No. 2020-05

UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

v.

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

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

APPELLEE'S MERITS BRIEF

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JURISDICTIONAL STATEMENT

Al-Abab Al Mufrad Care Services (AACS) filed suit against Christopher Hartwell, in his official capacity as Commissioner of Department of Health and Human Services, City of Evansburgh (HHS) in the Western District of East Virginia to vindicate its rights under the First Amendment to the United States Constitution. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On April 29, 2020, the district court granted AACS's Motion for a Temporary Restraining Order and Permanent Injunction. HHS appealed the district court's judgment, and on February 24, 2020, the court of appeals for the Fifteenth Circuit reversed. AACS petitioned the court of appeals for a rehearing on en banc, which was granted on July 15, 2020. This Court has jurisdiction under 28 U.S.C. § 1291 and reviews the district court's conclusions of law de novo. *Brown v. City of Pittsburgh*, 586 F.3d 263, 268-69 (3d. Cir. 2009).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. A law that is not neutral or generally applicable is presumed unconstitutional under the First Amendment right to free exercise of religion. To be neutral and generally applicable, laws must not carve out exemptions solely for secular conduct but not create a similar exemption for religious conduct, if the acts are analogous. EOCPA has two statutory exemptions for secularly motivated discrimination and HHS granted three enforcement exemptions for secularly motivated discrimination, but neither allowed an exemption for AACS's religiously motivated discrimination that was less damaging to EOCPA's purpose than the secularly motivated discrimination. Should this court hold that neither EOCPA nor HHS discriminated against AACS due to its religion, and find that EOCPA is a neutral and generally applicable law that HHS applied without favoritism?

II. The Free Speech Clause of the First Amendment prohibits the government from telling people what they must say. The doctrine of unconstitutional conditions advances that a condition attached to the grant of governmental benefit it unconstitutional if it requires the recipient to relinquish a constitutional right. Does the government violate the First Amendment by conditioning a religious child services agency's funding to participate in the adoption system on taking actions and making statements that directly contradict the agency's religious beliefs?

STATEMENT OF THE CASE

In 1972, East Virginia adopted the Equal Opportunity Child Placement Act ("EOCPA") which imposes nondiscrimination requirements on foster care and adoption agencies that receive public funds, including those from the City of Evansburgh's Department of Health and Human Services ("HHS"). R. at 4. The EOCPA prohibits child placement agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." *Id.* The EOCPA has an exception to its nondiscrimination mandate 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. *Id.*

In 1980, Al-Adab Al-Mufrad Care Services ("AACS") was formed with the mission to provide community support to Evansburgh's refugee population, including adoption placement for war orphans and other children in need of permanent families. R. at 5. AACS's mission statement provides, "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children

and ensuring that the services we provide are consistent with the teachings of the Qur'an." *Id.* From 1980 to 2017, HHS and AACS entered into an annual contract for adoption services, forming a successful partnership wherein thousands of children were placed in adoptive homes over their 37-year relationship. R. at 4-5.

In 2017, East Virginia amended the EOCPA by adding sexual orientation to the list of protected classes and by creating an additional exception whereby same-sex couples were given preferential treatment when an LGBTQ child needed placement. R. at 6. The amendment also imposed a condition on the child placement agencies, whereby funds were withheld unless the agency signed and posted in its place of business a statement that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." *Id.* Recognizing that religious-based agencies may take issue with espousing such views, the statue includes a provision allowing these agencies to also post a written objection to the policy. *Id.*

In 2018, HHS Commissioner Hartwell contacted all religious-based child placement agencies that contracted with HHS to inquire if they place children with same-sex couples. R. at 6-7. AACS Executive Director Sahid Abu-Kane informed Hartwell that its religious beliefs prohibit it from certifying same-sex couples as prospective adoptive parents, but that in the rare instance a same-sex couple contacts AACS, it happily refers couples to other agencies in the area that can better meet their needs. R. at 7. This practice has never once been the subject of a complaint from a prospective parent or member of the community. R. at 7, 9.

However, as a result of AACS following its sincerely-held religious beliefs, Hartwell informed Abu-Kane that he would implement an immediate referral freeze that would be

communicated to all other adoption agencies serving Evansburgh, and that for the first time in thirty-seven years, HHS would not be renewing its annual contract with AACS. R. at 7-8. Hartwell pursued this hardline path of enforcing the EOCPA despite that fact that HHS contracts with four adoption agencies which are expressly dedicated to serving the LGBTQ community and without regard to HHS's urgent need for more adoptive families because of a recent influx of refugee children into the foster care system, AACS's specialty and focus. R. at 8.

Hartwell attempted to justify this strict approach by claiming that EOCPA enforcement advances the following government purposes: (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services. R. at 9. However, this enforcement likewise had an immediate and detrimental impact on the community. For instance, as a result of the referral freeze, a young girl, whose two brothers had been placed by AACS with a family, was placed with another family by another agency. R. at 8. Also, a five-year-old autistic boy was denied adoption placement through AACS with the woman who fostered him for two years because of the referral freeze. *Id.*

In October 2018, AACS sued Commissioner Hartwell, alleging that enforcing the EOCPA against it violates its First Amendment rights under the Free Exercise and Free Speech Clause. *Id.* Accordingly, AACS seeking a temporary restraining order against HHS's imposition of the referral freeze and a permanent injunction compelling HHS to renew its contract with AACS. *Id.*

After a three-day evidentiary hearing, HHS did not dispute that, despite its strict enforcement of the EOCPA against AACS, it does allow exemptions to its nondiscrimination policies. R. at 8-9. These exemptions include the following: (1) HHS placed a white special needs child with an African American couple despite the presence of three certified white couples who wanted to adopt the child, due to EOCPA's purpose "only to preserve and protect minority children and families" through its policies; (2) On three occasions, HHS created a policy where children should not be placed with otherwise qualified adoptive parents if they were from a different Muslim sect than their own; and (3) HHS refused placement of a 5-year old girl with a family consisting only of a father and son, even though this family was otherwise certified by the sponsoring adoption agency. *Id.*

On April 29, 2019, the district court granted AACS's request for injunctive relief, finding that enforcement of the EOCPA against AACS violated AACS's Free Exercise and Free Speech rights. R. at 17. HHS subsequently appealed the district court's ruling, and on February 20, 2020, the Fifteenth Circuit reversed the district court. R. at 18-19. The instant appeal followed, and on July 15, 2020, the Fifteenth Circuit granted AACS's Petition for Rehearing En Banc. R. At 26.

SUMMARY OF THE ARGUMENT

I. The panel erred when it denied AACS injunctive relief against HHS. The First Amendment protects the right of religious individuals and organizations to freely exercise their religion without improper government interference. One way that the government can improperly interfere with free exercise rights is to craft a statute that punishes religiously motivated behaviors while exempting analogous behaviors that have secular motivations. Another form of free exercise interference is targeted enforcement of a neutral statute due to an organization's religious beliefs. EOCPA is not a neutral statute,

but even if it is held to be legal as written, HHS enforced it in a discriminatory and targeted manner against AACS due to its religious character. EOCPA purports to be against discrimination, but there are two exemptions within the statute for secularly motivated discrimination based on race and sexual orientation. The secularly-motivate discrimination does not offend HHS's goal any more than AACS's discrimination based on sexual orientation, yet HHS failed to provide an exemption for AACS's exercise of its sincerely held religious beliefs. Further, in practice, HHS enforces EOCPA to allow discrimination based on race, sex, sexual orientation, familial status, and religion, yet only enforces the statute against AACS due to its religious character. Finally, even if this court finds no violation under *Smith*, it should still defend AACS's right to exercise its religion under the *Sherbert-Yoder* standard which governed The Supreme Court's free exercise jurisprudence before *Smith* attempted to craft a new approach which has proven to be a failure over the past thirty years.

II. The panel erred when it denied AACS injunctive relief against HHS. The EOCPA mandates that each child placement agency sign and post at its place of business a statement espousing East-Virginia's nondiscrimination policy prior to the disbursement of funds. However, it is a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say. Accordingly, while the government is free to fund programs as it sees fit, it may not deny a benefit on a basis that infringes on the would-be recipients' constitutional rights. This protection, known as the unconstitutional conditions doctrine, works to prevents the government from withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right. When evaluating the constitutionality of a funding condition, courts distinguish

between (1) conditions that define the limits of the government spending program—that is, conditions specifying the activities the government wants to subsidize—and (2) conditions that try to leverage funding to regulate speech outside the contours of the program itself. While the former is permissible, the latter runs afoul of the First Amendment. Through its enforcement of the EOCPA, HHS demands that AACS either speak and act as the government prefers—by posting the notice and certifying same-sex couples—which would require setting aside its sincerely held religious beliefs, or lose its funding and ability to help thousands of children find their permanent families. This clearly falls within the second form of conditions, where as for almost forty years, HHS has contracted with AACS to facilitate the adoption process with the ultimate goal of finding each child a home that is in the child's best interest. This is not a forum to promote East Virginia's nondiscrimination policy. Accordingly, the funding condition impermissible regulates speech outside the contours of the program itself in attempt to compel the endorsement of ideas that HHS approves in violation of the First Amendment.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE PANEL'S HOLDING BECAUSE HHS SHOWED AACS DISFAVORABLE TREATMENT DUE TO ITS RELIGION IN VIOLATION OF ITS FREE EXERCISE RIGHTS UNDER THE FIRST AMENDMENT.

The First Amendment of the United States Constitution protects individuals from targeted negative treatment due to their religious beliefs. *See also Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (holding that the state cannot favor actors who engage in the specified act for nonreligious reasons). Indeed, the state cannot create a law that serves as a "religious gerrymander" that exempts secular actors from enforcement but punishes only the religiously-

motivated. *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Brennan, J., concurring). This can occur via the express words of the statute or in the statute's enforcement. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). When the government targets a religious group or individual for specific treatment due to religious belief, the activity is subject to strict scrutiny. *Id.* at 540. Before *Smith*, the Court had a settled rule of law that all government actions which created a substantial burden on religious exercise would have to pass the compelling interest test, but *Smith* moved past that doctrine. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963). *Smith*'s failure compels this Court to look back at that decision and see if the First Amendment would be better served with the original interpretation of its prohibition on infringing religious rights which spanned much of the 20th century. Here, the government violated AACS's first amendment rights when it showed disfavorable treatment to AACS by enforcing the EOCPA against its religiously motivated conduct while condoning and accepting numerous other forms of secularly-motivated conduct of the same character.

EOCPA creates a carve-out for discrimination based on race and sexual orientation. R. at 4, 6. Hartwell asserts that the purpose of the required racial discrimination is to "preserve and protect minority children and families." R. at 9. However, Hartwell asserts that the HHS's goals in enforcing EOCPA are to (1) enforce the law, (2) make child placement services widely available, (3) ensure that "the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents," and (4) make sure taxpayers are not denied access to services they fund. R. at 9. None of these stated goals justify creating exceptions to the discrimination policy, yet exceptions are built into the statute itself. Further, Hartwell does not contest that HHS contravened its non-discrimination policy in three instances of non-enforcement, when it placed a white child with black parents over equally qualified white families, when it declined to place a

little girl with a family consisting of a single father and his son, and when it discriminated based on religion to place Muslim children only with parents of the same sect as the child. R. at 8-9. The exceptions built into the law, coupled with the *ad-hoc* exemptions, show that HHS does not uniformly enforce EOCPA, and that it does indeed discriminate against AACS by merely enforcing the statute when the motivation behind the discrimination is based on religion.

A. HHS Showed AACS Disfavorable Treatment Due To Its Religious Beliefs, As Shown By Its Enforced Of EOCPA Against AACS In Its Sincerely Held Religious Practices While Consistently Choosing Not To Enforce Secularly Motivated Discrimination Based On Race, Sex, Sexual Orientation, Religion, And Familial Status.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This prohibition applies to state and local government through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Under *Smith*, the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." 494 U.S. at 877. Accordingly, the First Amendment prohibits the government from burdening religiously motivated conduct unless the law is "neutral" and "generally applicable." *Id.* at 879. A prospective law fails the requirement of facial neutrality when it discriminates against religiously motivated conduct, and the law fails the requirement of general applicability when it "proscribes particular conduct only or primarily when religiously motivated." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). Such laws that fail to satisfy either the requirement of facial neutrality or general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi*, 508 U.S. at 540.

1. The EOCPA is not neutral as to religion because it allows for specific forms of secularly motivated discrimination, while making no accommodation for religiously motivated discrimination.

In *Church of the Lukumi*, the Supreme Court struck down a City of Hialeah law that punished anyone who killed an animal "unnecessarily." 508 U.S. at 532. There, the law was only applied to prohibit religious animal sacrifices, while simultaneously condoning secularly-motivated activities such as slaughtering animals for food, using live rabbits to train greyhounds, and even hunting. *Id.* at 537. The Court determined that the city officials' selective enforcement of only religiously motivated conduct was discriminatory treatment because it judged religious reasons for killing to be of "lesser import than nonreligious reasons" as to analogous conduct. *Id.* at 537-38.

Our case is like *Lukumi*. There, Hialeah passed a law that prohibited the killing of animals, just as HHS passed a law prohibiting discrimination based on protected attributes. Further, just like the Hialeah created numerous exceptions to its policy, our case contains a state statute with no fewer than five bases to discriminate that are either allowed or mandated by the state. Just as Hialeah selectively chose to pursue their desire to help animals only when the conduct harming animals was religiously motivated, so too does HHS only choose to enforce its nondiscrimination policy when the discrimination is religiously motivated. And further, just as Hialeah permitted hunting, dog chasing, and animal slaughter, HHS similarly permits discrimination based on gender, sex, sexual orientation, familial status, race, and religion. Therefore, this court should hold that HHS similarly discriminated against religiously motivated conduct just was held in *Lukumi*.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999), the Third Circuit held that when the government creates a categorical exemption

for secularly motivated conduct, it cannot deny exceptions for similar religiously motived conduct. There, the city's police department had a no-beard policy but allowed a medical exemption for officer with sensitive skin. *Id.* at 363. However, it denied an exemption to Muslim officers who believed their faith prohibited them from shaving. *Id.* at 360–61, 366. The police department's interest in having a force of clean-shaven officers was undermined by a medical and secularly-motivated exemption but was too important to grant a similar religious exemption. *Id.* at 366. The court wrote that selective enforcement where the government "decid[es] that secular motivations are more important than religious motivations" is exactly the type of improper favoritism outlined in *Smith* and *Lukumi*. *Id*. at 365; see also *Blackhawk,* 381 F.3d. 210, 211 (3d Cir. 2004) (holding that Pennsylvania's refusal to exempt a Native American who kept bears for religious reasons from a wildlife permit fee, even though the statute contained exemptions for zoos and circuses, was improper favoritism because the interest served by the state's exception as well as the requested exception were analogous).

In contrast, the Supreme Court upheld Oregon's denial of unemployment benefits due to illegal peyote use in *Smith*, even though it was used in the course of a religious ritual. 494 U.S. at 874. The Court reasoned that the state's prohibition of peyote ingestion was a neutral law because it applied evenly to religious and secular alike, without exemption. *Id.* at 879.

Our case is like *Fraternal Order* and unlike *Smith*. Whereas the prohibition of peyote consumption was a blanket rule in *Smith*, the EOCPA's anti-discrimination policy carves out two exemptions from its enforcement, just as the police department in *Fraternal Order* carved out an exemption for officers with sensitive skin. Further, while Oregon maintained the integrity of its policy by not undercutting its goal of protecting its citizens from harmful drugs, *Fraternal Order*'s police department undermined its goal of having a unit with a uniform appearance by

granting a medical exemption to the shaving requirement. Also, the Muslim officers who wore bears created no greater disruption to the police unit's uniform appearance than the officers with medical conditions, so the court held there was no justification for the favoritism. So too does the discrimination by AACS pose no greater threat to HHS's stated goals of creating a broad pool of potential adoptive parents. In fact, their stated interest of having the bigger pool is hurt more by cutting out AACS—who serves exactly the community of children that HHS has stated need homes the most—than by allowing AACS to continue to serve the immigrant and refugee community while directing same-sex couples to the *four* agencies that specialize in serving them.

Therefore, the city performed impermissible favoritism and this Court should hold that HHS's enforcement of the EOCPA violates the Free Exercise Clause. *See also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006) (holding the government could not pass strict scrutiny for prohibiting ayahuasca while creating a similar exception for peyote use which undermined its stated objective of public safety).

2. The EOCPA is not generally applicable because it is enforced only against religiously motivated conduct, while the state uses its discretion not to enforce it against various secularly motivated forms of discrimination.

Even if the text of a law is neutral and generally applicable, if "government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct." *Tenafly Eruv,* 309 F.3d at 165–66. HHS not only failed to enforce the EOCPA against discrimination based on race, sex, sexual orientation, marital status, and religion, but it actively sanctioned those forms of discrimination, while singularly targeting

AACS for violation of its anti-discrimination statute. This demonstrates clear favoritism toward secularly-motivated discrimination. Accordingly, this Court must subject the non-generally-applicable enforcement of the statute to strict scrutiny, a test HHS cannot pass.

In *Tenafly*, the Third Circuit held that the town's attempt to prohibit Orthodox Jews from constructing an *eruv* merited strict scrutiny, because it singled out the residents' religiously motivated conduct for discriminatory treatment as compared with similar secularly motivated treatment. 309 F.3d at 168. An *eruv* consists of small symbolic pieces of plastic that Orthodox Jews placed on utility poles in their neighborhood for religious reasons. *Id.* at 152. However, the town the town prohibited Orthodox Jewish residents from creating an *eruv* because Tenafly had an ordinance proscribing attaching "any sign or advertisement, or other matter upon," the borough's telephone poles. *Id*. at 151. The court held that enforcing the ordinance was discriminatory because it was almost never enforced against secularly motivated conduct: house numbers, lost animal signs, holiday decorations, and various other community notices. *Id.* at 156. Therefore, the town's attempt to selectively enforce the ordinance only when its violations were religiously motivated was unconstitutional favoritism that violated the Orthodox Jewish residents' First Amendment rights. *Id.* at 178.

Our case is like *Tenafly*. Just as the city of Tenafly granted *ad hoc* exemptions to the ordinance for residents who posted signs, decorations, and house numbers but decided not to grant an exemption for the religiously-motivated use of the poles, which was no more intrusive or obstructive than the secular use, so too HHS grants—and even compels—exemptions to its nondiscrimination policy based on sex, sexual orientation, marital status, race, and religion for secular reasons, but also fails to grant an exemption for AACS's religiously-motivated

discrimination based on sexual orientation, even though its effects were less destructive to HHS's stated purpose of enlarging the pool of available parents.

Just as the court held in *Tenafly* that the *eruv*, while technically against the ordinance, did not create any community problems, here, while AACS technically violates the statute, is not practically narrowing the scope of service for LGBTQ couples. In *Tenafly*, the plastic was barely visible. The secular signs and posters were highly visible. Here, there are four agencies specifically for LGBTQ couples and twenty other agencies that serve them. LGBTQ couples have plenty of other options. The secular discrimination prevented a man and his son from adopting a little girl when they had already gone through the entire process. It also discriminates against white people in a *carte blanche* way, encompassing *all* of the agencies. AACS is actually considerate enough to discriminate from the outset, preventing couples from walking down the long and arduous road of adoption to be stymied at the end of it, which is how the secular discrimination exempted from the statute operates. Thus, just as *Tenafly* showed *de minimis* religious conduct being treated worse than secular conduct, less offensive religious discrimination is being treated far worse than significant secular discrimination, and that is exactly the type of prejudicial favoritism that the First Amendment prohibits.

B. This Court Should Depart From The Legal Standard Created By *Employment Division v. Smith* And Return To Its Classic First Amendment Jurisprudence Embodied In *Sherbert v. Verner* and *Wisconsin v. Yoder* That Honors The History Of The First Amendment, Aligns With Extensive Precedent, And Creates A More Just System.

Prior to *Smith*, the Supreme Court articulated the longstanding rule in *Sherber v. Verner*, 374 U.S. 398, 403-404 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 202 (1972), that if a neutral law of generally applicability substantially burdened religious conduct, then the state had to show that the challenged law was created to serve a compelling government interest and that it

was narrowly tailored to achieve that interest. *See also Cantwell*, 310 U.S. at 304. Despite this test's clarity, functionality, and consistency, the Supreme Court in *Smith* attempted to look beyond the issue presented to it, into the future, where it envisioned the *Sherber-Yoder* compelling interest test collapsing under greater religious pluralism, where more religious sects and new religions would bury courts under a mountain of religious liberty claims that would make governing impossible. *See Smith*, 494 U.S. at 888 (emphasis in original) ("We cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."). Thus, in *Smith*, the Supreme Court decided to craft a new standard that it believed would be more just and pragmatic: complete deference to neutral laws of general applicability, no matter how unjust or insensitive to religious practices. *Id.* at 890. Three things encourage this court to take another look at the *Smith* standard: the plain meaning and history of the First Amendment, which *Smith* swept under the rug, the immediate and widespread legislative pushback against *Smith*, and the faithfulness to justice and First Amendment principles of the *Sherbert-Yoder* standard in jurisdictions where it still applies, versus the injustices which have occurred where *Smith* has governed.

A plain reading of the First Amendment contradicts the Supreme Court's interpretation in *Smith*, because "exercise" means acts and actions—not merely to "believe and profess"—today as it did in 1789. *See e.g.*, Michael W. McConnell, *Free Exercise Revisionism & the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1109 (1990) ("Exercise means conduct."); *Smith*, 489 U.S. at 892 (O'Connor, J., concurring) (calling the majority opinion a "strained reading of the First Amendment"). Further, *Smith* contravenes the historic understanding of the First Amendment itself, running against nine of the thirteen colonies' state constitutions which exempted religious

exercise from neutral laws. *See id.* at 1152-53. The Court expressed this view plainly in *Cantwell*, writing that, "in every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 310 U.S. at 304. It then reiterated the position of religious exemptions in *Yoder*, where the Court stated that neutral laws can "nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U.S. at 220. Said even more clearly, "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability." Yoder*, 406 U.S. at 219-220 (emphasis added). Then, a third time, the Court echoed this religious exemption principle in *Sherbert*, applying the Free Exercise Clause to exempt parties from laws that the state otherwise had the power to enact. 374 U.S. at 403. It logically follows from these cases that Justice O'Connor, in her concurrence, argued that the *Smith* opinion required the court to "disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Smith*, 494 U.S. at 892.

This departure from precedent and the plain meaning of the First Amendment did not go unnoticed or unchallenged, and *Smith* has proven to be exceptionally unpopular. *See* Douglas Laycock, *Religious Liberty & the Culture Wars*, U. Ill. L. Rev. 839, 845 (2014) ("When Congress passed the federal RFRA in 1993, it acted unanimously in the House and 97-3 in the Senate."). Further, nineteen states have enacted state Religious Freedom Restoration Act legislation, and fourteen states have interpreted their state constitutions to exempt religious conduct from generally applicable laws. *Id.* at 844. Indeed, the very opinion contains a concurrence from Justice O'Connor that opens with the following phrase: "In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears

unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty. *Smith*, 494 U.S. at 891.

Finally, the outcome of *Smith* has been injustice, particularly for religious minorities. Brief for *Fulton v. Philadelphia* as Amici Curiae Supporting Petitioners, Jewish Coalition for Religious Liberty, 140 S. Ct. 1104 (2020) (No. 19-123). Justice O'Connor saw the writing on the wall in her *Smith* concurrence, writing prophetically: "laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. *Smith*, 494 U.S. at 901. Her prediction has come true. A quick review of lower court decisions following *Smith* provide numerous examples of minority faiths' and sects' belief being run roughshod over, not due to intentional discrimination, but due to indifference and ignorance of their requirements when the laws were passed. *See e.g.*, *United States v. Board of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 884 (3d Cir. 1990) (denying an exemption for a Muslim teacher to wear her religiously-required clothing at school); *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Ind. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) (denying exemption from school policy for Native American students who refused to cut their hair due to their religious beliefs); *Minnesota v. Hershberger*, 462 N.W.2d 393 (1990) (enforcing state requirement to display a Slow Moving Vehicle reflector on Amish farmer's buggy despite his production of an adequate and religiously-compatible alternative). Beyond these anecdotes, "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after Smith." Amy Adamczyk, John Wybraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. Church & State 237, 242 (2004). Despite this extreme decline in cases, which would tend to weed out the weaker cases, those stronger cases that did proceed to trial received favorable

decisions a mere twenty-nine percent of the time, down from an average of thirty-nine percent pre-*Smith*. *Id.* at 248. According to the Jewish Coalition for Religious Liberty, these two facts taken together, paint a picture of religious liberty post-*Smith* that is deeply troubling. Brief for *Fulton v. Philadelphia* as Amici Curiae Supporting Petitioners, Jewish Coalition for Religious Liberty, 140 S. Ct. 1104 (2020) (No. 19-123). Without a return to *Sherbert* and *Yoder*, we should expect continuing erosion of First Amendment religious liberty with the continued liberalization of society which pushes indigenous and traditional religions further into the minority.

II. THIS COURT SHOULD REVERSE THE PANEL'S HOLDING BECAUSE AACS'S FUNDING IS CONDITIONED UPON ITS ENDORSEMENT OF VIEWS CONTRARY TO ITS SINCERELY HELD RELIGIOUS BELIEFS IN VIOLATION OF ITS FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT.

The Equal Opportunity Child Placement Act (EOCPA) mandates that each child placement agency sign and post at its place of business a statement espousing East-Virginia's nondiscrimination policy prior to the disbursement of funds. R. at 6; E.V.C. § 42.-4. However, it is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (*AOSI*) (quoting *Rumsfeld v. Forum for Academ. & Inst'l Rights, Inc.*, 547 U.S. 47, 61 (2006) (*FAIR*)). Accordingly, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In other words, the unconstitutional conditions doctrine works to "prevents the government from . . . withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right." *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012).

Al-Adab Al-Mufrad Child Services (AACS) is non-profit, faith-based organization, committed to the mission of "lay[ing] the foundations of divine love and service to humanity" through "ensuring that the services [it] provides are consistent with the teachings of the Qur'an." R. at 5. Because the Quar'an and Hadith consider same-sex marriage to be a moral transgression, AACS's religious convictions prohibit it from endorsing parts of East Virginia's nondiscrimination policy and from certifying same-sex couples as prospective adoptive parents. R. at 7. Through its enforcement of the EOCPA, the Department of Health and Human Services (HHS) demands that AACS either speak and act as the government prefers—by posting the notice and certifying same-sex couples—which would require setting aside its sincerely held religious beliefs, or lose its funding and ability to help thousands of children find their permanent families. This is no true choice but an attempt to "compel th[e] endorsement of ideas that [HHS] approves" in violation of the First Amendment. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

A. The Government's Is Limited In Its Ability To Place Conditions On The Receipt Of Funds And May Not Leverage Funding To Regulate Speech Outside The Funded Program.

The First Amendment, made applicable to the states via the Fourteenth Amendment, prohibit laws that abridge the freedom of speech. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). And while Congress, in exercising its spending power, may refuse to subsidize the exercise of First Amendment rights, it may not deny benefits solely on the basis of the exercise of such rights. U.S. Const. art. I, § 8, cl. 1; *FAIR*, 547

U.S. at 59; *see also Leathers v. Medlock*, 499 U.S. 439, 451 (1991) (explaining that state legislatures, like Congress, have broad latitude in exercising their spending power); *cf. Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

"As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *AOSI*, 570 U.S. at 214. But the government's ability to impose eligibility criteria is not boundless. *See National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (*NIFLA*) (reaffirming that the government does not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement"). Indeed, the extent to which the government may indirectly pressure the exercise of the first amendment is limited by the doctrine of unconstitutional conditions. *See* Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 Case W. Res. L. Rev. 97 (1989). Therefore, when funding programs, activities, and the like, the government may only "impose limits on the use of such funds to ensure they are used in the manner [the government] intended." *AOSI*, 570 U.S. at 213.

Accordingly, when evaluating the constitutionality of a condition, courts distinguish between (1) conditions that define the limits of the government spending program—that is, conditions specifying the activities the government wants to subsidize—and (2) conditions that try to leverage funding "to regulate speech outside the contours of the program itself." *Id.* at 214-15. While the former is permissible, the latter runs afoul of the First Amendment. Courts must therefore examine the purpose of a government program when analyzing whether a condition to

participate in the program is constitutional under the First Amendment. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

For example, in *Rust*, the Supreme Court upheld restrictions that prohibited recipients of family planning funding under Title X to counsel, refer, or provide information on abortion. 500 U.S. at 196-97. There, Congress provided federal grants to subsidize clinics offering family planning services. *Id.* at 178-79. Congress did not consider abortion to be within its family planning objectives, and therefore included a provision forbidding doctors employed by the program from discussing abortion with their patients. *Id.* at 179-180. Thus, the restrictions were simply "designed to ensure that the limits of the federal program are observed." *Id.* at 193. The Court went on to explain because the Title X program was specifically designed to encourage family planning, not to provide prenatal care, a doctor who sought to care for a program patient who became pregnant would likewise fall outside of the scope of the federally funded program. *Id.*

Here, HHS has contracted with AACS to facilitate the adoption process. R. at 3. Like in *Rust*, where Congress explicitly outlined the program's family planning initiative, so to here, HHS provided the limits by which child placement agencies were to regulate their services. Specifically, "[i]n exchange for public funds, the agencies provide services that consist of home studies, counseling, and placement recommendations to HHS," and "[a]fter HHS places a child with an adoptive family, the private agency that recommended the family is contractually required to maintain supervision and support to ensure a successful placement." R. at 3-4. Unlike the condition prohibiting abortion-related speech in *Rust* which clearly supported the overarching goal of family planning, here, there is no such connection between facilitating adoption and creating a forum to promote East Virginia's nondiscrimination policy. Instead, the outlined

services clarify that the overarching goal of facilitating adoptions is to find each child a home that will be the child's "best interest." R. at 4.

In fact, the best interests assessment in the cornerstone of the entire program, such that each child placement agency *must* make its determination based on the best interests of the child. *Id.*; E.V.C. § 37(e). The plain text of the EOCPA likewise recognizes this requirement, carving out exceptions to its blanket policy mandating nondiscrimination when discriminatory considerations will help to further the best interests determination. R. at 4; E.V.C. § 42.-2(b). This clearly demonstrates that the purpose of the government program is to ensure that the adoption process is facilitated in a way that allows each child is placed in the best possible environment. Therefore, in line with the Court's explanation in *Rust*, it would be wholly permissible if HHS were to impose conditions regulating the length and number of home studies, as that requirement would properly be within the scope of the program. However, that is not the case here, and instead, HHS is attempting to shove its unrelated, nondiscriminatory policy into a box limited to adoption.

B. A Condition Which Empowers The Government To Compel Affirmative Speech To Receive Funding Crosses The Line From Merely Ensuring That Federal Funds Are Used For Their Intended Purpose To Abridging First Amendment Rights.

Not only is the purpose of funding AACS clear on its face, but also, the effect of enforcing the EOCPA further demonstrates its unconstitutionality. When a condition regulates speech outside the contours of the program itself, the recipient is effectively forced to become a mouth piece for the government's message. Here, by enforcing the EOCPA, HHS is mandating that AACS speak contrary to its beliefs and simply parrot the government's policy. However, the

government may not compel a private party "to be an instrument for fostering public adherence to an ideological point of view." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

In *AOSI*, the Supreme Court struck down a provision of a federal law that required, as a condition of federal funding, the grantees to adopt a policy explicitly opposing prostitution. 570 U.S. at 208, 214-21. There, the government required the organizations that received federal funds to combat the spread of HIV/AIDS to abide by two conditions: (1) ensure that such funds were not being used to promote or advocate the legalization or practice of prostitution or sex trafficking; and (2) have a policy explicitly opposing prostitution. *Id.* at 210. While the first condition appropriately specified the activities Congress sought to subsidize and ensured that the government was not funding speech which conflicted with the purposes of the grant, the Court found that the second requirement leveraged funding to compel speech outside of the federal program. *Id.* at 218. The Court explained that "[b]y requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient." *Id.* This placed the policy in direct tension with "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Id.* at 213 (quoting *FAIR*, 547 U.S. 47, 61).

Similarly, in *NIFLA*, the Supreme Court held that the California law requiring pregnancy-related centers to disseminate notices with information on the state's public family planning services, including abortions, compelled speech in violation of the First Amendment. 138 S. Ct. at 2369. The centers seeking relief from the notice requirement were "largely Christian belief-based" and "aim[ed] to discourage and prevent women from seeking abortions." *Id.* at 2368 (internal citation and quotations omitted). Thus, the government-scripted notices caused centers to simultaneously "inform women how they can obtain state-subsidized

abortions," while "at the same time . . . trying to dissuade women from choosing that option." *Id.* at 2371. Accordingly, the Court concluded that the notice requirement compelled the centers to "speak a particular message" that "plainly alter[ed] the content" of their speech. *Id.*; *cf. Dumont v. Lyon*, 341 F. Supp. 3d 706, 751 (E.D. Mich. 2018) (rejecting Catholic child welfare agency's argument that they would be forced alter the content of their speech to accommodate same-sex couples where there was no information that the agency would be required to disseminate any kind of scripted statement as a condition of partnering with the state).

In contrast, the Supreme Court in *FAIR*, upheld a statue which required institutions of higher education to provide military recruiters with the same access as the schools provided other recruiters or lose certain federal funds. 547 U.S. at 55. A group of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals challenged the condition, arguing that it forced the schools to choose between forgoing their First Amendment Right or lose funding. *Id.* at 53. However, the Court found that the statute "neither limits what law schools may say nor requires them to say anything," and emphasized that the schools were free to express whatever views they held on the military while still remaining eligible for the federal funds. *Id.* at 60. Although schools, through their recruiting assistance, may send e-mails and hang flyers on behalf of the employer, this did not amount to the school becoming a conduit for the government's message, and the school's own message was therefore not affected. *Id.* at 61-62. Alternately, the Court explained that because the First Amendment would not prevent Congress from directly imposing the statutes' access requirements under its power to provide for the common defense, the condition was permissible. *Id.* at 58; *cf. Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 988 (7th Cir. 1984) ("[T]hat what a government cannot compel, it should not be able to coerce."); Edward J. Fuhr, *The*

Doctrine of Unconstitutional Conditions & the First Amendment, 39 Case W. Res. L. Rev. 97 (1989) ("If the government could enforce the limitation in its own right, without reference to a government benefit, then attaching it to a benefit does not raise the question of the unconstitutional conditions doctrine.").

This case is similar to *AOSI* and *NIFLA* and distinguishable from *FAIR*. As in *AOSI* and *NIFLA*, AACS was likewise compelled to trumpet the government's position through both the notice and certification requirements. AACS's adoption services are laden with speech, from home studies, counseling, and evaluating prospective adoptive parents, to submitting its ultimate certification with the HHS. Moreover, these services are provided so that AACS itself can speak on the determinative question for adoption: whether it would be in the best interests of a child to be adopted by particular parents. Here, based on AACS's religious beliefs about marriage, it does not believe and, therefore, cannot state that adoption by a same-sex couple would ever be in the best interests of a child. Nonetheless, HHS is compelling AACS to say just that. This impermissibly forces AACS, itself, to adopt and espouse the views of the government. This, like in *AOSI*, crosses the line from a condition defining the program to a condition defining the recipient. And where an entity is forced to express the government's speech as its own, it cannot cabin that speech to any program.

Additionally, the notice here, like the notice required in *NIFLA*, demands that AACS speak a particular message—the government's message. Unlike in *FAIR*, where schools were free to express their views of the military without losing federal funding, here, AACS does not have a true opportunity to express its views such that its views can be clearly distinguished from the government's message. AACS was required to sign and post at its place of business a statement that it is "illegal under state law to discriminate against any person, including any

prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." Although the amendment also permits religious-based agencies to post on their premises a written objection to the policy, E.V.C. § 42.-4, this would result in AACS simultaneously endorsing the policy via signature and condemning it through a written objection, and then again endorsing it when certifying same-sex couples. Like in *NIFLA*, this tug-o-war between speaking its message and speaking the governments clearly alters the content of AACS's speech. *See also Pac. Gas & Elec. Co. v. Pub. Util. Com..*, 475 U.S. 1, 16 (1986) (explaining that because "the choice to speak includes within it the choice of what not to say," First Amendment "protection would be empty, [if] the government could require speakers to affirm in one breath that which they deny in the next.").

In sum, the requirement that AACS sign and post a notice with which is disagrees and that it certifies same-sex couples, despite its belief that this will never be in the best interest of the child, are fundamentally at odds with the free speech protections of the First Amendment and impose unconstitutional conditions on AACS's.

CONCLUSION

For the foregoing reasons, the panel's holding should be reversed.

Date: September 14, 2020

/s/ 23
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