No. 2020-05

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

v.

AL-ADAB AL-MUFRAD CARE SERVICES,
Plaintiff-Appellee.

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

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Brief for Plaintiff-Appellee

Oral Argument Requested

Team #32
Counsel for Plaintiff-Appellee

STATEMENT OF ISSUES

I. Whether a state violates the Free Exercise Clause of the First Amendment by refusing to renew the state's contract with a private adoption agency when the state's imposed statutory non-discrimination requirements would compel the agency to act contrary to its religious doctrine or else lose its agency contract.

II. Whether a government violates the First Amendment's free speech guarantee by requiring a private religiously-based adoption agency to engage in speech that directly contradicts that agency's religious beliefs as a condition of receiving public funds in exchange for adoption services.

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The opinion and order of the United States District Court for the Western District of East Virginia has not been reported at the time of filing of this Brief. For purposes of the Record, the opinion and order is reproduced at pages 2–17.

The panel decision of this Court is reproduced in the Record at pages 18–25.

STATEMENT OF JURISDICTION

This Court had jurisdiction over the appeal of the order of the district court granting a temporary restraining order and permanent injunction under 28 U.S.C. § 1292. R. at 19. The judgment of this Court was entered on February 24, 2020. R. at 18. Plaintiff-Appellee filed a timely petition for rehearing en banc, which this Court granted on July 15, 2020. *See* R. at 26; F. R. App. P. 35(a). This Court has jurisdiction pursuant to 28 U.S.C. § 46.

STANDARD OF REVIEW

This Court should review the grant of a permanent or preliminary injunction for abuse of discretion. *See Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013). In determining whether the district court's grant or denial of an injunction was abuse of discretion, the district court's factual findings are reviewed for clear error and its legal conclusions reviewed *de novo*. *Id.*

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions are set forth in the Appendix.

STATEMENT OF THE CASE & FACTS

Evansburgh, East Virginia, is a racially and ethnically diverse city that has a large refugee population from various countries including Ethiopia, Iraq, Iran, and Syria. R. at 3. In response to the high number of children in need of foster and adoptive homes, the City has charged its Department of Health and Human Services (HHS) with crafting a child placement system that best serves the well-being of each child in accordance with East Virginia law. *See* R. at 3; E. Va. Code § 37(d) (empowering municipalities to regulate child placements and providing 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.").

To fulfill this mandate, HHS has entered into contracts with thirty-four private agencies to provide foster care or adoption services, four of which expressly serve the LGBTQ community. R. at 3, 8. In exchange for public funds, contracted agencies provide a breadth of child placement services that include home studies, counseling, and training, culminating in an agency's certification or rejection of a particular family for adoption or foster care. R. at 3, 5. The certification process is highly discretionary on the part of agencies and prospective parents.[1] When HHS receives a child into custody, it sends a "referral" of that child to the agencies with which it has contracted who then notify HHS of potential matches from their lists of certified families. R. at 3. Whether a particular family would be a suitable match is based on an agency's careful assessment of whether it is in the child's "best interests" to be placed with a particular family. R. at 4. The East Virginia Code includes a non-exhaustive list of factors for agencies to

[1] HHS includes a "choosing an adoption agency" section on its website which makes the following statement to prospective adoptive parents: "[b]rowse the list of foster care and adoption agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be an important support to you during your parenting journey. Contact your preferred agency to find out how to begin the process. Each agency has different requirements, specialties, and training programs." R. at 5. Agencies typically follow a referral policy, referring a family to another agency if that family does not fit with the agency's profile and policies. R. at 5

consider in making this "best interests" determination: (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 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. *See* E. Va. Code § 37(e). When HHS places a child in an adoptive or foster home, the agency that recommended the family is contractually required to provide supervision and support services to ensure a successful placement. R. at 4.

East Virginia's Equal Opportunity Child Placement Act (EOCPA) imposes non-discrimination requirements on private foster and adoption agencies receiving public funds in exchange for child placement services. *See* E. Va. Code § 42. The EOCPA initially prohibited child placement agencies from discriminating on the basis of "race, religion, national origin, sex, marital status, or disability" when screening and certifying potential parents and families. *Id.* § 42.-2. Its text was amended, however, to prohibit discrimination on the basis of "sexual orientation" as part of the Governor's efforts to eradicate sexual orientation discrimination in various state laws[2] following the Supreme Court's ruling in *Obergefell*. *See* R. at 6; E. Va. Code § 42.-3(b). The amended EOCPA also provides that "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." E. Va. Code § 42.-3(c). Further, contracted agencies are required to sign and post a non-discrimination statement on

[2] Specifically, the Governor instructed state officials to examine and amend statutes not consistent with the state's commitment to "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6.

their premises,[3] although religiously-based agencies are permitted to post a written objection to the policy. *See id*. § 42.-4.

The Appellee, Al-Adab Al-Mufrad Care Services (AACS), is a religious non-profit adoption agency[4] that was created to provide community support to Evansburgh's refugee population. R. at 5. HHS has contracted with AACS to provide adoption services for several decades. R. at 5. Since its inception, AACS has facilitated thousands of adoptions, including those for children with special needs, war orphans, and trauma survivors. R. at 5. When AACS recommends a particular family for adoption, it affirms that the prospective parents have been thoroughly screened, trained, and certified and that it believes that it is in the referred child's best interest to be placed in that particular home. R. at 5. As an Islamic agency, AACS is uniquely positioned to serve the needs of Evansburgh's Muslim-identifying adoptive families and children. For example, due to social tensions in Evansburgh from 2013 to 2015, HHS relied on AACS's expertise with respect to its placement of refugee children from different Islamic sects. R. at 9. In accordance with the beliefs espoused in the Qu'ran and the Hadith, AACS considers same-sex marriage to be a moral transgression. R. at 7. AACS thus as a matter of policy does not perform home studies for same-sex couples or certify same-sex couples for adoption. R. at 7. Despite these views, AACS has always treated same-sex couples with respect and, when contacted, simply refers them to other agencies better suited to meet their needs. R. at 7.

