs.Opp.22-23; *see also* Pls.SUMF.Resp. ¶¶ 90-91, 159-60. Facts are stubborn things, and the record is shot through with them: DCF denied the Burkes for *their* Roman Catholic beliefs. Ex. AA at 60; Ex. GG at 2.

D. Defendants acted with religious hostility (Count III).

Plaintiffs demonstrated that Defendants violated clearly established law under *Masterpiece* and *Lukumi*. *See* Pls.Br.19-22; Pls.Opp.11-14. Defendants dispute that there was religious hostility based upon the statements made by a DCF employee during MAPP training. Defs.Opp.24-25. But DCF's 30(b)(6) witness testified this was an accurate statement of DCF policy. Pls.Br.19. Defendants argue that Mack's statements were made by a contractor, not the LRT. But her statements were part of the assessment, which the LRT reviewed and relied upon to deny the license. *Masterpiece* found evidence of hostility where the later panel reviewing a decision "did not mention those comments, much less express concern with their content." 584 U.S. at 636. Here, after reviewing these comments, Defendants claim "the license study was edited—as expressly permitted by DCF policy—to accurately reflect the LRT's decision and reasoning." Defs.Opp.26. Those edits removed Mack's positive statements and approval, Defs.SUMF.Resp. ¶¶ 136-46, but not her hostile statements—which means they accurately reflect the LRT's reasoning.

Defendants also claim that the Burkes were not singled out for their religious beliefs and were denied for policy reasons. *See* Defs.Opp.25-26. The glaring problem with this argument is the statement of the LRT: "[b]ased on this families [sic] beliefs about children who identify as LGBTQIA+." Ex. AA at 60. That makes this case unlike *Swartz*, where there was no evidence that

[10] *See Bates v. Pakseresht*, 146 F.4th 772, 795 (9th Cir. 2025) (almost exclusive "import and effect of [state] policy on prospective foster parents whose sincerely held religious beliefs contradict the state's perspective on gender identity"); *Blais v. Hunter*, 493 F. Supp. 3d 984, 996 (E.D. Wash. 2020) ("[I]n practice, [the regulations] work to burden potential caregivers with sincere religious beliefs yet almost no others.").

"hostile statements were made regarding the religious practice." *Swartz v. Sylvester*, 53 F.4th 693, 701 (1st Cir. 2022). And the Burkes were treated differently on the basis of their beliefs: as recounted at length, Pls.Br.16-18, 20, Defendants did not apply the law in an evenhanded fashion, including by licensing a family who had "little tolerance for very Catholic churches." Defs.SUMF.Resp. ¶ 49. Defendants claim this statement does not establish that a family would not be supportive of a child, *id.*, while maintaining that the Burkes, who said they would love and accept any child, were unsupportive because of their statements about sex and gender identity. *Id.* ¶ 120. This "attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of [Plaintiffs'] religious beliefs." *Masterpiece*, 584 U.S. at 638.

Finally, Defendants embrace Molina's hostile statements, including "when policy works to protect people," and Sweetman's alterations of the record, as "pursuant to DCF policy." Defs.Opp.25, 27. This conduct "demonstrates that the [Defendants'] consideration of [the Burkes'] case was neither tolerant nor respectful of [their] religious beliefs." *Masterpiece*, 584 U.S. at 639.

E. Defendants cannot satisfy strict scrutiny.

As the Burkes explained, not only is it clearly established that Defendants' actions are subject to strict scrutiny, clearly established law demonstrates that they fail strict scrutiny. Pls.Br.22-26. After all, government actions that lack either neutrality or general applicability "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. One follows the other.

And here, DCF's conduct flatly contradicts its asserted interests. Pls.Br.22. Defendants protest that the 2025 policy change is irrelevant, but this Court may take judicial notice of regulations and public regulatory materials. *See, e.g.*, *Leavitt v. Alnylam Pharms.*, 525 F. Supp. 3d 259, 266 n.1 (D. Mass. 2021). These policies are relevant to both official and personal capacity claims, since they rebut Defendants' argument that no other alternative was feasible. *See* Pls.Opp.27. If DCF can license families like the Burkes, it cannot have a compelling interest in excluding them. And

if DCF can meet the needs of LGBTQ children while licensing families like the Burkes, then a less restrictive alternative exists.

