No. 2020-05

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

October Term 2020

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

Appellant,

v.

AL-ADAB AL-MUFRAD CARE SERVICES PLAINTIFF-APPELLEE

Appellee,

On Rehearing En Banc of an Appeal From an Order of the United States District Court for the Western District of East Virginia Granting A Temporary Restraining Order and A Permanent Injunction.

BRIEF FOR PETITIONER

Team 27

ATTORNEYS FOR APPELLANT

QUESTIONS PRESENTED

I. Whether a religious-based child placement agency, under the Free Exercise Clause, can force an exemption to a State law protecting same-sex couples from discrimination during the parent certification process when the law applies to all contracting agencies, secular and religious alike.

II. Whether, under the Free Speech Clause, a city can require child placement agencies, when carrying out their contractual responsibilities, to not discriminate on the basis of sexual orientation during the parent certification process and require that those agencies post a factual recitation of the State's non-discrimination law.

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OPINIONS AND ORDER

The decision of the District Court for the Western District of East Virginia has not been reported in any official or unofficial reporter at the time of filing this Brief. The record sets forth the unofficial and unreported opinion of the Court of Appeals of East Virginia. *Al-Adab Al-Mufrad Care Serv. v. Harwell*, No. 2020-05 (E. Va. July 15, 2020.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I

E. Va. Code § 37(d) provides: "the determination of whether the adoption of a particular child by a particular prospective adoptive parent or couple should be approved must be made on the basis of the best interest of the child."

E. Va. Code § 37(e): provides that an agency must consider, among other things: "the ages of the child and prospective parent(s); the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s); the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background; and the ability of a child to be placed in a home with siblings and half-siblings.

E. Va. Code § 42-3(b): child placement agencies are prohibiting from "discriminating on the basis of race, religion, national origin, sex, marital status, disability, or sexual orientation when screening and certifying potential foster care or adoptive parents or families."

E. Va. Code § 42-3(c): "where the child to be placed an identified sexual orientation, Child Placement Agencies must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement."

E. Va. Code § 42-4: before funds are dispersed pursuant to the contract with a governmental entity, the Child Placement Agency must 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, material status, disability, or sexual orientation."

STATEMENT OF JURISDICTION

The District Court for the Western District of East Virginia granted Appellee, Al-Adab Al-Mufrad Care Services a Temporary Restraining Order against a referral freeze and permanent injunction compelling a renewal of contract. R. at 2. Appellant, Commissioner Christopher Hartwell appeals from the judgment. R. at 18. Appellee's petition for Rehearing En Banc pursuant to Federal Rule of Appellant Procedure 35(a)(2) has been granted. R. at 26.

STATEMENT OF THE CASE

A. Statement of the Facts

The City of Evansburgh has a shortage of foster and adoptive homes, with approximately 17,000 children in foster care, about 4,000 of whom are available for adoption. R. at 3. In Evansburgh, the City's Department of Health and Human Services ("HHS") is tasked under law with establishing a system to serve the well-being of each child under the care of the state. R. at 3. Accordingly, to ensure that children are placed in loving homes, HHS has entered into foster care and adoption services contracts with thirty-four private child placement agencies in Evansburgh. R. at 3. Under the contract, the agencies receive public funds to carry out their services for HHS, which include home studies, counseling, and placement recommendations. R.

at 3. HHS and the contracting agencies are governed by the East Virginia Code, which provides the "best interests of the child" as the basis of any child placement decision. R. at 3-4.

On November 4, 2014, HHS placed a white special needs child with an African American couple, even though there were other certified white adoptive families available to the child. R. at 8. On three occasions during a conflict between the Sunni and Shia sects from 2013 to 2015, HHS approved AACS's recommendation that children should not be placed with otherwise qualified adoptive parents from the other sect, and instead, delayed placement until a family of the same sect as the child could be found. R. at 9. On March 21, 2015, a five-year old girl was not placed with a single parent family consisting of a father and son, even though this family was otherwise certified by the sponsoring adoption agency. R. at 9. Nevertheless, Hartwell explained that, in these instances, HHS interpreted the provision in E.V.C. § 42.2 requiring preference for placement with same-race families to be intended only to preserve and protect minority children and families and thus the presumption did not govern that placement. R. at 9.

The contracting agencies, alone, are also subject to the Equal Opportunity Child Placement Act of 1972 ("EOCPA"), which prohibits any agency from "discriminating on the basis of sex, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." R. at 4. After the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Governor and Attorney General sought to "eradicat[e] discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. All State statues were reviewed by the Attorney General to mirror the Supreme Court's decision. R. at 6.

Soon after, the State of East Virginia amended the EOCPA and other State laws to expressly prohibit child placement agencies from discriminating on the basis of sexual

orientation. R. at 6. The amendment, E. Va. Code § 42-3(c), included a provision directing agencies to "give preference to foster and adoptive parents that are the same sexual orientation as the child needing placement." R. at 6. This provision directly mirrored a provision in the original EOCPA directing agencies to give preference to parents that are the same race as the child needing placement. R. at 4. The amendment also required that, in order to receive funds under the contract, all child placement agencies must "sign and post" notice of the EOCPA's non-discrimination law at its place of business. R. at 6.

In July 2018, a reporter for the local newspaper asked Commissioner Christopher Hartwell ("Hartwell") of the HHS, whether the religious-based agencies contracting with Evansburgh were in compliance with the EOCPA amendment. R. at 6. In response, Hartwell contacted those agencies and discovered that Al-Adab Al-Mufrad Care Services ("AACS") intentionally violated the law because of its belief in the Qur'an and the Hadith, which consider same-sex marriage to be a moral transgression. R. at 5. AACS told Hartwell that on the occasions that same-sex couples contacted the agency, it referred them to one of the four agencies in the area that served the LGBTQ community. R. at 7. At the time, no formal complaints had yet been filed against AACS by a prospective same-sex couple. R. at 7.

Two months later, Hartwell sent a letter to AACS. R. at 7. The letter noted that HHS "respects [AACS's] sincerely held religious beliefs" but that it "voluntarily accepted public funds in order to provide a secular service to the community," thus, it "must comply with the State's EOPCA to be able to receive government funding and referrals." R. at 7. The letter also notified AACS that HHS would not be renewing its contract with the agency on the annual renewal date of October 2, 2018. R. at 7-8. Lastly, the letter notified AACS that its non-compliance with the EOCPA necessitated a referral freeze that would be communicated to the

other agencies unless AACS provided "full assurance of its future compliance with the EOCPA" within ten business days. R. at 8. Following the referral freeze, HHS issued an "urgent notice" of the need for more adoptive families "because of a recent influx of refugee children into foster care." R. at 8. Because of the referral freeze, a young girl, "whose two brothers had been placed by AACS with a family," was placed with another family by a separate agency. R. at 8. Additionally, "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." R. at 8. Evidence from the district court found that since the referral freeze, several other agencies have complied with the EOCPA amendments. R. at 8.

