No. 2020-05

IN 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-ADAB 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

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BRIEF FOR APPELLANT

TEAM 15

Attorneys for Appellant

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit has jurisdiction of this appeal under 28 U.S.C. § 1291. The Fifteenth Circuit entered judgment on February 24, 2020. R. at 18. On July 15, 2020, the Fifteenth Circuit Court of Appeals granted Al-Adab Al-Mufrad Care Services' Petition for Rehearing En Banc. R. at 26; *see also* Fed. R. App. P. 35(a)(2).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether East Virginia's anti-discrimination policy, which requires Child Placement Agencies to treat all potential foster and adoptive families equally, is consistent with the First Amendment's Free Exercise Clause when enforced against a religious organization that denies service to same-sex couples and receives funding from the City.

II. Whether East Virginia's anti-discrimination policy, as applied to AACS, unconstitutionally conditions receipt of City funds under the First Amendment by requiring AACS to certify same-sex couples against their religious beliefs and requiring a notice be posted on its premises detailing the anti-discrimination policy.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The City of Evansburgh. Evansburgh is a large, racially and ethnically diverse city in East Virginia. R. at 3. There is a large refugee population in the City, and some of these families cannot adequately provide for their children because of severe hardships. R. at 3. There is a shortage of homes for children in the foster and adoption system. R. at 3. Evansburgh charged the Department of Health and Human Services (HHS) with the responsibility to establish an efficient system to provide the most suitable homes for these children. R. at 3. HHS has developed relationships with private Child Placement Agencies to assist with the adoption and

foster process. R. at 3. The City supports these private agencies with public funding, and in exchange the agencies provide a public service to Evansburgh citizens and children in the foster care system. R. at 3. The agencies give placement recommendations to HHS by providing unbiased information about prospective families after conducting home studies and counseling. R. at 3. HHS takes this information and uses established policies to determine the most suitable home for each child based on age, cultural and ethnic background, sibling relationships, race, medical needs, and disability. R. at 3–4; E.V.C. § 37. After HHS places a child with a family, the agencies are required to supervise the relationship to ensure a successful placement. R. at 4. HHS allows potential parents the ability to choose the most suitable agency for them and their prospective family so each parent is comfortable with their agency. R. at 5.

Al-Adab Al-Mufrad Care Services. Al-Adab Al-Mufrad Care Services (AACS) is a private adoption and foster agency that has contracted to provide a public service since 1980 without issue. R. at 5. AACS is a religious-based organization—similar to other child-placement contractors the City works with—which follows the Qur'an. R. at 6–7. Recently, AACS's religious beliefs have interfered with its ability to provide unbiased and equal service to all families. R. at 7. Despite its contract to comply with all laws of Evansburgh, it refuses to serve same-sex families or provide families with notice of the City's dedication to eradicating discrimination. R. at 7.

The Anti-Discrimination Policy. East Virginia adopted the Equal Opportunity Child Placement Act (EOCPA) in 1972, requiring Child Placement Agencies contracting with HHS to treat all families equally. R. at 4; E.V.C. § 42. Agencies cannot discriminate when serving prospective parents. R. at 4; E.V.C. § 42. The EOCPA provides, when a child is placed with a home—if all other qualifications are equal—the agencies should prefer a family the same race as

the child to ensure similarity to their natural home. R. at 4; E.V.C. § 42. After *Obergefell v. Hodges*, the EOCPA was amended to explicitly prohibit discrimination based on sexual orientation. R. at 6; E.V.C. § 42.-3(b), (c). Though the Governor carelessly commented that the state should eradicate discrimination "regardless of what philosophy . . . undergirds such bigotry," the Attorney General was in charge of amending all statutes. R. at 6. This amendment allowed for additional considerations for children who have identified a sexual orientation so they may be considered for placement with parents with similar orientations. R. at 6; E.V.C. § 42.-3(c). This policy was in place when AACS renewed its contract with HHS, but HHS was unaware of AACS's unwillingness to comply until Hartwell was confronted by a newspaper reporter who questioned whether religious organizations were discriminating. R. at 6–7.

Notice Requirement. AACS also refuses to comply with the EOCPA requirement that, as a government contractor, the agency must sign and post a statement at its place of business acknowledging that it is illegal to discriminate based on the "individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6; E.V.C. § 42.-4. The EOCPA allows religious-based organizations to post their own written objection to this policy. R. at 6. AACS did not express concern, nor did it post a written objection. R. at 7. But, when confronted by Commissioner Hartwell about this notice requirement, AACS refused to comply. R. at 7.

Discontinuance of Contract and Referral Freeze. Because of AACS's failure to comply with the anti-discrimination policy and the notice policy, Commissioner Hartwell did not renew the contract with AACS. R. at 7. Commissioner Hartwell sent a letter to AACS reiterating HHS's request that AACS comply with the EOCPA. R. at 7. The letter informed AACS of the institution of a "referral freeze" that would be communicated to all other adoption agencies,

ordering them to "refrain from making any adoption referrals" unless "AACS provided to HHS, within 10 business days, full assurance of its future compliance with the EOCPA." R. at 7–8.

II. NATURE OF PROCEEDINGS

The District Court. In response to the cancellation of its contract and the institution of the referral freeze, AACS brought suit against Commissioner Hartwell, in his official capacity as Commissioner of the City of Evansburgh's Department of Health and Human Services, stating First Amendment claims for violation of AACS's rights to freedom of religion and speech. R. at 1, 8. AACS sought a Temporary Restraining Order against the freeze and permanent injunction compelling HHS to renew its contract with AACS. R. at 8. The district court made various undisputed findings of fact after a three-day evidentiary hearing. R. at 9. The district court held that the EOCPA violated AACS's free exercise rights and its rights to freedom of speech and granted AACS's motions for a temporary restraining order and permanent injunction. R. at 17.

The Court of Appeals. Commissioner Hartwell timely appealed the district court's decision to the Fifteenth Circuit Court of Appeals. R. at 18. The panel decision by the Fifteenth Circuit found that the EOCPA did not violate AACS's free exercise rights or its freedom of speech. R. at 25. The panel reversed the district court's judgment, with Judge J. Overcash dissenting, being in full agreement with the district court's opinion. R. at 25. After the panel's reversal, AACS petitioned the full court of the Fifteenth Circuit for a Rehearing En Banc, under Federal Rule of Appellate Procedure 35(a)(2). R. at 26. After a majority vote of non-recused active judges, the Fifteenth Circuit granted AACS's motion for Rehearing En Banc. R. at 26.

SUMMARY OF THE ARGUMENT

I.