On September 17, 2018, the Appellant, the Commissioner of HHS, sent a letter to AACS alleging its noncompliance with the terms of the amended EOCPA. R. at 7. The Commissioner explained that unless AACS provided full assurance of its future compliance with the EOCPA,

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[3] The statement reads: "[i]t 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." E. Va. Code § 42.-4.

[4] AACS's mission statement provides that "[a]ll children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." R. at 5.

its contract for adoption services would not be renewed and an immediate referral freeze would be communicated to all other adoption agencies serving Evansburgh. R. at 7. AACS filed suit against the Commissioner in his official capacity, alleging that enforcement of the EOCPA against AACS violated its First Amendment rights to freedom of religion and freedom of speech. R. at 8. The district court found for AACS on both claims[5] and issued injunctive relief, requiring HHS to renew the City's contract with AACS and temporarily halting the referral freeze. R. at 17.

The Commissioner appealed the district court's ruling, and this Court reversed. In a panel decision, this Court held that the EOCPA was constitutional because it was facially neutral and met the general applicability requirement, since its exemptions were permissible and its provisions applied only to child placement agencies. R. at 22. Further, the panel did not find evidence of religious hostility on the part of HHS. R. at 21. With respect to AACS's free speech claim, this Court determined that enforcement of the EOCPA against AACS did not impose an unconstitutional funding condition because, given AACS's status as a state-authorized adoption agency, the notice and non-discrimination requirements were permissible regulations of governmental speech under the First Amendment. R. at 23. AACS petitioned for a rehearing en banc, which this Court granted. R. at 25.

SUMMARY OF THE ARGUMENT

The district court correctly determined that enforcement of the EOCPA as amended against AACS violates its First Amendment rights to freedom of religion and freedom of speech.

[5] The district court conducted a three-day evidentiary hearing, in which the Commissioner testified that HHS policy enforcing the EOCPA served to ensure the following 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. R. at 9.

The EOCPA violates AACS's free exercise rights because it fails the general applicability requirement and, due to currently enforced exemptions, is not neutral as applied. Explicitly and applied, the EOCPA permits the discrimination of some protected classes contrary to its written policy. Additionally, the EOCPA's non-discrimination provision does not satisfy strict scrutiny because the Governor of Eastern Virginia's directive that led to its amendment was religiously targeted. Without a showing of a compelling state interest and that the EOCPA provisions are narrowly tailored to achieve this interest, this Court should hold in favor of the rights guaranteed by the Free Exercise Clause and affirm AACS's freedom of religion claim.

Further, by refusing to renew the AACS's contract for adoption services, HHS is impermissibly excluding public benefits to an otherwise eligible recipient based on its religious beliefs. By enforcing the EOCPA's non-discrimination requirement against AACS without providing for a religious exemption, HHS has placed the AACS at a crossroads: act contrary to its mission and religious doctrine or lose its contract and ability to refer prospective adoptive parents. Religious organizations like the AACS should not be disqualified from public funding to provide a secular service on the basis of their religious beliefs. The government must continue to err on the side of protecting the rights of religious organizations to exercise their principles and convictions.

Regarding AACS's free speech claim, the district court correctly determined that enforcement of the EOCPA's notice and non-discrimination requirements against AACS as a prerequisite for the renewal of its adoption-services contract imposed an unconstitutional condition of funding. HHS's funding conditions compel AACS to engage in speech that directly contradicts its sincerely held religious beliefs and thus undermine AACS's right to free speech at each stage of the adoption process. Compliance with the EOCPA's ban on sexual orientation discrimination compels AACS to endorse same-sex couples as adoptive parents when, as a

matter of religious conviction, it believes that same-sex couples should not be certified and that households directed by same-sex parents cannot serve the best interests of children needing placement. The EOCPA's notice requirement further compels agency speech because it requires AACS to publicly affirm the government's philosophical or moral perspective about sexual orientation.

Contrary to Appellant's assertions, the EOCPA's amended provisions cannot be construed as permissible regulations on government speech or private subsidized speech under First Amendment precedents. The lack of government control over AACS's expressive activities, the nature of adoption services, and the enumerated purpose of Evansburgh's child placement program indicate that AACS's speech cannot be categorized as government speech and that the EOCPA's provisions attempt to regulate speech outside the scope of the child placement program.

For these reasons, AACS requests that this Court affirm the decision of the district court granting AACS injunctive relief from HHS's enforcement of the EOCPA's notice and non-discrimination provisions and remand with instructions that AACS's First Amendment claims advance to further proceedings consistent with this judgment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE EOCPA VIOLATED THE FREE EXERCISE CLAUSE BECAUSE THE AMENDED EOCPA TARGETS RELIGIOUS CONDUCT, IS NOT GENERALLY APPLICABLE, EXCLUDES A RELIGIOUS ORGANIZATION FROM PUBLIC BENEFIT, AND IS INCONSISTENT WITH THE RELIGIOUS PROTECTIONS IDENTIFIED IN *OBERGEFELL*.

This Court should affirm the ruling of the district court and find that the EOCPA's non-discrimination policy violates the AACS's right to free exercise of religion under the First Amendment. The First Amendment provides that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

Through the Due Process Clause of the Fourteenth Amendment, the Free Exercise Clause of the First Amendment is applied to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The First Amendment further prohibits HHS form restricting AACS's ability to receive public funds solely on the basis of its religious identity because recipients of public funding may not be disqualified on the basis of religious character. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Finally, HHS's refusal to renew AACS's contract and provide religious-based exemptions to the EOCPA is inconsistent with the religious protections identified and endorsed by the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

a. The EOCPA as Amended is Not a Neutral and Generally Applicable Law and Impermissibly Targets Religious Conduct, which is Prohibited under the Free Exercise Clause.

