Case No. 2020-05

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

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

v.

AL-ADAB AL-MUFRAD CARE SERVICES,
PLAINTIFF-APPELLEE

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

BRIEF FOR PLAINTIFF-APPELLEE

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ISSUES PRESENTED

I. Whether the Government's refusal to grant AACS an exemption to an anti-discrimination statute based on AACS's sincerely held religious beliefs in traditional marriage violates the Free Exercise Clause and is necessary to serve the purported Governmental interest in eliminating discrimination in the adoption process when, in conjunction with the statutory exemptions, the Government has granted other individualized exceptions for analogous, non-religious purposes that contravene the language of the anti-discrimination statute?

II. Whether the Government violates the First Amendment free expression rights of AACS, an organization with a religious-based mandate, when the Government conditions the receipt of government funds on AACS's complying with the Government's non-discrimination message on same-sex marriage when the message is inimical to AACS's sincerely held religious beliefs and the Government's contract with AACS requires AACS to provide its recommendations on foster care placement?

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STATEMENT OF JURISDICTION

The United States Circuit Court of Appeals for the Fifteenth Circuit held for Defendant-Appellant, Christopher Hartwell in his official capacity as commissioner of Department of Health and Human Services and the City of Evansburgh on February 24, 2020. R. at 19. This Court granted Al-Adab Al-Mufrad Care Services' Petition for Rehearing En Banc on July 15, 2020. R. at 26. This jurisdiction of this Court over this matter is found in 28 U.S.C. § 1254 (1).

STATEMENT OF FACTS

Al-Adab Al-Mufrad Care Services (AACS) is one of thirty-four Child Placement Agencies with which the City of Evansburgh, East Virginia contracts to serve the approximately 17,000 children in its foster care system. R. at 3. On October 30, 2018, AACS filed an action against Evansburgh's Health and Human Services (HHS) Commissioner regarding HHS's enforcement of the Equal Opportunity Child Placement Act (EOCPA). R. at 8. AACS contends that HHS violated AACS's rights under the Free Exercise and Free Speech Clauses of the First Amendment when, under the EOCPA, HHS cancelled its contract with AACS because AACS refused to comply with the Government's endorsement of same-sex marriage. R. at 2, 7-8.

An Overview of Evansburgh's Foster Care and Adoption System and AACS

Evansburgh has an overworked foster care and adoption system, which HHS is tasked to oversee.[1] R. at 3. Part of the reason the system is overworked is the City's large refugee population from countries like Ethiopia, Iraq, Iran, and Syria. *Id.* In fact, as recently as August 2018, HHS's foster care system was under increased stress because of a rise of refugee children into Evansburgh. R. at 8. To assist with the system's operations, HHS contracts with thirty-four Child Placement Agencies regarding the placement of foster children. R. at 3. Notably, four of these Child

[1] The arguments put forth in this brief will refer to Evansburgh's foster care and adoption services interchangeably.

Placement Agencies specifically support the LGBTQ community, R. at 8, while AACS is likely the only Child Placement Agency to serve Evansburgh's Muslim refugee population, R. at 5.

AACS was founded in 1980 to support the refugee population in accordance with the teachings of the Qur'an. *Id.* Since 1980, AACS has placed thousands of children and almost daily helps dozens of special needs children and children surviving trauma. *Id.* AACS has also advised Evansburgh on relationships between sects of the Islamic community. R. at 9. For example, from 2013-15 AACS advised HHS that during a time of rising tensions between Sunni and Shia people, that HHS should place Muslim foster children with families only within their same sect. *Id.*

AACS's contract with HHS has been renewed annually since 1980 and the most recent contract between the parties was renewed on October 2, 2017. R. at 5. According to its contract, AACS must certify that prospective adoptive parents go through appropriate screening, training, and certification. *Id.* AACS's contract also requires that AACS be "'in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh.'" *Id.*

HHS provides the Child Placement Agencies with public funds in exchange for the Agencies' services that include conducting home studies, providing counseling, and making placement recommendations to HHS. R. at 3. When a child enters the foster care system, HHS sends a referral of the child to the Child Placement Agencies. *Id.* The Child Placement Agencies subsequently notify HHS of any potential families to match the child in question. *Id.* Once HHS receives the Agencies' placement recommendation, HHS decides which of the Agencies' recommendations it will accept, weighing factors like the child's race, age, sibling relationships, medical needs, and disabilities. *Id.* Section 37(d) of the East Virginia Code (E.V.C.) provides that HHS's final placement decision "'must be made on the basis of the best interests of the child.'" R. at 4. Section 37(e) of the E.V.C. further provides that when a Child Placement Agency makes a

placement recommendation it must compare the following characteristics of the child to those of the prospective parents: (1) the child's age; (2) the child's physical and emotional needs; and (3) the child's cultural and ethnic background. *Id.* Section 37(e) also provides that Agencies must consider whether the child can be placed with his or her siblings or half-siblings. *Id.*

If a family wishes to serve as foster or adoptive parents, the family reaches out to the Child Placement Agency. R. at 5. HHS's website advises prospective foster or adoptive families to contact the Agency that will provide the "'best fit'" for the parents so that parents work with the Agency that makes them feel "'confident and comfortable.'" *Id.* Although the website does not say so, HHS has advised that this message refers to pairing parents to special services such as training regarding special needs children. *Id.*

The EOCPA

In 1972, East Virginia adopted the first iteration of the EOCPA, which prohibited all foster and adoption agencies from discriminating on "'the basis of race, religion, national origin, sex, marital status, or disability'" when determining whether prospective foster and adoptive parents are fit to serve. R. at 4. However, the EOCPA requires that "when all other parental qualifications are equal [Agencies] must "'give preference'" to foster and adoptive families in which at least one parent is the same race as the child needing placement." *Id.* The EOCPA also prohibits municipal funding to Agencies that do not comply with the EOCPA. *Id.* HHS has, however, deviated from the EOCPA in two instances: (1) In March 2015, HHS refused to place a 5-year old girl with a potential foster family consisting of a father and son and (2) HHS placed a white special needs child with African American parents when there were Agencies recommending placement with white parents. R at 8-9. Regarding the placement of the white special needs child, HHS Commissioner Hartwell has advised that HHS interpreted the EOCPA provision regarding

providing preferential treatment to parents of the same race as the child as intending to protect minority children, not white children. R. at 9.

Recently, East Virginia amended the EOCPA. R. at 6. After the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 655 (2015), the Governor of East Virginia commissioned the State's Attorney General to determine which of the State's statutes needed updating in order "to reflect [the State's] commitment to 'eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry.'" *Id.* The EOCPA, as updated by HHS, now requires: (1) that Child Placement Agencies do not discriminate on the basis of sexual orientation; (2) Child Placement Agencies must give placement preference to parents who have the same sexual orientation as that of the foster child; (3) in order to receive government funds, Child Placement Agencies must sign and post the EOCPA's non-discrimination message and if religious-based organizations object to the EOCPA's message, they may include a written objection to the notice posting. *Id.* HHS Commissioner Hartwell has asserted that the EOCPA serves the following governmental interests: (1) enforcement of laws that Child Placement Agencies voluntarily contracted to abide by; (2) that all members of the Evansburgh community will have access to the Child Placement Agencies; (3) to diversify the pool of foster and adoptive parents; and (4) that individuals whose taxes support the Child Placement Agencies have access to the Agencies' services. R. at 9.

