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

BRIEF OF PLAINTIFF-APPELLEE

Team Number: 17

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

JURISDICTIONAL STATEMENT 7

ISSUES PRESENTED 8

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 14

ARGUMENT 16

I. HHS substantially burdened AACS's freedom of religion by refusing to work with AACS until it compromises its religious beliefs..16

A. Strict scrutiny applies because HHS's policy is not neutral and is not generally applicable..16

1. HHS's policy is not neutral because it targets religious activity by singling out faith-based child placement agencies..17

2. HHS's policy is not generally applicable because it has a system of individualized exemptions, which are substantially under-inclusive........18

B. HHS's policy fails strict scrutiny..22

1. HHS's purposes regarding child placement agency access are not compelling because they are unsubstantiated, and the policy is underinclusive..22

2. HHS's actions are not narrowly tailored and fail to advance its stated interests...24

II. HHS has placed unconstitutional conditions on AACS's receipt of public funds and adoption referrals in violation of the First Amendment..25

A. The purpose of HHS's contract with AACS is to meet the best interests of the adopted children, and any conditions must be limited to this purpose.................26

B. HHS has unconstitutionally conditioned the receipt of public funds and adoption referrals on AACS certifying same-sex adoptions and thereby expressing a message that undermines AACS's mission...28

1. HHS seeks to place an unconstitutional condition on AACS's access to public funds and adoption referrals by requiring AACS to speak a message that endorses same-sex adoption..29

2. HHS seeks to place an unconstitutional condition on AACS's access to public funds and adoption referrals by requiring AACS to engage in expressive conduct that endorses same-sex adoption...............................30

C. HHS has also unconstitutionally conditioned the receipt of state funds and adoption referrals on AACS complying with a notice requirement that undermines AACS's mission..32

CONCLUSION 33

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Agency for Int'l Dev. v. All. for Open Soc'y (*AOSI I*),
570 U.S. 205 (2013) 27, 28

Am. Well Works Co. v. Layne & Bowler Co.,
241 U.S. 257 (1916) 7

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 24

Cammarano v. United States,
358 U.S. 498 (1959) 29

Cantwell v. Connecticut,
310 U.S. 296 (1940) 16

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993) ....*passim*

Emp. Div. v. Smith,
494 U.S. 872 (1990) 16, 17

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,
545 U.S. 308 (2005) 7

Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.,
515 U.S. 557 (1995) 28, 31

Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council,
138 S. Ct. 2448 (2018) 28, 29

Koontz v. Saint Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 30

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 27

Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n,
138 S. Ct. 1719 (2018) 17

Nat'l Inst. of Fam. & Life Advocs. v. Becerra,
138 S. Ct. 2361 (2018) 32, 33

Obergefell v. Hodges,
576 U.S. 644 (2015) 30

Perry v. Sindermann,
408 U.S. 593 (1972) 26

Rumsfeld v. F. for Acad. & Institutional Rights, Inc.,
547 U.S. 47 (2006) 26

Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.,
450 U.S. 707 (1981) 23

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017) 24

W. Va. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 26

Wooley v. Maynard,
430 U.S. 705 (1977) 29

UNITED STATES COURTS OF APPEALS CASES

New Hope Fam. Servs. v. Poole,
966 F.3d 145 (2d Cir. 2020) 18, 24, 25

Planned Parenthood of Greater Ohio v. Hodges,
917 F.3d 908 (6th Cir. 2019) 32

Roberts v. Neace,
958 F.3d 409 (6th Cir. 2020) 17

Shrum v. City of Coweta,
449 F.3d 1132 (10th Cir. 2006) 18

Stormans, Inc. v. Weisman,
794 F.3d 1064 (9th Cir. 2015) 19, 20, 21

Tenafly Eruv Ass'n v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 22

Ward v. Polite,
667 F.3d 727 (6th Cir. 2012) 19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 16, 26

STATUTES

28 U.S.C. § 1331 (2018) 7

28 U.S.C. § 1292(a)(1) (2018) 8

SECONDARY AUTHORITIES

Demographic Portrait of Muslim Americans, Pew Res. Ctr. (Jul. 26, 2017), https://www.pew
forum.org/2017/07/26/demographic-portrait-of-muslim-americans/ 25

Fed. R. App. P. 35(a)(2) 8

Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise*, 2 Univ. Penn. J. Const. L.
850 (2001) 22

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of East Virginia had subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331, which grants federal district courts "original jurisdiction of all civil actions arising under the Constitution. . . ." 28 U.S.C. § 1331 (2018). Normally when determining jurisdiction, "[a] suit arises under the law that creates the cause of action." *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). However, district courts also have jurisdiction "over state-law claims that implicate substantial federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). The embedded federal question must (1) be necessarily raised by the resolution of the state law question, (2) be actually disputed by the parties, (3) be substantial to the judicial system as a whole, and (4) be able to be resolved without disrupting the federal-state balance. *Id.* at 308.

Here, while the cause of action arose under East Virginia's Equal Opportunity Child Placement Act, this matter requires resolving the issue of whether Defendant-Appellant Christopher Hartwell's application of the statute to Plaintiff-Appellee Al-Adab Al-Mufrad Care Services ("AACS") violates AACS's First Amendment rights. R. at 2. Hartwell does not agree that applying the statute would infringe upon AACS's constitutional rights, and this disagreement was the crux of the issue presented before the district court. Further, the applicability of this statute may provide authority and guidance for courts applying similar statutes to religious institutions under the First Amendment. Finally, the narrow constitutional issues presented by this case would not infringe on the ability of East Virginia state courts to interpret its laws. Therefore, the presence of the constitutional questions at hand gave the district court subject matter jurisdiction over this case.