Under the Free Exercise Clause, the EOCPA is neither neutral nor generally applicable and impermissibly targets religious conduct. The Free Exercise Clause forbids any regulation of belief. *See Church of Lukumi Bablu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993); *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Evaluation of laws imposing restrictions on the exercise of religious belief requires strict scrutiny. *Lukumi,* 508 U.S. at 546. To satisfy strict scrutiny, the government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id*. Neutral and generally applicable laws may escape the standard of strict scrutiny. *Id*. However, facially neutral laws that fail to be applied neutrally in practice are still subject to strict scrutiny. *Id.* at 533-540. The EOCPA as amended was designed to target religious conduct, as demonstrated by the religious animus of state officials, and is not neutral in its application.

i. The Governor's directive to the State Attorney General and the HHS's refusal to renew AACS's contract demonstrate that the EOCPA impermissibly targets religious exercise and is therefore unconstitutional.

This Court failed to consider the state's targeting of agencies like the AACS on the basis of their religious beliefs, in regard to the EOCPA, when it reversed the ruling of the district court. Any facially neutral government action that is motivated by ill will toward a specific religious group or otherwise impermissibly targets religious conduct is unconstitutional. *Masterpiece*, 138 St. Ct. at 1737. In *Masterpiece*, the Supreme Court stated that "no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. *Id.* The role of secular government, rather, is to protect the free exercise of religion, not sit in judgment of closely held religious beliefs, especially those that secular officials may find offensive. *Id.* Accordingly, the Governor of East Virginia's directive to the Attorney General to conduct a thorough review of all state statutes to identify those not consistent with the state's commitment to "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry" is dispositive in this case. R. at 6.

Dismissing the Governor's statement as an isolated comment by an official with no role in the enforcement EOCPA fails to recognize that the Governor's statement was not isolated. Rather, following the Court's ruling in *Obergefell*, this statement was made as part of a directive to the Attorney General to review and amend state statutes to prevent the discrimination of same-sex couples on the basis of certain "philosophies or ideologies." R. at 6. This Court should interpret "philosophies or ideologies" to include religious philosophies. The fact that the Governor's statement does not refer to "religion" directly but rather to "philosophy or ideology" does not negate its intended effect. First, it must be noted that the reference to "ideology" is

merely repetitive as an ideology is a derivative or form of philosophy. *Ideology*, Brittanica, https://www.britannica.com/topic/ideology-society (last visited Sept. 13, 2020).

Further, the Governor's use of the word "philosophy" as opposed to "religion" or "religious belief" may not be invoked as a linguistic shield to thwart the AACS's claim for religious targeting. As defined by Encyclopaedia Britannica, philosophy is a rational, abstract, and methodical consideration of reality as a whole or of the fundamental dimension of human existence and experience. *Philosophy*, Brittanica, https://www.britannica.com/topic/philosophy (last visited Sept. 13, 2020). Major systems of philosophy include systems of Eastern and Western Philosophy. Of the major western philosophies, the three Abrahamic religious traditions are included–Christianity, Judaism, and Islam. Therefore, the concepts of religious beliefs, religion, and philosophy are inherently intertwined, and the state may not evade a constitutional challenge by alluding to and attacking such belief systems indirectly. The EOCPA as amended is an attack on unpopular religious beliefs, which is impermissible under the First Amendment. *Masterpiece*, 138 S. Ct. at 1737. The role of the government is not to impose such religious judgments, but rather to protect such unpopular religious beliefs that prove America's commitment to "serving as a refuge for religious freedom." *Id*.

Additionally, the severity of HHS's referral freeze and refusal to renew AACS's adoption services contract reflects its religious hostility. In *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 169 (2d Cir. 2020), the Second Circuit found that ordering the closure of an adoption agency for failure to adhere to a similar non-discrimination policy was indicative of religious animus. Similarly, in the instant case, HHS's order necessitated an immediate referral freeze, and the notice of cancellation of AACS's contract was less than thirty days from the date of renewal. R. at 7. In essence, the notice of immediate referral freeze and contract non-renewal shut down AACS's ability to operate. This closure was based on the organization's religious beliefs alone.

Because the amended EOCPA impermissibly targets religious conduct, the government must satisfy the burden of strict scrutiny in order to enforce its provisions. *Masterpiece*, 138 S. Ct. at 1737. The burden of strict scrutiny requires the state to prove a compelling state interest and the statute must be narrowly tailored to achieve that interest. *Lukumi*, 508 U.S. at 546. Commissioner Hartwell asserts that HHS policy enforcing the EOCPA serves to ensure compelling governmental purposes, which include ensuring the accessibility of child placement services to all Evansburgh residents, promoting a diverse and broad pool of adoptive parents, and ensuring taxpayers are not denied access to services provided by government contractors. R. at 13. The Commissioner also contends that the non-discrimination policy functions to ensure the successful placement of children in qualified adoptive homes. R. at 13.

The district court assumed *arguendo* that those interests were compelling, but other district courts addressing this issue have found in the alternative. For example, one court held the compelling interest of a diverse and broad pool of applications is not affected by the agency's right to refuse referrals of same-sex adoptive parents. *See Buck v. Gordon*, 429 F. Supp. 3d 447, 463 (2019). In *Buck v. Gordon*, the United District Court for the Western District of Michigan held a referral practice that allowed religious adoption agencies to refer couples to other agencies, including those specifically dedicated to serving the LGBTQ community, facilitated adoptive parent certification rather than restricted it. *Id*. An analysis of the adoption agencies in *Buck* revealed that by restricting and closing religious adoption agencies, fewer prospective adoptive parents were certified. *Id*. The court concluded that in consideration of this fact, the state's interest in passing the anti-discrimination policy strongly suggesting religious targeting rather than the broadening of the applicant pool. *Id*.

