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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STATEMENT OF JURISDICTION

The Fifteenth Circuit Court of Appeals entered judgment on February 24, 2020. R. at 18. On July 15, 2020, the Fifteenth Circuit granted Al-Adab Al-Mufrad Service's Petition for Rehearing En Banc, under Federal Rule of Appellate Procedure 35(a)(2). R. at 26.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether an anti-discrimination provision applied by the government in a selective manner that hinders a child placement agency's practice of religious beliefs violates the Free Exercise Clause?

II. Whether conditioning a child placement agency's funding on it renouncing its religious beliefs violates the First Amendment under the Unconstitutional Conditions Doctrine?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

City of Evansburgh. Evansburgh is the largest city in East Virginia with a population of approximately four million people. R. at 3. Evansburgh is an ethnically diverse city with a large population of refugees from Ethiopia, Iraq, Iran, and Syria. R. at 3. Evansburgh provides a safe haven for refugees facing severe personal and economic hardships, many of whom cannot care for their children. R. at 3. Approximately 17,000 children are in foster care, 4,000 of whom are available for adoption. R. at 3. Evansburgh has a chronic shortage of foster and adoptive homes. R. at 3. On April 22, 2018 the shortage reached its tipping point and the Department of Health and Human Services issued an urgent notice to all agencies stating the need for more adoptive families. R. at 8.

City of Evansburgh Department of Health and Human Services. City of Evansburgh Department of Health and Human Services (HHS) was tasked to create a system to best serve the

well-being of each child. R. at 3. The Commissioner of HHS is Christopher Hartwell. R. at 2. HHS has entered into contracts with thirty-four private agencies to provide child placement services. R. at 3. When HHS gives custody of a child, it sends a "referral" to one of the private agencies. R. at 3. The agencies keep a list of families and once they receive a referral contact HHS about potential matches. R. at 3. HHS compares the information about a potential family to the child's and determines which agency has the most suitable family. R. at 3. After placement of a child with a family, the agency supervises the family to ensure a successful transition. R. at 4. Families who seek to adopt foster children contact the agency they believe best serves their needs. R. at 4–5. If a family does not fit with the agency's profile and policies, the family is referred to another agency, which happens often. Each agency has its own mission and serves various members of the community, including four agencies that expressly serve the LGBTQ community. R. at 4, 8. HHS includes on its website a "choosing an adoption agency" section which states:

> Browse the list of foster care and adoption agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be an important support to you during your parenting journey. Contact your preferred agency to find out how to begin the process. Each agency has different requirements, specialties, and training programs.

R. at 5. The East Virginia Code requires HHS to make all decisions based on the best interest of the child. HHS considers information about the child and parents, including their ages, physical and emotional needs of the children compared to characteristics, capacities, strengths and weakness of the parents, the cultural and ethnic background of the child compared to the parents, and the ability of the child to be placed with siblings. R. at 4.

Equal Opportunity Child Placement Act. The Equal Opportunity Child Placement Act (EOCPA) prohibits child placement agencies from discriminating based on race, religion,

national origin, sex, marital status, or disability when screening prospective parents. All things being equal the EOCPA requires child placement agencies to "give preference" to foster and adoptive families who are the same race or same sexual orientation as the child. R. at 4, 6.

HHS approved exemptions to the EOCPA. HHS has approved exemptions to the EOCPA on several occasions. R. at 8–9. HHS three times approved a recommendation that children of the Sunni sect should not be placed with parents of the Shia sect and vice versa. R. at 9. HHS placed a white special needs child with an African American family after three other adoption agencies had screened white families. Hartwell claimed the EOCPA only protects minorities. R. at 8–9. HHS refused placement of a five-year-old girl with a family consisting of father and son. R. at 9.

Al-Adab Al-Mufrad Care Services. Al-Adab Al-Mufrad Care Services (AACS) is a non-profit agency that serves Evansburgh by providing home studies, counseling, and placement recommendations for the refugee population. R. at 3. AACS was founded in 1980 and has placed thousands of children in adoptive homes, many of whom are war orphans, special needs children, and trauma survivors. R. at 5. AACS has made it its mission to help the refugee population under the teachings of the Qur'an. R. at 5. Its mission statement reads, "[a]ll children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay 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. Contracts between HHS and AACS have been renewed annually since 1980. R. at 5. The most recent was signed on October 2, 2017, where AACS agreed to provide services, including screenings, training, and certification to prospective adoptive families while complying with the laws of East Virginia. R. at 5–6.

The Dispute. After the Supreme Court's decision in *Obergefell v. Hodges*, the Governor directed the attorney general, to review all statutes and identify, which must be amended to

reflect the State's 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. The EOCPA was amended to give preference to prospective parents who are the same sexual orientation as the child. R. at 6. The EOCPA requires agencies to sign and post a statement that says it is illegal to discriminate against any person. R. at 6. Religious agencies may post a sign besides this sign stating their objection to the policy. R. at 6.

In July 2018, a reporter contacted Hartwell and asked whether religious agencies were complying with the EOCPA amendments. R. at 6. Hartwell called the religious agencies to see if they were complying. R. at 6–7. Hartwell called AACS and spoke to Sahid Abu-Kane, the executive director. R. at 7. Abu-Kane reiterated to Hartwell that AACS provides services to the community under the teachings of the Qur'an, which consider same-sex marriage to be a moral transgression. R. at 7. Under these principles, AACS could not perform home studies for same-sex couples because doing so be against the teachings of the Qur'an. R. at 7. AACS always has treated same-sex couples with respect and dignity and refers them to other agencies. R. at 7. AACS has never had a complaint filed against it for this referral practice. R. at 7.

On September 17, 2018, Hartwell sent notice to Abu-Kane which stated it violated the EOCPA, HHS would not renew its contract, and instituted an immediate referral freeze. R. at 8. The freeze required all agencies to immediately stop sending children to AACS. R. at 7–8. The freeze ceased all placements AACS was working on, forced a young girl to be separated from her siblings, and stopped a foster family from adopting a special-needs boy. R. at 8.

II. PROCEDURAL HISTORY

United States District Court for the Western District of East Virginia. The United States District Court for the Western District of East Virginia held HHS violated AACS's First

Amendment rights under the Free Exercise Clause and the Unconstitutional Conditions Doctrine. R. at 14, 16. AACS sued Commissioner Hartwell, in his official capacity as commissioner of HHS, declaring that Hartwell's refusal to renew the City's adoption placement services contract with AACS violates AACS's First Amendment rights under the Free Exercise Clause and the Unconstitutional Conditions doctrine. R. at 2. AACS is seeking a temporary restraining order against the referral freeze and an injunction compelling Hartwell to renew the contract with AACS. R. at 2.