B. Proceedings Below

AACS brought this action against Hartwell, in his official capacity as Commissioner of HHS, alleging that his refusal to renew Evansburgh's adoption placement services contract with AACS violates AACS's First Amendment rights to freedom of religion and speech. R. at 2. Under the contract, AACS provided recruitment, training, and support for adoptive families in exchange for public funds. R. at 2. AACS filed a Motion seeking a Temporary Restraining Order ("TRO") against the referral freeze and an injunction compelling HHS to renew AACS's contract. R. at 2. The United States District Court for the Western District of East Virginia granted AACS's Motion for a TRO and permanent injunction was subsequently granted. R. at 2.

However, Hartwell appealed from the district court's judgment granting a TRO and permanent injunction to AACS. The district court held that Evansburgh's enforcement of a State anti-discrimination law, the EOCPA, as amended, against AACS violated its rights under the Free Exercise Clause. R. at 19. The court reasoned that the statutory exemptions combined with HHS's grant of individualized exemptions rendered the law neither neutral nor generally

applicable. R. at 19. The district court further held that enforcement of the law against AACS failed strict scrutiny. R. at 19. The Fifteenth Circuit rejected the district court's reasoning and reversed the judgement, finding that the enforcement of the EOCPA against AACS neither violates AACS's Free Exercise nor its Free Speech rights. R. at 25. The Petition of the Appellant AACS for Rehearing En Banc was granted upon the majority vote of non-recused active judges and pursuant to the Federal Rule of Appellant Procedure 35(a)(2). R. at 26.

SUMMARY OF THE ARGUMENT

For the now three decades since its decision in *Smith*, the Supreme Court approaches laws that incidentally burden religious beliefs as presumptively Constitutional if the law is both neutral and generally applicable. As the Fifteenth Circuit found the EOCPA amendment's express and applied objective is only to extend East Virginia's longstanding non-discrimination protections to same-sex couples in the realm of child placement. AACS cannot show that neither the law itself nor Evansburgh, targeted AACS with any religious hostility. HHS, as the primary enforcer of the law, only ever treated AACS as it would any other non-complying agency. The non-discrimination requirement is also generally applicable, required of all thirty-four contracting agencies, religious and secular alike. Because Evansburgh seeks to reach as many potential foster and adoptive parents as possible, HHS has never granted an exception to this contractual requirement for any reason. Any argument to the contrary, either intentionally or mistakenly misstates the facts and law.

Even if this Court departs from the Fifteenth Circuit's finding that the EOCPA is both neutral and generally applicable, the EOCPA is an undeniably necessary furtherance of East Virginia and Evansburgh's compelling interests. At the forefront is the State's interest in prohibiting discrimination and stigma against all minorities, including same-sex couples, in the

realm of child placement services and beyond. Relatedly, prohibiting discrimination against prospective parents is necessary to promote the best interests of children by ensuring that Evansburgh's pool of prospective parents mirrors the diversity and depth of the population at large. As Supreme Court precedent suggests, categorical non-discrimination laws like the EOCPA carry a presumption of narrow tailoring in its language and its purpose.

In a similar fashion to its first claim, AACS also attempts to wield the Free Speech Clause to circumvent the terms of its contract with the State. But as the Supreme Court has ruled time and time again, and as the Fifteenth Circuit accurately notes, governments like Evansburgh maintain significant authority to define the limits of their own speech, even when the speaker in question is a private one, like AACS. The Constitution plainly permits Evansburgh to impose legitimate speech requirements on contactors like AACS when those speakers agree to carry out services for the public on behalf of the government. Requiring that those services be carried out in a non-discriminatory manner does not offend the First Amendment's protections.

Additionally, a requirement that agencies like AACS not discriminate, may not even invoke the First Amendment. As the Supreme Court's jurisprudence suggests, any speech emanating from such a ban is merely incidental to the regulation of conduct. Even if this Court applies a speech analysis to understand the notice posting requirement as compelled speech, AACS must show some evidence that Evansburgh forced the endorsement of same-sex marriage upon AACS. No such facts exist.

ARGUMENT

I. THE EOCPA'S NON-DISCRIMINATION REQUIREMENTS ARE CONSTITUTIONAL UNDER ANY FREE EXERCISE REGIME.

Governmental entities like HHS seeking to enforce non-discrimination requirements on contracting parties like AACS may do so without offending the Free Exercise Clause when those

requirements are generally applicable and neutrally enforced. *Emp't Div. v. Smith,* 494 U.S. 872, 879 (1990). The EOCPA represents East Virginia's valid attempt at eradicating discrimination. To construe the inclusion of sexual orientation under that shield as a targeted attack on religious beliefs, is to challenge the very underpinnings of the Constitution, ignoring the delicate relationship between the right to religious exercise and the rule of law. Laws challenged by religious exercise claims at every turn would require our governments, large and small, "to satisfy every citizen's religious needs and desires," rendering legal schemes inept and scattered. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). As the Supreme Court has recognized, "[t]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Id.* In relying on that principle, this Court should affirm the Fifteenth Circuit's decision.

A. The Categorical Non-Discrimination Requirement, Applied To Agencies Across The Board Without Religion Bias, Is Constitutionally Sound Under *Smith*.

The Fifteenth Circuit correctly held that East Virginia's codified commitment to weeding out discrimination is not barred by AACS's claims of religious burdening because the EOCPA's non-discrimination requirement applies generally and neutrally to every child placement agency. For three decades, the Supreme Court's decision in *Smith,* has served as a rational limitation on Free Exercise claims. In *Smith*, the Court confronted a challenge to Oregon's State drug law by two Native Americans who sought a religious exemption to the law after using peyote for their religious ritual. *Id*. at 874. The Court granted no such exemption, holding that laws may incidentally burden religion as long as they are neutral and generally applicable. *Id.* at 879. Such a palpable limitation is cabined, however, by the enduring principle that freedom from "government action aimed at suppressing religious belief or practice" is an inherent Constitutional right. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,

559 (1993). While this freedom is paramount to the fabric of our laws, it would be paradoxical to understand the Free Exercise Clause as simultaneously relieving one's obligation to comply with a valid and neutral law of general applicability on the shaky ground that following such law would interfere with religious practice or belief. The Free Exercise Clause 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)." *Smith,* 872 U.S. at 879. AACS attempts to do just that, wielding the Free Exercise Clause as a cudgel against East Virginia's valid policy goal, to turn its conscience into mandated law. This Court should, then, affirm the Fifteenth Circuit's ruling because the EOCPA is both neutral and generally applicable.