Defendants respond with a bizarre misrepresentation of strict scrutiny. Without basis in or citation to any case, Defendants simply announce that "[a] proposed 'less restrictive alternative' must be more than simply 'workable' or 'possible' to invalidate a state regulation." Defs.Opp.29. But the Supreme Court has repeatedly said the opposite: "so long as the government can achieve its interests in a manner that does not burden religion, it *must* do so." *Fulton*, 593 U.S. at 541 (emphasis added); *accord Playboy*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). Thus, where DCF says that an alternative *does* exist by changing its policies to address poor fit at placement; and where Defendants concede that the 2025 policy was "always literally 'possible,'" in 2023, Defs.Opp.23; Defendants fail strict scrutiny. *See Pevia v. Green*, 695 F. Supp. 3d 628, 635 (D. Md. 2023) ("[D]efendants have not shown that any circumstances have changed such that the current less-restrictive policy was infeasible at the time the prior policy was in effect.").

Defendants next insist that the policies of many other states and the federal government, which protect LGBTQ youth while imposing fewer burdens on religious exercise, *see* Pls.Br.25 & n.5, have no bearing on DCF's ability to satisfy strict scrutiny, Defs.Opp.29-30. Not so. *Holt v. Hobbs* very clearly explains the strict-scrutiny inquiry: the existence of less restrictive policies in multiple other jurisdictions "suggests [*this* jurisdiction] could satisfy its … concerns through a means less restrictive than denying … the exemption sought." 574 U.S. 352, 368-69 (2015).[11] So too here. Defendants contend that DCF's policy was necessary to protect LGBTQ children from harms they

[11] Defendants claim that *Holt* uses a higher standard than the Free Exercise Clause, but that is only true in getting *to* strict scrutiny. *Holt*, 574 U.S. at 357 (RLUIPA applies strict scrutiny "even if the burden results from a rule of general applicability"). Indeed, the Supreme Court recently used the same reasoning in *Mahmoud v. Taylor*, explaining that "[s]everal States across the country permit broad opt outs," and that "prior to the introduction of 'LGBTQ+-inclusive' storybooks, the Board's own" policy was to provide opt outs. 606 U.S. 522, 568-69 (2025). "These facts belie[d] any suggestion that the provision of parental opt outs in circumstances like these" would be unworkable. *Id.* at 569.

claim are associated with being placed in unaffirming homes. Defs.Opp.27-28. But they've failed to present any evidence that the risks of those harms are any higher in Massachusetts than in any other state in the country. *See* Pl.Br.25; Defs.SUMF.Resp. ¶ 166 (offering no rebuttal evidence). So, even if Defendants' asserted harms were correct, that still doesn't explain why so many other states can address those exact same problems without burdening religious exercise. *See Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007) ("[I]n the absence of any explanation by RIDOC of significant differences between the ACI and a federal prison that would render the federal policy unworkable, the Federal … policy suggests that some form of inmate preaching could be permissible without disturbing prison security."). Defendants have failed to "offer persuasive reasons why [they] believe[ ] that [they] must take a different course," and this court cannot "defer[ ]" to Defendants' "mere say-so that they could not accommodate" the Burkes. *Holt*, 574 U.S. at 369. Defendants also rely extensively on *Williams-Yulee v. Florida Bar*, *see* Defs.Opp.28-30—which is the opposite of this case: the rule was upheld because the proposed alternatives were "unworkable" and contrary to the practices of "most States." 575 U.S. 433, 453-54 (2015). Here, the Burkes' proposed alternative *is* DCF's historic practice and current policy, and it is consistent with the policies of many states and federal regulations.

