Case No. 2020-05

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

AL-ADAB AL-MUFRAD CARE SERVICES,
PETITIONER,

v.

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

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 RESPONDENT CHRISTOPHER HARTWELL

Team 3

Attorneys for Defendant-Appellant

QUESTIONS PRESENTED

1. Whether a party can successfully argue that its First Amendment rights under the Free Exercise Clause have been violated where the law at issue is neutral and generally applicable and there is no evidence of hostility towards the party's religious beliefs.
2. Whether a party can successfully argue that its First Amendment rights under the Free Speech Clause have been violated when Congress utilizes its spending power to impose permissible limits upon the receipt of federal public funds to assist with adoption services.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifteenth Judicial Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291. R. at 19. The Fifteenth Circuit entered a judgment and reversed the District Court's decision to grant a Temporary Restraining Order and injunction order against HHS. R. at 25. Pursuant to Federal Rule of Appellate Procedure 35(a)(2), the Petitioner's request for a Rehearing En Banc was granted.

STATEMENT OF FACTS

Approximately 4,000,000 racially ethnic individuals call Evansburgh, East Virginia home. R. at 3. Refugees from various countries form a sect of the population. Like many highly populated cities, Evansburgh has approximately 17,000 children in foster care and 4,000 available for adoption. *Id*. To fight this crisis, the City designated the Department of Health and Human Services ("HHS") to establish a system solely dedicated to maximizing each and every child's wellbeing. *Id*. To date, HHS has contracted with 34 private child placement agencies throughout the city in order to faithfully provide foster care and adoption services. *Id*.

Among the many agencies is Al-Adab Al-Mufrad Care Services ("AACS"), which seeks to provide services that are consistent with the teachings of the Qur'an. All of these agencies, including AACS, gratuitously receive public funds so long as they provide services such as home studies, counseling, and placement recommendations to HHS. R. at 5. Once HHS receives a child into custody, it sends a referral to an agency. R. at 3. The agencies will then provide information about the family and suggest potential matches. *Id*. Ultimately, it is HHS who is tasked with the calculated decision of where to place a child in need. To aid such a process, HHS may consider the child's age, sibling relationships, race, medical needs, and disability when making final placement decisions. *Id*.

The East Virginia Code provides municipalities with the power to regulate foster and adoption placements. *Id*. Specifically, the Code states that "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 interests of the child." E.V.C. § 37(d).[1] R. at 3-4.

[1] A best interests assessment allows the agency to consider: (1) the ages of the child and prospective parent(s); (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s); (3) "the cultural or ethnic background of the child compared to the capacity of the adoptive

Although the Code does direct an agency to consider certain needs, the City opted to impose further requirements in order to ensure that potential foster and adoptive families were not discriminated against. R. at 4. As such, in 1972 it adopted the Equal Opportunity Child Placement Act ("EOCPA") to impose nondiscrimination requirements. *Id*.

Originally, the EOCPA prohibited 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." E.V.C. § 42.-2. *Id*. It also stated that when all parental qualifications were equal, the agencies must give preference to families where at least one parent is the same race as the child. *Id.* § 42.-2(b). However, following the groundbreaking United States Supreme Court decision in *Obergefell v. Hodges*, the Governor of East Virginia directed the Attorney General to diligently review all state statutes to identify which were insufficient in reaching the meritorious goal of eradicating discrimination in all forms, particularly against sexual minorities. R. at 6.

To protect its citizens even further, the City decided to further amend the EOCPA to prohibit agencies from discriminating on the basis of sexual orientation. E.V.C. § 42.3-(b).[2] *Id*. Additionally, the EOCPA was amended to state that before private agencies were able to receive public funds, it 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, marital status, disability, or sexual orientation." *Id*. Notably, the amendment provides a special exception for religious-based

parent to meet the needs of the child with such a background;" and (4) "the ability of a child to be placed in a home with siblings and half-siblings." E.V.C. § 37(e).

[2] The amendment further stated: "where the child to be placed has 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." *Id*. § 42.-3(c).

agencies, who are explicitly permitted to post a written objection to the policy on their premises. *Id.* § 42.-4. *Id*.

HHS has contracted with AACS annually since 1980. In return for public funds, AACS specifically agreed to provide adoption services and a certification that each family was thoroughly screened, trained, and certified. R. at 5. Significantly, section 4.36 of AACS's contract requires AACS to be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6. However, in July of 2018, the opposite stood true. Instead, the Commissioner of HHS, Christopher Hartwell, learned that AACS had not been in compliance with the EOCPA. R. at 6-7. AACS's own Executive Director informed Hartwell that its religious beliefs prohibited it from certifying qualified same-sex couples as prospective adoptive parents. R. at 7. The agency went as far as to outright refuse to perform home studies for same-sex couples. *Id*.

Upon such a troubling discovery, Commissioner Hartwell informed AACS of its noncompliance with the law and stated that he would not renew its contract. *Id*. Additionally, he stated that its outright refusal to certify same-sex couples would require an immediate referral freeze. *Id*. However, Hartwell did inform AACS that the freeze would be immediately lifted, so long as AACS could provide HHS with a full assurance of its future compliance with the EOCPA within 10 business days. R. at 8. Unfortunately, no such assurance ever took place. *Id*. Rather, on October 30, 2018, AACS decided to file an action against Commissioner Hartwell, seeking a temporary restraining order against the referral freeze and a permanent injunction compelling HHS to renew the contract. *Id*.