1. The EOCPA is neutral.

Neither Evansburgh's actions nor the EOCPA itself suggests a level of religiously targeted animus that rises to the threshold the Supreme Court requires to trigger strict scrutiny. A law only falls short of the neutrality standard under the *Smith* framework when its "object*"* is "the suppression of religion." *Lukumi,* 508 U.S. at 540. For the law in question to fail this prong, AACS must then show that the EOCPA's underlying purpose is to infringe on AACS's discriminatory practices "because of their religious motivation" or that some "covert suppression of particular religious beliefs" is afoot. *Lukumi,* 508 U.S. 533. Thus, unless the law either targets religious practices with animus or adopts formal classifications that discriminate *on the basis of religion*, the law is satisfactorily neutral. [1] Because the EOCPA commands all contracting child placement agencies alike, with no regard to their religious or secular motivations, and at no point

[1] See Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement,* 3 U. Pa. J. Const. L. 850, 865 (2001) (distinguishing between formal neutrality and substantive neutrality, arguing that the general applicability requirement has subsumed what Justice Souter recognized as substantive neutrality).

did any arm of East Virginia's government target AACS's religiously held beliefs out of hostility to religion, this Court should follow the Fifteenth Circuit's holding that the law is neutral.

i. *The EOCPA is neutral in its text and operation.*

As proscribed by the Supreme Court in *Lukumi*, a Free Exercise neutrality analysis "must begin with its text" and continue into the "the effect of a law in its real operation" because it is "strong evidence" of the law's object. *Lukumi,* 508 U.S. at 534-35. In that case, the Court conclusively found that, in operation, "almost the only conduct subject to" the City's ordinances "is the religious exercise of the Santeria church members." *Id.; See Id*. at 523 (finding that the City did not prohibit "cruelty to animals" sweepingly but, instead, only prohibited "killings for religious reasons"). Thus, the ordinances at issue in *Lukumi* "had as their object the suppression of religion," specifically of the Santeria religion. *Id.* at 542.

In contrast, AACS offers little evidence, from either text or operation, that the EOCPA's object is to suppress religion. In fact, the across the board non-discrimination policy is just that, intended through both text and operation to "[eliminate] all forms of discrimination." E.V.C. § 42.-2. R. at 13. The original act prohibits all 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." R. at 4. The amendment simply extends that protection to "sexual orientation." E.V.C. § 42.-3(b). R. at 6. Nothing in the plain text indicates that EOCPA's non-discrimination regulations can be applied in a manner inconsistent with the neutrality requirement. Unlike a prohibition on "killing for religious reasons" in *Lukumi,* E.V.C. § 42.-3(b) prohibits discrimination on the basis of sexual orientation against prospective parents categorically, no matter the motivation, whether secular or religious.

Over thirty States, including East Virginia, have some policy, statute, or ordinance "prohibiting discrimination in adoption based on sexual orientation." [2] If every law in the country protecting same-sex individuals or couples just by its inherent existence, operated to suppress religion, the legal landscape of non-discrimination would be left askew. *See Fulton v. City of Phila*., 922 F.3d 140, 159 (3d Cir. 2019) (noting that just because a religious agencies' "conduct springs from sincerely held and strongly felt religious beliefs does" not inherently imply that a city's "desire to regulate that conduct springs from antipathy to those beliefs). If the EOCPA's operation is, in fact, "strong evidence" of its object, then AACS cannot meet its burden of showing an object at odds with the Free Exercise Clause.

ii. *AACS cannot show religious targeting or hostility that rises to a level of unconstitutionality.*

Because AACS will likely fail to show religious suppression in the "text or operation" of the EOCPA, it must then meet its burden through evidence of some religious targeting or hostility. Here, the statements and actions from government officials are either too benign or too attenuated to trigger the level of religious hostility or targeting that the Supreme Court's precedent demands. Evansburgh and HHS have thus far enforced the EOCPA in a neutral fashion, with an eye to eradicating discrimination regardless of the actor.

In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1722 (2018), the Supreme Court provided "[f]actors relevant to the assessment of governmental neutrality[,] [including] 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-

[2] Foster and Adoption Law, Movement Advancement Project (Sep. 2, 2020), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

making body.'" From these categories, the Court will identify and analyze whether evidence of religious targeting exists and whether those events or statements evince sufficient animus.

In *Masterpiece*, the Supreme Court illustrated just how high the burden is for claimants like AACS to show hostility that offends the neutrality requirement. There, the Court rebuked the Colorado Civil Rights Commission's application of the State's non-discrimination law to a baker who refused his services to a same-sex couple based on his Christian beliefs. *Id.* at 1723. While the Division reviewed the claim in "formal, public hearings," it repeatedly disparaged the baker's religious objection. The Court consequently found an absence of "the neutral and respectful consideration of his claims" to which he was entitled. *Id.* at 1721. At one point in the hearings, a Commissioner even stated that religion is "one of the most despicable pieces of rhetoric that people can use." *Id.* at 1729. The Court, however, made an important distinction between those statements from officials that "might . . . mean simply that a business cannot refuse to provide services based on sexual orientation" and those statements that "might be seen as [an] inappropriate and dismissive . . . lack of due consideration for . . . free exercise rights." *Id.* The Court found that the Commissioner's comments fell into the latter category, constituting a hostile insinuation that religious beliefs are "insubstantial and even insincere." *Id. See also Lukumi*, 508 U.S. at 541-42 (noting hostility in the numerous comments made by the City Council members' denigrating the Santeria religion, including the president's targeted question, "What can we do to prevent the [Santeria] Church from opening?").

AACS unfoundedly alleges that the East Virginia Governor's statement about "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry" somehow derogates the "traditional definition of marriage," equating it to the hostility in the "contemporaneous statements" in

Lukumi and *Masterpiece*. R. At 6, 21. Irrespective of this mischaracterization, the Governor's benign statement nonetheless lies in stark contrast to the remarks made by the decisionmakers in *Lukimi* and *Masterpiece,* and do not evince a level of hostility that would trigger strict scrutiny.

Even in the unlikely event that this Court finds that the Governor's statements are hostile, the Fifteenth Circuit noted that the Governor "plays no role in enforcing the EOCPA." R. at 21. As such, his status in East Virginia, no matter how high, does not bear on the neutrality assessment because his comments are too attenuated to register as suspect. Unlike *Lukumi* and *Masterpiece*, where the hostile "remarks were made . . . by an adjudicatory body deciding a particular case," the remarks here are too far removed from the legislative or administrative process to evince animus. *Lukumi,* 508 U.S. at 540-542, *Masterpiece,* 138 S. Ct. At 1730.

AACS will also likely point to Hartwell's dealings with HHS as evidence of religiously targeted "administrative action." *Masterpiece,* 138 S. Ct. at 1722. While the record does indicate that Hartwell only investigated religious-based agencies, the record also includes the important catalyst for his review: an independent Evansburgh Times reporter who "inquired whether *religious-based* child placement agencies . . . were complying with the EOCPA amendments." R. at 6. (emphasis added). Importantly, the reporter only inquired into religious-based agencies. For Hartwell to follow up on the reporter's particularized inquiry in a particularized manner, does not suggest that he sought to target the religious agencies, but rather that he acted in a neutral and deliberate manner, staying within the bounds of the reporter's inquiry. The mere fact that the investigation revealed AACS's non-compliance does not imply something more nefarious.