Similarly, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292, which grants federal circuit courts jurisdiction to preside over appeals of "[i]nterlocutory orders [including injunctions] of the district courts of the United States . . . ." 28 U.S.C. § 1292(a)(1) (2018). Here, District Judge Karla granted AACS's motions for both a temporary restraining order to remove Hartwell's referral freeze and a permanent injunction to renew the parties' annual contract. R. at 17. Further, even when a panel of judges has previously ruled on a matter, a circuit court may conduct an en banc rehearing of an appeal where "the proceeding involves a question of general importance." Fed. R. App. P. 35(a)(2). Ordering such a rehearing requires the consent of "a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46(c) (2018). As Chief Judge Martin stated in his order on July 15, 2020, "a majority of non-recused active judges" on the Fifteenth Circuit voted in favor of AACS's petition to rehear the appeal en banc, R. at 26, thus giving this Court both the jurisdiction and the authority to preside over the present matter.

ISSUES PRESENTED

I. Under First Amendment jurisprudence, does the enforcement of a statute forcing an adoption agency to act in a manner contrary to its sincerely held religious beliefs violate the Free Exercise Clause when the statute is inconsistently applied and is not narrowly tailored to the city's goals?

II. Under First Amendment jurisprudence, does the enforcement of a statute forcing an adoption agency to prominently display a statement that goes against its sincerely held religious beliefs violate the Free Speech Clause when endorsing this message is a prerequisite to conducting business with the government and there is no exception for faith-based agencies?

STATEMENT OF THE CASE

Plaintiff-Appellee, Al-Adab Al-Mufrad Care Services ("AACS"), is one of the largest non-profit adoption agencies in Evansburgh, East Virginia. R. at 3. Originally founded in 1980 as a lifeline for Evansburgh's large refugee population, AACS helps place hundreds of children

into new, permanent homes each year. R. at 5. Specifically, AACS thoroughly screens and certifies potential families for their suitability, educates each perspective family on the adoption process, and provides further long-term support to facilitate the adoption process. R. at 4, 5. These services have been particularly important for Evansburgh's sizable refugee population because Evansburgh has chronic shortages of foster and adoptive homes, leaving thousands of children in the foster care system. R. at 3. A recent influx of refugee children into the system has only made this situation more dire. R. at 8. Currently, there are 17,000 children in the foster care system, 4,000 of whom are available for adoption from agencies like AACS. R. at 3. If AACS is prevented from placing children into these homes, the resulting burden will be felt by Evansburgh's thirty-four other agencies. R. at 8.

Like other adoption agencies, AACS must contract with the Evansburgh Department of Health and Human Services ("HHS") in order to provide adoption services. R. at 5. These contracts are renewed on an annual basis, with the most recent contract between AACS and HHS being executed on October 2, 2017. R. at 5. In addition to mandating that AACS comply with the laws of East Virginia and Evansburgh, the contract also lays out the relationship between AACS and HHS, as well as AACS's role in the adoption process. R. at 5. Per its annual agreements with the city, AACS is primarily charged with evaluating and certifying potential families who will provide suitable homes. R. at 5. When families seek to adopt a child through AACS, they reach out to AACS using the HHS website, which lists all of Evansburgh's adoption agencies and their differing requirements and values; if a family and agency are not a good match, the agency typically refers the family to another agency. R. at 4, 5. After HHS receives a child into custody, HHS refers the child to the private adoption agencies under contract, including AACS. R. at 3. AACS and the other agencies then provide HHS with a list of all

families who could be potential matches. R. at 3. After HHS receives this information from each agency, HHS determines which potential family is the best fit for the child and places the child into the home. R. at 3.

Under East Virginia law, municipalities such as Evansburgh work to ensure that the placements meet the best interests of the children going through the adoption process. R. at 4. East Virginia Code § 37(e) elaborates on this further, ordering agencies to consider factors such as "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths, and weaknesses of the adoptive parents," as well as the "cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background." R. at 4. East Virginia also directs municipalities to ensure that siblings and half siblings are placed together, hoping that familial bonds will benefit the children. R. at 4.

In addition to promoting the best interests of the child, East Virginia wields the extensive Equal Opportunity Child Placement Act ("EOCPA") to ensure that child placement agencies do not discriminate on factors such as race, marital status, or religion while evaluating potential foster care or adoptive parents. R. at 4. Despite this general prohibition on discrimination based on protected characteristics including race, the EOCPA simultaneously mandates that adoption agencies "must give preference" to families in which at least one parent is the same race as the child needing placement. R. at 4. During a 2014 adoption, HHS placed a white child with African American parents, and HHS explained that the general discrimination prohibition would only apply to minority children and not to all children generally. R. at 8, 9. While the EOCPA further prohibits discrimination based on marital status, HHS balked when an agency certified a family consisting of a father and son in March of 2015, and HHS ultimately refused to place a five-year-old child with that potential family. R. at 4, 9.

Since its inception forty years ago, AACS has operated in strict accordance with its Muslim faith. R. at 5. In its mission statement, AACS notes that "[a]ll children are a gift from Allah," and that AACS "lay[s] the foundations of divine love and service to humanity by providing for these children and ensuring that the services [they] provide are consistent with the teachings of the Qur'an." R. at 5. This mission guides AACS's work for Evansburgh's Muslim population, which includes refugees from Ethiopia, Iraq, Iran, and Syria. R. at 3. Because of the severe personal and economic hardships that refugees often face, many cannot care for their children and thus the refugees require the assistance of AACS and other faith-based agencies. R. at 3. Further, when the Sunni and Shia sects of Evansburgh's Islamic community had disagreements between 2013–15, AACS was able to utilize its unique perspective to avoid future conflict by helping HHS place children into families of the same sect at least three different times. R. at 9. This faith-based approach has helped AACS place dozens of children each day, bolstering the positive working relationship between AACS and HHS. R. at 5.