Moreover, the amended EOCPA is not narrowly tailored because the interest of successfully placing children in qualified adoptive homes is not furthered by this statute. Like the

adoption agency in *Buck*, where closure would have affected prospective adopted children, in this case, prospective parents, foster parents, employees, and the broader Evansburgh refugee community would be hurt by HHS's refusal to renew AACS's contract. Providing a religious-based exemption for AACS would not prevent same-sex couples from obtaining certification in Evansburgh, since they may be referred, as they have been by AACS previously, to thirty-four other child placement agencies including four specifically dedicated to serving the LGBTQ community. R. at 3, 8. Therefore, this Court must find that the EOCPA as amended is unconstitutional because the government has failed to satisfy its burden of strict scrutiny.

ii. The EOCPA was not applied neutrally and involved exemptions, and therefore fails the general applicability test and must be subject to strict scrutiny.

The EOCPA was not applied neutrally and utilized a system of exemptions, and therefore does not pass the general applicability requirement established in *Lukumi*, 508 U.S. at 543-46. As the Supreme Court stated in *Lukumi*, "facial neutrality is not determinative." *Id.* In its analysis in *Lukumi*, the Court cited its decisions in *Gillette v. United States,* 401 U.S. 437 (1971) and *Bowen v. Roy,* 476 U.S. 693, 703 (1986), which prohibited "subtle departures from neutrality" and "covert suppression of particular religious beliefs," respectively. The Free Exercise Clause thus protects against both overt and masked state hostility against religion. *Lukumi*, 508 U.S. at 543-46. The *Lukumi* court further recognized that systems of exemptions demonstrate a failure to satisfy the general applicability requirement. *Id*. In such cases where systems of exemptions are in place, the law at issue must satisfy strict scrutiny. *Id.* at 546; *Smith*, 494 U.S. at 878.

As the district court recognized, both the Third Circuit in *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) and the Sixth Circuit in *Ward v. Polite*, 667 F.3d 727, 749 (6th Cir. 2012) have identified discretionary exemptions to laws questionable under the Free Exercise Clause, rendering those laws subject to strict scrutiny. As stated by the

Court in *Ward*, "[a]t 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." 667 F.3d at 740. Other naturally exemption-riddled policies where Free Exercise Clause claims have been invoked include public health restrictions. *See, e.g.*, *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). In *Roberts*, the Sixth Circuit held that church congregants were likely to succeed on the merits of a Free Exercise Clause claim under the general applicability standard because the statewide order, which closed organizations considered not life-sustaining, including churches, contained four pages of exemptions. *Id*. at 413-14.

The EOCPA is a non-discriminatory policy applied to adoption, which by its nature requires discriminatory action on the part of child placement agencies and HHS. Similar to the public health policy in *Roberts*, adoption provisions are the antithesis of a generally applicable policy free from exemptions and exceptions policy. Like the policy in *Roberts*, the EOCPA's non-discrimination provision also contains exemptions both in the statute itself and as a result of HHS's past placement decisions. These statutory exemptions include permitted discrimination on the basis of race and sex, for presumably secular reasons. *See* E. Va. Code § 42.- 2(b). Further, just because these exemptions for secular reasons exist does not mean the law may escape a Free Exercise Clause claim. The various discrimination that may result from the consideration of factors in agencies' "best interests" determinations under East Virginia law constitute applied exemptions, which invalidates the EOCPA under the general applicability test. *See* E. Va. Code § 37(e). These exemptions are not insignificant; rather, they are valuable to the pursuit of the best interest of children in need of placement and represent the naturally discriminatory nature of adoption provisions.

The Second Circuit examined the issue before this Court in *New Hope*, finding that a Christian adoption agency stated a plausible claim for a violation of the Free Exercise Clause on the basis of sufficient suspicion of religious animosity or subtle departures from neutrality. *See* 966 F.3d at 169. The facts in *New Hope* involved a similar statute regarding discrimination by adoption agencies against same-sex couples, closure of the agency at issue, and suspicion of religious targeting by state officials. *See id*. This Court should follow the guidance of the Second Circuit and rule on the side of religious freedom.

b. Under the Free Exercise Clause, the State May Not Limit nor Exclude a Religious Organization for Public Benefit Based on Its Religious Beliefs Without Satisfying Strict Scrutiny.

Under the Free Exercise Clause, the HHS may not refuse to renew its contract or impose a referral freeze on AACS on the basis of its religious beliefs because under First Amendment precedents eligible recipients of public funding may not be disqualified from receiving such funding because of their religious status. *See Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020); *see also Trinity Lutheran*, 137 S. Ct. at 2020. This Court should expand this holding beyond status to ensure religious organizations are not disqualified from public funding because of their religious beliefs.

In *Espinoza*, the Supreme Court held that Montana's no-aid provision impermissibly excluded religious schools from public benefits solely because of religious status. *See* 140 S. Ct. at 2260. In *Espinoza*, the Court reviewed whether the Montana Supreme impermissibly struck down a public tuition assistance program on the basis that the scholarships were used to attend religious schools. *Id*. The Court held that ruling violated the free exercise rights of the religious schools seeking to benefit from the program and the rights of parents who wished to send their children to a religious school using those benefits. *Id*. at 2261. In its analysis, the Court cited to another recent Free Exercise Clause decision, *Trinity Lutheran*, where it also held that a state

policy regarding grants for playground resurfacing also impermissibly excluded a religious organization. 137 S. Ct. at 2020.