In deciding AACS's Free Exercise Clause claim the court began by noting if a law is not neutral or it is not generally applicable, it must survive strict scrutiny to be upheld. R. at 10. The court noted the EOCPA's anti-discrimination provision has codified exemptions requiring HHS to prefer adoptive parents based on race, religion, and sex for secular reasons. R. at 11. In addition, HHS had applied the EOCPA in a selective manner permitting discrimination when it favored its interests. R. at 12. The court found because of the categorical exemptions and the selective manner HHS had applied the EOCPA the law was neither neutral nor generally applicable, thus invoking strict scrutiny. R. at 13. Appellant did not contest the referral freeze and refusal to renew AACS's contract substantially burdened its religious beliefs, so the court was only left to decide whether the EOCPA served a compelling state interest narrowly tailored. R. at 14. Hartwell testified HHS proffered interest were: (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 qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad children needing such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those

services. R. at 14. The court did not rule on whether HHS's interests were compelling, but held it was unnecessary to deny an exemption to AACS to further those interests. R. at 14.

The court held HHS violated the Unconstitutional Conditions Doctrine by forcing AACS to display the EOCPA's notice requirement and certify same-sex couples. R. at 16. The court examined the purpose of the agency programs and stated the purpose of the relationship is to facilitate child adoptions, not promote the EOCPA's anti-discrimination message. R. at 16. Compelling AACS to affirm a message it does not believe, goes outside the scope of the program and violates the Unconstitutional Conditions Doctrine.

The United States Court of Appeals for the Fifteenth Circuit. HHS appealed the district court's decision. R. at 18. This Court addressed the Free Exercise Clause claim and held the law was a neutral generally applicable law because AACS could not show it had been treated differently than other agencies. R. at 21. This Court stated there was no evidence of hostility towards AACS and classified the codified exemptions and the selective manner it had applied the exemptions as essential for HHS to serve the children's best interest. R. at 22.

This Court held HHS did not violate the Unconstitutional Conditions Doctrine because AACS speech arose out of its contract with HHS to provide a public service. R. at 23. The was government speech according to this Court. R. at 24. In the next paragraph, however, this Court identified the speech as factual information. R. at 24. It suggested because AACS can place a message disclaiming the notice requirement it still can communicate its message. R. at 25.

SUMMARY OF THE ARGUMENT

I.

HHS violated AACS's right under the Free Exercise Clause by enforcing the EOCPA in a hostile, selective manner that prevents AACS's practice of religion. A law that burdens the

practice of religion must be neutral and generally applicable. If it fails under one of these principles, it must pass the rigors of strict scrutiny to be upheld. The EOCPA's anti-discrimination policy is neither neutral nor generally applicable. The law fails general applicability because HHS applies the provision to grant exemptions for secular conduct, while placing a heavy burden on religious beliefs. The statutory language of the EOCPA creates categorical exemptions for race, sexual orientation, and age, but refuses to permit exemptions for religious conduct. The interests advanced could be pursued without burdening AACS's religious conduct. The law also fails to be applied in a neutral manner. HHS applies the EOCPA when it serves its interests but refuses to make exceptions for religious conduct. The history of the law, series of events leading to the enactment, enforcement of the law, and degrading comments towards religion by officials are further evidence of the law's departure from neutrality. Because the law is not neutral or generally applicable it must survive strict scrutiny to be upheld.

The EOCPA fails under strict scrutiny, because the government has failed to show the selective enforcement of the EOCPA furthers its interests. As evident from the lack of general applicability the law is not narrowly tailored to advance the government's interests. The law violates AACS's right to Free Exercise of religion.

II.

Conditioning AACS's access to child placement funds upon the endorsement of views that conflict with its religious beliefs violates the First Amendment under the Unconstitutional Conditions Doctrine. AACS's refusal to post the EOCPA's notice requirement and certify same-sex couples is protected speech under the First Amendment. AACS speech is not government speech and it does not fit into the realm of commercial advertising speech. Forcing AACS to post the EOCPA's notice requirement and certify same-sex couples unduly burdens its speech and

undermines its religious message. Demanding AACS relinquish its First Amendment rights by promoting the EOCPA's notice requirement is outside the scope of the child placement program and violates its First Amendment rights under the Unconstitutional Conditions Doctrine.

ARGUMENT AND AUTHORITIES

Standard of Review. The issues before the Court are legal and should be reviewed de novo. *Celotex Corp. v. Catrett*, 477 U.S. U.S. 317, 323 (1986). With the First Amendment is implicated, this Court must examine the statements to see if they are protected by the constitutional guaranty of freedom of speech. *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

I. HHS HAS VIOLATED AACS'S RIGHTS UNDER THE FREE EXERCISE CLAUSE BY ENFORCING THE EOCPA IN A HOSTILE, SELECTIVE MANNER, PREVENTING AACS'S PRACTICE OF RELIGION.

HHS has violated AACS's rights under the Free Exercise Clause by enforcing the EOCPA's anti-discrimination provision in a selective manner burdening only AACS's practice of religion. The Free Exercise Clause of the First Amendment dictates that "Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof . . . ." U.S. Const. amend. I. The protection of the Free Exercise Clause is extended to state and local governments through the Fourteenth Amendment. U.S. Const. amend. XIV. The aim of the Free Exercise Clause is to foster a society in which people of all beliefs can live together without fear of religious suppression and discrimination. *Am. Legion v. Am Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). To accomplish this goal, the Free Exercise Clause protects all religious beliefs, even those out of favor with other with other citizens and the government. *See Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990); *see also W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (stating no government official can prescribe what shall be orthodox in religion or other matters of opinion). The Constitution mandates that the government not impose regulations

hostile to religious beliefs and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018). Same-sex couples must be treated with dignity and respect which AACS has consistently done throughout its operation. R. at 7. Similarly, however, the Supreme Court has long recognized that religious objections to the marriage of same-sex couples are protected views that must be treated with the same dignity and respect. *Masterpiece*, 138 S. Ct. at 1727; *see also Obergefell v. Hodges*, 576 U.S. 644, 679 (2015) (emphasizing that religions may adhere and continue to advocate with the utmost sincere conviction that same-sex marriage should not be condoned).

HHS ignored Supreme Court precedent by not allowing AACS to profess its religious beliefs. The Court has clarified, laws that burden religion must undergo the most rigorous scrutiny unless they are both neutral and generally applicable. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (stating neutrality and general applicability are interrelated, failure to satisfy one indicates that the other has not been satisfied). HHS has failed to show the EOCPA's anti-discrimination provision is being applied to AACS in a generally applicable manner. Alternatively, HHS has failed to show the law is neutral.

A. The EOCPA's Anti-Discrimination Provision Is Being Applied in a Selective Manner Burdening Religious Conduct While Permitting Analogous Secular Conduct to Go Unchallenged.

The EOCPA's anti-discrimination provision is being applied in a manner discouraging and hindering AACS's religious beliefs while failing to prohibit comparable secular conduct. General applicability relates to how the government pursues its interests. *Lukumi*, 508 U.S. at 543. If the government pursues its interests so it burdens religious conduct, but exempts secular conduct the law is not generally applicable. *Id.* at 544. Courts apply the principle in several ways. First,

courts check if the law creates a system riddled with discretionary, individualized secular exemptions, but discriminates against religious exemptions. *Smith*, 494 U.S. at 885 (stating where the State has a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship (citing *Bowen v. Roy*, 476 U.S. 693, 699 (1986); *Sherbet v. Verner*, 374 U.S. 398, 404 (1963))). Courts also determine whether the law creates a system of categorical exemptions but refuses to grant particular religious exemptions. *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). Finally, as enumerated in *Lukumi*, courts consider whether the government's interests are being pursued in an underinclusive manner against religious conduct. 508 U.S. at 543.