In 2015, however, East Virginia amended the EOCPA following the Supreme Court's decision in *Obergefell v. Hodges*. R. at 6. In adopting the amendment, the East Virginia governor committed to reducing "discrimination in all forms," and referred to the opposition of same-sex marriage as "bigotry." R. at 6. Evansburgh then began mandating that all adoption services must actively send children to live in same-sex households, but Evansburgh carved out an exception for children with an identified sexual orientation by mandating that agencies "must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." R. at 6. In addition to these new restrictions on adoption agencies, Evansburgh also now forces every child placement agency to prominently display a sign reading:

> [It is] illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation.

R. at 6. No exception is available for agencies whose religious values conflict with this statement, though religious agencies can display a written objection to the statement. R. at 6.

After the EOCPA was amended, AACS continued its mission of assisting Evansburgh's children. In July of 2018, however, a reporter with the Evansburgh Times contacted HHS Commissioner Christopher Hartwell to determine if religious agencies are compliant with the new same-sex adoption mandate. R. at 6, 7. At this point, Hartwell reached out to AACS, demanding to know their stance on placing children with same-sex parents. R. at 7. AACS's Executive Director, Sahid Abu-Kane, explained to Hartwell that "Allah orders justice and good conduct," and that AACS has always treated couples with respect regardless of their sexual orientation. R. at 7. Abu-Kane noted a few instances where same-sex couples have reached out to AACS about its services and pointed out that AACS has never denied a couple or sabotaged their candidacy; rather, AACS would refer them to another agency, a practice that was typical among Evansburgh's adoption agencies. R. at 7, 5. Evansburgh has four adoption agencies that work closely with LGBT families, and AACS refers same-sex couples to these agencies so that AACS can help the children without violating its religious beliefs. R. at 8, 7. As a result, no same-sex couples have ever filed formal complaints against AACS, a fact that Hartwell himself conceded during this conversation. R. at 7.

Still, Hartwell claimed that these referrals are not enough to satisfy the EOCPA and began threatening retaliatory action against AACS. R. at 7. In a September 17, 2018 letter, Hartwell acknowledged AACS's "sincerely held religious beliefs," but told the agency that "AACS must comply with the State's EOCPA to be able to receive government funding and

referrals." R. at 7. AACS was given ten business days to assure the city that it would comply with the EOCPA, despite the fact that direct placement in same-sex households is against AACS's religious beliefs. R. at 8, 7. Hartwell told AACS that if they do not consent to his demands, HHS would refuse to renew AACS's annual contract and institute a "referral freeze," which would prevent AACS from placing children in new homes altogether. R. at 7.

AACS filed this lawsuit on October 30, 2018, motioning for both a temporary restraining order to remove this oppressive referral freeze and a permanent injunction to renew AACS's annual contract with HHS. R. at 8. Arguing before the United States District Court for the Western District of East Virginia, AACS asserted that Hartwell's and HHS's actions violate AACS's First Amendment rights under the Free Exercise and Free Speech Clauses. R. at 2, 8. In a March 2019 evidentiary hearing, Hartwell claimed that the EOCPA satisfied several government interests by ensuring that "child placement services are accessible to all Evansburgh residents who are qualified for the services" and ensuring that "the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents." R. at 8–9.

During this hearing, District Judge Capra also uncovered further evidence of the harm HHS caused by enacting the referral freeze. R. at 8. One notable example took place on October 13, 2018, when a young girl was placed separately from her two brothers (who were both placed by AACS), which only happened because the other agency could not refer her to AACS. R. at 8. This placement directly contravenes East Virginia Code § 37(e), which directs municipalities to ensure that children are "placed in a home with siblings or half-siblings." R. at 4. Similarly, on January 7, 2019, the referral freeze prevented a five-year-old boy with special needs from being adopted by the woman who had fostered him for two years. R. at 8. Finally, it was undisputed that on August 22, 2018, HHS notified all of its agencies about a severe shortage of adoptive

families due to the large amount of refugee children entering the foster care system, but HHS nonetheless proceeded to freeze out AACS and all potential families who work with the agency. R. at 8.

After reviewing this evidence, District Judge Capra found that Hartwell violated AACS's First Amendment rights to Free Exercise and Free Speech. R. at 17. As such, Judge Capra granted AACS's motions for injunctive relief on April 29, 2019. R. at 17. Hartwell appealed, and a divided Fifteenth Circuit reversed the order on February 24, 2020, with Judge Overcash adopting the "District Court's well-reasoned opinion" in his dissent. R. at 25. AACS timely petitioned the Fifteenth Circuit for a rehearing en banc, and a majority of the Circuit's non-recused active judges voted to grant the petition under Federal Rule of Appellate Procedure 35(a)(2). R. at 26. Thus, on July 15, 2020, Chief Judge Martin ordered that prior disposition in this case not be cited as precedent, with the briefs on this rehearing en banc to follow. R. at 26.

SUMMARY OF THE ARGUMENT

HSS's actions are unconstitutional because its heavy-handed enforcement of the EOCPA violates AACS's First Amendment rights. Incorporated to the states by *Cantwell v. Connecticut*, the First Amendment enshrines both the free exercise of religion and the freedom of speech, prohibiting any state action that substantially burdens these fundamental liberties. By imposing a series of regulations that substantially burden AACS's sincerely held religious beliefs, HHS has acted unconstitutionally for two reasons: First, HHS has selectively punished AACS until it compromises its religious beliefs, and HHS's actions are not supported by any compelling state interest, nor were HHS's actions narrowly tailored to satisfy its interests. Second, HHS has attempted to force AACS to espouse a message that violates AACS's sincerely held beliefs by holding AACS's business hostage until AACS forfeits its First Amendment rights. Because

HHS's actions violate AACS's fundamental rights, the district court properly granted AACS's motions for injunctive relief, and thus this Court should affirm the district court's decision.