By refusing to renew public social service contracts with adoption agencies based on their religious beliefs, HHS excludes otherwise eligible recipients from a public benefit "solely because of their religious character." *Id*. at 2021. Like the policy in *Trinity Lutheran*, this policy puts the AACS to a choice: surrender its commitment to its mission statement that adheres to religious doctrine or cease serving the community as an adoption agency. The state effectively penalizes the free exercise of constitutional liberties when it conditions "the availability of benefits ... upon [a recipient's] willingness to ... surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

Further, HHS's refusal to renew the AACS's contract means that prospective adoptive parents in Evansburgh's refugee community may no longer have access to an adoption agency. Under state law, HHS's child placement program requires the assessment and consideration of families under the guidelines of East Virginia Code § 37(e), which include the consideration of "the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background." Based on these guidelines, in a city with a large refugee community with residents from Muslim-majority countries such as Iraq,[6] Iran,[7] and Syria,[8] an adoption agency with a mission statement consistent with the teachings of the Qur'an would play an important role in the adoption process. R. at 3. While the policy at issue focuses

[6] *2018 Report on International Religious Freedom: Iran*, U.S. Dep't of State, https://www.state.gov/reports/2019-report-on-international-religious-freedom/iran/ (last visited Sept. 13, 2020).
[7] *Iraq 2018 Religious Freedom Report*, U.S. Dep't of State, https://www.state.gov/wp content/uploads/2019/05/IRAQ-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf (last visited Sept. 13, 2020).
[8] *2018 Report on International Religious Freedom: Syria*, U.S. Dep't of State, https://www.state.gov/reports/2018-report-on-international-religious-freedom/syria/ (last visited Sept. 13, 2020).

on the rights of prospective adoptive parents, adoption involves more than the rights and interests of the prospective adoptive parents. This Court must consider, first and foremost, the rights and best interests of the adoptive child. *See* E. Va. Code § 37. The rights and interests of natural parents and other biological family members are also valuable in the adoption process. The Supreme Court has recognized that the right of parents to direct "the religious upbringing" of their children is an "enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 213-214, 232 (1972). In *Espinoza*, the Court applied this in the context of school choice. *See* 140 S. Ct. at 2246. In the instant case, this Court must consider this parental right in the context of adoption and the opportunity for biological parents to utilize adoption agencies that serve their community and adhere to their same values. HHS's policy burdens the religious exercise of parents considering the adoption of their biological children, as well as the religious exercise of the agency.

While the governmental policies in *Espinoza* and *Trinity Lutheran* were explicitly exclusionary of religious organizations due to their religious "status," in line with the aforementioned neutral application and exemptions analysis applied above this Court should be wary of laws that are facially neutral but designed to be clearly prejudicial against the beliefs of religious organizations, especially when the policies exclude a religious organization from public benefit. The Governor of East Virginia's statements, which directed the Attorney General to review of all state statutes to eradicate discrimination regardless of the underlying ideology or philosophy, or the Commissioner's statement specifically referencing AACS's religious beliefs in relation to providing a "secular social service" cannot be ignored. The EOCPA is a religiously discriminatory policy, similar to the policies in *Espinoza* and *Trinity Lutheran*. Such policies are "odious to our Constitution all the same." *Trinity Lutheran*, 137 S. Ct. at 2025. As the Court held

in *Trinity Lutheran* and subsequently emphasized in *Espinoza*, the Free Exercise Clause protects against even "indirect coercion." *Espinoza*, 140 S. Ct. at 2256.

Since enforcement of the EOCPA disqualifies AACS from receiving public funds due to its religious beliefs, strict scrutiny applies. For the aforementioned reasons, HHS fails to meet this burden and the district court's ruling must be affirmed.

c. Upholding the EOCPA As Applied Is Inconsistent with the Free Exercise Protections and Exemptions Provided for in the Court's Decision in *Obergefell*.

When amending the EOCPA, East Virginia failed to consider the free exercise protections endorsed by the Supreme Court in *Obergefell*. Therefore, in addition to the aforementioned reasons, the Court should allow for religious protections and reverse the ruling of the court below. The amendment of the EOCPA followed the Supreme Court's decision in *Obergefell*, as East Virginia attempted to expand statutory protections against discrimination for same-sex couples. However, the state's directive and subsequent amendment to the EOCPA fails to recognize the Court's emphasis on First Amendment protections for religious organizations and persons to exercise their principles

> "[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Obergefell*, 576 U.S. at 679.

Exemptions for religious organizations are appropriate under *Obergefell*. For the aforementioned reasons, the Court should find the EOCPA violates the Free Exercise Clause and affirm the decision of the district court.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MANDATORY COMPLIANCE WITH EOCPA'S NOTICE AND NON-DISCRIMINATION PROVISIONS UNDERMINES AN AGENCY'S RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT AND THEREBY IMPOSES AN UNCONSTITUTIONAL CONDITION ON AGENCY FUNDING.

a. HHS's Speech-Based Funding Conditions Compel AACS to Engage in Speech that Contradicts its Religious Beliefs in Violation of First Amendment Free Speech Protections.

Enforcement of the EOCPA's notice and anti-discrimination requirements compels AACS to engage in speech that directly contradicts its religious beliefs as a condition of receiving public funding and thus undermines AAC's right to free speech under the First Amendment. The First Amendment prohibits both direct and indirect burdens on speech. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Under the unconstitutional conditions doctrine, a government may not coercively withhold a benefit by conditioning its receipt on the forgoing of the recipient's constitutionally protected interest – "especially his interest in freedom of speech." *Id*. This freedom includes both the right to "speak freely" as well as the right to "refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Compelling individuals to endorse a view that they find objectionable violates the First Amendment's "cardinal constitutional command" and undermines free speech. *Janus v. Am. Fed'n of State, City & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, 61 (2006) ("First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."); *Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."). In the context of speech related to sexual orientation, the Supreme Court has recognized that religious and philosophical perspectives regarding the validity of same-sex marriage are "protected forms of expression."

See Obergefell, 576 U.S. at 657 ("[T]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."); *see also Masterpiece*, 138 S. Ct. at 1727.

