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## Ideology Over Compassion: How SB 407 Prioritizes Gender Dogma Over Child Welfare

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# Ideology Over Compassion: How SB 407 Prioritizes Gender Dogma Over Child Welfare

Peyton Kwalwasser\*

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## I. INTRODUCTION

In 1973, Verne Teyler and his wife took a leap of faith and bought a ranch in Castro Valley, California.<sup>1</sup> Motivated by a deep passion to protect the most vulnerable, they set out on a mission to “stabilize the lives of as many traumatized children as possible.”<sup>2</sup> Over the next thirty-three years, the Teylers served in Alameda County as dedicated and loving foster parents to more than 800 foster children.<sup>3</sup> In 1985, the Teylers expanded their mission into a nonprofit called Hosanna Homes to recruit and support other Christian families.<sup>4</sup> Their ministry

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2025; B.A., Philosophy, Fresno Pacific University, Fresno, 2020. First of all, thank you to my grandparents, for their endless support and encouragement. I also thank my parents, for inspiring my passion for this topic through their steadfast example that adults should do hard things for children. Finally, thank you to the Law Review staff for their assistance in editing this article.

<sup>1</sup> California Family Council, *Verne Teyler, Foster Care Parent of an Estimated 900 Children Speaks Against SB 407*, YOUTUBE (Apr. 17, 2023), <https://youtu.be/HYIbpcVkbNk> (on file with *University of the Pacific Law Review*).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

reflects a larger trend of Christian engagement with the child welfare system; Christian Americans adopt at more than double the rate of the general population.<sup>5</sup>

As time progressed, Hosanna Homes grew to serve ten Bay Area counties and thousands of children.<sup>6</sup> Today, however, the Castro Valley Ranch is empty and Hosanna Homes is gone.<sup>7</sup> For years, the Teylers faced constant pressure from the county to remove religious requirements, like church attendance, from Hosanna Homes.<sup>8</sup> Eventually, the frequent confrontation with the counties they served over their practice of faith became too difficult and expensive to sustain.<sup>9</sup>

However, these types of religious practices are not uncommon.<sup>10</sup> Studies show that eighty-two percent of foster parents cite faith or religious community as helpful for creating a successful foster home environment.<sup>11</sup> Much of this supportive community comes from programs like the Teylers', who provide care and resources to foster families who commit to regular church attendance.<sup>12</sup> Family support from faith-based groups has intangible long-term affects within the child welfare system.<sup>13</sup> Data show thirty to fifty percent of foster parents quit after one year, largely crediting their lack of support.<sup>14</sup> In comparison, parents introduced to the system through church foster for more years than the average resource family.<sup>15</sup> This impact goes beyond just opening their homes, as Christians often step up as mentors or hire youths in their businesses when they age out of the system.<sup>16</sup>

With the growing number of youths and high turnover rate of foster parents, California should focus on retaining these loving, religious families instead of turning them away.<sup>17</sup> If SB 407 passes and affirming an evolving sexuality becomes the standard for resource family approval, Christian families will leave the system.<sup>18</sup> Research shows that excluding these religious parents could cut the number of resource families of an already underserved foster system

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<sup>5</sup> Barna Group, *5 Things You Need to Know About Adoption*, BARN (Nov. 4, 2013), <https://www.barna.com/research/5-things-you-need-to-know-about-adoption/> (on file with *University of the Pacific Law Review*).

<sup>6</sup> CALIFORNIA FAMILY COUNCIL, *supra* note 1.

<sup>7</sup> *Id.* (describing Mr. Teyler's transition out of the foster system into other supportive ministries because of the increasing difficulty of state policies along with his old age).

<sup>8</sup> CALIFORNIA FAMILY COUNCIL, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> Dr. John DeGarmo, *Faith Based Organizations Play an Important Role in Foster Care*, MEDIUM (June 29, 2021), <https://drjohndegarmo.medium.com/faith-based-organizations-play-an-important-role-in-foster-care-ddc262a499b> (on file with *University of the Pacific Law Review*).

<sup>11</sup> *Id.*

<sup>12</sup> CALIFORNIA FAMILY COUNCIL, *supra* note 1; DEGARMO, *supra* note 10.

<sup>13</sup> DEGARMO, *supra* note 10.

<sup>14</sup> *Id.*

<sup>15</sup> Mary E. Cox, Cheryl Buehler & John G. Orme, *Recruitment and Foster Family Service*, 29 J. OF SOCIO. & SOC. WELFARE 151, 166 (2002), <https://scholarworks.wmich.edu/jssw/vol29/iss3/9/> (on file with *University of the Pacific Law Review*); *Resource Family Approval Program (RFA)*, CAL. DEP'T OF SOC. SERV. (2024) <https://www.cdss.ca.gov/resource-families> (On file with *University of the Pacific Law Review*) (defining "resource family" as "a caregiver who provides out-of-home care for children in foster care. Resource Families include individuals, couples and families").

<sup>16</sup> DEGARMO, *supra* note 10.

<sup>17</sup> *Keeping Up with the Caseload: How to Recruit and Retain Foster Parents*, BROOKINGS (Apr. 24, 2019), <https://www.brookings.edu/blog/up-front/2019/04/24/keeping-up-with-the-caseload-how-to-recruit-and-retain-foster-parents/> (on file with *University of the Pacific Law Review*).