HHS's enforcement of the EOCPA violates AACS's fundamental right to the free exercise of religion. When a governmental action targets religion in a way that is not neutral or generally applicable, the action must satisfy strict scrutiny. The East Virginia government amended the EOCPA to target faith-based agencies whose religions do not conform to the State's views on marriage. The law was riddled with exceptions in both text and application, with only one consistency in mind: targeting religious agencies. Because HHS's actions are neither neutral nor generally applicable, strict scrutiny applies. HHS's unconstitutional actions do not survive strict scrutiny analysis. The policy interests HHS uses to support its decisions are unsubstantiated, resulting in a policy that is both underinclusive and not narrowly tailored to meet HHS's stated goals. Because HHS's decisions cannot withstand strict scrutiny, this Court should affirm the district court's determination that they are unconstitutional violations of AACS's First Amendment right to free exercise of religion.

Additionally, HHS's enforcement of the EOCPA violates AACS's freedom of speech. The constitutional guarantee of free speech protects both the right to speak and the right to refrain from compelled speech. As such, no government may condition receipt of public funds on a business expressing a message to which the business fundamentally opposes. HHS has imposed this precise kind of unconstitutional condition in this case. HHS has frozen all referrals to AACS—disproportionately harming Evansburgh's large Muslim population—until AACS displays a sign repeating the state's hand-picked talking points on the EOCPA. Businesses generally must be able to retain the freedom from such state-mandated expressive conduct, let alone a business whose religious values prohibit such a display. Because HHS has conditioned

AACS's business on compelled speech, this Court should affirm the district court's determination that this is an unconstitutional condition in violation of AACS's First Amendment right to free speech.

ARGUMENT

I. HHS substantially burdened AACS's freedom of religion by refusing to work with AACS until it compromises its religious beliefs.

Enshrined in the United States Constitution, the First Amendment protects individuals and businesses from government action that infringes on their fundamental right to religion. U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]"). This "free exercise clause" protects not only AACS's freedom of internal belief, but also AACS's "freedom to believe and [its] freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause to the states). Laws that are "generally applicable and otherwise valid" do not violate the Free Exercise Clause, even when they have an "incidental effect" on a religious practice. *Emp. Div. v. Smith*, 494 U.S. 872, 878 (1990). In contrast, laws that are neither neutral nor generally applicable must pass strict scrutiny analysis, which requires the government to prove both that it has a compelling interest and that the law is "narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–32 (1993).

HHS's enforcement of EOCPA infringes on AACS's freedom of religion because it must pass strict scrutiny, and it fails to do so. First, the EOCPA is neither facially neutral nor generally applicable due to HHS's system of individualized exemptions for selecting adoption and foster families. As such, EOCPA must survive strict scrutiny analysis. Second, HHS's regulation fails strict scrutiny, because HHS's interests are not compelling, nor is the policy narrowly tailored to advance its interests.

A. Strict scrutiny applies because HHS's policy is not neutral and is not generally applicable.

The test for neutrality and the test for general applicability are highly interrelated, where lack of neutrality often indicates lack of general applicability and vice versa. *Id.* at 531. First, a policy is not neutral if its purpose is to infringe or to restrict a practice because it is religiously motivated. *Id.* at 533. Second, a policy is not generally applicable "where the state has in place a system of individual exemptions," which means the state must have a compelling reason to "refuse to extend that system to cases of 'religious hardship.'" *Id.* at 537; *Smith*, 494 U.S. at 884. Since HHS's policy is neither neutral nor generally applicable, strict scrutiny would apply to its decision, a burden for which it cannot overcome.

1. HHS's policy is not neutral because it targets religious activity by singling out faith-based child placement agencies

The HHS policy enforcing EOCPA is not neutral because its purpose is to infringe or restrict AACS' religiously motivated practices. To determine the object or purpose of a policy, the Supreme Court has examined the text of the policy and the circumstances surrounding a policy's adoption. *Lukumi*, 508 U.S. at 533. A policy is not neutral when it lacks "secular meaning discernable from the language or context" or when it includes masked hostility. *Id.* at 533–34. Masked hostility can be revealed by government officials' comments that "pass[] judgment upon or presuppose[] the illegitimacy of religious beliefs and practices." *See Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n,* 138 S. Ct. 1719, 1730–31 (2018). Likewise, this hostility can be towards religious people generally or just one religion where "[a] law is not neutral and generally applicable unless there is neutrality between religion and non-religion." *Roberts v. Neace*, 958 F.3d 409, 413, 415 (6th Cir. 2020) (citations omitted).

Even if the text of a policy appears facially neutral, the totality of the evidence, historical background, administrative history, and contemporary statements by decision-makers may reveal hostility towards religious belief. *New Hope Fam. Servs. v. Poole*, 966 F.3d 145, 160 (2d Cir. 2020). In *New Hope*, a Christian organization referred unmarried couples and same-sex couples to other foster and adoption agencies due to its religious beliefs, but the religious organization was told to change its policies or close its adoption operation. *Id.* at 166, 149. While the regulation applied to secular and religious groups, comments by government officials indicated hostility towards religion, where a state agency described New Hope's traditional views of sexuality as "archaic." *Id.* at 164. As a result, the Second Circuit held that the evidence suggests that the regulation was informed by hostility and was thus not neutral. *Id.* at 183.