In a nearly parallel case out of the Second Circuit, a Christion adoption agency challenged a regulation promulgated by the New York Office of Children and Family Services (OCFS) that prohibited private agencies from discriminating on the basis of sexual orientation and marital status. *See New Hope*, 966 F.3d at 170. In *New Hope*, the court held that the agency stated a plausible claim that the regulation impermissibly restricted speech on the ground that it "compelled" the agency to endorse a view that it did not believe; specifically, that adoption by same-sex couples can ever be in the best interests of a child. *Id.* at 171. In making this determination, the court emphasized that speech is an integral part of each stage of the agency's adoption services and that these services were designed specifically to facilitate agency speech on the issue of applicants' suitability for adoption. *Id.* Because the agency's "sincerely held" religious beliefs prevented it from recommending adoption by same-sex couples, the court concluded that mandatory compliance with the OCFS's non-discrimination policy abridged the agency's First Amendment rights and thus imposed an unconstitutional condition on agency funding. *Id.* at 178.

Like the regulation in *New Hope*, enforcement of the amended EOCPA compels AACS to endorse same-sex couples as adoptive parents when, as a matter of religious conviction, it believes that same-sex couples should not be certified. Speech is vital to the execution of AACS's contractual duties as an adoption agency. Prospective parents undergo a thorough vetting process, which requires agencies to provide training, written assessments, and recommendations to HHS with respect to their suitability as adoptive parents. R. at 3. Agencies

also perform home studies. R. at 3. A home study certification signifies an agency's approval of a family and, ergo, an endorsement of the relationships of those living in the home. When HHS receives a child in its custody, it sends a "referral" of that child to the agencies with which it has contracted. R. at 3. Agencies must then assess whether it is in the best interests of that particular child to be placed with particular certified homes and, under the new schema, "give preference" to foster or adoptive parents that are the same sexual orientation as the child if he or she has an identified sexual orientation. *See* R. at 4; E. Va. Code § 42.- 3(c). Agencies are further required to supervise and provide support services to adoptive families to ensure a successful placement. R. at 4.

Requiring AACS to comply with the EOCPA's non-discrimination and notice policies thus undermines AACS's right to both "speak freely" and "refrain from speaking" at each stage of the adoption process. *See Wooley*, 430 U.S. at 714. AACS is a religiously-based agency created to provide community services to Evansburgh's large refugee population. R. at 5. AACS's mission statement provides, in pertinent part, "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." R. at 5. Since its inception, AACS has helped place thousands of Evansburgh's most vulnerable children into adoptive homes – including war orphans, children with special needs, and trauma survivors – based on a careful calibration of children's "best interests" guided by its Islamic ideals and beliefs. R. at 5. In accordance with the canonical texts of Islam, AACS personnel are prohibited from conducting home studies with same-sex families or certifying otherwise qualified same-sex couples as adoptive parents. R. at 7. Enforcement of the EOCPA's ban on sexual orientation discrimination would thus compel AACS to engage in

speech that directly contradicts its religious beliefs regarding the suitability of same-sex couples as adoptive parents as well as the "best interests" of children in need of placement.

Moreover, the notice requirement in East Virginia Code § 42.-4 compels agency speech because it requires AACS to endorse a view that it finds objectionable and restricts AACS's right to communicate its own message about the merit of the EOCPA's sexual orientation discrimination provisions. *See West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (finding that a local law compelling school child to salute and pledge to the American flag required "the affirmation of a belief and an attitude of mind" in violation of free speech); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 572-73 (1995) (holding that requiring private organizers of St. Patrick's day parade to allow an LGBTQ group to participate as a parade unit violated the organizers' First Amendment free speech rights because it required organizers to alter the "expressive content" of their parade). While the Court's decision in *Rumsfeld* can be instructive with respect to AAC's free speech claim, it should not be controlling. In *Rumsfeld*, the Court held that requiring law schools to post bulletins and send emails on behalf of military recruiters as a condition of federal funding did not rise to the level of "compelled speech" for purposes of the First Amendment because it did not sufficiently interfere with the schools' own message regarding military policy. 547 U.S. at 63. The Court determined that the publication of such "factual statements" did not involve the type of expressive activity contemplated by the First Amendment because it neither suggested that the schools endorsed the recruiters' speech nor restricted schools' ability to assert their own message. *Id.*

Here, the compulsory posting of East Virginia's non-discrimination policy constitutes an "expressive activity" as opposed to a mere "factual statement." *See Rumsfeld*, 547 U.S. at 64. In contrast to the publication of meeting dates, times, and locations, the content of the non-

discrimination policy at issue in this case involves a subject of great cultural, religious, and philosophical significance. *See Obergefell*, 576 U.S. at 657; *Masterpiece*, 138 S. Ct. at 1727. Thus, unlike the recruitment assistance in *Rumsfeld*, an agency's posting of the non-discrimination policy on its premises constitutes an affirmation or endorsement "of a belief and an attitude of mind" akin to the flag salute and pledge at issue in *Barnette*, 319 U.S. at 633. The EOCPA's notice requirement also restricts AACS's ability to assert its own message regarding sexual orientation, thereby altering the expressive content of its adoption program. As the Court recognized in *Hurley*, an organizations' decision to remain silent on the issue of sexual orientation constitutes an expression of that organization's message entitled to First Amendment protection. See 515 U.S. at 572-73. Accordingly, the notice requirement compels AACS to affirm the policy's message about sexual orientation regardless of the statutory carve-out permitting religious-based agencies to post a written objection to the non-discrimination policy.

Since HHS's enforcement of EOCPA's notice and non-discrimination requirements undermine AACS's right to free speech, conditioning the renewal of AACS's contract for adoption services on its compliance with the amended EOCPA imposes a funding condition that is impermissible under First Amendment precedents. As such, this Court should affirm the district court's order and remand this case for further proceedings consistent with this ruling.

b. AACS's Expressive Activities Cannot Be Classified as Government Speech for First Amendment Purposes.