HHS's Cancelling of its Contract with AACS

Prompted by questions from a reporter, HHS Commissioner Hartwell learned in June 2018 that AACS was in non-compliance with the EOCPA. R. at 7, 8. Hartwell learned that AACS could not certify same-sex couples as qualified adoptive parents because doing so violates AACS's religious beliefs. R. at 7. Sahid Abu-Kane, AACS's Executive Director, advised Hartwell that

AACS would not conduct home studies for same-sex couples because the Qur'an and Hadith consider same-sex relationships to be immoral. *Id.* Abu-Kane stressed, however, that when same-sex couples sought AACS's assistance, AACS respectfully advised the couples that AACS could not help them and referred them to Agencies that served the LGBTQ community. *Id.* No formal complaints have been made against AACS for referring LGBTQ parents to other Agencies. *Id.*

On September 17, 2018, Hartwell informed AACS via letter that because AACS was non-compliant with the EOCPA, HHS would not go forward with AACS's contract renewal, scheduled for October 2018. *Id.* Hartwell's letter restated his discussion with Abu-Kane and acknowledged that AACS's "'sincerely held religious beliefs'" prohibited it from complying with the EOCPA. *Id.* Hartwell's letter further stated that AACS had contracted with HHS to provide a "'secular service,'" and therefore, AACS's compliance with the EOCPA was mandatory. *Id.* HHS subsequently instituted a referral freeze on AACS that would apply not only to referrals from HHS, but from the other Child Placement Agencies unless AACS provided HHS, within ten business days, assurance of AACS's future compliance with the EOCPA. *Id.* As a result of the referral freeze a woman who fostered a five-year old autistic boy was not allowed to adopt him and a young girl was not placed with her brothers because the placements were through AACS. R. at 8.

STATEMENT OF THE CASE

On October 30, 2018, AACS filed an action against HHS Commissioner Hartwell seeking a temporary restraining order against HHS's referral freeze and seeking a permanent injunction that would require HHS to renew its contract with AACS. R. at 8. AACS maintains that the EOCPA violates its First Amendment rights to free exercise and free speech. *Id.* On April 29, 2019, the United States District Court for the Western District of East Virginia granted AACS's temporary restraining order and permanent injunction. R. at 17. First, the court held the EOCPA

was neither neutral nor generally applicable. R. at 11-12. Therefore, the court subjected the statute to strict scrutiny, R. at 10, and determined that HHS's denying AACS an exemption from the EOCPA was not necessary to further the Government's interest in acting on behalf of foster children, R. at 14. Second, the court held that HHS's conditioning of municipal funds on AACS's certifying same-sex couples as qualified adoptive parents and posting HHS's non-discrimination message was unconstitutional because the funding requirements compelled AACS to speak the government's message, R. at 15, and because the program facilitated private speech, R. at 16.

On February 24, 2020, the United States Court of Appeals for the Fifteenth Circuit overturned the district court's holding and found in favor of HHS. R. at 18. The Fifteenth Circuit held that the EOCPA was neutral and generally applicable because (1) the Governor's statement equating AACS's beliefs to bigotry was not sufficiently hostile to suggest that AACS was treated differently than other groups and (2) the EOCPA's statutory exemptions do not apply to HHS and they are necessary to serve the interests of foster children. R. at 21-22. Additionally, this Court held that HHS's funding conditions were permissible because the government funded AACS's speech and because the EOCPA's notice provision required AACS to post factual speech. R. at 23-24. On July 15, 2020 this Court granted AACS's motion for a rehearing en banc. R. at 26.

SUMMARY OF THE ARGUMENT

I.

HHS's Enforcement of the EOCPA Renders it Neither Neutral nor Generally Applicable.

In order to properly balance religious and secular ideals and uphold the principles upon which the Free Exercise Clause operates, Plaintiff-Appellee respectfully requests this Court reverse its decision and affirm the ruling of the United States District Court for the Western District of East Virginia. The Free Exercise Clause mandates that the government not target religious

conduct; any regulation whose object is the suppression of religious beliefs and is not neutral or generally applicable is subject to strict scrutiny. The EOCPA is neither neutral nor generally applicable because the City of Evansburgh has singled out AACS because of its religious beliefs through a system riddled with individualized exemptions, enforced on an ad hoc basis by HHS.

HHS's Actions Against AACS Are Not Necessary to Serve a Compelling Government Interest.

When a statute fails to meet the neutrality or general applicability requirements of the Free Exercise Clause, it is subject to strict scrutiny, such that the regulation must be necessary to serve a compelling governmental interest. While eliminating all forms of discrimination within the adoption system is a legitimate governmental concern, HHS's system of individualized and ad hoc exemptions severely undermines HHS's interests to curb discrimination. Furthermore, refusing to grant an exemption to AACS is not necessary to serve them. The refusal to extend to AACS an exemption to the EOCPA based on its sincerely held religious beliefs demonstrates HHS's straying from neutrality in applying the regulation in question.

II.

HHS is Unconstitutionally Compelling AACS's Speech.

The government may not compel individuals to engage in speech that is personal and requires adherence to a particular ideology. Furthermore, the government may not compel individuals to act as couriers of its favored speech. Here, HHS unconstitutionally compels AACS's speech because, in order to receive government funds, AACS must comply with HHS's endorsement of same-sex marriage, even though doing so is against AACS's religious beliefs. Moreover, HHS requires AACS to sign and post the EOCPA. In doing so, HHS is unconstitutionally forcing AACS to act as a courier of HHS's favored speech.

HHS's Funding Condition is Outside the Scope of its Contract with AACS.

The government may use the power of its purse to promote policies and values that it views as favorable. However, the government exceeds the contours of its funding power when it regulates the speech of the *organization* that runs a government funded *program*. The government regulates the organization when the organization may not espouse views contrary to those of the government, even if it uses private funds to do so. Here, because the EOCPA requires AACS to certify same-sex couples as qualified adoptive parents, the regulation regulates the speech of AACS itself. Thus, even if using wholly private funds AACS would not be able to comply with the EOCPA, thereby making the non-discrimination requirement unconstitutional.

HHS's Contract with AACS Facilitates Private Speech.

When the government funds a program that facilitates private speech, it may not condition funding on private organizations' espousing the government's favored viewpoints. The government facilitates private speech when the nature of the government funded program requires individual expression. Here, HHS's contract with AACS facilitates private speech because AACS uses its professional discretion and analysis to make placement recommendations to HHS. By making a recommendation to HHS, AACS is not simply relaying HHS's speech, but engaging in its own speech.

ARGUMENT

East Virginia amended the EOCPA to bring the statute into compliance with the Court's holding in *Obergefell v. Hodges*, 576 U.S. 644 (2015). R. at 6. Ironically, however, the amended EOCPA disregards the careful balancing of interests the Court delineated in its watershed opinion. Specifically, in *Obergefell* the Court noted the inherent tension between protecting the rights of gay and lesbian couples and protecting the religious liberty rights of people who do not condone same-sex marriage on religious grounds. *Obergefell*, 576 U.S. at 672 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."). The Court balanced these competing interests by concluding that while *individuals* may decide not to condone same-sex marriage because of their religious beliefs, the *government* may not discriminate against same-sex couples. *Id.* There is no similar balancing of interests evident in the text of the EOCPA, which indiscriminately requires all organizations to comply with HHS's approval of same-sex marriage regardless of the organization's sincerely held religious beliefs. R. at 6. Accordingly, this Court should reverse its decision and affirm the district court's holding.