In fact, evidence of neutrality is only bolstered by Hartwell's actions after finding out that AACS refused to comply with the EOCPA. In all communication thereafter, Hartwell acted rationally and reasonably in his dealings with the AACS; he provided notice to the agency of the

consequences of non-compliance and noted his "respect" for AACS's "sincerely held religious beliefs." R. at 8. Nothing in their dealings suggest that Hartwell would have treated any secular agency differently had they also not complied. *Contrast with, Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262-2263 (2020) (striking down a "no aid" provision barring state aid to religious schools as a direct consequence of the school's religious status). Here, HHS's refusal to contract with AACS is predicated on AACS's failure to adhere to critical terms of the contract rather than *because of* AACS's religious status. As made clear by Hartwell's letter to AACS, had the agency chosen to comply with HHS's non-discrimination policy, HHS would have renewed its contract with AACS. R. at 8.

2. The EOCPA is generally applicable because HHS does not subject AACS or any contracting agency to "unequal treatment."

A law is generally applicable under *Lukumi* as long as the scheme treats does not disfavor religiously motivated conduct and secularly motivated conduct that "endangers [the government's] interests in a similar or greater degree." *Lukumi,* 508 U.S. at 543. A law will be subject to strict scrutiny, on the other hand, if it subjects religious observers to "unequal treatment" and is "underinclusive" of its stated purposes. *Id.* at 523. As both lower courts noted, the presence of "individualized exemptions" often serves as a harbinger of an underinclusive regulatory scheme. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). This, however, is not always the case. As the Supreme Court and lower courts have emphasized, the "mere presence" of an exception does not run afoul of the Free Exercise Clause unless the state action "impose[s] burdens only on conduct motivated by religious belief," while "fail[ing] to prohibit nonreligious conduct that endangers" asserted governmental interests to "a similar or greater degree." *Lukumi*, 508 U.S. 543.

As one commentator clarified, the general applicability requirement does not "require religious conduct to be exempted from a law whenever *any* secular conduct is exempted." Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities,* 75 Ind. L.J. 77, 119 (2000) (emphasis added); *See Lukumi,* 508 U.S. at 542 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.") Rather, "religion is treated unequally only if nonexempted religious conduct *is in the same relationship to the purpose of* the law as exempted secular conduct." Frederick Mark Gedicks, *Three Abnormalities, 75 Ind. L.J. 77, 119.*

The Third Circuit illustrated the importance of this distinction in *FOP Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 361 (3d Cir. 1999), arising when two Sunni Muslim officers brought a Free Exercise claim against the New Jersey Police Department for failing to exempt them from the department's "zero tolerance" no-beard policy. The officers argued that the policy was underinclusive and selectively enforced because the department granted "secular" exemptions to the policy for medical reasons and for "undercover officers whose 'assignments or duties permit a departure from the requirements." *Id.* at 360. The Third Circuit held that the granting of medical exemptions "undoubtedly undermines the Department's interest in fostering a uniform appearance through its 'no-beard' policy." *Id*. at 366. Importantly, however, the Third Circuit distinguished the undercover exemption as permissible. The undercover exemption did not "undermine the Department's interest in uniformity" because "undercover officers are obviously not held out to the public as law enforcement personnel." *Id.; See also Smith,* 494 U.S. at 906 (holding that a secular prescription exemption to the peyote prohibition did not trigger strict scrutiny because the prescription exemption did not necessarily undermine the State's interest in curbing the unregulated use of dangerous drugs).

East Virginia law provides HHS and agencies with varying degrees of discretion to ensure the "best interests of the children." These "exceptions," however, are nothing more than commonplace identity-based considerations. To construe them as "ad hoc" exemptions that undermine the EOCPA misapplies the general applicability requirement for two reasons: First, the "exceptions" identified by AACS and the district court only apply in the child placement process, not the parent certification process. Second, none of the "exceptions" that the district court points to injure the government's interest in non-discrimination to a "similar or greater degree" than does a categorical policy refusing to certify same-sex couples.

i. *The parent certification process and child placement process are "dissimilar activities."*

The district court erroneously hinges its analysis on the "codified" and "individualized" exemptions identified in the EOCPA itself and in HHS's "past placement decisions." R. at 11-12. First, the Court singles out E.V.C. 37(e), otherwise known as the "best interests assessment," applied by agencies and HHS during the child placement decision process. Second, the Court points to E.V.C. 42.2(b), which requires agencies only to give preference to potential families "in which at least one parents is the same race [or sexual orientation] as the child needing placement" but only when "all other parental qualifications are equal." R. at. 4. By comparing these identity-based assessments to the non-discrimination requirement in E.V.C. § 42.-3(b) the Court conflates two dissimilar activities: on the one hand, a discretionary system limited to a "best interests assessment" for the child placement process, and, on the other hand, a categorical ban on discrimination against same-sex couples. The distinction is an important one because, as the Supreme Court recently noted in the context of government shutdowns during the Covid-19 pandemic, the Free Exercise Clause is not implicated when a law "exempts or treats more

leniently only dissimilar activities." *S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613, 1614 (2020) (Roberts, concurring).

The district court's failure to distinguish between the parent certification process and the child placement process belies their analysis. The categorical non-discrimination ban only applies to agencies during the parent certification process, barring those agencies from discriminating against prospective parents on the basis of a number of protected characteristics, including sexual orientation. R. at 5-6. The "best interests assessment" or identity-based considerations, in contrast, only apply in the child placement process, after the parents have been approved. R. at 3-4. Nowhere in the record does the district court identify, or AACS allege, that HHS or Evansburgh granted an exemption to the categorical ban on non-discrimination required of agencies during the parent certification process.

Beyond conflating two dissimilar activities, the district court also conflates the actors involved. The district court argues that between 2013 and 2015, HHS engaged in "several kinds of discrimination proscribed under the EOCPA when placing children." R. at 12. This so-called discrimination is allegedly founded on the basis of sex, religion, and race when it placed children with families. *Id.* As an initial matter, these placements occurred before the EOCPA was even amended to include protections for sexual orientation. Secondly, and more importantly, "the EOCPA does not apply to HHS or any of its personnel," but only to child placement agencies like AACS. R. at 22. Because the Free Exercise Clause "does not require the government to apply its laws to activities that it does not have an interest in preventing," Evansburgh is not subject to Free Exercise penalization for deciding that HHS may take identity-based considerations into account where the best interests of the children are at stake. *FOP*, 170 F.3d 366. HHS, as Evansburgh's administrator of the East Virginia law, requires this autonomy in

order to carry out the "delicate task of placing children in homes where they will hopefully remain and thrive." R. at 22. *See Fulton,* 922 F.3d 158, (highlighting the fact that Philadelphia's analogous government agency "never refuse[d] to work with individuals because of their membership in a protected class," unlike the Catholic agency asserting the Free Exercise claim).

ii. *The EOCPA's identity-based considerations do not harm the government's interest in non-discrimination.*

Even if this Court determines that the parent certification process and the child placement process somehow exist in the same realm of activity, the general applicability requirement is still satisfied because identity-based considerations do not harm the EOCPA's purposes to "a similar or greater degree" than the non-discrimination requirement at issue. Like in *Fraternal Police*, where the undercover exemption did not harm the department's interest in uniformity, here, the best interests assessment and preference rules harm neither, East Virginia's interest in prohibiting discrimination, nor its interest in successful child placement. Considering age, emotional needs, or ethnic background during the child placement assessment, or giving preference to race and sexual orientation where appropriate, does not injure the government's interest in prohibiting discrimination against prospective parents. *Fulton,* 922 F.3d at 158, (noting the "many differences between [the agency's discriminatory] behavior and the [city's] consideration of race or disability when placing a foster child "which "seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account").

"Discrimination" cannot be understood in a vacuum in the child placement context. The purpose underlying the EOCPA, beyond ensuring the best interests of the children, is to prevent the harm that results when agencies, secular or religious, discriminate against same-sex, interracial or religious couples. Allowing agencies and the HHS to give preference to those vulnerable groups during the child placement process does not injure the government's purposes,

but rather reinforces Evansburgh's interest in meeting the specific and unique needs of disadvantaged populations by creating an avenue for the most successful placement possible.

For the reasons above, this Court should find that the EOCPA is both neutral and generally applied under the Free Exercise Clause.

B. Even If This Court Finds That The EOCPA Is Not Neutral or Generally Applicable, The EOCPA Is Still Constitutional Under A Strict Scrutiny Analysis.

Although compelling evidence shows the EOCPA to be both neutral and generally applicable – even if this Court finds otherwise – the non-discrimination requirements nonetheless represent a narrowly tailored furtherance of East Virginia's compelling interest in prohibiting discrimination. *See Lukumi,* 508 U.S. at 531-32 (holding that a law failing neutrality or general applicability "must be justified by a compelling interest and must be narrowly tailored to advance that interest"). East Virginia's prohibition on discrimination in the parent certification process is essential for furthering the best interests of the children because it reinforces the rule of law to ensure that all qualified parents, no matter their sexual orientation, race, ethnicity, or religion can as easily access the child placement arena as any public service. By prohibiting discrimination against prospective parents, the EOCPA seeks only to expand the amount of available homes for the children in need of both fostering and adoption.

1. The EOCPA is narrowly tailored to further Evansburgh's compelling interests.

The compelling interests served by non-discrimination laws like the EOCPA in the adoption arena are twofold. First, they ensure that qualified, prospective same-sex couples have full access to the services they help fund without fear of refusal or stigma that same-sex couples and LGBTQ persons experience. Second, and relatedly, by erasing that stigma they serve the

best interests of the children needing placement by expanding the pool of potential parents showing solidarity with vulnerable LGBTQ wards.

i. *Eradicating discrimination to both protect LGBTQ persons as taxpayers and to eradicate the stigma's that follow them.*

Evansburgh has an interest in enforcing the EOCPA in order to protect the LBG tax paying residents of Evansburgh who expect to enjoy the full benefits of public monies used to fund child placement services. In the interest of good governance and fiscal equity, Evansburgh maintains an interest in enforcing its laws across the board so that "individuals who pay taxes to fund government contractors are not denied access to those services." R. at 9. Otherwise, Evansburgh or East Virginia might face serious legal challenges from its LGB citizens, as other States now face. *See Dumont v. Lyon*, 341 F. Supp. 3d 706, 717 (E.D. Mich. 2018) (assessing the viability of Equal Protection and Establishment Clause complaints from prospective adoptive same-sex couples who were denied by faith-based state adoption agencies).

And while ensuring that taxpayers receive full and fair access to the services they fund is compelling enough, even more compelling is government's interest in preventing the harm that results when LGB persons seek to start a family and are turned away. The Supreme Court has endorsed the importance of protecting LGB persons from the "stigma and injury of the kind prohibited by our basic charter." As Justice Kennedy noted, "the nature of injustice is that we may not see it our own times" *Obergefell,* 576 U.S. at 665. When Governments both big and small have employed nondiscrimination in attempts to eradicate the prejudices of the past, the Supreme Court has repeatedly acknowledged the inherent compelling interest in that legislation.

Over the last decade, the Supreme Court has extended that deference to legislation designed to prohibit discrimination on the basis of sexual orientation, noting that same-sex couples "cannot be treated as social outcasts or as inferior in dignity and worth" and that

consequently "the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights." *Masterpiece,* 138 S. Ct. at 1727.

When allowing this discrimination to "become enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell,* 576 U.S. at 672. For both ensuring that taxpayers receive their fair share of the programs they fund and eradicating the harmful stigma, enforcing the laws of the state is the most efficient, direct, and narrowly tailored way to further those interests. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (noting that "discrimination based on archaic . . . assumptions . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life").

ii. *Creating a deep and diverse pool of potential foster and adoptive parents for vulnerable children, including LBGTQ wards.*

The eradication of stigma against LGBTQ persons via non-discrimination laws like the EOCPA encompasses two even more important interests regarding the children of the state: first, the prevention of stigmatized harm extends to the wards of the state who are LGBTQ themselves and second, by creating more homes for all children in need by inviting every possible prospective parent into the fold rather than allowing agencies to turn them away.

As Hartwell testified, Evansburgh maintains a strong interest in diversifying the pool of potential candidates by making the child placement services accessible to all qualified Evansburgh residents. R. at 9. The motivation behind that interest is, of course, that Evansburgh suffers from "a chronic shortage of foster and adoptive homes," with nearly "17000 children in foster care, 4000 of whom are available for adoption." R. at 3. Evansburg has a compelling interest, if not a duty, to create an environment where, as many qualified parents as possible can

access the proper channels necessary to either foster or adopt. Allowing exemptions to the non-discrimination policy, as AACS seeks to enforce, would necessarily mean that every religious agency in the city would now be permitted to discriminate on the basis of sexual orientation. Granting these exemptions would undermine that interest by stigmatizing potential same-sex parents and dissuading them from entering the adoption and foster process, thereby leaving children with fewer options than they already have. If fact, same sex couples are seven times more likely than different-sex couples to foster or adopt.[3] It makes sense, then, that Evansburgh would want to welcome, rather than turn away, such a valuable group of potential parents.

The district court tries to subvert this argument by noting that Evansburgh contracts with "thirty-four other child placement agencies, four of which are dedicated to serving the LGBTQ community." R. at 8. They argue that enforcement of the law is not narrowly tailored because on the occasions that "same-sex couples previously contacted the agency about its adoption placement services, AACS treated them with respect and referred them to other agencies." R. at. 7. This reasoning fully ignores the interests at stake under the EOCPA and the purposes behind non-discrimination law, which is to protect both same-sex couples and LGBTQ children from the "stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece,* 138 S. Ct. at 1728.

Even more importantly, across the board enforcement of the EOCPA not only ensures protection for LGBTQ children and parents, but also discrimination "on the basis of race, religion, national origin, sex, marital status, or disability" R. at 4. The same stigma can attach to

[3] Study showing that 2.9% of same-sex couples vs. 0.4% of different-sex couples raise foster children; 21.4% of same-sex couples vs. 3.0% of different-sex couples have an adopted child. Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?,* THE WILLIAMS INSTITUTE: UCLA SCHOOL OF LAW (July 2018), https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/.

any of these protected populations if HHS is forced to grant an exemption. For example, if HHS were to allow AACS to discriminate on the basis of sexual orientation, there is no reason to believe that they will not also have to grant exemptions to AACS or other agencies seeking to discriminate on the basis of religion as well. There is no imaginable end to the exceptions that HHS will be forced to grant if AACS prevails. In other jurisdictions, publicly funded religious-based agencies have not only refused same-sex couples, but also refused to place children with Jewish, Catholic, Muslim, Buddhist, Hindu, atheist, and agnostic prospective parents. [4]

Finally, LGBTQ youth make up a disproportionate amount of the children in protective care [5] and experience higher levels of rejection in foster care and adoption than other children. [6] These children are even more susceptible to the stigmatization that discrimination naturally entails. Allowing agencies the ability to discriminate for any reason, religious or secular, will not only enforce that stigma, but also send a message to the children that the does not have their "best interest" at heart.

II. THE EOCPA'S NON-DISCRIMINATION REQUIREMENTS REPRESENT A PERMISSIBLE RESTRAINT ON AGENCIES CONTRACTING WITH EVANSBURGH TO PERFORM A GOVERNMENT SERVICE.

As arbiters and administrators of the laws of East Virginia, Hartwell and HHS maintain significant leeway in defining the contours of Evansburgh's child placement program. This includes the authority to impose necessary conditions on contractor speech in order to effectively disseminate the EOCPA's prohibition on discrimination. With the understanding that the

[4] As Lydia Currie painstakingly expressed, "I was barred from becoming a foster parent because I am Jewish," Lydia Currie, *I was barred from becoming a foster parent because I am Jewish,* JEWISH TELEGRAPHIC (Feb. 5, 2019, 5:46 PM), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish.
[5] More concerning is the fact that a 2019 study found that 30.4% of youth in foster care identify as LGBTQ compared to the 11.2% not in foster care. LGBTQ The Issue, CHILDREN'S RIGHTS, https://www.childrensrights.org/lgbtq-2/ (last visited Sep. 13, 2020).
[6] Studies show some 78 percent of LGBTQ youth were removed or ran away from foster homes because of the hostilities they faced, and 56 percent chose to live on the street–rather than in a foster care placement–because they felt safer there. LGBTQ The Issue, CHILDREN'S RIGHTS, https://www.childrensrights.org/lgbtq-2/ (last visited Sep. 13, 2020).

government's message should neither be "garbled nor distorted by the grantee[s]" with which it contracts, the Supreme Court's jurisprudence in this realm appropriately refocuses the debate away from traditional free speech analyses. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542, (2001) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 833 (1995)). Rather, the focus lies on whether the restrictions placed on the contractors are "legitimate and appropriate" and "designed to ensure the limits of the [government] program observed." *Velazquez*, 531 U.S. at 541.

There is no doubt that private speakers enjoy robust Constitutional freedom from both the government's censorious hand and any governmental compulsion to "utter what is not in his mind." *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps*., 138 S. Ct. 2448, 2464 (2018); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943); *Wooley v. Maynard* 430 U.S. 705, 714 (1977) (freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all"). But where that private speaker contracts with the government to carry out a governmental function, their speech is transformed into the government's purview and the rationales bolstering the Free Speech protections lose their weight. *Garcetti v. Ceballos,* 547 U.S. 410, 444 (2006) ("Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection"). Agencies like AACS do not retain the same First Amendment protections reserved to private speakers when their speech "owes its existence" to the "professional responsibilities" outlined in a contract for services. *Garcetti,* 547 U.S. at 421-22.

Under these principles, this Court should affirm the Fifteenth Circuits holding that AACS cannot force Evansburgh into a contract under duress using the First Amendment. East Virginia's non-discrimination requirements are a legitimate and appropriate extension of the State's interest

in eradicating discrimination in the child placement services arena -- an arena that is inherently governmental. Even if this Court finds that the requirements are subject to a more traditional compelled speech analysis, the non-discrimination requirements do not constitute unconstitutional conditions because AACS's own speech remains "unfettered." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

A. The Supreme Court Has Repeatedly Affirmed That Governments Maintain A Significant Interest In Defining The Contours Of Their Own Speech, Including That Of Private Actors.

Because the most vulnerable wards of the states are implicated in the process, child placement services are inherently governmental in form and function. The EOCPA's non-discrimination requirements represent appropriate and legitimate measures in the furtherance of East Virginia's goal of eradicating discrimination in the realm of child placement. Under the Supreme Court's precedent, when governments like Evansburgh contract with private agencies for assistance, those agencies are acting as an arm of HHS, entitling the government wide latitude to define the scope of the child placement program.

The Supreme Court held that governmental authority contains the "ancillary power to ensure that … funds are properly applied to the prescribed use." *Rust v. Sullivan*, 500 U.S. 173, 195 (1991). This power derives from the government's interest in "[ensuring] that the limits of the . . . program are observed" and that government funds are not expended "outside the scope of the federally funded program." Id. at 193. There, the "private" grantees operated within a federally funded family planning program. The condition on the Title X funds prohibited the recipients from "advocat[ing] abortion as a method of family planning." (180). Because the speech was fully wihin the confines of the program, the Court held that the "general rule that the Government may choose not to subsidize speech applies with full force." *Id*. at 200.

In *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, the Court reaffirmed this principle, ruling that requirements are constitutional when they "define the limits of the government spending program" and "specify the activities Congress wants to subsidize." 570 U.S. 205, 214 (2013). In contrast, requirements are unconstitutional when they "seek to leverage funding to regulate speech outside the contours of the program." *Id*. at 214-15. Leveraging funding outside the program includes those governmental schemes "designed to facilitate private speech, not to promote a governmental message." *Rosenberger,* 515 U.S. at 542. For example, in *Velazquez*, when Congress attempted to prohibit government funded lawyers from delivering "advice or argumentation that existing welfare laws are unconstitutional or unlawful," the Supreme Court found that the "program was designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S. at 533.

Thus, the Court's tendency is to disallow First Amendment challenges to speech that are delivered within the contours of government programs unless some private speech is implicated in the program. Thus, in order to succeed on its challenge, AACS will somehow need to show that when providing child placement services, its speech is private in nature. The facts of this case clearly bar that showing because child placement services are a government function and the non-discrimination requirements clearly define the limits of the program.

1. Child placement services are a government function.

AACS must first show, then, that child placement services, including certification of potential families, are not governmental in function, a high burden given the facts. In Evansburgh, East Virginia law "empowers municipalities to regulate the foster and adoption placements of children" and the EOCPA's non-discrimination requirements apply to all thirty-four "private placement agencies receiving public funds." R. at 3-4. HHS is charged with

"establishing a system that best serves the well-being of each child," including the regulation of agencies that accept "public funds in order to provide a secular social service to the community." R. at 7. From the taxpayer funding to the contracts for specific services, Evansburgh and East Virginia operate as a purely governmental service.

2. The non-discrimination requirements are within the scope of child placement services program.

As directed by the contract with HHS, AACS, "in exchange for public funds" provides "services that consist of home studies, counseling, and placement recommendations to HHS." R. at 3. These services mirror the services provided by agencies in other jurisdictions and constitute a rational and necessary exercise in finding qualified caretakers for the children who need it most. Because they are performed pursuant to the government contract, Evansburg can define the limits of the program by instituting an across the board nondiscrimination requirement on the contracting agencies. R. at 4. Here, that "limit" proscribed by East Virginia law is that its child placement services are carried out without discrimination toward prospective parents based on any number of immutable characteristics, including sexual orientation. R. at 6.

AACS cannot show that any private speech is implicated because they are contracted with the Evansburg HHS to provide an explicitly governmental service. Whereas the lawyers in *Velasquez* would still be legally permitted to offer their legal consultation to clients regardless of the government's funding, the speech here would quite simply not exist without the government's hand. Without the contract, the child placement services that AACS provides, and any speech emanating from those services, would not exist. *See Fulton*, 922 F.3d at 161 ("The speech here *only occurs* because CSS has chosen to partner with the government to help provide what is essentially a public service"). Thus, Evansburg is well within its right to define how

those services are administered with a "legitimate and appropriate" non-discrimination requirement. *Velazquez*, 531 U.S. at 541.

This contract distinction is an important one and Evansburgh's position is significantly strengthened by its presence. In seemingly all of the Supreme Court's government funding cases cited by both the district court and Fifteenth Circuit, the plaintiffs asserting the First Amendment challenges were purely grantees. *Velazquez*, 531 U.S. at 536, ("funds appropriated by Congress to eligible local grantee organizations"); *Agency for Int'l Dev.* , 570 U.S. at 218 ("compelling a grant recipient to adopt a particular belief"); *Forum for Acad. & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 247 (3d Cir. 2004), rev'd and remanded sub nom. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 51 (2006). ("federal grants"); *Rust* 500 U.S. at 181 ("Petitioners are Title X grantees and doctors"). AACS, on the other hand, is not only a grantee but a contractor, tasked with carrying out services related to a clearly delineated government function. The First Amendment does not bar Evansburgh, then, from defining those services with related requirement. If AACS "objects to [the] condition[s] on the receipt of [HHS's] funding, its recourse is to decline the funds." *Agency for Int'l Dev.* 570 U.S. at 214 .

B. Irrespective of the Contract, The Non-Discrimination Conditions Are Nonetheless Constitutional Under The Supreme Court's Compelled Speech Precedent.

This Court should classify AACS as a government contractor and accordingly, apply the Supreme Court's strict rules surrounding government speech. However, even if this Court ignores the importance of the contract, the EOCPA is still permissible under the Court's more traditional "unconstitutional conditions" jurisprudence. Under this line of cases, AACS must show that the receipt of a "government benefit" is conditioned on the "relinquishment of a constitutionally protected right," in this case its freedom from compelled speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Where the speech conditions imposed do not interfere

with the speaker's "ability to communicate its own message," the condition will not violate the First Amendment. Additionally, where speech is plainly incidental to the regulation of conduct, the Court has never found an "abridgment of freedom" under the First Amendment.

1. Neither the EOCPA's notice requirement nor the certification requirement compel AACS to affirm a governmentally proscribed belief.

In this realm, the Court employs a variety of important considerations to determine whether the government forces the entity to impermissibly "affirm [a] belief in any governmentally prescribed position or view." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 100 (1980). To reach that determination, the Supreme Court is wary of speech requirements from the government that "compel the endorsement of ideas that [the government] approves." *Agency for Int'l Dev.* 570 U.S. at 213. *See Id*. (holding that the provision requiring organizations that receive government funding to have policy expressly opposing prostitution violated their First Amendment rights). If, however, there is no likelihood that the public will perceive the speech as anything other than the government's, the condition will pass muster. If it is reasonably likely that the public will understand the requirement to be an expression of the government and not of the entity, then the speech is not compelled.

In *Rumsfeld,* the Court applied these considerations to the Solomon Amendment, which conditioned the receipt of federal funding on "the inclusion and equal treatment" of military recruiters on university campuses, despite the school's objection to the prohibition of homosexuals from openly serving in the military. The Court held that the requirement did not place an unconstitutional condition on federal funds because nothing in the amendment's hosting requirements "[approached] a Government-mandated pledge or motto that the school must endorse." *Id.* at 64. Because even "high school students can appreciate the difference between"

school sponsored speech and government speech, "nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what they may say about the military's policies." *Id*. AACS must show that the contractual requirements compel some endorsement of same-sex relationships, a burden they cannot meet.

i. *The EOCPA's notice requirement does not interfere with the ability of AACS to convey its own differing views because it merely requires a posting of the current law.*

Many organizations that contract with the government (and many that do not) may disagree with the statements they are required to post. While it is no doubt true that "the First Amendment does "not leave open to public authorities to compel [an entity] to utter a message with which he does not agree," the Court's case law provides a number of avenues for the government to provide an unfettered message via a notice requirement. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468, (2009). Most notably, in *National Association of Manufacturers v. Perez*, the court applied the considerations present in *Rumsfeld* to the federally mandated Posting Rule. *Nat'l Ass'n of Manufacturers v. Perez*, 103 F. Supp. 3d 7, 11 (D.D.C. 2015). The Court reiterated that if "the objecting party "remain[s] free under the statute to express whatever views they may have . . . all the while retaining eligibility for federal funds," then the statute does not violate the objecting party's First Amendment rights. *Id.* at 16-17.

In considering the Constitutionality of the Posting Rule, which required federal government contractors and subcontractors to post notices informing employees of their rights under the National Labor Relations Act, the Court applied a compelled speech analysis. To support its holding that the Rule was not compelled speech, the court first pointed out that Posting Rule does not interfere with the contractor's ability to convey a different message because the contractor remained free to express its own views or engage in lawful activities to

discourage unionization. *Id*. at 16. The court went on to say that employees were unlikely to believe that the notice represented the employer's speech. *Id*. at 17. Nothing in the ruling prevented a contractor from creating its own posting and placing it next to the Department of Labor-drafted Notice, so as to make clear that the Notice does not reflect the contractor's own views and its display is government mandated. *Id*. Put another way, because neither the contractors' own speech nor the public's perception of that speech were in any way affected by the requirement, it could not be deemed compelled speech. Requiring a government-contracted agency to post relevant antidiscrimination laws on their premises merely constitutes a publication of the government's regulations around what is, at its core, a public service.

To construe East Virginia's requirement that all contracting agencies sign and post the State's non-discrimination notice at its place of business as compelled speech ignores the State's clear interest in disseminating factual information regarding state law to its denizens. This requirement is not compelled speech because the sign merely acknowledges the law of East Virginia: that agencies cannot discriminate against any person, including a "prospective . . . parent on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. Like the federally mandated Posting Rule in *Perez*, the EOCPA's requirement does not interfere with AACS's ability to express its own views about homosexuality, same sex relationships, or same-sex parents. Furthermore, the EOCPA could not condition its funding on the expectation that AACS or any child placement agency "adopt the notice as their own speech" *Perez*, 103 F. Supp. 3d at 13.

The normalized popular conception of government mandated notices in no way suggests that prospective foster parents or the community at large will construe the notice reciting a non-discrimination law as a reflection of AACS's own views on homosexuality or same-sex

parenting. What's more, not only are there no prohibitions on AACS posting signs containing its own differing views; the amendment even explicitly "permits religious-based agencies, however, to post on their premises a written objection to the policy." Id. § 42.-4. R. at 6. AACS is explicitly permitted to write a scathing objection to the EOCPA's requirements and even educate the public about their religiously based reasons for viewing same-sex parenting as a moral transgression. R. at 7. The same agency that is enforcing non-discrimination requirements would make an equal effort to enforce AACS's right to display its objection to those very requirements. Further, the only purpose the notice requirement serves is to make sure that the evolving law is effectively disseminated to the public, particularly members of the public seeking services connected to HHS. Abu Kane states that "no same-sex couples have ever filed formal complaints of discriminatory treatment against AACS" R. at 7. However, the record is silent as to why this may be. It is entirely possible that same-sex couples who were turned away since the updated EOCPA's requirements did not file a complaint because they were unaware of the laws protecting them from such treatment. Had the agency posted a notice, these same-sex couples could ensure that the courts acknowledge their right to be treated as equally as opposite-sex couples when seeking services with HHS's contracted organizations.

Like the Posting Rule, the EOCPA requirement here is a "far cry" from the government-mandated speech deemed unconstitutional in *Barnette*. *Perez*, 103 F. Supp. 3d at17. See *Barnette* (holding that action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations because it invades the First Amendment-protected sphere of spirit and intellect). *Barnette*, 319 U.S. at 642. AACS's sphere of spirit and intellect on the other hand, are well-preserved here as it maintains a multitude of unfettered avenues to adequately express its opinions that the evolution of anti-discrimination laws across this nation.

ii. *The Supreme Court has ruled that non-discrimination legislation constitutes a prohibition on conduct, not speech.*

Even if the ban on conduct may require or prohibit certain speech, the laws will still be directed not against speech but against conduct. The First Amendment exception most relevant here pertains to speech "integral to conduct." Eugene Volokh, Essay, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355 (2018). In *Rumsfeld*, the court distinguished between a law compelling a law school to send scheduling emails for military recruiters coming to their campus, and laws forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto, "Live Free or Die,". *Wooley v. Maynard*, 430 U.S. 705, 97 (1977). In *Rumsfeld*, Chief Justice Roberts notes the Court's long held rule that speech such as the aforementioned emails, is "plainly incidental to the [requirement's] regulation of conduct," and even if compelled, "has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949). Similarly, a ban on discrimination has been viewed by the Court as a prohibition on conduct, rather than speech. Justice Roberts further iterates this, noting that a ban on racial discrimination requiring an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. *R.A.V. v. St. Paul,* 505 U.S. 377, 389 (1992).

As an initial matter, nowhere in the EOCPA does the law require that the contracting agencies speak at all. The EOCPA's requirements are best understood as speech incidental to the regulation of conduct; in this case, the requirement is to certify same sex couples alongside opposite-sex couples, and the prohibited conduct being discrimination. Just as the "recruiting assistance" in *Rumsfeld* was a "far cry from the compelled speech in Barnette and Wooley," any

incidental speech arising out of the non-discrimination requirements are plainly incidental to the conduct being regulated. *Rumsfeld,* 547 U.S. at 68. Like in *Rumsfeld*, where the law school's role was to facilitate recruiting to assist their student in obtaining jobs, AACS is merely fulfilling the government-funded role of facilitator, collaborating with HHS to foster connection between child and family. All of these distinctions over conduct and speech are without difference, however, under the current facts. As discussed above, agencies like AACS, under contract with the government to provide government services, cannot enter into that contract on its own terms.

C. A Ruling For AACS Would Render Government's Feckless and Inept.

Presumably, AACS hopes that, if it prevails, Evansburgh will continue to contract with religious agencies unscathed, granting exceptions to its religiously held belief under the First Amendment. In reality, a decision in favor of AACS would lead to Evansburgh governments contracting only with those agencies who do not demand exemptions to non-discrimination ordinances. This would deny the community the diverse insights that religious agencies like AACS bring to the child placement services arena. Evansburgh has an interest in making sure that as many agencies as possible contract with them, but in order to achieve that goal, application of the laws must necessarily be consistent. "It is the very business of government to favor and disfavor points of view" and, here, Evansburgh and East Virginia have deemed non-discrimination against prospective parents a favorable pursuit. *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). If this Court holds otherwise, government programs would collapse under the weight of Free Speech challenges, forced to forego partnerships with contractors who do not comply. One can only imagine the litany of objections, both religious and secular, that might arise if the First Amendment can hereon be wielded to force governments into compliance with private beliefs.

The Supreme Court made sure to emphasize in *Obergefell* that the First Amendment protects religions observers right to "advocate with utmost, sincere conviction that . . . same-sex marriage should not be condoned." *Obergefell,* 576 U.S. at 680. Those observers "may engage those who disagree with their view in an open and searching debate." But just as "[t]he Constitution does not permit the State to bar same-sex couples from marriage," it also does not permit religious observers to alter the terms of their contractually mandated governmental duties according to their beliefs. Outside of the contract, AACS is free to allow its religious beliefs to inform how they help address Evansburgh's "shortage of foster and adoptive homes." Where a contract is in place, however, and the speech is governmental in nature, AACS's objections amount to little more than "a First Amendment heckler's veto." *Johanns*, 544 U.S. at 574, (SOUTER, J., dissenting) Without the authority to "select the views it wants to express . . . it is not easy to imagine how government could function." *Summum*, 555 U.S. at 467-68.

CONCLUSION

As Justice Kennedy noted in *Masterpiece*, cases like the present pit two important but conflicting principles against each other: the State's authority "to protect the rights and dignity of gay persons" from discrimination "when they seek goods or services" versus the "right of all persons to exercise fundamental freedoms under the Frist Amendment." *Masterpiece,* 138 S. Ct. at 1723. But in the child placement services realm, the rights and dignities of vulnerable populations take on a special and delicate importance and should be given due deference. There is no doubt that freedom of speech has a preferred position among the rights in the Constitution, but when entities contract with the government to provide public services as AACS has done, they cannot then choose to dictate the terms of that contract for any reason, religious or secular. For the above reasons, we ask this Court to affirm the Fifteenth Circuit's decision.