HHS's enforcement of the EOCPA is informed by masked hostility when looking at the totality of the evidence and historical background. While it appears textually to be secular by ensuring child placement agencies do not discriminate, government officials made comments that presuppose the legitimacy of AACS's religious beliefs. Similar to the "archaic" comment in *New Hope*, the EOCPA amendments arose out of a statement by the Governor, where he indicated that a faith-based, traditional belief about marriage is "bigotry." Additionally, no one had filed a complaint about AACS's faith-based referral policy when HHS contacted the agency. Furthermore, HHS only contacted faith-based agencies to confirm compliance with the EOCPA amendments. Such actions are not neutral because it is impermissible to single out an agency due to "knowledge of [its] religious commitment*.*" *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (holding hostility or animus is not necessary to prove a lack of neutrality where someone is singled out based on "knowledge of his religious commitment" rather than religious prejudice). As such, HHS's enforcement of the EOCPA is not neutral because the

totality of the evidence reveals that government officials considered AACS's religious beliefs bigotry and HHS singled AACS out due to its religious character.

2. HHS's policy is not generally applicable because it has a system of individualized exemptions, which are substantially under-inclusive.

Even if the Court finds that HHS's enforcement of EOCPA is neutral, its enforcement is not generally applicable because it has a system of individualized exemptions and its policy is substantially under-inclusive. A policy is not generally applicable when it utilizes a "system of individual exemptions" and selectively "impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 537, 543. Likewise, a policy is not generally applicable when it "substantially underinclude[s] non-religiously motivated conduct that might endanger the same governmental interests that the law is designed to protect." *Stormans, Inc. v. Weisman*, 794 F.3d 1064, 1079 (9th Cir. 2015).

Where a regulation in practice is "riddled with exemptions," the regulation must pass strict scrutiny. *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). In *Ward,* when a counseling student referred her gay client to another student because her faith prevented her from affirming extramarital and same-sex relationships, the counselling student's university expelled her. *Id.* at 730. While the university claimed it had a policy against referrals, it previously made exceptions by allowing referrals at least twice and its ethics code allowed values-based referrals. *Id.* at 735–37. Ultimately, the court held that the university selectively enforced policies by allowing secular, but not faith-based referrals. *Id.* at 739.

While HHS claimed its non-discrimination policy prohibits referrals to other agencies, HHS's system of placing children in foster and adoptive families is riddled with exemptions. These exemptions were far more numerous than those in *Ward*, as HHS habitually deviated from the required factors in E.V.C. § 37(e) for selecting families and from E.V.C. § 42.-2's non-

discrimination policy. For example, HHS ignored an autistic boy's unique emotional needs when it denied his adoption by his foster mother of two years, due its freeze against AACS. HHS also deviated from its policy of keeping siblings together when it placed a sibling in a different home from her two brothers, again due to the freeze against AACS. In essence, HHS selectively burdened religiously motivated conduct because it was willing to make secular exemptions to its policies, but not faith-based exemptions.

HHS' exemptions are not limited to when HHS instituted its freeze against AACS, but rather constitute a pattern over the years. In 2014, HHS ignored its policy of placing children in a home with at least one parent of the same race as the child when it placed a white child with an African American family, even though three white families had been certified. In 2015, HHS deviated from its non-discrimination policy regarding marital status and sex when it denied a placement to a certified father and son family unit. From 2013 through 2015, HHS repeatedly approved AACS's recommendations of not placing Muslim children of one sect with a qualified family of a different sect, which could be classified as religious discrimination. If the university in *Ward* had a policy riddled with exemptions due to two mere exemptions, HHS's seven-year pattern of repeatedly deviating from its policy certainly constitutes a policy riddled with exemptions as well.

While an individualized, exemption-based policy is not generally applicable, simply having an exemption and "some minimal governmental discretion" does not mean a policy lacks general applicability. *Stormans*, 794 F.3d at 1082. In *Stormans*, state rules prohibited pharmacies from refusing to provide drugs for any religious, moral, or philosophical reason. *Id*. at 1077. While the rules allowed exemptions for reasons such as lack of payment, the exemptions were not individualized because "the [exemption] provisions [we]re tied to

particularized, objective criteria." *Id.* at 1081. Even though some pharmacies did not stock for reasons outside of the permitted exemptions, those refusals were not accepted or promulgated by the state; therefore, the court held that the rules were neutral and generally applicable. *Id.* at 1080–81, 1071.

HHS's policy lacks general applicability because its exceptions engendered more than minimal government discretion and are inherently ad hoc due to the individualized nature of foster and adoptive services. Unlike the objective and particularized rules in *Stormans*, the factors for foster and adoptive recommendations are not objective by any stretch of the imagination. Emotional needs of children and parental strengths and weaknesses are far more subjective calculations than the objective fact that a patient has not paid for his prescription. Furthermore, unlike the unapproved exemptions that developed in *Stormans*, HHS has perpetrated ad hoc exemptions to its nondiscrimination policy regarding race, sex, marital status, and religion as explained above. Such actions demonstrate how HHS's enforcement of EOCPA is underinclusive as it fails to ensure non-religious based reasons for discrimination are prohibited; thus, endangering the EOCPA's goal of nondiscrimination. The EOCPA even makes an exemption to its prohibition on racial discrimination by requiring racial preference to ensure that one parent is the same race as the child. However, HHS discretionarily made an exemption-to-the-exemption when it placed a white child with an African American family. While the commission's rules in *Stormans* merely provided minimal government discretion and objective exemptions, EOCPA is inherently subjective and allowed HHS wide discretion in enforcing it.

HHS has a system of individualized exemptions because it frequently allowed deviation from its procedures for selecting adoptive and foster families for a multitude of reasons. It even allowed deviation for religious reasons previously, but now is prohibiting AACS from deviating

for other religious reasons. *See* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise*, 2 Univ. Penn. J. Const. L. 850, 866–68 (2001) (describing how under *Smith* and *Lukumi*, where state and local governments create a system of individualized exemptions, they must be prepared to "either grant the religious exemption or be prepared to pass strict scrutiny.") Also, HHS's policy was substantially underinclusive because it allowed exemptions for non-religiously motivated placement decisions that endangered its goal of nondiscrimination. As a result, not only was HHS's enforcement of EOCPA not neutral, but it also was not generally applicable; therefore, it must past strict scrutiny.