Whether dealing with a system with individualized exemptions, categorical secular exemptions, or an underinclusive law, courts have clarified the government cannot put secular motivations above religious motivations. *FOP Newark Lodge No. 12*, 170 F.3d at 365. HHS has created a system in which it consistently grants individualized exemptions, grants categorical exemptions as enumerated under the statute, and overall applies the EOCPA in an underinclusive manner that favors secular conduct while discriminating against religious conduct.

1. HHS has used the EOCPA's anti-discrimination provision to grant individualized exemptions for secular conduct but discriminates against AACS's religious conduct.

HHS has implemented the EOCPA's anti-discrimination provision in a way where it routinely grants individualized exemptions to the statute based on its own discretion. A system of individualized exemptions is one where case-by-case inquiries are routinely made by the government authority. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). Granting exemptions based on certain religious and secular conduct, but not allowing others is the precise evil the general applicability requirement seeks to avoid. *Lukumi*, 508 U.S. at 545–46.

Courts have held that systems in which the government has the discretion to grant case-by-case exemptions for secular conduct, but refuses to grant exemptions for religious conduct, violates the principle of general applicability and must undergo strict scrutiny. *Axson-Flynn*, 356 F.3d at 1299. In *Axson-Flynn*, the court held a discretionary system where case-by-case exemptions were made violates the principle of general applicability. *Id.* Axson-Flynn, a Mormon training to become an actor refused to use the words "God," "Christ," and curse words. *Id.* at 1280. Her professors told her refusing to say these words would hinder her development and she must change her practices. *Id.* at 1282. She withdrew from the program. *Id.* Reviewing the practices of the program, the court found it made exemptions for others including, allowing a Jewish student to avoid an improvisational exercise depicting Yom Kippur. *Id.* at 1299. The court stated because there was evidence of individualized exemptions given to others, she had established a discretionary system that violated the principle of general applicability. *Id.*

In *Ward v. Polite*, the court found the implementation of a university's anti-discrimination policy was in reality a system of individualized exemptions that violated the general applicability requirement. 667 F.3d 727, 738 (6th Cir. 2012). Ward, a student in the last stages of a counseling program, was expelled for asking to refer a gay client. *Id.* at 730. She was a Christian and refused to affirm same-sex relationships. *Id.* at 729. While there, Ward expressed to her professors she had no problem counseling gay students, but she would not engage in counseling that required her to affirm their sexual orientation. *Id.* at 731. The court reviewed the applicable polices in place at the program and found the school permitted value-based referrals, referrals for clients who wish to explore end-of-life options, and referrals for clients who could not pay for the services. *Id.* at 739. The court stated allowing a referral would not only be in the best interest of

Ward, but also the client. *Id.* The anti-discrimination policy was riddled with exemptions and could not be justified under the principle of general applicability. *Id.*

HHS has consistently used its discretion to make individualized case-by-case exceptions to the EOCPA for secular reasons. As clarified in *Ward*, and *Axson-Flynn*, a case-by-case system of exemptions is not generally applicable. HHS refused to place a white special needs child with three white family's because it claimed the Code was only meant to protect minority children. R. at 8–9. HHS has granted exemptions based on religious creed. During a period where tensions arose between the Sunni and Shia refugees in the city, HHS approved a recommendation three times that a child should not be placed with qualified parents because the child was a different sect than the parents. R. at 9. HHS granted exemptions based on sex when it refused to place a five-year-old girl with a father and son who were certified as an adoptive family. R. at 9. As evident from the second and third example, when the Code is in line with HHS's beliefs, it makes exemptions, but when the Code is not, HHS applies it strictly. This practice of individualized exemptions based on race, religion, and sex violates the principle of general applicability. This Court must look to *Ward*, and *Axson-Flynn*, to find making these individualized exemptions is evidence of HHS's discriminatory intent. Similar to *Axson-Flynn*, HHS cannot demand AACS violate its religious principles and carry the burden of policy. HHS has applied the EOCPA when it serves its interests but maintains the discretion to avoid it on a case-by-case basis.

Allowing a religious-based exemption would not be harmful to the LGBTQ community. Since 1980, AACS has treated all people in a respectful nondiscriminatory manner. R. at 7. AACS has never received a complaint by a same-sex couple. R. at 7. Similar to *Ward,* AACS is not demanding same-sex couples not be certified, AACS is merely requesting a referral, which

would serve the best interests of the parents and the children. It is a common practice to refer families; not allowing AACS a referral based on its religious beliefs violates the principle of general applicability.

2. The EOCPA creates several categorical exemptions that allow discrimination based on race, sexual orientation, sex, and age for secular motivations.

The EOCPA provides in statute for discrimination based on race, sexual orientation, sex, and age for HHS's secular motives. A law that creates a categorical exemption for individuals with a secular objection, but not for a religious objection fails the general applicability requirement and triggers strict scrutiny. *FOP Newark Lodge No. 12*, 170 F.3d at 365. When the government makes this value judgment in favor of secular motivations, its actions are not generally applicable. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208 (3d Cir. 2004). As the Supreme Court stated in *Lukumi*, "all laws are selective to some extent, but categories of selection are of paramount concern when the law has the incidental effect of burdening religious practice." 508 U.S. at 542.

Courts have held when a statute permits categorical secular exemptions but fails to similarly exempt religious conduct, it violates the principle of general applicability. *FOP Newark Lodge No. 12*, 170 F.3d at 365. In *FOP Newark Lodge No. 12*, the court held allowing medical exemptions to a "no beard" policy without considering religious exemptions suggested discriminatory intent and violated the principle of general applicability. *Id.* Officers Faruq Abul-Aziz and Shakoor Mustafa are both Sunni Muslims who believe religiously they must grow their beards. *Id.* at 359. The Newark Police Department had a "no beard" policy but made medical exemptions and exemptions for undercover officers. *Id.* The department refused to exempt for Aziz and Mustafa. *Id.* at 361. Both were disciplined. *Id.* In determining whether the "no beard"

policy violated Aziz and Mustafa's free exercise rights, the court looked to the fact the department granted categorical exemptions. *Id.* at 365. The court stated the department had effectively discriminated against their religion by placing secular motivations over religious motivations. *Id.* The court dismissed the department's argument stating the difference between medical exemptions and religious exemptions was the department's duty to comply with the Americans with Disabilities Act. *Id.*

The two categorical exemptions in the EOCPA allow discrimination based on race, sexual orientation, sex, and age for secular reasons. The EOCPA requires agencies favor sexual minorities and racial minorities when placing a child. E.V.C. § 42.-2(b), (c)(1). HHS considers factors such as the age of parents, the physical and emotional needs of the child compared to the characteristics of the parents, and the ethnic background of the families compared to the children. *Id.* § 37(e)(1), (2), (3). These factors allow discrimination based on age, sex, and religion for the secular goal of serving the child's best interest. Similar to *FOP Newark Lodge No. 12*, allowing exemptions for secular reasons but not religious reasons is evidence of religious-based discrimination. HHS cannot pursue its interests burdening religious conduct without considering certain categories of secular conduct, no matter the motive. As the Supreme Court stated in *Lukumi*, all laws are selective; the problem, however, is allowing a selective law to burden religious conduct without placing the same burden on secular conduct. This practice violates the principle of general applicability and, thus, invokes strict scrutiny.