Getting back to what strict scrutiny requires, Defendants fail even to approach any part of this demanding standard. They do not state precisely a compelling interest that can be realized only against the Burkes, *see Fulton*, 593 U.S. at 541, but gesture at generalized interests in the wellbeing of children in their care, avoiding discrimination, promoting stability, and avoiding disrupted adoptive placements. Ex. II at 11-12. But "a state's general conception of the child's best interest does not create a force field against the valid operation of other constitutional rights." *Bates*, 146 F.4th at 783 (citing cases since 1972). And the record hollows out each of these interests. Defendants advance their interest in children's wellbeing and against discrimination by allowing families to refuse a placement for any reason but the Burkes'. *See supra* II.B. This doesn't help DCF fix its problems: DCF admits its need for more foster homes, and admits it puts children in

hospitals, out-of-town placements, staffed apartments, and even office buildings. *See* Defs.SUMF.Resp. ¶¶ 14-17; *see also Fulton*, 593 U.S. at 542 (rejecting asserted interest because "[i]f anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents"). Defendants promote stability—with which Massachusetts has a poor record, *see* Defs.SUMF.Resp. ¶ 65—by allowing parents to refuse children's placement if it becomes objectionable *to them*, *see id.* ¶¶ 34-54. But the Burkes stated that they would love any child placed with them, *see* Pls.SUMF ¶¶ 90-91, 98-99, and DCF could identify no action that would lead to a disrupted adoption, *see* Peel 30(b)(6) Tr. at 136:10-138:17.

"The creation of a system of exceptions" like DCF's, *Fulton*, 593 U.S. at 542 (citing *Lukumi*, 508 U.S. at 546-47), "undermines" its "contention that the provision of opt outs to religious parents would be infeasible or unworkable," *Mahmoud,* 606 U.S. at 567. This rule is fatal to Defendants' compelling interest argument. DCF cannot claim it has a compelling interest in barring the Burkes from caring for *any* child when licensed foster families can "decline placements for all kinds of reasons, including for LGBTQ youth." Molina.Tr. at 55:6-8. Rather, "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, 593 U.S. at 63; *see also Fulton*, 593 U.S. at 541. Defendants cannot make such a showing as to the Burkes.

III. Defendants violated the Burkes' clearly established free speech rights (Count V).

Defendants mistake repetition for persuasion. They do not provide a single case holding that foster parents lose their speech rights, or accept the least diminishment of those rights, when they are licensed. *See* Defs.Opp.30. They completely ignore *Barnette*, *303 Creative*, and the host of cases clearly establishing that the government cannot compel speech in support of its own orthodoxy. *See* Pls.Br.26-27; Pls.Opp.15-19.

Instead, Defendants suggest they cannot prevent "verbal abuse or neglect" unless they can *both* prohibit *and* compel the Burkes' speech. Defs.Opp.30. The Burkes have never argued that DCF

cannot place "*any* limits" on foster parents' speech, *id.*—only that the limits DCF *does* place must be constitutional, and not "coerce" them into "betraying their convictions" "on controversial subjects such as … sexual orientation and gender identity." *Janus v. AFSCME*, 585 U.S. 878, 893, 913 (2018). Insofar as Defendants nod toward their other arguments for dodging the clear constitutional prohibitions on compelling speech and punishing dissenting speech, Plaintiffs have already addressed those arguments. *See* Pl.Resp.17-19. Defendants also claim that foster parents' rights are rooted in contract, not the Constitution. Defs.Opp.12 (citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977)). But government benefits and contracts may not be denied on an unconstitutional basis *whether or not* an applicant is somehow entitled to them. *See* Pls.Opp.16-17 (collecting cases). Defendants ask this Court for a new rule, a "framework" premised on "school administration" and "government employees" that *both* ducks strict scrutiny *and* makes their actions legal three years after the fact. Defs.Opp.27, 30. That's not how strict scrutiny or qualified immunity works. *Supra* I, II.E. Defendants' arguments fail.

CONCLUSION

The Court should grant the Burkes' motion for partial summary judgment.

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of Local Rule 7.1(b) because it does not exceed 20 pages, double-spaced.

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CERTIFICATE OF SERVICE

I certify that this document, filed through the Court's ECF system on April 17, 2026, will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF).

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