Case No. 2020-05

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

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

V.

AL-ABAD AL-MUFRAD CARE SERVICES,
PLAINTIFF-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

BRIEF FOR PLAINTIFF-APPELLEE

COUNSEL FOR PLAINTIFF-APPELLEE
TEAM 14
DATED SEPTEMBER 14, 2020

ISSUES PRESENTED

I. Whether the refusal to renew the City of Evansburgh's Department of Health and Human Services ("HHS") adoption placement services contract with Al-Adab Al-Mufrad Care Services ("AACS") violates AACS's First Amendment right to Free Exercise of religion, by requiring AACS to accept same-sex couples in accordance with the amended Equal Opportunity Child Placement Act ("EOCPA"), which is not a neutral and generally applicable law because it is in direct contradiction to the specific teachings of the Qur'an and the Hadith.

II. Whether a government agency can compel a non-profit to display and act upon a message at odds with the non-profit's sincerely held religious beliefs by conditioning public funding on their compliance.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifteenth Circuit was entered on February 24, 2020. The petition for a writ of certiorari was granted on July 15, 2020. The jurisdiction of this Court rests on the Federal Rules of Appellate Procedure 35(a)(2).

STATEMENT OF THE CASE

Plaintiff-Appellee, Al-Adab Al-Mufrad Care Services ("AACS"), is a non-profit adoption agency located in the City of Evansburgh. R. at 3. Until recently, AACS was contracted by Commissioner Christopher Hartwell ("Defendant-Appellant" or "Defendant") of the City of Evansburgh's Department of Health and Human Services ("HHS") to provide support to a racially and ethnically diverse population. R. at 3. Specifically formed to provide support to the refugee population, AACS also assists in adoption placement for war orphans and other children in need of permanent families. R. at 5. As such, AACS strives to fulfill their mission which states: "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." R. at 5.

Defendant and HHS are responsible for establishing a system that serves the best interest of every child, in accordance with the East Virginia Code ("E.V.C"). R. at 4. Accordingly, HHS has entered into foster care and adoption service contracts with thirty-four private child placement agencies, including AACS, four adoption agencies that are expressly dedicated to serving the LGBTQ community in Evansburgh, and several others that have complied with the EOCPA amendments. R. at 8. There is a chronic shortage of foster homes in Evansburgh, where approximately 17,000 children are in foster care. R. at 3. These contracts provide public funding to agencies like AACS. R. at 3. Then, left to the sole discretion of HHS, it determines which

private agency has the most suitable family for a child based upon the referred child's age, sibling relationships, race, medical needs, disability and sexual orientation, if applicable. R. at 3.

In 1972, East Virginia adopted the Equal Opportunity Child Placement Act ("EOCPA") and imposed nondiscrimination requirements on AACS under E.V.C. § 42. R. at 4. Following the decision in *Obergefell*[1] in 2015, the EOCPA was amended to prevent discrimination on the basis of sexual orientation. E.V.C. § 42.-3(b). R. at 6. However, under the EOCPA, whenever all other parental qualifications are equal, agencies must "give preference" to potential families in which at least one parent is of the same race as the child and "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 4, 6.

Additionally, before funds are dispersed, the amended EOCPA requires a contracting agency to sign and post at its place of business a statement 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, the amendment permits a religious-based agency to post on their premises a written objection to the statement. E.V.C. § 42.-4. R. at 6.

AACS's contract with HHS was renewed on October 2, 2017. R. at 5. The renewal came after the Governor of East Virginia directed the Attorney General to conduct a thorough review of all state statutes to identify which ones needed to be amended to reflect the commitment to "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. After Defendant spoke with a reporter in early July 2018, he contacted all religious-based agencies in the area, including AACS,

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[1] *See Obergefell v. Hodges*, 576 U.S. 644 (2015).

to inquire about their policies and practices regarding the placement of children with same-sex couples. R. at 6-7.

Following a conversation with Sahid Abu-Kane, the Executive Director of AACS, Defendant first learned that AACS's religious beliefs, in accordance with the Qur'an and the Hadith, prohibited it from certifying qualified same-sex couples because it is viewed to be a moral transgression. R. at 6-7. Abu-Kane noted that AACS's practices were not violative of the EOCPA because it is not discrimination to follow the teachings of the Qur'an, which state: "Allah orders justice and good conduct." Qur'an, 16:90. R. at 7. Abu-Kane further explained that when same-sex couples contacted the agency, AACS treated them with utmost respect and referred them to other agencies that served the LGBTQ community. R. at 7. Since families who pursue adoption or foster care must seek out their own agency to see if they fit within the agency's profile and policies, it is normal practice for families who do not fit within an agency's guidelines to be referred to another agency. R. at 4-5. Defendant and Abu-Kane both admit that there has never been a formal complaint filed against AACS for discriminatory treatment by a same-sex couple. R. at 7.

Defendant states that HHS's policy enforcing the EOCPA serves to ensure the following governmental purposes: (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services. R. at 9.

After the enactment of the EOCPA, tensions arose between Sunni and Shia refugees in Evansburgh during a period of an influx of members of both sects from 2013 to 2015. R. at 9. On

at least three occasions during this tension ridden period, HHS approved AACS's recommendation that children should not be placed with otherwise qualified adoptive parents from the other sect and instead delayed placement until a family of the same sect as the child could be found. R. at 9. Additionally, in November of 2014, HHS placed a white special needs child with an African American despire three other adoption agencies screening and certification of white adoptive families for the child. R. at 8-9. Defendant explained that HHS interpreted E.V.C. § 42.2, requiring preference placement with same-race families, as "solely intended to preserve and protect minority children and families and as a result, the presumption did not govern that placement." R. at 8-9. On another occasion in March of 2015, HHS refused placement of a five-year-old girl with a family consisting only of a father and son, despite this family being certified by the sponsoring adoption agency. R. at 9.