Evansburgh's policy against discrimination by Child Placement Agencies is valid under the Free Exercise Clause of the First Amendment. The policy is neutral in its text, legislative history, and actual effect. Additionally, the policy applies generally to all Child Placement Agencies receiving public funding from the City of Evansburgh, without exemption. There is no evidence of animosity from the enactment or text of the policy and AACS cannot identify another Child Placement Agency treated differently in enforcement of the anti-discrimination rule. A deferential standard should apply when analyzing the policy because the Department of Health and Human Services acts as a manager, rather than a sovereign government, when enforcing the anti-discrimination policy. As a neutral and generally applicable law enforced by the City as a manager, the policy is subject to rational basis review. Under rational review, the policy is constitutional as it rationally relates to the legitimate interests in equal access to public services and acting in the child's best interests.

II.

The EOCPA does not unconstitutionally condition receipt of federal funding under the Free Speech Clause of the First Amendment. The act of certifying a couple as prospective adoptive parents is not inherently expressive enough to receive First Amendment protections. Additionally, even if it was, as a government contractor, AACS's speech is government speech, where the government can dictate its message without infringing on the First Amendment rights of the private contractor. The notice requirement also constitutes government speech as AACS is merely hosting the government's speech on its premises and still may express its own speech under its First Amendment rights. The EOCPA does not prohibit AACS from espousing a

differing viewpoint or require it to endorse or affirm the government's speech. Further, any burden on AACS's rights under the First Amendment is incidental and survives a challenge under the First Amendment.

ARGUMENT AND AUTHORITIES

Standard of Review. Both issues before this Court are legal in nature and are reviewed de novo. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In First Amendment cases, the court examines the statements in issue and the circumstances of the speech to ensure the judgment does not constitute a forbidden intrusion on the field of free expression. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

I. REQUIRING CHILD PLACEMENT AGENCIES THAT RECEIVE PUBLIC FUNDING TO TREAT ALL POTENTIAL FAMILIES EQUALLY, REGARDLESS OF SEXUAL ORIENTATION, IS CONSISTENT WITH THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

The anti-discrimination policy of the EOCPA is a valid exercise of government authority under the Free Exercise Clause and in the best interest of every child. Under the First Amendment, the Free Exercise Clause protects every citizen's right to believe and profess their own religious doctrine. U.S. Const. amend. I; *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990).[1] The First Amendment supports two notions: the right to believe and the right to act. *Cantwell*, 310 U.S. at 303–04. The former is absolute, but the right to act on these beliefs, by nature, cannot be. *Id.* One is not excused from their failure to comply with a "valid and neutral law of general applicability" on grounds that the law prescribes actions that a religion forbids. *Smith*, 494 U.S. at 879. When challenging a law based on the Free Exercise Clause, AACS must prove a substantial burden on the free exercise of its sincerely held beliefs. Hartwell does not contend

[1] U.S. Const. amend. XIV (making the Free Exercise Clause applicable to the states by incorporation); *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

that AACS's religious beliefs are insincere and recognizes the burden of the referral freeze resulting from AACS's refusal to serve same-sex couples. R. at 13. But, a law with an incidental burdening of religious practices may still be valid. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

The policy is presumed valid because it is a neutral policy generally applied to all Child Placement Agencies. Additionally, the government's role as an administrator of adoption services, rather than as lawmaker, requires a more deferential standard. Under rational basis, the anti-discrimination policy reasonably relates to the legitimate interest of serving all equally and meeting the child's best interests. This policy is not simply valid, it is imperative. Allowing discrimination injures not only those denied service by AACS but harms the children the government has been entrusted to protect.

A. Rational Basis Is the Appropriate Standard When Evaluating a Neutral and Generally Applicable Law, Enforced by the State as an Administrator of a Public Service.

The anti-discrimination policy is a neutral law of general applicability set in force by the government as an administrator, and is therefore presumed valid. When a law is neutral and applied generally, it need not be justified by a compelling interest but merely analyzed under rational review. *Church of Lukumi*, 508 U.S. at 531. Additionally, courts defer to the government's policies when acting as a regulator or manager of a public service, rather than as sovereign law maker. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). EOCPA's anti-discrimination policy must be analyzed under rational basis because it is a neutral law, not targeted to affect a religion, and has been applied generally to all Child Placement Agencies. Acting as an administrator of adoption services, the government's regulations for contractors should be viewed deferentially.

1. The anti-discrimination policy is a neutral and generally applicable law enacted to eradicate discrimination against same-sex couples and applied evenhandedly to all Child Placement Agencies.

The EOCPA's policy against discrimination is neutral, does not target religion, and applies generally to all Child Placement Agencies funded by the City. The general applicability of a law and its neutrality are interrelated requirements. *Church of Lukumi*, 508 U.S. at 531. When a law satisfies both requirements, the law need not be justified by a compelling interest. *Id.* East Virginia's policy is subject to rational basis review for two reasons: first, the policy, requiring uniform treatment for all, is neutral toward religion; and second, the anti-discrimination policy applies to all Child Placement Agencies, without exception.

a. The EOCPA's anti-discrimination policy is a neutral law, prompted by Obergefell v. Hodges*, which targets the unequal treatment of same-sex couples when seeking to adopt or foster a child.*

The amendment to the EOCPA, requiring equal treatment for all, is neutral because the law was prompted by a Supreme Court decision, has secular meaning, and the actual effect applies to all agencies. When analyzing the neutrality of a law, courts look to the text, the legislative history, and the actual effect of the law. *Church of Lukumi*, 508 U.S. at 534–43. This policy is neutral because the text is secular and facially neutral. There is a neutral purpose for the law, as seen through the legislative history after *Obergefell v. Hodges*. Finally, the policy permits no Child Placement Agency to discriminate against same-sex couples, binding all agencies equally.

i. The anti-discrimination policy is facially neutral as its text holds a secular meaning, rather than solely a religious one.

The policy prohibits all Child Placement Agencies "from discriminating on the basis of sexual orientation," which has a secular meaning with no connotation regarding religion. R. at 6. When a policy makes no reference to religious conduct or practices, it is facially neutral.

Stormans, Inc. v. Selecky, 586 F.3d 1109, 1130 (9th Cir. 2009). A policy is not neutral if the text uses words with a primarily religious meaning. *Church of Lukumi*, 508 U.S. at 533. The words "discriminate" and "sexual orientation" are not religious as they simply regulate secular activity.