Given the absence of government control over the expressive activities of adoption agencies and the historical function of Evansburgh's child placement program, the EOCPA's notice and non-discrimination requirements cannot be construed as permissible regulations on "government speech." AACS's contractual relationship with HHS to provide adoption services for the City of Evansburgh in exchange for public funds is insufficient to render its expressive activities "government speech" under the First Amendment. In *Matal v. Tam*, the Supreme Court

held that the mere fact that the government authorizes, approves, or licenses certain conduct *does not* transform the speech engaged therein into government speech. 137 S. Ct. 1744, 1758 (2017). The *Matal* court warned against the overuse of the government-speech doctrine and urged courts to exercise "great caution" in extending it beyond established precedents. *See id.* ("[I]f private speech could be passed off as government speech by simply affixing a government seal of approval, the government could easily silence or muffle the expression of disfavored viewpoints.").

When determining whether speech is governmental or private, courts must consider the degree of the government's control over the message conveyed and the history and function of the medium involved. In *Johanns v. Livestock Marketing Association*, the Court held that a federally created advertising program to promote the sale of beef involved government speech because the message set out in the promotions was established by the government "from beginning to end." 544 U.S. 550, 560 (2005). The Court noted the various mechanisms through which the government exercised control over the program, including congressionally-established content guidelines, meetings between officials to discuss the content of advertisements, and the Secretary's authority to edit or reject proposed advertisements. *Id.* at 561. The Court reached a similar result in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), finding that a local government's acceptance of a Ten Commandments monument for display in a city park represented government speech. The Court cited the government's historic use of monuments to "speak to the public," as well as the public's close identification of public parks with government ownership. *Id.* at 470; *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) (finding that messages on Texas specialty license plates were government speech because license plates have "long been used by the States to convey state messages" and Texas directly controlled the messages inscribed therein).

The factors illustrated in these cases are not present here. First, unlike the monuments discussed in *Pleasant Grove*, adoption has not traditionally served as a means for the government to communicate with the public on various matters. Rather, the East Virginia Code mandates that foster and adoption systems be singularly focused on identifying placements that serve the best interests of children in municipal custody. *See* R. at 3; E. Va. Code § 37(d). Second, there are no facts in the Record to suggest that the public understands AACS to be operating on behalf of the City or representative of the City's viewpoint regarding child placement issues. Finally, in contrast to the high level of government control over the programs at issue in *Johanns* and *Walker*, any "message" conveyed by AACS in the exercise of its contractual duties is not controlled or even monitored by government officials. East Virginia Code § 37(e), by its nature, entrusts contracted agencies with discretion in determining the best interests of the children seeking placement. The statute neither defines "best interests" nor provides a hierarchy with respect to how the best-interest factors should be prioritized by agencies. HHS personnel do not directly oversee private agencies during the course of their evaluation, certification, and recommendation of prospective couples for adoption and are not statutorily required to conduct an independent review of an agency's best-interests assessment before placing a child with in an adoptive family.

Thus, a close reading of First Amendment precedents confirms that AACS's status as a state-authorized adoption agency is not dispositive of whether its speech constitutes government speech. Since adoption has not been historically used by the City to convey a message to the public, the public does not consider adoption agencies to function on behalf of the City, and agencies' expressive activities are not subject to the supervision or control of City officials, AACS speech cannot be construed as government speech for purposes of the First Amendment.

c. The EOCPA's Notice and Non-Discrimination Requirements Are Not Permissible Regulations on Private Subsidized Speech under First Amendment Precedents.

The EOCPA's notice and non-discrimination requirements cannot be classified as permissible regulations of private speech under the Supreme Court's subsidized speech line of cases. It has long been recognized that when the government disburses public funds to private entities to convey a governmental message, it may take appropriate steps to ensure that its message is "neither garbled nor distorted" by the grantee. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995); *see also Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("[W]hen the government funds a program, it has the right to define the limits of that program's speech and exclude speech that contradicts its intended message."). The First Amendment functions as a limitation on this power. First, the First Amendment prohibits substantial restrictions on subsidized speech where the purpose of the government program is to facilitate private speech and not to promote a government message. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Where the funding program is designed to convey a government message, the First Amendment further proscribes government restrictions that regulate speech "outside the contours of the program itself." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l (AOSI)*, 570 U.S. 205, 211 (2013).

In *Rust*, the Supreme Court recognized that private subsidized speech may be regulated as government speech where the government creates a funding program to promote its own message. *See* 500 U.S. at 196. The program at issue in *Rust* authorized grants to health-care organizations to advise patients on family planning topics but prohibited funds from being used in programs where abortion was a method of family planning. *Id.* at 178. To enforce this provision, Congress enacted regulations barring recipients from providing counseling, referrals, or information relating to abortion. *Id.* at 179-80. The Court held that these regulations were constitutionally permissible because they served to "define the scope" of the government's

program, which was established for the express purpose of promoting its message about family planning – a message that excluded the promotion of abortion. *Id.* at 196. While *Rust* never referred to a "government speech" doctrine to justify its ruling, the Court later clarified its decision by characterizing the medical counseling by the doctors as government speech. *See Velazquez*, 531 U.S. at 542.

This "latitude" for speech-based restrictions on subsidized speech does not apply where a government program is created to facilitate private speech. *See Velazquez*, 531 U.S. at 542; *see also Rosenberger*, 515 U.S. at 834 ("It does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."). In *Velazquez*, the Court struck down a law prohibiting a federal legal aid program from funding organizations that represented indigent clients in an effort to amend or challenge existing welfare laws. *See* 531 U.S. at 549. The Court determined that the speech performed by program recipients was entitled to the same First Amendment protections as private speech because the program was created to facilitate legal representation of indigent clients, a process necessitating attorney speech with respect to client interests. *Id.* at 542. In the context of welfare benefits claims, attorneys speak in direct opposition to the government's message, which is delivered by attorneys defending the benefits decision. *Id.* The Court held that, by prohibiting attorneys' ability to advise their clients and present legal arguments, the government had restricted a medium of private expression to the extent that it "distorted its usual functioning" and thus clearly ran afoul of First Amendment free speech protections. *Id.* at 544.

Like the legal aid program in *Velazquez*, Evansburgh's child placement program was designed not to promote its own message but rather to facilitate private speech regarding the issues of candidates' suitability for adoption and children's best interests. The certification

process for adoptive families is highly discretionary on the part of both potential parents and adoption agencies. Contracted agencies maintain distinct training requirements and exercise statutorily-authorized discretion in their calculus of children's best interests. R. at 3. With respect to prospective parents, HHS includes a "choosing an adoption agency" section on its website that instructs candidates to browse the list of foster care and adoption agencies to "find the best fit for you." R. at 5. The website further implores candidates to feel "confident and comfortable with the agency *you choose*." R. at 5 (emphasis added). By restricting AACS's ability to freely express its view regarding same-sex couples' suitability for adoption and the best interests of children to be placed in homes directed by same-sex parents, HHS's regulations "distort [the] usual functioning" of agency speech in the adoption process. *Id.* at 544. Given the private nature of the expression and the extent of HHS's restriction on agency speech, the amended EOCPA clearly substantially interferes with AACS's right to free speech under the First Amendment.

Further, even if this Court determines that Evansburgh's child placement program was created to convey a government message, enforcement of the notice and non-discrimination requirements against AACS constitutes an unconstitutional funding condition because the provisions regulate agency speech that falls outside the contours of the child placement program. In *AOSI*, the Court held that a funding program to combat the spread of AIDS around the world could not constitutionally require funding recipients to affirmatively condemn the practice of prostitution. S*ee* 570 U.S. at 215. The Court found that the government's anti-prostitution affirmation requirement superseded the scope of its AIDS program because it compelled grant recipients to adopt a particular belief as a condition of funding. *Id*. at 218. According to the Court, demanding that recipients adopt the government's view on an issue of public concern "by its very nature affects protected conduct outside the scope" of the funding program. *Id.* The Court reached a similar conclusion in *FCC v. League of Women Voters of California*, 468 U.S.

364, 402 (1984), where it held that regulations prohibiting recipient noncommercial broadcast television and radio stations from editorializing were impermissible under the First Amendment. Noting that it would be impossible for a station to limit its use of federal funds and simultaneously employ private funds for editorializing activities, the Court found that such regulations went beyond ensuring that funds were spent for their authorized purpose and impeded protected speech. *Id.* at 394.

Here, Evansburgh's child placement program was not designed to promote East Virginia's non-discrimination policy but rather to facilitate adoptions that best serve the well-being of each child. *See* R. at 3; E. Va. Code § 37(d). The brief history of the EOCPA's revision reveals that the amendments were not enacted to advance this governmental purpose; rather, they were enacted for the benefit of prospective parents. *See* R. at 6. Enforcement of the EOCPA's provisions against AACS thus does not serve to promote the City's "message" with respect to child placement but rather leverages funding to regulate speech that falls "outside the contours" of the child placement program. *See AOISA*, 570 U.S. at 218. Like the regulations in *AOISA*, the EOCPA compels AACS to adopt the government's view on an issue of public concern as a condition for funding. Further, similar to the media outlets' predicament in *FCC*, it would be impracticable for AACS to retain its authorization as an adoption agency *and* express its view that adoption by same-sex couples cannot be in the best interests of a child. *See FCC*, 468 U.S. at 393-94. Thus, the EOCPA's notice and non-discrimination requirements are not necessary to define the limits of the child placement partnership and instead function to compel AACS to affirm a message it does not believe as a matter of religious conviction.

The instant facts suggest that restricting AACS's speech undermines HHS's best interests approach. AACS was formed specifically to serve Evansbugh's most vulnerable children in a manner aligning with its Islamic principles. A core component of the statutory best interest

assessment is the "cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background." E. Va. Code § 37(e). Evansburgh has a large refugee population from various countries, including several Muslim-majority countries such as Ethiopia, Iraq, Iran, and Syria. R. at 3. Due to its special relationship with the Islamic community, AACS is uniquely positioned to train and certify Muslim-identifying adoptive families and meet the cultural and emotional needs of Muslim-identifying children. AACS's high adoption rates, coupled with HHS's historic reliance on AACS's expertise with respect to the placement of refugee children from different Islamic sects, show the value of AACS's religious and cultural perspective. R. at 9.

Since the EOCPA's notice and non-discrimination requirements do not define the limits of the City's child placement program, they are impermissible regulations of subsidized private speech as applied to AACS. Accordingly, this Court should uphold the district court's order and affirm that enforcement of the EOCPA as amended is an invalid funding condition under First Amendment precedents.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States District Court for the Western District of East Virginia granting AACS injunctive relief and remand with instructions that the district court apply the correct legal framework to analyze AAC's First Amendment claims.

Respectfully submitted this 14th day of September 2020.

/s/ Team Number 32

Counsel for Plaintiff-Appellee

APPENDIX

Constitutional Provisions

U.S. Const. amend. I provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutory Provision

E. Va. Code § 37(d) provides, in pertinent part:

> [T]he 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. Va. Code § 37(e) provides, in pertinent part:

> An agency must consider, among other things: (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 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. Va. Code § 42.-2 provides, in pertinent part:

> Child Placement Agencies are prohibited 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.
>
> No municipal funds are to be dispersed to child placement agencies that do not comply with the EOCPA.
>
> When all other parental qualifications are equal, child placement agencies must give preference to foster or adoptive families in which at least one parent is the same race as the child needing placement.

E. Va. Code § 42.-3 provides, in pertinent part:

> Child Placement Agencies are prohibited from discriminating on the basis of sexual orientation.

> [W]here 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.

E. Va. Code § 42.-3 provides, in pertinent part:

> [T]he Child Placement Agency must sign and post at its place of business a statement that it is illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation.