Case No. 2020-05

UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

AL-ADAB AL-MUFRAD CARE SERVICES,

APPELLANT

v.

CHRISTOPHER HARTWELL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, CITY OF EVANSBURGH,

APPELLEE

ON REHEARING EN BANC OF AN APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF EAST VIRGINIA GRANTING A TEMPORARY RESTRAINING ORDER AND A PERMANENT INJUNCTION

ORIGINAL BRIEF OF APPELLEE, CHRISTOPHER HARTWELL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, CITY OF EVANSBURGH, ON REHEARING EN BANC

TEAM 1

COUNSEL FOR APPELLEE

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Under the Free Exercise Clause, is a facially nondiscriminatory law that is evenhandedly enforced without hostility toward child placement agencies a constitutionally permissible, neutral, and generally applicable law?

II. Under the unconstitutional conditions doctrine, does the government have the right to impose policy and define the scope of a child placement agency's speech when the government funds the agency but still allows the agency to publicly express its objections to the government's policy?

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STATEMENT OF JURISDICTION

The Western District of East Virginia had original subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, which grants district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." This suit is based upon a violation of the First Amendment of the United States Constitution. The decision of the district court below was a final decision; therefore, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

The district court's judgment was rendered on April 29, 2019. This Court rendered its panel decision on February 24, 2020. Pursuant to Federal Rule of Appellate Procedure 40(a)(1), Appellant filed a timely Petition for Rehearing En Banc, which was granted on July 15, 2020.

STATEMENT OF THE CASE

A. Statement of Facts

1. Evansburgh's Adoption System

The City of Evansburgh charged its Department of Health and Human Services, ("HHS"), with establishing a child-care system that would best facilitate adoption of the city's foster children while serving their best interests. R. at 3. The system that HHS devised included contracting with private child placement agencies that would help HHS conduct certain steps required to facilitate child adoptions. R. at 3.

Over the years, HHS amassed thirty-four child placement agencies in Evansburgh willing to help HHS identify adoptive and foster families that would care for the children in HHS's custody. R. at 3. HHS developed a contract that would allow it to use the child placement agencies to identify suitable foster families in exchange for public funds. R. at 3. The contract also obligated

the child placement agency to "maintain supervision and support to ensure a successful placement" on behalf of HHS after HHS identified the best fit for the child. R. at 4. As a result of this contractual agreement, foster parents will inevitably spend an extensive amount of time with their agency; therefore, the prospective parents must make a deeply personal choice and select an agency that will best represent them. R. at 5. After browsing and selecting their preferred agency from the list on HHS's website, prospective parents reach out to the agency to begin the certification process. R. at 5.

Plaintiff-Appellant, Al-Adab Al-Mufrad Care Services, ("AACS" or "the agency"), is one of the agencies that is contracted to identify families on behalf of HHS. R. at 3. AACS specializes in providing child placement services for children from the refugee population of Evansburgh. R. at 5. Like the other agencies, AACS is contracted to provide home studies, counseling, and placement options for HHS in exchange for public funding. R. at 3.

HHS's adoption process is fairly straightforward. First, HHS receives a child into custody and sends a "referral" of the child to all child placement agencies. R. at 3. Then, upon receiving the referral, child placement agencies will notify HHS if any of the families that the agencies have identified are a suitable match for the child. R. at 3. Finally, HHS selects the family that best suits the child's needs using statutory considerations: "(1) 'the ages of the child and prospective parent(s);' (2) 'the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);' (3) 'the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background;' and (4) 'the ability of a child to be placed in a home with siblings and half-siblings.'" R. at 4.

2. The Equal Opportunity Child Placement Act

In addition to contracting to perform these services on behalf of HHS, one of the basic requirements to contract with HHS as a child placement agency is to agree to abide by East Virginia law when performing under the contract. R. at 5-6. Specifically, the contract required all agencies be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6. This includes an East Virginia statute adopted in 1972, the Equal Opportunity Child Placement Act, and its 2015 amendment (collectively, the "Act") forbidding discrimination on various bases, including sexual orientation. R. at 6.

The Act's purpose is to create a nondiscriminatory environment within the network of child placement agencies. R. at 4. In exchange for an agency's agreement to not discriminate, HHS provides government funding to the agency. R. at 4. When it was originally enacted, the statute stated that the agencies could not discriminate "on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families" without losing the government funds. R. at 4. The original Act granted an exception to the nondiscrimination statute: agencies should "give preference" to parents or families that have at least one parent that shared the same race as the child when all other qualities among the potential families are equal. R. at 4. The motivations behind the Act are to ensure that all qualifying residents have access to any adoption agency of their choosing and to expand and diversify the pool of adoptive and foster parents for children in care. R. at 9. From the outset, the purpose of the Act was to create an inclusive environment and provide equal and fair treatment to all of Evansburgh's citizens, not to discriminate against religious agencies. R. at 9.

East Virginia adopted an amendment to the Act in 2015 that added sexual orientation as a trait protected from discrimination. R. at 6. The Governor of East Virginia ordered the state's attorney general to update all of the state's nondiscrimination laws to include sexual orientation as

a protected class. R. at 6. In pursuit of the child's best interests, the amendment to the Act also included a provision "where the child to be placed has an identified sexual orientation, Child Placement Agencies must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." R. at 6.

The final facet of the amendment established a notice requirement stating that all child placement agencies must post a sign in its place of business stating that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. However, recognizing certain religious objections to same-sex marriage, the amendment allowed agencies to post their objection to the policy at their places of business alongside the required signage. R. at 6. This granted religious agencies the ability to continue expressing their beliefs while ensuring that all potential families knew that they were in a nondiscriminatory environment. R. at 6.

Because the overall goal of this system is to satisfy the best interests and needs of the child, HHS has granted exemptions from the Act over the years in that pursuit. R. at 8-9. Specifically, these exemptions led to the following determinations: (1) HHS placed a white special-needs child with an African-American family, R. at 8-9, and (2) HHS denied placement of a five-year-old girl with a father and son pair, R. at 9. In addition to these secular exemptions, HHS granted a religious exemption from the Act between 2013 and 2015 when tensions arose between two sects of the local Islamic community. R. at 9. At the time, AACS recommended that HHS should not match children and families of differing sects because of this tension. HHS heeded the warning and placed Islamic children with parents and families of the same sect during that period. R. at 9.

3. The Controversy

AACS and HHS have maintained yearly contracts since AACS's founding in 1980. R. at 5. In July 2018, Christopher Hartwell, Defendant-Appellant and Commissioner of HHS, ("Hartwell"), spoke to a reporter who wanted to know if all the agencies were abiding by the Act. R. at 6-7. After performing his due diligence as commissioner, Hartwell learned that AACS was refusing to certify same-sex couples and alerted AACS that they were in violation of the Act and their contract by doing so. R. at 7. AACS informed Hartwell that its beliefs prohibited them from certifying same-sex couples; they would continue to discriminate against same-sex couples "because the Qur'an and the Hadith consider same-sex marriage to be a moral transgression". R. at 7.

Despite its utmost respect for AACS's religious beliefs, HHS informed AACS that it would not be renewing AACS's contract because of AACS's non-compliance with East Virginia laws. R. at 7. HHS gave AACS another opportunity to rectify its non-compliance—if they posted the required text within ten business days and assured HHS that they would comply with the Act, HHS would renew the contract. R. at 7-8. AACS's refusal to simply follow the law forced a referral freeze. R. 8. Therefore, because AACS represented these foster parents, a girl was unable to be placed with her two brothers, and a foster mother was unable to adopt her special-needs foster son of two years. R. at 8.

Instead of complying with the Act after two opportunities to do so, AACS instead filed suit.

B. Course of Proceedings.

AACS filed suit on October 20, 2018, alleging that HHS violated its First Amendment rights under the Free Exercise Clause and the Free Speech Clause. R. at 8. The district court rendered its judgment on April 29, 2019, granting AACS a temporary restraining order and

permanent injunction. R. at 17. On appeal, a panel of this court rendered its decision on February 24, 2020, finding no First Amendment violations and reversing the district court's decision. R. at 18-19. Pursuant to Federal Rule of Appellate Procedure 40(a)(1), the AACS filed a timely Petition for Rehearing En Banc, which was granted on July 15, 2020. R. at 26.

SUMMARY OF THE ARGUMENT

HHS has the authority to initiate a referral freeze against AACS for not complying with the nondiscrimination requirements as outlined in EOCPA because the Act is a neutral and generally applicable law that does not inhibit AACS's Free Exercise of Religion. The Act's nondiscrimination requirement is neutral and generally applicable because it even-handedly prohibits child placement agencies' discrimination to ensure equal access to a publicly funded service. Specifically, the Act is neutral because it does not contain any religious words or directly condemns religious practices. Also, the Act's enforcement is neutral because its purpose was not to suppress or control religious beliefs, and HHS's enforcement does not attempt to regulate religion.

Additionally, the Act is generally applicable because the law prohibits both secular and religious organizations from discriminating. Further, HHS allows exceptions to the Act for the sole purpose of making decisions in the best interest of the child and permits secular and religious organizations to do so. Furthermore, HHS displayed no hostility toward AACS in the enforcement of the Act. HHS respects AACS's religious beliefs and the critical work they do in the community and requested AACS to comply with the policy so HHS could lift the referral freeze. None of these actions evidenced hostility. Finally, even if this court finds these arguments unpersuasive, the Act and application will survive strict scrutiny analysis. The Act furthers a compelling state interest

(the ability for all taxpayers to access all the child placement agencies using its tax dollars). The Act is narrowly tailored in pursuit of that interest.

As the panel held, HHS has not violated AACS's rights under the First Amendment Free Speech Clause because enforcement of the Act as a condition for receiving public funds is not an unconstitutional condition, and the Act does not compel speech. HHS has not imposed an unconstitutional condition on AACS by prohibiting it from discriminating against prospective foster parents based on sexual orientation. Because AACS receives public funds for providing foster care and adoption services, HHS is entitled to define the limits of its contract with AACS. Moreover, the purpose of the contract between HHS and AACS is to provide foster care and adoption services, not to facilitate private speech.

Enforcement of the Act does not qualify as compelled speech because it does not compel AACS to endorse same-sex couples as adoptive parents. The Act merely prevents child placement agencies from discriminating against prospective parents based on sexual orientation, as prohibited by East Virginia's law. Because the agency receives public funding from HHS to provide foster care and adoption services, AACS's speech constitutes government speech when serving in that capacity, as the panel held. The Act's nondiscrimination requirements are not compelled speech because the Act does not regulate speech protected by the First Amendment.

ARGUMENT

I. HHS has not violated AACS'S rights to the free exercise of religion.

This court should affirm the panel's decision because: (1) the Act is a neutral and generally applicable law; (2) HHS did not enforce this law with hostility upon AACS; and in the alternative, (3) the Act can withstand strict scrutiny. Although the Constitution protects every person's freedom of belief, the judiciary must strike a balance between a person's freedom to act and society's need

for equal protection under the law. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-304 (1940). *See also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 874 (1990) (citing *Reynolds v. United States,* 98 U.S. 145, 166-167 (1878). Accordingly, the Supreme Court determined those neutral and generally applicable laws are still enforceable, even when proscribing conduct that an individual's religion prescribes, or vice versa. *Smith*, 494 U.S. at 878. Therefore, to prove that the Act is not neutral and generally applicable, AACS must show that the Act's objective intended to specifically target the agency "because of" its religious beliefs. The agency's burden of proof is high because laws which are neutral and generally applicable are not subject to strict scrutiny;[1] Moreover, states can still enforce laws that may fall under the above framework, if they can withstand strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Undoubtedly, the Act is a neutral and generally applicable law that can withstand strict scrutiny; therefore, its enforcement does not interfere with AACS's free exercise of religion.

A. The Act is neutral and generally applicable because it applies to each agency equally, and HHS's enforcement of the Act and its exceptions do not target specific religious beliefs.

The Act is neutral and generally applicable because it even-handedly prohibits discrimination by any private or public foster care and adoption agency to abolish discrimination and ensure that protected classes have access to public services. Many federal and state laws conflict with the myriad of religious views held in the United States; however, enforcement of a neutral and generally applicable law does not violate a religious organization's First Amendment right to exercise its religion. *Smith*, 494 U.S. at 879 (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Where the Supreme Court denied a mother's claim to free exercise of her religion when

[1] A law fulfills strict scrutiny when enactment "is justified by a compelling interest and is narrowly tailored to advance the that interest." C*hurch of the Lukumi Babalu Aye, Inc*, 508 U.S. at 533.

employing her children as child laborers); *and United States v. Lee,* 455 U.S. 252, 263 (1982) (Where the Supreme Court rejected an Amish employer's objection to social security taxes claiming interference with their religious beliefs)). AACS has not and cannot meet this burden.

1. The Act is neutral because it does not facially or inadvertently target religious practices.

The Act is a "neutral law" as defined by jurisprudence because the text does not contain religious words nor imposes specific demands on religious organizations different from those required of a secular organization. To determine neutrality, a court must first look to the object of the law. *Church of the Lukumi Babalu Aye, Inc*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of its religious motivation, the law is not neutral"). Courts find facial neutrality when, as here, a law's text does not refer to religious practices or use primarily religious language without an identifiable secular meaning or context. *See id.* A law remains neutral when there is no indication that suppressing religious practices was the law's object. *Id.* at 534. To succeed in a neutrality argument, AACS must show the Act does more than adversely impact them, but actually "targets religious conduct." *See id* at 535 ("For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination."). AACS does not meet this burden.

As illustrated in *Church of the Lukumi Babalou Aye Inc v. City of Hialeah*, the Supreme Court held that to meet the "minimum requirement of neutrality," the law's text must not contain religious words or undertones. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. In that case, the church filed suit when particular city ordinances interfered with its ritual and sacrificial animal slaughtering. *See id.* at 534. The ordinance directly prohibited "a religious group from sacrificing an animal in a religious ritual or practice," and the Court held that, because the city

used familiar religious words like "ritual" and "sacrifice," the ordinance was not facially neutral. *Id* at 527.

The ordinances in *Church of the Lukumi Babalu Aye, Inc.* are a stark differentiation to the Act. AACS offers no evidence that the text of the Act is facially discriminatory because it does not use words with religious undertones or address religious activities specifically. *See* R. at 4; *see also* R. at 6. The Act neutrally prohibits "Child Placement Agencies from discriminating on the basis of sexual orientation." R. at 6. Because AACS cannot show that the Act is facially discriminatory towards religion, the only other argument AACS has available is that the motivation of the Act's enforcement was to suppress AACS's religious beliefs. This argument must fail, as well.

For example, in *Employment Division v. Smith*, the Supreme Court upheld a criminal statute prohibiting sacramental peyote ingestion. *Smith*, 494 U.S. at 874. The respondents, two members of a native American church, ingested peyote[2] for sacramental purposes at a religious ceremony. They then lost their jobs and were denied unemployment compensation because their peyote ingestion was a criminal act. *See id*. The petitioners argued that the criminal statute violated their free exercise of religion by criminalizing part of their religious ceremony. *See id*. The Supreme Court distinguished government regulation of religious beliefs, or the free exercise of religion, from secular laws that interfere with religious practices. *See id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1968) ("the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such'")). The Court determined Oregon's drug law and unemployment compensation guidelines made no attempts to

[2] Peyote is a drug classified in Schedules 1 and V of the Federal Controlled Substances Act. *Smith v. Employment Div., Dept. of Human Resources*, 301 Or. 209, 217-19 (1986) (*Smith I).*

regulate religion. *See Smith,* 494 U.S. at 875. Thus, an individual's religious beliefs do not excuse him from complying with an otherwise neutral and valid law. *Id.* at 878.

Like the laws and regulations in *Smith*, HHS here made no attempts to regulate religious beliefs by enforcing the Act. The policy underlying the Act originated in 1972 to prohibit private child placement agencies from receiving public funds if the agency discriminated "on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." R. at 4. Obviously, the Act's text is facially neutral, only employing secular words with no religious undertones. Also, the stated primary motivations behind the Act are neutral—(1) eliminating unlawful discrimination by ensuring all qualified prospective foster parents have access to any adoption agency of their choosing; (2) expanding and diversifying the pool of adoptive and foster parents to find appropriate homes for the 17,000 children in care; and 3) taxpayers funding government contractors have access to the services. R. at 9. These motivations do not target religious beliefs or even mention religion; instead, the ultimate aim is for protected classes to enjoy access to public services. Hence, the Act is a neutral law because its text and tone are facially neutral. The motivations behind HHS's enforcement do not target religions but provide equality to all prospective adoptive parents.

2. The Act is generally applicable because it is applied consistently to religious and secular organizations and only makes categorical exemptions.

HHS's enforcement of the Act meets the general applicability requirement because it equally prohibits discrimination by secular and religious organizations. The Act remains a neutral law because HHS's enforcement throughout all private child placement agencies is generally applicable to both secular organizations and religious-based organizations. A law meets the general applicability standard when its prohibitions interfering with religious beliefs also prohibit "substantial, comparable secular conduct that would similarly threaten the government's interest."

Stormans, Inc v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Church of the Lukumi Babalu Aye, Inc*, 508 U.S. at 542-546). Laws that do no selectively impose certain conditions on religious conduct meet the general applicability standard. *Parents for Privacy v. Barr,* 949 F.3d 1210, 1233 (9th Cir. 2020). Further, laws are neutral when enforced exceptions for secular motivations are viewed equally to religious motivations. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999); *See also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (2002) *(*quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535)) (stating that the government must enforce laws on a religion-neutral basis, as "the effect of a law in its real operation is strong evidence of its object"). HHS generally applied the Act to all child placement agencies and enforced its nondiscrimination laws on both secular and religious organizations.

In *Parents for Privacy v. Barr*, the Ninth Circuit concluded that a new student safety plan, permitting high school students to use the locker room or restroom of the gender they most associate with, did not interfere with other students' Free Exercise rights. *Parents for Privacy,* 949 F.3d at 1233. Parents of cisgender children argued that the plan violated their children's First Amendment rights because undressing and dressing in the presence of members of the opposite sex attacked their sincere religious beliefs. *See id*. However, the Ninth Circuit dismissed the parents' claim for injunctive relief, holding the plan was neutral and generally applicable. *See id.* at 1234. The court reasoned that the law did not punish anyone for expressing their religious views, nor did it force anyone to embrace particular aspects of secular ideas which the parents found to be against their religion. *See id.* Further, the court held that the law was generally applicable because it did not require only religious students or staff to share a locker room with a member of the opposite sex; instead, it applied to all students and faculty. *See id.* at 1235 ("The correct inquiry

here is whether, in seeking to create a safe, nondiscriminatory school environment for transgender students, the Student Safety Plan selectively imposes certain conditions or restrictions only on religious conduct").

Like the equal enforcement of the antidiscrimination student safety plan in *Parents for Privacy*, HHS equally enforced the Act against both secular and religious child placement agencies. First, HHS did not selectively require only religious organizations to comply with the nondiscrimination requirement against same-sex couples; instead, the Act applied to every agency. R. at 4. AACS would necessarily urge this court that HHS's actions seem discriminatory to certain groups regarding the process of placing a child. But the statutory criteria HHS must use for child placement decisions do not deny a protected class adoption services and are intended to serve the child's best interest. *See* R. at 4.

> (1) the ages of the child and prospective parent(s); (2) the physical and emotional needs of the child in relation to the characteristics, capacities, strengths, and weaknesses of the adoptive parent(s); (3) the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background; (4) the ability of a child to be placed in a home with siblings and half-siblings

R. at 4. While this criteria could appear to discriminate based on specific characteristics of the prospective parents (age, race, ethnicity, religion, and so forth), they are, in fact, enforceable under the Act because they do not deny a protected class adoption services and intend to serve the child's best interest. These guidelines motivated HHS's placement of a white special needs child with an African-American couple on November 4, 2014, R. at 8, and HHS's refusal to place a five-year-old girl with a certified father and his son on March 21, 2015. R. at 9. HHS made these individual exceptions for religious and secular organizations and followed the child's best interest guidelines outlined in the Act.

HHS also allowed religious exceptions to the Act, demonstrating how HHS meets the general applicability standard. For example, from 2013 to 2015, tensions arose between two different sects of the Islamic community in Evansburgh. R. at 9. AACS recommended that HHS not allow children to be placed with otherwise qualified parents from an opposing sect due to the tensions. R. at 9. HHS agreed with AACS's recommendation and enforced it accordingly. R. at 9. Making these exceptions did not denigrate religious organizations while commending secular agencies but rather furthered HHS's and all of the agencies' shared goal of placing abused and neglected children in families who will love and cherish them. Therefore, the Act is generally applicable because it does not impose conditions only on religious conduct, and HHS applies exclusions and exceptions categorically to fit the child's best interest without discriminating against religion.

B. The City of Evansburgh did not apply the Act with hostility, nor did it intentionally target AACS's religious views.

Although HHS froze referrals to AACS upon learning of its discrimination against same-sex couples, HHS treated its religious reasoning without hostility and simply asked them to follow the Act so they may lift the freeze. The First Amendment's Free Exercise Clause entitles individuals to an unbiased review of conscience-based objections. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1730 (2018). Specifically, states must show neutrality towards religion and cannot base laws or regulations on hostility towards a religion or a religious viewpoint. *Masterpiece Cakeshop, Ltd.*, 138 S.Ct. at 1731. There must be evidence of bias in the historical background of the legislative material, or partisan statements made by members of the decision-making body, to maintain an argument for malicious application. *See id.* at 1732 (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533). Further, courts may not

judge specific religious beliefs by allowing one religion's conscience-based objections for providing services to a class of people but prohibit another religion's potentially discriminatory acts. *Masterpiece Cakeshop, Ltd.*, 138 S.Ct. at 1730 ("A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness").

In a case with almost identical facts to the one at bar, *Fulton v. City of Philadelphia*, the Third Circuit Court of Appeals held that enforcing antidiscrimination laws against an adoption agency refusing to work with same-sex couples was consistent with the First Amendment's Free Exercise Clause. *Fulton v. City of Philadelphia*, 922 F.3d 140, 145 (3d Cir. 2019). The adoption agency filed a lawsuit after the city stopped referring children to its agency. *Id.* at 143. The city initiated the referral freeze upon learning that the agency did not certify same-sex couples for adoption or placement. *Id.* at 150. The court determined that the city treated the adoption agency's religious views impartially and only criticized the agency for violating the city's nondiscrimination policy. *Id.* at 155. Notably, the court stated: "[the agency] never refuses to work with individuals because of their membership in a protected class. Instead it seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Id.* at 159. Therefore, enforcing nondiscrimination laws was constitutional and did not violate the agency's First Amendment rights. *Id.*

This court should follow the *Fulton* court's analysis because the Third Circuit correctly analyzed the Free Exercise claims, and the facts are nearly identical. Like the city in *Fulton,* HHS treated AACS impartially. First, as the court held in *Fulton*, when an agency accepts public funds, they must follow the city's nondiscrimination policy. Here, the Act clearly states: "No municipal funds are to be dispersed to child placement agencies that do not comply with the [Act]." R. at 4.

Second, there is still no evidence HHS treated AACS's religion with hostility, despite AACS failing to comply with the Act. In fact, HHS treated AACS benevolently, evidenced by (1) by HHS accepting AACS's recommendation to place children in families of the same Islamic sect, R. at 9, (2) by a letter Commissioner Hartwell wrote stating: "HHS respects your [AACS's] sincerely held religious beliefs," R. at 7, and (3) HHS's website description which encourages potential foster parents to browse the agencies' list, stating each one has different requirements, specialties, and training programs. R. at 5. Clearly, the above instances indicate fair and nonhostile treatment towards AACS, and AACS presents no evidence to the contrary. Should this court decide otherwise, a circuit split would occur and create uncertainty in the law.

Further, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held that the Commission violated a Christian baker's First Amendment rights when it determined that the baker unlawfully discriminated against a same-sex couple when he refused to bake their wedding cake. *Masterpiece Cakeshop, LTD.*, 138 S. Ct. at 1721 (2018). The Court focused on the Commission's cruel treatment toward the baker, ruling that the neutral and generally applicable law was unenforceable because the commissioner described the baker's faith as "despicable" and compared his religious beliefs to defending slavery and the holocaust; and the Commission's different treatment between this case and substantively similar cases where the bakers' conscience-based objections prevailed. *See id.* at 1730. Courts facing similar Free Exercise issues consistently reference the *Masterpiece Cakeshop* decision to determine whether the evidence before them rises to that level of hostility. *See Fulton v. City of Philadelphia*, 922 F.3d at 145; *see also New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 157 (2d Cir. 2020). As illustrated below, the evidence AACS presents to prove hostility falls far below the instances in *Masterpiece Cakeshop.*

Therefore, HHS must not suffer the same fate as the Commission in *Masterpiece Cakeshop* because HHS did not show hostility towards AACS or its religious views. AACS's only potential basis for claiming hostility rests in a negative comment the Governor made in 2015, which is woefully inadequate. R. at 6. Not only is the Governor's comment far less hostile than the Commissioner's in *Masterpiece Cakeshop*, but the remarks were also neither directed towards AACS nor the referral freeze adopted by HHS. But even if they were, the Governor plays no role in enforcing the Act against child placement agencies, R. at 6, as opposed to *Masterpiece Cakeshop,* where the authority enforcing the nondiscrimination law expressed an explicit bias against the market participant that it was regulating. *See Masterpiece Cakeshop, LTD.*, 138 S. Ct. at 1730.

Moreover, HHS did not demonstrate any discriminatory behavior shown by the Commission in *Masterpiece Cakeshop* when applying exceptions to anti-discrimination laws. HHS's exceptions to certain parts of the Act were solely for the child's best interest during placement, not to sit in judgment of an agency's different religious views. The facts do not show that HHS provided preferential treatment to certain agencies over others; instead, consequences arose because AACS did not follow a neutral and generally applicable law outlined in its contract with HHS.

The majority in *Masterpiece Cakeshop* established a high standard for hostility; nevertheless, Justice Ginsburg's dissent argued that even with the hostility shown, there was not enough evidence to determine that the Free Exercise clause protected the baker's discriminatory policies. *Masterpiece Cakeshop, LTD.,* 138 S. Ct. at 1748 (Ginsburg, J., dissenting). Nondiscrimination policies protect classes of people commonly discriminated against. Therefore, the dissent appropriately distinguished situations where bakers lawfully refused to accommodate

hateful messages requested by *any* customer from *Masterpiece Cakeshop* where the baker unlawfully declined to accommodate customers solely based on their sexual orientation. *See id*.

In the same regard, AACS refusing home study services to same-sex couples disqualifies a protected group of people from receiving its government-funded services. AACS explicitly states that they discriminate "because the Qur'an and the Hadith consider same-sex marriage to be a moral transgression," thereby excluding same-sex couples from receiving its unique, refugee-oriented services. R. at 7. Moreover, HHS contracted with AACS to provide a public service to the people of Evansburgh, thereby giving them a heightened responsibility to practice nondiscrimination policies than the private baker in *Masterpiece Cakeshop*. *See infra* II.B.2. Therefore, these minute instances of hostility should not invoke the Free Exercise Clause because it would set a precedent of allowing service providers to deny benefits to an entire group of people. AACS does not meet its burden to show hostility under the majority opinion of *Masterpiece Cakeshop*. Furthermore, if this court decides against HHS, they will effectively be lowering the standard of hostility, producing overwhelmingly negative consequences for protected classes of people.

Most recently, the Second Circuit reiterated the *Masterpiece Cakeshop* "slight suspicion" standard of hostile treatment in *New Hope Family Services, Inc. v. Poole*. Similar to AACS, a child placement agency denied same-sex couples placement services because of its religious views. *New Hope Family Services, Inc.*, 966 F.3d at 157. The government threatened to shut down the privately funded adoption agency because they did not comply with nondiscrimination laws. *Id.* at 149. The Second Circuit, looking at all the evidence in a light most favorable to New Hope, *Id* at 160 (citing *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009)), determined the agency presented a plausible claim after providing sufficient evidence of hostility towards its religious practices when

the government enforced its nondiscrimination laws. *Id*. at 162. Specifically, the government did not enforce an antidiscrimination law on the agency until five years after promulgated. *Id.* at 166. Additionally, the government forced the agency to "'compromise' . . . its own religious views about family and marriage and subscribe to the state's orthodoxy on such matters" to remain in business. *Id.* at 168.

Poole, sets a dangerous precedent by further lowering the evidentiary standard for hostile practices that *Masterpiece Cakeshop* initially presented. As a result, this court should discount it. But even under *Poole's* lessened standard, AACS still cannot meet its burden to show hostility against it. Primarily, HHS's consequence was not nearly as hostile as the city in *Poole* because HHS simply ordered a referral freeze. Although in *Poole,* and this case, time passed between enacting the law and enforcement upon the agency, R. at 6, the Second Circuit only affirmed this evidence to establish a plausible claim, not to grant relief to New Hope. Thus, AACS cannot consider this time-lapse as enough evidence of hostility. Finally, this case is distinguishable because, like in *Fulton*, AACS receives government funds. Consequently, AACS is a public service, R. at 3, and government contractors must comply with nondiscrimination requirements while providing public services. AACS cannot meet its burden to establish hostility for this court to reverse their previous decision and grant AACS its requested relief.

C. Alternatively, even if the Act is neither neutral nor generally applicable, it nevertheless withstands the strict scrutiny standard.

As shown above, the Act is neutral and generally applicable, and HHS did not enforce the policy against AACS with hostility towards its religious views. However, in the alternative, the Act still withstands strict scrutiny review. Laws that "infringe upon or restrict practices because of . . . religious motivation" must withstand strict scrutiny. C*hurch of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. State's individualized enforcement of the law must be compelling enough to show

the advancement of interests of the highest order and must be narrowly tailored in pursuit of those interests, to withstand strict scrutiny. *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 141 (1987). Enforcing a law that burdens religious conduct must serve to advance a compelling government interest, such that no other law could produce the same affect without inhibiting religious beliefs that are at odds with that government interest. C*hurch of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. "It is black-letter law that "eradicating discrimination" is a compelling interest" *See Fulton,* 922 F.3d at 163 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)); *see also Fulton*, 922 F.3d at 164 ("The government's interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do."). The Act withstands strict scrutiny because it is narrowly tailored to demand all government contractors stop discriminatory actions and advance the compelling government interest of eradicating discrimination in all forms.

In contrast, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* the Supreme Court determined the police department's policy banning facial hair on police officers, which was discriminatorily applied, did not satisfy strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12,* 170 F.3d at 367. The police department enforced its beard police unevenly, granting exceptions for medical reasons but not for religious reasons. However, granting these exceptions left some police officers bearded and others not. *See id*. Thus, directly opposing its argument, which claimed the policy's narrow tailoring, advanced the public interest of safety through a unified police force. *See id*. ("We are at a loss to understand why religious exemptions threaten important city interests, but medical exemptions do not"). The Supreme Court emphasized a policy is not narrowly tailored if the exceptions to that policy "undermines" the interests the policy is trying to advance. *Id.* at 366.

Unlike the no-beard policy and its discriminatory exceptions in *Fraternal Order of Police Newark*, HHS's policy is narrowly tailored to ensure placement agencies do not discriminate against same-sex couples. R. at 6. No exception HHS makes to this policy discriminates against a protected class and thus does not undermine this nondiscriminatory policy's interests. The facts AACS presents evidencing discriminatory exceptions permitted by HHS do not undermine the Act's narrowly tailored interest of protecting marginalized classes of people; instead, the exceptions are attributed to HHS's goal of following the best interest of a child. R. at 8-9. The Act is narrowly tailored to eliminate discrimination and thus meets the first element of strict scrutiny.

In conclusion, the Act satisfies the neutral and generally applicable framework for enforceable laws that do not violate an individual or entities' free exercise of religion. The Act's text is facially neutral, and HHS enforces it amongst all agencies without hostility. Further, the Act is generally applicable to secular and religious organizations and only allows exemptions when the child's best interest is at stake. Lastly, though the Act is unquestionably neutral and generally applicable, the law also withstands strict scrutiny because it is narrowly tailored to address adoptive placements for children in foster care and serves the compelling state interest to eliminate all forms of discrimination and ensure that the adoptive parent pool is as diverse as the children in care.

II. HHS has not violated AACS's rights under the First Amendment because enforcement of the Act as a condition for receiving public funds is not an unconstitutional condition, and the Act does not compel speech.

A. Requiring AACS to certify same-sex couples to receive public funds is not an unconstitutional condition because HHS may define the limits of the contract, and the contract's purpose is to provide foster care and adoption services.

Enforcement of the Act is not an unconstitutional condition because HHS has a right to define the limits of its service contracts with child placement agencies, and the purpose of these contracts

is to provide a government service. Under the unconstitutional conditions doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). However, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Additionally, although the government "may not require grant recipients to adopt the government's views as their own," it may condition the granting of public funding. *Fulton v. City of Philadelphia*, 922 F.3d 140, 161 (3d Cir. 2019), *cert. granted*, 140 S.Ct. 1104 (2020) (citing *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205 (2013)).

1. HHS is entitled to define the limits of its service contracts with child placement agencies because it pays for those services with public funds.

HHS is entitled to define the limits of the service contracts it enters into with child placement agencies because it pays for those services with public funds. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. In *Rust v. Sullivan*, grantees receiving federal funds intended to provide family-planning services challenged regulations issued by the Department of Health and Human Services. *Id.* at 178-181. The regulations prohibited Title X programs from engaging in family-planning services related to abortion. *Id.* at 179-80. In part, the grantees argued that the regulations violated their First Amendment rights because they unconstitutionally conditioned the funds by requiring the grantees give up their right to "engage in abortion-related activities." *Id.* at 196. The Supreme Court rejected the grantees' argument and upheld the regulations. *Id.* at 203. In part, the Court reasoned that the regulations did not prohibit the grantees from engaging in abortion-related activities. *Id.* at 196. Rather, the Court reasoned, the regulations only required that the grantees not use the federal funds to engage in those activities. *Id.*

Like the department in *Rust*, HHS is also entitled to define the limits of its contract with AACS because HHS pays AACS public funds in exchange for adoption and foster care services. R. at 3. Under Section 4.36 of the contract between HHS and AACS, AACS is to be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6. Those laws include the Act, which "prohibit[s] Child Placement Agencies from discriminating on the basis of sexual orientation." R. at 6. Therefore, AACS may not discriminate based on sexual orientation because it receives public funding for its services.

Furthermore, although a complaint of discrimination has not been filed against AACS yet, R. at 7, under § 42.-2(a) of the Act, agencies that fail to comply with the Act are not to receive municipal funds. R. at 4. Therefore, under state law, HHS is barred from granting AACS public funds while it continues to discriminate against prospective adoptive parents based on sexual orientation. Moreover, by refusing to certify same-sex couples as adoptive parents, AACS is essentially seeking to deny taxpayers access to publicly funded services based solely on their sexual orientation.

By discriminating against prospective parents based on sexual orientation, and thus failing to comply with the terms of the Act, AACS effectively forced Hartwell to issue a referral freeze, resulting in a young girl being placed in a foster family apart from her brothers and an autistic boy denied adoption with his foster mother. R. at 8. Moreover, there are 17,000 children in foster care in Evansburgh, including 4,000 who may be adopted. R. at 3. By discriminating against prospective adoptive parents based simply on their sexual orientation, in violation of state law, AACS is effectively stealing from those 17,000 children opportunities to be placed in qualified homes.

Additionally, like Congress in *Rust*, HHS is not denying AACS right to refrain from endorsing views that conflict with its religious beliefs. In fact, as the panel decision noted, under § 42.-4, the agencies are expressly permitted to post objections to the Act's anti-discrimination policy. R. at 6, 25. In conclusion, HHS is merely refusing to allocate public funding to an agency that has failed to comply with East Virginia law. R. at 7-8.

2. Enforcement of the Act as a condition of receiving public funds is not an unconstitutional condition because the purpose of HHS's contract with AACS is to provide foster care and adoption services.

"[C]ourts should look to the purpose of a government program when analyzing whether a government condition to participation in the program is constitutional under the First Amendment." *Fulton*, 320 F. Supp. 3d at 696 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001)). For example, in *Legal Services Corp. v. Velazquez*, the Supreme Court held that a funding condition on a program intended to "facilitate private speech" violated the First Amendment. *Velazquez*, 531 U.S. at 537. The Legal Services Corporation ("LSC") was established through an act of Congress to distribute congressional funds to organizations to provide financial aid to indigent clients in need of legal services. *Id.* at 536 (quoting 42 U.S.C. § 2996b(a)). The condition at issue prohibited the congressional funds from being used in "an effort to amend or otherwise challenge existing welfare law." *Id.* at 536-37. The Court held that the condition violated the First Amendment. *Id*. The Court reasoned that the program was intended to "facilitate private speech." *Id.* at 542. Specifically, distinguishing from *Rust,* the Court reasoned that the funding facilitated private speech because it was intended "to provide attorneys to represent the interests of indigent clients," and those attorneys would speak for that client, not for the government. *Id.* at 542-43.

In comparison, in *Fulton*, the Third Circuit rejected an argument similar to the one that the agency has purported in this case. *Fulton*, 922 F.3d at 161. The Third Circuit held in part that the religious agency was not likely to succeed in its compelled speech argument. *Fulton*, 922 F.3d at 161. The district court distinguished the case from *Velazquez* and reasoned that Philadelphia and the Department of Human Resources hired the agency "to perform governmental functions." *Fulton*, 320 F. Supp. 3d at 696-97. Further, the agency claimed that the city violated its First Amendment free speech rights by compelling it endorse opinions regarding same-sex marriage contrary to its own opinions. *Fulton*, 922 F.3d at 161. The Third Circuit rejected the agency's claim, concluding that "[the city] simply insists that [the agency] abide by public rules of nondiscrimination in the performance of its public function under any foster-care contract." *Id.* Specifically, the court reasoned in part that "[t]he speech here only occurs because [the agency] has chosen to partner with the government to help provide what is essentially a public service." *Id.*

As the panel decided in this case, the purpose of HSS's contract with the agencies, unlike the program in *Velazquez*, is not "to facilitate private speech." R. at 23. Like the city's contract with the religious agency in *Fulton*, the purpose of HHS's contract with the agencies is to provide adoption services, including home studies, counseling, and recommended placements to HHS. R. at 3. These foster care and adoption services are part of a system established by HHS at the behest of Evansburgh. R. at 3. Like the religious agency in *Fulton*, AACS is performing a public service on behalf of HHS in exchange for performing foster care and adoption services.

For these reasons, enforcement of the Act as a condition of receiving public funds is not an unconstitutional condition because the purpose of HHS's program is to provide foster care and adoption services in Evansburgh.

B. Enforcement of the Act does not qualify as compelled speech.

This court should affirm its panel decision because enforcement of the Act is not a violation of AACS's rights under the Free Speech Clause. Although the First Amendment prevents the government from "abridging the freedom of speech," U.S. Const. amend. I, "free speech protection is not an absolute" William M. Howard, *Constitutional Challenges to Compelled Speech—Particular Situations or Circumstances*, 73 A.L.R. 6th 281 (2012). Here, HHS has not abridged AACS's freedom of speech by preventing it from discriminating against prospective adoptive parents based on sexual orientation.

1. Enforcement of the Act does not compel AACS to endorse same-sex couples as adoptive parents.

First, the Act's ban on sexual orientation discrimination does not compel AACS to endorse same-sex couples as adoptive parents. "[W]hile the government may place conditions on the use of public grant monies, it may not require grant recipients to adopt the government's views as their own." *Fulton*, 922 F.3d at 161 (citing *All. for Open Soc'y Intl.*, 570 U.S. 205 (2013)). In *Fulton*, the Third Circuit held that the city's nondiscrimination policy did not compel the religious agency to endorse same-sex marriage. *Fulton*, 922 F.3d at 161. In part, the agency argued that the city's nondiscrimination policy, which prevented it from discriminating based on sexual orientation, compelled the agency to make endorsements conflicting with its religious beliefs. *Id.* at 160. Specifically, it argued that the city required it "to adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents" *Id.* at 161. The Third Circuit rejected the agency's argument and held that they did not have a reasonable likelihood of success in its compelled speech claim. *Id.* Specifically, the court reasoned that "[the city] simply insists that [the agency] abide by public rules of nondiscrimination in the performance of its public function under any foster-care contract." *Id.* at 161. In concluding that the city did not require the

agency to endorse same-sex marriage, the court noted that the city was clearly willing to continue working with the agency. *Id.*

Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, the Supreme Court held that a funding condition, which required laws schools to allow military recruiters access to its campus equal to that of other employers, was not an unconstitutional condition and did not qualify as compelled speech. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 48-62 (2006). An association of law schools opposed to discrimination based on sexual orientation and Congress's policy regarding sexual orientation in the military argued that the statute was unconstitutional and violated its First Amendment rights by compelling speech. *Id.* at 52-53. The Supreme Court disagreed and concluded that the statute did not limit or compel the law schools' speech. *Id*. The Court reasoned that the statute permitted the schools to express their own views regarding the military's employment policy and still receive federal funding. *Id.* For example, the Court noted that the schools "'could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests.'" *Id.*

In this case, HHS is simply not requiring AACS to officially endorse same-sex couples as adoptive parents. AACS claims that the Act "compels it to endorse same-sex couples as adoptive parents" by preventing it from discriminating against adoptive parents based on their sexual orientation. R. at 22. However, § 37(e) of the East Virginia Code lists four criteria that child placements agencies are to use in placing children, none of which require the agencies to consider the sexual orientation of prospective adoptive parents. R. at 4.

Furthermore, like the city in *Fulton*, HHS has demonstrated its willingness to continue working with AACS. This is evidenced by Hartwell's letter to the agency, which states:

"[a]lthough HHS respects your sincerely held religious beliefs, your agency voluntarily accepted public funds in order to provide a secular social service to the community. AACS must comply with the [Act] to be able to receive government funding and referrals." R. at 7. First, this letter demonstrates that HHS is willing to continue working with AACS once it complies with the Act, despite knowing that its religious beliefs "consider same-sex marriage to be a moral transgression." R. at 7. HHS is not compelling AACS to make an endorsement of any kind. § 42.-3(b) of the Act merely prevents that child placement agencies from discriminating on the basis of sexual orientation according to East Virginia's law. R. at 6.

Moreover, § 42.-4 of the Act demonstrates that HHS is not requiring the agency to adopt HHS's views regarding same-sex marriage as its own. § 42.-4 merely requires that the agencies sign and post a statement explaining that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. This language does not reference the agencies' views on same-sex marriage. Additionally, like the act in *Rumsfeld*, § 42.-4 explicitly permits AACS to post an objection to the anti-discrimination policy. R. at 6. This further demonstrates that HHS is not requiring AACS to adopt HHS's views as its own. HHS is explicitly permitting agencies to express their own views regarding same-sex marriage without losing public funding. R. at 4. For these reasons, enforcement of the Act is not speech compulsion because HHS is not requiring AACS to officially endorse same-sex couples as adoptive parents, make endorsements of any kind, or limit AACS's speech.

2. AACS's speech qualifies as government speech.

AACS's speech constitutes government speech. Government speech, unlike private speech, is not regulated by the Free Speech Clause. *Matal v. Tam*, 137 S.Ct. 1744, 1757 (2017)

(quoting *Pleasant Grove City v. Summum*, 55 U.S. 460, 467 (2009)). Therefore, AACS's speech when acting in its capacity as a child placement agency providing foster care and adoption services to HHS.

"When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenburg v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (citing *Rust*, 500 U.S. at 196-200). In *New Hope Family Services, Inc. v. Poole*, the Second Circuit reversed the district court's dismissal of the religious adoption agency's Free Speech claims and rejected the district court's finding of government speech. *Poole*, 966 F.3d at 184. The Second Circuit reasoned that the district court incorrectly used *Velazquez* and *Fulton* to support its finding of government speech. *Id.* at 172. Specifically, the court held that those two cases were not applicable because the agency did not receive government funding for its adoption services. *Id.* Moreover, the Second Circuit noted that the agency "avoids government funding precisely to 'ensure its autonomy to operate in accordance with its religious beliefs.'" *Id.*

In comparison, in *Fulton*, the district court determined that agency was hired to perform a government function. *Fulton*, 320 F. Supp. 3d at 697. Specifically, the court reasoned, "[the agency's] work under the Services Contract is, thus, an extension of DHS's own work and [the agency's] speech, to the extent any is required under the Services Contract, constitutes governmental speech under *Legal Servs. Corp.*" *Id.*

The facts in this case more closely align with those in *Fulton.* First, unlike the adoption agency in *Poole*, AACS receives public funding in exchange for the foster care and adoption services it provides to HHS. R. at 3. Therefore, when applying the Second Circuit's reasoning, *Velazquez* and *Fulton* would be applicable in this case. Second, although the prospective families

contact the child placement agencies, HHS advertises the services of the agencies that it contracts with on its website. R. at 4-5. The "choosing an adoption agency" section of HHS's website states: "[b]rowse the list of foster care and adoption agencies to find the fit for you." R. at 5. By advertising the child placement agencies' services on a government website, it is clear that the agencies, including AACS, are intended to perform a governmental service for the public. For these reasons, AACS's speech constitutes government speech when acting in its capacity as a child placement agency providing foster care and adoption services to HHS.

3. The Act regulates conduct, not speech.

Finally, the Act's nondiscrimination requirements are not compelled speech because the Act regulates conduct that is not expressive. "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Rumsfeld*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Therefore, because the Act regulates conduct, HHS has not violated AACS's freedom of speech.

As the panel decision stated, this case is analogous to *Rumsfeld.* R. at 23. In *Rumsfeld*, the Supreme Court held that the statute at issue did not qualify as compelled speech. *Rumsfeld*, 547 U.S. at 62. The Court determined that the Act did not violate the law schools' freedom of speech, even though accommodating military recruiters on their campuses involved elements of speech, such as e-mails and postings to bulletin boards on behalf of the military recruiters. *Id.* at 61. Specifically, the Court reasoned that the statute did "not dictate the content of the speech at all," and the elements of speech were "plainly incidental to the [statute's] regulation of conduct." *Id.*

Generally, public accommodations laws seek to regulate conduct and not speech, because they "prohibit 'the *act* of discriminating against individuals in the provision of publicly available

goods, privileges, and services.'" *Masterpiece Cakeshop, Ltd.*, 138 S.Ct. 1719 at 1741 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572 (1995)). For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Supreme Court reasoned that a state's public accommodation law prohibiting discrimination based on sexual orientation "in 'the admission of any person to, or treatment in any place of public accommodation, resort or amusement'" did not violate the First Amendment. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572 (1995).

In this case, HHS is complying with East Virginia law under the Act by prohibiting the child placement agencies that it contracts with from discriminating on the basis of sexual orientation. R. at 4. As the Supreme Court explained in *Rumsfeld*, this type of regulation prohibiting discrimination is a regulation of conduct, which does not abridge AACS's freedom of speech. Moreover, the Act is a law analogous to the public accommodation law contemplated by the Supreme Court in *Hurley*. For these reasons, enforcement of the EOCPA is not compelled speech because it regulates conduct, not speech.

All of the considerations in this case weigh in favor of affirming the panel's decision. First, the Act satisfies the neutral and generally applicable framework for enforceable laws that do not violate an individual or entities' free exercise of religion. The Act's text is facially neutral and HHS enforces it amongst all agencies without hostility. Additionally, though the Act is unquestionably neutral and generally applicable, the law also withstands strict scrutiny because it is narrowly tailored to advance the compelling government interest of nondiscrimination. Second, enforcement of the Act does not violate AACS's rights under the Free Speech Clause. Enforcement of the Act as a condition for receiving public funds in exchange for foster care and adoption

services is not an unconstitutional condition. Furthermore, enforcement of the Act does not compel AACS to endorse same-sex couples as adoptive parents.

CONCLUSION

For the aforementioned reasons, this Court should find that enforcement of the EOCPA did not violate AACS's Free Exercise or Free Speech rights under the First Amendment.

Respectfully Submitted,

__/s/_____

Team 1

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