When a law alludes to solely religious practices, it may be biased. In *Church of Lukumi*, the use of words like "sacrifice" and "ritual" indicated bias. 508 U.S. at 533–34. The law, enacted after a Santeria church planned to organize in the area, prohibited animal killings when part of a sacrifice or ritual. *Id.* at 524. These words not only had a strong religious connotation, but also a religious origin. *Id.* at 534. From the text, the law targeted solely religious behavior, while excluding similar actions. *Id.* The Court reasoned the words "sacrifice" and "ritual" would allow hunting, euthanasia, and eradication of insects, but would prohibit similar killings in a religious context. *Id.* at 537. The primarily religious meaning of "sacrifice" and "ritual" indicated the law was targeted to affect religion. *Id.* at 538.

Here, the anti-discrimination policy makes no reference to religion. As defined, discrimination means a "prejudicial outlook, action, or treatment."[2] Even if "discrimination" was in the Qur'an or the Hadith, the word retains a secular meaning. Alternatively, "sexual orientation" was not even defined until about 1948, whereas the Qur'an dates to the early 600's.[3] This text is distinct from that in *Church of Lukumi* because the words have no religious origin and do not lend themselves to impacting only religious groups. The language of the policy is neutral and impacts all Child Placement Agencies generally, as intended by the legislature.

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[2] *Discrimination*, *Merriam-Webster Dictionary Online*, https://www.merriam-webster.com/dictionary/discrimination (last visited Sept. 8, 2020).

[3] *Sexual Orientation*, *Merriam-Webster Dictionary Online*, https://www.merriam-webster.com/dictionary/sexual%20orientation (last visited Sept. 8, 2020); Sean Coughlan, *'Oldest' Koran Fragments Found in Birmingham University*, BBC NEWS (July 22, 2015), https://www.bbc.com/news/business-33436021.

ii. Prompted by the decision in *Obergefell v. Hodges*, the policy's legislative history shows the neutral purpose for the amendment to the EOCPA.

Confronted with the unjust discrimination identified in *Obergefell v. Hodges*, the EOCPA was amended to protect same-sex couples. Relevant evidence of neutrality is the historical background of the law, events prior to adoption, and statements made by the decision-making body. *Church of Lukumi*, 508 U.S. at 540. When a law is prompted by a public concern of unequal access to services, the legislative history is neutral. *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19–123). In contrast, when a law is triggered by religious animosity, this evidences a partial law. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002).

Even if a comment questions the religious doctrine of an organization, this does not suggest a prejudicial history. In *Fulton*, the Third Circuit analyzed a similar policy prohibiting child placement agencies from discriminating against any family. 922 F.3d at 148. The rule had been in effect for a long period without objection while the Child Placement Agency provided services for the City. *Id.* When a reporter published an article regarding the agency's discriminatory actions toward same-sex couples, the commissioner of human services recognized the issue and froze all referrals to the agency. *Id.* at 149. Though the commissioner made harsh comments implying that the agency should follow teachings of Pope Francis rather than the Archdiocese of Philadelphia, those comments alone could not infer a biased history of the policy. *Id.* at 148.

A prejudicial history would consist of overt comments targeted at a specific religious group during the enactment or enforcement of a law. *See Tenafly Eruv Ass'n*, 309 F.3d at 153 (finding a biased history when comments were made by council members expressing "serious concern,"

that the "Ultra-Orthodox" Jews might stone their cars); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1729 (evidencing a biased legislative history when commissioners commented that *particular* religious beliefs and persons were not welcome in their community).

The history and policy here are similar to *Fulton*. The EOCPA was a longstanding rule amended to reflect commitment to eradicating discrimination after the decision in *Obergefell v. Hodges*. R. at 4, 6. AACS's beliefs regarding same-sex marriage, similar to the circumstances in *Fulton*, were unknown to the attorney general when amending the statute and unknown to Commissioner Hartwell. The policy was not intended to target religious beliefs because the Attorney General and Commissioner Hartwell were unaware it would even affect AACS. Additionally, the City and AACS had nearly forty-years of history working together without issue. R. at 5. One comment from the governor complaining about the beliefs, which *may* underlie discrimination, might be similar to the commissioner's comment in *Fulton*, careless and insensitive, but not conclusive. R. at 6. The governor's concern holds even less weight than that of the commissioner in *Fulton* because the governor was neither involved in the amendment nor the enforcement of the policy. R. at 6, 7. Distinct from *Tenafly* or *Masterpiece*, the rule was not enacted or enforced after hostile comments directed toward the Islamic faith. There were no negative comments regarding Muslims. The history of the anti-discrimination policy is neutral, showing no animosity toward Islam.

iii. The actual effect of the anti-discrimination policy shows that the law applies to all Child Placement Agencies without targeting the Islamic faith.

Even when a religious group is the only group who objects to the law, the law may still be neutral in its effect. When a law *only* affects religious groups, it could indicate a biased law. In *Christian Legal Society Chapter of the University of California v. Martinez*, a rule requiring

student organizations to accept any student remained unchallenged until a Christian group wanted to form an organization. 561 U.S. 661, 672 (2010). Though no other group was concerned by the rule, it was not indicative of a biased effect. *Id.* The policy neutrally affected all student organizations even if they did not have to amend their bylaws to comply. *Id.* Similarly, in *Stormans*, the law requiring timely delivery of all medications applied to all pharmacists, even if secular pharmacists already carried the requisite medications. 586 F.3d at 1131 ("That the rules may affect pharmacists who object to Plan B for religious reasons does not undermine the neutrality of the rules.").

Consistent with *Christian Legal Society* and *Stormans*, the anti-discrimination policy applies to all Child Placement Agencies, even if AACS is the only one to object to it or that must adapt because of it. AACS is the only one objecting because no other Child Placement Agency partnering with Evansburgh denies access to families. Although some agencies focus specifically on assisting families with unique circumstances or families which are underrepresented, these agencies remain open and accessible to all. R. at 8. Here, AACS is not serving everyone; it has expressly denied assisting same-sex couples and instead refers them to another agency. R. at 7.

b. As a generally applicable law, the anti-discrimination policy applies to all Child Placement Agencies without exception, ensuring every family is considered during the adoption process.

The anti-discrimination policy applies to all Child Placement Agencies without exception. Every law is selective in a sense, but the general applicability requirement focuses on when the law is enforced *only* against religious conduct. *Church of Lukumi*, 508 U.S. at 542–43. A law may be generally applicable even when it permits exemptions for some, but when a law consistently makes secular exemptions and prohibits religious exemptions, the law is selectively

enforced.[4] The anti-discrimination policy applies to all Child Placement Agencies without exemption, serving its purpose of eradicating discrimination and affording children with the most broad and diverse pool of parents.