Months later, an evidentiary hearing in March 2019 established the following undisputed facts[3]:

1. Four adoption agencies in Evansburgh serve the LGBTQ community; other agencies have complied with the EOCPA amendments.

2. On August 22, 2018, HHS informed all agencies that due to an increase of refugee children into foster care, there was a shortage of adoptive families.

3. On October 13, 2018, the referral freeze required HHS to place one girl and her two brothers with different homes.

4. On January 7, 2019, a five-year-old autistic child did not receive placement through AACS with the woman who had fostered him for two years due to the referral freeze.

5. Three agencies had screened and certified families for a Caucasian special needs child, however, Commissioner Hartwell found the needs of the child to be best suited as placed with an African American couple. Commissioner Hartwell reassured the community and explained that the provision in E.V.C. § 42.2 requiring preference for placement was meant to preserve and protect minority children and families throughout the city.

6. Due to an ongoing tension between two sects of the Islamic community in Evansburgh, HHS approved AACS's recommendation that certain children should not be placed with families, albeit qualified families, from the other sect to avoid such tension in the home.

7. Although an agency had certified a father and son family, on March 21, 2015, HHS chose not to place a 5-year-old girl with the family.

[3] R. at 8-9.

8. HHS testified that the HHS policy enforcing the EOCPA serves the four governmental purposes: (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services.

STATEMENT OF THE CASE (PROCEDURAL HISTORY)

Al-Adab Al-Mufrad Care Services ("AACS") started this action against Christopher Hartwell, in his official capacity as Commissioner of the City of Evansburgh's Department of Health and Human Services ("HHS"). R. at 2. AACS alleges that Hartwell's refusal to renew the City's adoption placement services contract with AACS violates AACS's First Amendment rights to freedom of religion and speech. *Id*. AACS filed a motion seeking a Temporary Restraining Order ("TRO") against HHS's referral freeze and an injunction compelling HHS to renew the contract with AACS. *Id*. The United States District Court for the Western District of East Virginia granted the Plaintiff's Motions for a TRO and granted a permanent injunction because the Court found that the enforcement of the Equal Opportunity Child Placement Act ("EOCPA") violates AACS's Free Exercise and Free Speech rights. *Id*.

HHS appealed the District Court's decision to the United States Court of Appeals for the Fifteenth Circuit. R. at 18. The Fifteenth Circuit reversed the District Court's decision and ruled that enforcement of the EOCPA against AACS does not violate either AACS's Free Exercise or Free Speech rights. R. at 25. The Fifth Circuit granted the Petitioner's request for a Rehearing En Banc.

SUMMARY OF THE ARGUMENT

This Court must apply rational basis review in order to ascertain whether the EOCPA violates AACS's First Amendment rights under the Free Exercise Clause. Upon such review, the Court will find that the EOCPA satisfies rational basis scrutiny for three reasons. First, the law is neutral and generally applicable, serves legitimate state interests, and is rationally related to achieving such interests. The United States Supreme Court has repeatedly held that one must comply with a neutral law that is not aimed at restricting religious beliefs, such as the EOCPA. Second, the referral freeze and decision not to renew AACS's contract must be upheld because HHS is not required to contract with AACS and essentially fund its religious beliefs. Courts have distinguished between essential governmental benefits, such as unemployment compensation, and mere funding of services such as adoption services. Third, AACS has failed to present evidence of hostility towards its religious beliefs in order to trigger strict scrutiny. Absent such evidence, the Court must conduct a rational basis review.

Further, the United States Court of Appeals for the Fifteenth Circuit correctly held that the EOCPA does not place an unconstitutional condition on the receipt of public funds for adoptive services and assistance. If AACS wants to keep receiving funds, but truly disagrees with the notice that HHS is requiring, then AACS may post this disagreement coupled with the notice of non-discrimination. Congress has the authority to spend for the good of the general welfare and may place limits on such distribution of funds. U.S. CONST. Art. I, §VIII, Cl. I. HHS is not asking AACS to banish their own viewpoints on same sex marriage in any way, and neither is HHS asking AACS to conform their beliefs with that of HHS.

HHS and AACS voluntarily contracted together and within the contract agreed to abide by all laws and regulations put out by the City of Evansburgh. Thus, if AACS does not wish to comply

with the laws and regulations of the City of Evansburgh, they do not have to contract with HHS. The EOCPA very clearly states that if AACS wants to continue to receive public funds, AACS must certify same-sex couples E.V.C § 42.-4. Just because the government wishes to subsidize one point of view does not mean they have to subsidize every point of view. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Again, AACS can post a disagreement with this certification to make sure their speech is not affected by the certification. Thus, HHS has not put an unconstitutional condition on the receipt of public funds to assist in child adoption services, and therefore, HHS has not violated the First Amendment by following the mandates of the EOCPA. E.V.C. § 42-.4.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT CORRECTLY HELD THAT THE EQUAL OPPORTUNITY CHILD PLACEMENT ACT DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The United States Constitution affords the citizens of this nation with various protections. One such protection includes the right to freely exercise religion, as set forth by the Free Exercise Clause of the First Amendment. However, as some may commonly misunderstand, the Free Exercise Clause does not provide inexhaustible and limitless protection to the practice of religion. Instead, if the Court finds that the law serves a rational basis, it must uphold the law as constitutional and not violative of the Free Exercise Clause.