<sup>18</sup> CALIFORNIA FAMILY COUNCIL, *supra* note 1.

in half.<sup>19</sup> In regulating resource families' expressive conduct, SB 407 fails to meet the strict scrutiny standard under the First Amendment and prioritizes ideology over child welfare.<sup>20</sup>

## II. LEGAL BACKGROUND

In recent years, other states have attempted to enforce their non-discrimination statutes in defense of sexual minorities.<sup>21</sup> Under the guise of anti-discrimination, states like New York, Pennsylvania, and Colorado have instituted government policies mandating sexual attitudes.<sup>22</sup> The court has responded by protecting the First Amendment rights of religious Americans to dissent from state-ordered views that violate their convictions.<sup>23</sup> Section A introduces the legal standard of strict scrutiny under which First Amendment claims are analyzed.<sup>24</sup> Section B discusses the First Amendment challenges brought against laws prescribing sexual attitudes in various states.<sup>25</sup>

### A. Strict Scrutiny Applied to Regulation of Expressive Conduct

The United States has a long history of protecting people like the Teylers from the dangers of government overreach and its suppression of disfavored speech.<sup>26</sup> The First Amendment exists expressly for this purpose—to prevent the government from enacting laws that, in operation, abridge free speech, regardless of the benign motivations behind them.<sup>27</sup>

When constitutional questions are brought before a court, the judge will evaluate the claims using varying degrees of scrutiny, the highest being strict

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<sup>19</sup> Jedd Medefind, *Heritage Foundation Forum: How Faith, Foster Care, and Adoption Go Together*, CHRISTIAN ALL. FOR ORPHANS (June 23, 2018), <https://cafo.org/2018/06/23/heritage-foundation-forum-how-faith-foster-care-and-adoption-go-together/> (on file with *University of the Pacific Law Review*) (citing findings that “sixty-five percent of non-kin foster parents attend religious services” and that some states rely on religious groups to recruit nearly half of its resource families).

<sup>20</sup> Alliance Defending Freedom, *Oregon: Adopt Gender Ideology Before Adopting Children*, ALL. DEFENDING FREEDOM (Apr. 20, 2023), <https://adfflegal.org/article/oregon-adopt-gender-ideology-adopting-children> (on file with *University of the Pacific Law Review*) (detailing the legal complaints made under the First Amendment in a pending case against a similar Oregon statute).

<sup>21</sup> Christiana Kiefer, *Do States Really Want Good Foster Parents?*, WORLD (May 2, 2023), <https://wng.org/opinions/do-states-really-want-good-foster-parents-1682985794> (on file with *University of the Pacific Law Review*) (describing similar cases from Pennsylvania, New York, New Jersey, Washington, and Oregon).

<sup>22</sup> *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 159 (2d Cir. 2020); *Fulton v. City of Philadelphia*, Pennsylvania, 141 S. Ct. 1868, 1882 (2021); 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308 (2023).

<sup>23</sup> Bryan Neihart, *What Is Freedom of Conscience, and Why Does It Matter?*, ALL. DEFENDING FREEDOM (Apr. 11, 2023), <https://adfflegal.org/article/what-freedom-conscience-and-why-does-it-matter> (on file with *University of the Pacific Law Review*).

<sup>24</sup> *Infra* Part A.

<sup>25</sup> *Infra* Part B.

<sup>26</sup> *1st Amendment Timeline*, FREE SPEECH CTR. (2018), <https://mtsu.edu/first-amendment/page/first-amendment-timeline> (on file with *University of the Pacific Law Review*).

<sup>27</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“That is why the first amendment expressly targets the operation of the laws — i.e., the “abridg[ement] of speech” — rather than merely the motives of those who enacted them.”).

scrutiny.<sup>28</sup> When the government attempts to regulate expressive conduct, the court applies the highest standard of scrutiny.<sup>29</sup> When identifying which claims are subject to strict scrutiny, courts look for content-based laws that target speech based on its communicative substance.<sup>30</sup> If a regulation of speech is content-based, meaning the law applies to particular speech because of the message it expresses, it is subject to strict scrutiny.<sup>31</sup> This standard assumes that the state regulation in question is presumptively unconstitutional unless the government can prove that the law is narrowly tailored to serve compelling state interests.<sup>32</sup>

Courts evaluate First Amendment challenges under the strict scrutiny standard.<sup>33</sup> When considering these issues, the court prioritizes cases that involve essential interests over those less directly shielded by constitutional provisions.<sup>34</sup> Courts provide these more directly-shielded constitutional provisions a greater defense and apply a higher standard for government regulations to meet.<sup>35</sup> In such cases, the court will subject the government interference to strict scrutiny.<sup>36</sup>

First, the court requires the government to show how its regulation serves a “compelling governmental interest.”<sup>37</sup> This element most clearly separates the heightened standard of strict scrutiny from the lesser standard of intermediate scrutiny because the government interest must be “compelling,” not simply “important.”<sup>38</sup> While never explicitly defined, the language here is intended to separate those interests that are crucial from those that are simply “an exercise of discretion or preference.”<sup>39</sup> Compelling interests are those most necessary to government functions, such as national security, crime prevention, or protection of fundamental liberties.<sup>40</sup>

Second, the government must demonstrate its law is the least restrictive measure to achieve its end.<sup>41</sup> Regulations that are too broad and go beyond the restrictions necessary to accomplish their purpose are, therefore, not “narrowly tailored.”<sup>42</sup> Should a state regulation fail on either element of the strict scrutiny

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<sup>28</sup> Legal Information Institute, *Strict Scrutiny*, CORNELL L. SCH. (2023), [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (on file with *University of the Pacific Law Review*).

<sup>29</sup> *Case Categories: Expressive Conduct/Symbolic Speech*, FIRST AMEND. ENCYCLOPEDIA (May 10, 2023), <https://www.mtsu.edu/first-amendment/encyclopedia/case/116/expressive-conduct-symbolic-speech> (on file with *University of the Pacific Law Review*).

<sup>30</sup> *Id.* (“When faced with laws that infringe on expressive conduct, the Supreme Court generally asks whether the regulation is aimed at the expressive or the nonexpressive aspects of the conduct.”).

<sup>31</sup> *Id.*

<sup>32</sup> Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> (on file with *University of the Pacific Law Review*).

<sup>33</sup> LEGAL INFORMATION INSTITUTE, *supra* note 28.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> STEINER, *supra* note 32; *1st Amendment Timeline*, *supra* note 26.

<sup>37</sup> LEGAL INFORMATION INSTITUTE, *supra* note 28.

<sup>38</sup> STEINER, *supra* note 32.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Ruth Ann Strickland, *Narrowly Tailored Laws*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws> (on file with *University of the Pacific Law Review*).

