Case No. 2020-05

UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

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

v.

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

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

BRIEF FOR APPELLEE AL-ADAB AL-MUFRAD CARE SERVICES

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The United States District Court for the Western District of East Virginia originally had jurisdiction to hear the case under 28 U.S.C. § 1331, as Al-Adab Al-Mufrad Care Service's claims arise under the First Amendment of the United States Constitution. Christopher Harwell filed a timely appeal with the United States Court of Appeals for the Fifteenth Circuit after a final decision from the United States District Court for the Western District of East Virginia. The United States Court of Appeals for the Fifteenth Circuit had the jurisdiction to hear this case pursuant to 28 U.S.C. § 1291, which states: "the courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States...." The Fifteenth Circuit has jurisdiction to rehear the case en banc pursuant to the Federal Rule of Appellate Procedure 35(a)(2), which provides that a majority of circuit judges who are not recused and are in regular active service may order an appeal to be reheard by the court of appeals en banc if the proceeding involves a question of exceptional importance. The requirements of Rule 35(a)(2) have been met in this situation.

ISSUES PRESENTED

1. Did the panel err when it held that HHS's refusal to renew AACS's contract for child placement services with the city did not violate AACS's constitutional rights under the Free Exercise Clause of the First Amendment?
2. Did the panel err when it determined that the EOCPA's ban on sexual orientation discrimination does not violate AACS's First Amendment rights under the Free Speech Clause?
3. Did the panel err when it held that the EOCPA's notice requirement did not create an unconstitutional condition violating the AACS's First Amendment rights?

STATEMENT OF THE CASE

I. Factual Background

The City of Evansburgh, East Virginia, has a diverse population of around 4,000,000 people. R. at 3. A large proportion of the population are refugees from Ethiopia, Iraq, Iran, and Syria, all of which have significant Islamic populations. R. at 3; One World Nations Online, *Islamic World*, https://www.nationsonline.org/oneworld/muslim-countries.htm. Many of these refugee families cannot properly provide for their children and are forced to turn to foster care and adoption. R. at 3. Currently, there are approximately 17,000 children in the foster care system and 4,000 children available for adoption. *Id*. In response to a "chronic shortage of foster and adoptive homes," the city of Evansburgh has turned to the Department of Health and Human Services (HHS) for the purpose of "establishing a system that best serves the well-being of each child" in need of foster care or adoption. *Id*. HHS maintains contracts with 34 private child placement agencies who, in exchange for public funding from Evansburgh, provide home studies, counseling, and placement recommendations to HHS. *Id*. In fact, on August 22, HHS sent an urgent notice to the child placement agencies it contracts with that there is a need for more adoptive families due to a recent increase in the number of refugee children placed in foster care. *Id.* at 8.

Families interested in fostering or adopting children reach out to private child placement agencies via the HHS website. R. at 4-5. When a child is placed into the custody of HHS, HHS will refer the child's case to the private agencies, who in turn, will notify HHS of potential foster and adoptive parents who they believe are suitable to meet the needs of the child. *Id.* at 3. HHS ultimately determines which family the child will be placed with. *Id.* This determination is based on a multitude of factors including: the ages of the child and the prospective parents; the prospective parents ability to care for the child's physical and emotional needs; the cultural and

ethnic backgrounds of the child and the prospective parents; and whether the child may be placed with their siblings. R. at 4; E.V.C. § 37(e). Ultimately, all placements "must be made on the basis of the best interests of the child." R. at 4.; E.V.C. 37(d)). After the child is matched with a family, HHS requires the private agency involved to "maintain supervision and support to ensure a successful placement" with the foster or adoptive family. R. at 4.

East Virginia adopted the Equal Opportunity Child Placement Act (EOCPA) in 1972. R. at 4. As originally enacted, the EOCPA prohibits private foster care and adoption agencies receiving funds from HHS 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; E.V.C. § 42. In addition, the EOCPA also requires that if all other qualifications of the prospective parents are equal, the agencies must give preference to the prospective parents where at least one parent shares the same race as the child. R. at 4; E.V.C. § 42.-2(b). However, HHS has demonstrated that there are some exceptions to these "rules." R. at 8-9. On November 4, 2014, a white special needs child was placed with an African American couple despite the fact that other white couples were screened and certified to adopt the child. *Id.* Commissioner Hartwell stated that the "same race" provision of the E.V.C. was meant only to protect minority children, not white children. *Id.* at 9. Further, on March 21, 2015, HHS refused to let a certified family consisting of a father and son adopt a five-year old girl, likely because she was of a different sex than the family. *Id.*

In 1980, Al-Adab Al-Mufrad Care Services (AACS) was founded as a private child placement agency with the purpose of supporting the refugee community, including adoption services for displaced children. R. at 5. AACS's public-facing mission statement states that they believe that "[a]ll children are a gift from Allah" and that their services are "consistent with the

teachings of the Qur'an." *Id.* While maintaining those ideals, the agency has placed thousands of children including children with special needs and children who are trauma survivors. *Id.* AACS also maintains a unique position within the Evansburgh community because of its Islamic beliefs. Between 2013 and 2015, when there was some conflict between the Sunni and Shia sects of refugees in Evansburgh, HHS followed AACS's recommendations that Islamic children should not be placed with potential families of the other sect and that placements should be delayed to ensure that the child was matched with a family of the same religious beliefs. *Id.* at 9. Although AACS's beliefs prohibit the agency from directly certifying same-sex couples as qualified adoptive parents, AACS has referred same-sex couples that are interested in adoption to the four adoption agencies that specialize in serving the LGBTQ community. *Id.* at 7. No members of the LGBTQ community have ever filed any complaints against AACS for discriminatory behavior. *Id.* at 7. HHS has annually renewed its contract with AACS since its founding. *Id.* at 5.

After the decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Governor of East Virginia tasked the Attorney General with ensuring that state statutes were changed to "eradicat[e] discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." *Id.* at 5. The EOCPA was one of the statutes which was changed as a result. *Id.* The amended statute states that child placement agencies must "give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." R. at 5; E.V.C. § 42.-3. The amended statute also requires the child placement agency to sign and post a notice in its place of business reading that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6; E.V.C. § 42.-4. Although the agency may post a written objection to the

policy, they must still publicly sign and post the notice before they may receive any funds from the HHS. *Id.*

In July 2018, Christopher Hartwell, the Commissioner of the City of Evansburgh's Department of Health and Human Services, reached out to Shahid Abu-Kane, the Executive Director of AACS, only after being approached by a reporter asking whether all religious-based child placement agencies receiving funding from HHS were complying with the EOCPA amendments. R. at 6-7. It was during this conversation that Commissioner Hartwell learned of AACS's aforementioned practices regarding the LGTBQ community. *Id.* at 7. On September 17, 2018, Commissioner Hartwell sent a letter to AACS stating that HHS would not be renewing its contract on the renewal date of October 2, 2018, despite the ongoing influx of refugee children who need to be adopted. *Id.* The letter further stated that despite its religious beliefs, AACS was required to comply with EOCPA to receive government funding and referrals because child placement is a "secular social service." *Id.* The letter stated that there would be an immediate referral freeze placed on AACS which would be communicated to the other adoption agencies in Evansburgh and that the other agencies should "refrain from making any adoption referrals" to AACS unless AACS agreed to completely comply with EOCPA within 10 business days. *Id.* at 7-8.

There have been several issues caused by this freeze imposed by the HHS. R. at 8. Firstly, on October 13, 2018, a young girl was unable to be placed with her biological brothers because her brothers had been placed by AACS before the freeze had occurred. *Id.* Secondly, a five-year-old boy with special needs was denied an adoption placement with the woman who had fostered him for two years because the initial foster placement was done through AACS. *Id.*

II. Procedural Background

AACS filed an action against Commissioner Hartwell on October 30, 2018, stating that the EOCPA enforcement violates its First Amendment rights under the Free Exercise Clause and the Free Speech Clause. R. at 2. AACS sought a temporary restraining order (TRO) of the referral freeze imposed by HHS and a permanent injunction to compel HHS to renew its contract with AACS. *Id.*

A three-day evidentiary hearing was held in March 2019. R. at 8. At this time Commissioner Hartwell testified that the HHS policy to enforce the EOCPA ensured that when child placement agencies agree to abide by state and local laws, those laws are followed; that child placement services are accessible to all residents of Evansburgh; that the pool of potential foster and adoptive parents is diverse; and that individuals who "pay taxes to fund government contractors are not denied access to those services." *Id.* at 9.

On April 29, 2019, the United States District Court for the Western District of East Virginia granted AACS's motion for a TRO and permanent injunction, holding that "enforcement of the EOCPA against AACS violates AACS's Free Exercise and Free Speech rights." R. at 16.

Commissioner Hartwell appealed to the United States Court of Appeals for the Fifteenth Circuit. R. at 18. The appeal was heard by a panel of three judges on February 24, 2020. *Id.* The majority reversed the decision of the District Court, stating that "enforcement of the EOCPA against AACS does not violate either AACS's Free Exercise or its Free Speech rights." *Id.* at 25. One judge dissented, stating that the District Court's opinion was well-reasoned and should be affirmed. *Id.*

AACS petitioned for a rehearing en banc, which was granted by a vote of a majority of non-recused, active judges on July 15, 2020. R. at 26.

SUMMARY OF THE ARGUMENT

The panel's decision to reverse the District Court's judgement in Commissioner Hartwell's favor should be reversed because HHS's enforcement of the EOCPA and refusal to renew AACS's contract is unconstitutional and violates AACS' rights under the Free Exercise Clause and Free Speech Clause of the First Amendment.

The EOCPA, as interpreted and enforced by HHS, fails to satisfy the requirements of neutrality and general applicability because religiously motivated conduct is treated discriminatorily as compared to analogous secular conduct. Thus, the Court must analyze HHS's conduct under strict scrutiny. HHS's actions cannot survive review under strict scrutiny because its actions are neither justified by compelling governmental interests nor narrowly tailored to advance any such interests. The interests asserted by HHS as justification for burdening AACS's rights under the Free Exercise Clause are not compelling for two reasons. First, HHS allows exemptions to the EOCPA for analogous, secularly-motivated conduct that cause the same alleged harms it is attempting to prevent. Second, none of the interests asserted by HHS are advanced, nor are any of the alleged harms prevented, by denying an exemption to AACS for religious hardships. The narrow tailoring requirement is also not satisfied because there are less restrictive means available for the HHS to advance its asserted interests without burdening AACS's free exercise of religion. As such, HHS's conduct is unconstitutional and violates AACS's rights under the Free Exercise Clause.

Moreover, the requirements of the EOCPA violate AACS's First Amendment right to free speech in two ways: the nondiscrimination requirement and the mandatory notice requirement. Under the Supreme Court's decisions in *Rust* and *AOSI*, only funding conditions that regulate how recipients spend government funding are constitutional. *Rust v. Sullivan*, 500 U.S. 173 (1991);

Agency for International Development v. Alliance for Open Society International (AOSI), 570 U.S. 205 (2013). On the other hand, conditions that compel recipients to affirm as their own the government's view on an issue of public concern violate the First Amendment. The nondiscrimination and notice requirements do not merely regulate how public funds are spent. Instead, the nondiscrimination requirement mandates AACS to affirm the government's views on same-sex marriage, even when they are acting in a private capacity to determine the best interests of the child. The anti-discrimination notice requirement also creates an unconstitutional condition by withholding government funds until AACS signs and posts a public policy that is contrary to its Islamic beliefs. Thus, the EOCPA regulates AACS's speech outside the scope of the funding program violating AACS's free speech rights under the First Amendment.

ARGUMENT

I. Because this Case Presents a First Amendment Claim, this Court Reviews the District Court's Conclusions of law de novo.

When a case presents a First Amendment Claim, a United States federal appellate court reviews a district court's conclusions of law *de novo*. *See, e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263, 268 (3d Cir. 2009). Additionally, an appellate court has "'a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim.'" *Id.* at 289 (quoting *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d. Cir. 2004)). Because AACS is asserting First Amendment claims, this standard is applicable to this Court's review.

II. Refusing to Renew AACS's Contract with the City violated AACS's Constitutional Right under the Free Exercise Clause.

The Free Exercise clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The First Amendment has been made applicable to the states by incorporation into the Fourteenth Amendment. *See Employment Div. v. Smith*, 494 U.S. 872, 876-77 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)). "[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717 (1981). The Supreme Court has been clear that "a State would be 'prohibiting the free exercise of religion' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. The Court has explained that a law that is not neutral and generally applicable "must be justified by a compelling

governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hilaleah*, 508 U.S. 520, 531-32 (1993).

The case currently before the Court represents an attack on the free exercise of religion for all Americans and an erosion of those fundamental principles of religious liberty that this country was founded on and that the Constitution was created to protect. Commissioner Hartwell and the HHS have unconstitutionally violated AACS's rights to freely exercise its sincerely-held religious beliefs. HHS has not enforced the requirements of the EOCPA in a neutral manner, granting exemptions to the EOCPA's antidiscrimination provisions for numerous secular or inconsistent reasons, in addition to requiring discrimination and favoritism among protected classes. The EOCPA and HHS's enforcement of the law are not narrowly tailored to advance any governmental "'interests of the highest order.'" *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). By failing to renew AACS's contract with the city, HHS has violated AACS's First Amendment rights while doing nothing to advance the interests it has put forward as justification. HHS's actions are plainly unconstitutional.

A. The Department of Health and Human Services actions are subject to strict scrutiny because it has failed to meet the requirements of neutrality and general applicability.

If a law is neutral and generally applicable, then it will not be subject to strict scrutiny "even if the law has the incidental effect of burdening" the free exercise of religion. *Lukumi*, 508 U.S. at 531 (citing *Smith*, 494 U.S. at 876-77). If either neutrality or general applicability are not met, then the law will be subject to review under "the most rigorous of scrutiny." *Id.* at 546. As the Supreme Court explained in *Lukumi*, "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one is a likely indication that the other has not been satisfied." *Id.* at 531. It is not sufficient that a law appears to be facially neutral and generally applicable. Courts "must

survey meticulously the circumstances" and assess "the effect of a law in its real operation." *Id.* at 534-35. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). "Where the state conditions receipt of an important benefit upon conduct proscribed be a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-18. This case presents a situation in which HHS has taken a facially neutral law, and then enforced the law in a non-neutral manner that discriminated against the sincere, religiously motivated beliefs and conduct of AACS and its members.

Courts have identified a multitude of means by which the neutrality requirement can be violated. In *Lukumi*, the Supreme Court held that a city's supposed animal cruelty laws were actually a purposeful attempt to outlaw the practice of animal sacrifice by the church of Santeria. The ordinances were mostly neutral and generally applicable on their face. However, in practice, the ordinances almost exclusively applied to animal sacrifice by adherents of Santeria, while exempting the secular and kosher slaughter of animals. *Lukumi*, 508 U.S. at 536. The Court held that the practical effects of the law were not religiously neutral, because "the text of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings," causing "the burden of the ordinances, in practical terms, [to fall] on Santeria adherents but almost no others." *Id.* at 537, 542. The principles and requirements outlined in *Lukumi* apply not only to laws which "prohibit religious conduct, but also when the government denies religious adherents access to publicly available money or property." *Tenafly Eruv Ass'n v.*

Borough of Tenafly, 309 F.3d 144, 169 (3d Cir. 2002) (citing *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Davey v. Locke*, 299 F.3d 748, 753-54 (9th Cir. 2002)).

In *Tenafly*, the city had an ordinance that prohibited placing any signs or objects on utility poles, but the common practice of the city was to almost never enforce the ordinance, frequently allowing citizens and groups to attach signs, decorations, and other matters to the poles. *Tenafly*, 309 F.3d at 151. The city chose to enforce the ordinance and prohibit the eruv when a group of Orthodox Jews requested permission to construct an eruv – a demarcated area that allowed Orthodox Jews to more freely engage in regular life activities on the Sabbath while still following tenets of their faith – by placing plastic strips that looked identical to utility lines on the city's utility poles. *Id.* at 151-52, 154. The Third Circuit held that the city violated the Free Exercise Clause when it selectively enforced the ordinance only as to this religiously motivated conduct while exempting similar secular conduct from enforcement. *Id.* at 168. In another case, the Third Circuit held that the Newark Police Department's "no-beard-policy" was subject to strict scrutiny because it allowed for exemptions for medical purposes but not for religious purposes. *Fraternal Order of Police Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (explaining that "when government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny").

The Sixth Circuit has held that a university's actions were subject to strict scrutiny when it expelled a counseling student, Ward, for refusing to affirm a homosexual student's sexual orientation and relationship, which Ward's religious beliefs prevented her from doing. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Ward had requested permission to refer the homosexual student to another counselor because affirming homosexuality conflicted with her religious beliefs and caused religious hardship. *Id.* at 729-30. Because the university had a history of ad hoc

enforcement of its antidiscrimination policy and frequently granted referral requests "for secular – indeed mundane – reasons, but not for faith-based reasons," analysis under strict scrutiny was required. *Id.* at 739-40. "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny. *Id.* at 740 (citing *Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. at 537). "A double standard is not a neutral standard." *Id.* (citing *Fraternal Order of Police*, 170 F.3d at 365-67).

HHS violated the neutrality requirement when it failed to grant an exemption for AACS's religiously motivated reason. "[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884) (internal quotation omitted). Further, "in situations where government officials exercise discretion in applying a facially neutral law, . . . they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct." *Tenafly*, 309 F.3d at 165-66.

HHS not only allows discrimination on the basis of sexual orientation for secular reasons, it requires such discrimination in certain situations. R. at 6. An agency is required to engage in preferential, discriminatory treatment on the basis of sexual orientation when it is in the best interest of the child by requiring the agencies to give preference to couples of the same sexual orientation as the child's (if the child's sexual orientation is known). *Id.* However, AACS was not granted an exemption to refer same-sex couples to other agencies when it was in the best interest of AACS's free exercise of its religious beliefs. *Id.* at 7. This is an impermissible double standard and blatantly violative of the neutrality requirement. The preferential treatment of one class of

persons is inherently discriminatory towards others outside of that class. *Compare Discrimination*, Black's Law Dictionary (11th ed. 2019) (defining discrimination as "[t]he effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability"), *with Preferential*, Black's Law Dictionary (11th ed. 2019) (defining preferential treatment as "[g]iving advantage to one or more over others; favoring some people or things over others").

The district court correctly held that the exemptions and preference requirements contained in EOCPA "permit discrimination on the basis of race and sexual orientation in certain contexts for secular reasons – presumably because the state and its local agents believe such discrimination promotes the child's well-being." R. at 12. After a white child was placed with an African American couple, despite white families being available to accept the child, Commissioner Hartwell explained that "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." *Id.* at 9 (emphasis added). This policy and HHS's interpretation is racially discriminatory for two reasons. First, it is discriminatory to give preferential treatment based on race, regardless of the reasons underlying it. Second, having a law be applicable only to minority individuals and not white individuals is unquestionably discriminatory. Analogous to the circumstances in *Lukumi*, the EOCPA, as interpreted and enforced by HHS, violates the neutrality requirement because it allows (and requires) exemptions to its antidiscrimination provisions for secular motivations while prohibiting religiously motivated exemptions. This is not religious neutrality; this is an impermissible double standard.

Even if the provisions of the EOCPA were neutral and generally applicable, HHS's actions denying an exception for AACS's religiously motivated reasons while allowing such exceptions for secular reasons must be subject to strict scrutiny. As previously discussed, HHS's interpretation and enforcement of the EOCPA either allows or mandates discrimination among protected classes for secular reasons. R. at 4. The EOCPA would allow an agency to discriminate against a homosexual couple and give preferential treatment to a heterosexual couple if the child's sexual orientation is identifiable as heterosexual, assumingly because HHS views such discrimination to be in the best interest of the child. R. at 6; E.V.C. § 42.-3(c). Furthermore, although the ordinance does not expressly allow discrimination on the basis of religion, HHS has previously allowed such an exemption for secular reasons. HHS has allowed discrimination on the basis of religion, when it "approved of AACS's recommendation that children should not be placed with otherwise qualified adoptive parents from" different Islamic sects than the child (presumably for the secular purpose of child welfare and the risks associated with tensions between Sunni and Shia refugees in the city at that time). R. at 9.

HHS seemingly has no issue with child placement agencies turning away individuals that they do not wish to work with, at least when such conduct is secularly motivated. It is common practice for child placement agencies to refer a family to another agency if the "family does not fit with the agency's profile and policies," a fact that HHS is aware of and thus (at least passively) condones. R. at 5. Whenever a homosexual couple would contact AACS for adoption placement services, AACS always "treated them with respect and referred them to other agencies that served the LGBTQ community." R. at 7. AACS was simply referring the homosexual couples to an agency that was a better fit to serve that couple, because AACS's sincerely held "religious beliefs prohibited it from certifying qualified same-sex couples as prospective parents." *Id.* The

circumstances of this case paint a clear picture that HHS would allow any number of exceptions to the requirements of the EOCPA when it is "for secular – indeed mundane – reasons, but not for faith-based reasons." *Ward*, 667 F.3d at 739-40. Identical to *Tenafly*, the government allows child placement agencies to disregard provisions of the EOCPA for secular reasons or when a family simply is not a good "fit with the agency's profile and policies." R. at 5. However, when AACS requests permission to do the same in circumstances that cause severe conflict and hardship for its sincerely held religious beliefs, HHS has refused to grant AACS any sort of accommodation or exemption. *Id.* at 7-8. This shows that the EOCPA is a law that is riddled with discriminatory, conflicting, and ad hoc exemptions for secular reasons. Just as the court observed in *Ward*, such "an exception-ridden policy" is "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

In the present case, HHS has clearly violated the neutrality and general applicability requirements by devaluing AACS's religious hardships as compared to secular reasons, enforcing a highly flawed and inconsistently enforced law only against AACS's religiously motivated conduct. As such, HHS's actions must be narrowly tailored to advance a compelling governmental interest.

B. By failing to show that its actions are narrowly tailored to advance a compelling governmental interest, HHS has violated the Free Exercise Clause.

"A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546; *accord City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional

law."). The Supreme Court has explained that enforcement of a law that is not neutral and generally applicable or otherwise restricts the free exercise of religion "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel*, 435 U.S. at 628). Just as the neutrality and general applicability requirements are interrelated, the narrow tailoring and compelling governmental interest requirements are also interrelated. *Id.* at 531-32. When a law is underinclusive, burdening religious conduct but not analogous secular conduct that produces similar harms, or overbroad, burdening religion more than is necessary to accomplish the interest, then the law is not narrowly tailored. *See id.* (holding that the ordinances were both overbroad and underinclusive because the "proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far less degree"). Additionally, where enforcement of a law only burdens "conduct protected by the First Amendment and fails to . . . restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id.* at 546-47.

When there is insufficient evidence to prove that supposed harms asserted by the government are actually likely to occur if an exemption for religious hardship is granted, then the governmental interests are not compelling and do not justify the burdens imposed on religion. *See Thomas*, 450 U.S. at 718-19. In *Thomas*, a Jehovah's Witness was denied unemployment benefits when he was forced to resign from a job that involved directly manufacturing military weapons, an activity that conflicted with his religious beliefs. *Id.* at 710. The Supreme Court held that the "interests advanced by the State do not justify the burden placed on free exercise of religion," because the State had failed to show that "the number of people who find themselves in the

predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment," or "even to seriously affect unemployment." *Id.* at 719.

Commissioner Hartwell and HHS contend that their unyieldingly harsh enforcement of the EOCPA against AACS and the resulting exclusion of AACS as a contracting child placement agency helped to serve "the compelling state interests of eliminating all forms of discrimination" and "successfully placing children in qualified adoptive homes." R. at 13. Specifically, Hartwell asserts that this strict enforcement of the EOCPA ensures that

> "1) child placement services are accessible to all Evansburgh residents who are qualified for the services; 2) the pool of adoptive parents is as diverse and broad as the children needing placement; and 3) individuals who pay taxes to fund government contractors are not denied access to those services."

Id. As explained in *Lukumi*, these interests cannot be held to be compelling when HHS only enforces the EOCPA against religiously motivated conduct and not analogous secular conduct. Additionally, under *Thomas*, the asserted interests are not compelling because HHS has failed to demonstrate that enforcement of the EOCPA and refusing to renew AACS's contract actually advances any of its interests or prevents any of the asserted harms.

Analogous to the unconstitutional governmental conduct in *Thomas* and *Lukumi*, HHS has failed to show that granting an exemption and allowing AACS to refer homosexual couples to other agencies advances any of the interests put forward in justification nor any of the harms it fears would allegedly occur. AACS's practice of referring such clients does not prevent citizens from accessing child placement services. The practice does not cause the pool of adoptive parents to be less diverse and broad than the children needing placement. The practice does not impede efforts to successfully place children in qualified adoptive homes. If anything, HHS's refusal to grant an exemption or renew AACS's contract actually harms all of the interests asserted in justification. Removing AACS from the available agencies decreases accessibility to child

placement services and removes the only identified agency that specializes in matching refugee children and families – with a large portion of the children needing fostering or adoption falling into this category. As such, the asserted interests cannot be deemed compelling when those interests are not logically advanced by HHS's unjustified burden on AACS's First Amendment rights.

Assuming, *arguendo*, that the interests asserted by Commissioner Hartwell and HHS are "of the highest order" and sufficiently compelling to justify infringing AACS's constitutional rights, enforcement of the EOCPA is not narrowly tailored to advance any of those interests. Narrow tailoring requires that enforcing "the law is the least restrictive means of furthering its interest." *City of Boerne*, 521 U.S. at 534. "The least-restrictive-means standard is exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). The government must show that it "lacks other means of achieving its desired goal without" burdening the free exercise of religion. *Id.* In *Hobby Lobby*, the Department of Health and Human Services failed to satisfy the narrow tailoring requirement, because there were plenty of other reasonable means by which the government could ensure that women had access to contraceptives without requiring employers to provide insurance that covered contraceptives (a requirement that conflicted with the employer's religious beliefs). *Id.* The Court explained that "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issues to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* Cost can be a factor to consider, but where the government is reasonably able "to expend additional funds to accommodate citizens' religious beliefs," not doing so violates the narrow tailoring requirement. *Id.* at 731-32. The Sixth Circuit recently held that narrow tailoring was not satisfied when there were "plenty of less restrictive

ways to address" public health concerns than a flat prohibition on in-person worship services during a public health emergency, such as requiring the same public health measures applicable to analogous secular activities that the Governor's executive order allowed. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020).

In the present case, HHS has failed to offer any evidence to show that burdening AACS's constitutional rights was the least restrictive way to further these supposedly compelling governmental interests. As in *Hobby Lobby*, there is no indication that the government could not reasonably bear the burden of screening the few potential foster or adoptive families that an agency could not serve due to religious hardship. Presumably, the city handled all of these screening duties before it began to outsource this work to independent contractors like AACS. This would accomplish all of the asserted governmental interests without burdening the free exercise of religion. Alternatively, the government could require an agency to refer individuals to another agency when a conflict arises, whether or not that conflict is based on secular or religious reasons. This is conduct that AACS and other agencies have already been regularly engaging in without issue. R. at 3-4. Such an amendment to the laws and policies would ensure that the asserted governmental interests are advanced and does not unduly burden the free exercise of religion. Thus, HHS's current conduct is not the least restrictive means of furthering its interests. As such, HHS has failed to satisfy the narrow tailoring requirement of strict scrutiny.

Because HHS cannot show that its religiously discriminatory and burdensome enforcement of the EOCPA against AACS is justified by a compelling governmental interest nor narrowly tailored to advance such an interest, the Court must hold that HHS's conduct is unconstitutional and violates the Free Exercise Clause of the First Amendment.

III. EOCPA's nondiscrimination provisions, including the mandatory notice requirement, impose an unconstitutional condition on free speech because

they require private agencies to affirm a belief that cannot be confined within the scope of the funding program.

"Congress shall make no law … abridging … freedom of speech." U.S. Const. amend. I. The fundamental rights of the First Amendment have been incorporated against the states by the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Freedom of speech also includes the right to refrain from speaking and prohibits the government from compelling the speech of a citizen. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Janus v. American Federation of State, Cty., and Municipal Employees,* 138 S. Ct. 2448, 2463 (2018); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). 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 Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 59 (2006) (quoting *Board of Comm'rs, Wabaunsee Cty. V. Umbehr*, 518 U.S. 668, 674 (1996)). The panel incorrectly determined that the EOCPA did not violate AACS's right to free speech under the First Amendment because a) the EOCPA compels recipients to adopt the government's beliefs to determine what is the best interests of the child and b) the anti-discrimination notice of the EOCPA compels the speech of AACS as a whole, both of which exceed the scope of the funding program

A. Requiring AACS to adopt the government's ideology as its own to determine what is in the best interest of the child violates the First Amendment.

Conditions on government funding result in unconstitutional burdens on free speech when the conditions do not merely "specify the activities [the legislature] wants to subsidize," but "seek to leverage funding to regulate speech outside the contours of the program itself." *AOSI,* 570 U.S. at 214. In short, the government cannot "compel as a condition of federal funding the affirmation

of a belief that by its nature cannot be confined within the scope of the Government program." *Id*. at 221.

To determine whether a government condition to participate in a program is unconstitutional under the First Amendment, courts examine it in the context of the purpose of a funding program. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Conditions on funding programs avoid triggering the First Amendment if the conditions impose limits on the use of the funds simply to ensure that they are spent on the activities that the legislature intended to fund. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983). In *Regan*, the Court upheld a prohibition against substantial lobbying activities as a condition for tax exempt status, reasoning that "Congress has merely refused to pay for the lobbying out of public monies." *Regan*, 461 U.S. at 545. *Rust* follows the same reasoning to the conclusion that the government could prohibit recipients of Title X funds from providing counseling, referrals, and information regarding abortion as a method of family planning, again explaining that "Congress has merely refused to fund such activities out of the public fisc." *Rust*, 500 U.S. at 198. The challenged laws in both cases do not implicate the First Amendment because they merely specify the activities that the legislature intended, or refused, to fund. *Regan*, 461 U.S. at 545; *Rust*, 500 U.S. at 198.

On the other hand, conditions that leverage funding to regulate recipients' speech outside of the program violate the First Amendment. *AOSI*, 570 U.S. 205 (2013); *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984). In *League of Women Voters*, the Court struck down a condition on federal assistance to broadcast television and radio stations that absolutely prohibited all "editorializing" because it "went beyond ensuring that federal funds not be used to subsidize 'public broadcasting editorials,' and instead leveraged the

federal funding to regulate the stations' speech outside the scope of the program." *AOSI* at 216 (citing *League of Women Voters*, 468 U.S. at 399). In *AOSI*, the Court relied on the same reasoning when it struck down a condition requiring recipients of HIV/AIDS aid to adopt a policy opposing prostitution. *Id*. at 221. The condition violated the First Amendment because it demanded the funding recipients to adopt as their own the government's view on an issue of public concern, which is a condition that "by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id*. at 218 (citing *Rust*, 500 U.S. at 197). These cases show that requiring recipients to affirm a belief as their own as a condition on funding infringes on free speech.

The nondiscrimination requirements of the Equal Opportunity Child Placement Act (EOCPA), as applied to AACS, violate the First Amendment because the requirements compel recipients to affirm a belief as their own in what constitutes the best interests of the child, exceeding the scope of the legislative purpose to fund child adoptions. The text and history of the EOCPA make clear that the East Virginia legislature intended to address the need for adoptions that would best serve the well-being of each child in Evansburgh, regardless of the background they come from. R. at 3-4. On its website, HHS emphasizes the priority on finding the best fit for each child. *Id*. at 5. E.V.C. § 37 directs that the determination of child placements must be made on the basis of the best interests of the child, and that private agencies consider several factors when making recommendations. *Id.* at 4. However, these factors are ambiguous, suggesting that the legislature intended to leave it to each private child placement agency's discretion to make recommendations based on their own understanding of the child's best interests. *Id.* at 3-4. AACS, has served this legislative purpose by making thousands of child placement recommendations on the basis of the

best interests of the child after evaluating their compatibility with prospective parents since its formation in 1980. *Id*. at 5.

The nondiscrimination requirements under E.V.C. § 42, however, leverage funding to regulate recipients' speech outside of the program in violation of the First Amendment under *AOSI*. 570 U.S. 205. The requirements, like the unconstitutional prohibitions against "editorializing" in *League of Women Voters* and against advocating for prostitution in *AOSI*, compel recipients of funding to affirm a belief that cannot be confined within the scope of the Government program. To comply with E.V.C. § 42, AACS would have to forsake their belief of what is in the best interests of the child and instead adopt the government's belief that discriminating on the basis of race by giving preference to parents of the same race is in the best interests of the child, while discriminating on any other basis is not. R. at 4. In essence, the nondiscrimination requirements demand that AACS adopt as their own the government's view on race and same sex marriage, issues of public concern, a condition that by its very nature affects 'protected conduct outside the scope of the federally funded program.' *AOSI*, 570 U.S. at 218 (citing *Rust*, 500 U.S. at 197). The requirements therefore violate the First Amendment by seeking to leverage public funding to regulate AACS' speech outside the child placement program.

Contrary to the panel's opinion, the Supreme Court's holding in *Rust* does not change the conclusion that the nondiscrimination requirements violate free speech because unlike the prohibition on spending public funds to advocate for abortion in *Rust*, AACS spends no public funds in referring same sex couples to a child placement agency that is a better fit for their needs. The record shows that the funding program in this case only supports home studies, counseling, and placement recommendations to HHS. R. at 3. After placement, the agency that recommended the family is contractually required to maintain supervision and support to ensure a successful

placement. *Id*. at 4. But if a family seeking to foster or adopt a child does not fit the agency's profile and policies for any reason, they are normally referred to another agency. *Id*. at 4-5. No public funds are spent when an agency refers prospective parent(s) to another agency, therefore the conditions exceed the scope of the EOCPA funding program by compelling the private agency to affirm a belief in what is in the best interests of the child.

To hold that the First Amendment does not apply to funding conditions like this risks enabling the government to impose various additional ideological requirements on other agencies. The government would be able to, for example, require all private child placement agencies to only certify prospective parents who vote for Democrats or join the military before providing funding. Such a result would not comport with the Supreme Court's admonition that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalist, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed.*, 319 U.S. at 642.

B. The EOCPA anti-discrimination notice imposes an unconstitutional condition on AACS because it attempts to regulate the agency's speech as a whole, outside the scope of the funding program.

A core principle of the First Amendment is that "freedom of speech prohibits the government from telling people what they must say." *West Virginia Bd. of Ed.*, 319 U.S. at 642. "A law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (quoting *West Virginia Bd. of Ed.*, 319 U.S. at 633). Although state and federal governments are not obligated to provide public funding, the government must not compel funding recipients to abandon their First Amendment rights and instead espouse the government's beliefs, which are contrary to their own as a condition to receive funding *AOSI*, 570 U.S. at 206 (citing *Rust,* 500

U.S. at 195); *Planned Parenthood of Greater Ohio v. Hodges (PPGO)*, 917 F.3d 908, 911 (6th Cir. 2019). To do so would impose an unconstitutional condition upon the recipient. *PPGO*, 917 F.3d at 911. To determine whether a condition is unconstitutional, the court must consider the scope of the speech limitation and its relationship to the underlying purpose of the government funding program. *Velazquez*, 531 U.S. at 542; *AOSI,* 570 U.S. at 218-19. If the funding recipient is able to maintain its ideologies without compromising government funding, then the speech limitation is not unconstitutional. *Rust*, 500 U.S. at 198-200. However, if the government's condition requires the recipient to change its public-facing policies, the condition is impermissible. *AOSI*, 570 U.S. at 218-19.

Where the government seeks to regulate the conduct of an institution as a condition for funding, without regulating speech, the condition may not violate the First Amendment. *FAIR*, 547 U.S. at 62 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). In *FAIR*, the Court held that an Amendment that regulated the conduct of law schools as a condition to receive federal funding did not violate the First Amendment because it did not compel the law school to change its beliefs in order to comply with the condition. *FAIR*, 547 U.S. at 70. Law schools wanted to limit the presence of military recruiters on campus in opposition to the military's discriminatory policies against the LGBTQ community. *Id.* at 52. As a result, Congress passed the Solomon Amendment requiring law schools to give military recruiters the same access to law students as other employers in order to receive government funds. *Id.* The Court held that the Solomon Amendment did not limit the law schools' First Amendment rights because the Amendment did not compel or limit the law schools' speech in any way. *Id.* at 60. The schools were still free to express their views about the military's discriminatory policies and continue to receive federal funding, so long as they allowed military recruiters the same access to their campus as other

employers received. *Id.* The Court concluded that this was not an unconstitutional condition. *Id.* at 70.

If the government limits the speech of an institution as a condition to receive funds, the condition is constitutional only if it is placed on a program or service itself and not wholly on the recipient of the funds. *Rust*, 500 U.S. at 197. In *Rust*, Title X of the Public Health Service Act, which funded preventative family planning services while explicitly prohibiting recipients from using Title X funds to provide abortion counseling, was found to be constitutional. *Id.* at 174-175. Certain Title X recipients brought suit claiming that the condition prohibiting speech relating to lawful abortions violated their First Amendment rights. *Id.* at 192. However, the Court held that the government's condition was permissible because Title X funding recipients were permitted to provide these "prohibited" services as long as they were kept "physically and financially separate" from the Title X services. *Id.* at 176. Recipients could both receive Title X funding and continue to provide abortions and abortion counseling because the condition only regulated what services could be provided through Title X, not the recipient as a whole. *Id.* Therefore, the Court held that the government's condition was not unconstitutional.

In contrast, government conditions on funding that seek to regulate the speech of a whole institution by requiring them to change a public-facing policy statement are unconstitutional. *AOSI*, 570 U.S. at 213. The Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act") required recipients to develop an explicit policy opposing prostitution in order to receive funding to combat these diseases. *Id.* at 208. Instead of choosing organizations that already supported anti-prostitution values, the government was asking recipient organizations to include certain language in their core policy statements—essentially asking these organizations change their beliefs—to receive program funding. *Id.* at 218. Recipients who wanted to remain

neutral on the issue of prostitution brought suit, stating that this condition infringed upon their First Amendment rights. *Id.* at 205. The Court agreed, finding that the condition was unconstitutional because it attempted to regulate the speech of the recipient as a whole, rather than regulate the program alone; there was no way that neutral organizations could maintain their position and also receive much-needed funding to reduce the spread of HIV and AIDS. *Id.* at 218. The Court held that requiring a potential funding recipient to change a policy statement is, by definition, outside the scope of the government's funding program because a "recipient cannot avow the belief dictated by [the government]… and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id.* In addition, the government may not require institutions to display messages on their private property for the sole purpose of being seen by the public. *Maynard*, 430 U.S. at 713. When a New Hampshire law made it a crime to obscure the words "Live Free or Die" on its state license plate, the Court held that the law was unconstitutional because the state does not have the power to "constitutionally require individual to participate in dissemination of ideological message by displaying it on his private property in manner and for express purpose that it be observed and read by the public." *Id.*

In the current case, the panel incorrectly held that the updated EOCPA anti-discrimination notice requirement does not infringe on AACS's First Amendment rights. The panel improperly relied on *FAIR* and *Rust*, which are clearly distinguishable from the case at bar; instead the Court en banc should look to *AOSI* and *Maynard* for guidance. Firstly, unlike the Solomon Act in *FAIR* which attempted to regulate the conduct of the recipients, *FAIR*, 547 U.S. at 52, the amended EOCPA attempts to regulate AACS's speech in the form of an anti-discrimination notice. R. at 6. Second, this condition for funding applies to the AACS as a whole, instead of simply to the funding program. This is distinguishable from *Rust*, where the speech limitation was confined to the use of

Title X funds. 500 U.S. at 197. Here, the EOCPA asks the AACS to endorse the anti-discrimination notice by signing it and posting it publicly before any funds are dispersed to them; this falls outside the scope of the funding program. R. at 6. Much like the neutral recipients in *AOSI* who were asked to adopt an anti-prostitution policy contrary to their beliefs, 570 U.S. at 213, if AACS adopted the anti-discrimination policy in order to receive funding, it cannot then backtrack and create another policy for child placement services provided without government funding. It is important to note that AACS was formed to provide general community support to the refugee population and its foster care and adoption services are only a fraction of the services AACS provides. R. at 5. As in *AOSI,* there is no avenue provided by the EOCPA that allows AACS to receive funding for its child placement services while maintaining its religious beliefs outside of the HHS program. It is also significant that the EOCPA requires AACS to sign and post the notice in its place of business for the sole purpose of being viewed by the public and the notice has been pre-written by the government, R. at 6, much like the text on the state license plate in *Maynard*; this is the exact type of government action which the Court stated was unconstitutional in *Maynard.* 430 U.S. at 713. By complying with the EOCPA's condition, AACS would be espousing the government's position—a position that conflicts with its own religious beliefs—which will likely alienate AACS's clientele and make it more difficult to place displaced children from Ethiopia, Iraq, Iran, and Syria with foster and adoptive parents of the same religion as them. This result conflicts with the underlying purpose of HHS's funding program. R. at 3-4.

The Court en banc should hold that the EOCPA nondiscrimination and notice requirements violate the First Amendment.

CONCLUSION

For the aforementioned reasons, this Court en banc should reverse the decision of the panel and affirm the decision of the United States District Court for the Western District of East Virginia.

Date: September 14, 2020

Respectfully submitted,

__/s/ Team 28_____
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