Under rational basis review, the Court must ascertain whether the law serves a legitimate purpose and whether the means of implementing the law has a rational relation to achieving that purpose. *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483 (1955). This Court should apply rational basis review to AACS's Free Exercise Clause claim and find that the EOCPA satisfies rational basis scrutiny because (1) the law is neutral and generally applicable, serves legitimate state interests, and is rationally related to achieving such interests; (2) HHS is not required to fund AACS's religious activities; and (3) AACS has failed to set forth any evidence to trigger review under strict scrutiny.

a. This Court Must Apply Rational Basis Scrutiny to Evaluate the Constitutionality of the EOCPA Because It Is a Neutral and Generally Applicable Law, Serves Legitimate State Interests, and Is Rationally Related to Achieving Such Interests.

AACS's Free Exercise Clause claim must fail because the EOCPA is a neutral and generally applicable law that serves four legitimate interests. The United States Supreme Court has repeatedly held that one must comply with a neutral law not aimed at restricting religious beliefs and notably, mere conscientious scruples do not relieve one of such obligation. *Emp. Div.*

v. Smith, 494 U.S. 872, 889 (1990); *Minersvile Sch. Dist. Bd. Of Ed. v. Gobitis*, 310 U.S. 586, 594–95 (1940).

In *Smith*, the Supreme Court found that a law prohibiting the possession of a controlled substance was neutral and generally applicable and as such, two Native American citizens' Free Exercise Clause claim was barred. *Smith,* 494 U.S. at 890. There, the citizens ingested a controlled substance, peyote, for religious purposes and were subsequently denied unemployment benefits from their employer. *Id.* at 874.

First, the Court noted that a "generally applicable religion-neutral law" that has the effect of burdening a particular religious practice need not be justified by a compelling interest. *Id.* at 886. Instead, if prohibiting the exercise of religion is not the object, but rather the incidental effect of a "generally applicable" provision, the First Amendment will not be violated. *Id.* at 878. Second, the Court held that while the Free Exercise Clause permits the right to believe and profess whatever religion one desires, it 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)." *Id.* at 877–79.

Upon holding that the law did not violate the citizens' Free Exercise Clause rights, the *Smith* Court continued: "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878. Similarly, prior to the *Smith* decision, the Supreme Court stated a similar proposition:

> Conscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. *Minersville Sch. Dist. Bd. Of Ed.,* 310 U.S. at 594–95.

Although the *Smith* Court did not discuss rational basis review, other courts have applied rational basis scrutiny to factually analogous cases. For example, in *Fulton v. City of Phila.*, the United States District Court for the Eastern District of Pennsylvania examined a case where a foster care agency argued that the city violated its Free Exercise Clause rights by ceasing referrals to the agency due to its failure to provide services to married same-sex couples. 320 F.Supp.3d 661, 669 (E.D. Pa. 2018).

In *Fulton*, the city's Department of Human Services ("DHS") contracted with various private foster care agencies who, among other things, would screen and train prospective foster parents. *Id.* at 670. Among one of these contractual agreements was with Catholic Social Services ("CSS"). *Id.* When the commissioner of DHS learned that CSS was refusing to provide their "publicly funded services" to married same-sex couples, he closed intake referrals to CSS in order to look more deeply into the agency's policies. *Id*. at 671–73.

The contract between DHS and CSS incorporated a Philadelphia ordinance that prohibited discrimination on the basis of sex, sexual orientation, gender identity, marital status, or familiar status against those seeking services from CSS. *Id.* at 670–71. The court found that because the contract and the ordinance incorporated into the contract were "on its face, a neutral law of general applicability under *Smith*," rational basis review applied. *Id.* at 682–83. Ultimately, the court concluded that both the contract and the incorporated ordinance satisfied rational basis scrutiny for three reasons.

First, there was no evidence that the contract or the ordinance were drafted with the intent "'to infringe upon or restrict practices because of their religious motivation'" and the contract made no explicit reference to religion. *Id.* at 683 (citing *Lighthouse Inst. for Evangelism, Inc*., 510 F.3d 253, 275 (3d Cir. 2007); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.

520, 533 (1993)). Second, the contract and ordinance did not proscribe conduct only when religiously motivated. Rather, they only proscribed "CSS's ability to turn away qualified Philadelphians on the basis of particular character traits . . . ." *Id.* The court explicitly noted how DHS would not permit any foster agency, faith-based or not, to turn away potential foster parents because of the parents' characteristics. *Id.* at 684. Finally, the court noted the city's various legitimate state interests, such as, among others, the city's interest in ensuring that services are equally accessible to all citizens and ensuring that the pool of foster parents was as diverse and broad as the children in need of foster parents. *Id.* at 685.

Under *Smith*, *Minersvile*, and *Fulton*, the EOCPA is a neutral and generally applicable law that satisfies rational basis scrutiny. In *Smith*, the law may have incidentally affected the Native American citizens' religious practice, however, such incidental effect was insufficient to prevail under a Free Exercise Clause claim. Similarly, here, the EOCPA may have an incidental effect on AACS's religious practice. However, long standing precedent establishes that such mere effect does not relieve AACS of complying with the law. The case at bar is substantially similar to *Fulton*. Like the governing provision in that case, the EOCPA does not proscribe conduct based on religion, rather, it proscribes AACS's ability to turn away qualified citizens on the basis of particular character traits. Just as DHS indicated that it would not permit any foster agency, faith-based or not, to turn away potential foster parents, the record is void of any indication that HHS would permit any foster agency in Evansburgh to refuse to work with foster or adoptive parents based on particular characteristics.

The *Smith*, *Minersvile*, and *Fulton* courts all refused to sustain a Free Exercise Clause claim absent evidence of a law that seeks to burden religious practice. AACS has failed to set forth evidence to establish that the EOCPA was passed in order to burden religious practice. Instead, on

its face, the law applies equally to all adoption agencies throughout the city. AACS attempts to argue that the statutory exemptions, combined with HHS's grant of exemptions, are what render the EOCPA not neutral or generally applicable.

AACS's focus on the so-called exemptions are where its argument falters because it fails to recognize that such considerations are rationally related to achieving HHS's legitimate interests. Commissioner Hartwell testified to four differing interests, including (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services.

First, the portion of the statute that permits agencies to give preference to certain foster or adoptive families is distinguishable from an agency's decision to completely refuse to work with foster or adoptive families based on certain characteristics. While the former is a route to achieving all four of HHS's legitimate interests, the latter functions as an agency's attempt to outright discriminate against individuals by refusing to work with them due to a certain characteristic, such as sexual orientation. Second, the EOCPA satisfies rational basis scrutiny because it serves the aforementioned state interests, two of which were deemed as sufficient in the *Fulton* case. Ultimately, AACS attempts to circumvent the fact that the agency itself seeks to engage in categorical discrimination against certain foster or adoptive families on the basis of sexual orientation by merely using the "exemptions" of the EOCPA as a scapegoat.

Because the EOCPA is a neutral and generally applicable law, this Court should apply rational basis scrutiny to review the constitutionality of the law. The law satisfies rational basis

scrutiny because it serves four legitimate interests and each so-called "exemption" to the law is rationally related to achieving those interests. As such, this Court should reaffirm the its decision to deny AACS's Free Exercise Clause claim.

b. Commissioner Hartwell's Referral Freeze and Decision to Not Renew a Contract With AACS Is Permissible Because the Free Exercise Clause Does Not Impose an Affirmative Requirement for HHS to Fund Religious Activities.

While AACS may argue that the Free Exercise Clause protects it from government intrusion, it may not argue that the Clause requires HHS to renew its contract. Such a proposition is demonstrated by certain courts' tendency to distinguish between essential government benefits and other, arguably non-essential, benefits such as funding of certain services.

For example, the *Fulton* court distinguished between cases involving essential government benefits such as unemployment compensation or the ability to hold office, and "a state contract for youth residential services, which is not a public benefit." *Fulton*, 320 F.Supp.3d at 686. Notably, because "the State [cannot] be required under the Free Exercise Clause to contract with a religious organization," the court held that CSS was not entitled to "a government services contract to perform governmental work." *Id.*

In another case, the United States District Court for the Western District of Michigan reviewed a claim brought under the Free Exercise Clause by a non-denominational Christian faith-based organization, Teen Ranch. *Teen Ranch v. Udow*, 389 F.Supp 827, 829 (W.D. Mich. 2005). The state agency, Family Independence Agency ("FIA"), would contract with private organizations, such as Teen Ranch, to provide care and supervision to abused and delinquent youth. *Id.*

When a child became a ward of the state, the FIA would then place the child with one of the agencies it had contracted with. *Id.* Among other concerns, once the FIA found out that Teen

Ranch incorporated religious practices into its program, it issued a moratorium against further placements at Teen Ranch. *Id*. at 830. The FIA notified Teen Ranch that the incorporation of faith into treatment was not permitted by state or federal law and that if Teen Ranch did not modify its practices, it would not lift the moratorium. *Id.*

Teen Ranch argued that the moratorium violated its Free Exercise Clause rights because it conditioned "the receipt of a governmental benefit on Teen Ranch's surrender of its religious beliefs and practices and burdens the free exercise of Plaintiff's religious beliefs without satisfying the strict scrutiny standard." *Id*. at 837. The court found that there was no Free Exercise Clause violation. *Id*. at 839. Similar to the *Fulton* court, the court held that a state could not be required under the Free Exercise Clause to contract with a religious organization. Further, the court noted that "the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity.'" *Id*. at 838 (citing *Eulitt v. Maine, Dept. of Educ*., 386 F.3d 344, 354 (1st Cir. 2004)).

Like the *Fulton* and *Teen Ranch* courts noted, under the Free Exercise Clause, HHS is not required to contract with AACS. Additionally, *Teen Ranch* demonstrates why HHS's referral freeze must be upheld. There, the court found that the freeze did not violate the Free Exercise Clause because ultimately, the state is not required to fund religious activities. While HHS is not funding religious activities per se, that is essentially what AACS seeks to have the City of Evansburgh do. AACS seeks to receive public government funding in order to selectively provide service to foster and adoptive families based on religious principles. Both *Fulton* and *Teen Ranch* demonstrate that HHS is not required to do so and, as such, Commissioner Hartwell's referral freeze and refusal to renew the contract do not violate AACS's Free Exercise Clause rights.

c. This Court Must Apply Rational Basis Scrutiny Because AACS Has Failed to Set Forth Evidence to Trigger the Applicability of Strict Scrutiny.

Smith and subsequent precedent establish that under strict scrutiny, the statute or governmental action at issue must serve a compelling state interest and the statute or action must be narrowly tailored to achieving such interest. *Smith*, 494 U.S. at 873. However, the Supreme Court has refused to apply strict scrutiny absent evidence to demonstrate that the law singles out religion on its face or that the law was motivated by hostility towards religion. *Lukumi*, 508 U.S. at 520; *Masterpiece Cakeshop v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018). As indicated, AACS has failed to argue that the EOCPA singles out religion on its face. Therefore, the Court must ascertain whether or not the law was motivated by hostility towards religion.

One example where a court found no evidence of hostility was in *Fulton*. There, CSS pointed to comments made by the mayor of the city in order to argue that DHS and the city sought to penalize it for its religious beliefs. *Fulton*, 320 F.Supp. at 686. CSS pointed to certain comments that, for example, demonstrated the mayor's critique of policies of the Archdiocese of Philadelphia. *Id.* at 687. Upon review of the comments, the court held that CSS relied too heavily on such "to draw a sweeping conclusion that CSS has suffered impermissible hostility at the hands of the Mayor." *Id.* Because CSS failed to demonstrate hostility, the court held that review under strict scrutiny was not appropriate. *Id.* at 689.

In *Lukumi*, a city adopted a law that prohibited the slaughter of animals except for food consumption purposes. *Lukumi*, 508 U.S. at 520. After a church for the Santeria religion attempted to open in the city, the city held emergency legislative sessions. *Id.* The evidence demonstrated that certain comments were made, such as the fact that ritual sacrifice for purposes other than food consumption was not a "necessary" killing and "unnecessary" meant "done without any useful

motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal." *Id.* at 527.

Ultimately, the Court found that the passage of the law was an attempt to suppress the Santeria religion and noted that the law applied to ritual sacrifice even if the animal was eaten during the ritual. *Id*. The result of the law was that few animal killings were prohibited except for Santeria sacrifice. *Id*. at 536. Although the law itself was neutral and generally applicable, the Court found that the law failed strict scrutiny based on the hostility towards the Santeria religion.

A more recent discussion on hostility is demonstrated by *Masterpiece Cakeshop v. Colo. Civil Rights Com'n*, 138 S. Ct. 1719 (2018). There, a cakeshop owner told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages. *Id.* at 1720. The couple filed a claim with the Colorado Civil Rights Commission, who held in favor of the couple. *Id.* The Supreme Court found that requiring the owner to bake a cake would violate his rights under the Free Exercise Clause. *Id.*

Upon review of the Commission's decision, the Court found that the record demonstrated hostility towards religion. *Id.* at 1722. For example, some of the members of the Commission at the owner's hearings "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged [the owner's] faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." *Id*. at 1721. Additionally, the Court focused on the different treatment between the owner and other objectors who prevailed before the Commission. *Id.* The Court noted how the Commission considered that the message on the cake would be attributed to the customer, not baker, yet failed to address the point "in any of the cases involving requests for cakes depicting anti-gay marriage symbolism." *Id.*

The facts of the case at bar are most analogous to those of *Fulton*. Like CSS, AACS has relied on one single comment made by an official in order to draw a sweeping conclusion that it has suffered from hostility. In *Fulton*, CSS pointed to four comments by the mayor and yet, the court held that all four comments were insufficient to demonstrate hostility. Here, AACS has pointed to one comment. If the four comments in *Fulton* were insufficient to demonstrate hostility, here, one such comment must similarly be insufficient.

The facts of both *Lukumi* and *Masterpiece Cakeshop* are distinguishable. In *Lukumi,* in addition to the comments made at the legislative meetings, the Court noted how the practical effect of the law was that few animal killings were prohibited except for Santeria sacrifice, therefore only burdening the Santeria religion. The comments in *Lukumi* are distinguishable from a sole isolated comment in this case. Additionally, the EOCPA was not an attempt to suppress AACS's religious practice and does not have the practical effect of burdening only AACS's practice. Instead, the law applies to any adoption agency that refuses to comply with the anti-discrimination policy, regardless of the agency's religious beliefs.

In *Masterpiece Cakeshop*, the member of the Commission made a comment that likened the cakeshop owner's religious beliefs to a defense of slavery and the Holocaust. First, the comment is distinguishable because it was directed specifically towards the owner's religious beliefs. Here, AACS has only pointed to a comment by the mayor who spoke not to a specific religion, rather, the belief in traditional marriage. Additionally, the individual in *Masterpiece Cakeshop* sat on a commission in charge of the ultimate decision in the case. Here, the Mayor of Evansburgh is unable to enforce the EOCPA against the agency. Finally, the Court tended to focus on how the Commission failed to address whom the message on the cake would be attributed to, yet gave weight to such fact in the owner's case. No such disparate treatment exists in this case.

The plaintiff has not set forth evidence to demonstrate that it has been treated differently than any other child placement agency under the EOCPA.

This case is analogous to *Fulton*, where the court found insufficient evidence to demonstrate hostility towards religion. This case does not involve an attempt to suppress religious practice, such as in *Lukumi*, or demonstrate evidence of true hostility, such as in *Masterpiece Cakeshop*. As such, review under strict scrutiny is not appropriate and this Court must apply rational basis scrutiny to AACS's Free Exercise Clause claim.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT CORRECTLY HELD THAT THE EQUAL OPPORTUNITY CHILD PLACEMENT ACT DOES NOT VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE OF THE FIRST AMENDMENT.

The Court of Appeals for the Fifteenth Circuit is correct in holding that the EOCPA does not violate the First Amendment because the EOCPA does not put an unconstitutional condition on AACS to receive public funds in return for adoption services. R. at 25. The Spending Clause of the United States Constitution grants the power to Congress to tax and spend for the good of the general welfare. U.S. CONST. Art. I, 8, Cl. I. Incidental to this power is the ability to fund particular state or private programs and activities. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 213 (2013). This spending power authorizes Congress to impose limits on the use of these funds to ensure the state or private program is using those funds exactly how Congress intended. *Id.* It is well settled precedent that Congress may not impose a condition on recipients of any public funds to affirm the government's point of view. *Agency for Int'l Dev.*, 570 U.S. at 218. However, the EOCPA does not condition the receipt of public funds on an affirmation of assimilating viewpoints. Nothing within the EOCPA prohibits AACS to post their own viewpoint, nor does it outlaw AACS to speak freely about their viewpoints and beliefs.

The EOCPA does not put an unconstitutional condition on AACS because if AACS does not wish to certify same sex couples for adoption services, AACS may deny public funds. Private programs and organizations, such as AACS, do not have a constitutionally protected right to obtain public funding to support their activities. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019). If AACS does not wish to comply with the City of Evansburgh's anti-discrimination laws, AACS can continue their business without the use of public funds and referrals. Just because HHS does not subsidize the exercise of a fundamental right does not mean HHS infringed upon that right. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Thus, the Department of Health and Human Services for the City of Evansburgh has not infringed upon any fundamental rights of AACS, as AACS is under no obligation to voluntarily contract with HHS for adoption services if they do not wish to comply with the law. Finally, if AACS continues their discriminating policies, they will be in breach of contract with HHS because the voluntary contract between HHS and AACS states that all parties must comply with the City of Evansburgh laws and regulations.

Moreover, AACS's position that *Agency for International Development v. Alliance for Open Society International*, 570 U.S. 205 (2013), controls the case before this Court is without merit. In the aforementioned case, the government was compelling an affirmation to condemn the practice of prostitution. *Id*. at 221. However, in the case at bar, HHS is not requiring any affirmation of viewpoint or beliefs. HHS is not requiring that AACS assimilate their viewpoints, but rather just asking AACS to post a notice. HHS has made it clear that if AACS truly disagrees with such notice, they may also post their own disclosure statement stating their disputes with the notice required by the City of Evansburgh. Thus, this case is more aligned with and analogous to the holdings and facts of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S.

47 (2006), and *Rust v. Sullivan*, 500 U.S. 173 (1991), as far as the First Amendment and the unconstitutional conditions doctrine are concerned.

a. When The Government Funds A Public Program, The Government May Define The Limits Of That Program's Speech And Thus, The Permissible Limitation Of Posting A Factual Notice Of Evansburgh Law Does Not Place An Unconstitutional Condition On AACS.

The Health and Human Services Department of the City of Evansburgh did not violate the First Amendment when they attempted to obtain AACS's compliance with the EOCPA. The EOCPA does not unconstitutionally condition the receipt of public funds on an affirmation of a particular viewpoint. A factual notice about a City of Evansburgh law is not an affirmation of any belief or viewpoint, especially when AACS can put their own viewpoint and/or disagreement with the law right next to the notice regarding the EOCPA.

The Spending Clause of the Constitution, located in Article 1, Section 8, Clause 1, gives Congress the power to tax and spend for the good of the "general welfare." US CONST. Art. I, §8, Cl. I. This power includes the discretion and right to impose limits on public funding of particular state or private programs. *Id*. Congress can, without offending the First Amendment, selectively fund certain programs to address an issue of public concern without funding other ways of addressing the same exact public concern. *Agency for Int'l Dev.*, 570 U.S. at 217. To begin an analysis for an unconstitutional condition, this Court must first look at the government's purpose behind funding a program. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right". *Rust*, 500 U.S. at 175. This is because there is a major difference between when a state interferes with a protected activity (free speech) and when a state encourages a different activity in agreement with legislative policy. *Id*. at 193. The thought process that by choosing to fund a program with a certain viewpoint to advance certain permissible goals is unconstitutional merely

because it necessarily discourages alternative goals, would render an abnormal amount of Congress's initiatives unconstitutional. *Id*. at 194. This cannot be the precedent that this Court wants to make.

In *Rust*, the issue before the Supreme Court was whether the Title X program that places a prohibition on a doctor's ability to counsel on abortion was an unconstitutional condition under the First Amendment. 500 U.S. at 178. The Court ruled that this prohibition of counseling on abortion did not infringe on the doctor's First Amendment right to Free Speech because these doctors were accepting public funds from Congress and thus, Congress, under their Spending Clause power, can impose limits on this public funding to private doctors. *Id*. at 203. Title X did not offend the Constitution because Congress merely selected one permissible way of funding a program to address an issue of major public concern, abortion, without funding other ways of addressing the same exact problem in abortion. *Id*. at 174.

Further, the Supreme Court reasoned that this was not an unconstitutional condition because the government was not forcing the doctors of the Title X program to assimilate their own view and viewpoints on abortion with that of the government's. *Id*. at 175. The law at issue in *Rust* places no bar on these doctors to talk about abortion on their own time, and the regulations do not force the Title X grantees to give up abortion related speech entirely, however, the law merely makes it so that this abortion counselling is kept separate and distinct from the activities of the Title X project. *Id*. The doctors can talk about it on their own and on their own time, but if they want to continue to receive public funds, they must do so within the limits that Congress has prescribed them. *Id*. at 190.

Similarly, as in *Rust*, here too this Court must decide on whether a condition of a receipt of public funds is unconstitutional in regard to the First Amendment. Under their Spending Power,

as in *Rust*, Congress has the power to impose limits on public funds. The current limit at issue to receive public funds is for AACS to post a notice of non-discrimination. The purpose behind this limitation of funds is to serve the best interests of the child being adopted, when all other relevant factors are equal. Additionally, to comply with the precedent laid out in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the EOCPA was amended with the intent to eradicate all forms of discrimination. However, because AACS is choosing to discriminate against same-sex couples, AACS cannot truly do what is best for the child. Evidence has shown that it is in a LGBTQ+ child's best interest to live and grow up in a household that encourages the child to explore their sexuality. Yet, because of AACS's tendency to discriminate against same-sex couples, this is no longer possible, and thus, the EOCPA cannot accomplish the intended goal of furthering the best interests of the child in any adoption process.

Further, HHS has not forced AACS to assimilate HHS's views or viewpoints. Similar to the facts in *Rust,* the government has made no effort to force the grantee of public funds to abandon their discriminating speech. HHS is merely requiring that such discrimination be kept separate and distinct from the notice requirement. Additionally, the law does not prohibit AACS to disagree with the anti-discrimination notice. If AACS truly disagrees with such notice, they can place a disclaimer right next to the notice stating their disagreement. This will serve as a clear indication that the notice posted does not speak to AACS's viewpoint or beliefs. Further, AACS can write that the only reason they put up such a notice was to comply with the laws and regulations of the City of Evansburgh, solidifying the fact that no one reading such a notice will think it is the speech of AACS. Therefore, in no way is the EOCPA infringing on any right to speak freely, because the EOCPA has specifically included a provision to allow exceptions to religious based organizations

to speak freely about the non-discrimination post, just as long as they post the factual notice about Evansburgh law.

Lastly, this Court should find, just as in *Rust*, that insisting public funds be spent on the activities in which they are authorized cannot violate the United States Constitution. This is because the government is not denying a benefit to anyone. Anyone can receive these public funds if they comply with the local laws and regulations. Furthermore, as in *Rust*, the EOCPA is not unconstitutional merely because Congress is selecting one permissible way of funding a program to address an issue of public concern without funding another alternative solution to the public concern. Thus, the Equal Opportunity Child Placement Act does not violate the United States Constitution as it does not place an unconstitutional condition upon AACS.

In the case at issue, the government is funding certain programs involved in child adoption services. The EOCPA has put permissible limitations on this funding. If AACS so vehemently disagrees with the policy the EOCPA is trying to implement, they may use their First Amendment right to do so and include signage that they disagree with the EOCPA right next to the notice of anti-discrimination. Thus, the EOCPA does not infringe on any fundamental right of AACS, nor does it put an unconstitutional condition on AACS in their adoption services business.

b. <u>If AACS Does Not Wish To Certify Same-Sex Couples As Congress Has Permissibly Imposed, AACS Can Voluntarily Exit The Contract With HHS As The EOCPA Does Not Condition Receipt Of Any Public Funds On An Assimilation Of Beliefs And AACS's Speech Is Not Affected By The Speech They Are Supposed To Accommodate.</u>

The Equal Opportunity Child Placement Act does not violate the unconstitutional conditions doctrine of the First Amendment. AACS voluntarily contracted with HHS to receive public funds. If AACS does not want to comply with the City of Evansburgh's laws and regulations as they voluntarily contracted to do with HHS, AACS can opt out of federal funding for adoptive

services. AACS's speech is not affected by the speech of the EOCPA as AACS is still permitted to say whatever they choose about the EOCPA and its certification policy. If AACS makes it clear that they are only certifying the same-sex couples because of the EOCPA, no one in the City of Evansburgh will confuse the certification for the speech of AACS.

As previously mentioned, Congress has the ability and power to offer public funds to public and private groups. US CONST. Art. I, § 8, Cl. I. Congress may also impose limits and/or conditions upon these groups to ensure that Congress's original intent is being met. *Id*. "As a general matter, if a party objects to a condition on the receipt of federal funding, their recourse is to decline the funds." *Agency for Int'l Dev.*, 570 U.S. at 206. Another course of action for constituents that object to a condition on funds is to resort to the political process and vote in someone with viewpoints that align with their own. *Legal Services Corp.,* 531 U.S at 541. The point remains the same even when discussing that this condition may affect the recipient's exercise of the First Amendment. This is because Congress is given the authority to attach reasonable and unambiguous conditions to federal public funds that grantees are not required to accept. *Rumsfeld*, 547 U.S. at 59. Furthermore, because "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy, states cannot interfere with a protected activity, but they may encourage an alternative activity with permissible limitations. *Rust*, 500 U.S. at 175.

In *Rumsfeld*, the Supreme Court of the United States held that the Solomon Amendment, which conditioned federal funding for law schools, on the condition that military personnel be given the same access to recruiting students as law firms, was constitutional. 547 U.S. at 70. However, several law schools took a stance against this Amendment because they did not agree with the military's views on sexual preferences. *Id.* at 52. Thus, the law schools tried to claim that

their First Amendment rights were being violated by an unconstitutional condition for receiving federal funds. *Id.* at 53.

However, because the law schools in *Rumsfeld* were not required to accept the federal funding, the Supreme Court found that there was no unconstitutional condition on receiving such funds. *Id*. at 59. If the schools in *Rumsfeld* did not want to accommodate the military, the Court stated that the schools can just deny the federal funding. *Id*. The Court added that nothing about accommodating the military meant that students would treat the military accommodations as their school endorsing such discriminatory views against sexual preferences. *Id*. at 65. Additionally, this was not ruled as a compelled-speech violation because the complaining speaker's - the law schools - own speech was not affected by the speech it was forced to accommodate. *Id*. at 64. The law school was still free to raise their concerns to their student body about the military views and about the law school's disagreement with the military's views. *Id.* Lastly, this was not a state interference telling the law school they cannot speak or compelling them to speak, the legislature was merely encouraging an alternate activity consistent with legislative policy. *Id*. at 62.

Just as the Supreme Court in *Rumsfeld* decided, this Court should rule as well that if AACS does not wish to certify same-sex couples for public funding, then they can voluntarily exit the contract with HHS just as easily as they voluntarily entered the contract. There is nothing in the law or within the EOCPA that states that AACS must accept the condition to continue working. They only need to meet the condition in order to receive federal funding that Congress has imposed its permissible limits on. Additionally, as the Supreme Court also noted in *Rumsfeld*, nothing about certifying same-sex couples means that AACS endorses or assimilates the views of the government. As mentioned previously, if AACS truly wants it to be known that they disagree with the certification requirement of the EOCPA, they can write or talk about such a disclosure in any

manner they so choose. It is already blatantly evident from their website that AACS opposes same-sex couples, and their followers will know that this certification is not an endorsement of the government's views, as AACS has stated all throughout their website that they follow the teachings of the Qur'an.

Additionally, just as in *Rumsfeld,* this court should rule the EOCPA requirement is not a compelled-speech violation because the AACS's speech is not affected by the speech it is forced to accommodate under the EOCPA. AACS may post whatever speech or notice they wish. Moreover, they may post a notice on their website that says they are merely complying with the laws of the City of Evansburgh and do not endorse such views. Thus, AACS will make sure that their voice is being heard and their followers will not feel betrayed, all while still following the conditions to receive federal funding for their assistance in child adoption services. Just as the Court stated in *Rumsfeld*, if the law schools are allowed to speak freely about their disagreement with the military's views, and no one will think that the military accommodations is speech from the law schools, here too if AACS is allowed to denounce the EOCPA freely, no one will think that the certification of same-sex couples is speech from AACS. Lastly, this is not state interference like the Court noted in *Rumsfeld*, but merely encouraging an alternate activity consistent with legislative policy of the City of Evansburgh to eradicate all forms of discrimination throughout the City.

AACS's claim that the EOCPA violates the First Amendment of the United States Constitution is without merit. Congress, under the Spending Clause, has the power and authority to impose limits on federal funding of certain public and private programs. As such, AACS can either accept the EOCPA and maintain the contract they have with HHS or opt out and choose to not accept federal funding due to their discrimination against same-sex couples.

CONCLUSION

The Respondent respectfully requests this Court to reaffirm its decision and hold that the Equal Opportunity Child Placement Act is constitutional and does not violate either the Free Exercise Clause or Free Speech Clause of the First Amendment.

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Respectfully Submitted,

Team 3
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