<sup>42</sup> *Id.*

standard, the law is deemed unconstitutional and invalid.<sup>43</sup> The court reviews free speech claims involving religion under this strict scrutiny standard.<sup>44</sup> Because of this high standard, the most potent challenges to SB 407 are those under the First Amendment.<sup>45</sup> Under a strict scrutiny analysis, SB 407 will fall short on free speech grounds.<sup>46</sup>

*B. First Amendment Challenges: Compelled Speech*

In 2018, the New York Office of Children and Family Services (OCFS) conducted a procedural review of its authorized adoption agencies.<sup>47</sup> New Hope was one such agency that underwent an OCFS site review.<sup>48</sup> In its evaluation, OCFS discovered New Hope's policy against placing children with homosexual or unmarried couples.<sup>49</sup> New Hope's placement policy had never previously been questioned because New York allows its authorized agencies discretion in finding an "appropriate placement" that is "in the child's best interest."<sup>50</sup> So long as it remained within the broader state requirements for approval, New Hope was permitted to place children with only heterosexual, married couples.<sup>51</sup> The agency made this decision because of its religious belief about what family structure is best for a child.<sup>52</sup>

In its 2018 review, however, OCFS decided that New Hope's placement policy violated the 2013 non-discrimination addition to New York's child welfare regulations.<sup>53</sup> As part of a continued effort to make adoption more inclusive in the state, New York updated its non-discrimination regulations in 2013.<sup>54</sup> These new regulations explicitly prohibited discrimination against applicants because of sexual orientation or gender identity and expression.<sup>55</sup> Calling New Hope's religiously motivated placement policy "discriminatory and impermissible," OCFS demanded the agency change its policy or close its services.<sup>56</sup> Refusing to compromise on its religious beliefs, New Hope responded with a lawsuit, in which

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<sup>43</sup> *Id.*

<sup>44</sup> LEGAL INFORMATION INSTITUTE, *supra* note 28.

<sup>45</sup> *Id.*

<sup>46</sup> Letter of Opposition to SB 407 from Kevin T. Snider, Chief Couns. Pac. Just. Inst., to S. Jud. Comm., Cal. S. (Apr. 18, 2023) (on file with *University of the Pacific Law Review*) (explaining PJT's legal grounds for opposing SB 407 as unconstitutional); ALLIANCE DEFENDING FREEDOM, *supra* note 20 (describing the applicable legal theories under the First Amendment to a similar statutory challenge in Oregon).

<sup>47</sup> New Hope, 966 F.3d at 158.

<sup>48</sup> *Id.*

<sup>49</sup> New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145, 157–58 (2d Cir. 2020).

<sup>50</sup> *Id.* at 151.

<sup>51</sup> *Id.* at 157–58.

<sup>52</sup> *Id.*; Policy Staff, *Explainer: Religious Liberty Victory at the 2<sup>nd</sup> Circuit in New Hope Fam. Servs. v. Poole, ETHICS & RELIGIOUS LIBERTY COMM'N* (July 23, 2020), <https://erlc.com/resource-library/articles/explainer-religious-liberty-victory-at-the-2nd-circuit-in-new-hope-family-services-v-poole/New> (on file with *University of the Pacific Law Review*).

<sup>53</sup> New Hope, 966 F.3d at 159.

<sup>54</sup> *Id.* at 155.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 158.

the court recognized the plausibility of the agency's claim based on the First Amendment right to refuse compelled speech.<sup>57</sup>

In 2021, the Court spoke again on the conflict between state non-discrimination laws and the First Amendment right to traditional attitudes of sexuality.<sup>58</sup> This time in a case from Pennsylvania, the Court found that First Amendment protections guaranteed for adoption agencies, like New Hope, extended also to foster care groups.<sup>59</sup> In *Fulton v. City of Philadelphia, Pennsylvania*, the court issued a unanimous decision invalidating Philadelphia's use of anti-discrimination policies to exclude a faith-based foster care group from child welfare services.<sup>60</sup> Catholic Social Services (CSS) filed a complaint against the City of Philadelphia after the city refused its annual contract, claiming CSS violated its non-discrimination policy.<sup>61</sup> When CSS refused to certify same-sex couples as foster parents, Philadelphia argued that this refusal violated its requirement that agencies certify foster parents without regard to sexual orientation.<sup>62</sup> The Supreme Court found the City's refusal to be unconstitutional under the First Amendment because it could not pass strict scrutiny.<sup>63</sup>

Because CSS had religious objections to same-sex couples raising children, the Court held that Philadelphia's exclusion of CSS from the foster system must be "narrowly tailored" to achieve a "compelling state interest."<sup>64</sup> Under this standard, the Court held Philadelphia placed an unjustified burden on CSS's free exercise rights.<sup>65</sup> Maximizing the number of potential foster families was not a sufficient reason to deny an exception to CSS because the Court found that doing so would counterintuitively lessen the number of available foster families.<sup>66</sup> Additionally, the Court stated that the City advanced a "weighty" interest in providing equal protection for same-sex foster parents.<sup>67</sup> However, because the City's foster care contract provided for exceptions to its non-discrimination provision, the Court found there was no sufficiently compelling reason "on the facts of this case" to deny a similar exception to CSS.<sup>68</sup>

The arguments in *New Hope* and *Fulton* may be just the beginning of a larger trend developing in the court.<sup>69</sup> With the recent *303 Creative LLC v. Elenis*

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<sup>57</sup> POLICY STAFF, *supra* note 52; *New Hope*, 966 F.3d at 176.

<sup>58</sup> Michael McConnell, *Prof. Michael McConnell (Stanford) on Fulton v. City of Philadelphia*, REASON MAG. (Nov. 6, 2020), <https://reason.com/volokh/2020/11/06/prof-michael-mcconnell-stanford-on-fulton-v-city-of-philadelphia/> (on file with *University of the Pacific Law Review*) (contextualizing the debate between traditional sexual ethics and modern views of sexuality within *Fulton*'s holding).

<sup>59</sup> *Fulton*, 141 S. CT. at 1882.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1872.

<sup>62</sup> *Fulton*, 141 S. CT. at 1872–73; MCCONNELL, *supra* note 58.

<sup>63</sup> *Fulton*, 141 S. CT. at 1873.

<sup>64</sup> *Id.* at 1881.

<sup>65</sup> *Id.* at 1867 ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.").