3. The EOCPA's anti-discrimination provision is underinclusive to advance the government's interests and only pursues these interests against religiously motivated conduct.

The EOCPA's is underinclusive to advance HHS's interests. A law is underinclusive if it pursues an interest only against religiously motivated conduct. *Lukumi*, 508 U.S. at 543. If a law

fails to include prohibitions against secular conduct that would endanger the interest it is underinclusive. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2014). HHS pursues its interests by solely placing a burden on AACS while permitting comparable secular conduct.

Laws that burden a specific religion to pursue a governmental interest, but leave ample doors open for comparable secular conduct are underinclusive. *Lukumi*, 508 U.S. at 543. In *Lukumi*, the Supreme Court held a city's ordinances that only burdened the Santeria religion, while failing to prohibit secular conduct that undermined the same interests were underinclusive. *Id.* at 545. The City of Hialeah, enacted several ordinances prohibiting animal sacrifice, killing, and slaughtering. *Id.* at 528–29. The ordinances exempted licensed establishments. *Id.* at 528. The City claimed the purpose was, protect public health, safety, and welfare. *Id.* The Santeria Church practiced animal sacrifice as a part of its religion. *Id.* at 524. The Church believed these ordinances attempted to drive it out of the city, so it sued. *Id.* at 528. In discussing general applicability, the Court stated these broad ordinances failed to prohibit nonreligious conduct that similarly violated the City's interests. *Id.* at 543. The underinclusion was evident because while the ordinances pursued various interests, they only burdened the Santeria religion. *Id.*

HHS has advanced various interests in enforcing the EOCPA; however, these interests are pursued only against AACS's religious conduct. HHS claims that enforcing the EOCPA allows agencies to be accessible to all residents, the pool of parents is diverse, and laws of the city are enforced against those who violate them. R. at 9. Similar to *Lukumi*, HHS pursues these interests solely against religious-motivated conduct while allowing secular conduct to go unpunished. AACS predominately serves the refugee community. By forcing AACS to shut down, not only is HHS potentially denying access to individuals who would favor AACS over other agencies, but it is adding to the shortage of adoptive homes. AACS is not denying same-sex individuals the

right to be certified, it is merely asking HHS to allow it to continue its operation under the teachings of the Qur'an. Just as there are organizations that primarily serve the LGBTQ community, AACS serves a different faction of the community, further promoting diversity amongst children and prospective parents. Enforcing the EOCPA's anti-discrimination policy solely against AACS, does not show the community that laws must be enforced, but the City is not tolerant of religious beliefs besides those that are in favor. It is evident the city can pursue its interest by not solely burdening AACS's religious conduct. As this law is not generally applicable, it must pass the rigors of strict scrutiny.

B. The EOCPA's Anti-Discrimination Provision Is a Hostile Policy and Unduly Burdens AACS's Religious Conduct.

The EOCPA's anti-discrimination policy is a hostile policy toward AACS's religious beliefs. The Free Exercise Clause prohibits even slight departures from neutrality on matters of religion. *Lukumi*, 508 U.S. at 534. The principle of neutrality demands strict adherence by government officials in creating and enforcing laws that burden religious practices and beliefs. *Masterpiece*, 138 S. Ct. at 1732. A law is not neutral if its purpose is to limit or infringe on practices based on religious motivation. *Lukumi*, 508 U.S. at 533. The object of the law is determined by the facial neutrality[1] and the laws neutrality in application. *Id.* As most laws do not discriminate on their face, courts examine the application of the law meticulously, surveying if even a slight suppression of religion results. *Id.* at 534. To determine whether the law is neutral in its application, courts consider the effect the law has in its operation. *Id.* at 535. Most recently, the Supreme Court has also identified several factors courts must also use to assess neutrality. *Masterpiece*, 138 S. Ct. at 1731. The factors include the historical background of the law, the

[1] Appellee does not challenge the facial neutrality of the EOCPA as it applies to all adoption agencies.

series of events leading to the enactment and enforcement of the law, and any statements made by members of the decision-making body. *Id.* Upon finding even the slightest departure from neutrality strict scrutiny must apply. *Id.*

1. The EOCPA's anti-discrimination policy in its actual application operates in a hostile manner towards AACS's religious beliefs.

HHS has applied the EOCPA, in a hostile manner toward AACS's religious beliefs. Similar to the general applicability, neutrality requires observing the laws operation and enforcement. If a law is being enforced selectively against religious conduct, it is not a neutral law. Government bodies cannot decide secular motivations are more important than religious motivations. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 166 (3d Cir. 2002). HHS has failed to enforce the EOCPA in a nondiscriminatory fashion and has diverted from its obligation of neutrality.

Courts have consistently held when a governmental body fails to enforce a law uniformly and instead target religious conduct the law is not being applied neutrally. *Id.* at 168. In *Tenafly Eruv Ass'n v. Borough of Tenafly*, the court held because the Borough did not enforce a law evenhandedly, but instead granted exemptions to various secular and religious groups while excluding others, it violated the neutrality principle. *Id.* The ordinance prohibited any postings on utility poles. *Id.* at 151. Despite this rule, churches, private citizens, and even Borough officials routinely posted religious and nonreligious items on the poles. *Id.* at 151–52. The Orthodox Jewish residents of Tenafly attempted to place items on the poles for religious purposes and the Council ordered their removal. *Id.* at 154. The court noted the problem with the Council's actions was the consistently granted exemptions as to other individuals. *Id.* at 167. By continually allowing exemptions, the officials singled out religious conduct and discriminated against the Jewish people. *Id.* at 168. Had the Council applied the ordinance in a uniform fashion, it would not have violated the neutrality principle. *Id.* at 167.

HHS has failed to apply the EOCPA uniformly and has violated the neutrality principle. HHS has a historical practice of choosing when to enforce the EOCPA and when to make exemptions. R. at 8–9. In certain instances, HHS considers race, ethnicity, and sexual orientation when making placement decisions. R. at 4. HHS also forgoes these considerations when it sees fit. R. at 8–9. Applying the EOCPA burdening only AACS is the exact departure from neutrality the government cannot undertake, as evidenced in *Tenafly*. HHS has shown its selective enforcement is discriminatory and only burdens AACS's religious beliefs. For a law to be neutral it must be applied evenhandedly. Similar to *Tenafly*, only enforcing the EOCPA against AACS is a strong departure from neutrality. Further, the historical background, comments made by the state, and series of events leading to enforcement is also evidence of the lack of neutrality.