A law is still generally applicable if it serves its purpose, even if it allows exemptions for some. In *Vandiver v. Hardin County Board of Education*, the Third Circuit found that a law with religious-neutral application of exemptions generally applied as long as the decision was free from any religious bias. 925 F.2d 927, 934 (3d Cir. 1991). A student challenged a public school's rule requiring he satisfy a testing requirement when the school had the option to grant other students a probationary placement period instead. *Id.* The purpose was to ensure that a child's home-school education was of sufficient quality. *Id.* The Third Circuit stated that without evidence that *similarly situated* transferees, with a secular home-school background, were provided an exemption that the challenger was not, the law was generally applicable because it served its purpose. *Id.*

HHS does not provide exemptions to allow Child Placement Agencies to discriminate. AACS contends HHS is provided an "exemption" that it is not. R. at 11–12. HHS, however, is not an agency that certifies and trains families, but rather a government agency charged with protecting children and providing them with the most suitable home. Similar to *Vandiver*, AACS cannot point to *any* Child Placement Agency afforded an exemption withheld from AACS. Distinct from *Vandiver*, the Commissioner has no power to subjectively grant an exemption to a Child Placement Agency. What AACS challenges is not HHS's power to discriminate against same-sex couples, because HHS has no such power. In determining which family is the most

[4] *Compare United States v. Lee*, 455 U.S. 252 (1982) (allowing an exemption from social security taxes for self-employed Amish, but not for Amish employers or employees), *with Masterpiece Cakeshop*, 138 S. Ct. 1719 (permitting bakers to refuse service when they consider the design offensive, but not for a baker who objects on religious grounds).

suitable for a child, HHS may consider factors of the "child's age, sibling relationships, race, medical needs, and disability." R. at 3. These factors ensure that when the government removes a child from their home, the child has the best opportunity to be placed with a family—not just capable of caring for them—but the most equipped to relate to the child, meet their needs, and love them. Because of these considerations, AACS contends it should be permitted to deny service to applicants based on their sexual orientation. This comparison AACS makes is unrelated to the general applicability analysis and should be dismissed. Because AACS cannot point to an agency permitted to discriminate, the claim that the policy is selectively enforced is unfounded.

Where there are exemptions consistently permitted for secular groups, but denied to religious groups, the law is selective. *See Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (allowing counselors to refuse counseling based on secular reasons, but not allowing the same exemption to a religious counselor, was not a generally applicable policy); *see also FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (exempting police officers with medical issues from policy of clean shaven faces, but not affording the same exemption to Muslims).

What AACS alleges would be akin to a requirement in *FOP Newark Lodge No. 12* that all police officers must have a clean shaven face, but claiming because the fire department does not abide by the same rule, one officer shouldn't have to either. Moreover, the factors HHS considers when placing a child do not permit discrimination in any sense. These factors allow consideration of relevant aspects of the realities of raising a child separated from their natural family. The anti-discrimination policy applies to all Child Placement Agencies, ensuring every citizen has access to adoption services and all families are considered for adoption.

2. Recognizing the critical difference of the government's role as an administrator of adoption services, rather than a regulator of laws, a more deferential standard should apply.

A more deferential standard should apply to the state's policies when acting as an administrator through HHS rather than as a lawmaker. The Supreme Court has consistently recognized that the government, when acting as an employer, manager, or administrator rather than a sovereign, has greater leeway in regulating its workforce. *See generally Engquist*, 553 U.S. 591. Where the state implemented policies for agencies receiving state funding and assisting with a public service, the state's role should be considered in affording deference to the policy.

There is a clear distinction between the government acting as a lawmaker and regulating its own internal operations. *Id.* at 599; *see Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 894 (1961) (granting deference to the government's dismissal of an employee when managing the internal operation of a federal establishment). In *Engquist*, the Court found no basis for the action because the government acted as an employer, rather than as sovereign. 553 U.S. at 598. The Court adopted principles to guide when the government acts as an employer rather than as sovereign. *Id.* at 600. First, while citizens do not lose their rights as a government employee, their rights must be balanced against the realities of the employee-employer context. *Id.* Second, courts must consider whether the issue lends itself more to the government acting as an employer or to the basic concerns of the right. *Id.* The Court expressed it would not supplant its own judicial discretion in place of the government's managerial decisions. *Id.* at 608.

The City's ability to enact neutral and generally applicable policies is strengthened when the state acts as a manager of its own affairs. Here, the state is carrying out its role as a manager of state services. The policies in place permit the most effective system of adoption services. The state is not attempting to govern the private conduct of AACS, rather the service that AACS

provides for East Virginia citizens with their tax dollars. Applying *Engquist*, AACS does not lose all rights as a contractor for the state. But the policy relates, not to AACS as a religious organization, but to its role as a contractor providing services for the state. Here, the court should not be charged with the heavy task of analyzing every decision a state makes when managing its own affairs, but should afford deference to the state as an administrator of adoptive and foster services. Therefore, because of the state's role as a manager and the neutrality and general applicability of the anti-discrimination policy, the law is presumed valid under rational basis.

B. Under Rational Basis, the Anti-Discrimination Policy Passes Constitutional Muster by Serving the Legitimate Government Interests of Ensuring Diversity, Equality, and Accessibility by Allowing All Families to Be Considered During the Placement Process.

When analyzed under rational basis review, the policy is reasonably related to the legitimate interests of accessibility to public services, protecting the best interests of children, and enforcing laws. In *Smith*, the Court determined a neutral and generally applicable law need not be justified by a compelling interest, rather it should be analyzed under rational review. 494 U.S. 872.[5] By ensuring all qualified families are served by Child Placement Agencies, the policy is rationally related to providing access and allowing more families for children. The interest in law enforcement, accessibility, and the child's best interests are legitimate interests.

1. The anti-discrimination policy is rationally related to the interests of protecting equality and meeting every child's needs by ensuring every family has equal access to Child Placement Agencies.

The anti-discrimination policy is rationally related to the state's interests by providing more potential families and allowing accessibility for all. Under rational basis review, the policy is

[5] *See Stormans*, 586 F.3d 1109 (applying rational basis to a neutral and generally applicable law); *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007).

presumed to be valid. *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993). The policy may be overinclusive or underinclusive and still constitutional if the policy is rationally related to legitimate interests. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.* at 488. Where rational basis applies, even imperfect policies are upheld if they bear some rational relation to the interests.[6]

HHS's anti-discrimination policy is presumably valid and bears a rational relationship to the interests at stake. AACS must prove the policy has no relation to accessibility, ensuring a broad pool of parents, or enforcement of laws. AACS cannot meet this burden. By prohibiting discrimination, the policy guarantees every qualified individual will be considered for adoption. The policy ensures same-sex couples whose tax dollars fund AACS have access to this service. Allowing same-sex couples to be considered for adoption allows more families to be available for children. The anti-discrimination policy is rationally related to the government's interests.