Despite issuing an urgent notice to all Child Placement Agencies stating the need for more adoptive families as a result of an influx of refugee children into foster care, on September 17, 2018, Defendant sent a letter to AACS alleging that AACS was not in compliance with the EOCPA and that HHS would not renew its contract on the annual renewal date of October 2, 2018. R. at 7, 8. The letter further explained, in addition to revoking AACS's public funding, an immediate referral freeze would be communicated to all other adoption agencies, preventing AACS from fulfilling its mission. R. at 7-8. AACS was given an ultimatum: comply with the EOCPA, or lose the ability to receive referrals and ultimately, funding. R. at 7-8. As a result of the freeze, a young girl whose two brothers had been placed by AACS with a family was placed with different family by another agency. R. at 8. Additionally, a five-year-old autistic boy was denied adoption placement with the woman who fostered him for two years because of the referral freeze placed upon AACS. R. at 8.

After Defendant sent the letter to AACS alleging that AACS was not in compliance with the EOCPA and that it would renew its contract on September 17, 2018, AACS filed against Defendant, seeking a temporary restraining order against HHS's imposition of the referral freeze and a permanent injunction compelling HHS to renew its contract with AACS on October 30, 2018. R. at 2. Thereafter, there was a three-day evidentiary hearing in March 2019. R. at 8.

In April 2019, following the evidentiary hearing, the district court decided in favor of AACS, holding that the application of the EOCPA against AACS violated the agency's Free Exercise rights because statutory exemptions coupled with HHS's grant of individualized exemptions rendered the EOCPA neither neutral nor generally applicable. R. at 18-19. Thus, the district court held that enforcement of the EOCPA against AACS failed strict scrutiny. R. at 19.

Further, the district court, in evaluating AACS's free speech claims, held that requiring AACS to endorse same-sex couples as adoptive parents and post the EOCPA's anti-discrimination message on AACS's property forced AACS to engage in speech that defied its religious beliefs. R. at 19. The district court ultimately found that requiring AACS's speech as a condition of obtaining Evansburgh funds in exchange for adoption services infringed upon AACS's First Amendment rights under the unconstitutional conditions doctrine. Thus, the district court granted the temporary restraining order and issued the injunction. R. at 19.

Defendant subsequently appealed the district court's ruling and the Fifteenth Circuit reversed. R. 19. AACS now appeals the Fifteenth Circuit's decision. R. 26.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and hold: (1) the EOCPA violates the Free Exercise Clause of the First Amendment because it is neither neutral nor generally applicable; and (2) the EOCPA violates the

Unconstitutional Conditions Doctrine by compelling specific speech from a private party through the use of public funds.

First and foremost, the EOCPA violates the free exercise rights of AACS because it is not a law of neutral and general applicability and raises at least a slight suspicion of religious animosity. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 149 (2d Cir. 2020). A State's law may not law specifically target a religious practice. *Emp't Div., Department of Human Resources of Oregonv. Alfred L. Smith*, 494 U.S. 872, 879 (1990). In the issue at hand, at least a slight suspicion exists that there are discriminatory practices targeted at AACS, as a result of its views that same-sex marriage is a moral transgression. R. at 6-7. Only the four LGBTQ serving agencies in Evansburgh and a few other agencies in the city, but not all, are abiding by the amended EOCPA. R. at 7.

Similarly, statutory language must not directly target a specific religious practice. *Lukumi,* 508 U.S. at 546-7. Attention must always be given to the analysis of religious gerrymanders because, although the EOCPA seems neutral and generally applicable on its face, it specifically targets AACS, whose long-held beliefs are placed on the chopping block. *Id*. at 534. As the EOCPA is "directed at [plaintiffs] religious practice" it falls outside the scope of *Smith.* 494 U.S. at 878. Where there are individualized exemptions to a law, there must be a legitimate explanation for such exemptions for the law satisfy strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999). There are no such legitimate justifications here because all individualized exemptions were discriminatorily determined. R. at 8-9, 12-13. Specifically, a white special needs child was placed with an African American couple despite the certification of white adoptive parents by three other agencies; a five-year-old girl was

refused placement with a family consisting only of a father and son, despite certification by the sponsoring adoption agency; and, on three other occasions, children were refused placement with an AACS certified family because the adoptive parents were of the different sect than the child. R. at 8-9, 12-13. Further, where governmental hostility prevents the law from being applied in a neutral manner, that law cannot survive strict scrutiny. *Masterpiece*, 138 S. Ct. at 1720. Here, even the isolated statements made by the East Virginia governor in 2017 associating the traditional conception of marriage to bigotry directly target and discriminate against AACS's closely held beliefs that same-sex marriage is a moral transgression. R. at 7.

Contemporaneously, since September 11, 2001, there are growing concerns that the judiciary and public's religious and racial animosity towards Muslims and the Islam practice have substantially heightened.[2] The United States has historically had instances of discrimination based upon race, specifically when at war.[3] The judiciary has a hand in influencing public viewpoint, and ultimately provides a basis to security fears, when important decisions are made regarding religiously and racially rooted issues.[4] The issue at hand for AACS is unfortunately no exception to these instances. AACS, as a Muslim entity, is being targeted because Islam is deeply misunderstood and not mainstream in the United States.[5]

Moreover, because the government cannot limit AACS's religious speech directly, it is also unconstitutional for HHS to coerce AACS to limit its own speech in the hopes of receiving continued public funding. The First Amendment is applicable to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Further, the unconstitutional

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[2] Gregory C. Sisk & Michael Heise, Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts, 98 Iowa L. Rev. 231, 236–37 (2012)
[3] *Dow v. United States*, 226 F. 145 (4th Cir. 1915)
[4] Sisk & Heise, *supra* n. 2.
[5] *Id*. at 255.

conditions doctrine prevents the government from conditioning benefits on a relinquishment of a constitutionally protected right, "especially his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This case presents a prima facie violation of the unconstitutional conditions doctrine because HHS chose not to renew AACS's contract with the City due to their continued free speech exercise reflecting their religious beliefs on sexuality. R. at 7.