2. The historical background, comments made by the State's officials, and events leading to the enforcement of the EOCPA further exhibits HHS's discriminatory intent.

The EOCPA's historical background, comments made by state officials, and events leading to the enforcement exhibit the State's hostility towards AACS's religious beliefs. Discrimination towards religion can be shown by the historical background, comments made by state officials, and events leading to enforcement of the law. *See Lukumi*, 508 U.S. at 540 (stating hostile comments and enacting ordinances that targeted religious practices shortly after the Church started operating is strong evidence of the discriminatory intent). Governmental bodies must give fair and respectful considerations to religious objections. *Masterpiece*, 138 S. Ct. at 1732. A longstanding lack of objection, followed by the sudden enforcement against a religious group, is also a sign of religious animosity. *New Hope Fam. Servs. v. Poole*, 966 F.3d 145, 168 (2d Cir. 2020). Even a slight deviation violates the principle of neutrality. *Lukumi*, 508 U.S. at 534.

Courts have held treating a secular group's objections as legitimate coupled with hostile comments by the government shows a lack of neutrality. *Masterpiece*, 138 S. Ct. at 1729. In *Masterpiece*, the Court held dismissive comments by the government and selective enforcement of the law showed a lack of consideration for the petitioner's religious beliefs. *Id.* The petitioner, a Christian, refused to make a cake for a same-sex wedding because it violated his beliefs. *Id.* at 1724. An investigation was opened against him. *Id.* at 1725. During the investigation the commissioners commented stating his beliefs were not welcome in the community and called his beliefs despicable and rhetorical. *Id.* at 1729. But other bakers were permitted to object to work that violated their conscience. *Id.* at 1730. The Court stated the commissioners' sentiment toward the petitioner's beliefs was inappropriate and violated the principle of neutrality. *Id.* at 1729. The Court continued to state that government officials must apply nondiscrimination policies in a neutral manner, especially when dealing with a person's religious beliefs. *Id.* at 1730. Hostility towards a religious viewpoint cannot be tolerated by officials with a duty to enforce laws fairly and neutrally without passing judgment on religious beliefs and practices. *Id.* at 1731.

HHS enforcement of the EOCPA solely against AACS violates the principle of neutrality. Surveying the timeline leading to the amending and enforcing of the EOCPA sheds light on the state's animosity towards AACS. HHS and AACS have operated without dispute for over 40 years. R. at 5. Enforcement of the EOCPA against AACS did not occur until after 2018 when Hartwell spoke to a reporter who inquired about the EOCPA's anti-discrimination policy and compliance by religious-based adoption agencies. R. at 6–7. Rather than treating AACS in a neutral manner, Hartwell singled AACS out, and discriminated against it by only checking to see if it was complying with the EOCPA. Similar to *Masterpiece*, Hartwell treated religious agencies

different because of their affiliation, which is the exact conduct *Masterpiece* seeks to avoid. In addition, HHS did not object to AACS's policies for at least three years.[2]

The comments made regarding EOCPA attests to the government's departure from neutrality. Similar to *Masterpiece*, the Governor stated the need to eradicate discrimination regardless of what philosophy or ideology drives such bigotry. R. at 6. When you examine this statement's meaning, clearly it expresses hostility toward AACS's beliefs. The Governor, similar to the Commissioners in *Masterpiece*, is characterizing AACS's beliefs in a hostile, intolerant manner and is hardly acting neutral. In *Masterpiece*, governmental bodies have the duty to be fair and neutral when dealing with religious beliefs. The statement made by the Governor prefers one protected class's view while renouncing another's. Approval or disapproval of religious views should not be expressed by any government official, let alone the Governor of the State.

C. The EOCPA's Anti-Discrimination Policy as Applied to AACS Fails Strict Scrutiny.

The EOCPA's anti-discrimination policy fails strict scrutiny. The EOCPA is neither neutral nor generally applicable and must pass the rigors of strict scrutiny to satisfy the First Amendment. To satisfy strict scrutiny a law that burdens religion must advance the government interest of the highest order and must be narrowly tailored in pursuit of those interests. *Lukumi*, 508 U.S. at 545. Laws that treat religious beliefs with animosity will rarely survive the test of strict scrutiny. *Id.*

[2] Not only did HHS not enforce the EOCPA, it even acknowledged that "each agency has different requirements, specialties, and training programs" alluding to the fact that some agencies may be religious affiliated, some may specialize in serving the LGBTQ community, and some may be better suited with helping children with special needs. R. at 7–9.

1. HHS's enforcement of the EOCPA does not serve a compelling governmental interest.

HHS has failed to provide a compelling governmental interest in enforcing the EOCPA. A law cannot be regarded as protecting an interest of the highest order when it leaves ample modes to damage the interest. *Id.* at 547. In *Lukumi*, "where the government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification is not compelling." *Id.* at 546–47. Hartwell claims that enforcing the EOCPA serves three interests: Child placement services are available to all residents,[3] the pool of adoptive parents is as diverse as the children needing such parents, and state and local laws are enforced against agencies. R. at 9. HHS's selective enforcement undermines these interests by only restricting religious conduct, leaving open other feasible means to harm the interests.

Courts have held preventing discriminatory conduct while burdening religious agencies does not serve a compelling interest. *Buck v. Gordon*, 429 F. Supp. 3d 447, 463 (W.D. Mich. 2019). In *Buck v. Gordon*, the court found the state's interest in preventing discrimination and making child placement agencies available to all citizens was undermined by attempting to close an agency. *Id.* St. Vincent is an agency who serves Michigan in a variety of ways including child placement. *Id.* at 451. Michigan has a chronic shortage of foster and adoptive homes. *Id.* at 452. St. Vincent does not prevent unmarried or LGBTQ couples from fostering or adopting; it merely refers them to another agency. *Id.* at 453. The court, ultimately, found the state was targeting religious beliefs by canceling the contract, so it applied strict scrutiny. *Id.* at 462–63. The court

[3] During Hartwell's testimony, he claimed EOCPA serves four primary interests. The second and the fourth are the same; the only difference is he qualifies the fourth by saying services cannot be denied to residents who pay taxes. This is the same as not denying services to the citizens of Evansburgh. R. at 9.

noted the government had two interests: enforcing nondiscrimination laws and providing certified homes. *Id.* at 463. The court dismissed the first explaining disturbing the system of referrals was evidence of the state's actual goal to replace St. Vincent's beliefs with its own. *Id.* The court continued to state nothing in the record supported the state's contention referring parents limited homes. *Id.* The court found closing St. Vincent would constrict the amount of homes that could be certified and hurt the number of diverse homes. *Id.*

HHS has failed to show closing AACS would further its interest in promoting anti-discrimination. Similar to *Buck*, AACS has never stopped a same-sex couple from being certified; it simply refers the couple so it need not violate the teachings of the Qur'an. R. at 7. The state's interest in making child placement services available to all citizens has nothing to do with enforcing the EOCPA in a targeted manner. AACS has not denied same-sex couples from becoming adoptive parents by referring them. In *Buck*, referrals are usually a way to streamline the process so more couples can become certified. By allowing referrals, Evansburgh can continue to address the chronic shortage of adoptive homes serving the governments interests.