2. The City has legitimate interests in enforcing laws, guaranteeing accessibility of public services, and allowing the pool of potential families to be as diverse as the children.

The purpose of the anti-discrimination policy is not simply legitimate, but this policy is supported by interests which must be strongly protected. The policy serves four legitimate interests: (1) enforcement of laws when agencies voluntarily agree to be bound by state law;[7] (2)

[6] *See Lighthouse Inst. for Evangelism*, 510 F.3d at 263 (finding a plan prohibiting churches in downtown was rationally related to revitalizing the area simply because it was not arbitrary and bore some relation to this purpose); *see also Vandiver*, 925 F.2d at 932 (stating that the school's testing regulation was presumed valid under rational review without much analysis).

[7] *Wyoming v. Houghton*, 526 U.S. 295, 304 (1999) (finding effective law enforcement a legitimate government interest); *Ctr. for Competitive Pol. v. Harris*, 784 F.3d 1307 (9th Cir. 2015) (stating that enforcement of laws is a sufficiently important government interest).

equal access to all qualified families; (3) broadening the pool of potential families for children; and (4) ensuring those who pay taxes for services may access these services. R. at 9. Under rational basis, AACS must negate "every conceivable basis which might support" the policy. *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1993)). Here, AACS has failed to meet this burden as the policy is supported by multiple legitimate interests.

Discrimination has consistently led to inequal opportunities. Though individuals may hold their own ideas about morals, the City must ensure equal access to public services for all. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (stating there would be a compelling interest in eradicating discrimination against women, relating to equal access). Throughout history, discrimination has affected citizens' abilities to access public services. Yet, the Court has consistently determined equal access to public services is a compelling interest. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (upholding Title II of the Civil Rights Act of 1964 by stating its object was to absolve "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (determining the compelling interest of equal access to women extended to goods, services, privileges, and advantages). "A State enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts*, 468 U.S. at 625.

Since the decision in *Obergefell v. Hodges* courts have struggled with how to reconcile the dichotomy between religion and gay rights. Through this struggle, homosexuals' rights to equal access, service, and recognition have not been as vehemently protected as they should be. There are collateral consequences to denying a same-sex couple service when trying to foster or adopt a child. First, this may be the *only* option for a same-sex couple to have a child, but by denying

their certification—even if they can go to another agency—ACCS is refusing them from the primary step to becoming parents. Second, denial of access to a public service (equipped by taxpayers' dollars) because of one's marital status—which has been deemed not only lawful, but deserving of recognition and safeguarding—is impermissible.[8] It is highly likely that many families AACS provides child-placement services to are not aligned with Islam. Any family who seeks services at AACS and is not Muslim is not living in a way approved by Islam. Even Muslim families may not obey the Qur'an, yet they are presumably accepted and welcomed at AACS. AACS cannot deny services to same-sex couples simply because it is more obvious how they deviate from the Islam. AACS is not exclusively serving those who are aligned with its religious beliefs; it is actively discriminating against same-sex couples because their "sin" is not concealed.

The state has a legitimate, even substantial, interest in protecting children's best interests. In *Palmore v. Sidoti*, the Court held that the state is charged with a duty of the highest order in protecting the interests of children. 466 U.S. 429, 433 (1984). The Court dealt with a mother losing custody of her child based on the discriminatory belief that the child would face difficulties because of the mother's black husband on account of his race. *Id.* at 430. Determining these prejudices would not be tolerated by the law, the Court found the state had a substantial government interest in protecting the best interests of the child. *Id.* at 433. The Court stated: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

[8] *See Obergefell v. Hodges*, 576 U.S. 644 (2015) (acknowledging the fundamental right of same-sex couples to marry); *see also United States v. Windsor*, 570 U.S. 744, 770 (2013) (recognizing the equal dignity of same-sex marriages).

The state has more than a legitimate interest in acting consistently with the child's best interests, but an *obligation* to provide children with the most suitable home quickly. There is a dire need for more adoptive families, specifically in Evansburgh; denying certification to *any* qualified family is forsaking the child's urgent need for a home. R. at 8. Not only may it delay the adoption process, but denying service to same-sex couples reduces the placement options for children. Inevitably, some children may never be placed with a permanent home and could "age out" of placement. This sad reality is only expanded by denying qualified families from the opportunity to adopt. Though AACS claims it does not deny same-sex couples (by referring them elsewhere) at *best* this is abandoning the child's urgent need for an immediate home. At worst, this is deterring qualified families from becoming foster parents altogether, which will force children to remain in the system until they can care for themselves. Regardless of AACS's optimism, allowing AACS to deny same-sex couples access to foster and adoptive services will leave children without a home.

II. THE EOCPA DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON AACS BY REQUIRING IT TO CERTIFY SAME-SEX COUPLES AS PROSPECTIVE ADOPTIVE PARENTS AND TO POST STATE LAW ON ITS PREMISES AS A REQUIREMENT FOR RENEWAL OF ITS GOVERNMENT CONTRACT.

Under the unconstitutional conditions doctrine, "the government may not deny a benefit to a person on the basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.* (*FAIR*), 547 U.S. 47, 59 (2006). The doctrine is a narrow limitation on government decision-making and is only meant to address circumstances where constitutional rights are at stake and when the condition prevents the fund recipient from engaging in conduct outside of the government funded program. *Regan v. Tax'n with Representation*, 461 U.S. 540, 545–46 (1983).

Before this Court can even address the unconstitutional condition issue, it must first decide whether AACS's conduct constitutes speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[The Government] may not [condition] a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). The district court improperly assumed without discussion that the act of certifying gay couples constituted First Amendment speech. R. at 16. Even if it did, both the notice and certification requirements would constitute government speech, escaping AACS's First Amendment protections. Finally, the EOCPA does not burden AACS's separate First Amendment speech to an unconstitutional degree. Because there isn't any speech, and any speech would be incidental government speech, the unconstitutional conditions doctrine does not apply.

A. The First Amendment Does Not Apply to Conduct That Is Not Inherently Expressive or to the Speech of the City and Its Contractors.

