No. 2020-05

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

OCTOBER 2020

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 of an appeal from an order of The United States District Court for the Western District of East Virginia granting a temporary restraining order and a permanent injunction.

BRIEF FOR APPELLEE

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ISSUES PRESENTED

I. Does the government violate a religious-based adoption group's Free Exercise rights when an anti-discrimination policy prohibits discrimination on the basis of sexual orientation and race yet allows ad hoc exemptions for secular purposes and declines to extend those exemptions for religious purposes?

II. Under the Unconstitutional Conditions Doctrine, does a governmental agency violate a religious-based adoption agency's right to free speech when they are required to post a policy and conduct activities that go against the agency's religious conviction and places a condition on governmental funding that is outside the purpose of the program?

OPINIONS AND ORDER

The record sets forth the unreported opinion of the United States Court of Appeals for the Fifteenth Circuit, *Hartwell v. Al-Adab Al-Mufrad Care Serv's*, No. 2020-05 (15th Cir. Feb. 24, 2020). R. at 18-25. The record sets forth the unreported opinion of the United States District Court for the Western District of East Virginia, *Al-Adab Al-Mufrad Care Serv's. v. Hartwell*, No. 18-cv-02758 (W.D. Va. April 29, 2019). R. at 2-17.

CONSTITUTIONAL PROVISIONS

This case involves questions pertaining to the First Amendment and the Spending Clause in the United States Constitution. See Appendix for the relevant constitutional provisions.

STATEMENT OF JURISDICTION

The judgment of the district court was entered on April 29, 2019 and the judgement of the United States Court of Appeals for the Fifteenth Circuit was entered on February 24, 2020. The petition for Rehearing En Banc, conforming to the requirements of Fed. R. App. P. 35, was granted on July 15, 2020. This Court has appellate jurisdiction under 28 USC § 1291.

STATEMENT OF THE CASE

Statement of Facts

Al-Adab Al-Mufrad Care Services' crucial role in Evansburg Al-Adab Al-Mufrad Care Services (AACS) is an adoption agency located in Evansburg, East Virginia, that provides support to the refugee population R. at 3. With an ethnically and racially diverse population of approximately 4,000,000 people, 17,000 children are currently in the foster care system with

about 4,000 of them up for adoption in Evansburg. R. at 3. The Department of Health and Human Services of the City of Evansburg (HHS) issued an urgent notice to the Child Placement Agencies that there was a need for more adoptive families because of an influx of refugee children increasing the demand and surpassing the supply; this caused there to be a chronic shortage of foster and adoptive homes. R. at 8. AACS was formed to provide support for the specific population of refugees including war orphans and other children in need of homes. AACS has helped place thousands of children into adoptive homes and assists dozens of children ranging from those with special needs to those who are trauma survivors. R. at 5.

HHS Contracts HHS has entered into contracts with thirty-four child placement agencies of all kinds in the City of Evansburg to serve the best interests of the children. R. at 3. In exchange for funding, the agencies provide services to HHS, such as home studies, counseling, and placement recommendations. R. at 3. When a child is received into custody by HHS, HHS sends referrals to the private foster care and adoption agencies that it has contracted, and the agencies notify HHS of potential family matches. Based on the child's race, age, medical needs, and disability, HHS determines which qualified families are most suitable for placement. R. at 3. Since 1980, contracts for services between HHS and AACS have been renewed annually, with the most recent being executed on October 2, 2017. R. at 5.

East Virginia Statutes and Amendments According to the East Virginia Code § 37(d), placements are required to be made on the basis of the best interests of the child and an agency must consider a number of factors such as the child and prospective parent's age, physical and emotional needs, cultural and ethnic background, and the ability of the child to have siblings and step-siblings. R. at 4. In 1972, East Virginia enacted the Equal Opportunity Child Placement Act (the Act), which prohibits child placement agencies from discriminating based on race, religion,

national origin, sex, marital status, or disability when screening and certifying potential parents or families for child placement. R. at 4. The Act was amended to prohibit child placement agencies from discriminating based on sexual orientation; however, the agencies must give preference to parents that are of the same sexual orientation as the child needing placement if that child has identified one. 576 U.S. 644 (2015); R. at 6. The Act was further amended to require, as a condition of funding, child placement agencies to post at its place of business, an anti-discrimination policy; however, religious based agencies are allowed to post an objection to the policy. R. at 6. Commissioner Hartwell claims that their interests in enforcing the Act include placing children in qualified homes, providing services to all residents who qualify, eliminating discrimination, ensuring the adoptive parents are as diverse as the children needing placement, and making sure that residents who are paying taxes to fund governmental services are not denied access to those services.

Referral Freeze and denial to renew contract AACS's religious beliefs prohibit it from certifying same-sex couples as prospective parents; however, on the few occasions when a same-sex couple contacted the agency, they referred them to the other multiple agencies that serve the LGBTQ community. R. at 7. There are four adoption agencies that are expressly dedicated to serving the LGBTQ community and others that are willing to serve that population. R. at 7. Although AACS has not screened same-sex couples, no same-sex couples have ever filed a complaint about AACS's practices. R. at 7. Hartwell notified AACS that their contract would not be renewed and that a referral freeze would be communicated to all other adoption agencies in Evansburg because of their non-compliance. R. at 7. As a result of the freeze, a young girl was placed with a different family apart from her brothers who AACS placed prior to the freeze, and a five-year-old boy with autism was denied placement through AACS with the woman who

fostered him for two years. R. at 8. Although the Act prohibits discrimination on several bases, the statute itself calls for secular exemptions, such as race and sexual orientation. R. at 6. As stated above, the government refuses to extend an exemption for religious purposes. R. at 7.

Procedural History

District Court for the Western District of East Virginia AACS filed suit against Mr. Hartwell alleging that his refusal to renew Evansburg's adoption placement services contract with AACS violates AACS's First Amendment Rights to freedom of religion and speech. Appellee, AACS, moved for a Temporary Restraining Order and a permanent injunction on the referral freeze and denial of the contract renewal which the district court granted.

Court of Appeals for the Fifteenth Circuit Hartwell appealed the district court's granting of AACS's motions to the United States Court of Appeals for the Fifteenth Circuit. The Fifteenth Circuit reversed the district court's granting of the plaintiff's motions, reasoning that AACS failed to meet the burden of showing that the Act is not neutrally and generally applicable. The court also reasoned the anti-discrimination law does not compel AACS to say anything and the notice requirement permits them to communicate its own message about the Act's provisions.

SUMMARY OF THE ARGUMENT

Free Exercise Claim The Free Exercise Clause of the First Amendment states that Congress may not make a law prohibiting the free exercise of religion. Laws that are not generally applicable and neutral are subject to strict scrutiny, which must further a compelling governmental interest through narrowly tailored means in order to pass muster. The Act is neither generally applicable nor neutral because in operation, and in the statute itself, ad hoc

exemptions are permitted for secular purposes and are not extended to religious purposes, creating a double standard. The effect of allowing a religious exemption to AACS is the same as the effect of allowing secular exemptions has on the governmental interests. Laws that are not generally applicable and neutral are subject to strict scrutiny, therefore, the Act must pass strict scrutiny.

The government claims that its compelling interests include placing children in qualified homes, providing services to all residents who qualify, eliminating discrimination, ensuring the adoptive parents are as diverse as the children needing placement, and making sure that residents who are paying taxes to fund governmental services are not denied access to those services. Although the interests of the government may be compelling, denying exemptions for religious purposes is not necessary because there are many other child placement agencies that screen same-sex couples. Placing a referral freeze on AACS is furthering the shortage of available homes and damaging AACS's ability to serve the refugee population. Also, prospective parents are aware that each agency has different criteria and policies they follow. Not renewing AACS's contract would take services that were specifically tailored to serve war orphans and other refugees and make the pool of adoptive parents and services less broad and diverse. An exemption to AACS is not necessary or narrowly tailored; therefore, the Act and the amendments fail strict scrutiny and violate AACS's free exercise rights.

Unconstitutional Conditions Claim The unconstitutional conditions doctrine stands for the principle that the government cannot place conditions on granting public benefits or subsidies that cause the recipient to surrender constitutional rights, such as freedom of speech. The anti-discrimination policy requirements being imposed on AACS as a condition of funding, reach outside the bounds of the contract because the purpose is not to further anti-discriminatory

actions, but to make sure children are being put into suitable, qualified homes. The condition of funding that has nothing to do with the purpose of the contract violates AACS's First Amendment right to free speech because it requires them to affirm beliefs that they do not agree with consistent with that of the government. Also, the condition is unconstitutional because, as a result of the condition, AACS is being punished with a referral freeze and being denied a contract renewal, which ultimately inhibits AACS from performing the adoption services as a result of not posting the anti-discrimination policy and screening same-sex parents. Not only is the condition outside the purpose of the program, but an anti-discrimination policy is not just a factual statement, but it is politically charged and posting the policy and requiring the screening of same-sex couples forces a protected class to abandon core beliefs and actively work against its own interests. Therefore, this court should grant AACS's motion seeking a Temporary Restraining Order against the referral freeze and an injunction compelling HHS to renew AACS's contract because AACS's Free Exercise rights and freedom of speech were violated.

STANDARD OF REVIEW

Appellate courts evaluate questions of constitutional law under a *de novo* standard of review. *Lopez Ramos v. Barr*, 942 F.3d 376, 380 (7th Cir. 2019). This includes the examination of the constitutionality of statute, a question of law, which is evaluated under a *de novo* standard of review. *United States v. Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012) ("We review *de novo* questions of law, including the constitutionality of a statute."). A *de novo* standard of review is non-deferential and "no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

ARGUMENT

I. AACS's free exercise rights were violated when the government did not extend an exemption for religious purposes given that there are statutory and ad hoc exemptions for secular reasons.

The Free Exercise Clause states that Congress may not make a law "respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. Amend. I. The Free Exercise Clause is applied against the states by the 14th Amendment Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1990). Free exercise rights are not only a personal guarantee that only individual persons possess, but also rights that are applicable to corporations and other organizations. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1133-34 (10th Cir. 2013). The free exercise of religion gives people "the right to believe in whatever religious doctrine one desires," and the government may not compel religious affirmations, punish the expression of religion, or impose disabilities on the basis of religion. *Cent. Rabbinical Cong. of US & Canada v. N.Y.C. Dep't of Health and Human Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014). An injury to free exercise rights occurs when the government compels someone "to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion." *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir. 1987).

Although the government may not interfere with or regulate beliefs, the Supreme Court has determined that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability…". United States v. Lee, 455 U.S. 252, 263 (1982). Although the right to exercise religion freely is absolutely protected and can never be wholly denied, religious activities can be subject to

some regulation. *Reynolds v. United States*, 98 U.S. 145, 166 (1879). Burdens on religious beliefs are constitutionally allowed in 2 circumstances: (1) where the burden is just incidental subject to a generally applicable and neutral law, and (2) where the government is intentionally regulating religious activity with a narrowly tailored law. *See generally Reynolds*, 98 U.S. at 166.

Laws that are determined to be neutral and generally applicable are subject to rational basis review, which means that there just has to be a rational relationship to a legitimate state interest. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F. 3d 194, 212 (2d Cir. 2012). Any law that places a burden on the exercise of religion, such as religious conduct, that is not neutral or generally applicable, is subject to strict scrutiny, which can only be satisfied if the law was passed to further a compelling governmental interest and is narrowly tailored to attain that interest. *Id.* The policy at issue in this case is neither neutral nor generally applicable because of the ad hoc exemptions for secular purposes; therefore, it is subject to strict scrutiny. R. at 12. It does not satisfy strict scrutiny because although the government's interest in placing the children in qualified adoption homes is compelling, denying an exemption for religious purposes is not necessary or narrowly tailored to achieve that interest. R. at 12.

A. The Act should be subject to strict scrutiny because it is neither generally applicable nor neutral.

Under the Free Exercise Clause, public authorities can enforce generally applicable and neutral laws even when they burden faith-based conduct. *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). Conversely, if a law is generally applicable and neutral on its face, but is subject to various exemptions, it must advance compelling governmental interests and must be narrowly tailored to

achieve those interests. *Id.* The characteristics of "generality and neutral applicability are interrelated," and it is likely that when one is not satisfied, neither is the other. *Church of the Lukumi Babaulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

When determining if a law is neutral, the minimum requirement is that it is not facially discriminatory. *Cent. Rabbinical,* 763 F.3d at 193. Even if a law is facially neutral, that is not determinative of neutrality because the neutrality requirement goes past facial discrimination and can be discriminatory in operation. *Id.* at 194. When a law has no exceptions, the law will usually be generally applicable, and an exemption for religious purposes will not be allowed. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J. L. & Pub. Pol'y 627, 628 (2003). Conversely, when a secular interest is looked at as being more important than a religious one, the exemption must be granted. *Id.*

When there are multiple exemptions to the dispute law or policy, suspicion is raised as to whether the law is generally applicable or neutral. *Fraternal Order of Police Neward Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3rd Cir. 1999). Furthermore, a law that selectively imposes burden on conduct that is motivated by religious belief and not secular motives, does not meet the general applicability requirement. *Cent. Rabbinical,* 763 F.3d at 196. Therefore, a law is neither considered to be generally applicable nor neutral if it regulates conduct motivated by religion and not secular conduct, which is at least as harmful to the government interests that justify it. *Id.* The Act's anti-

discrimination policy is neither generally applicable nor neutral because of the statutory and ad hoc exemptions; therefore, it must be analyzed under the most stringent standard – strict scrutiny.

1. **The Act is not generally applicable because it contains statutory and ad hoc exemptions for secular purposes but denies religious exemptions.**

Courts have found that a law is not generally applicable when the government creates an exemption for secular objections and not for religious objections. *Fraternal* Order, 170 F.3d at 365. In *Fraternal Order*, male officers in the Neward Police Department were subject to an order that prohibits beards but allows medical exemptions to the "no beard" rule and also allows exemptions for undercover officers when their "assignments or duties permit a departure from the requirements." *Id.* at 360. Two police officers who are Sunni Muslims believed that they were "under a religious obligation to grow their beards," and alleged that the police department mandating that they shaved their beards violated their free exercise rights under the First Amendment *Id.* The court stated its concern of government deciding that secular exemptions are more important than exemptions for religion are "only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious exemption." *Id.* at 365. The court ultimately concluded that by the department allowing secular exemptions while refusing religious ones, strict scrutiny was triggered. *Id.*

Similarly, in *Blackhawk v. Pennsylvania*, a Native American owner of a few black bears filed suit against the Pennsylvania Game Commission alleging that his free exercise rights were violated by refusing to allow him an exemption to the permit fee requirement for having wildlife in captivity. 381 F.3d 202, 202 (3d. Cir. 2004). Lakota Indians believe that the black bears "sanctify religious ceremonies and imbue worshipers with spiritual strength." Id. at 204. The government stated that there are two main interests served by the permit fee: it generates money and it tends to discourage the keeping of wild animals in captivity." *Id.* at 211. The law at issue allowed exemptions to the permit fee for zoos and circuses, which would undermine the interests that are "furthered" by the permit fee in similar ways than providing an exemption for religious purposes would. *Id.* at 211. The court held that the exemptions provided for secular reasons, the circus and zoos, did not pass muster under strict scrutiny. *Id*.

The Act is not generally applicable because the statute itself contains secular ad hoc exemptions that allow the government to discriminate on the basis of race and sexuality, but the government refuses to extend those to AACS for religious purposes. R. at 11. Also, the exemptions that allow discrimination for secular purposes have essentially the same effect that allowing discrimination on the basis of sexuality for religious purposes would have on the government's interests. R. at 11. Similar to *Fraternal Order* and *Blackhawk*, the government in this case has allowed exemptions for secular purposes, which require placement agencies to give preference to adoptive

and foster families when at least one of the parents is the same racial minority as the child being placed. R. at 11. In addition, an amendment was enacted in 2017 that required placement agencies to place children with foster or adoptive parents that are of the same sexual orientation as the child needing placement if the child has identified their sexual orientation. R. at 11. The government did not allow AACS to refuse to screen same-sex parents even though the Qur'an and the Hadith "consider same-sex marriage to be a moral transgression." R. at 7. Allowing exemptions for secular purposes, and refusing those exemptions for religious purposes, shows that the government is valuing the secular interests over religious interests. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J. L. & Pub. Pol'y 627, 628 (2003). Because the government has allowed these secular exemptions, religious exemptions for the same purposes must be allowed. *Id.*

The effect of allowing a religious exemption to AACS is the same as the effect of allowing secular exemptions has on the governmental interests. R. at 7. The secular exemptions allow for discrimination on race and sexuality when the parents identify as the same race and sexual orientation of the child that needs to be adopted. R. at 11. Similar to the denial of the permit in *Blackhawk* and how it would have the same effect on the governmental interests as the exemptions for the zoos, in this case, allowing an exemption to HHS to discriminate on the basis of race and sexuality is not "eradicating discrimination." Allowing AACS to respectfully decline service and refer

clients to another organization would have the exact same effect as HHS placing children based on their race and sexual orientation. Like the police department's "no-beard" law in *Fraternal Order* and the denial of relief from the permit fee in *Blackhawk*, the Act is not generally applicable because it allows categorical secular exemptions while prohibiting exemptions for religious purposes. R. at 11.

2. The Act is not neutral because it fails to regulate secular conduct and permits a double standard.

Courts have held a law is not neutral where the government permits a double standard and fails to regulate secular conduct that is as at least as harmful to the legitimate government interests justifying it. *Ward v. Polite*, 667 F. 3d 727, 740 (6th Cir. 2012). In *Ward*, a graduate-counseling student, Ward, was fired because she asked to refer a student who sought advice on same-sex relationships to another counselor because it was against her religious beliefs to affirm same sex marriage, which was required by the school's "values based" counseling model. *Id.* at 731. The school refused to extend an exemption to Ward and fired her on the grounds that she violated the school's anti-discrimination policy by asking to refer that client to another counselor. *Id.* Although a religious exemption was not extended, the school's code of ethics permits referrals that are values-based. *Id.* at 739. Professors testified that counselors are encouraged to refer a homosexual client that is seeking conversion therapy, and the code of ethics also permits referrals who are terminally ill and wishing to explore their "end-of-life options." *Id.* Counselors may also turn down clients who cannot afford to pay when the

code of ethics expressly prohibits discrimination based on socioeconomic status. *Id*. Given that the school allows these referrals for secular purposes, the court held that firing Ward on the basis of her religious beliefs but allowing counselors to refer students for other reasons violated her free exercise rights. *Id.* at 740. Allowing a referral would serve the best interest of both Ward and the client because they would be able to receive services from someone who was able to discuss his relationship issues. *Id.* The referrals that were allowed for other reasons "severely undermine the university's interest in expelling Ward," and set up a double standard resulting in a law that is not neutral. *Id.* at 740; *See Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 432-37 (2006).

The Act and the anti-discrimination policy are not neutral because although it may be facially neutral, the law creates a double standard that is as harmful to the interest of eradicating discrimination by allowing secular exemptions. R. at 12. Like the plaintiff in *Ward*, who was penalized for not partaking in an activity that went against her religious convictions while referrals for non-religious purposes were allowed, AACS has been penalized for not performing screening for same-sex couples when it goes against their religious beliefs when exemptions for secular reasons were allowed. R. at 11. The problem is not that they are being penalized for doing so, but the problem comes from the fact that HHS has allowed agencies to discriminate for secular reasons, which goes against the interest of eradicating discrimination through the policy. R. at 10. In the policy itself, HHS is able to discriminate based on

sexual orientation and race and must give preference to families where the parents are of the same race and where the parents identify as the same sexual orientation as the child needing placement. R. at 4. HHS must also consider factors, such as the age of the children and prospective parents, cultural or ethnic background, the physical and emotional needs of the children, and the ability for the children to be placed in a home with siblings. R. at 12. By having to consider these factors, that leaves room for potential discrimination based on race and ability of the child when choosing prospective parents. R. at 12. There are also instances where HHS has refused placements seemingly because of the sex of a child. R. at 9. In 2015, HHS refused to place a 5-year-old girl with a family that was only a father and son even though the family was certified by the adoption agency. R. at 9. Allowing exemptions for sexual orientation and race undermine the interest of eradicating discrimination which HHS claims is one of their interests. R. at 12. The Act is being enforced unevenly by allowing ad hoc exemptions, yet exemptions to the policy are not being extended to AACS's religiously motivated conduct, which refutes the argument that the law is neutral in operation. R. at 11.

B. Although the government's interest may be compelling, the law does not satisfy strict scrutiny because it is not necessary to deny the exemption to further those interests.

Courts have held that although a government's interest may be compelling, denying a religious based exemption burdens Free Exercise rights when the denial does little to further the governmental interests. *Wisconsin v. Yoder*, 406 U.S. 204, 222 (1972). In *Yoder*, members of the Amish religion were convicted of

violating a Wisconsin school attendance law requiring school attendance until the age of sixteen. *Id.* at 205. Wisconsin advanced two interests in support of the education law: (1) some degree of education is necessary to participate effectively in our political system and (2) "education prepares individuals to be self-reliant and self-sufficient participants in society." *Id.* at 221. The Amish demonstrated that their religious beliefs commanded their way of life and gave support through excerpts from the bible that command the Amish not to be conformed to the world. *Id.* at 216. That command is fundamental to the Amish faith, and they claimed formal education after the age of sixteen would destroy their free exercise of religion. *Id.* The Amish do not let their children grow in ignorance when they pass the point of acceptable public education, but they teach their children vocational skills and habits. *Id.* There was no evidence that an additional one to two years was necessary to further the interests of the government, so compelling the Amish children to attend school past sixteen was a violation of their Free Exercise rights. *Id.*

The Act does not survive strict scrutiny because denying an exemption to AACS is not necessary to achieve the government's interests of placing children in qualified adoption homes. R. at 14. Like the plaintiff's in *Yoder*, the law at issue in this case goes against AACS's religious beliefs that command their way of life. R. at 11. AACS gave support that performing home studies for same-sex couples went against their religion because "the Quar'an and the Hadith consider same-sex marriage to be a moral transgression." *Id.* at 7. Hartwell contends that the enforcement of the Act serves the following purposes: successfully placing children

in qualified homes, making sure child placement services are accessible to all Evansburg residents, eradicating discrimination, making sure the pool of foster and adoptive parents is as diverse and broad as the children in need of parents, and making sure individuals who pay taxes are not denied access to those services. R. at 13. Although the interests may be compelling, denying an exemption for religious purposes does little to further those interests because there has been a shortage of adoption homes due to an influx of refugees, a segment that AACS specifically caters to. R. at 3. Not renewing AACS's contract would take services that were specifically tailored to serve war orphans and other refugees, and make the pool of adoptive parents and services less broad and diverse.

HHS implementing a referral freeze and refusing to renew AACS's contract actually stifles the government's interests of placing children in a qualified adoption home because the number of possible families and the speed at which they are being screened for, decrease these placements. R. at Also, there are other adoption agencies that are able to serve the segment of the population that AACS is not able to serve because of their religious convictions. R. at 8. For example, there are four other adoption agencies that are dedicated to serving the LGBTQ community that would be able to serve those families, which would still further the interest of placing children in qualified homes. R. at 13. Not renewing AACS's contract would inhibit the goal of placing children in qualified homes and making sure that the pool of adoptive parents is as diverse as the children in need. R. at 13. Not renewing AACS's contract and instituting a referral freeze is not narrowly

tailored and necessary to further the government's interests and actually has an adverse effect on those interests; therefore, it does not pass strict scrutiny. R. at 13.

II. AACS's right to free speech was violated by placing a condition on funds that is outside the scope of the program resulting in compelled speech that goes against AACS's religious convictions.

A basic premise of the First Amendment is that the government is prohibited from telling people what to say and is applicable to the states by the Fourteenth Amendment. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S 624, 642 (1943). Freedom of speech includes the right for people to decide for themselves what beliefs they want to express or refrain from expressing. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Compelled speech, being forced to speak messages that the speaker would rather remain silent on, "occurs regardless of whether the speech is ideological." *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013).

The Spending Clause of the United States Constitution provides that Congress may "lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defen[s]e and general welfare of the United States." *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987). State legislatures also have the latitude to exercise their spending power just like Congress. U.S. Const. art. I, § 8, cl. 2; *See Leathers v. Medlock*, 499 U.S. 439, 451 (1991). Although the government may place certain restrictions on the receipt of public finds, this power is not unlimited. *Dep't. of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 434 (5th Cir. 2014); *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 355 (1977*); See also Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The government has become more involved in supplying vital benefits, in this case funding for the adoption agency,

and that has increased the opportunity for “substantial inhibition and suppression” of constitutional rights. Editors, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144, 144 (1968) (discussing the increasing effects of conditions of on the suppression constitutional rights).

The unconstitutional conditions doctrine stands for the principle that “the government cannot place conditions on its granting of public benefits or subsidies that cause the recipient to surrender vital constitutional rights, even if the government has no obligation to provide the benefit and thus could withhold it altogether.” *All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222, 252 (S.D.N.Y. 2006). Although there are some reasons upon which the government may deny a benefit, the government may not deny a benefit especially for a reason that will infringe on freedom of speech.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972.); *See generally R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005). If benefits are denied on the basis of constitutionally protected rights such as speech, the “exercise of those freedoms would in effect be penalized and inhibited.” *Sindermann*, 408 U.S. at 597*; See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996).

Courts have held that a condition placed on receiving federal funding is unconstitutional when the condition reaches outside the purpose of the program and compels an organization to adopt the government’s belief as a condition. *Agency for Int’l Dev. v. All. For Open Society Int’l*, 570 U.S. 205, 214 (2013). In *Agency for Int’l. Dev. v. All. For Open Society Int’l,* the government conditioned federal funding on the program only if the organizations adopted an anti-prostitution affirmation policy that explicitly opposed prostitution and sex trafficking. 570 U.S. at 206. The court examined the

purpose of the program, to combat the spread of AIDS, in order to determine the constitutionality of the anti-prostitution affirmation. *Id.* It was determined that the condition the government placed on funding was unconstitutional because the anti-prostitution requirement went outside of the purpose of the program by compelling the organization to adopt the anti-prostitution affirmation requiring the organization to speak the beliefs of the government. *Id.* at 218.

The notice condition of the East Virginia Code § 42.-4 and the requirement that AACS screen same-sex couples are unconstitutional conditions that violate AACS's First Amendment rights. R. at 16. Similar to the policy requirement placed on the plaintiffs in *All. for Open Soc'y Int'l*, HHS required AACS to post an anti-discrimination policy and certify same-sex parents as a condition of funding. R. at 6. In this case, the purpose of the contract between HHS and AACS was to make sure that children are being placed in qualified adoption homes and to "facilitate child adoptions that best serve the well-being of the child. R. at 16. The requirements being imposed on AACS as a condition of funding reach outside the bounds of the contract because the purpose is not to further anti-discriminatory actions, but to make sure children are being put into suitable qualified homes. R. at 11. The condition of funding that has nothing to do with the purpose of the contract is an unconstitutional condition and violates AACS's First Amendment right to free speech because it requires them to affirm beliefs that they do not agree with consistent with that of the government. *Int'l Dev. v. All. For Open Society Int'l*, 570 U.S. 205 at 214. Although AACS may post an objection to the policy, they are still being compelled to post the policy even though it goes against their religious convictions. R. at 6.

Conversely, courts have held that a condition can be upheld when it is trying to regulate the activities that are within the scope of the program and when that condition is not completely eradicating the activities of the organization. *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 543 (1983). In *Regan*, there was a statute allowing nonprofits to receive benefits as long as they did not partake in lobbying. *Id.* The statute was ultimately upheld because the organization could simply make a separate entity for lobbying purposes and could still use the benefits for non-lobbying purposes. Id. at 544. The statute was constitutional as long as the condition did not use the benefits in order to inhibit all lobbying activities. *Id.* The condition in our case is unconstitutional because as a result of the condition, AACS is being punished with a referral freeze and being denied a contract renewal, which ultimately inhibits AACS from performing the adoption services as a result of not posting the anti-discrimination policy and screening same-sex parents. R. at 11. The distinction from *Regan* and our case is that, in our case, there is no way that AACS can exercise their constitutional right to freely exercise their religion while still being able to receive funding.

Opposing counsel may try to refute the argument that HHS is compelling AACS to adopt its message by proposing the anti-discrimination statement is a factual statement; however, an anti-discrimination plaque is not factual, but politically charged. *See*, Eugene F. Miller, *What Does "Political" Mean?*, 42 The Rev. of Politics. 56 (1980). In *Rumsfield v. Forum for Acad. & Inst. Rights, Inc. (FAIR)*, law schools claimed the federal law that requiring them to welcome military recruiters on their campuses and providing email notifications of when the recruiters were visiting compelled speech that they did not want to say. 547 U.S. 47, 62 (2006); R. at 24. The Court held that the law school's

free speech rights were not infringed because posting factual information does not affect the school's speech. *Id.* Although posting factual information does not affect speech, posting an anti-discrimination policy essentially requiring the screening of same-sex couples is forcing a protected class to – essentially – abandon core beliefs and actively work against their own interests. R. at 11. Being compelled to advertise ethical sentiments contrapositive to AACS's fundamental beliefs isn't the same as posting a military recruiter's schedule as in *FAIR* and is presumptively unconstitutional. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Moreover, because an anti-discrimination message is politically charged, requiring a business to post it on their building can hardly support the claim that they are not requiring AACS to adopt their views. R. at 11.

CONCLUSION

AACS's free exercise rights were violated with the enforcement of the Act, which resulted in a referral freeze and a denial to renew their contract with HHS. The Act should be subject to strict scrutiny because the law is neither generally applicable nor neutral, and it should not pass muster because it is riddled with secular exemptions in the statute and in practice. Even though the interests may be compelling, denying an exemption for a religious based reason is not necessary to further the interests because there are a plethora of other agencies that can serve the LGBTQ community, and not renewing the contract and instituting a referral freeze actually stifles the ability of children to be placed into qualified homes among a shortage of adoptive families. AACS's First Amendment right to free speech was violated by the requirement that AACS post an anti-discrimination policy on their place of business and screen same-sex couples as a condition of public funding. The conditions placed on funding are outside the scope of the

purpose of the program, to place children in qualified adoptive homes, and compelling AACS to post a politically charged statement they do not agree with is compelling speech that is making a protected class abandon their core beliefs. It is for these reasons that this court should affirm the decision of the United States District Court of the Western District of East Virginia.

CERTIFICATE OF SERVICE

We certify that a copy of the appellee's brief was served upon the appellant through the counsel of record by certified U.S. mail return receipt requested, on this, the 14th day of September 14, 2020.

Team 22

APPENDIX

Constitutional Provisions

Amendment I

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.

U.S. Const. art. I, § 8, cl. 2

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States