The Supreme Court has made clear that restricting speech as a prerequisite for involvement in a program meant to promote private speech is a violation of the First Amendment. *Perry v. Sindermann*, 408 U.S. at 597. After *Perry v. Sindermann*, the Court exemplified what such impermissible restriction looks like. In *Agency for International Development v. Alliance for Open Society Internation (AOSI)*, the Court held that where a government program meant to prevent the spread of AIDS required participants to speak against prostitution, that restriction violated the unconstitutional conditions doctrine. 570 U.S. 205, 214 (2013). There is no doubt that reducing or eliminating prostitution could potentially slow the spread of AIDS, but that was secondary to the main goal of the program. The present case presents an even clearer application of the doctrine. Whereas prostution is a potential means to spread AIDS, anti-discrimination and the need to find suitable foster homes are entirely separate issues. Although anti-discrimination is a laudable goal of any program, the City currently contracts with thirty-four private child placement agencies equipped to handle children of all backgrounds and beliefs without impermissibly limiting the speech of AACS. R. at 3.

Even under the less deferential holding in *Rumsfeld v. Forum for Academic & Instituional Rights Inc.* (*FAIR*), the EOCPA still unconstitutionally compels AACS's speech. 547 U.S. 47 (2006). The Court in *FAIR* held that merely requiring a law school to post information about

military recruiters coming to campus did not infringe on their school's speech. *FAIR*, 547 U.S. at 70.

However, the Fifteenth Circuit erroneously compared *FAIR* to the case at hand by omitting two crucial factual distinctions. First, the action at issue in *FAIR* was simply the *posting* of information about the time and place of the military's recruiting, whereas here, HHS seeks AACS to not only *post* the text reflecting the purpose of the EOCPA, but to *act* on its words by expanding its services to a class of individuals it normally referred to more appropriate agencies. *Id*. at 61-62. Secondly, and most importantly, the substantive speech in *FAIR* came from the military itself. *Id*. The military—being a separate third party unaffiliated with the school other than a mere informational posting, runs little to no risk of confusion as to the source of the speech. AACS, however, operating in their private capacity, has no third-party actor in this case. Thus, the speech that HHS seeks to compel would require direct action on the part of AACS, leading to a substantial if not inevitable possibility that others would see this speech as indicative of AACS's own beliefs.

As the facts in this case are clearly differentiated from *FAIR*, the Fifteenth Circuit should adopt the reasoning of the Supreme Court in *Hurley v. Irish American Gay, Lesbian, and Bisxual Group of Boston*. There, the Court reasoned that a private parade organizer did not have to accommodate groups with views contrary to their own because their message would be compromised by the speech they were forced to accommodate. *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 566 (1995). Notably, the Court expressed concerns over the likelihood that these contrary beliefs would be "identified with those of the owner." *Id*. at 580. These concerns are well-founded and inevitable should AACS be compelled to alter their own speech because once again, even in a parade, there are often separate public ally appearing groups or sections, whereas no such correlation exists for AACS. Therefore,

not only does HHS' policy unconstitutionally restrict AACS's right to the free exercise of their sincerely held religious beliefs, but it requires them to act contrary to those beliefs, making it appear as though the values of the EOCPA are their own.

ARGUMENT

I. THE EOCPA IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY BECAUSE IT SUPPORTED DISCRIMINATION AGAINST AACS ON THE BASIS OF RELIGION, RESULTED IN CHILD PLACEMENT THAT WAS NOT IN THE BEST INTEREST OF THE CHILD, AND PROMOTED OTHER DISCRIMINATORY PRACTICES DUE TO HHS'S GRANT OF INDIVIDUALIZED EXCEPTIONS.

A. The EOCPA violated the constitutionally protected Free Exercise rights of AACS by requiring AACS to consider same-sex couples in the adoption and foster process, directly conflicting with its long-held religious beliefs.

The EOCPA violates AACS's right of the free exercise of religion as the Act is not a neutral law of general applicability, and, at the very least, raises the slight suspicion of religious animosity. *Lukumi*, 508 U.S. at 547; *Masterpiece*, 138 S. Ct. at 1731. Therefore, AACS cannot be constitutionally forced to comply with the Act. It is a well settled constitutional principle that the Free Exercise Clause of the First Amendment, as applied to the States by incorporation into the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), guarantees protection that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. *See also Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 449 (1988) (recognizing that the Free Exercise Clause protects against laws that "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."). Accordingly, "beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531. *See also McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (noting that, "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte,

and perform other similar religious functions."); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). Thus, the First Amendment protects against all "governmental regulation of religious beliefs." *Emp't Div. v. Smith*, 494 U.S. 872 at 877.

In the event that a governmental action substantially burdens a religious practice, strict scrutiny must be applied. *Id*. at 883. Under strict scrutiny, the government must demonstrate a compelling state interest and the governmental action must be narrowly tailored to advance that interest. *Id*.; *Lukumi,* 508 U.S. at 533. *See also Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246, 2260 (2020) (describing strict scrutiny as a "stringent standard" which is not "watered down but really means what it says," and "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests") (internal quotation marks and alterations omitted). However, when a law is neutral and of general applicability, the government does not have to show that the law is narrowly tailored to achieve a compelling state interest. *Emp't Div. v. Smith*, 494 U.S. at 879; *New Hope*, 966 F.3d at 162. Further, there need not be a compelling governmental interest justification "even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. *See also Thomas v. Review Bd. of Indiana Employment Sec. Div.,* 450 U.S. 707, 717–18 (1981) (holding that, "compulsion" to modify one's behavior and to violate his beliefs "may be indirect"… but "the infringement upon the free exercise clause is nonetheless substantial"). However, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Moreover, "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Lukumi*, 508 U.S. at 547; *Masterpiece,* 138 S. Ct. at 1731. Thus,

even when a state government administers a wholly discretionary funding program, such as the EOCPA, it must still abide by the constraints of the free exercise clause. *See Thomas v. Review Bd.,* 450 U.S. 707 (1981); *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2024 (2017).