<sup>66</sup> *Id.* at 1881–82.

<sup>67</sup> *Id.* at 1882.

<sup>68</sup> *Id.*; MCCONNELL, *supra* note 58 (discussing which competing interests should prevail under a strict scrutiny analysis).

<sup>69</sup> Andrea M. Picciotti-Bayer, *Supreme Court Rejects Ideological Conformity in 303 Creative v. Elenis*, NAT'L CATH. REG. (June 30, 2023), <https://www.ncregister.com/commentaries/lorie-smith-303-creative-v-elenis>

decision, the Court is signaling to lawmakers its willingness to strike down non-discrimination laws that target religious views about sexuality.<sup>70</sup> The 2016 Colorado claim challenges Colorado's enforcement of the Colorado Anti-Discrimination Act (CADA) as unconstitutional under the First Amendment.<sup>71</sup> Colorado website designer Lorie Smith decided to expand her online brand to include website services for weddings.<sup>72</sup> Consistent with all other elements of her online brand, Smith did not intend to create any product that violated her religious convictions about traditional marriage.<sup>73</sup> In preparing to launch her new undertaking, Smith feared that Colorado would weaponize CADA and force her to assent to views on sexuality that she religiously objects to.<sup>74</sup>

Filing suit against the CCRC, Smith protested that Colorado's enforcement of its anti-discrimination statute as inconsistent with First Amendment protections against compelled speech.<sup>75</sup> Calling Smith's website designs "original," "tailored creations" that were "expressive in nature," the Court held that she could not be coerced into communicating a sexual message she did not believe.<sup>76</sup> In justifying the Court's decision, Justice Gorsuch wrote that the First Amendment protects Smith from expressing a message she does not agree with.<sup>77</sup> On a website with her name, of which she is the sole owner and operator, such expression would equate to compelled speech.<sup>78</sup>

### III. SB 407

Senator Wiener proposed SB 407 to amend Sections 16519.5, 16519.61 of the California Welfare and Institutions Code ("Code") to ensure that all foster youths are placed in LGBTQ affirming homes.<sup>79</sup> Currently, these sections of the Code work together to regulate the approval process for resource families interested in fostering youths across all counties in California.<sup>80</sup> Existing law requires resource families to undergo an approval process where a social worker conducts a home evaluation to observe the family's compliance with permanency requirements prescribed in the Code.<sup>81</sup> SB 407 alters this approval process by

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supreme-court-decision (on file with *University of the Pacific Law Review*) (discussing the recent shift in majority opinions and the resulting dissents from the Court regarding free speech and anti-discrimination laws).

<sup>70</sup> *Id.*

<sup>71</sup> 303 Creative, 143 S. Ct. at 2308.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2310; PICCIOTTI-BAYER, *supra* note 68 (describing CADA's inconsistencies with fundamental constitutional principles).

<sup>76</sup> 303 Creative, 143 S. Ct. at 2308.

<sup>77</sup> *Id.* at 2313.

<sup>78</sup> *Id.*

<sup>79</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted); Sydney Johnson, *California Bill Would Enhance Protections for LGBTQ Youth in Foster Families*, KQED (Mar. 17, 2023), <https://www.kqed.org/news/11943932/california-bill-would-enhance-protections-for-lgbtq-youth-in-foster-families> (on file with *University of the Pacific Law Review*) (quoting state Senator Wiener "We need to do everything in our power to make sure foster youth are in supportive, affirming homes").

<sup>80</sup> CAL. WELF. & INST. CODE § 16519.5(A).

<sup>81</sup> *Id.*



expanding the evaluation requirements of both the home environment assessment and the permanency standards laid out in Section 16519.5 of the Code.<sup>82</sup>

SB 407 proposes additions to Section 16519.5 that require assessments of a resource family's ability to care for LGBTQ foster youth.<sup>83</sup> SB 407 imposes these standards through a new county oversight program which expands the county's state-mandated responsibility to continually monitor resource family compliance with the code.<sup>84</sup> Under this new program, counties are required to collaborate with state-selected advocacy groups to produce specific standards of care for LGBTQ children.<sup>85</sup> The new standards developed in collaboration with LGBTQ advocates will amend the permanency criteria already in place and will be enforced through family evaluations and risk assessments.<sup>86</sup>

SB 407 also broadens the state-mandated documentation of these assessments to include a standardized acknowledgement of and agreement with the state-sanctioned standards of care for LGBTQ youth.<sup>87</sup> The existing home environment assessment asks resource families to understand the rights of the youths placed in their care and commit to protecting them.<sup>88</sup> SB 407 expands this assessment to include signed documentation as proof of a family's capacity to provide the expected care for LGBTQ children.<sup>89</sup> This documentation obligates resource families to acknowledge "that sexual orientation, gender identity, and expression can evolve over time."<sup>90</sup> Additionally, families must also agree that "should difficulties around these issues arise" they will "seek out any and all available resources offered by the county."<sup>91</sup> Section 16519.61 of the Code provides the enforcement mechanism for these changes.<sup>92</sup> This section authorizes counties to deny approval to foster children if the resource family fails to comply with the new SB 407 standards.<sup>93</sup>

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<sup>82</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> CAL. WELF. & INST. CODE § 16519.5(d)(2)(C)(i).

<sup>89</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> CAL. WELF. & INST. CODE § 16519.61(A).

#### IV. ANALYSIS

The clash of traditional religious values and modern views of sexuality is a long-debated cultural controversy that is becoming a highly contentious area of legislation.<sup>94</sup> The First Amendment has important things to say about such conflict.<sup>95</sup> Section A examines why SB 407 is subject to strict scrutiny under the First Amendment.<sup>96</sup> Section B contends that SB 407's sexuality mandate cannot be justified by a "compelling state interest."<sup>97</sup> Section C argues that SB 407's sexuality mandate is not "narrowly tailored."<sup>98</sup>

##### *A. SB 407 Subject to Strict Scrutiny Under the First Amendment*

The First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech."<sup>99</sup> Included in this protection of speech is the right not to speak.<sup>100</sup> The state cannot compel assent to a belief or attitude.<sup>101</sup> The government has no authority to demand its citizens to "publicly . . . profess any statement of belief or to engage in any ceremony of assent."<sup>102</sup>

This nonexistent power is the same false authority that SB 407 exploits.<sup>103</sup> Contemporarily, attitudes about sexuality, including beliefs about homosexuality, same-sex marriage, and gender identity are hotly debated.<sup>104</sup> While modern views of sexuality may be more popular in California, it is hardly accurate to describe public attitudes on sexuality as anything near a complete consensus.<sup>105</sup> In fact, it is exactly the reality of this debate over sexuality that has driven politicians like

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<sup>94</sup> MCCONNELL, *supra* note 58 (discussing the polarizing consequences of contentious cultural questions about sexuality being thrust into the legislative arena).

<sup>95</sup> Johannes Widmalm-Delphonse, *Religious Discrimination Hurts Kids Waiting to Be Adopted*, ALL. DEFENDING FREEDOM (Aug. 29, 2023), <https://adfflegal.org/article/religious-discrimination-hurts-kids-waiting-be-adopted> (on file with *University of the Pacific Law Review*).

<sup>96</sup> *Infra* Part A.

<sup>97</sup> *Infra* Part B.

<sup>98</sup> *Infra* Part C.

<sup>99</sup> U.S. CONST. amend. I.

<sup>100</sup> *What Does Free Speech Mean?*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (on file with *University of the Pacific Law Review*) (listing under the established free speech rights the right not to speak).

<sup>101</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (finding that the Bill of Rights protects against "public authorities . . . compel[ing]" someone to "utter what is not in his mind").

<sup>102</sup> *Id.*

<sup>103</sup> SNIDER, *supra* note 46 (claiming that SB 407 violates the First Amendment).

<sup>104</sup> Carrie Blazina & Chris Baronski, *How Americans View Policy Proposals on Transgender and Gender Identity Issues, and Where Such Policies Exist*, PEW RSCH. CTR. (Sept. 15, 2022), <https://www.pewresearch.org/short-reads/2022/09/15/how-americans-view-policy-proposals-on-transgender-and-gender-identity-issues-and-where-such-policies-exist/> (on file with *University of the Pacific Law Review*) (reporting the significant divide among public opinion on sexuality issues, including close splits over gender identity education in schools and access to public restrooms); Kim Parker, Juliana Menasce Horowitz & Anna Brown, *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), <https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/> (on file with *University of the Pacific Law Review*) (reporting divided opinions on issues such as whether sex is determined at birth and gender transition medical care).

<sup>105</sup> See PARKER, HOROWITZ & BROWN, *supra* note 103 (finding that thirty-seven percent of Americans favor investigating parents involved in minor transition for child abuse, compared to thirty-one percent who think that minor transition should be legal).

California State Senator Wiener to legislatively coerce a consensus.<sup>106</sup> In pursuit of “affirming homes,” Senator Wiener’s bill does just this in two significant ways—coercing assent and pursuit of care.<sup>107</sup>

SB 407 first requires resource families to acknowledge that sexuality “can evolve over time”—coercing assent.<sup>108</sup> The bill mandates that prospective resource families undergo a home evaluation that will now include a specific review of its ability to care for LGBTQ youths.<sup>109</sup> In doing so, the county will require families to agree that gender identity and expression can change in order to be approved.<sup>110</sup> As demonstrated by the considerable public debate over this exact issue, there are surely many California families who do not hold to this belief, many of them for religious reasons.<sup>111</sup> Even if they are the minority, the First Amendment still protects their views.<sup>112</sup>

Secondly, resource families must agree to “seek out” whatever gender-related medical care is prescribed by California’s standards of care, to be developed by state-selected LGBTQ advocates—pursuit of care.<sup>113</sup> A careful analysis of the language of these provisions leads to serious constitutional concerns.<sup>114</sup> If submitting to documentation and actively pursuing medical treatment are considered protected expressions, then SB 407 runs squarely into the dominion of the Free Speech Clause of the First Amendment.<sup>115</sup>

Modern precedent navigating the conflict between religiously motivated convictions and opposing state policies answers this question of expression decisively.<sup>116</sup> When New York tried to force New Hope Adoption Agency to assent to a state-prescribed view of same-sex couples, the Court held the agency was allowed discretion on the matter.<sup>117</sup> Specifically, the Court found that New Hope had religious discretion over the child’s best interest, even if its determination dissented from the state’s policies on sexuality.<sup>118</sup>

SB 407 prescribes a sexual ethic that the Legislature believes is in the best interest of foster children, but *New Hope* suggests that the First Amendment

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<sup>106</sup> JOHNSON, *supra* note 78 (explaining state Senator Wiener’s motivation to introduce SB 407 in response to the “anti-LGBTQ” direction of other states).

<sup>107</sup> ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 407, at 6 (Mar. 16, 2023).

<sup>108</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> BLAZINA & BARONAVSKI, *supra* note 103; PARKER, HOROWITZ & BROWN, *supra* note 103; Colleen Shalby, *Controversial Sex Education Framework for California Approved Despite Protest*, L.A. TIMES (May 10, 2019), <https://www.latimes.com/local/lanow/la-me-sex-education-california-20190510-story.html> (on file with *University of the Pacific Law Review*) (describing the divided attitudes among California families over the content in public school sexual education).

<sup>112</sup> *1st Amendment Timeline*, *supra* note 26; W. Va. State Bd. of Educ., 319 U.S. at 634 (describing the intention of the First Amendment to place certain liberties “beyond the reach of majorities and officials”).

<sup>113</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted).

<sup>114</sup> SNIDER, *supra* note 46.

<sup>115</sup> *1st Amendment Timeline*, *supra* note 26; *id.* (finding that no government authority can “force citizens to confess by word of act” opinions with which they disagree).

<sup>116</sup> 303 Creative, 143 S. Ct. at 2310 (responding to the dissent’s claims that anti-discrimination justifies abridgment of free speech, the Court renounces its effort to “eliminate disfavored ideas” because they do not sympathize with the speaker’s message).

<sup>117</sup> *New Hope*, 966 F.3d at 151–53.

<sup>118</sup> *Id.*

requires room for discretion.<sup>119</sup> It is exactly this discretion, present in almost all of the state's assessment standards, that triggers strict scrutiny because it brings the law outside the protections of neutrality.<sup>120</sup> When a regulation targets particular expressive conduct, like an agency's view of same-sex couples, the law becomes content-based, not content-neutral.<sup>121</sup> SB 407 places that same content-based target on the backs of resource families.<sup>122</sup> By conditioning eligibility on state-sanctioned sexual perspectives, California is policing its child welfare system through an "ideological litmus test."<sup>123</sup> Compelling families to affirm a particular gender ideology or face complete exclusion from the foster system directly undermines their First Amendment free speech rights.<sup>124</sup> This type of restriction on expressive conduct is the exact kind of content-based regulation that triggers careful strict scrutiny analysis.<sup>125</sup>

Whether a foster child can receive gender-affirming care while in a non-affirming home is a separate question.<sup>126</sup> Forcing a parent to actively pursue that care is a First Amendment violation because advocacy for gender-affirming medical care is inherently a public and expressive endeavor.<sup>127</sup> Communicating with doctors, psychologists, and even the children themselves require the foster parent to engage their expressive faculties to convey a particular message about sexuality.<sup>128</sup> As the state cannot compel Smith to condone gay marriage on a website, it also cannot compel a foster parent to condone gender-affirming care in a doctor's office or their own home.<sup>129</sup> To legally coerce a parent into accepting and expressing a sexually-affirming attitude is to coerce an endorsement of that view in their family and community.<sup>130</sup>

Consistent with all relevant legal precedent, the assent and pursuit of care actions demanded by SB 407 unconstitutionally compel speech, in violation of the First Amendment.<sup>131</sup> Consequently, strict scrutiny presumes these provisions of SB

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<sup>119</sup> *Id.*; ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 407, at 6 (Mar. 16, 2023).

<sup>120</sup> See *New Hope*, 966 F.3d at 152–53 (explaining how the foster care assessment standards "entrust authorized agencies with considerable discretion in determining the best interests of a child"); *Fulton*, 141 S. Ct. at 1877 (establishing that a law cannot escape strict scrutiny if it is not facially neutral).

<sup>121</sup> *Case Categories: Expressive Conduct/Symbolic Speech*, *supra* note 29.

<sup>122</sup> See *WIDMALM-DELPHONSE*, *supra* note 94 (describing how a similar Oregon law and other sexuality-related adoption regulations "violate the right to free speech by compelling parents to affirm the state's ideology in word and deed").

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Case Categories: Expressive Conduct/Symbolic Speech*, *supra* note 29.

<sup>126</sup> See *Id.* ("[E]xpressive conduct is behavior designed to convey a message."); *WIDMALM-DELPHONSE*, *supra* note 94 (arguing that similar sexuality-based policies "violate the right to free speech by compelling parents to affirm the state's ideology in word and deed").

<sup>127</sup> *W. Va. State Bd. of Educ.*, 319 U.S. at 634 (holding that an action which requires a person to "communicate by word and sign his acceptance of the political ideas it thus bespeaks" is constitutionally invalid).

<sup>128</sup> *Case Categories: Expressive Conduct/Symbolic Speech*, *supra* note 29; *id.* (declaring state action that "requires affirmation of a belief and an attitude of mind" unconstitutional).

<sup>129</sup> See *303 Creative*, 143 S. Ct. at 2312 (holding that the government could not coerce the plaintiff into sexually progressive ideological speech on her website).

<sup>130</sup> *Id.*; *W. Va. State Bd. of Educ.*, 319 U.S. at 634.

<sup>131</sup> See *303 Creative*, 143 S. Ct. at 2312 (holding that the government could not force the plaintiff into expressions that violate her beliefs about sexuality because "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or

407 unconstitutional unless it is “narrowly tailored” to serve a “compelling governmental interest.”<sup>132</sup>

*B. SB 407 Fails the Compelling Interest Standard*

Strict scrutiny first requires a government regulation to pursue a “compelling...state interest.”<sup>133</sup> While the intersection of foster care and discrimination certainly treads several complex concerns, there are three central interests which may seem compelling.<sup>134</sup> First, maximizing the number of available resource families able to provide foster children with a safe home.<sup>135</sup> While this interest is certainly important, *Fulton v. City of Philadelphia, Pennsylvania* held that this is not a sufficiently compelling interest under strict scrutiny.<sup>136</sup> Secondly, ensuring equal treatment for prospective same-sex foster parents was “weighty,” yet still not a compelling interest under strict scrutiny.<sup>137</sup>

The interest most likely to meet the “compelling” standard under strict scrutiny is the protection of LGBTQ foster children from the dangers of non-affirming homes.<sup>138</sup> Under *West Virginia Board of Education v. Barnette*, state burdens on First Amendment rights are unconstitutional without a “clear and present danger” that the government can “prevent and punish”.<sup>139</sup> This standard was not met by the West Virginia Board of Education because a student’s silent objection to the pledge of allegiance did not present an urgent command for state action.<sup>140</sup> Proponents of the bill may argue that the assent and pursuit provisions of SB 407 are consistent with *West Virginia Board of Education v. Barnette*’s holding.<sup>141</sup> Because the harm done to LGBTQ foster children by non-affirming homes is so great, dissenting views of sexuality are a matter of imminent danger to the protection of children.<sup>142</sup> State Senator Wiener even claims that the suicide rates of foster children are directly related to the anti-affirming attitudes many of them face at home.<sup>143</sup>

There are several reasons why protecting foster children from non-affirming homes does not rise to the constitutionally-required level of

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deeply ‘misguided,’”); see also *W. Va. State Bd. Of Educ.*, 319 U.S. at 633–34 (emphasizing that the government does not have the constitutional authority to coerce ideological agreement by requiring “the individual to communicate by word and sign his acceptance of...political ideas”).

<sup>132</sup> LEGAL INFORMATION INSTITUTE, *supra* note 28.

<sup>133</sup> STEINER, *supra* note 32.

<sup>134</sup> *Keeping Up with the Caseload: How to Recruit and Retain Foster Parents*, *supra* note 17.

<sup>135</sup> *Fulton*, 141 S. CT. at 1881–82.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> STEINER, *supra* note 32; ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 407, at 6 (Mar. 16, 2023) (elaborating on the dangers of non-affirming homes).

<sup>139</sup> *W. Va. State Bd. of Educ.*, 319 U.S. at 634.

<sup>140</sup> *Id.*

<sup>141</sup> ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 407, at 6 (Mar. 16, 2023) (proposing that the sexuality mandate will help children by ensuring “affirming homes”).

<sup>142</sup> JOHNSON, *supra* note 78; *Suicide Risk Factors*, TREVOR PROJECT (July 16, 2021), <https://www.thetrevorproject.org/resources/article/suicide-risk-factors/> (on file with *University of the Pacific Law Review*) (claiming that non-affirming home environments are causally linked to higher suicidality rates among LGBTQ youths).

<sup>143</sup> ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 407, at 6 (Mar. 16, 2023).

“compelling.”<sup>144</sup> First, the bill offers inconsistent evidence that its mandates will achieve their purported end.<sup>145</sup> In fact, many experts believe that the gender-affirming care prescribed by the bill is actively harmful to the long-term health of children.<sup>146</sup> Contemporary analyses of gender-affirming methods of care link surgeries and cross-sex hormones to “significant and irreversible harms” that are “associated with a significant increase in the adolescent suicide rate.”<sup>147</sup> While reliable research on the long-term health outcomes of youths exposed to this kind of medical treatment is limited, there is significant scientific evidence suggesting their harmful effects.<sup>148</sup> If SB 407 increases this exposure, it may very well achieve the opposite of its aim.<sup>149</sup>

Moreover, while the protection of children is certainly a crucial function of the state government, it is unclear how a foster parent’s objection to the assent provision hinders that function.<sup>150</sup> Even if gender and sexual identity can evolve, the bill does not explain how a foster parent’s individual decision not to assent to that view harms LGBTQ children in their care.<sup>151</sup> The bill offers no evidence that parents who have traditional views on sexuality fail to properly care for LGBTQ youths in their home.<sup>152</sup> In fact, many parents with these views actively affirm that they are ready and willing to love any child that enters their care, regardless of their sexual attitudes.<sup>153</sup> Children often engage in behaviors of which their parents disapprove, but such tension is a natural part of child rearing.<sup>154</sup> Behavioral

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<sup>144</sup> STEINER, *supra* note 32; GREENE, *supra* note 128 (refuting the supposed benefits of gender-affirming care like cross-sex hormones and surgeries).

<sup>145</sup> ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 407, at 6 (Mar. 16, 2023); *Suicide Risk Factors*, *supra* note 142; see GREENE, *supra* note 128 (offering social and scientific evidence to argue that cross-sex hormones and ‘gender-affirming’ medical interventions do not produce positive health outcomes for children).

<sup>146</sup> GREENE, *supra* note 128 (explaining how recent medical research suggests that causal links between “gender affirming interventions” and “suicide prevention” are not well established); Stephen Hammes, *Youth Gender Transition Is Pushed Without Evidence*, WALL STREET J. (July 5, 2023), <https://www.wsj.com/articles/trans-gender-affirming-care-transition-hormone-surgery-evidence-c1961e27> (on file with *University of the Pacific Law Review*) (detailing a letter from the President of the Endocrine Society explaining that a growing number of European nations are halting cross-sex hormones and surgeries because of “significant risks” and little evidence of benefits).

<sup>147</sup> GREENE, *supra* note 128.

<sup>148</sup> *Id.* (reviewing recent research that demonstrates increased “easing access to puberty blockers and cross-sex hormones by minors without parental consent increases suicide rates”); HAMMES, *supra* note 146 (“Every systematic review of evidence to date...has found the evidence for...benefits of hormonal interventions for minors to be of low or very low certainty.”).

<sup>149</sup> GREENE, *supra* note 128.

<sup>150</sup> See ALLIANCE DEFENDING FREEDOM, *Oregon Mom Denied Adoption Due to Religious Views on Gender*, YOUTUBE (Apr. 13, 2023), <https://youtu.be/QtCaoTkdjyA?si=Sx3cyvg4MkLo7eU4> (on file with *University of the Pacific Law Review*) (interviewing senior counsel of Alliance Defending Freedom about the adverse effects on the child welfare system when states exclude those with orthodox sexual values).

<sup>151</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted); KIEFER, *supra* note 21 (questioning the supposed negative outcomes of children in non-affirming homes).

<sup>152</sup> KIEFER, *supra* note 21; Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, IMPRINT (Nov. 28, 2017), <https://imprintnews.org/featured/arkansas-one-faith-based-group-recruits-almost-half-foster-homes> (on file with *University of the Pacific Law Review*) (detailing the importance of faith-based groups and individuals in maintaining the child welfare system).

<sup>153</sup> KIEFER, *supra* note 21; ALLIANCE DEFENDING FREEDOM, *supra* note 150 (describing the willingness of religious families to foster sexual minorities despite their orthodox views of sexuality).

<sup>154</sup> Amy Morin, *7 Positive Ways to Discipline Children in Foster Care*, VERYWELL FAM. (Oct. 9, 2020), <https://www.verywellfamily.com/how-to-discipline-children-in-foster-care-1094929> (on file with *University of the Pacific Law Review*).

disagreements, however, do not equate to an unsafe home environment.<sup>155</sup> In fact, treating foster children as a natural part of the family often helps them feel more cared for.<sup>156</sup> SB 407 seems to take an exceedingly reductive approach to the care of children and fails to consider the full scope of their best interests.<sup>157</sup>

### C. SB 407 Fails the Narrowly Tailored Standard

If the interest sought by SB 407 is the protection of LGBTQ foster children, the bill leaves open several questions about the sweeping nature of its assent and pursuit provisions.<sup>158</sup> Strict scrutiny requires that the regulation pursue the least restrictive measure to achieve its end.<sup>159</sup> Regulations that are too broad and go beyond the restrictions necessary to accomplish their purpose are, therefore, not “narrowly tailored.”<sup>160</sup> It seems that SB 407 could take several measures to tailor its restrictions more narrowly toward its end.<sup>161</sup> Perhaps SB 407 could make policy distinctions according to the age of the child in question.<sup>162</sup> Parents could foster younger children free of restriction, but the care of older children would require agreement with the assent and pursuit provisions.<sup>163</sup> This would allow parents to participate freely in the child welfare system for younger children, restricting only their participation with older kids.<sup>164</sup> Perhaps the bill could make distinctions between children who actively identify as LGBTQ and those who do not present any nontraditional sexual attitudes.<sup>165</sup> Similarly, parents could then participate freely in the system for some children, with restrictions applying only on certain occasions.<sup>166</sup> Considering the complex needs of foster youths, SB 407’s assent and pursuit provisions appear unnecessarily vast.<sup>167</sup> Given the “least

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<sup>155</sup> Katherine Lee, *Surprising Reasons Why We Need to Discipline Children*, VERYWELL FAM. (Oct. 1, 2020), <https://www.verywellfamily.com/surprising-reasons-why-we-need-to-discipline-children-620115> (on file with *University of the Pacific Law Review*) (explaining how corrective discipline when parents disagree with a child’s behavior is “vital” for the child’s development, happiness, and well-being).

<sup>156</sup> MORIN, *supra* note 154.

<sup>157</sup> GREENE, *supra* note 128 (detailing the complex, long-term effects of gender affirming care); WIDMALM-DELPHONSE, *supra* note 94 (discussing the trivial nature of centering a child’s wellbeing solely on their sexual preferences).

<sup>158</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted); STRICKLAND, *supra* note 41.

<sup>159</sup> STRICKLAND, *supra* note 41.

<sup>160</sup> *Id.*

<sup>161</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted); *see* STRICKLAND, *supra* note 41 (explaining that governments must use “the least restrictive means to achieve their purposes” to pass the narrowly tailored standard).

<sup>162</sup> ALLIANCE DEFENDING FREEDOM, *supra* note 150 (interviewing senior counsel of Alliance Defending Freedom about the sweeping nature of a similar Oregon statute that mandates agreement with state-sanctioned sexuality to foster children of any age, gender identity, or religious affiliation).

<sup>163</sup> *See id.* (suggesting that gender and sexual issues do not typically arise with children under the age of nine, so legislation mandating sexual ethics can be tailored to older children).

<sup>164</sup> *See id.* (arguing that sexual ethic mandates are not relevant to the care of children under the age of nine, so their uniform imposition for all ages unnecessarily restricts the fostering of young children).

<sup>165</sup> *See id.* (suggesting that legislators can more narrowly tailor sexual ethic mandates to kids presenting nontraditional sexual attitudes for a less restrictive policy).

<sup>166</sup> *Id.*

<sup>167</sup> SB 407, 2023 Leg., 2023–2024 Reg. Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted) (preventing all families who do not believe that gender and sexuality “evolve” or do not want to participate in

restrictive” standard of strict scrutiny, it is unlikely that SB 407’s assent and pursuit provisions are “narrowly tailored” enough to withstand legal challenge.<sup>168</sup>

## V. CONCLUSION

History echoes a bitter reality: those in power often use that power to crush dissent.<sup>169</sup> Few institutions invite their dissenters to struggle against the injustices of the human condition as fiercely as the United States Constitution.<sup>170</sup> The courts have long been pioneers of justice, passing on a profound legacy of equality and human dignity to the American people.<sup>171</sup> Though the whims of culture may change, this legacy should remain.<sup>172</sup>

To allow SB 407 to mandate state-approved sexual attitudes and discriminate against those unwilling to comply is an unamerican denigration of that legacy.<sup>173</sup> SB 407 blatantly violates the guarantees of the First Amendment by compelling speech.<sup>174</sup> Forcing resource families to assent to a government view of sexuality that contradicts the deeply held religious convictions of many Californians is an unjustified restriction on the freedom of expression.<sup>175</sup> SB 407’s complete exclusion of certain families from the child welfare system solely on the basis of their religious beliefs about sexuality is not consistent with the First Amendment.<sup>176</sup>

As twenty-first century Americans, we have inherited an incredible legal tradition of freedom and equality.<sup>177</sup> Such a legacy was built on the shoulders of great men and women who fought for the liberty and fair treatment of those with whom they disagreed.<sup>178</sup> Before California is now a choice: recognize the price of liberty and honor the great American tradition of equality or denigrate the most fundamental cause of our great inheritance.<sup>179</sup> California’s Legislature must make the right decision and reject SB 407.<sup>180</sup>

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‘gender-affirming’ medical care, without exception, from the child welfare system); see STRICKLAND, *supra* note 41 (detailing how narrowly tailored laws must be employed through the least restrictive means).

<sup>168</sup> STRICKLAND, *supra* note 41.

<sup>169</sup> *1st Amendment Timeline*, *supra* note 26 (chronicling the various First Amendment challenges by dissenters throughout American history).

<sup>170</sup> Megyn Kelly, *Supreme Court’s Historic Free Speech Ruling for Colorado Web Designer, with Judge Amul Thapar*, YOUTUBE (June 30, 2023), <https://www.youtube.com/watch?v=eHzaXI88sYA> (on file with *University of the Pacific Law Review*).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> SNIDER, *supra* note 46.

<sup>174</sup> *Id.*

<sup>175</sup> *1st Amendment Timeline*, *supra* note 26; MCCONNELL, *supra* note 58.

<sup>176</sup> WIDMALM-DELPONSE, *supra* note 94.

<sup>177</sup> KELLY, *supra* note 170; Kelly Howard, *Is Religious Freedom Discrimination?*, ALL. DEFENDING FREEDOM (Jan. 6, 2023), <https://adfflegal.org/article/religious-freedom-discrimination> (on file with *University of the Pacific Law Review*).

<sup>178</sup> KELLY, *supra* note 170.

<sup>179</sup> SNIDER, *supra* note 46; NEIHART, *supra* note 23.

<sup>180</sup> SNIDER, *supra* note 46; HOWARD, *supra* note 177.



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