B. HHS's policy fails strict scrutiny.

Having demonstrated that HHS's policy is not neutral and generally applicable, the Court must apply strict scrutiny. As such, HHS's requirement that AACS ignore its religious beliefs and certify qualified same-sex couples must be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 532. HHS's policy fails strict scrutiny because it both lacks a compelling governmental interest and is not narrowly tailored to advance that interest.

1. HHS's purposes regarding child placement agency access are not compelling because they are unsubstantiated, and the policy is underinclusive

Given HHS's policy lacks neutrality and is overbroad or underinclusive, there is already a presumption that its governmental interests are not compelling. *Lukumi*, 508 U.S. at 546–47; *see also Tenafly Eruv Ass'n v. Borough of Tenafly,* 309 F.3d 144, 172 (3d Cir. 2002) ("[A] lack of neutrality eviscerates [the] contention that [a] restriction is narrowly tailored to advance [a] compelling interest."). Adding to this presumption is the affirmation that the compelling interest

requirement "is not water[ed] . . . down but really means what it says." *Lukumi*, 508 U.S. at 546 (citations and quotations omitted).

Practically speaking, compelling interest requires more than just "generalized statements," but rather "concrete evidence" about the danger the government is seeking to avoid. *See Ward*, 667 F.3d at 740 (holding university's claim that counseling student's faith-based referral would put its accreditation at risk was unsubstantiated). HHS asserted that its policy serves four purposes. The first two—(1) ensuring access to agencies for qualified residents and (2) ensuring taxpayers are not denied access—are not compelling interests because HHS has no concrete evidence that any qualified person or taxpayer was denied access to an agency due to AACS's referral policy. There is nothing in the record to suggest that a qualified same-sex couple failed to be certified or served by another agency after AACS referred them, and no one ever filed a complaint about being denied access by AACS. Additionally, same-sex couples are still able to receive access to agency services through many of the other thirty-four agencies. In fact, four agencies *specifically* serve the LGBT community and others freely serve the LGBT community. While HHS may argue that the compelling interest is equal access of services at all child placement agencies generally, the Supreme Court has held that the compelling interest inquiry must be "properly narrowed." *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.,* 450 U.S. 707, 719 (1981). As such, the properly narrowed interest is access to *an* agency, not access to *all* agencies, which every qualified same-sex couple and taxpayer has.

Additionally, when an ordinance is underinclusive "the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546–47. While HHS asserts that enforcing the law, its third stated interest, is a compelling interest, the underinclusivity of its enforcement means this interest is not compelling. HHS claimed to have reached out to ensure

that religious agencies were in compliance with the nondiscrimination policy; however, HHS inexplicably declined to ensure that secular ones were in compliance with the policy as well. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (holding that where religious entities are similarly qualified as secular entities, governments may not treat a religious entity differently "solely because of its religious character"). Even when contacting the religious agencies, HHS received no confirmation on whether AACS complied with the nondiscrimination requirement regarding marital status. Many faith-based agencies do not certify unmarried couples either, so it is highly likely that AACS does not certify unmarried parents and perhaps not a divorced parent either. *See New Hope Fam. Servs*., 966 F.3d at 157. As a result, taxpayers and residents who are adopting as unmarried parents may be referred to other agencies and not receive access from AACS, just like same-sex couples who seek out AACS. Additionally, this interest of enforcing the EOCPA is underinclusive because HHS's freeze caused violations of E.V.C. § 37(e). As discussed *supra* section I.A.2, HHS did not follow subsection 37(e) during the freeze on two separate occasions. Since HHS is not enforcing the law against itself, enforcing the law cannot be the interest served by the EOCPA.

2. HHS's actions are not narrowly tailored and fail to advance its stated interests.

Not only are three of HHS's stated interests not compelling, but the final interest is not narrowly tailored. The second prong of strict scrutiny, narrow tailoring or least-restrictive means, "is exceptionally demanding." *Burwell v. Hobby Lobby*, 573 U.S. 682, 728 (2014). This demanding requirement means that the state must show that it does not have another means of "achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id.*

Assuming *arguendo* that ensuring a diverse applicant pool is a compelling interest, HHS has options for more narrow tailoring that achieve its desired goal and do not substantially burden AACS's exercise of religion. For example, HHS could provide a specific carve-out for faith-based action in its policy. *See New Hope Fam. Servs.,* 966 F.3d at 154. (explaining how, according to the Governor, New York's permissive law regarding same-sex couples adopting children did not compel agencies to place children with same-sex couples). HHS has already been willing to do this in the past on a discretionary basis for Muslim sects, despite this exemption contravening the EOCPA's nondiscrimination provision. Alternatively, even though AACS already refers same-sex couples to other agencies, HHS could make it mandatory to ensure that same-sex couples have access to other agencies.

Under either of these options, or a combination of the two, HHS would serve its goal of having a diverse applicant pool without burdening AACS's religious exercise. In contrast, if HHS succeeds in forcing AACS to close, it will actually decrease the diversity of the applicant pool, given AACS serves an important niche function in Evansburgh. While the record is silent on whether other agencies narrowly serve the Muslim and refugee populations, it is unlikely given Muslims are a religious minority in the United States. *Demographic Portrait of Muslim Americans*, Pew Res. Ctr. (Jul. 26, 2017), https://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/. Without AACS, if tensions once again arise between the Muslim sects in Evansburgh, then very likely no agency will remain to recommend appropriate religious deference for the placement of Muslim children. AACS is simply the best agency to identify the refugee and Muslim communities' needs, and some members of those communities might be hesitant about working with another agency that does not share their cultural and religious background.