Here, there is *at least* slight suspicion of animosity toward the religious beliefs of AACS, manifested by the individualized targeting of AACS on the basis of its religious practices. R. at 6-7. Only the four LGBTQ agencies in the City of Evansburgh, as well as several other agencies, but not all, are abiding by the amended EOCPA. R. at 7. The animosity towards AACS is further exemplified in a statement made by the East Virginia governor in 2017 relating the traditional conception of marriage to bigotry, namely, "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 21.

The Supreme Court has long been tasked with weighing compelling governmental interests against the protections of the First Amendment, specifically the right to free exercise. In *Smith*, employees were fired by a drug rehabilitation organization for misconduct and were unable to obtain unemployment compensation after attending sacramental ceremonies that included the ingestion of peyote. *Emp't Div. v. Smith*, 494 U.S. at 874. Notably, the Supreme Court refused to rule on a violation of the Free Exercise Clause alone, but did so in conjunction with other constitutional protections, such as free speech. *Id*. at 881. The Court reasoned that the use of peyote during religious services does not excuse a person from "compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id*. at 879. In the aggregate, the Court held that the compelling state interest outweighed the free exercise of religion, and that the law was a neutral law of general applicability. *Id*. at 921. The State's ban on the possession of

peyote was not a law specifically aimed at those using it for a religious reason. *Id*. at 878. Rather, the law applied to everyone who might possess peyote, regardless of the reason. *Id*. Conversely, here, the discriminatory practices directly targeted at institutions like AACS thwart its religious belief-based guiding principles and view that same-sex marriage as a moral transgression. R. at 7. Therefore, this law is neither neutral nor generally applicable.

Conversely, the Supreme Court has recognized that if a statute's language directly targets a specific religious practice, the law is neither neutrality nor general applicable and is violative of the First Amendment. *Lukumi*, 508 U.S. at 546-7. For example, in *Lukumi*, the Court held that a city ordinance using specific language relating to the Santeria religion's use of animal sacrifice failed both the neutrality and general applicability requirements, and that it is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id*. The Court reasoned that if the objective of an implemented law is to infringe upon and "restrict practices because of their religious motivation, the law is not neutral." *Id*. at 533. In order to determine the intent of an implemented law, a textual analysis must first be applied to ensure "the minimum requirement of neutrality [...] that a law not discriminate on its face." *Id*. at 533. The Court determined that a law is not neutral on its face if it "refers to a religious practice without a secular meaning discernible from the language or context." *Id*. However, facial neutrality is not wholly determinative because the Free Exercise Clause also protects against masked discrimination. *Id*. at 534. To evaluate the latter, the Court should meticulously look to "the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id*. Here, the Court consider religious gerrymanders because, although the law appears neutral on its

face, the EOCPA namely targets those agencies, specifically AACS, whose long-held beliefs are being smothered by imposing a required standard.

After both the *Smith* and *Lukumi* decisions, courts of appeals across the country applied strict scrutiny to policies which were subsequently enacted as a result of specific religious practices. *Central Rabbinical Cong. v. New York City Dep't of Health & Mental Hygiene,* 763 F.3d 183, 195 (2d Cir. 2014). Additionally, strict scrutiny was applied where "[a]mple evidence support[ed] the theory that no such policy existed" until legislators and officials actively sought to impose penalties upon a religious claimant. *Ward v. Polite,* 667 F.3d 727, 739 (6th Cir. 2012). Both the Second and Sixth Circuit's correctly analyzed both *Smith* and *Lukumi* and determined that a policy which was "directed at [plaintiffs] religious practice" falls outside the scope of *Smith. Emp't Div. v. Smith,* 494 U.S. at 878.

When confronting masked discrimination, courts have looked to the statutory criteria and language that is relevant in each specific case. In *Fulton v. City of Philadelphia*, which was recently granted a writ of certiorari by the Supreme Court in February 2020, a Catholic foster care agency claimed that the City violated its rights under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses by not allowing renewal of their contract as a result of their policy of not accepting same-sex couples. 922 F.3d 140, 146 (3d Cir. 2019), *cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).[6] The statute at issue there included language prohibiting the Catholic foster agency from discriminating "due to race, color, religion, or national origin, and it incorporated the City's Fair Practices Ordinance, which in part prohibits sexual orientation discrimination in public

[6] It also must be noted that Justice Thomas, Justice Alito, and Justice Gorsuch would have granted the initial request for injunctive relief on the part of the Petitioners. *Fulton v. City of Philadelphia, Pa.,* 139 S. Ct. 49, 201 L. Ed. 2d 1127 (2018).

accommodations." *Id*. at 148. The Third Circuit explained there must be evidence that "religiously motivated conduct was treated worse than otherwise similar conduct with secular motives" for the agency to succeed. *Id*. at 156; *see also Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002); *Fraternal Order of Police*, 170 F.3d 359; *Lukumi*, 508 U.S. 520; *Masterpiece*, 138 S. Ct. 1719). Otherwise, if this cannot be proven, the law is neutral and of general applicability. *Id*.

Courts must also evaluate a law's individualized exemptions to examine its neutrality and general applicability. In *Fraternal Order of Police*, the Third Circuit examined a Police Department's policy where secular exemptions were made for officers who were prohibited from shaving their beards for medical reasons, but held that there was no substantial justification for refusing to provide that same exemption for officers required to wear beards for religious purposes. 170 F.3d at 360. The court reasoned that, because the Police Department "provided no legitimate explanation as to why the presence of officers who wear beards for medical reasons" is different from the "presence of officers who wear beards for religious reasons," the policy failed strict scrutiny. *Id*. at 366. Here, HHS placed a white special needs child with an African American couple after three other adoption agencies had screened and certified white adoptive families for the child.; refused placement of a five-year-old girl with a family consisting only of a father and son, even though this family was otherwise certified by the sponsoring adoption agency; and approved discrimination on the basis of religion three separate times, by prohibiting placement of a child with an AACS certified family, because the adoptive parents were of the different sect than the child. R. at 8-9, 12-13.

A similar strict scrutiny analysis occurred in *Masterpiece,* where the Supreme Court addressed an anti-discrimination law that violated the First Amendment rights of a baker where he

refused service of a wedding cake for a same-sex couple because it went against his own religious beliefs. *Masterpiece*, 138 S. Ct. at 1720. The Court held that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression," however, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id*. at 1727. *See also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694 n.24 (2010); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, n. 5 (1968) (*per curiam*); *Hurley*, 515 U.S. at 572. The Court reasoned that as a result of governmental hostility towards the baker's religious beliefs, the law was applied contrary to the neutral manner in which it must be applied to survive strict scrutiny. *Id*. at 1732. Further, in assessing governmental neutrality, the Court reasoned that relevant factors may include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body." *Id.* at 1731. These factors are not dispositive, but are all relevant to the determination of a First Amendment violation under strict scrutiny analysis.

More recently, the Second Circuit in *New Hope* addressed the issue raised by a Christian adoption agency alleging that the New York Office of Children and Family Services violated their Free Exercise rights due to the prohibition of discrimination based upon sexual orientation and marital status. *New Hope*, 966 F.3d at 149. The Second Circuit, reiterating rules cited in *Lukumi* and *Masterpiece*, held that a Free Exercise claim should not have been dismissed upon even a slight suspicion of religious animosity. *Id*. at 161. The court reasoned that because the mandatory,

not permissive, language of the statute, gave rise to a reasonable suspicion that the law may be violative of free exercise. *Id*. at 166. *See also McDaniel v. Paty*, 435 U.S. at 626, 628-29.

Here, the Fifteenth Circuit misapplied the holding of *Smith* to the present case. In fact, *Smith* should not even be applied to this case, akin to *Central Rabbinical* and *Ward*. The amended EOCPA falls squarely into an exception delineated in *Smith*, not only because it is lacking neutrality and general applicability but also because the EOCPA was subsequently enacted as a result of beliefs that are held by certain religious practices. Unlike the plaintiff in *Smith*, Defendant here cannot identify or prove that there is a compelling state interest so as to deprive AACS of its right to free exercise. Defendant contends that the compelling state interest is to eliminate all forms of discrimination and to act in the best interest of each child. R. at 4, 13. However, this cannot be the case because E.V.C. § 37(e) provides its own set of discriminatory practices on the basis of age, disability (physical or mental), race, culture, ethnicity, and sexual orientation. R. at 4. More specifically, HHS does not comply with its *own* discriminatory practice exemption and only does so on an ad hoc basis. R. at 11-14. For example, HHS placed a white special needs child with an African American couple after three other adoption agencies had screened and certified white adoptive families for the child. R. at 8-9. On yet another occasion, HHS refused placement of a five-year-old girl with a family consisting only of a father and son, even though this family was otherwise certified by the sponsoring adoption agency. R. at 8-9. Additionally, HHS approved discrimination on the basis of religion three separate times, by prohibiting placement of a child with an AACS certified family, because the adoptive parents were of the different sect than the child. R. at 12-13.

Moreover, HHS fails to illustrate that it truly operates with the intention that the best interest of each child is ensured. For example, after the abrupt and immediate referral freeze of

AACS, a young girl whose two brothers had been placed by AACS was placed with an entirely different family by different agency because of the freeze against referrals to AACS. R. at 8-9. Additionally, a five-year-old autistic boy was denied adoption placement through AACS with the same woman who fostered him for two years because of the referral freeze. *Id*. While the best interest of the child is a legitimate social concern, the consequences of the referral freeze have been more of a punishment for AACS than a protection of the children in Evansburgh's already overburdened foster and adoption system. *See e.g. Wisconsin v. Yoder*, 406 U.S. at 235 (holding "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements").

At issue here is the discriminatory practice on the basis of sexual orientation. The EOCPA provides, "where the child to be placed has an identified sexual orientation, [agencies] must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." R. at 6. If anything, this statement should reinforce AACS's practice of referring same-sex couples to the four adoption agencies that are expressly dedicated to serving the LGBTQ community in Evansburgh and several others that have complied with the EOCPA amendments when dealing with prospective adoptive parents. R. at 7, 8. If the best interest of each child were truly kept in mind, there would be no reason to subject a child to parents who will be unaccepting of their sexual orientation. Additionally, under different circumstances and facts, the Court has

ruled on language similar to this when addressing Affirmative Action issues.[7] This discriminatory language would almost certainly not pass the stringent strict scrutiny test applied in those cases.[8]

Similar to the plaintiffs in *Lukumi, Fulton,* and *Fraternal Order of Police,* EOCPA language here targets AACS's mission specifically, which provides, "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." R. at 5. AACS accepts all children, regardless of religion, race, sex, disability, or sexual orientation. Defendant contends that HHS has four compelling governmental purposes for enforcing the EOCPA: "(1) when child placement contractors *voluntarily* agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are *qualified* for the services; (3) the pool of foster and adoptive parents is as *diverse and broad* as the children in need of such parents; and (4) *individuals who pay taxes* to fund government contractors are not denied access to those services." R. at 9. However, these allegedly compelling governmental purposes have not been furthered by HHS in practice.

Pointing to specific statutory language, in order for AACS to receive its funding, the EOCPA *requires* that AACS post a statement claiming that it is illegal to discriminate, amongst other things, on the basis of sexual orientation. *Id*. This is not voluntary as contended by Defendant.

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[7] See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (holding that race is a narrowly tailored interest that may be considered as a factor for admission, but that a racial quota is unconstitutional.); *Grutter v. Bollinger,* 539 U.S. 306 (2003) (reaffirming the decision in *Bakke* and holding that diversity is a compelling interest on graduate school campuses and race may be used only as a factor for determining admission.); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that a racial point system allocating more points to applications with "underrepresented minority" status was not sufficiently narrowly tailored so as to pass strict scrutiny.); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (holding that race as a factor used to fill remaining spots after their "Top Ten Percent Plan," was narrowly tailored to serve a compelling state interest.)

[8] *Id.*

Additionally, the services are accessible for anyone who is *qualified* for the services. *Id*. There is no way of determining if discriminatory practice is being used where there is a vague guideline to do so. Penultimately, if HHS truly wanted the pool of foster and adoptive parents to be *diverse and broad*, it would accept AACS's religious views as views in the best interest of children who have this religious background, as there is a chronic shortage of adoptive and foster homes, not only in Evansburgh, but across the United States.[9] R. at 3, 9. Lastly, there is possible discrimination against those who individuals who may be unable to *pay taxes* because of their legal status, or otherwise. R. at 9.

Furthermore, it is clear that the EOCPA was not applied equally or promptly following the decision in *Obergefell*, as it took almost three years after the last renewed contract on October 2, 2017 for Defendant and the HHS to look into the alleged discriminatory practice. R. at 5-7. Notably, there had never been a complaint filed against AACS by a same-sex couple when they were referred to other agencies. R. at 7. Additionally, the normative practice for families seeking to foster or adopt children is to initiate contact with an agency, and if the family does not fit with the agency's profile and policies, the family is referred to another agency. R. at 4-5. There is no guideline or record offered for any agency regarding why certain families are accepted, while others are not. Defendant only discovered the acceptance of same sex couples went against AACS's religious practices after inquiry and after AACS's candor regarding the inquiry. R. at 6-7. If anything, agencies have an interest in lying about discriminatory practices, because, otherwise, it will lose funding. While AACS could have stated that it was in compliance with the EOCPA and continued its practice of referring same-sex couples to the agencies that are

[9] Emily Wax-Thibodeaux, *'We are just destroying these kids': The foster children growing up inside detention centers,* Washington Post (Dec. 30, 2019)

specifically dedicated to serve the LGBTQ community, they chose to tell the truth. Instead of misleading HHS, AACS was open about its beliefs in observance of the Qur'an and the Hadith. If Defendant and HHS aimed to hold AACS accountable so as to accept same-sex couples without question, then it should have explicitly included such a stipulation in its contracts after the decision in *Obergefell*. 576 U.S. 644.

Moreover, as in *Fulton*, there is no discussion of the other adoption agencies who may not have followed the guidance anti-discriminatory laws, like the EOCPA in this case, even though it is implied that only four adoption agencies that are expressly dedicated to serving the LGBTQ community in Evansburgh and several others that have complied with the EOCPA amendments, but not *all* of the agencies. *Fulton*, 922 F.3d at 146. R. at 7, 8. As such, since AACS holds true to its religiously held principles, it is clear that the court's analysis of AACS's conduct is much more stringent than in a situation where it would treat a secular entity. As stated by Third Circuit in *Fraternal Order of Police,* there must be a legitimate explanation as to the difference in treatment, which is lacking here. 170 F.3d at 366.

Here, in the order reversing the district court's ruling, the Fifteenth Circuit mentions the statement made by the East Virginia governor in 2017 in its decision, suggesting that belief in the traditional definition of marriage equates to bigotry, was "such an isolated comment made by an official who plays no role in enforcing the EOCPA against the agency" and "does not rise to the level of impermissible hostility sufficient to defeat the law." R. at 21. However, akin to *Masterpiece* and *Fulton,* there is no way of knowing that this is an isolated incident and if this public disparagement influenced political and societal perception. *Masterpiece*, 138 S. Ct. at 1729-30; *Fulton*, 922 F.3d at 156-58. In both of those cases, there was evidence of hostile statements being made on multiple occasions and even in the implementation of the laws. These comments

are significant in determining the discriminatory history of this law's adoption and implementation. Like in *New Hope* even this slight suspicion of religious animosity gives rise to a potential Free Exercise violation that must not be dismissed so easily. *New Hope*, 966 F.3d at 161. These comments, in addition to EOPCA as it is written and applied, demonstrate that the law is not a neutral law of general applicability, and as such, the EOCPA violates AACS's right of the free exercise of religion.

B. The EOCPA is a legislative tool to further the marginalization of Muslims for their background and practice of Islam in the United States.

Following the tragedies of September 11, 2001, there have been obvious divergences in the successes of Muslims in religious-liberty claims, which lie in the deep-rooted notion that Islam poses a national security risk.[10] These judicial trends in regard to religious liberty claims have potentially influenced political and social perception.[11] Although members of the judiciary, who preside over the court system as a whole are held to a higher standard, they are human beings who have been affected by the aftermath of 9/11.[12] As Justice Cardozo once stated, these men and women are "hardly immune from '[t]he great tides and currents which engulf the rest of men.'"[13] While religion plays a particularly large role in discriminatory practices, and ultimately judicial decisions, there cannot be a dismissal of the possible racial bias that exists.[14] In fact, according to the Pew Research Center, fifty-one percent of "Muslims whose families have been in the U.S. for

[10] Sisk & Heise, *supra* n. 2 at 236-37.
[11] *Id*. at 259.
[12] *Id*. at 281-2
[13] I*d*.
[14] *Id*. at 257-8.

at least three generations are black."[15] Accordingly, no true racial or ethnic group can be said to make up a majority of those practicing Islam.[16]

This religious and racial divide traces decades, however, and the case of George Dow in 1915 sheds light on this institutionalized and systematic discrimination.[17] George Dow was a Syrian immigrant living in South Carolina, who had appealed his naturalization denial all the way up through the courts and, eventually, to the Fifth Circuit.[18] In the lower courts, Dow had been continuously denied naturalization because he did not meet the racial requirement of United States law, "which limited naturalization to 'aliens being free white persons, and to aliens of African nativity and to persons of African descent."[19] Although it is not clear whether Dow himself was Muslim, Syria being a predominantly Muslim country, and Dow being categorized as "non-white" by Judge Smith of the South Carolina District Court, just because he was a Syrian, demonstrates this stigma that has penetrated decades of ideology.[20]

Here, AACS, acting as a Muslim-devoted agency, was discriminated against on the basis of its religion and, inherently, on the basis of race. As exemplified by *Dow* and the case at bar, there is, and has been, an implicit racial bias against Muslims that is much different than the biases against those who practice more mainstream religions. Whether this stems from a racial and religious bias is unclear, but it nonetheless arises from one of the biases, or both. Until Islam is accepted as mainstream and implicit biases surrounding world events have been alleviated, these

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[15] Pew Research Center, *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream*, Religion and Public Life (July 26, 2017), https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/.
[16] *Id*.
[17] Gualtieri, S. (2001). Becoming "White": Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States. *Journal of American Ethnic History*, 20(4), 29. Retrieved September 12, 2020, from http://www.jstor.org/stable/27502745; *Dow v. United States*, 226 F. 145 (4th Cir. 1915).
[18] *Id*.; *Dow*, 226 F. 145 (4th Cir. 1915).
[19] *Id*.
[20] Marie A. Failinger, Islam in the Mind of American Courts: 1800 to 1960, 32 B.C.J.L. & Soc. Just. 1. 10 (2012).

common patterns of discrimination will continue, and innocent people and organizations will be unjustly injured.

II. HHS'S REQUIREMENT FOR AACS TO DISPLAY THE EOCPA'S MANDATED STATEMENT IN ITS PLACE OF BUSINESS VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BECAUSE IT COMPELS AACS TO PROMOTE A MESSAGE DIRECTLY AT ODDS WITH ITS SINCERELY HELD RELIGIOUS BELIEFS AND CONDITIONS FUNDING ON ITS COMPLIANCE.

HHS's requirement that AACS post the EOCPA's anti-discrimination statement in its place of business violates the unconstitutional conditions doctrine because it not only requires AACS to comply with an act fundamentally at odds with AACS's sincerely held religious beliefs, but also affirmatively implies support for the act through the posting of its message and conditions funding on doing so. The unconstitutional conditions doctrine requires that the government not condition benefits on a potential recipient's relinquishment of a constitutionally protected right, "especially his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. at 597. When a state compels individuals "to voice ideas with which they disagree, it undermines [free speech]." *Janus v. American Federation of State Cty., and Municipal Employees,* 138 S. Ct. 2448, 2464 (2018). Here, HHS conditioned a city contract on AACS's compliance with and posting of a message reflecting the newly enacted EOCPA's anti-discrimination statement. R. at 6-7. Doing so presented AACS with the choice of standing by their sincerely held and publicly known religious beliefs, or succumbing to governmental pressure in an effort to maintain their funding. They chose to do the former. R. at 7. Because HHS's policy as applied directly required AACS to restrict their First Amendment right or lose funding, the policy is an unconstitutional restriction on the First Amendment.

A. Conditioning government funding on the affirmative support of non-discrimination legislation violates the First Amendment because non-discrimination is beyond the scope of AACS's contract with HHS.

Where the purpose of a program is to facilitate private speech, a restriction on that speech violates the First Amendment if speech is a prerequisite for that program. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001). The First Amendment guarantees "freedom of speech," including "both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 783 (1988). It thus follows that a government cannot compel private parties to "to be an instrument for fostering public adherence to an ideological point of view. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). There can be no doubt that the speech at issue here is private speech. The relationship between HHS and AACS has historically been one where HHS sends a referral and AACS makes an independent recommendation of potential matches to HHS. R. at 3. Additionally, the Supreme Court has stated that displaying government notices can be enough to find compelled private speech. *See e.g. NIFLA v. Becerra*, 138 S. Ct. 2361, 2370-75 (2018) (holding that displaying "government-drafted notice is compelled private speech" and that governments do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement"). Regulatory authority stifling disfavored speech "[pose]s the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.. *Id*. at 2374 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). The speech at issue here is afforded even great protection under *Obergefell*, because this is a religious organization which may "advocate with the utmost, sincere conviction that…same-sex marriage should not be condoned. *Obergefell*, 135 S. Ct. at 2607. HHS's policy seeks to facilitate private speech. However, under the EOCPA, the speech HHS seeks to compel

is beyond the scope of their contract with AACS, exactly the type of behavior prohibited by the unconstitutional conditions doctrine.

In *AOSI*, the Court held that while funding a program to prevent the spread of AIDS, the government could not compel recipients to affirmatively condemn the practice of prostitution, finding that the anti-prostitution affirmation was beyond the scope of the government's AIDS program. *AOSI*, 570 U.S. at 214. Similarly, here, the purpose of the government program is to place foster children into appropriate foster homes, not to further anti-discrimination. R. at 3. Even though anti-discrimination necessarily plays a part in such a program – so too does combating factors of the spread of AIDS like in *AOSI* – the court found that just because one speech might bolster the other, it was nevertheless not enough when those ideals are outside of the main focus of the government program. *AOSI*, 570 U.S. at 206-07. Additionally, to hold AACS to the non-discrimination goals in this case would be even more egregious because in *AOSI* the Supreme Court prevented the government from necessitating that private entities condemn a policy in speech only. *Id*. Here, not only would HHS require AACS to affirmatively condemn discrimination on the basis of sexual orientation, but they would require them to act on that condemnation as well.

The Fifteenth Circuit in this case held that AACS's speech is outside of the scope of its contract with HHS but that *AOSI* does not control merely because AACS chose to partner with HHS. R. at 23. This is a distinction without a difference; because the foster care business necessitates working with some form of public entity to operate, any foster business would seek out a partnership with an organization such as HHS.

B. Even if *FAIR* controls the analysis of this case, the EOCPA notice still unconstitutionally compels AACS's speech because *FAIR* only compelled speech by a third party, whereas here AACS is directly compelled.

In *FAIR*, the Court held that compelling a law school to merely post information about military recruiters' arrival on campus did not affect the school's speech. *FAIR*, 547 U.S. at 70. The Fifteenth Circuit in this case simply analogized HHS' posting requirement to the email notice required in *FAIR* and declared that it is controlling. R. at 23-24. However, the Court ignored the crucial fact the law school *in FAIR* was required only to give notice of the military's presence on campus. *FAIR*, 547 U.S. at 61-62. The military being a third party with no other connection to the school creates little evidence that their speech is reflective of the school. In contrast, here, there is no third party at issue. HHS requires AACS *itself* to post an anti-discrimination statement and to act on the EOCP policy, not some separately identified third party. R. at 6. This removes an important distancing link that is present in *FAIR,* increasing the likelihood of confusion that the speech at issue is indicative of AACS's beliefs.

C. By requiring AACS to post the EOCPA statement in the workplace, HHS effectively coerces support of HHS' ideology because it is reasonable to believe that the message is coming from AACS.

A state anti-discrimination law cannot require a private group advocating a message to include another group whose message conflicts with their own because their message will be affected by the speech they are forced to accommodate. *Hurley,* 515 U.S. at 566. In *Hurley,* gay, lesbian, and bisexual Irish Americans sued the Boston St. Patrick's Day Parade organizers for excluding their organization from the parade. *Id*. at 557. There, the Supreme Court held that the parade organizers could not be compelled to include messages that they did not agree with because there was a likelihood that those views would be "identified with those of the owner," threatening the speaker's autonomy. *Id*. at 580. Here, the message of the EOCPA is directly at odds with that

of AACS. In its mission statement, AACS explicitly states that its goal is to provide services "consistent with the teachings of the Qur'an." R. at 5. As such, these teachings do not permit AACS to facilitate the placement of foster children into homes identifying with sexual orientations at odds with those teachings. By assisting such foster children, it is reasonable to believe that those actions suggest support of LGBTQ beliefs on behalf of AACS. Although the court in *Hurley* notes that the ability to post a sign disavowing the contrasting belief may be sufficient to sustain a First Amendment restriction, this is easily differentiated in the case at hand. *Hurley*, 515 U.S. at 580 (quoting *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980)). *Pruneyard* dealt with a space open to the general public for the purposes of shopping, not a private business. 447 U.S. at 77. Furthermore, it is reasonable to believe that AACS's values will be attributed to these contrary messages, because unlike in *Turner Broadcasting,* their direct actions suggest support of this message.

D. AACS's right not to publicly display the EOCPA anti-discrimination statement and to continue to refer LGBTQ foster children to other agencies should be permitted as a matter of public policy.

AACS's policy of referring out foster children who do not fit the agency's profile and policies is inherently non-discriminatory because the policy applies to all individuals and includes multiple characteristics including family size and makeup, not just sexual orientation. R. at 4. This policy was in place long before the EOCPA amendment at issue here, and as conceded by HHS, this policy did not lead to a single complaint. R. at 7. Furthermore, as noted in the record, AACS treated all of those with sexual orientations at odds with its religious beliefs with respect and referred them to agencies adept to serve the LGBTQ community. *Id*. AACS's policy therefore did not deny anyone the ability to receive foster services due to their sexual orientation. This policy undoubtedly had a net positive practical effect by benefitting foster children in the LGBTQ

community as it allowed them to work with agencies familiar and sympathetic to their individual situation rather than one clearly unfamiliar and unequipped to handle the needs of LGBTQ children. Notably, there is no issue here of foster children being unable to find an agency to assist them due to their sexual orientation. Therefore, as a matter of public policy, to realize the beneficial intent of the EOCPA on the LGBTQ community, they can be best served by allowing agencies with reservations about providing these services to refer them to those that can.

HHS's decision not to renew its contract with AACS had an immediate detrimental effect on the many children and families that they served.[21] R. at 8. Following a three-day evidentiary hearing, the District Court found that the referral freeze had the practical effect of denying foster or permanent homes to children who had already expected to be placed.[22] R. at 8. All of this at a time when HHS was already failing to meet the increasing foster demands of the City, especially among the refugee population that AACS primarily served. R. at 3. Furthermore, this is not an issue unique to Evansburgh. Religious foster care and adoption agencies all over the country are faced with the impossible choice between abandoning their deeply personal religious beliefs, or ceasing to provide essential foster services.[23] A policy can hardly be said to combat the shortage of aid for foster children when it would leave countless children without access to foster services. "A law cannot be regarded as protecting the interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

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[21] It is undisputed in the record that Evansburgh has a chronic shortage of foster homes, with approximately 17,000 children in foster care. It is further admitted that the City directed HHS to partner with private agencies such as AACS to combat this dire shortage. R. 3.

[22] The District Court found that a young girl whose brothers had been placed by AACS was forced to be placed with a separate family—separating her from her brothers—due to the referral freeze against AACS. The court also found that the referral freeze caused a five-year-old autistic boy to be denied adoption with a woman who had fostered him for two years.

[23] *See* Peter Smith, Catholic Charities Battles to Serve Children and Adoptive Parents, National Catholic Register, March 15, 2018, https://perma.cc/7FTU-ZBP7 (describing religious organization's battle between their beliefs and continued funding across the country).

Therefore, HHS's policy not only harms those it seeks to protect by saddling children with agencies ill-equipped to meet their needs, but it also creates innocent casualties among the children outside the reach of the EOCPA who depend on these services.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that this court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted this 14th day of September 2020.

/s/ Team 14

Team 14
Counsel for Plaintiff-Appellee