Standard of Review

The district court's decision granting AACS's request for a temporary restraining order and permanent injunction, R. at 17, is reviewed for an abuse of discretion, *Cummings v. Connell,* 316 F.3d 886, 897 (9th Cir. 2003). The issue in the case at hand, whether HHS has violated AACS's free exercise and free speech rights under the First Amendment, is a question of law. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Under *de novo* standard of review, this Court owes no deference to the lower court's decision. *Id.*

I. THE GOVERNMENT HAS VIOLATED AACS'S FREE EXERCISE RIGHTS BECAUSE IT HAS NOT APPLIED THE EOCPA IN A NEUTRAL, GENERALLY APPLICABLE MANNER TREATING ANALOGOUS RELIGIOUS AND NON-RELIGIOUS CONDUCT EQUALLY AND IS THUS SUBJECT TO STRICT SCRUTINY.

This Court should reverse its holding and affirm the district court's decision because enforcement of the EOCPA against AACS violates AACS's free exercise rights. The United States Constitution guarantees free exercise of religion under the First Amendment, applicable to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), in that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. amend. I. Under the Free Exercise Clause, a regulation targeting religious beliefs is not permissible. *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). Any regulation that targets religious beliefs and is not neutral or of "general application" is subject to strict scrutiny, such that the regulation must serve a compelling governmental interest and be narrowly tailored to achieve that end. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Further, a regulation that is neutral on its face may nonetheless violate the Free Exercise Clause if it burdens the exercise of religion in its application. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

This case invokes the balancing of two pivotal constitutional interests: the ability of the government to prevent discrimination against same-sex couples and the ability and right of the individual to exercise, freely and openly, their fundamental First Amendment rights. In the present case, HHS has violated AACS's free exercise rights, as guaranteed by the First Amendment. The EOCPA is not neutral or generally applicable because the statute grants numerous exceptions that require the Government to contemplate some form of discrimination in conjunction with the Government's inconsistent grant of individualized exemptions from the anti-discrimination

policies of the EOCPA. Furthermore, the EOCPA does not meet strict scrutiny because HHS's refusal to renew AACS's contract with the City imposition of a referral freeze are not necessary to serve the purported governmental interests. Accordingly, this Court should affirm the decision of the district court.

A. The Government's Ad Hoc Grant Of Exemptions To The EOCPA And Refusal To Extend Such Exemptions To AACS Based On AACS'S Religious Beliefs Renders The EOCPA Neither Neutral Nor Generally Applicable.

The Government's enforcement of the EOCPA is violative of the Free Exercise Clause because both the statutory exemptions and HHS's individualized grant of exemptions to the regulation render the EOCPA neither neutral nor generally applicable. Neutrality and general applicability are "interrelated" and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. In an otherwise facially neutral statute, if the object of the law is the suppression of religion, the neutrality requirement of the Free Exercise Clause is violated. *Id.* at 542. In applying a facially neutral law, the government contravenes the neutrality requirement if they exempt secular conduct but not analogous religious conduct. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, at 165-66 (3d Cir. 2002). A regulation that operates as a "system of individualized exemptions" is not neutral or generally applicable. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (stating that "a double standard is not a neutral standard"). Further, a regulation is not generally applicable if it protects secular conduct to a greater extent than it protects comparable religious conduct. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1233 (11th Cir. 2004).

1. The Government's Enforcement Of The EOCPA Against AACS Because Of AACS's Religious Beliefs While Granting Exemptions To The EOCPA For Non-Religious Conduct Renders The EOCPA Not Neutral In Operation.

Beyond facial neutrality, a regulation must be neutral in operation and religious conduct may not be the target thereof. *Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014); *see also Lukumi*, 508 U.S. at 534. In *Central Rabbinical Congress*, New York City's Board of Health passed a regulation that banned the practice of direct oral suction during a circumcision procedure absent consent from the guardian of the child on which the operation was being performed. 763 F.3d at 191. The court held that the regulation was not neutral in operation because "as a practical matter" the only conduct the regulation controlled was the Jewish practice of "metzitzah b'peh" and, as such, the regulation was subject to strict scrutiny. *Id.* at 195.

To enforce the statute on a "religion-neutral basis," the government may not single out a particular religion. *Tenafly*, 309 F.3d at 167. In *Tenafly*, a statute prohibited the placement of certain materials, including signs and advertisements, on utility poles in public streets. *Id.* at 151. The statute did not provide for any exemptions, but in practice many exemptions were granted for church signs, lost animal posters, holiday displays, among other secular and non-secular purposes. *Id.* However, when an Orthodox Jewish group sought to attach religious symbols to the utility poles, the city council did not grant an exemption and forced the group to remove the symbols. *Id.* at 154. The court held that the city's selective enforcement of the statute against the Orthodox Jewish group violated the neutrality principles of the Free Exercise Clause because it "single[d] out the plaintiffs' religiously motivated conduct for discriminatory treatment," and, as such, the city's actions were subject to strict scrutiny. *Id.* at 168, 172.

If the purpose of a regulation is to "restrict practices because of their religious motivation," the regulation fails the neutrality requirement and will be subject to strict scrutiny. *Lukumi*, 508 U.S. at 532; *see also, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (1999) (holding that a statute that contained a medical exemption, but did not likewise grant a religious exemption to a statute, where granting the exemption for a religious purpose would have equally furthered the proffered governmental interests, the government was making a value judgment favoring "secular motivations" over religious motivations.). In *Lukumi*, a series of ordinances restricted the practice of animal sacrifice. *Id.* at 534. The Court held that, by examining the effect of the ordinances, it was clear that their purpose was to suppress animal killings exclusively within the Santeria religion and exclude animal killings outside of that context although the same governmental interests were implicated. *Id.* at 535-37. Because of the legislative "gerrymander," the burden of the ordinance's restriction fell exclusively upon the Santeria religion, triggering strict scrutiny. *Id.* at 536.

Even in the most subtle contexts the government may stray from the neutrality requirement of the Free Exercise Clause. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*¸ 168 S. Ct. 1719, 1731 (2018). In *Masterpiece Cakeshop*, an expert baker, a devout Christian, declined to design a wedding cake for a same-sex couple who sought his services. *Id*. at 1724. The couple filed a complaint alleging unequal service based on their sexual orientation. *Id.* at 1725. The Court held that the commission responsible for enforcing the anti-discrimination statute cannot "impose regulations that are hostile to religious beliefs" and cannot pass judgment upon a person's religious convictions. *Id.* at 1731. Factors such as decisionmakers' statements about religion and historical background of a decision can be considered when assessing government neutrality. *Id.*; *See also Lukumi*, 508 U.S. at 540 (stating "[r]elevant evidence [of discriminatory intent] includes, among

other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body").

In the present case, the EOCPA is not neutral in operation because, as a practical matter, religious beliefs, namely those of AACS, have borne the burden of the EOCPA, while non-religious purposes for exemptions have been granted. Like *Tenafly*, where the city enforced an ordinance against an Orthodox Jewish organization after not having enforced the ordinance against other analogous religious and non-religious conduct, 309 F.3d at 167, HHS has enforced the EOCPA against AACS after its assertion of its sincerely held religious beliefs, while HHS has not enforced the system of individualized mandates evenhandedly for analogous, non-religious purposes, R. at 8, 9. Despite the language in the EOCPA prohibiting discrimination based on "race, religion, national original, sex, marital status, or disability," R. at 4, HHS does discriminate based on these categories. For example, HHS discriminated based on race when it placed a white special needs child with African American parents when there were certified parents of the child's same race. R. at 8. Additionally, HHS discriminated based on sex when refusing to place a female child with a father and son. *Id.* Thus, when HHS refused to grant AACS an exemption from the EOCPA's non-discrimination requirement based on AACS's sincerely held religious beliefs, HHS contravened the neutrality requirement of the Free Exercise Clause. R. at 7. Further, similar to *Lukumi*, where the Court held that the government's singling out the Santeria religion demonstrated its lack of neutrality, HHS violates the neutrality requirements of the Free Exercise Clause because it has passed judgment upon AACS's religious beliefs in determining that its religious motivations are not worthy of an exemption to the EOCPA, while analogous, non-religious conduct is worthy of exemptions. R. 7, 8, 9. HHS has showcased its disfavor with

AACS's religious beliefs in traditional marriage by not granting it an exemption to the EOCPA, while allowing exemptions for other forms of discrimination. *Id.*

Evidence that the government has strayed from neutrality and passed judgment upon AACS's sincerely held religious convictions is observable in the Governor of East Virginia's comments equating AACS's belief in traditional marriage to "bigotry." R. at 6. In *Masterpiece Cakeshop*, the Court held that evidence of government hostility toward religious convictions can be found in statements made by decisionmakers enforcing a regulation. 168 S. Ct. at 1731. Additionally, in *Lukumi*, "contemporaneous statements" made by decisionmakers can be considered when assessing government neutrality. 508 U.S. at 540. Similar to *Masterpiece Cakeshop* and *Lukumi*, the Governor of East Virginia, the individual responsible for directing the Attorney General to enforce the EOCPA, equates traditional marriage with bigotry. R. at 6. This statement by the Governor demonstrates a hostility toward religion, which the Free Exercise Clause does not tolerate.

2. The Government's Ad Hoc Grant Of Individualized Exemptions To The EOCPA And Refusal To Extend Such An Exemption To AACS Creates a System of Individualized Exemptions Rather than a Generally Applicable Policy.

Regulations that are "exception-ridden" may operate as a "system of individualized exemptions, the antithesis of a neutral and generally applicable policy" and, as such, must satisfy strict scrutiny. *Ward*, 667 F.3d at 740 (6th Cir. 2012); *see also Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (stating that "[a]s a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law."). In *Ward*, the plaintiff, as a university guidance counselor, sought to reassign a student to a different guidance counselor because of her objections to the student's same-sex relationship, the topic of the counseling. 667 F.3d at 731. The school eventually expelled the plaintiff for violating the school's code of ethics.

Id. The court held that because the school had granted numerous other reassignments for various other secular reasons that the university had impermissibly expelled the plaintiff. *Id.* at 740.

A regulation that does not include a mechanism for individualized or categorical exemptions is generally applicable. *Bowen v. Roy*, 476 U.S. 693, 708 (1986); *see also Fraternal Order of Police*, 170 F.3d at 365 (1999) (holding that the Court's concern in *Lukumi* and *Employment Division v. Smith* was the "prospect of the government's deciding that secular motivations are more important than religious motivations," where the government creates a mechanism for exemptions for secular purposes, but not religious purposes.). In *Bowen*, the appellees objected to their daughter's receiving of a social security number on the basis that receiving a social security number violated their Native American religious practices. *Id.* at 695. Thereafter, appellees' social security benefits were reduced. *Id.* The Court held that because every applicant for social security benefits must provide a social security number and there are no individualized exemptions in the statute, nothing in the social security statutes suggested religious discrimination. *Id.* at 708-09.

Substantially underinclusive regulations that regulate religious conduct while ignoring secular conduct that is "at least as harmful to the legitimate government interests purportedly justifying it" are not generally applicable. *Central Rabbinical Congress*, 763 F.3d at 197. In *Central Rabbinical Congress*, the intent of the New York City Board of Health's regulation was to eliminate the risk of infants contracting herpes simplex virus from the procedure. *Id.* The regulation's statement of purpose explicitly stated that it was intended to regulate the Jewish practice of "metzitzah b'peh." *Id.* The court held that the regulation was not generally applicable because it was substantially underinclusive in that the regulation exclusively applies to only

religious conduct, while not regulating secular conduct that caused the infection in infants at similar rates. *Id.* at 197. Thus, the regulation was subject to strict scrutiny. *Id.*

In the present case, the EOCPA is not a generally applicable regulation because it is a system of individualized exceptions, which HHS has not equally applied to AACS. In *Ward*, a university expelled a student counselor for violating the university's anti-discrimination policy after the student refused to counsel a homosexual individual about a same-sex relationship. 667 F.3d at 731. The university had, however, granted numerous exceptions to the anti-discrimination policy for various other reasons, thus the policy was not "even-handed" or "faith-neutral." *Id.* at 739. Similar to *Ward*, the EOCPA operates as a system of individualized exemptions to the EOCPA, thus rendering the regulation not generally applicable. The E.V.C. § 42-.2(b) states that "when all other parental qualifications are equal, Child Placement Agencies must 'give preference' to foster or adoptive families in which at least one parent is the same race as the child needing placement." R. at 4. Additional factors included in the E.V.C. include: the age of the child and parents; personality of the child and parents; the cultural and ethnic backgrounds of the child and the parents; and presence of siblings within adopting homes. *Id.* The EOCPA was amended to include provisions for sexual orientation requiring preference to be given to parents who share the same sexual orientation as that of the child. *Id.* § 42-.3(c).

Unlike *Bowen*, where the statute required every applicant for social security benefits to provide a social security number, 476 U.S. at 708-09, HHS, through the EOCPA, has created a system of individualized exemptions, which have not been applied equally to AACS. R. at 8, 9. Despite the mandate of the EOCPA against discrimination based on race, religion, ethnicity, sex, disability, or sexual orientation, R. at 6, HHS has granted a number of individualized exemptions, R. at 8, 9. HHS has refused to place a young girl in a household consisting of only a father and

son. R. at 9. Despite the Government's preferences for placement of children in families of their same race, HHS placed a white child with special needs in an African American household. R. at 8-9. HHS has allowed AACS to delay placement of Muslim children in order to place the children in households consisting of parents from the same sect of Islam as the child. R. at 9. The use of this system of individualized, ad hoc exemptions undermines the government's argument that the EOCPA is a generally applicable statute because it has not been applied even-handedly in the case of religious convictions held by AACS.

Lastly, the EOCPA is substantially underinclusive such that it has been enforced because of AACS's religious convictions while ignoring non-religious reasons for discrimination, granted by HHS on an ad hoc basis, that contravene the purported interests of the Government. In *Central Rabbinical Congress*, the court held that a regulation that only applied in a religious context was underinclusive where the interests of the government could have been better served if the regulation applied even-handedly to non-religious contexts. 763 F.3d at 197. Similar to *Central Rabbinical Congress*, the enforcement of the EOCPA is underinclusive—applying to religiously motivated conduct and ignoring secularly motivated conduct that is just as harmful to the government's interests. R. at 7-9. The EOCPA includes an exemption allowing adoption agencies to "give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." R. at 6. The EOCPA is not generally applicable because it permits discrimination on the basis of race, sex, and sexual orientation for non-religious reasons, while not extending an exemption to AACS for an analogous, religiously motivated reason. R. at 8. The same governmental interests are implicated when an exemption is permitted, regardless of the motivation. The Government argues that its interest in "eradicating discrimination in all forms," R. at 6, is the reason for denying AACS an exemption, R. at 7. However, HHS was seemingly not

concerned about discrimination when it approved discrimination on the basis of sex when placing a white special needs child with African American parents when there were certified parents of the child's same race, R. at 8, or when it refused to place a female child with a father in son, *Id.,* all against the backdrop of a city plagued with chronic foster home shortages, R. at 3, and AACS has been at the forefront of serving the City's diverse refugee population. R. at 3, 5.

B. The EOCPA Is Subject To Strict Scrutiny Because It Operates As A System Of Individualized And Categorical Exemptions Not Extended Equally To Both Religious And Non-Religious Conduct.

The Government's enforcement of the EOCPA is subject to strict scrutiny because it is not neutral nor generally applicable. *See Lukumi*, 508 U.S. at 546; *see also Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 873 (1990) (stating that "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") (quoting *Bowen v. Roy*, 476 U.S. at 708). Further, a neutral, generally applicable regulation may still fail strict scrutiny if it fails to advance a substantial government interest and be narrowly tailored to achieve that interest.[2] *Lukumi*, 508 U.S. at 546. The government must justify its actions against religion that are neither neutral nor generally applicable with a compelling interest that is accomplished through the least restrictive means necessary.[3] *See Thomas v. Review Bd. Of Indiana Employment Sec. Division*, 450 U.S. 707,

[2] The Court in *Smith* held that the government need not justify burdens on religious conduct if the regulation in question is neutral and generally applicable; however, thirty-three states have rejected the *Smith* standard by enacting subsequent legislation or subjecting neutral and generally applicable laws that burden religious conduct to strict scrutiny. *See* Douglas Laycock & Steven, *Generally Applicable Law and the Free Exercise of Religion*, T. Collis, 95 Neb. L. Rev. 1, 3 (2016).

[3] Six circuits interpret *Smith* as applying strict scrutiny to only regulations that are *not* neutral or generally applicable. In either case, the EOCPA is subject to strict scrutiny because it meets the *Smith* standard of causing religious hardship and the law is not neutral or generally applicable. *See id.*

718 (1981). Indeed, HHS's unwillingness to renew AACS's contract contradicts the purported interests in protecting foster care children given the current nationwide shortage of foster care families. *See* Maggie Wong Cockayne, *Foster to Adopt: Pipeline to Failure and the Need for Concurrent Planning Reform*, 60 Santa Clara L. Rev. 151, 168-69 (2020) ("Foster care capacity has decreased in at least half of the states between 2012 and 2017").

A regulation that entails individualized and categorical exemptions for non-religious conduct, but not for religious conduct, triggers strict scrutiny. *Blackhawk v. Pennsylvania*¸ 381 F.3d 202, 212 (2004). In *Blackhawk*, the plaintiff sought an exemption from a state code requiring a permit to purchase two bear cubs, in his case, for Native American religious purposes and obtaining a permit would cause him financial hardship. *Id.* at 205. The state code provided for exemptions to the permit requirement "where hardship or extraordinary circumstances" were present as long as the exemption was "consistent with sound game or wildlife management activities or the intent" of the state code. *Id.* The court held that the state code was not generally applicable because the code created a system of individualized, discretionary exemptions for "entirely secular reasons," but did not extend those exemptions for the religious reasons offered by the plaintiff. *Id.* at 209-10, 212. Thus, the state code was subject to strict scrutiny since it provided individualized exemptions for non-religious reasons that individuals could keep animals. *Id.* at 212.

The government will fail strict scrutiny where the proffered governmental interests could be achieved by a narrower regulation that does not improperly distinguish between religious and non-religious conduct. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (2004). In *Surfside*, an ordinance divided the city into different zoning districts, only one of which allowed the presence of churches and synagogues. 366 F.3d at 1219. The plaintiffs sought a special use

permit to continue its synagogue services in the business district of the city. *Id.* at 1220. The court held that the ordinance did not meet strict scrutiny because it was "overinclusive and underinclusive in substantial respects." *Id.* at 1235. Overall, the ordinance treated religious and non-religious conduct on unequal terms and the interests of the city, namely "retail synergy," could be achieved by a narrower ordinance that did not treat analogous religious and non-religious conduct differently. *Id.*

In the present case, the Government, while extending its system of individualized and categorical exemptions for non-religious purposes, has not extended that system to AACS because of its religious beliefs, thus triggering strict scrutiny. Similar to *Blackhawk*, where the city refused to extend an exemption for religious purposes, F.3d 202 at 209-10, 212, HHS has created a mechanism for individualized and categorical exemptions through the EOCPA and h not extended this system to AACS because of its sincerely held religious beliefs causing AACS religious hardship, thereby triggering strict scrutiny. R. at 8, 12, 13. To meet strict scrutiny, the government will have to demonstrate that the actions are necessary to serve a compelling governmental interest. *See Blackhawk*, F.3d 202 at 212; *see also Smith*, 494 U.S. at 873. Although the Government maintains it has an interest in "eradicating discrimination in all forms," R. at 6, the E.V.C. and the EOCPA are highly selective mechanisms, each with a list of factors that require contemplation of discrimination by HHS when placing a child in an adoptive home, R. at 4, 6.

Furthermore, HHS's threat of an immediate referral freeze and unwillingness to renew AACS's contract with the City undermines the purported governmental interests in providing accessible child placement services and creating a diverse pool of foster and adoptive parents to meet the needs of diverse children when the City of Evansburgh has a large refugee population and approximately 17,000 children in its foster care system. R. at 3, 13. In *Surfside*, the court held

that the proffered governmental interests in "retail synergy" could be achieved through a narrower means instead of delegating where religious places of worship could be located. 366 F.3d at 1235. Similar to *Surfside*, the interests of the Government, here the care of foster children, can be achieved through a narrower means than a referral freeze on AACS. Such a referral freeze would directly contravene the Government's interest in protecting foster children, especially in light of a nationwide shortage of foster families. *See* Cockayne, *supra*, at 168-69 (2020). Since 1980, AACS has placed thousands of children and almost daily helps dozens of special needs children and children surviving trauma. R. at 5. Additionally, there are four other adoption agencies within the City that directly serve its LGBTQ population. R. at 8. AACS has always treated prospective LGBTQ parents with respect and no formal complaints have been made against AACS for referring LGBTQ parents to other Agencies. R. at 7. Given these facts, neither the termination of AACS's contract with the City, nor an immediate referral freeze is necessary to serve the Government's interests.

II. HHS'S REQUIRING AACS TO CERTIFY THAT SAME-SEX COUPLES ARE QUALIFIED ADOPTIVE PARENTS IS AN UNCONSTITUTIONAL CONDITION BECAUSE, IN ORDER TO RECEIVE MUNICIPAL FUNDING, HHS REQUIRES AACS TO ESPOUSE A POSITION THAT IS INIMICAL TO ITS SINCERELY HELD RELIGIOUS BELIEFS.

The EOCPA is unconstitutional because it conditions the receipt of municipal funds on AACS's certifying that same-sex couples are qualified adoptive parents, a position that is inimical to AACS's sincerely held religious beliefs and, in turn, violative of AACS's First Amendment rights. While the government has the right to fund, and therefore favor, certain types of speech over others, the government may not do so at the cost of suppressing an organization's First Amendment right to free expression. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l* (*AOSI*), 570 U.S. 205, 213-14 (2013). The government cannot use its might as a vehicle to subdue protected

views that are different than its own. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (stating that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"). As such, the government's conditioning of funds infringes on an organization's First Amendment rights and, in turn, is unconstitutional if (1) the government compels an organization to engage in speech of the type the First Amendment is intended to protect, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); (2) the government's funding condition is outside the scope of the government program, *AOSI*, 570 U.S. at 214-15; or (3) the government's funding program facilitates private speech, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

Here, HHS's requiring AACS to certify same-sex couples as qualified adoptive parents, R. at 7, is an unconstitutional condition because (1) HHS is regulating AACS's views on the validity of marriage, which are views that are profoundly personal and of the type the First Amendment was intended to protect; (2) HHS's funding condition regulates the actions of AACS as a whole, as opposed to a particular HHS funded program, because even if privately funded AACS cannot comply with HHS's non-discrimination requirement; and (3) HHS's requiring AACS to provide its recommendation on foster care placements constitutes facilitating private speech. By conditioning government funding on AACS's relinquishing its belief in traditional marriage, HHS has ignored the careful balancing of religious liberty and LGBTQ rights the Court denoted in *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (recognizing the need to balance the religious belief rights of individuals who do not condone same-sex marriage with same-sex couples' right to marriage).

A. HHS Unconstitutionally Compels AACS's Speech Because HHS Requires AACS To Adhere To An Ideology That Infringes On Beliefs That Are Profoundly Personal And Central To AACS's Mandate To Follow The Teachings Of The Qur'an.

The First Amendment prohibits the government from dictating what people are required to say. *Rumsfeld v. Forum for Acad. & Inst'l. Rights, Inc. (FAIR)*, 547 U.S. 47, 61 (2006). However, determining whether the government is compelling speech lies in the amorphous test of determining whether the government is regulating the type of speech the First Amendment was intended to protect. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). The Court has specified this test by holding that the government compels speech if it regulates the substance of a message as opposed to speech incidental to conduct. *FAIR*, 547 U.S. at 61-62.

The government cannot require individuals to adhere to a particular ideology where doing so infringes on the types of personal freedoms the First Amendment was designed to safeguard. *Barnette*, 319 U.S. at 642. In *Barnette*, the state passed a statute requiring school children to salute and pledge allegiance to the American flag. *Id.* at 626. The plaintiffs challenged the statute as unconstitutional under the First Amendment because the statute required them to salute an image, which is inimical to their religious beliefs. *Id.* at 629. The Court held that the statute was unconstitutional because the government was regulating speech that is profoundly personal. *Id.* at 642 (characterizing the mandatory flag salute and pledge of allegiance as "invad[ing] the sphere of intellect and spirit which it is the purpose of the First Amendment" to protect). Notably, Justices Black and Douglas acknowledged that religious freedom rights cannot allow individuals to flout the law in a way that can be harmful to others, but they discerned that compelling speech was not the mechanism to mitigate any potential harm. *Id.* at 643-44 (Black, J., concurring). Thus, Justices Black and Douglas suggest that even in an attempt to protect rights held by others, the government may not compel speech to fit the government's favored ideology. *Id.*

Another indicator that the government is impermissibly compelling speech is if the government forces individuals to act as "courier[s]" of the government's message. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). In *Wooley*, the government required all noncommercial vehicles with New Hampshire license plates to carry the message "Live Free or Die." *Id.* at 707. The plaintiffs challenged the statute, claiming that the message requirement conflicted with their First Amendment religious freedom rights. *Id.* at 709. In holding that the message requirement was unconstitutional, the Court was persuaded by the fact that cars are so central to daily life that the government was essentially forcing the plaintiffs to make the government's message ubiquitous. *Id.* at 715. The Court further reasoned that the government's message requirement was unconstitutional because it forced acceptance of a majority opinion. *Id.* (stating "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable"). Thus, regardless of how acceptable a particular view may be in the eyes of the government, or even to a majority of citizens, the government cannot require individuals to adopt the contested view.

Conversely, the government does not compel speech when the focus of the regulation is conduct, not speech related to the conduct. *FAIR*, 547 U.S. at 62. In *FAIR*, the government conditioned federal funds on schools' giving military recruiters the same level of access to students as nonmilitary recruiters. *Id.* at 51. In doing so, schools were required to send students e-mails and flyers on behalf of the military. *Id.* at 61. In holding that these actions did not constitute compelled speech, the Court reasoned that the government was regulating the conduct of the schools, that is, requiring that they provide equal student access to military recruiters, and any invocation of speech, such as e-mails and flyers, was purely incidental to the requisite conduct. *Id.* at 62. The Court further reasoned that the contested government requirement in *FAIR* was distinct from those

in *Barnette* and *Wooley* because the government did not require schools to subscribe to any particular ideology when enforcing the equal access requirement. *Id.*

Like the government in *Barnette*, HHS here is regulating speech of the type the First Amendment was intended to protect because HHS's non-discrimination requirement involves a profoundly personal subject. Marriage is foundational to American society. *Obergefell*, 576 U.S. at 669 (stating that "marriage is a keystone of [American] social order"). As such, views on the sanctity and validity of marriage are profoundly personal and certainly within "the sphere of intellect and spirit which it is the purpose of the First Amendment" to protect. *Barnette*, 319 U.S. at 642. By requiring that AACS endorse same-sex marriage, HHS forces AACS to abandon not only its religious beliefs, but also AACS's mandate to place foster children according to the tenets of the Qur'an. R. at 5. HHS's action here is no different than that of the government in *Barnette*, where the plaintiffs were required to abandon their religious beliefs and salute and pledge allegiance to the American flag. *Barnette*, 319 U.S. at 626, 228. Thus, as in *Barnette*, HHS is impermissibly compelling AACS to subscribe to speech of a profoundly personal nature that the Government views as favorable.

HHS will likely argue that it has an interest in compelling speech that protects same-sex couples because, as Justices Black and Douglas noted in *Barnette*, protecting one group's First Amendment rights cannot be a foil for disparaging the rights of another group. *Id.* at 643-44 (Black, J., concurring). However, Justices Black and Douglas resolved in *Barnette* that the government's compelling speech is not a permissible mechanism to protect the rights of others. *Id.* Furthermore, HHS's insinuation that respecting AACS's right to believe in traditional marriage harms the LGBTQ community disregards the fact that there are four Child Placement Agencies in Evansburgh that serve the LGBTQ population. R. at 8. Furthermore, HHS's own website

designates that some Child Placement Agencies may present a better fit for prospective adoptive parents than other agencies. R. at 5. Thus, HHS does not have to compel AACS to endorse same-sex marriage in order to ensure that prospective same-sex parents are represented and protected.[4]

In addition to compelling speech that is profoundly personal, HHS is also forcing AACS to act as a "courier" of HHS's message. *Wooley*, 430 U.S. at 717. HHS's notice requirement is similar to the messaging requirement in *Wooley* because HHS requires a private party to display its message and because the notice requirement is so overbroad. R. at 6. The EOCPA requires Child Placement Agencies to post and sign a notice dictating HHS's stance on same-sex couples' qualifications to be adoptive parents. *Id.* Furthermore, the EOCPA requires the notice to be visible at all times the business is in operation, not only, for example, when providing services to same-sex couples. *Id.* The breadth of the notice requirement is so pervasive that it is similar to New Hampshire's requiring the message "Live Free or Die" on all noncommercial license plates at all times and is, therefore, unconstitutional. *Wooley*, 420 U.S. at 707.

HHS's notice requirement is unlike the recruiting materials in *FAIR* because here, the Child Placement Agencies are forced not only to post the EOCPA's non-discrimination message, but also to sign the posting.[5] R. at 6. In this way, HHS's mandated speech requirement extends beyond those in *FAIR* and even those in *Wooley*. In *FAIR* the government simply required schools to relay military recruiting materials to students. *FAIR*, 547 U.S. at 61. In *Wooley*, while New Hampshire required individuals to display the state's message at all times, it did not require individuals to sign the message. *Wooley*, 420 U.S. at 707. Because HHS not only requires AACS to subscribe to its

[4] Notably, by cutting funding to AACS, HHS implicitly favored Evansburgh's LGBTQ population over its Muslim refugee population because AACS is likely the only Child Placement Agency that serves the refugee population according to the teachings of the Qur'an. R. at 5.

[5] It is true that the Government allows religious-based Child Placement Agencies to post a written objection to the notice. R. at 6. However, allowing an objection does not discount the fact that the Government is requiring AACS to not only post the notice, but also to sign it. *Id.*

view on a deeply personal subject but also requires AACS to sign and display HHS's messaging at all times, HHS is impermissibly compelling AACS's speech. R. at 6.

B. Requiring AACS To Certify Same-Sex Couples As Qualified Adoptive Parents Is Outside The Scope Of HHS's Contract With AACS Because Even If AACS Were To Operate With Solely Private Funds, The EOCPA Would Still Prohibit AACS From Making Foster Care Placements.

The government has a right to use its financial power to promote policies and values that it views as favorable. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that government may make a "value judgment" in its "allocation of public funds"). Thus, when the government funds a program, it may regulate the policies that program espouses.[6] *Rust*, 500 U.S. at 194-95. However, the government may not, as a condition of funding, regulate the values and policies of the *organization* that runs the *program*. *AOSI*, 570 U.S. at 217. Conditioning funding on the organization's policies is outside the scope of the government's program funding, and is therefore unconstitutional, because the government is requiring the organization to adhere to viewpoints the government deems favorable. *Id.* at 214-15.

Government funding conditions regulate the organization, rather than the program, when even if the organization uses private funds to espouse policies contrary to those of the government, the organization is unable to comply with the government's funding conditions. *Id.* at 218. In *AOSI* the federal government provided funds to non-governmental organizations to fight the global spread of HIV/AIDS. *Id.* at 208. The Court held that the government's condition that, in order to receive federal funds, organizations must adopt policies opposing prostitution and sex trafficking was unconstitutional. *Id.* at 221. The Court recognized that the government's funding requirement mandated the speech of the organizations, but conceded that, in general, if an organization does

[6] *See infra* Sect. II (C) for discussion distinguishing when a government funded program constitutes government speech as opposed to private speech.

not wish to conform to a funding condition, the organization may simply reject the government funds. *Id.* at 213. However, the Court reasoned that the key flaw in the government's funding condition at issue was that even if the organization decided to accept federal funds for the government program, the *organization* could not adhere to the government's policy position and then, via a privately funded program, support an opposing view. *Id.* at 218. Thus, the government's funding condition was unconstitutional because it exceeded the scope of the program it was funding and attempted to regulate the speech of the organizations running the program. *Id.* at 221.

A similar unconstitutional funding condition was at issue in *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364, 366 (1984), where the government conditioned federal funds for public broadcast stations on the stations' not editorializing content. The Court held that the government's funding condition was unconstitutional because even if a broadcast station used private funds for certain content, the *station itself* would still be banned from editorializing if it accepted any federal funds at all. *Id.* at 401. Thus, the government's funding condition regulated the actions of the organization itself.

Conversely, government funding conditions are permissible when they are limited to regulating the program the government is funding. *Rust*, 500 U.S. at 197-98. In *Rust*, the government gave organizations funding for Title X family planning services so long as those organizations did not offer abortion referrals or advice. *Id.* The Court held that this condition was permissible because the condition regulated the organization's actions only insofar as the actions were related to a Title X project. *Id.* at 196-97. The Court reasoned that although agents of the organization must comply with the Title X requirements when working on a Title X project, the organization's agents could, in a separate capacity, partake in abortion guidance prohibited by Title X. *Id.* at 198. In its analysis, the Court balanced the government's right to promote ideas it views

as favorable while simultaneously balancing the First Amendment rights of individuals involved with government projects. *See Id.* at 196 (stating that the government is "simply insisting that public funds be spent for the purposes for which they were authorized. [The regulations] do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities").

Here, HHS's conditioning of government funds is unconstitutional because AACS cannot, even with private funds, comply with the language of the EOCPA and adhere to its sincerely held religious beliefs. In pertinent part, the EOCPA "prohibit[s] Child Placement Agencies from discriminating on the basis of sexual orientation." R. at 6. Thus, even if AACS used wholly private funds to place foster children, the *organization* would still be in non-compliance with the EOCPA if it declines to certify same-sex couples as qualified adoptive parents because the statute does not allow for an organization to disagree with HHS's categorical acceptance of same-sex couples. In this way the EOCPA's non-discrimination condition is similar to the funding conditions in *AOSI* and *League of Women Voters of California* because in both precedent cases the government's funding conditions impermissibly pressured the *organization* running the government *program* to adhere to the government's views. *AOSI*, 570 U.S. at 218; *League of Women Voters*, 468 U.S. at 400. Specifically, in *AOSI* non-governmental organizations could not, even with private funds, support a policy contrary to the government's complete disavowal of prostitution. *AOSI*, 570 U.S. at 218. Likewise, in *League of Women Voters of California*, broadcast stations, even with private funding, were prohibited from editorializing any content – not only content subsidized with government money. *League of Women Voters*, 468 U.S. at 400. Thus, in *AOSI*, *League of Women Voters of California*, and in the case at hand, there is no differentiation between speech that arises from a HHS funded program and speech that is wholly that of the organization.

Furthermore, the funding condition in the case at hand is unlike that in *Rust* because the funding condition in *Rust* allowed individuals to demonstrate views contrary to those of the government so long as government money was not used to propagate those views. *Rust*, 500 U.S. at 198-99. In *Rust* the government condition against abortion was limited only to the contours of Title X programs. *Id.* Individuals involved in organizations that received Title X funding were able to participate in abortion related activities outside of Title X programs. *Id.* In the case at hand, however, the EOCPA is so broad in scope that there is no allowance for an individual to decline to endorse same-sex marriage. R. at 6-7. The EOCPA not only "prohibit[s] Child Placement Agencies from discriminating on the basis of sexual orientation," but also requires AACS to post HHS's non-discrimination policy on its premises.[7] R. at 6. Unlike the conditions in *Rust* there is no distinction in application of the EOCPA to only Child Placements funded by or associated with HHS. *Compare Rust*, 500 U.S. at 198-99 (stating that the abortion referral and services restriction only applied within the contours of the Title X program) *with* R. at 6-7 (demonstrating that HHS's non-discrimination requirements were applied without regard to HHS funding). As such, the scope of the EOCPA's funding conditions exceeds HHS's funding.

C. HHS's Contract With AACS Facilitates Private Speech Because The Contract Requires AACS To Engage In Independent Analysis.

The government may engage in viewpoint discrimination when the government itself is the speaker or when the government funds private entities to relay the *government's* speech. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995). However,

[7] The Government does allow religious-based organizations to accompany the non-discrimination notice with a written objection. R. at 6. However, AACS maintains that regardless of the ability to accompany the notice with an objection, the requirement to post the notice in and of itself forces AACS to engage in speech it disagrees with and thereby violates AACS's First Amendment rights.

when the government funds a program that facilitates *private* speech it may not condition funding on private organizations' espousing the government's favored viewpoints. *Velazquez,* 531 U.S. at 542 ; *See also* Andy G. Olree, *Identifying Government Speech*, 42 Conn. L. Rev. 365, 376-79 (2009) (explaining the evolution of the Court's jurisprudence on distinguishing government speech from private speech). The government facilitates private speech when the nature of the government funded program requires individual expression. *Velazquez,* 531 U.S. at 542-43.

When a government funded program requires individuals to engage in independent analysis, the government creates a program to facilitate private speech. In *Velazquez,* the government funded the national Legal Services Corporation (LSC) to provide legal services for indigent clients. *Id.* at 536. However, the government conditioned program funding on limiting the types of claims LSC attorneys could bring on behalf of their clients. *Id.* The Court held that the government's funding condition was unconstitutional because it undermined the attorney-client relationship by disallowing LSC attorneys to fully and freely represent their clients' interests. *Id.* at 542. The Court reasoned that by restricting the types of claims LSC attorneys could bring forward, the government was impermissibly regulating private speech that it tacitly facilitated through its funding program. *Id.* at 542-43. Thus, because the government had created a forum for private speech it could not regulate the speech within that forum by restricting the types of legal analysis and argumentation LSC attorneys were permitted to engage in. *See also Rosenberger,* 515 U.S. at 834, 837 (holding that a government program that denied funding to a religious-based student organization was unconstitutional because the program "expend[ed] funds to [student organizations to] encourage a diversity of views from private speakers").

In holding that the government funding program at issue in *Velazquez* facilitated private speech, the Court distinguished the program from that at issue in *Rust*. *Velazquez,* 531 U.S. at 541

(characterizing *Rust* as an example of government speech as opposed to a government program that facilitates private speech). The government program in *Rust* funded family planning services on the condition that they not offer abortion services or referrals. *Rust*, 500 U.S. at 178. The Court later described the government program in *Rust* as a program that did not "encourage private speech but instead used private speakers to transmit specific information pertaining to [the government's] own program." *Rosenberger*, 515 U.S. at 833 (explaining the Court's holding in *Rust*, 500 U.S. at 198-99). Thus, the program in *Rust* can be distinguished from that in *Velazquez* because the program in *Rust* did not require participants to engage in individual expression or individual analysis. *Compare Rust*, 500 U.S. at 198-99 (stating that individuals involved in Title X projects were required to provide services in accordance with Title X funding) *with Velazquez*, 531 U.S. at 545-46 (stating that the government funded program created an attorney-client relationship and that attorneys, in turn, had discretion to act in accordance with that relationship).

Here, the relationship between AACS and HHS is similar to that of the government and LSC in *Velazquez* because HHS facilitates the private speech of Child Placement Agencies by requiring the agencies to engage in professional discretion and analysis. The terms of AACS's contract with HHS requires AACS to recommend to HHS which placement will be best for a foster child. R. at 3. AACS makes these recommendations to HHS after engaging with the foster child and relevant parties through home visits and counseling sessions. *Id.* Because AACS builds relationships with foster children and potential foster families, HHS's contract with AACS is similar to that of the government and LSC in *Velazquez*. In *Velazquez* the government funded a program that created attorney-client relationships. *Velazquez*, 531 U.S. at 536. Once an attorney-client relationship is created, the attorney's professional discretion and analysis are inherent to maintaining that relationship and pursuing a course of action that is in the client's best interests.

Id. at 545-46. Thus, like the government in *Velazquez*, HHS created an avenue for AACS to build relationships with foster children and potential foster families and to, in turn, use their professional discretion and analysis to determine which course of action is in the best interests of the child.

HHS will likely argue that *Velazquez* does not control the case at hand and rather, that the circumstances here are similar to those in *Rust.* However, HHS's relationship with AACS is different than that of the government and entities receiving Title X funding in *Rust* because AACS provides recommendations and, therefore, engages in individual discretion and analysis. R. at 3. In *Rust* individuals involved in the Title X program were simply required to provide the government's message on family planning services. *Rust,* 500 U.S. at 198-99. Conversely, here, AACS uses its professional judgement to determine what is in the best interest of the child. R. at 3. Further supporting that AACS's speech is distinct from that of HHS is the fact that HHS has final right of approval over recommendations provided by AACS and all Child Placement Agencies. *Id.* If the recommendations of the Child Placement Agencies were simply relaying HHS's message, like individuals involved in the Title X program in *Rust,* HHS would have no issue in approving Child Placement Agencies' recommendations. However, the record shows that HHS routinely overrides the recommendations of Child Placement Agencies – demonstrating that the recommendations are the speech of the Agencies themselves and not of HHS. R. at 8-9. (stating that HHS overrode Agencies' recommendations regarding the placement of a white child special needs child and a five-year old girl). Thus, because HHS's contract with AACS facilitates private speech because in making its recommendations to HHS, AACS is engaging in individual professional discretion and analysis.

In conclusion, HHS's refusal to extend to AACS an exemption to the EOCPA when AACS asserts its sincerely held religious beliefs is not permissible given that both the statutory language

of the EOCPA and HHS's application thereof operate as a system of individualized exemptions that has been extended to analogous, non-religious conduct. A regulation that is not neutral or generally applicable triggers strict scrutiny. The EOCPA does not meet this heightened standard of scrutiny because neither an immediate referral freeze nor cancellation of AACS's contract with the City is necessary to serve the purported government interest in the protection of foster children. Contrariwise, such action would negate the purported government interests given the chronic shortage of foster families in the City and AACS's commitment to serving the large and diverse refugee population currently in need. Furthermore, HHS's conditioning government money on AACS's certifying same-sex couples as qualified adoptive parents and on AACS's posting and signing HHS's non-discrimination notice is unconstitutional because (1) HHS impermissibly compels AACS's speech when it requires AACS to sanctify same-sex marriage, which is inimical to AACS's sincerely held religious beliefs; (2) HHS imposes funding requirements on AACS that are outside the scope of the government program being funded; and (3) HHS facilitates private speech by requiring AACS to provide its recommendations on foster child placement.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests this Court reverse its holding and AFFIRM the decision of the United States District Court for the Western District of East Virginia.

Respectfully submitted,

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