Conduct that is not inherently expressive is not protected by the First Amendment. The First Amendment protects "inherently expressive" conduct from laws that impose substantial burdens on the expressive elements of such conduct. *FAIR*, 547 U.S. at 65–66; *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548. And even if the court finds the conduct inherently expressive and the law a substantial burden, the law will be upheld "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Those protections, however, fall by the wayside when the speech being regulated is speech funded by the government. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (holding that when the government appropriates funds to a program, it may define the limits of that program, including its speech). Any speech from AACS as a government contractor constitutes

government speech, allowing the government to dictate what is said within the confines of the program.

1. Certifying couples as prospective adoptive parents is not "inherently expressive" as to constitute speech under the First Amendment.

"[C]onduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *FAIR*, 547 U.S. at 65–66 (citing *O'Brien*, 391 U.S. at 376). But, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," the Court only provides First Amendment protections to conduct that is "inherently expressive." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *accord FAIR*, 547 U.S. at 65–66.

In deciding whether conduct is inherently expressive and afforded First Amendment protections, the Court asks whether there was an intent to set forth a particularized message and if there was a great likelihood that the message would be understood by viewers. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). The conduct must convey a "point" that will be "overwhelmingly apparent" to objective observers, *FAIR*, 547 U.S. at 66, and be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments[.]" *Spence*, 418 U.S. at 409. If any additional "explanatory speech" is needed, the conduct is unlikely to be "inherently expressive" and protected under the First Amendment. *FAIR*, 547 U.S. at 66. The Court, and lower courts, have routinely found that a failure to be "inherently expressive" without an explanation, removes said conduct from the First Amendment.[9]

[9] *See FAIR*, 547 U.S. at 64 (refusing to host a military recruiter was not inherently expressive because the law school's disapproval would not be reasonably understood without accompanying explanation); *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125–28 (2011) (finding the legislator's act of voting was not "inherently expressive" as a reasonable observer could not discern the reasons for the vote without explanation); *Stanglin*, 490 U.S. at 25 (holding recreational dancing did not express an idea that affords protection under the First Amendment).

Here, certifying same-sex couples comes nowhere near the standard required under *O'Brien*, *FAIR* and *Spence*. AACS's certificating a same-sex couple, complying with the EOCPA, conveys no particular message overwhelmingly apparent to an objective observer. A taxpayer makes no affirmation, endorsement, or message about current tax brackets by paying taxes. Nor does AACS make or promote any message by complying with state law.

2. Even if there was First Amendment speech at issue, AACS's speech constitutes government speech and does not invoke First Amendment protections.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). A private entity is a state actor subject to First Amendment constraints in a few limited circumstances: (1) when a private organization performs a traditionally public function; (2) when a private entity is compelled by the government to take specific action; or (3) when a private entity and the government act jointly. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). When the government funds a program, it may define the limits of that program's speech. *Rust*, 500 U.S. at 194. "As a general rule, government has the undeniable right to speak for itself and to advocate and defend its own policies subject only to the review of the electoral and political processes." *Child. First Found., Inc. v. Martinez*, 631 F. Supp. 2d 159, 172 (N.D.N.Y. 2007) (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

To constitute government speech, the "government sets the overall message to be communicated and approves every word that is disseminated, [and by doing so] it is not precluded from relying on the government speech doctrine merely because it solicits assistance from non-governmental sources in developing specific messages." *Id.* (citing *Johanns v.*

Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005)). The government can regulate "what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("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."")). "As a consequence of the government speech doctrine, when government exclusively crafts and controls its own speech, from 'beginning to end,' said speech is exempt from First Amendment scrutiny. *Child. First Found.*, 631 F. Supp. 2d at 172 (citing *Johanns*, 544 U.S. at 560). No matter what viewpoint the government supports, or how one-sided it may be, as long as it does not infringe upon an individual's First Amendment Rights, it is constitutional. *Id.* (citing *Women's Emergency Network v. Bush*, 323 F.3d 937, 946 n.9 (11th Cir. 2003)).

The government speech doctrine only applies when the purpose of the program is to support a government message, rather than facilitate private speech. *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541–42 (2001). "It does not follow that . . . viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. The protections afforded to government speech apply when the program promotes a government message, rather than facilitating private speech. *Legal Servs. Corp. v. Velasquez*, 531 U.S. at 542. Therefore, the purpose of the program or speech must be determined before the government speech doctrine can apply. *Id.*; *e.g.*, *Pleasant Grove City*, 555 U.S. 460 (deciding the city's placing of a monument in a public park was government

speech as the city did not open the park as a forum for installation of permanent monuments, but was rather expressing the city's view).

The district court improperly concluded *AOSI* was dispositive when it determined the purpose of the program and the speech "compelled" did not coincide. R. at 16. The district court relied on *Agency for International Development v. Alliance for Open Society International* (*AOSI*). 570 U.S. 205 (2013). In *AOSI*, a federal regulation gave funding to combat HIV/AIDS worldwide. *Id.* at 205. As a condition of receiving funding, recipients had to agree in their award documents that they opposed "prostitution and sex trafficking[.]" *Id.* at 210 (citing 45 C.F.R. § 89.1(b) (2012)). The respondents were a group of domestic organizations that combated HIV/AIDS worldwide and feared the adoption of this stance would alienate "certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS." *Id.* at 211. The Court found this affirmation went "beyond defining the limits of the federally funded program to defining the recipient." *Id.* at 218 (citing *Rust*, 500 U.S. at 197). Under the regulation in *AOSI*, "[a] recipient [could not] avow the belief dictated by the [Regulation] when spending [Government] funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id.* The Court found that because the affirmation of the belief against prostitution "by its nature cannot be confined within the scope of the Government program," that the requirement was an unconstitutional condition. *Id.* at 221.

Here, both the purpose of the program and funding, coupled with the relationship between HHS and AACS, renders AACS's "speech" government speech. The purpose of the program was not to facilitate private speech, but to ensure the success of a government program allowing for the adoption of children. AACS, as a government contractor, is subject to oversight through

both contract provisions between AACS and HHS as well as the East Virginia Code empowering municipalities oversight of the foster and adoption placements of children. R. at 3, 5–6 ("The East Virginia Code empowers municipalities to regulate the foster and adoption placements of children[.]" & "Section 4.36 of the contract requires AACS to be 'in compliance with the laws, ordinances, and regulations of the State of East Virginia and the City of Evansburgh.'"). Not only is AACS a government contractor, AACS and the City of Evansburgh act jointly to effectuate adoptions of children, rendering AACS a state actor for First Amendment purposes. The purpose of the government contract is "to provide foster care or adoption services." R. at 3. This purpose is fulfilled through the necessarily complimentary functions of HHS and AACS, along with the other private Child Placement Agencies HHS has entered into foster care and service contracts with. AACS is charged with "provid[ing] services that consist of home studies, counseling, and placement recommendations to HHS." R. at 3. When HHS receives a child into custody, it then contacts these private adoption agencies for a list of families, which HHS then reviews to determine which private agency "has the most suitable family" to entrust the child to. R. at 3. This process could not happen without both agencies working together to effectuate the goal of having a child placed into a loving home. By serving the government purpose of effectuating adoptions, and not creating a platform by which a private message can be disseminated, the contracts with private adoption agencies render any private adoption agency, including AACS, a state actor, and any speech the government requires government speech.

Not only does AACS's speech constitute government speech, but as further described in Section II.B.2 below, AACS is still permitted to exercise its First Amendment rights outside the confines of the program. Neither the certification requirement nor the notice requirement requires an affirmation or endorsement of the government's message, as the policy in *AOSI* did.

The affirmation in *AOSI* had practical, negative consequences in that the recipients would have lost the ability to effectively continue their purpose in host countries that legalized prostitution. Here, AACS still may have its own speech and even actively protest the policy, while complying with it. Because of the difference between *AOSI*'s notice requirement and HHS's—specifically the differing practical implications and real-world effects on the recipient's speech—the district court improperly relied on *AOSI* as dispositive precedent.

a. Compliance with the non-discrimination policy when certifying couples constitutes government speech in pursuit of the City's goal of finding a suitable home for a child.

Courts have upheld speech as government speech even when a private entity disagrees with the government's message it is required to host or support. In *Delano Farms Co. v. California Table Grape Commission*, the Supreme Court of California dealt with whether compelled assessments on California grape-growers for grape-related advertisements violated the grape growers First Amendment rights. 4 Cal. 5th 1204, 1210 (2018). The grape growers contended that by forcing them to pay these assessments, they were funding speech that promoted all California grapes equally, while the grapes they grew were "exceptional." *Id.* The court held that although the government's message was initially supported by market participants (the grape-growers), the message only existed because the California Table Grape Commission issued the advertisements. *Id.* at 1237–38. Because the commission was "subject to meaningful oversight by public and other government actors," and was the one to issue the advertisements, the court deemed the speech government speech and the compelled assessments constitutional.[10] *Id.* at 1237, 1244.

[10] The United States Court of Appeals for the Ninth Circuit dealt with the same arguments brought by the same grape-growers in a concurrent action brought in federal court. *Delano Farms Co. v. California Table Grape Comm'n*, 586 F.3d 1219, 1230 (9th Cir. 2009). The court

Similar to *Delano Farms Co.*, requiring AACS to certify same-sex couples, under the EOCPA, constitutes government speech. HHS, through its contracts with private adoption agencies, fund its own message of what the City believes is a suitable home for children. That message is only possible through action by both parties, albeit it through funding from one. The certifying of same-sex couples, or any couples, is entrusted to AACS to help complete HHS's goal; therefore, HHS is subject to meaningful oversight by public and government actors. Although the record is silent as to the structure of HHS, it is a governmental agency charged by the City of Evansburgh "with establishing a system that best serves the well-being of each child" and is held accountable by City leadership, voters, and the public overall. Any certification by AACS disseminates the City's belief of what is a suitable home and is government speech.

b. Compliance with the notice provision of the EOCPA equally constitutes government speech as government speech hosted by a private entity.

A requirement that information be posted on premises of a private institution is a common and routinely upheld requirement of federal and state statutes.[11] When a government contractor is required to host government speech, as opposed to speak in its own right, that hosted government speech does not burden the contractor's First Amendment rights. *Nat'l Ass'n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 17 (D.D.C. 2015); *e.g.*, *FAIR*, 547 U.S. 47.

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dismissed the grape-growers' claims on the same governmental speech conclusion the Supreme Court of California reached. *Id.*

[11] *See* 29 U.S.C. Ch. 15 (requiring hazard labels by Occupational Safety and Health Act); 29 U.S.C. Ch. 20 (ordering wage transparency rules under the Migrant and Seasonal Agricultural Worker Protection Act); 29 U.S.C. §§ 1001–1461 (requiring benefits plan disclosure under the Employee Retirement Income Security Act); 29 U.S.C. §§ 2101–2109 (mandating plant closing notice under the Worker Adjustment and Retraining Notification Act).

Hosted government speech—informing the reader of their rights or the law—is constitutional as long as it does not prevent the poster from speaking. In *National Ass'n of Manufacturers v. Perez*, the District Court for the District of Columbia examined whether the U.S. Department of Labor's regulation unconstitutionally compelled speech when government contractors were forced to post notices regarding employees' workplace rights. 103 F. Supp. 3d at 12. The regulation required government contractors and subcontractors to post a notice "in conspicuous places in and about [their] plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically." *Id.* (citing 29 C.F.R. § 471, Subpt. A, App. A (2015)). The notice consisted of three sections generally describing the employee's bargaining rights under the NLRA, illegal anti-union sections, and illegal coercive actions of unions. *Id.* The government contractors that brought suit contended that the forced notice provision violated their rights to not speak "by requiring their members, as a condition of contracting with the federal government, to display what they say is a Notice biased in favor of unionization." *Id.* at 13. The court, relying on *FAIR*, found that the mandated notice requirement was a "'far cry' from the government-mandated speech deemed unconstitutional in *Barnette* and *Wooley*."[12] *Id.* at 17. The court reasoned that the posting requirement does not require contractor speak at all, but "[r]ather, the contractor is required to host *government speech* as a condition of receipt of a federal contract. That . . . presents a contractor with a choice—agree to post the Notice or forgo federal contracting." *Id.* (emphasis added). Additionally, the regulation allowed a different message, "so as to make clear

[12] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), struck down regulations requiring schoolchildren to recite the Pledge of Allegiance on threat of expulsion from school and regulations compelling license plates to host the slogan "Live Free or Die."

that the Notice does not reflect the contractor's own views and its display is government mandated." *Id.* The court held the notice requirement merely hosted government speech and did not prohibit the government contractors from advancing their own speech. *Id.*

The notice requirement as part of the EOCPA is similar to the one in *National Ass'n of Manufacturers*. The EOCPA requires a statement be posted saying it is "illegal under state law to discriminate against any person, including prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sec, marital status, disability, or sexual orientation." R. at 6 (citing E.V.C. § 42.-4). The mandated notice requirement is, once again, a far-cry from the government speech deemed unconstitutional in *Barnette* and *Wooley*. The notice requirement only requires AACS to host the government speech, explaining that it is illegal under state law to discriminate based on an individual's protected characteristic. AACS, additionally, can post a written objection to the anti-discrimination policy. By merely hosting the government speech, and still being allowed to post its own speech even hypothetically right next to the government notice, AACS still retains its First Amendment rights while hosting government mandated speech.

B. Even if the EOCPA Burdened AACS's First Amendment Speech, the Limitations Do Not Burden AACS's Speech to an Unconstitutional Degree.

If this Court finds a burden on AACS's own speech, the burden is incidental. The Court has held that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). "Regulations that burden speech incidentally . . . must be evaluated in terms of their general effect . . . [and are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech."

Albertini, 472 U.S. at 688–89 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 288–89 (1984)). This standard applies whether a plaintiff challenges a regulation for compelling speech or restricting it. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (finding that compelled speech and compelled silence are constitutionally equivalent). The Court must uphold the regulation if the burden is no greater than necessary and advances a substantial government interest, even if there might be a less burdensome alternative.

1. Any burden the EOCPA places on AACS's speech is incidental to the law's regulation of discriminatory conduct.

The Court has routinely upheld incidental burdens on speech, both in regulation of speech and conduct.[13] "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see FAIR*, 547 U.S. at 62 ("Congress . . . can prohibit employers from discriminating in hiring on the basis of race . . . [and] require an employer to take down a sign reading 'White Applicants Only' . . . ."); *accord Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

Laws regulating conduct, with an incidental burden on First Amendment speech, are constitutional. In *FAIR*, the Forum for Academic and Institutional Rights (FAIR) challenged the Solomon Amendment (10 U.S.C. § 983) which required law schools and law facilities to provide access to military recruiters equal to that provided for other recruiters or lose certain federal

[13] *See, e.g.*, *FAIR*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

funding. 547 U.S. at 51. FAIR sought to "restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military." *Id.* FAIR contended the Solomon Amendment forced the law schools to "choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities." *Id.* at 53. The Court found that the Solomon Amendment "neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds." *Id.* at 60. The Court further found that the Solomon Amendment "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* (original emphasis). The "compelled speech" of recruiting assistance was "plainly incidental to the . . . regulation of conduct" that survived First Amendment scrutiny as "it has never been deemed an abridgement 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." *Id.* at 62 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The Court also found that beyond the speech complained of, the conduct regulated also survived a First Amendment challenge, and upheld the Solomon Amendment as constitutional. *Id.* at 70.[14]

Similar to *FAIR*, the EOCPA only imposes incidental regulation of speech while regulating conduct. The EOCPA regulates conduct because it prohibits Child Placement Agencies from discriminating on "the basis of race, religion, national origin, sex, marital status, or disability,"

[14] The court, applying the same principles discussed in Section II.A above, also found the conduct was not inherently expressive enough to constitute speech, and that even if it were, it would most certainly be government speech. *FAIR*, 547 U.S. at 67–68 & 61 n.4.

and later sexual orientation, "when screening and certifying potential foster care or adoptive parents or families." R. at 4, 6 (citing E.V.C. §§ 42.-2, -3(b)). The "compelled speech" in the notice provision stating that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of the individual's race, religion, national origin, sex, marital status, disability, or sexual orientation" is merely incidental to the regulation of conduct by the EOCPA. R. at 6. Moreover, as Section II.B.2 further describes, this signage does not infringe on AACS's right to post its own message even adjacent to the government-mandated signage. Because the regulation merely incidentally regulates speech, this Court should find this *de minimis* regulation survives First Amendment scrutiny.

2. Regardless of any burden, the EOCPA does not restrict AACS's speech as it may still exercise its own First Amendment rights outside of the government program.

Beyond any incidental burden, the EOCPA does not prohibit AACS from speaking. A government condition is constitutional when it does not foreclose alternate means to communicate the desired message. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). In *FAIR*, the Court noted that, despite Solomon Amendment's requirements to accommodate military recruiters, the amendment did not inhibit FAIR's ability to speak on its own. 547 U.S. 63–65; *accord Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 958 n.15 (D.C. Cir. 2013) (finding First Amendment was not violated in workplace government-mandated speech when "an employer could post a statement next to the poster pointing out its compulsory nature"), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

Concurrently, the EOCPA does not require a statement of endorsement or belief, distinguishing this case from *AOSI*. In *AOSI*, the Court objected to requiring the contracting

party to "explicitly agree with the Government's policy to oppose prostitution and sex trafficking." 570 U.S. at 213. The Court found that "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (quoting *Rust*, 500 U.S. at 197). Under regulation in *AOSI*, "[a] recipient [could not] avow the belief dictated by the [Regulation] when spending [Government] funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id.* The Court struck down the regulation as it required recipients to profess a specific belief. *Id.* at 218, 221.

Nothing in the EOCPA prohibits AACS from expressing its own views on discrimination, sexual orientation, or anything of its pleasing. The EOCPA specifically allows AACS to post on its premises "a written objection to the policy." R. at 6 (citing E.V.C. § 42.-4). Neither does the EOCPA require AACS to affirmatively state it agrees with the regulation or endorse it. By not infringing on AACS's rights of free speech, the EOCPA survives any First Amendment challenge of compelled speech.

3. The Government's anti-discrimination purpose behind the EOCPA is a substantial Government interest as it furthers the reasoning behind *Obergefell v. Hodges* in protecting citizens against discrimination based on sexual orientation.

The Court will uphold incidental burdens on speech if the regulation "promotes a substantial government interest[.]" *FAIR*, 547 U.S. at 67. *Roberts v. United States Jaycees* addressed a law prohibiting places of public accommodation from discriminating on the basis of gender. 468 U.S. at 612, 615. The Court explained the law "does not aim at the suppression of speech" or distinguish action "on the basis of viewpoint," but rather "eliminat[es] discrimination and assur[es] . . . citizens equal access to public available goods and services." *Id.* at 624. The

Court held that "even if enforcement . . . causes some incidental abridgment . . . [of] protected speech, that effect is no greater than necessary to accomplish the State's legitimate purpose" and that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute . . . may have on . . . associational freedoms." *Id.* at 628, 623.

Likewise, East Virginia has a compelling interest in prohibiting discrimination. The amendment made to the EOCPA prohibiting against discrimination based on sexual orientation was 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.'" R. at 6. That same commitment coincides with the interest in *Roberts* and *Obergefell v. Hodges*:

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.

Obergefell, 576 U.S. at 671. That same interest applied to marriage, extends here to the ability for gay parents to adopt. Affirming AACS's contended right to discriminate against gays and lesbians destroys the strides the gay rights movement has taken since *Obergefell*.

CONCLUSION

This Court should REVERSE the judgment of the United States District Court for the Western District of East Virginia in all respects.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT