No. 2020-05

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

Defendant-Appellant,

v.

AL-ADAB AL-MUFRAD CARE SERVICES,

Plaintiff-Appellee.

On Rehearing 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

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BRIEF FOR APPELLANT

Team 26

Counsel for Appellant

ISSUES PRESENTED

I. Does the Al-Adab Al-Mufrad Care Services (AACS) have the right to discriminate against same-sex couples in accordance with their religion under the Free Exercise Clause of the First Amendment?

II. Do the notice requirement of the East Virginia Code (E.V.C.) and the requirement that AACS screen and certify same sex couples qualify as unconstitutional conditions in violation of the First Amendment?

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The opinion of the United States District Court for the Western District of East Virginia is available in the Record. R. at 2–17. The opinion of the United States Court of Appeals for the Fifteenth Circuit is available in the Record. R. at 18–25.

STATEMENT OF JURISDICTION

The Western District Court of East Virginia had original jurisdiction over this matter pursuant to 28 U.S.C. § 1331. The District Court granted a permanent injunction and temporary restraining order in favor of appellee, Al-Adab Al-Mufrad Care Services (AACS), on April 29, 2019. R. at 8, 17. Appellant, Commissioner Hartwell (HHS), timely filed for appeal to this Court pursuant to 28 U.S.C. § 1292(a)(1). R. at 18. On appeal, a three-judge panel reversed the District Court's decision on February 24, 2020. R. at 18. AACS timely filed a petition for a Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35(a)(2), which this Court granted on July 15, 2020. R. at 26.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, which in relevant part provides: "[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I.

In addition, this case involves the application of the Fourteenth Amendment, which in relevant part provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

This case also involves provisions of East Virginia Code (E.V.C.) § 42, which adopts the Equal Opportunity Child Protection Act (EOCPA) and E.V.C. § 37.

STATEMENT OF THE CASE

Evansburgh is a city in East Virginia with a large refugee population. R. at 3. Currently, there are nearly 17,000 children in the Evansburgh foster care system, with over 4,000 of them being eligible for adoption. R. at 3. To place as many children as possible in a suitable adoptive or foster home, HHS has contracted with dozens of private agencies around the city for the purpose of helping certify couples as foster and adoptive parents. R. at 3. When HHS takes custody of a child, it sends a referral of the child to the private agencies. R. at 3. After referring to their lists of available families, the agencies notify HHS of any potential matches. R. at 3. These agencies secure public funding by providing services such as home visits, counseling, and placement recommendations to HHS. R. at 3.

AACS is one of the private organizations that has contracted with HHS to provide these services in exchange for public funds. R. at 5. AACS was founded to provide support to the Muslim refugee community. R. at 5. AACS's core mission is to provide support and services that are consistent with the teachings of the Qur'an. R. at 5. Prior to contracting with AACS, East Virginia adopted the EOCPA into the E.V.C. § 42. R. at 4. The EOCPA imposes nondiscrimination requirements on private child placement agencies receiving public funds. R. at 4. Part of the EOCPA prohibits municipal funds from being distributed to agencies not in compliance with the act. R. at 4. Following the decision in *Obergefell*, the EOCPA was amended to include prohibition of discrimination based on sexual orientation. R. at 6. The amended EOCPA also requires all foster and adoption agencies to post a sign stating the anti-discrimination policy prior to receiving public funds. R. at 6. However, religious-based agencies may post a written objection to the policy. R. at 6. Following the adoption of the amended EOCPA, HHS's commissioner, Christopher Hartwell, contacted all religious-based agencies in

the area, including AACS, to ensure compliance with the EOCPA amendments. R. at 7. During this time, Commissioner Hartwell discovered AACS refused to conduct home visits and certify same sex couples for adoption, which is in direct violation of the EOCPA. R. at 7. Commissioner Hartwell proceeded to send a letter informing AACS of their non-compliance. R. at 7. The letter also informed AACS that further action would be taken if AACS did not guarantee compliance within ten days of receipt. R. at 7. When AACS did not follow-up, HHS issued a referral freeze on all AACS pending and incoming cases and informed AACS that their annual contract would not be renewed. R. at 7.

AACS brought action against Commissioner Hartwell, in his official capacity, seeking a temporary restraining order against the freeze and a permanent injunction compelling HHS to renew its contract with AACS. R. at 8. AACS alleges that enforcement of the EOCPA is a violation of their First Amendment rights under the Free Exercise and the Free Speech Clause. R. at 8. The District Court granted AACS's motion for a temporary restraining order and permanent injunction. R. at 18. However, while on appeal in the 15th Circuit, a three-judge panel reversed the District Court's decision. R. at 18. This case now sits in this Court for a rehearing en banc. R. at 26.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's granting of AACS's motions because the enforcement of the EOCPA does not violate AACS's Free Exercise or Free Speech rights. AACS's practices are discriminatory and are not protected under the Free Exercise Clause of the First Amendment.

To prevail on a Free Exercise claim, one must show they were treated more harshly due to their religion than any secular group would have been had they engaged in similar conduct. If a law is neutral and generally applicable, strict scrutiny is not triggered. However, even if a law is not neutral or generally applicable it still may be permitted if it meets strict scrutiny; for a law to meet strict scrutiny, it must be narrowly tailored to achieve a compelling state interest.

The EOCPA is neutral because it does not explicitly burden religion and the lawmakers' intent was not religiously motivated. The act is also generally applicable because the provisions are equally enforced between religious and secular entities. Even if this Court were to find the EOCPA is not neutral or generally applicable, HHS still prevails because the act meets strict scrutiny. East Virginia has a compelling state interest in preventing the discrimination of same-sex couples by publicly funded foster and adoption agencies. The State's interest in ensuring all residents equal access to these services is specifically addressed in and supported by the EOCPA, making it narrowly tailored to prevent this type of discrimination.

Furthermore, neither the E.V.C. notice requirement nor mandated compliance with the EOCPA anti-discrimination policy are unconstitutional conditions in violation of the First Amendment. Generally, the government may place conditions on the receipt of public funds so long as the condition does not deprive individuals of their constitutionally protected rights. Conditions that are 1) unrelated to the government funded program, 2) explicitly coercive, or 3)

compel speech violate the Free Speech Clause of the First Amendment. The EOCPA and the notice requirement in E.V.C. § 42.-4 are related to HHS's program as they are only applicable to AACS within the course of their contractual duties to screen and certify potential foster and adoptive parents. AACS is not compelled to endorse the government's views on discrimination as AACS is free to post a public objection to the EOCPA.

Additionally, the EOCPA and E.V.C. § 42.-4 are regulatory laws designed to compel anti-discriminatory conduct not speech. Conduct is only protected under the First Amendment if it is expressive in nature. Regulatory laws that impose incidental burdens on these rights may be justified if the government has an important government interest and meets the standards of the *O'Brien* test. Screening and certifying foster and adoptive parents is not inherently expressive. However, even if the conduct is expressive, the government's enforcement of the EOCPA is justified and necessary under *O'Brien* to achieve the government's interest in ensuring access to child placement services to all residents of Evansburgh.

Because AACS's rights were not violated under the Free Exercise or Free Speech Clause, the District Court improperly granted AACS's motions.

ARGUMENT AND AUTHORITIES

The District Court erred in granting AACS's temporary restraining order against HHS's imposition of the referral freeze, as well as granting the permanent injunction compelling AACS's contract renewal. AACS's claim that the application of the EOCPA violates their rights to Free Exercise and Free Speech under the First Amendment are unlikely to succeed. A party seeking a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The District Court improperly granted AACS's motions because the EOCPA is a neutral and generally applicable law designed to regulate non-expressive conduct. Therefore, AACS's Free Exercise and Free Speech rights were not violated and they have suffered no irreparable injury.

AACS'S DISCRIMINATORY ACTIONS ARE NOT PROTECTED UNDER THE FREE EXERCISE CLAUSE BECAUSE THE LAW IS NEUTRAL AND GENERALLY APPLICABLE.

The Free Exercise Clause prevents Congress from making any laws "respecting an establishment of religion or prohibiting the free exercise thereof." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (quoting U.S. Const. amend I). These protections are extended to state governments through the Fourteenth Amendment. *See id*. However, this right does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div. of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n.3 (1982)). Neutral and generally applicable laws which only incidentally impact a religious practice do not need to be justified by a

compelling state interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Even if a law is found not to be generally applicable and neutral, the law will still stand if it is justified by a compelling state interest and is narrowly tailored to that interest. *Id*. at 533.

A. The EOCPA is Generally Applicable and Neutral, and Therefore, is Not Subject to Strict Scrutiny.

General applicability and neutrality of a law are intertwined and analyzed together. *Lukumi*, 508 U.S. at 532. For a law to be neutral, it must, at a minimum, "not discriminate on its face." *Id*. at 533. If the law selectively imposes a burden on religious conduct or only pursues the governmental interest against religious entities, then it is not generally applicable. *Id*. at 534. A law with exemptions does not violate neutrality and general applicability unless those exemptions specifically target religious conduct. *Id*. at 538.

1. *The EOCPA is neutral because it does not discriminate on its face.*

To determine if a law is neutral, the Court first examines facial neutrality. *Id.* at 533. A law is not facially neutral "if it refers to a religious practice without a secular meaning discernable from language or context." *Id*. In *Lukumi*, the government passed ordinances which prohibited ritualistic animal sacrifice; however, secular exemptions existed, such as for hunters and slaughterhouses. *Id.* at 520. The Church of Lukumi sued, claiming the law was not facially neutral due to the religiously charged language. *Id*. at 533–34. The Court agreed that the law was facially discriminatory because the use of the words "sacrifice" and "ritual" held such strong religious connotations and lacked a secular meaning. *Id*. at 534.

When determining if a law is neutral, the Court also looks to the context under which the law was written. *Id*. at 540. If the overall context indicates that the true objective of the law is to burden religious freedom, the law will not be considered neutral. *Id*. In *Lukumi*, the Court

examined the circumstances in which the ordinances were passed and found that the lawmakers' intent was to burden specific religious practices. *Id*. at 540–41. The ordinances were only enacted after the church decided to move to the city. *Id*. at 541. Furthermore, the comments of the city council, such as "what can we do to prevent the church from opening," supported the Court's conclusion that the intent of the ordinance was to "target animal sacrifices by Santeria worshippers." *Id*. at 541–42.

The EOCPA is neutral because it does not facially discriminate or specifically target religious conduct. The act does not use words with religious meanings, but instead uses words with secular context such as "race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. Unlike the ordinance in *Lukumi*, which had strong religious connotation, the words in the EOCPA have a clear secular meaning within the context of the law.

When examining the legislative history of the EOCPA, it is clear the law was not created with the intent to target religious conduct. Unlike the ordinance in *Lukumi*, which was enacted as a response to a religious activity, the EOCPA was adopted in response to *Obergefell* and to achieve the City's interest in "eradicating discrimination in all forms." R. at 6. Furthermore, the amendment to the EOCPA to include discrimination based on sexual orientation lacked explicit mention of how religious conduct might be impacted. The legislative history and context surrounding the amendment lack any indication of intent to target religious entities. There is no record or evidence of any religiously discriminatory statements or conduct by the legislature. Because the law is facially neutral and not written with the intent to target religious entities, the amended EOCPA is neutral.

2. ***East Virginia's implementation of the EOCPA is generally applicable because it does not treat conduct differently purely because it is religiously motivated***.

A law is not generally applicable if it treats similar conduct differently based off if it is motivated by religious views. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Com'n*, 138 S.Ct. 1719, 1731 (2018). In *Masterpiece*, a baker refused to bake a cake for a same-sex wedding, claiming it to be against his religious beliefs. *Id*. at 1724. The couple filed a complaint against the baker for violating the Colorado Anti-Discrimination Act (CADA). *Id.* at 1725. The lower court found the baker discriminated on the basis of sexual orientation. However, on appeal, the baker contended that forcing him to bake a cake for same-sex couples violated his right to free exercise of religion. *Id*. The Court found that the law did violate the baker's rights because he had not been given the "neutral and respectful consideration" to which he was entitled. *Id*. at 1728. Furthermore, the Court noted that the Commission had inequitably applied the law as they had previously allowed bakers to refuse service to individuals requesting cakes that displayed images "disapprov[ing] of same-sex marriage, along with religious text." *Id*. at 1728, 1730. These exceptions, combined with the disparaging comments about the baker's religion, led the Court to find the application of the law violated "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id*. at 1731.

When the government arbitrarily enforces a law against religious entities but allows secular entities to partake in similar conduct, the general applicability requirement is violated. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165–166 (3d Cir. 2002). In *Tenafly*, a city ordinance prohibited citizens from placing items on "any pole, tree, curbstone, sidewalk or elsewhere… excepting such as may be authorized by this or any other ordinance of the Borough." *Id*. at 152. Members of the Orthodox Jewish community began constructing an eruv, a ceremonial demarcation of an area designed to allow small children and disabled persons to attend synagogue during the Sabbath. *Id*. Upon completion, the city demanded the eruv be

removed even though they had allowed both religious and secular violations of the ordinance in the past. *Id*. at 155. These allowed violations include local churches posting signs bearing crosses, private postings by individuals, and the Chamber of Commerce affixing Christmas decorations to utility poles. *Id.* The court found the ordinance not to be generally applicable because the city had not only allowed violations for secular groups in the past, but also for groups of the Christian faith. *Id.* Because the ordinance was selectively applied against members of the Orthodox Jewish community, the court concluded that the application of the city ordinance was religiously motivated, and therefore, not generally applicable. *Id.*

To prevail under a Free Exercise claim, one must show: (1) they were treated more harshly due to their religion; and (2) similar conduct would have been treated differently if that person held different religious views. *Fulton v. City of Philadelphia*, 922 F.3d 140, 154 (3d Cir. 2019), cert. granted, 140 S.Ct. 1104 (2020) (citing *Lukumi*, 508 U.S. at 524). In *Fulton*, the city did not renew a contract with Catholic Social Services (CSS) for foster care services due to their refusal to certify same-sex couples. *See id*. at 149. The court held the refusal to renew the contract did not violate CSS's rights under the Free Exercise Clause because the law was generally applicable. *Id*. at 158–59. CSS argued that the city's consideration of race and disability when placing a child into a home was selective enforcement of the anti-discrimination law. *Id*. at 158. The court ruled this was not arbitrary enforcement as the city never refused to certify an otherwise qualified household because of these considerations. Instead, the city only used the considerations when determining which home was the best fit for a child. *Id.*

Unlike in both *Masterpiece* and *Tenafly*, where the policies were applied despairingly between religious and secular entities, HHS equitably applied the EOCPA to all publicly funded foster and adoption agencies. Contrary to *Masterpiece,* where the commission selectively

allowed secular exemptions, HHS did not apply the anti-discrimination act arbitrarily between agencies. The record does not reflect any evidence that non-compliant secular agencies were treated differently than AACS. Furthermore, HHS did not inequitably enforce their policy against the Muslim community but contacted all religious agencies, distinguishing it from the city in *Tenafly*. AACS's claim that they were treated more harshly than other publicly funded foster agencies is unsupported.

Instead, HHS's actions are comparable to those of the government in *Fulton*. Like health and human services in *Fulton*, HHS did not renew their contract with a religious agency due to the agency's unilateral refusal to screen and certify same-sex couples. Despite both governments adopting a same-sex anti-discrimination policy, both publicly funded religious agencies failed to comply even after being notified of their violations.

The District Court incorrectly concluded that the post-certification considerations used when placing a child in a home were secular exemptions. R. at 11–12. The court falsely applied E.V.C. § 42.-2 to the post-certification placement of a child. However, this provision explicitly applies only to the "screening and certifying [of] potential foster care or adoptive parents." R. at 4. Like in *Fulton*, the race, religion, and sexual orientation of foster and adoptive parents are only considered when placing a child into a home. R. at 8–9. Furthermore, HHS has never allowed secular or religious agencies to consider race, religion, or sexual orientation during the screening and certification process. Therefore, HHS's enforcement of the EOCPA is generally applicable to all publicly funded child placement agencies.

A statute is generally applicable when similar conduct is treated equitably between religious and secular entities. HHS requires all their agencies to follow the anti-discrimination guidelines when screening and certifying a family. R. at 7. Furthermore, AACS's claim that HHS has

previously allowed secular exemptions is invalid because these considerations are not a part of E.V.C. § 42. Instead, these exemptions fall under E.V.C. § 37(e), which applies only to HHS when making post certification placement decisions. R. at 4.

Because the EOCPA is neutral and HHS's implementation of the act was generally applicable, strict scrutiny does not apply.

B. Even if the EOCPA is Not Neutral or Generally Applicable, it Meets Strict Scrutiny.

If a law is not neutral or generally applicable, the state must prove both that the government has a compelling interest and the law is narrowly tailored to achieve that interest. *Lukumi*, 508 U.S. at 546.

1. *HHS has a compelling interest in preventing discrimination based on sexual orientation*.

A compelling interest must be substantive and specific, not just a general assertion of a possible interest by the government. *Ward v. Polite*, 667 F.3d 727, 731 (6th Cir. 2012). In *Ward*, a student in a counseling program refused to counsel a client on their same-sex relationship due to her religious beliefs. *Id.* The student asked that the client be referred to another counselor. *Id*. In response, the university dismissed the student from the program, claiming she violated the code of ethics. *Id*. at 732. The university's interest in expelling the student was not compelling, as referrals were commonplace for counseling services. *Id*. at 740. The school's assertion that the referral put them in danger of losing accreditation was unsubstantiated. *Id*. Furthermore, the claim that the referral would interfere with the requirement that the school teach the American Counseling Association's code of ethics was too general of an assertion. *Id*. The court found these concerns were not substantive or specific enough to rise to the level of a compelling interest. *Id*.

Unlike in *Ward*, HHS has a substantive and specific interest in enforcing the EOCPA against AACS in order to allow all residents to have equal access to adoptive services and encourage a diverse pool of potential adoptive and foster parents. To allow AACS to continue to discriminate against potential adoptive parents based on their sexual orientation would impact HHS's ability to successfully place nearly 17,000 children, as it minimizes the pool of qualified applicants to choose from. R. at 3.

2. *The application of the EOCPA is narrowly tailored to achieve HHS's compelling interest.*

Laws that are "overbroad or underinclusive," and can be achieved by laws that are less restrictive to First Amendment rights are not narrowly tailored. *Lukumi*, 508 U.S. at 546. In *Lukum*i, the Supreme Court held a law is not narrowly tailored when it only restricts religious conduct but allows secular conduct which can cause "appreciable damage to [a] supposedly vital interest." *Id*. at 547 (quoting *Florida Star v. B.J.F*., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring)). The court in *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, applied the Supreme Court's findings in *Lukumi* to a policy which allowed officers to have beards for medical, but not religious reasons. 170 F.3d 359, 366 (3d Cir. 1999). The state claimed allowing officers to have a beard for religious reasons would impact the morale of police officers, as well as create concerns of police being readily identifiable. *Id.* The state offered no proof as to why a religious exemption would threaten these interests, but the medical exemption did not. *Id.* The court held the policy was not narrowly tailored to achieve a compelling interest because the medical exemptions undermined the supposed interest. *Id.*

HHS's enforcement of the EOCPA is narrowly tailored to achieve a compelling interest. Unlike *Lukumi* and *Fraternal Order*, the EOCPA does not allow for any exemptions, much less an exemption which would allow discrimination during the certification process and narrow the

pool of adoptive and foster parents. Although HHS considers factors such as sexual orientation and race when placing a child, these exemptions do not impact the state's compelling interests in a diverse pool of candidates, but furthered the state's goal of serving the best interests of the child. Because there are no exemptions which impact the interests of the state, the law is narrowly tailored.

Even if this Court finds the EOCPA is not neutral or generally applicable, AACS's right to free exercise has not be violated because the EOCPA meets strict scrutiny. Therefore, the District Court inappropriately granted AACS's motions.

THE DISTRICT COURT INCORRECTLY DETERMINED THAT THE NOTICE REQUIREMENT OF E.V.C. § 42.-4 AND THE REQUIREMENT THAT AACS CERTIFY SAME-SEX COUPLES ARE UNCONSTITUTIONAL CONDITIONS IN VIOLATION OF THE FIRST AMENDMENT.

As a general matter, the government may put conditions on the receipt of public funds. *Agency for International Development v. Alliance for Open Society International (AOSI)*, 570 U.S. 205, 214 (2013). However, "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc*., 547 U.S. 47, 49 (2006) (quoting *U.S. v. American Library Assn., Inc*., 539 U.S. 194, 210 (2003)). Conditions that are 1) irrelevant to the objectives of the program, 2) are coercive in nature, or 3) compel speech outside the "contours of the program itself" are unconstitutional. *AOSI*, 570 U.S. at 214–15.

A. The E.V.C. § 42.-4 Notice Requirement Does Not Compel Speech.

Speech is compelled when the complainant's own message is affected by the speech it was forced to accommodate. *Rumsfeld*, 547 U.S. at 49 (2006) (referencing *Hurley v. Irish–American Gay, Lesbian and Bisexual Grp. of Boston, Inc*., 515 U.S. 557, 566 (1995)). However, incidental abridgement of speech made in the course of regulating conduct has never been found

to be "illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *See id*. at 62 (quoting *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949)).

AACS's claims improperly rely on the assumption that the purpose of E.V.C. § 42.-4 is to compel publicly funded foster and adoption agencies to agree with the government's anti-discriminatory views. However, E.V.C. § 42.-4 contains an explicit exemption for religiously affiliated organizations, such as AACS. R. at 6. This exemption allows religious agencies to post a written objection alongside the policy, expressing their viewpoints and disagreements. R. at 6.

The District Court improperly relied on the Supreme Court's ruling in *AOSI*, that requiring health organizations to sign an explicit statement denouncing prostitution prior to receiving federal funding was an unconstitutional condition. R. at 16. However, the circumstances presented in *AOSI* vary significantly from those in this case. The policy requirement in *AOSI* compelled recipients to expressly endorse the government's opinion. 570 U.S. at 205. Prior to receiving funds, recipients were required to sign a statement guaranteeing their organization "[was] opposed to 'prostitution and sex trafficking because of the psychological and physical risks they pose[d] for women, men, and children." *Id*. at 210 (quoting 45 CFR § 89.1(b) (2012). The policy limited recipient organizations' ability to work within certain countries and "diminished the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS." *See id*. at 211. Additionally, recipients alleged that their privately funded programs were subject to censorship because speaking openly with individuals involved in the commercial sex trade may have violated the policy requirement. *Id*.

As originally written, the only exemption to the act was for recipients who worked with the Global Fund to Fight Aids; however, these organizations still had to sign the statement guaranteeing opposition to prostitution. *Id*. at 210. The amended act allowed recipients to work with organizations "engage[d] [ ] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking" as long as the recipients retain "objective integrity and independence from any affiliated organization." *Id*. at 211 (quoting 45 CFR § 89.3). However, the policy requirement remained in effect. *See id*. The Supreme Court ruled the amended guidelines were an insufficient remedy because they did not allow for recipients to express their own beliefs. *Id*. at 219. Instead, the Court found the guidelines to be hypocritical as they stated recipients could work with organizations "inconsistent with *the recipient's opposition*." *Id*. at 219–20. Ultimately, the Court held that requiring organizations to express a specific belief in order to receive government funding is an unconstitutional condition. *Id*. at 218.

Here, AACS was not required to express a specific belief. E.V.C. § 42.-4 requires all contracted agencies to sign and post the neutral law where individuals seeking foster and adoption services will be notified of their rights. However, E.V.C. § 42.-4 does not require religiously affiliated organizations to endorse the law or the government's opinion. The exemption specifically exists to facilitate freedom of expression by allowing for objections to be publicly acknowledged. Because AACS is free to express their opposition to the E.V.C., their speech is not compelled.

B. The EOCPA's Ban on Sexual Orientation Discrimination Does Not Compel AACS to Endorse Same-Sex Couples as Adoptive Parents.

AACS's claim that the EOCPA compels speech fails for the same reasons as their E.V.C. § 42.-4 claim. "Freedom of speech prohibits the government from telling people what they must say." *Rumsfeld*, 547 U.S. at 61. However, the government may place conditions on the

distribution of public funds so long as the government does not require the recipient to adopts its views. *Fulton*, 922 F.3d at 161 (referencing *AOSI*, 570 U.S. at 205).

AACS adopts the viewpoint expressed by Catholic Social Services (CSS) in *Fulton*. *See id*. at 161. In *Fulton*, CSS argued "it ha[d] been required to adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents." *Id*. Similarly, AACS believes that anti-discriminatory law, which prevents arbitrary rejection of same-sex couples, requires them to endorse same-sex marriage. R. at 14–15. However, the court rejected this argument in *Fulton*, finding that the alleged "speech" associated with certification of families arose out of CSS's contract to provide public services that complied with state law. *Fulton*, 922 F.3d at 161. Because CSS's claim centered around compelled speech, the court concluded *AOSI* was controlling in determining whether CSS's First Amendment rights had been violated. *Id*. Ultimately, the court held the law did not compel speech stating, "[t]he [c]ity would violate *AOSI* if it refused to contract with CSS unless it officially proclaimed its support for same-sex marriage." *Id.* Because the city's only objection to renewing CSS's contract was non-compliance rather than their religious objections, the court determined that the organizations were still able to endorse and abide by their own beliefs outside the course of the contract. *Id.*

The EOCPA asks nothing more of AACS than the law in *Fulton* did of CSS. It simply requires a publicly funded organization to act in accordance with anti-discrimination policies while carrying out their contracted duties to screen and potentially certify foster and adoptive parents. It does not require AACS to officially proclaim support for same-sex marriage or abide by the EOCPA outside the performance of their contractual obligations. Furthermore, like the city in *Fulton*, HHS was willing to renew the contract if AACS provided a guarantee of future compliance within 10 days of Commissioner Hartwell's letter. R. at 7-8. HHS's willingness to

renew the contract despite knowledge of AACS's religious views illustrates that the basis for the referral freeze and nonrenewal were entirely motivated by noncompliance and not AACS's religious views. Accordingly, this Court should adopt the Third Circuit's reasoning in *Fulton* and find that the EOCPA does not compel speech.

At most, AACS has offered support to show the government's intent in enacting the EOCPA was to compel conduct. When a law affects what an organization must do and not what they must say, the law regulates conduct, not speech. *Rumsfeld*, 547 U.S. at 60. In *Rumsfeld*, the Court addressed whether a law that required schools to grant equal access to military recruiters violated the school's rights to free speech. *Id*. The Court concluded that the purpose of the law centered around conduct, specifically regulating recruitment by affording equal access. *Id*. at 60–61. The Court further explained that this compelled conduct is only protected under the First Amendment if it is inherently expressive. *Id*. at 66. Ultimately, the Court found that "the expressive component of a law school's actions [was] not created by the conduct itself but by the speech that accompanie[d] it." *Id*. The Court reasoned "if combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id*. Like the act in *Rumsfeld*, the aim of the EOCPA is to allow equal access to foster and adoptive services by regulating the certification process. Therefore, the EOCPA is only burdensome to First Amendment protections if this court determines that certification is inherently expressive.

C. The Compelled Conduct Under the EOCPA and E.V.C. § 42.-4 is Non-Expressive and Therefore, Does Not Violate First Amendment Protections.

Certain forms of expressive conduct are subject to First Amendment protections. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). "[W]hen 'speech' and 'nonspeech' elements are combined

in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.*

Under *O'Brien*, the government may enact regulations aimed at controlling conduct that burdens First Amendment freedoms when 1) the government has constitutional power to act; 2) the regulation "furthers an important or substantial governmental interest"; 3) the government's interest is unrelated to suppressing expression; and 4) the regulation's incidental suppression of First Amendment rights is narrowly tailored. *Id*. at 377. When determining whether burning draft cards was symbolic speech protected under the First Amendment, the Court first analyzed whether the government had the authority to enact the regulatory law. *Id*. at 376–77. Finding that Congress's power to raise and preserve an army allowed for the implementation of a registration system, the Court then looked at whether Congress had a substantial government interest in regulating individuals' ability to destroy or alter draft cards. *Id*. at 377–78. The Court disagreed with O'Brien's assertion that draft cards were nothing more than "pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant." *Id*. at 378. Instead, the justices adopted the stance that draft cards served many substantial purposes that would be "defeated by the certificates' destruction or mutilation" including (1) proof of registration that ensures efficient administration in the event of suspected delinquency; (2) a form of communication between the board and registrants by supplying simplified and quickly accessible contact information; (3) a reminder to registrants to notify the board of any changes to the information contained on the card; and (4) an aid in identifying "valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates." *Id*. at 378–79; *see also City of Erie v. Pap's A.M.*, 529 U.S.

277, 296 (2000) (holding that the government may also have a substantial interest in regulating harmful secondary effects of an entities conduct).

The Fourteenth Amendment provides that "states shall not deprive citizens . . . of equal protection of the laws." U.S. Const. amend. XIV. It is without question that states have the authority to pass legislation dealing with discrimination. HHS is a government entity which is bound by the Fourteenth Amendment with whom AACS contracted to provide certification services. Therefore, they were acting as a government agent when evaluating potential foster and adoptive parents. It is imbedded not only in legislative history but also judicial precedent that preventing discrimination is a compelling government interest. *See C.R. Cases*, 109 U.S. 3 (1883); *Brown v Bd. of Educ*., 347 U.S. 483 (1954); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Craig v. Boren*, 429 U.S. 190 (1976); *U.S. v. Virginia*, 518 U.S. 515 (1996); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

When the Court in *O'Brien* turned its attention to whether the government's interest in enacting the regulatory law was related to suppression of speech and expression, it noted that the law did not distinguish "between public and private destruction, and it [did] not punish only destruction engaged in for the purpose of expressing views." 391 U.S. at 375. The Court frowned upon O'Brien's assertion that an investigation into the motives of the legislature was warranted when the law itself was facially neutral simply because a few unwise Congressmen had chosen to express their own views. *Id*. at 383–84.

The EOCPA does not distinguish between individuals who discriminate because they are attempting to express their religious views versus those who fail to comply for any other reason. It simply states that it is against the law for child placement agencies to "[discriminate]on the

basis of race, religion, national origin, sex, [sexual orientation], marital status, or disability when screening and certifying potential foster care or adoptive parents." R. at 5–6.

Lastly, the Court addressed whether the incidental suppression of O'Brien's rights was caused by a law that was narrowly tailored to achieving the government's goals of ensuring the continuous availability of a registration service. *O'Brien*, 391 U.S. at 381.The Court held the law as amended to be "an appropriately narrow means of protecting [the government's] interest [by condemning] only the independent noncommunicative impact of conduct within its reach." *Id*. at 382.

Mandating compliance is the least restrictive means of furthering HHS's interest in enacting anti-discrimination policies. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 733 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."). Furthermore, the wording of the EOCPA itself ensures that the law is narrowly tailored to achieve the government's objective of non-arbitrary denial of qualified foster and adoptive parents merely because of discriminatory beliefs. The law adopts the phrasing "when screening[] and certifying potential foster or adoptive parents." R. at 5. The law is directed at non-communicative conduct within its lawful reach and is only applicable to AACS when acting as a state agent to provide the proscribed service. There is not a more direct way to avoid discriminatory practices in certification than to enact a law that removes the consideration of sexual orientation as a basis for denying otherwise qualified individuals. Therefore, the law is narrowly tailored to the government's purpose.

Because the EOCPA and the E.V.C. § 42.-4 notice requirement were implemented to regulate discriminatory conduct and not to compel AACS to condone the government's views,

the rights guaranteed by the First Amendment have not been offended. Furthermore, because AACS has failed to establish that the EOCPA or E.V.C. § 42.-4 compel speech or protected conduct, the District Court improperly granted an injunction.

CONCLUSION

Because the EOCPA is a neutral and generally applicable law that compels non-expressive conduct, Appellants respectfully ask this Court to find the application of the EOCPA and E.V.C. § 42.-4 to AACS did not violate the Free Exercise or Free Speech Clause of the First Amendment. For these reasons, this Court should reverse the District Court's decision to grant AACS's motion for a temporary restraining order against the referral freeze and the permanent injunction compelling HHS to renew AACS's contract.

Respectfully submitted,

Team 26
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