HHS also claims it wants the pool of adoptive parents and children to be diverse and broad. R. at 7. Enforcing the freeze, directly undermines this goal. Of the thirty-four agencies, AACS is the only one that primarily supports refugee children from war-torn countries. R. at 3, 5. Not renewing the contract will likely constrict the diversity of the parents who adopt and the children who are placed. Analogous to *Buck*, closing AACS will directly erode the diverse parents, as there will no longer be an agency that specifically supports the refugee community.

Two families have felt the harsh effects of the referral freeze. R. at 8. On October 13, 2018, a young girl was denied reuniting with her family because of the freeze and on January 7, 2019, a foster parent of two years was denied the ability to adopt because of the freeze. R. at 8. The

referral freeze is not just affecting AACS, but is also burdening the citizens and children of Evansburgh that HHS should protect. While HHS seeks to promote diversity among children and foster parents, enacting the freeze has negatively affected this goal, as evidenced by these two cases. Allowing the freeze to continue will further undermine the government's goal.

2. The EOCPA's anti-discrimination provision is not narrowly tailored to advance the government's interest.

The EOCPA's anti-discrimination provision fails to be narrowly tailored to advance the government's interests. A law is not narrowly tailored if its objectives are only being pursued against religious conduct, while exempting conduct that also harms the interest. Much of the analysis of whether a law is narrowly tailored hinges on the general applicability and neutrality of the law. *See Tenafly Eruv Ass'n*, 309 F.3d at 172; *see also Lukumi*, 508 U.S. at 546–47 (stating a lack of neutrality eviscerates the contention a law is narrowly tailored to advance a compelling interest). The enforcement of the EOCPA is not narrowly tailored because its objectives are only pursued against religious conduct. The objectives of HHS in enforcing the EOCPA could be met with a narrower law that does not allow for secular exemptions, while denying religious ones.

II. CONDITIONING AACS'S ACCESS TO CHILD PLACEMENT FUNDS UPON THE ENDORSEMENT OF VIEWS THAT CONFLICT WITH ITS RELIGIOUS BELIEFS VIOLATES THE FIRST AMENDMENT UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

Conditioning AACS's access to child placement funds solely on the endorsement of views that conflict with its religious beliefs violates the Unconstitutional Conditions Doctrine. Over seventy years ago, the Supreme Court stated the liberties of religion and expression may not be infringed upon by placing conditions on those privileges. *Sherbet v. Verner*, 374 U.S. at 404. It is a bedrock principle of First Amendment jurisprudence that speech cannot be regulated because of the government's desire to curtail a viewpoint on a controversial issue. *FCC v. League of*

Women Voters, 486 U.S. 364, 383–84 (1984). Whether the government has the obligation to offer the benefit in the first place, conditioning funds in exchange for giving up constitutionally protected rights is unconstitutional. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Unconstitutional Conditions cases arise when the government places a condition on the recipient of funds and has prohibited the recipient from engaging in protected conduct. *Id.* at 213. A precursor to applying the doctrine is showing you have a constitutional right to engage in the conduct. *Id.* The recipient then must show the condition unduly burdens speech. *Id.* Last, the recipient must show the conditions are outside the scope of the program funded. *Id.* Both the EOCPA's notice requirement and forcing AACS to certify same-sex couples compels AACS to renounce its religious beliefs to receive funds; this is an unconstitutional condition.

A. AACS's Refusal to Post the EOCPA's Notice Requirement and Certify Same-Sex Couples Is Protected Speech Under the First Amendment.

AACS's refusal to post the EOCPA's notice requirement and certify same-sex couples is protected speech under the First Amendment. The First Amendment stands for the principle that each person can decide the ideas and beliefs they wish to express and adhere to. *Agency for Int'l Dev.*, 570 U.S. at 213. The First Amendment also provides individuals with the option to say nothing. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Enforcing the EOCPA's notice requirement and forcing AACS to certify same-sex couples, when it chooses not to because of its religious beliefs, violates the First Amendment.

1. AACS's religious message communicated through spoken word and expressive conduct is speech for purposes of the First Amendment.

AACS expresses its message through spoken word and expressive conduct which is protected by the First Amendment. The constitution does not stop with written or spoken word,

but also includes conduct that is inherently expressive. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006); *see also Hurley v. Irish-Am. Gay*, 515 U.S. 557, 570 (1995) (holding a parade was an expressive activity that afforded the organizers the protection of the First Amendment). The speech HHS seeks to suppress is both expressive conduct and spoken word regarding AACS's religious opposition to same-sex marriage. As the Supreme Court has recognized, these objections are protected forms of speech. *Masterpiece*, 138 S. Ct. at 1727.

Courts have consistently held conduct that is inherently expressive receives the protection of the First Amendment. *Hurley*, 515 U.S. at 570; *see also Barnette*, 319 U.S. at 632 (stating conduct such as displaying a cross, flying a flag, or saluting receive the protection of the First Amendment). In *Hurley v. Irish-American Gay*, the Court held by admitting certain groups to a parade the organizer sought to convey a message which was protected by the First Amendment. 515 U.S. at 570. The South Boston Allied War Veterans Council held a parade every year to celebrate the feast of the apostle of Ireland, while promoting traditional religious and social values. *Id.* at 560. The organizers had the authority to admit or deny any group. *Id.* The respondents, a group of gay, lesbian, and bisexual decedents of Irish immigrants, sought admission to the parade to express pride in their heritage as openly gay, lesbian, and bisexual individuals. *Id.* at 561. The organizers denied the application, stating that allowing the group to participate would distort the organizers' intended message. *Id.* The Court began by determining whether conduct, the parade, deserved protection of the First Amendment. *Id.* The Court stated the organizers through selecting groups to participate in the parade conveyed a message that comported with their celebration. *Id.* at 575. The government did not simply want to regulate conduct, but the inherent symbolic expressions the organizers sought to express through the individuals it allowed in the parade. *Id.* at 568. The Court continued by stating the First

Amendment goes beyond written and spoken words, and also protects conduct as a form of expression. *Id.* at 569. By participating, the respondent group would equally convey an expressive message. *Id.* at 570. Because the message the respondent group would convey would conflict with the organizers, the organizers had every right not to allow the respondent group's message to distort its own. *Id.* The Court held that the parade operated as a medium to convey a message, and the government could not regulate this conduct on the basis it was not speech. *Id.*

In determining whether conduct was inherently expressive courts have analyzed whether the conduct mandated changed the complaining speaker's message. *Rumsfeld*, 547 U.S. at 63. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Supreme Court held a law school's decision not to allow military recruiters on campus was not expressive conduct because the law schools were not the party conveying a message. *Id.* at 64. A group of law schools restricted access to military recruiters because of the schools' disagreement with the military's stance on homosexuality. *Id.* at 51. When the government enacted the Solomon Amendment, which stated schools would lose federal funding if they denied military recruiters access, the law schools sued. *Id.* at 52. The Court began by determining whether the law schools' conduct was protected by the First Amendment. *Id.* at 60. The Court noted that under the statute law schools remained free to express views regarding the military and the statute merely affected what law schools must do rather than what they must say. *Id.* The Court distinguished *Hurley*, noting that allowing military recruiters access is not expressive and does not convey the schools' message. *Id.* at 64. The Court continued to state that conduct that must come with explanatory speech is strong evidence it is not inherently expressive. *Id.* at 66. The Court found because the schools' conduct in permitting military recruiters on campus did not convey a message in and of itself. *Id.*

AACS's decisions to not display the EOCPA's notice requirement and to refer same-sex couples is an expressive form of conduct entitled to First Amendment protection. Since opening in 1980, AACS has fostered a reputation of serving the community under the Qur'an. R. at 5. Part of its reputation is its religious identity. How AACS serves the community directly reflect its mission and its message. Analogous to *Hurley*, the families AACS certify and work with reflect the principles they operate by. Forcing AACS to adopt statements that conflict with its religious identity expresses a message to the public that it does not take the teachings of the Qur'an seriously and severely undermines its message. Unlike *Rumsfeld*, HHS is not attempting to regulate conduct, but attempting to undermine the message and values AACS promotes. In addition, as evident in *Rumsfeld*, AACS needs no explanatory speech to explain the expressive nature of its conduct. The city and the community understand that AACS operates under the teachings of the Qur'an; the conduct, speech, and actions it takes reflect this message. The conduct in placing children in adoptive homes conveys an idea that the First Amendment protects.

2. AACS's speech is not government speech because the children, families, and members of the community AACS serves understand that the message AACS conveys is its own.

HHS's contention that AACS's speech when serving as a child placement agency is government speech is misguided. The Supreme Court has recognized the government's own speech is exempt from First Amendment regulation. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). The Court has also recognized that the doctrine is often misused and should be applied with great caution. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). The government cannot convert private speech to government speech by requiring approval for certain conduct. *Id.* When the government provides funds to encourage a diversity of views, it

does not follow the speech is government speech simply because of funding. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Allowing the government to convert private speech to government speech by attaching a "seal of approval" would silence the expression of disfavored viewpoints which our First Amendment jurisprudence forbids. *Matal*, 137 S. Ct. at 1758; *see also Nat'l Inst. of Fam. Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (dismissing the idea the government can deny First Amendment protection by requiring a license). To qualify as government speech, the speech from its inception must convey a government message. *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009).

The required government act of funding, certifying, or approving private speech does not transform private speech to government speech. *Matal*, 137 S. Ct. at 1758. In *Matal v. Tam*, the Supreme Court held that the government's act of giving a "seal of approval" did not change private speech to government speech. *Id.* The government claimed granting a trademark was government speech. *Id.* at 1757. To address this question, the Court surveyed cases considering government speech. *Id.* at 1759–60. The Court started by analyzing *Johanns v. Livestock Marketing Ass'n*, in which Congress created a program to promote the sale of beef products. *Id.* at 1759. The Court noted that in *Johanns*, the message conveyed from beginning to ending was established by the federal government. *See id.*; *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 556 (2005) (holding the ads were government speech because the government's involvement and creation of the ads conveyed a message established by the federal government). The Court also evaluated *Walker v. Texas Division, Sons of Confederate Veterans Inc.*, which it considered on the furthest spectrum of government speech and held trademarks exhibit none of the factors enumerated in *Walker*. *See Matal*, 137 S. Ct. at 1759.; *see also Walker*, 576 U.S. 200, 211 (2015) (stating because the speech is used by the states to convey a message, closely

identified with the public as a government message, and is under governmental control the speech was government speech). The Court held trademarks are not government speech and cautioned future courts about harmful implications of the extension of the doctrine. *Matal*, 137 S. Ct. at 1760.

When the government itself does not speak, but funds a variety of ideas and viewpoints, the funded programs speech is not government speech. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 515, 834 (1995). This principle is evident from Supreme Court precedent dealing with the Unconstitutional Condition Doctrine. *See id.* (holding a student organization writing in a university newspaper, funded by the university was not government speech because the purpose of the funding was to encourage a diversity of views); *see also Legal Servs. Corp.*, 531 U.S. at 533 (holding a lawyer advocating for clients as part of a government program is not delivering the government's message).

HHS has failed to establish that AACS is conveying a government message. Each one of the agencies in East Virginia has its own values. HHS acknowledges the differences between each agency in the "choosing an adoption agency" portion of its website and has never operated to take control of the agencies' message. R. at 5. As evident in *Matal*, and the cases the Court surveyed, the government has failed to show the speech engaged in is government speech without taking control of the message. HHS neither traditionally used agencies to convey a message nor does the public identify the message as attributable to the government.

Each adoption agency conveys a unique message. Just as the children each agency serves are diverse, so too are the agencies. HHS cannot contend that each mission statement of the thirty-four adoption agencies are government messages. As evident in *Matal*, attaching a government "seal of approval" requirement does not convert private speech into a government

message. To do so would directly contradict the longstanding Supreme Court precedent and undermine the free speech doctrine. Allowing the government to silence expression on disfavored viewpoints by claiming any private speaker who contracts with the government is not afforded First Amendment protection would severely walk back years of Supreme Court precedent.

3. The EOCPA's notice requirement does not fit into the limited context of commercial advertising speech.

The EOCPA's notice requirement does not fit into a limited exception applied only to purely factual information while advertising. *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 651 (1985). EOCPA's notice requirement is not commercial speech. The Court has allowed compelled notice requirements commercial advertising. To fit into this exception, the notice must convey purely factual information that is noncontroversial and is not unduly burdensome. *Id.* Requiring AACS, a religious organization, to affirm same-sex marriage is a controversial subject that undermines its religious beliefs. *See Obergefell v. Hodges*, 576 U.S. at 680 (classifying the divide between same-sex marriage and religious convictions that oppose it as an ongoing debate).

B. Forcing AACS to Post the EOCPA's Notice Requirement and Certify Same-Sex Couples Unduly Burdens Its Speech and Undermines Its Message.

Forcing AACS to endorse the EOCPA and certify same-sex couples burdens AACS's speech and compels it to promote a message that directly contradicts its mission. Our system which secures the right to adopt various religious, political, and ideological views also guarantees the right to oppose such concepts. *Wooley*, 430 U.S. at 714. A state may not constitutionally force a person through laws to profess a belief or disbelief in any religious doctrine. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). As embodied in *Hurley*, "this general

rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . ." 515 U.S. at 573. The government violates this principle when as it has done here, forces a speaker to agree on a particular matter changing the speaker's message and undermining its mission. *Agency for Int'l Dev.*, 570 U.S. at 213. Even anti-discrimination laws must yield to the Constitution. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (11th Cir. 2018).

The Supreme Court has consistently held the government cannot compel speakers to propound a political message at odds with their own because the First Amendment stands for the fundamental principle that speakers have the autonomy to choose the content of their message. *See Hurley*, 515 U.S. at 573 (reaffirming the principle while laws may promote conduct in the place of harmful behavior, it is not free to interfere with speech to promote an approved message or discourage a disfavored one). In *Hurley*, the Court held the government could not force a parade organizer to include a group that would undermine the message he sought to portray. *Id.* at 581. In resolving the compelled speech argument, the Court stated that, regardless of the organizers' reason, the case boiled down to whether the government could force a speaker to adopt a particular viewpoint. *Id.* at 575. Allowing the government to require the groups admittance into the parade would effectively permit the government to shape a private speaker's message. *Id.* This has long been forbidden by the First Amendment. *Id.*

The First Amendment forbids HHS from forcing AACS to convey a message at odds with its own. Allowing HHS to compel AACS to accept its belief as its own distorts its message and takes away its autonomy. As evidenced in *Hurley*, the government may never alter, change or distort a private speaker's speech, let alone compel the speaker to adopt the government's stance. Allowing HHS to do so would place a heavy burden on AACS, something our constitution does

not allow. Although anti-discrimination laws serve a crucial interest in this state, when regulating speech, similar to *Hurley*, they must yield to the Constitution and not place undue burdens on private speakers. Adopting the EOCPA's notice requirements and certifying same-sex couples, goes directly against the teachings of the Qur'an and undermines the message AACS conveys. Regardless of the political, public, or governmental disproval, the government cannot commandeer a private speaker's message and force it to adopt a policy at odds with its beliefs.

C. Demanding AACS Relinquish Its First Amendment Rights by Promoting the EOCPA's Anti-Discrimination Policy Is Outside the Scope of the Child Placement Program.

Ordering AACS to relinquish its First Amendment rights by promoting the EOCPA's anti-discrimination policy is outside the scope of the child placement program. HHS's contract with AACS is to facilitate adoptions that best serve the interests of the children. The Unconstitutional Conditions Doctrine forbids the government from oppressing a constitutional enumerated right by coercively withholding benefits from those who exercise them. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). The government is only allowed to condition federal funds when the condition directly shapes implementation of the program. *See United States v. Am. Libr. Ass'n*, 539 U.S. 194, 212 (2003) (holding distributing federal funds to public libraries for internet access with the condition they install a filtering software does not violate the First Amendment). *Contra Agency for Int'l Dev.*, 570 U.S. at 221 (stating demanding funding recipients adopt the government's position eradicating prostitution and sex trafficking went beyond the program). The difference between these cases is in the latter the government is forcing the recipient to affirm the government's belief on a subject outside the program.

Courts have routinely held the government cannot condition public funds on relinquishing a right outside the scope of the program. *Agency for Int'l Dev.*, 570 U.S. at 221. In *Agency for*

International Development v. Open Society International, Inc., the Supreme Court held the government could not force recipients of funds to affirm the government's belief as a condition of the program. *Id.* The government established a program to combat the spread of HIV/AIDS. *Id.* at 208. The program funded organizations on the condition they have a policy opposing prostitution and sex trafficking. *Id.* The respondents, a group of domestic organizations, feared imposing this policy would alienate host governments they worked with, censor their publications, and deter prostitutes from working with them. *Id.* at 211. While the appeal was pending, the program issued guidelines permitting funding recipients to work with affiliate organizations that did not adopt the policy if they maintained their independence from the organization. *Id.* The Court distinguished Congresses ability to selectively fund certain programs that address an issue without funding alternative ways to address the same issue from conditions that reach outside a program and burden speech. *Id.* at 217. The Court stated, the policy requirement operated as an ongoing condition that compelled recipients to adopt the government's position as their own. *Id.* at 217–18. The policy went beyond defining the program by imposing a condition that attempted to define the recipient and its mission. *Id.* at 218. The government attempted to get around the Unconstitutional Conditions Doctrine by claiming the respondents could just create affiliate organizations. *Id.* But the Court dismissed the idea stating the recipient could not profess one belief while operating as an affiliate and express a contrary belief. Doing so would be hypocritical. *Id.* at 219.

Courts have made exceptions for funding conditions when the conditions relate specifically to operating the program and do not hinder the recipient's free speech rights. *Rust v. Sullivan*, 500 U.S. 173, 198 (1991). In *Rust v. Sullivan*, the Supreme Court held Congress's decision to fund specific family planning methods while excluding others was not outside the scope of the

program, because the conditions related directly to the operation of the program not the recipients. *Id.* Congress enacted Title X to provide federal funding for family planning services. *Id.* at 177. The program focused on preconceptional counselling, and education, but included no pregnancy care. *Id.* at 179. Because Title X was limited to preconceptional care, it excluded counseling on abortion. *Id.* The Court began by noting from its inception, congress's goal was to fund a program encouraging family planning. *Id.* at 194. The government was simply insisting public funds be spent in line with the program, not placing a condition on the recipient. *Id.* at 196–97. The Court ultimately stated this was not an unconstitutional condition because Congress was not suppressing a dangerous or disfavored idea but prohibiting counseling that exceeded the program. *Id.* at 199.

HHS has placed a condition on AACS's free speech right and effectively forced it to adopt the government's message and abandon its own religious convictions. Unlike *Rust*, HHS is placing a condition on AACS to suppress a disfavored idea. HHS is forcing AACS to alter its mission and agree with the government on a matter of public concern. Evansburgh has charged HHS to establish a system to best serve the well-beings of the children in the system and facilitate adoptions. R. at 3. HHS is reaching outside this scope, similar to *Agency*, by commandeering AACS's First Amendment rights. HHS can without violating the constitution ensure public funds are spent on the services the program provides, home studies, counseling, and placement recommendations as in *Rust*. Similar to *Agency*, HHS's conditions go beyond ensuring how public funds are spent; they force AACS to adopt the government's belief on same-sex marriage. AACS has been given two choices renounce its religious beliefs or closing its services. R. at 7. The scope of the program was defined long before the EOCPA was amended in 2015. AACS has served this community for over forty years, has provided homes for

thousands of children, and has never had a complaint. While its stance on same-sex marriage may have become disfavored in the eyes of the public, forcing AACS to abandon its religion and adopt the government's stance is an unconstitutional condition.

Religious agencies ability to post an objection to the policy does not change the outcome. As the Court discussed in *Agency*, this is hypocritical, illogical and would frustrate AACS's mission. Placing the EOCPA's notice requirement goes directly against the teachings of the Qur'an. Similar to *Agency*, placing the statement then turning around and saying you do not agree with it would confuse parents visiting AACS, and the children it serves. Imposing HHS policy requirement while still operating as a religious agency would be hypocritical and directly undermine its mission.

CONCLUSION

This Court should affirm the judgment of the United States District Court of Western District of East Virginia.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE