CASE NO. 2020-05

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,
Appellant,

v.

AL-ADAB AL-MUFRAD CARE SERVICES,
Appellee.

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

BRIEF FOR APPELLEE

Brief Prepared by Team 19

QUESTIONS PRESENTED

1. Does a statue violate a religious organization's Free Exercise rights when the statute allows exemptions for secular reasons but not religious, permits the religious organization to be treated differently because of its religion, and undermines the very purposes it sets out to accomplish when enforced against the organization?
2. Does the unconstitutional conditions doctrine apply when a government contracted entity is forced to waive its First Amendment rights of free speech to keep its contract and receive public funding?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

RULES

U.S. SUPREME COURT CASES

U.S. COURT OF APPEALS CASES

SECONDARY AUTHORITIES

CONSTITUTIONAL PROVISIONS & STATUTES

U.S. Const. amend. I Freedom of Religion, Speech, Press, Assembly, and Petition

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

OPINIONS BELOW

AACS filed an action in the United States District Court for the Western District of East Virginia against Christopher Harwell in his official capacity as Commissioner of the City of Evansburgh's Department of Health and Human Services. R. at 2. AACS sought a Temporary Restraining Order against the referral freeze and a permanent injunction compelling HHS to renew its contract with AACS. R. at 2. The District court granted both AACS's motion for a TRO and a permanent injunction holding that AACS's First Amendment rights to freedom of religion and speech were indeed violated. R. at 2.

Commissioner Hartwell then appealed to the United States Court of Appeals for the Fifteenth circuit. R. at 18. The court of appeals reversed the district court's holding, alleging that AACS's First Amendment rights were not violated. R. at 19. The court of appeals reasoned that AACS did not present enough evidence showing it was treated more adversely than other agencies and that AACS's free speech rights were not substantially impeded. R. at 21 & 25. The court of appeals relied on the district court's findings of fact to make these holdings. R. at 19.

A Rehearing En Banc was then granted. The panel in the previous case shall not be cited as precedent during this en banc proceeding. R. at 26.

STATEMENT OF THE CASE

The City of Evansburgh is home to a large refugee population from various countries including Ethiopia, Iraq, Iran, and Syria that have suffered severe personal and economic hardships making it impossible for them to adequately provide for their children. R. at 3. There are approximately 17,000 children in foster care, and Evansburg has a chronic shortage of homes for these children. R. at 3. Health and Human Services ("HHS") entered into contracts with 34 private child placement agencies in Evansburg in response to this high number of children needing homes. R. at 3. The East Virginia Code requires the greatest possible consideration for the best interests of the children when making placement decisions. R. at 3-4.

The Equal Opportunity Child Placement Act ("EOCPA") imposes a non-discrimination requirement on agencies receiving government funds providing that discrimination on the basis of race, religion, national origin, sex, marital status, or disability is prohibited. R. at 4. However, the EOCPA expressly states that agencies must give preference to same race families. R. at 4. Each child placement agency is specially equipped to serve a specific sect of the community. R. at 5. If a family's beliefs do not align with one agency's profile and policies, they are simply referred out to an agency that their beliefs do align with. R. at 5.

The Governor of Evansburgh described any philosophies or ideologies that prohibit a government funded agency from giving preference to traditional marriages equated to "bigotry" after the Supreme Court legalized same-sex marriage. R. at 6. As a result of this, the EOCPA was amended to include sexual orientation on the list of protected classes. R. at 6. However, just as there is an express provision for race preference, there is also an identical express provision for sexual orientation preference. R. at 6. The EOCPA was amended further to require child placement

agencies to sign and post a non-discrimination statement at their place of business while allowing religious based agencies to post a written objection to the policy. R. at 6.

Al-Adab Al-Mufrad Care Services ("AACS") has served the refugee population in the City of Evansburg since 1980. R. at 5. AACS has placed thousands of children including war orphans, children with special needs, and trauma survivors. R. at 5. In a conversation with Chairman Hartwell, Abu-Kane, the Executive Director of AACS, explained that because of the Islamic beliefs the agency is founded on, AACS elects not to work with same sex couples. R. at 7. Abu-Kane went on to emphasize that any time a same-sex couple contacted AACS in the past, they were treated with the utmost respect and simply referred to another agency that could better serve their interests as the East Virginia Code says to do. R. at 7. Abu-Kane further emphasized that there have never been any complaints of discriminatory treatment against AACS made by any same-sex couples seeking child placement services. R. at 7.

After the conversation between Abu-Kane and Chairman Hartwell, AACS received a letter alleging it was not in compliance with the EOCPA; therefore, HHS would not renew its contract. R. at 7. The letter also stated that because AACS elected not to work with same-sex couples for religious reasons, there would be an immediate referral freeze put on the agency. R. at 8

STATEMENT OF JURISDICTION

This Court has jurisdiction over this En Banc proceeding pursuant to Federal Rule of Appellate Procedure 35(a)(2). The district court granted Appellee's motions for Temporary Restraining Order and permanent injunction on April 29, 2019. Appellant filed its notice of appeal on February 24, 2020. A Rehearing En Banc was granted July 15, 2020. The panel disposition in this case shall not be cited as precedent.

SUMMARY OF THE ARGUMENTS

I. The district court properly granted AACS's Temporary Restraining Order and Permanent Injunction because AACS's Free Exercise rights were violated by a statute that is not generally applicable or neutral and substantially burdened its religious beliefs. For these reasons, this Court should affirm the district court's Temporary Restraining Order and Permanent Injunction.

Regulation of religious beliefs is prohibited by the Free Exercise Clause. The only way regulation does not violate the Free Exercise Clause is when the regulation is done through a generally applicable and neutral law and religious exercise is not substantially burdened. The Supreme Court has repeatedly enforced the notion that presence of secular exemptions to a statute coupled with prohibition of religious exemptions from that same statute show an outright absence of generally applicability. A statute is not neutral when it treats religious conduct differently than completely analogous secular conduct. The principle that the government cannot impose burdens on religious conduct it does not impose on secular conduct is essential to protecting the rights guaranteed by the Free Exercise Clause. The EOCPA is not generally applicable, not neutral, and substantially burdens religious conduct; therefore, it violates the Free Exercise clause.

II. It is proper to uphold AACS's Temporary Restraining Order and Permanent Injunction because Appellant's contractual conditions with AACS is unconstitutional. This Court should affirm the district court's ruling in favor of AACS.

The unconstitutional conditions doctrine prohibits contractual conditions that force a party to waive its constitutional rights for government funding. The doctrine prevents government entities from leveraging its status over employees and other contracted entities. However, some contractual conditions that look to waive constitutional rights can be enforceable. For these conditions to be

enforceable, courts have looked to see if the condition is germane to the purpose of the government program, and determine whether the condition coerces the party to waive its constitutional right or be forced into a worse state before entering into the contract. The Supreme Court determined if either the condition lacks germaneness or unjustly coerces a party to waive its constitutional rights, the condition is unconstitutional. Because the condition with HHS both lacks germaneness to the child adoption program and coerces AACS to waive its rights to free speech, the unconstitutional conditions doctrine applies.

ARGUMENTS & AUTHORITIES

I. THE EOCPA VIOLATES THE FREE EXERCISE CLAUSE BECAUSE IT IS NOT GENERALLY APPLICABLE, NOT NEUTRAL, AND IMPEDES UPON SINCERELY HELD RELIGIOUS BELIEFS

The Free Exercise clause forbids any regulation of beliefs. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990); *See also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). There are two components to showing a violation of the Free Exercise clause: general applicability and neutrality. *See Lukumi*, 508 U.S at 533; *Smith*, 494 U.S. at 877. When a statute or ordinance is found to not be generally applicable or neutral, it is subject to strict scrutiny regardless of the motivation behind enacting it. *Lukumi*, 508 U.S. at 546; *Smith*, 494 U.S. at 878.

Once a plaintiff proves that his religious exercise is grounded in a sincerely held religious beliefs and that the government's actions substantially burdens his religious exercise, the defendants are then heavily burdened by showing the actions it took are the least restrict means of furthering a compelling governmental interest. *See Holt v. Hobbs*, 574 U.S. 352, 352-53 (2015); *See also Burwell v. Hobby Lobby*, 573 U.S. 682, 682 & 726 (2014). Because this case implicates First Amendment interests, however, we do not rely on the normal clear-error standard for factual

review, but instead conduct an independent examination of the record as a whole. *Brown v. City of Pittsburgh*, 586 F.3d 263, 268–69 (3d Cir. 2009).

A double standard is not a neutral standard nor a generally applied standard. *See Ward v. Polite,* 667 F.3d 727, 749 (6th Cir. 2012). In this case AACS already proved its Free exercise rights were violated because the EOCPA is not generally applicable, it is not neutral, and because of this, it must be looked at under strict scrutiny. The EOCPA is not generally applicable because the secular exemptions already present immediately negate any general applicability. The EOCPA is not neutral because it subjected AACS to harsher treatment than other organizations engaging in the exact same conduct. Because the EOCPA is not generally applicable or neutral it must be looked at under strict scrutiny, and the state's interests of trying to prevent discrimination are not compelling enough to override the sincerely held religious beliefs of an organization that has served the community in a way that no other organization has been able to.

A. The EOCPA Is Not Generally Applicable Because Already Present Secular Exceptions Defeat General Applicability Automatically

Courts have consistently found a statue to not be generally applicable when other secular exceptions are already in place. See *Lukumi,* 508 U.S. at 543-46; *Christian Legal Soc. Chapter of the Univ. of California v. Martinez,* 561 U.S. 661, 697 (2010); *Finch v. Peterson*, 622 F.3d 725, 726 (7th Cir. 2010). A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated. *Lukumi,* 508 U.S. at 543-46. If a law burdens religiously motivated conduct more than non-religiously motivated conduct, it often undermines the purposes of the law. *See Id*. Even limited exceptions can make a law less than generally applicable, triggering strict scrutiny. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise*

of Religion, 95 NEB. L. REV. 1, 10 (2016). A discriminatory purpose or ill-willed motive need not be shown if the law is not generally applicable. *Id.* Where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason. *Smith*, 494 U.S. at 884.

A law is not generally applicable if that law carves out exceptions for secular reasons but does not allow exceptions for religious reasons. *See Lukumi* 508 U.S. at 524. For example, in *Lukumi*, a city in Florida adopted an ordinance prohibiting the slaughter of animals except in certain recognized circumstances after several emergency sessions held immediately after a Santeria church first tried to open. *Id*. The Santeria regularly used animal sacrifices in many of its rituals. *Id*. The ordinance had clear exemptions for the killing of animals "for the primary purpose of food consumption" and was only limited to "sacrifice" in the contexts of "a public or private ritual ceremony." *Id*. at 527. Considering the other exceptions present in the ordinance, the Court held the ordinance was not generally applicable because it burdened only conduct motivated by religious beliefs which violates the rights protected by the Free Exercise Clause. *Id.* at 543.

Consistent with *Lukumi,* the Supreme Court also found a law was not generally applicable because religiously motivated conduct was treated differently than secularly motivated conduct. *Masterpiece Cakeshop Ltd. V. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1732 (2018). In that case, Colorado's Civil Rights Division found that baker Jack Phillips engaged in prohibited discriminatory behavior by refusing to make a wedding cake for a same-sex couple because of religious reasons. *Id.* However, the Civil Rights Division allowed bakers to refuse to bake cakes with homophobic expressions reasoning those actions did not violate the state's civil rights because the requested message was offensive. *Id.* at 1730-31. These discrepancies in enforcement of civil rights laws show that the state treated other bakers' conscience-based objections as legitimate but

Phillips' conscience-based objection as illegitimate. *Id.* at 1730. Ultimately, the Supreme Court held that while Colorado has the right to enforce civil rights, it was still bound under the First Amendment to afford Phillips a "neutral and respectful consideration" which the Civil Rights Division did not. *Id.* at 1729.

The Third Circuit relied the lack of evidence in the record showing previously admitted secular exemptions to a non-discrimination policy to determine whether it was generally applicable. *See Fulton v. City of Philadelphia*, 922 F.3d 140, 158 (3d Cir. 2019). The court in *Fulton* pointed out on numerous occasions that there was no record showing any other foster care agency was permitted to discriminate against members of protected classes. *Id.* The agency in *Fulton* has allowed agencies to make exceptions for secular or non-secular reasons and claims to seek the best fit for the child. *Id*. The court relies on this lack of evidence in the record to make its holding. *Id*. at 159.

On the other hand, following the logic in *Masterpiece Cakeshop*, the Sixth Circuit said that individualized as hoc exemptions render policies the "antithesis of neutral and generally applicable." *See Ward,* 667 F.3d at 749. In *Ward*, a graduate counseling student asked permission to refer a client seeking counseling on same-sex relationships to another student counselor because of religious reasons and was expelled for violating the anti-discrimination policy. *Id.* at 731. The court held the program was not generally applicable because it permitted referrals for other secular reasons but not religious ones. *Id.* at 731.

When exceptions are granted for secular reasons but not religious reasons, courts find a lack of general applicability. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3d. Cir. 1999). For example, in *Fraternal Order of Police,* a police department allowed exceptions to the facial hair policy for medical reasons but not for religious

reasons. *Id.* The court found that this inconsistency sufficiently suggested discriminatory intent triggering strict scrutiny, which is only triggered when a policy is not generally applicable, which the policy could not survive. *Id*. at 365.

In this case, the EOCPA is not generally applicable because there are other secular exceptions put into place and, because of this, AACS is treated differently than other organizations that engage in the same exact conduct. Similar to the ordinance present in *Lukumi*, the EOCPA is not generally applicable because has carve outs allowing other non-religious organizations to engage in the exact same behavior but with no consequences. R. at 9. The ordinance in *Lukumi* had exceptions for consumption and raising of animals for consumption and even though sometimes the religious organization consumed the animals in their rituals, they still couldn't do it. In our case, the EOCPA has exceptions for sex, race, and ethnicity. R. at 8-9. The EOCPA expressly allows preference to be given to same race families. R. at 4. The HHS has refused placement of a child for sex-based reasons when refusing to place a young girl in an all-male family. R. at 8. The HHS has allowed AACS to give preference based on ethnicity when allowing tensions were at a high between the Sunni and Shai sects of the Islamic Community. R. at 9. There are many ways the EOCPA has carved out exceptions that are okay for other agencies to take advantage of, but when AACS tries to use one of those exceptions to do what is in the best interest for the child, it is prohibited from serving its community. *See* R. at 7-9.

On the other hand, this case is unlike the case in *Fulton* because HHS not only allows secular exemptions to made, it also manages similar secularly motivated conduct inconsistently. While there may be factual similarities between *Fulton* and the case at hand, the principle difference is that in *Fulton* there is no evidence of previous secular exemptions at all while in our case there is multiple instances of secular exemptions being treated inconsistently. R. at 8-9. The

Commissioner said himself that the law was merely a suggestion when he let a white special needs child be placed with an African American family even though certified white families were available. R. at 9. The court in *Fulton* focused on the fact that there was nothing in the record showing religious and non-religious organizations were treated differently, however, our case is distinguishable because as applied, the HHS has allowed exemptions for ad-hoc reasons but will not allow exemptions for Constitutionally protected reasons. *See* R. at 8-9. HHS has refused placement of a 5-year old girl with a family consisting only of a father and son, evidencing sex-conscience based decision are permitted because was found to be in the best interest for the child. R. at 9. HHS has allowed AACS itself to refuse placement with different sects of the Islamic community evidencing ethnicity-conscience based decisions. R. at 9. Even though these exceptions are present and acceptable under the EOCPA, for some reason, HHS continues to suggest that placing a child in a home that has similar religious beliefs is unacceptable even though it would serve the state's interest and be in the best interest for the child.

By contrast, the case at hand is more analogous to *Fraternal Order of Police* because in that case, the court held that inconsistency in the application of the statute rendered it not generally appliable therefore invalid. As the district court established, the EOCPA has already been proven to be applied inconsistently with discrepancies for race, sex, and ethnicity. R. at 14. Considering these inconsistencies, the EOCPA is on its face not generally applicable because, as the court in *Ward* clearly establishes, a double standard is not a generally applicable one.

This case is most like the cases in *Masterpiece Cakeshop* and *Ward* where the law was found to be not generally applicable because it allowed exemptions for conscience based or value-based reasons but not for religious based reasons. In *Masterpiece Cakeshop* the religious organization was not able to make conscience-based decisions, but non-religious organizations

were able to make similar conscience-based decisions. In our case, AACS was not allowed to make decisions for religious or conscience-based reasons but other adoption agencies were encouraged to make such decisions. *See* R. at 3-4. The court in *Ward* held that ad hoc enforcement of secular exceptions evidences the antithesis of general applicability, and that could not be more present in this case. The exceptions that are expressly built into the EOCPA aren't even generally applied. *See* R. at 4 & 9. Chairman Hartwell personally explained that even though there is an express provision giving preference to same-race families was, the reason a white special needs child was placed with an African American family was because that provision was merely a "suggestion." R. at 9. The EOCPA can in no way be generally applied if it allows inconsistent enforcement of express provisions.

The EOCPA is not generally applicable because there are exceptions already in place that cause AACS's religiously motivated conduct to be treated differently than other adoption agencies secularly motivated conduct.

B. The EOCPA Is Not Neutral as Applied Because It Targets AACS's Religiously Motivated Conduct

A statute is not "neutral" if it targets religiously motivated conduct either on its face or applied in practice. *Lukumi*, 508 U.S. at 533-40. A statute lacking facial neutrality can still be ruled definitively unconstitutional if it lacks neutrality in practice. *See Lukumi*, 508 U.S at 533. If the law treats analogous religious and secular conduct in objectively unequal ways, the law is not neutral, and at least one of its purposes or objects is to discriminate. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 9 (2016).

The Free Exercise Clause forbids even subtle departures from neutrality and covert suppression of particular religious beliefs. *See Bowen v. Roy,* 476 U.S. 693, 703 (1986) (plurality opinion); *See also Gillette v. United States,* 401 U.S. 437, 452 (1971). When challenging a facially neutral law, those alleging non-neutrality must only prove the law was adopted with the knowledge of any adverse effects it may have on identifiable groups. *See Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Many statutes are selective to some extent, but categories of selection are of *paramount concern* when a statute has the incidental effect of burdening religious practice. *Lukumi*, 508 U.S. at 542 (emphasis added).

For example, the Supreme Court in *Lukumi* found an ordinance to not be neutral in practice because the ordinance treated a religious organization differently than other organizations engaging in the exact same conduct. *Id.* In *Lukumi*, multiple city officials made hostile comments evidencing the purpose of the ordinance was to suppress religion including a statement about the religious organization's beliefs being a sin and pure foolishness. *Id.* at 541. The Court found that the ordinances suppressed much more religious conduct was necessary to achieve legitimate ends proving the ordinance was not neutral. *Id.*

Following that same logic, the Third Circuit found the law in *Fulton* to be neutral because it did not suppress more religious conduct than was necessary. *Fulton*, 922 F.3d at 157. The Commissioner in *Fulton* did make statements that, taken out of context, could be improper but were actually made during a negotiation to try and find a solution that would benefit all parties. *Id*. Also the intake freeze put on the adoption agency in *Fulton* was there only to evaluate the relationship between the agency and the City. *Id*. at 149. The freeze did not affect the children already placed with the agency or the agency's other relationships with the City. *Id.* Further, the City allowed the agency to work with children it felt would be best served by the agency even

during the freeze. *Id.* The court found that because the religious conduct was not overly burdened, suppressed, or treated differently than non-religious conduct, the law was indeed neutral. *Id*. at 159.

It is clear in this case that the EOCPA caused AACS to be treated differently by the HHS than other organizations that engaged in the same conduct but held different religious views. Similar to the ordinance in *Lukumi*, the EOCPA is not neutral in practice because it causes AACS to be treated differently. See R. at 14. In *Lukumi,* city officials made multiple comments about how the religious organization's beliefs were sinful and foolish. The Governor of East Virginia made analogous comments by disregarding and shaming AACS's beliefs in his statement saying AACS's beliefs equate to "bigotry." R. at 6. The lower court wrongfully disregards this comment saying it does not rise to the level of hostility present in *Lukumi*. R. at 21. This misrepresents the context of the comment. AACS has a preference for traditional marriage in the couples it adopts to and was publicly ridiculed for it. R. at 7. However, when other agencies give parallel preference on the basis of sex or race, they are praised for doing what is in the best interest for the child. See R. at 9. While the comments made the Governor may not facially rise to the level of animosity as the comments in *Lukumi,* looked at in context, they certainly paint a dangerous and discriminatory picture.

This case is unlike the case in *Fulton* because the EOCPA did suppress more conduct than was necessary. In *Fulton,* the agency's relationship with the City and the children it was already working with was unaffected by the intake freeze. In our case, AACS's relationship with the children it was already working was severely affected by the referral freeze. *See* R. at 8. A little girl was separated from her brothers because the referral freeze would not allow her to be placed with the family AACS placed her brothers with. *Id.* A 5-year-old autistic boy was denied adoption

with the woman who had been his mother for two years because of the freeze. *Id.* Considering HHS claims to only want what is best for the children, there doesn't seem to be much worse effect on the children then ripping them away from possibly the only family they know. Also, in *Fulton*, the seemingly controversial statements made by the Commissioner were made in the context of a negotiation a solution. The comments made by the Governor were made in the context of scrutinizing religious organizations for their beliefs while giving a public statement about the EOCPA. R. at 6. In addition, even though there is an express provision giving preference to same-race families, the Commissioner said the reason a white special needs child was denied adoption into a white family was because the provision was merely a "suggestion" and did not govern all placement decisions. R. at 4 & 8. There is an idential provision giving express preference to same-sexual orientation families. R. at 6. How can a law be applied neutrally if one express provision is deemed merely a "suggestion" when not followed, and another provision caused a pillar of the community to be banned from serving its duty to the people when not followed?

Neutrality and generally applicability go hand in hand. If a law is not neutral it cannot be generally appliable, and if a law is not generally applicable it cannot be neutral. The EOCPA is not generally applicable *or* neutral because the already present secular exemptions that negate general applicability are not consistently applied proving the EOCPA treats AACS and its religiously motivated conduct disproportionally negating neutrality in practice. Because the EOCPA is not generally applicable or neutral, it must be looked at under strict scrutiny when considering if there is a compelling state interest to warrant the violation of a basic Constitutional right such as the freedom to exercise religion.

C. No State Interest Is Compelling Enough to Take Away the Freedom to Exercise Religion

A compelling state interest must be used to justify a not neutral and not generally applicable law. *Smith*, 494 U.S. at 886. State interests are not compelling when a government policy substantially burdens the exercise of religion. *See Holt* 574 U.S. at 356; *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Fulton*, 922 F.3d at 159. A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. *Lukumi*, 508 U.S. at 546.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. *Lukumi*, 508 U.S. at 546-47. The interest given in justification of a governmental restriction that harms only conduct protected by the First Amendment is hardly compelling when the government fails to enact feasible measures to restrict other conduct producing substantial and similar harm. *Id*. When there is a substantial encroachment upon personal liberty, the only way a state can prevail is if it shows a subordinating motive that is equally as compelling. *Bates v. Arkansas,* 361 U.S. 516, 524 (1960).

The Court in *Sherbert* found that a merely rational relationship to a colorable state interest would not suffice in denying a Seventh-day Adventist unemployment benefits because of her unwillingness to work on Saturdays. 374 U.S. at 410. The Court emphasized that the employee did not pose a substantial threat to public safety, peace, or order which was a required showing for the state to have permission to regulate religious conduct. *Id*. at 403. The Court in *Yonder* took this further by finding that the state's interests in educating its citizens did not compel an Amish family to abandon its beliefs and require their children to attend formal high school to the age of sixteen as the law required. 406 U.S. at 234. The Court admitted that the state's interest in the education of its citizens was indeed compelling; however, it ultimately found the interest to be not compelling

enough because that the state failed to identify how the interest in enforcing compulsory education would be adversely affected by granting a religious exception. *Id.* at 236.

Together, these two cases laid the foundation for the law in this area. The Supreme Court in both *Sherbert* and *Yoder* clearly established that only "paramount interests[s]" of the "highest order" that involve a "substantial threat to public safety, peace or order" qualify as compelling enough to override the freedom to exercise religion. *See Yonder*, 406 at 215; *Sherbert*, 374 U.S. at 403, 406. The Court in *Holt* held that Department's interest in keeping prisoners safe and identifiable does not outweigh a Muslim prisoner's sincerely held religious beliefs in growing a beard because the Department failed to show how a religious exemption would adversely impact its interests. 574 U.S. at 366. The Supreme Court once again enforcing the notion that the only way a state interest is compelling enough to override religious beliefs is if the state can show granting an exception would adversely affect said interests. *See Id*. at 369.

Following that same logic, the Third Circuit found a state's interest in prohibiting discrimination compelling enough because there was no evidence in the record that showed providing a religious exemption would adversely affect said interests. *See Fulton*, 922 F.3d at 159. In *Fulton*, the state put an intake freeze on a religious adoption agency for violating the non-discrimination policy by choosing to not work with same-sex couples for religious reasons. *Id*. at 147. However, there is no evidence in the record of a same-sex couple ever approaching the adoption agency. *Id.* at 148. During this freeze, no children that were already under the care of the agency were affected. *Id.* at 149. The agency was even granted exceptions for particularly strong reasons such as a child being placed in the same family as their sibling during the freeze. *Id.* Because the record showed that even during the intake freeze, the religious organization was not substantially burdened, the court found in favor of the state.

The interests of HHS trying to prevent discrimination substantially burdens AACS because HHS has failed to show how granting a religious exemption would adversely affect the prevention of discrimination. The Supreme Court has repeatedly said that in order for a state's interest to overpower the freedom to exercise religion, the state must show that granting a religious exemption would adversely affect the interests. The record here shows the opposite. Chairman Hartwell testified that the purpose of enforcing the EOCPA is to (1) make sure all applicable laws are enforced, (2) make placement services acceptable to all qualified Evansburgh residents, (3) keep a full and diverse pool of foster or adoptive parents, and (4) make sure no one who is entitled to the services is denied them. R. at 9. The referral freeze against AACS alone goes against the majority of these objectives, and when paired with the EOCPA, all of the interests the state contends are so compelling are adversely impacted.

Chairman Hartwell says enforcing the EOCPA is important in making sure all applicable laws are enforced, but the district court has already found that the EOCPA is not neutral or generally applicable and requiring any organization to comply to a biased and narrowly applied rule is most certainly is substantially burdensome on not only AACS but all other agencies. R. at 14. HHS's interest in making sure placement services are acceptable to all qualified residents would not be even minimally burdened by allowing AACS's religious exemption because there are already several adoption agencies expressly dedicated to serving the LGBTQ community in Evansburgh. R. at 8. Keeping a full and diverse pool of foster or adoptive parents would not be possible without AACS's contribution to the community especially considering the influx of refugee children that need the kind of families AACS specializes in providing. *See* R. at 5 & 8. Not allowing AACS to serve the community as it has for over thirty years would actively go against the state's interest in making sure no one who is entitled to services is not denied them because it would take away the

main avenue thousands of families have used to adopt. R. at 5. Enforcing the EOCPA against AACS would not serve any of the objectives it sets out to accomplish. *See* R. at 14.

This case is unlike *Fulton* because there is clear evidence showing an adverse effect on the state's interests if the exemption is not granted. In *Fulton* there was no evidence of a same-sex couple ever approaching the agency, no evidence of children being adversely affected by the freeze, and no evidence of the state's interests being violated because of the freeze. In our case, all of those things are present. On multiple occasions same-sex couples have approached AACS, and AACS treated them with respect and politely directed them to an agency that would better serve their needs with no complaints. R. at 7. The record shows multiple instances of children being adversely affected by the referral freeze. *See* R. at 8. A little girl was taken away from her brothers when AACS was not able to place her with them because of the freeze. *Id.* at A five-year-old autistic boy was denied adoption with a woman who fostered him for two years because of the freeze. *Id.*

HHS asserts it only wants to act with the children's best interests but then refuses to allow AACS to do just that by serving an important segment of the community. The refugee population of the community is facing an urgent shortage of adoptive homes. R. at 8. AACS is uniquely equipped to serve this population. R. at 5. It goes against rationality to think that it best serves the state's interest in acting with the children's best interest by eliminating an agency that is dedicated to serving a large and distinctive part of the population. For these reasons, the EOCPA violates AACS's free exercise rights.

The EOCPA is not generally applicable because it treats religiously motivated conduct differently than analogous conduct with other motives. The EOCPA is not neutral as applied because it targets religiously motivated conduct. Because AACS and the district court have already

shown that the EOCPA is not generally applicable or neutral, it must be evaluated under strict scrutiny. When looked at under strict scrutiny, AACS's freedom to exercise religion is substantially burdened by the state's interest in prohibiting discrimination.

II. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE DOES APPLY BECAUSE THE CONDITION FOR GOVERNMENT FUNDS STIFLES AACS' EXERCISE TO REFRAIN FROM SPEECH

"The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This Court should affirm the district court's ruling because AACS' contract with HHS is unconstitutionally conditioned, which resulted in HHS' improper referral freeze and termination of the contract. The district court properly determined that HHS' contractual condition was unconstitutional because it hindered AACS' First Amendment rights.

The unconstitutional conditions doctrine has perplexed the lower courts and the Supreme Court for decades as to its application to a variety of cases and circumstances. When the government attempts to wrongfully coerce an individual to waive his constitutional right to free speech or his right to silence, the coercion is ultimately unconstitutional. *See id.* In the case at bar, this Court must determine if the Appellant's condition to endorse the government's policy for public government funding is truly constitutional, or if the Appelleej's First Amendment right to refrain from speech is at risk due to the Appellant's unconstitutional condition.

At its inception, the unconstitutional conditions doctrine simply prohibited any condition that burdened a constitutional right. In the case of *Frost v. Railroad* Commission, the Supreme Court held that the state may not condition the commercial use of public highways on compliance with regulations governing common carriers. *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583 (1926). In the end, the Court's opinion and rationale for the case applies to any and all

unconstitutional conditions in all contexts, and Justice Sutherland said, "A state is without power to impose an unconstitutional requirement as a condition for granting a privilege." *Id.* at 598.

Currently, the unconstitutional conditions doctrine is known to have two variations. The first states that the government may never grant a privilege subject to the condition that the recipient not exercise a constitutional right, "especially his interest in freedom of speech." Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE WESTERN RESERVE L. REV. 97, 99-100 (1989) (citing *Elrod v. Burns*, 427 U.S. 347, 359 (1976)). Appellant's unconstitutional condition clearly exemplifies this variation of the doctrine. The second variation of the unconstitutional conditions doctrine states that the government may only condition a government benefit on an individual's restraint from exercising a constitutional right when "the state presents compelling state interests" for compelling the restraint. *Id.* at 100 (citing *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980)). The Appellant does not support his use of an unconstitutional condition and does not highlight compelling state interests that are sufficiently linked to the purpose of the contract between AACS and the Appellant.

Courts have attempted to create consistent application of the unconstitutional conditions doctrine through the use of a germaneness test to determine if there is a nexus between the condition and the governmental program. *See Connick v. Myers*, 461 U.S. 138, 142 (1983). Alternatively, the Supreme Court has utilized a balancing test to determine whether the governmental interests or individual's interests would warrant application of the unconstitutional conditions doctrine. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Moreover, courts have also held that when conditions for government funding either penalize the exercise of First Amendment rights, or the compulsion of speech, the condition in question is unconstitutional. *See*

Wooley, 430 U.S. at 714. Under all frameworks and tests, the Appellant unconstitutionally conditioned its contract with AACS by compelling AACS to waive its First Amendment rights.

A. The Unconstitutional Condition Set by HHS Lacks Germaneness With the Purpose of the Child Adoption Program

This court should affirm the district court's ruling in favor of AACS and enforce the permanent injunction and temporary restraining order because the purpose of the contract and government funding is to promote foster services and adoption placements, not to facilitate the speech of adoption agencies. As Justice Frankfurter said, "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 417 (1950) (J. Frankfurter, concur). Moreover, the Supreme Court has already explained that some speech is protected by the First Amendment, and "may not be made the subject of coercion to speak or coercion to subsidize speech." *Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457, 478 (1997). AACS' First Amendment rights should not be subjected to coercion by the Appellant.

The germaneness test has been one of the few methods to decipher the unconstitutional conditions doctrine, and this test has been applied in many ways. The most notable cases are the Nollan and Dolan cases to explain the germaneness analysis. In *Nollan v. California Coastal Commission*, the issue was centered around a purchase of beachfront property to which the government conditioned the family's permit to rebuild the property by compelling the purchasers to "allow the public an easement to pass across. . .their property. . ." as a way to protect the public's ability to see the beach. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987). There, the Supreme Court asserted that the lack of a nexus between the condition and the original "legitimate

state interest" as an "out-and-out plan of extortion" because it forced the Nollan's to waive their property rights to preserve state interest that is wholly unrelated to the easement condition.

Furthermore, in *Dolan v. City of Tigard*, the Supreme Court assessed whether an "'essential nexus' exists between the 'legitimate state interest' and the permit condition" for similar facts as *Nollan*. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). The Supreme Court expanded on *Nollan* by stating that not only should there be a nexus between the condition to obtain a permit and the burden of the condition, but also the government conditions must be proportional to the governmental interest. *Id.* at 396. This "rough proportionality" assessment requires the government entity to make an individualized determination that the condition is related in nature and extent to the program's impact. *Id.* at 388-91.

Similarly, the Supreme Court emphasized the importance of germaneness in *South Dakota v. Dole* when it ruled affirmed the state's reduction of federal highway funds because the state had a minimum drinking age below 21. *S.D. v. Dole*, 483 U.S. 203, 205 (1987). The germaneness link between the government benefit and the condition was established because the purpose of the highway funding was to provide safe highways for citizens, and the presence of underage drinkers increased the risk of harm to others due to unsafe and inebriated driving. *Id.* at 208. Unlike the cases above, the Appellant's does not satisfy the germaneness requirement between its anti-discrimination notice condition for government funding and the purpose of the contract, to provide children with homes that fit their best interests.

In this case, the court's precedence and prior tests show that there lacks both germaneness between the Appellant's unconstitutional condition and the governmental purpose. It is undisputed that the Appellant was tasked to establish a program to address the shortage of foster and adoptive homes, and the purpose of the contract with AACS is to further this goal. R. at 3. According to the

Appellant, the purpose enforcing the EOCPA notice requirement is to provide all Evansburgh residents and taxpayers access to child placement services if they are qualified. R. at 9. However, the Appellant fails to adequately establish a nexus between notice requirement and the maintenance of residential access to child adoption services. *See Nollan*, 483 U.S. at 828; *see also Dole*, 483 U.S. at 205. The Appellant's unconstitutional condition compels AACS to waive its right to refrain from speech at the cost of government funding and its contract, but this condition directly contradicts with the governmental purpose to preserve access to adoption services. *See Nollan*, 483 U.S. at 828.

The germaneness link between the government funding and the unconstitutional condition is also unsatisfied under *Dole* because the funding was for the purpose of maintaining adoption services for the public, not for the unconstitutional condition imposed by the Appellant. *See Dole*, 483 U.S. at 208. Moreover, the Appellant's unjust referral freeze resulted in the wrongful placement of children and the denied placement with families who are better suited to foster or adopt the child. R. at 8. Had the Appellant refrained from enforcing the notice requirement under EOCPA and allowed AACS to exercise its First Amendment right and continue with its services, the Evansburgh residents, refugee children, and other foster children would be placed with the best homes that suit the children's best interests.

Furthermore, the notice condition under the EOCPA for government funding is not proportional to the governmental purpose. *See Dolan*, 512 U.S. at 386. Here, the Appellant fails its burden to establish "rough proportionality" because the condition goes too far by compelling speech at the cost of professional adoption services by a well-known adoption agency. *See id.* at 388-91. The case of *Rust v. Sullivan* does not provide proper guidance for the case at bar because the condition and limitations imposed by the government was germane and proportional to the

governmental program, but the limitations here are neither germane nor proportional. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). While the government can choose to fund programs that align with its own social views, the religious views and actions of AACS do not inhibit the operations of the program in a material manner. *See id.* Even if same-sex couples approached AACS for certification, AACS continued to assist such couples by referring them to other adoption agencies that would suit their needs. R. at 7. The contract between AACS and the government was to provide services Under both assessments of germaneness and proportionality, the Appellant wrongfully conditioned AACS' contract and the district court correctly granted the permanent injunction and TRO in favor of AACS.

B. Conditions May Not Penalize or Compel Speech from Individuals and HHS' Unconstitutional Condition Penalizes and Compels Speech from AACS

While all states have the ability to deny a governmental privilege or benefit to any person or entity operating in the state or impose conditions for such benefits, the state is still limited as to what the condition entails. *See Frost,* 271 U.S. at 593. "[T]he power of the state. . .is not unlimited; and one of those limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Id.* The government should not be allowed to make offers that have the potential to leave the recipient in a worse state if the recipient chooses to reject the offer. *See* Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE WESTERN RESERVE L. REV. at 106. Such offers are considered threats or at least offers with coercive conditions that usually require the recipient to reduce their utility or refrain from exercising their rights in some form. *Id.*

In the case of *Sherbert v. Verner*, the Supreme Court found that the disqualification for benefits can impose a burden on an individual's First Amendment rights, in that case the right was

a person's freedom of religion. *Sherbert*, 374 U.S. at 403. The appellant in *Sherbert* was forced to forego her state's unemployment benefits because the benefit conditioned her to refrain from her religious practice of not working on the Sabbath Day of her faith. *Id.* at 399-400. The appellant in the case argued that the South Carolina statute unconstitutionally conditioned the state's governmental benefits and imposed a burden that poses a threat to free exercise rights. *Id.* The Supreme Court stated, "'if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)). The Court further identified that the condition was coercive in nature because it forced the appellant to choose between exercising and expressing her religious beliefs, or "abandoning one of the precepts of her religion in order to accept work. . ." *Id.* Unless the state shows that such "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order," such conditions for government benefits are unconstitutional and should not be forced upon any citizen. *Id.* at 403.

Similarly, the Court in *Speiser v. Randall* determined that conditions on public benefits cannot be maintained if such conditions operate in a manner that reduces or deters an individual's exercise of First Amendment rights. *Speiser v. Randall*, 357 U.S. 513, 515 (1958). In that case, honorably discharged veterans applied for property tax exemptions under California law. *Id.* The application required applicants to sign an oath which stated, "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." *Id.* The veterans refused to sign the oath even though they could have signed the oath to obtain the government benefits, and voiced their views regardless. *Id.* As a result, each

veteran that did not endorse the oath had their applications denied. *Id.* The Court explained that the denial of the government benefit due to a claimant's engagement in certain forms of speech (or restraint of speech) unconstitutionally penalizes or coerces claimants to refrain from exercising their constitutional rights. *Id.* at 518-19. Such legislation that deals directly with speech and the expression of ideas in a detrimental manner should not continue to burden an individual's rights unless the state comes forward with sufficient proof to justify its restraint of such rights or freedoms. *Id.* at 529.

In the case at bar, the unconstitutional condition of coerced speech for government funding unjustly burdens AACS to either waive its right to free speech and exercise of religion or lose its crucial position to serve the Evansburgh community. *See Sherbert*, 374 U.S. at 399-400; *see also Speiser*, 357 U.S. at 518-519. AACS is forced to choose between two evils when the choice is not necessary to fulfill the governmental purpose of the program to connect children with certified adoptive families. While the effect of the Evansburgh legislation is indirect, the condition imposed by the Appellant is unconstitutional because it severely affects AACS' protected rights. *See Sherbert*, 374 U.S. at 404. It is unreasonable to compare the use of the unconstitutional conditions doctrine here to the facts presented in the *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)* case. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 48 (2006). In *FAIR* a group of law schools claimed implicit endorsement of a recruiter's message rather than the government's message by stating when recruiters are on campus. *See id.* The Court also stated that the use of the Solomon Amendment was necessary and effective to fuel the government interest in supporting military forces through recruitment efforts. *See id.* These facts are starkly different than this case. Moreover, the Appellant has failed to show how AACS' refusal to post a notice on its facility poses some "substantial threat" to the program. *See Sherbert*, 374 U.S. at 403.

Despite AACS' conscientious objection to follow the notice requirement under EOCPA, AACS continues to serve prospective same-sex parents by referring them to other adoption agencies who can better assist their needs**.** R. at 7. As a result of AACS' refusal to post such an "oath" on its facilities, children of various backgrounds have had their cases mishandled by the Appellant, which could have been avoided had the Appellant restrained from unconstitutionally penalizing and attempting to coerce AACS' posting of the Appellant's policy. *See Speiser*, 357 U.S. at 518-19. Under such precedence, and due to the increase in both the number of mishandled adoption cases, and increased need for competent services for children from Ethiopia, Iraq, Iran, and Syria, this Court should affirm the district court's ruling in favor of AACS. Doing so will allow AACS to continue to provide necessary services for Evansburgh's citizens and increase the number of correctly placed children with the most proper families based on the child's individual needs and interests.

CONCLUSION

The district court properly ruled in favor of AACS because HHS' conduct impedes on AACS' constitutionally protected right to free speech and exercise of religion. Moreover, Appellant's enforcement of the EOCPA unconstitutionally conditions its contract with AACS by forcing AACS to waive its First Amendment right or have AACS and the greater Evansburgh community suffer. Such actions are unconscionable and detriment the government's program to protect the best interests of the child.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d). I certify that this brief meets the technical rules approved by the Federal Rules for practice in the federal appellate courts and before appellate judges, and as specified in the Local Rules of this Court. Appelle's brief conforms to all page length and word limitations approved by the Federal Rules of Appellate Procedure.

By: Team 19

Attorneys for Appellee

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Brief for the Appellees was forwarded to all parties to this proceeding in compliance with Fed. R. App. P. 25, on this the 12th day of September 2020.

By: Team 19

Attorneys for Appellee