HHS's enforcement of EOCPA fails strict scrutiny because it lacks a compelling government interest, and it has more narrow options to achieve its goals without unconstitutionally burdening religious exercise. Because HHS's actions cannot withstand strict scrutiny, this Court should affirm the district court's finding that this enforcement violates AACS's First Amendment right to free exercise.

II. HHS has placed unconstitutional conditions on AACS's receipt of public funds and adoption referrals in violation of the First Amendment.

HHS's conditions for public funds and adoption referrals violate the First Amendment because the conditions force AACS to certify adoptions for same-sex couples and to advertise adoption services for same-sex couples at its adoption clinic. *See* U.S. Const. Amend. I (Congress shall make no law . . . abridging the freedom of speech . . . .") As far back as the 1940s, the United States Supreme Court has recognized that "no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). For this reason, the government cannot deny a benefit to an entity on a basis that violates the entity's First Amendment rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (ruling that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). Specifically, the government cannot condition access to public funding on an entity surrendering its right to speak freely. *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (recognizing that the First Amendment "limit[s] . . . Congress' ability to place conditions on the receipt of funds").

The purpose of HHS's contract with AACS is to protect the best interests of the child, not to promote the EOCPA's anti-discrimination policy. Accordingly, HHS has unconstitutionally

conditioned AACS's receipt of public funding and adoption referrals on two conditions that would force AACS to forfeit its First Amendment rights by forcing AACS to express a message that undermines its religious mission. First, HHS seeks to force AACS to certify same-sex adoptions. Second, HHS seeks to force AACS to advertise same-sex adoptions. Each violation of AACS' First Amendment rights is addressed, in turn, below.

A. The purpose of HHS's contract with AACS is to meet best interests of the adopted children, and any conditions must be limited to this purpose.

As a threshold matter, the purpose of HHS's contract with AACS controls what conditions HHS can constitutionally place on AACS. The United States Supreme Court has made it clear that the government's purpose for creating a benefit should be considered as a threshold matter in assessing an unconstitutional conditions claim. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). When the purpose of providing a benefit is to accomplish a program's goal, the government can require acceptance of the goal as a prerequisite to participate in the program. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). However, the government cannot require funding recipients to forfeit their First Amendment rights to promote messages that the recipients disagree with, when the messages do not accomplish a program's purpose. *Agency for Int'l Dev. v. All. for Open Soc'y* (*AOSI I*), 570 U.S. 205, 214 (2013). For example, in *AOSI I*, the Supreme Court held that the government could not require an organization to condemn prostitution as a prerequisite to receive funds for combating AIDS. *Id.* at 214. In reaching its holding, the Court reasoned 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). The Court ruled that such conditions are unconstitutional

because they go "beyond defining the limits of the federally funded program to defining the recipient." *Id.*

Here, the purpose of the program is to certify adoptions that meet the best interests of the child. The purpose of the program is not to promote private acceptance of EOCPA's same-sex anti-discrimination policy. Accordingly, any condition placed on AACS by HHS must only relate to the child's best interests as determined by AACS, not the goal of the EOCPA same-sex anti-discrimination policy. Because HHS has asserted EOCPA policy goals as its reasons for denying AACS access to public funds and adoption referrals, HHS has placed a condition unrelated to the contract on AACS. This condition is unrelated to the purpose of the contract and merits First Amendment scrutiny, as explained in Sections II.B and II.C below.

B. HHS has unconstitutionally conditioned the receipt of public funds and adoption referrals on AACS certifying same-sex adoptions and thereby expressing a message that undermines AACS's mission.

HHS has placed an unconstitutional condition on AACS's receipt of public funds and adoption referrals because HHS seeks to require AACS to certify same-sex adoptions through its speech and expressive conduct, which would undermine AACS's religious mission of enabling only heterosexual adoptions. Protecting organizations from a state's attempt to prevent speech is a critical function of the American form of government. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council*, 138 S. Ct. 2448, 2464 (2018) (ruling that when "a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines" democracy). Both speech and expressive conduct are protected under the First Amendment's Free Speech Clause. *See AOSI I*, 570 U.S. at 221 (protecting speech under the First Amendment); *Hurley v. Irish-American Gay, Lesbian and*

Bisexual Grp. of Bos., 515 U.S. 557, 569–70 (1995) (protecting expressive conduct under the First Amendment).

When AACS certifies adoptions, AACS communicates a message through its speech and expressive conduct that the parents adopting a child are the parents who will best serve the child's interests. In this way, AACS communicates a message, both through its speech and its conduct, that the parents and child will form the best possible family environment for the child's development. Because AACS sincerely believes that Allah does not approve of same-sex relationships, AACS believes that same-sex couples can never best serve a child's interests. Accordingly, AACS has not certified same-sex adoptions. HHS seeks to force AACS to forfeit its First Amendment rights to speak and to engage in expressive conduct, if it accepts public funding and referrals from HHS. By conditioning the receipt of public funds and adoption referrals on the certification of same-sex adoptions, HHS has attempted to force AACS to communicate a message contrary to AACS's beliefs. HHS's unconstitutional conditions on AACS's speech and expressive conduct are addressed, in turn, below.

1. HHS seeks to place an unconstitutional condition on AACS's access to public funds and adoption referrals by requiring AACS to speak a message that endorses same-sex adoption.

HHS's condition requiring AACS to speak a message that endorses same-sex adoption is an unconstitutional condition that violates the First Amendment. Freedom of speech "includes both the right to speak and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, (1977). Compelling individuals to speak "views [that] they find objectionable" must "be universally condemned." *Janus*, 138 S. Ct. at 2463. The government cannot impose a condition on public funding that is "aimed at the suppression of dangerous ideas." *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519

(1958)). On the same-sex marriage and family issue, specifically, the United States Supreme Court has recognized that the First Amendment protects the rights of same-sex marriage opponents "to advocate with utmost sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015) (acknowledging that same-sex marriage opponents "may engage those who disagree with their view in an open and searching debate").

AACS speaks through its home studies, recommending whether a couple should be approved for meeting the best interests of a child. When AACS produces reports from these home studies, AACS speaks a message of approval or disapproval of the couples and the home environments to HHS. Because AACS believes that a same-sex couple can never meet the best interests of a child, it refrains from speaking recommendations for same-sex couples at all. AACS's decision to refrain from speaking allows AACS to advocate that message, which is based on AACS's sincere conviction that Allah does not approve of same-sex adoption and that certifying such adoptions would violate AACS's sincerely held beliefs. HHS seeks to suppress AACS's ability to communicate its sincere believes and to compel AACS to speak a view it finds objectionable. *See Koontz v. Saint Johns River Water Mgmt. Dist*., 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."). HHS's attempts to suppress some speech and compel other speech violate AACS's First Amendment rights to speak messages it believes and refrain from speaking messages it does not believe. As such, HHS's attempts to regulate AACS's speech are unconstitutional conditions on AACS's access to public funding and adoption referrals.

2. HHS seeks to place an unconstitutional condition on AACS's access to public funds and adoption referrals by requiring AACS to engage in expressive conduct that endorses same-sex adoption.

Not only does HHS seek to place an unconstitutional condition on AACS's right to free speech, but HHS also seeks to place an unconstitutional condition on AACS's right to engage in expressive conduct as well. The government may not condition an entity's receipt of a benefit on the entity's forfeiture of its First Amendment right to engage in expressive conduct. *Rust*, 500 U.S. at 197 ("[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on a *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the *protected conduct* outside the scope of the federally funded program.") (second emphasis added). Simply put, the government cannot exclude private organizations from receiving benefits should they engage in expressive conduct that the state dislikes. *Hurley*, 515 U.S. at 579–80. For example, in *Hurley*, the Supreme Court held that Massachusetts could not force a private organization, which was hosting a parade in a place of public accommodation, to include an LGBTQ group among the groups in the private organization's parade. *Id.* at 569. The Court ruled that "a private speaker does not forfeit constitutional protection simply . . . by failing to edit their themes to isolate an exact message" discernible through their expressive conduct. *Id.* at 569–70.

As a private adoption agency, AACS has the right to decide which messages to promote through its expressive conduct of providing adoption services, just as the parade organizers in *Hurley* had the constitutional right to decide which messages to promote through their expressive conduct of hosting a parade. The act of providing adoption services sends a message that the child's interests will be served best by the prospective parents. Because AACS believes that same-sex parents can never best serve the interests of the child, AACS has the constitutional

right to not engage in expressive conduct that would send a message that same-sex couples can serve the child's best interests. *Cf. Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 915 (6th Cir. 2019) ("[The unconstitutional conditions] doctrine applies when the government attempts to ban or undermine a benefit recipient's exercise of a right that the Constitution guarantees."). Therefore, HHS has placed an unconditional condition on AACS by requiring it to engage in expressive conduct that sends a message that same-sex couples adopting children will serve the child's best interests.

Because HHS's unconstitutional violations of AACS's First Amendment rights to speak freely and engage in expressive conduct do not relate to the purpose of AACS's contract with HHS, HHS has placed an unconstitutional condition on AACS's access to public funds and adoption referrals by mandating that AACS endorse same-sex adoption.

C. HHS has also unconstitutionally conditioned the receipt of state funds and adoption referrals on AACS complying with a notice requirement that undermines AACS's mission.

HHS has placed an additional unconstitutional condition on AACS's receipt of public funds and adoption referrals because HHS seeks to require AACS to endorse same-sex adoption services through a notice requirement, even though AACS does not wish to endorse such adoptions. The government cannot condition the receipt of a benefit on an organization posting a notice requirement with a message that alters its own speech. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (citing *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). In *Becerra*, the Supreme Court held that California's notice requirement for pro-life health clinics to advertise abortions violated the clinics' First Amendment right to communicate pro-life messages. *Id.* at 2378. The Court ruled that content-based notice requirements violate organizations' rights to speak messages when the regulations "alter the

content" of the messages that an organization wishes to endorse. *Id.* The Court reasoned that "[b]y requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech." *Id.* (citing *Riley*, 487 U.S. at 795).

Here, the EOCPA's notice requirement mandates that AACS advertise that adoption agencies cannot discriminate against prospective parents on the basis of sexual orientation, even though AACS objects to this message. As such, the notice requirement mandates that AACS advertise adoption services to same-sex couples, while AACS is advancing a message that allowing same-sex couple to adopt does not serve the best interests of children. In this way, the notice requirement undermines AACS's message that promotes heterosexual adoptions, just as the notice requirement in *Becerra* undermined the clinic's promoted pro-life advocacy message. Accordingly, the notice requirement unconstitutionally violates AACS's First Amendment right to free speech, just as the notice requirement in *Becerra* unconstitutionally violated the clinic's First Amendment right to free speech. Because this unconstitutional violation does not relate to the purpose of AACS's contract with HHS, HHS has placed an additional unconstitutional condition on AACS's access to public funds and adoption referrals by mandating the notice requirement. Therefore, this Court should affirm the district court's finding that HHS's enforcement of the EOCPA violated AACS's First Amendment rights.

CONCLUSION

For the aforementioned reasons, Plaintiff-Appellee Al-Adab Al-Mufrad Care Services respectfully requests that this Court affirm the district court's well-reasoned decision.

This the 14th day of September, 2020.

/s/ Team 17
Counsel for Plaintiff-Appellee