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## **STATEMENT OF THE ISSUE**

Did the Court of Appeal for the Fifteenth Circuit err in denying Al-Adab Al-Mufrad Care Services's motions for a temporary restraining order and permanent injunction against Christopher Hartwell, in his capacity as commission of the City of Evansburgh Department of Health and Human Services, after Al-Adab Al-Mufrad Care Services failed to demonstrate how their freedom of speech and religion were violated, by being required to comply with a statute, prohibiting discrimination against potential adoptive parents?

## **STATEMENT OF THE CASE**

### **Court Disposition and Proceedings Below**

After Al-Adab Al-Mufrad Care Services (AACS), declined to cooperate with the Equal Opportunity Child Placement Act (EOCPA), the Commissioner of the City of Evansburgh Department of Health and Human Services (HHS), Christopher Hartwell, decided not to renew AACS' contract and stopped sending AACS referrals for services. The District Court granted AACS a Temporary Restraining Order (TRO) and a Permanent Injunction upon AACS' motion, so HHS would be required to operate under contractual obligations until litigation is completed. HHS appealed to this Court and the motions for a TRO and Permanent injunction were reversed. After an unfavorable verdict, AACS' petition for this Court to rehear this case En Banc was granted.

### **Statement of Facts**

After seventeen years of doing business together, AACS brought action against HHS, alleging violation of their first amendment rights of free speech and religion. R. at 2, 5.

AACS, is one of thirty-four publicly funded, private adoption agencies in Evansburgh, East Virginia used to . R. at 3. For over forty years, adoption agencies in East Virginia have been required to comply with the EOCPA, in exchange with public funds. R. at 4. EOCPA imposes nondiscriminatory requirements on the publicly funded adoption agencies. R. at 4.

In light of a U.S.S.C. decision, the Governor of East Virginia reviewed the state's statutes to amend any laws permitting discrimination, especially against sexual minorities. R. at 6. After careful review, several statutes were amended, including the EOCPA to prohibit discrimination on the basis of sexual orientation. R. at 6. In an effort to match children with an ideal and compatible family, the local statute allows agencies to give preference to families, where the child and adoptive parents have a mutual characteristic, such as age or sexual orientation. R. at 12. To further advance the prohibition of discrimination, the EOCPA also required that publically funded child placement agencies post signs on their businesses stating that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. However, to accommodate religious-based agencies opposed to the nondiscriminatory requirements, the EOCPA allowed these businesses to post a written objection to the policy on their premises. R. at 6. Later, Commissioner Hartwell spoke with Sahid Abu-Kane, the Executive Director of AACS, and learned that AACS's religious beliefs prohibited them certifying same sex couples as prospective adoptive parents. R. at 6. Hartwell asked Abu-Kane if he understood that AACS was violating the EOCPA by refusing to certify same-sex couples, but Abu-Kane responded by stating that he is following the teachings

of the Qur'an, and suggests that same-sex couples go through different agencies that better serve their needs. R. at 6.

Two months after the interaction between Hartwell and Abu-Kane, Hartwell wrote a letter to the AACS informing AACS that HHS could not renew their annual contract with AACS the following month, due to the allegations that AACS was not complying with the EOPCA's nondiscriminatory requirements. R. at 7. In addition to not renewing their contract, HHS also informed AACS that HHS would have to place a referral freeze on AACS unless AACS provided full assurance that AACS would comply with the EOPCA. R. at 8. AACS did not provide any assurance to HHS to comply with the HHS, and instead filed action against Commissioner Hartwell, seeking a temporary restraining order against HHS's referral freeze, and a permanent injunction compelling HHS to renew its contract with AACS. R. at 8. AACS alleges that prohibiting their refusal to screen same-sex couples as prospective adoptive parents violates their First Amendment rights under the Free Exercise Clause and Free Speech Clause. R. at 8.

Once the suit commenced, HHS and AACS stipulated to several facts at an evidentiary hearing. R. at 8. Those facts include a few isolated incidents over a four year period that less than ten children out of the several thousand needing homes were placed in qualified homes, but not the most ideal. R. at 8, 9.

### **Summary of the Argument**

The District Court erred in its granting of AACS' motion for a temporary restraining order and preliminary injunction because AACS' harm would be reparable, the "balance of harms test" favors HHS, AACS is not likely to succeed on the merits of the case, and granting

AACS a TRO would not serve public interest. AACS would not be able to prove that HHS violated AACS' first amendment rights because case law and the facts of the case support HHS' right to impose the constitutional conditions on the agency being regulated.

Additionally, the District Court incorrectly holds that *AOSI* governs the unconstitutional conditions issue before this court. Adversely, the facts and reasoning of this case more closely resemble those of *FAIR* and *Rust*, therefore, both cases govern. Firstly, HHS is not requiring AACS to support any viewpoint regarding homosexuality. . Secondly, HHS is allowed to place conditions on a program/agencies it has contracted with. Thirdly, HHS has the right to fund or not fund any agency based on the agency's stance regarding an issue on which the government has a viewpoint. Lastly, HHS has the constitutional authority to regulate foster and adoptive services in Evansburg. HHS is a private organization that had the right to reject government funds, but instead agreed to enter into a contract with the government in order to further the aim of completing a government function.

Furthermore, AACS did not prove that the EOCA violated its First Amendment right to exercise its religion. ACS has failed to show that statute was created with the objective of burdening their religious practices, or that the existence of exemptions have prevented the statute from being neutral and generally applicable.

Lukumi does not govern this case because there are not many exceptions laid out in the codified statute. There is no evidence to support an allegation that HHS used this statute to sanctify AACS' religion. Additionally, the statute in this case was constructed to serve a compelling state interest; the well being of children.

## **ARGUMENT**



## **Standard of Review**

Because this case involves constitutional issues, the case will be reviewed *de novo*. *Brown v. City of Pittsburgh*, 586 F. 3d. 263. Therefore, the First Amendment violations alleged will be decided after independent investigation and conducting an examination of the record as a whole. Additionally, the hearing *en banc* requires this Court to review the case before it without deference to its previous decision.

## **Preliminary Injunctive Relief**

**I. This Court Should Deny AACS' Motion to Obtain a Temporary Restraining Order Because the Harm Asserted by AACS Would Be Reparable, the Balance of Harms Test Does Not Favor AACS, AACS Would Likely Not be Successful on the Merits of the Case, and Public Interest Would Not be Served if the TRO Was Granted by This Appellate Court.**

Injunctive relief is a type of relief granted under extraordinary circumstances when the moving party clearly establishes entitlement to the injunctive relief sought. *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981). In making the determination of granting a TRO, this Court must employ the balance of hardships test after the moving party establishes it will suffer irreparable harm if the TRO is not granted. *Krichbaum v. United States Forest Serv.*, 991 F. Supp. 501, 502 (W.D. Va. 1998). Constitutional violations do not per se constitute irreparable harm. *NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012). However, courts have found that irreparable harm exists when money damages are inadequate. *A Helping Hand, LLC v. Balt. Cnty.*, 355 F. App'x 773 (4th Cir.

2009). The balancing of hardships tests weighs the hardships to be suffered by all interested parties if the TRO is granted or denied. *Krichbaum*, 991 F. Supp. 501, 502. Furthermore, the court must conclude that the moving party would likely be successful on the merits of the case. *Id.* However, if both the conclusion of irreparable harm and the balance of hardships test favor the plaintiff, the court must only determine whether or not the plaintiff has raised a serious or substantial issue. *Id.* Lastly, the court must consider whether public interest favors injunctive relief. *Id.* All factors in determining whether to grant a TRO do not have the same weight: the most important factor is the outcome of weighing the hardships that would result to both parties. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991).

*Kirchbaum*, sets out the requirements that must be satisfied to award a moving party a TRO. *Krichbaum*, 991 F. Supp. 501, 502. A citizen filed suit against the Forest Service and a district ranger and moved to enjoin the parties from cutting down trees. *Id.* The motion was denied because the plaintiff was unable to prove irreparable harm would likely occur, but the court lays out the elements of a TRO. *Id.*

In *NAACP*, the court granted a temporary restraining order regarding constituents' right to vote during an election. *NAACP*, 858 F. Supp. 2d 516. The election process was underway and the plaintiff brought the action timely. *Id.* The redrawing of district lines was the subject of litigation, so the court ruled that preliminary injunctive relief was due under a view of the facts in their entirety because irreparable harm would be realized by the plaintiff if an injunction was not granted. *Id.*

Additionally, in *A Helping Hand, LLC*, the Fourth Circuit Court of Appeals denied the granting of preliminary injunctive relief because the plaintiff did not prove that money damages

would be an inadequate remedy to the plaintiff's damages. *A Helping Hand, LLC*, 355 F. App'x 773. A local Maryland ordinance banned the operation of a clinic within 750 feet of a residence. *Id.* The district court granted a two year injunction in favor of the plaintiff, but the appellate court reversed that district court's judgment holding that money damages would sufficiently remedy plaintiff's relocation requirement. *Id.* Furthermore, the court held that although the ordinance could be inconvenient for parties, that inconvenience does not amount to equating to irreparable harm. *Id.*

The appellate court affirmed the denial of a motion for a preliminary injunction due to the weakness of a substantive argument in *United Sanitation Servs., Inc. v. Tampa*. 302 So.2d at 435. A private garbage company was receiving permits from city officials to collect garbage from private companies. *Id.* After the city upgraded its equipment, the officials stopped granting the permits to United Sanitation Services, Inc. *Id.* After moving for an injunction to stop the city officials from denying the company's permits, the district court held that the lack of strength of the substantive argument amounted to the inability of proving the case would likely succeed on its merits. *Id.* Therefore, the district court's denial of the motion was affirmed. *Id.*

Lastly, in *Rum Creek Coal Sales, Inc.*, The Fourth Circuit Court of Appeals denoted that the most important factor to consider when determining whether to grant a TRO is the balance of hardships factor. *Rum Creek Coal Sales, Inc.*, 926 F.2d 353. The appellate court granted a TRO to the company requiring the police force to take action against people committing criminal violations during the Rum Creek Coal Strike. *Id.* The appellate court held that the district court erred in its application of the balance of hardships test. *Id.* Additionally, because the balance of

hardships test favored the plaintiff and the plaintiff proved there was a grave or serious question for litigation, the denial of the TRO was the appropriate course of action. *Id.*

**A. AACCS' Harm Could Be Remedied By Compensation, Because AACCS Is Advocating for the Court to Enforce HHS to Fulfill Contractual Obligations.**

Assuming *arguendo* that HHS deprived AACCS of its right to practice its religion freely and that HHS placed an unconstitutional condition on AACCS, AACCS' constitutional rights have indeed been violated, and AACCS is entitled to relief. However, the basis of the dispute in the case is AACCS receiving referrals for child placement from HHS and being granted a renewal on a government contract. The harm suffered by AACCS would be the financial loss AACCS would incur as a result of the referral freeze and the denial of a contract renewal. Similar to *A Helping Hand, LLC*, the harm suffered by AACCS could be repaired by the granting of whatever amount of compensation the court would deem equitable. An award of compensatory damages would place AACCS in the position the agency would have been in had the contract been renewed and referrals had continued to be given. Therefore, money damages would be an equitable remedy and could adequately reverse the damages sustained as a result of HHS' actions.

Additionally, AACCS did not allege that money damages would be an inadequate remedy in its complaint. Furthermore, similar to the facts of *A Helping Hand, LLC*, AACCS is a private for profit entity. AACCS should have other avenues for generating income and the government is not solely responsible for the profitability of AACCS' business.

AACCS could argue that a part of its loss would be the inability to fulfill its mission and serve the members of its community. However, all of the other agencies in Evansburgh is able to

service those citizens. No other agency has refused service to anyone belonging to the Islamic faith, and the other agencies are all operational under the requirements set forth in the statute.

**B. Relating to the Burden Imposed on Both Parties, HHS Would Carry the Heavier Financial Burden and HHS Would be Required to Rectify AACS' Discriminatory Effects Imposed On Evansburgh's Homosexual Community.**

In the present case if this court was to grant AACS a TRO, HHS would have to continue to send referrals to AAC and allow AACS to continue to perform its foster and adoptive care services. A TRO demands that HHS continue to take this action and continue to fund AACS with government funding. The grant of a TRO would burden the government and the city's taxpaying base financially. The government would be required to fund an organization not complying with requirements set out in law. Furthermore, the state would suffer harm through its citizens due to the citizens rights being violated. Because the government is required to protect the rights of its citizens, the violation of a citizen's constitutional rights have huge implications, and the government would be tasked with the burden of rectifying the violations imposed on its citizens.

Adversely, denying a TRO would deprive AACS of funding. The foster and adoptive agency would not be able to perform the functions AACS formerly contracted to carry out.. However, AACS is a private agency, and as such AACS should be able to raise non-government related funds. AACS has not provided any evidence that supports nor has AACS stated that the agency is entirely dependent on government money. Consequently, HHS would carry the heavier burden imposed on both parties if a TRO was granted in favor of the opposition.

**C. AACS Will not be Able to Prove that AACS Would Likely be Successful On the Merits of AACS' Case.**

This case does not weigh heavily in the direction of AACS. The case put forth by AACS has no clear shot to a favorable verdict in the district court. The substantive issues in the discussions of both the Free Exercise Clause and unconstitutional conditions both favor HHS. Therefore, AACS is not likely to succeed on the merits of its case.

**D. Granting AACS Injunctive Relief goes against Public Interest by Allowing AACS to Continuously Discriminate against Homosexual People, and Would Also Require the Government to Finance AACS' Discriminatory Practices.**

Lastly, public interest would not be served if the TRO is granted. Adoption services and foster care services are still being performed in Evansburgh while this litigation continues. The public interest would be served through a denial of the TRO because anti-discrimination measures would be upheld. Denying the TRO would ensure that the city does not fund an organization that would discriminate against and demographic of people due to their sexual orientation. Granting the TRO would encourage AACS' practice of discriminating against a portion of Evansburgh's population and deprive them of their constitutional rights. Granting the TRO would be doing the community a disservice.

Because AACS's harm could be remedied by compensation, the balance of harms test favors HHS, AACS is not likely to succeed on the merits of the case, and granting AACS a TRO would not serve public interest, AACS' motion for a TRO should be denied.

**Permanent Injunction**

**II. The Court Should Deny the Motion for a Permanent Injunction Because AACS Would Not Suffer Irreparable Harm, Monetary Damages Would**

**Adequately Compensate AACS' Injury, the Balance Of Hardships Test  
Favors HHS, and Granting the Injunction Would Disserve Public Interest.**

A permanent injunction requires the petitioner to satisfy a four-factor test which requires the plaintiff to demonstrate that it suffered irreparable injury, the remedies available at law such as monetary damages are inadequate to compensate for that injury, considering balance of hardships between plaintiff and defendant, remedy in equity is warranted, and the public interest would not be disserved by permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 388 (2006).

The elements of a permanent injunction mirror those of a TRO, with the exclusion requiring the movant to prove that the case would likely succeed on the merits of the case. Therefore, the analysis is the same as in the TRO analysis, excluding the likelihood of success on the merits analysis.

For the same reasons stated in the TRO analysis, the motion for a permanent injunction should be denied.

**Unconstitutional Conditions**

- III. **The Condition Requiring AACS to Post the Anti-discrimination Sign in Its Agency Was Constitutional Because the Conditions in the EOCPA Can be Applied Indirectly and be Consttutional, the Imposition of the Condition Is Necessary for AACS to Fulfill Its Contractual Obligation with HHS, and the Government Has the Right to Define the Limits of AACS' Speech Because of AACSS' Receipt of Government Funding.**

The First Amendment of the Constitution of the United States of America guarantees freedoms regarding religion, expression, assembly, and the right to petition to any citizen and non-citizen within US territory. *U.S. Const. amend. I*. With respect to an individual’s right to the freedom of speech (a means of expression), the function of the First Amendment is to prohibit Congress or any government agency from restricting one’s right to speak freely. *Id. amend.I*. Freedom of expression also means that the government is not allowed to require an individual to say anything at all. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018).

The unconstitutional conditions doctrine requires that the government not condition benefits on a would-be recipient’s relinquishment of a constitutionally protected right, “especially, his interest in freedom of speech.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The government has the power to regulate areas prescribed to it by the constitution through laws, conditions, requirements, etc. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.(FAIR)*, 547 U.S. 47 (2006). Additionally, conditions are not unconstitutional if those conditions can be constitutionally imposed directly. *Id.* Furthermore, when the government funds a program, the government has a right to define the limits of the program’s speech. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

The District Court held that the case of *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc. (AOSI)*, 570 U.S. 205 (2013) governs the case before this Court, and this is consistent with AACS’ position. The application of *AOSI* is a misapplication. In *AOSI*, the Court held that requirement an anti-prostitution condemnation to receive federal funds was unconstitutional. *Id.* The Court held that the government required the recipient of government funds to express a



certain viewpoint. However, the facts of this case do not require AACS to approve or nor condemn homosexuality. HHS is simply requiring them to apply to a generally applicable law within the state's authority to regulate. Additionally, the speech AACS is arguing is being forced upon it is outside of the scope of the contractual obligations AACS is to perform. AACS has been awarded a contract to place children in foster and adoptive homes. Speech regarding homosexuality is outside of the contractual obligations AACS has with HHS. Furthermore, AACS chose to partner with HHS to perform its obligations. Therefore, the facts of this case align more with *FAIR*, 547 U.S. 47 (2006) and *Rust*, 500 U.S. 173, 194 (1991) and the decisions of both *FAIR* and *Rust* govern the dispute between HHS and AACS.

In *FAIR*, the Supreme Court of the United States held that the Solomon amendment did not violate a law school's freedom of speech. *FAIR*, 547 U.S. 47 (2006). The government passed an amendment that prohibited law schools from declining entry to military recruiters, even if the schools do not agree with the recruiter's mission. *Id.* The school was not in agreement with the military's stance on homosexuality, thus the law school did not want the recruiters to come on campus. *Id.* The court reasoned that the Solomon amendment did not limit what the school could say nor did the law require the school to say anything. *Id.* Additionally, the court reasoned that the government was regulating conduct rather than speech. *Id.* Finally, in *FAIR*, the court reasoned that even if the law was regulating expressive conduct, the government's conditions placed on the school were justified because the conditions were fit in furthering the substantial government interest of raising and supporting the United States Armed Forces. *Id.*

In *Rust*, 500 U.S. 173, 194 (1991), the Supreme Court of the United States held that if a government has the right to define the limits on an agency's speech if the government funds that

agency. The government conditioned grant recipients to not provide abortion information, resources, or counseling to anyone. *Id.* The courts held that the government is allowed to fund institutions that align with the government's viewpoints. *Id.*

**A. The EOCPA does not Require AACS to partake in any speech, nor Does the EOCPA Require AACS to Adopt Any Viewpoint.**

Similar to *FAIR*, the government is not requiring AACS to take any stance on homosexuality. The placement of the sign in AACS' agency building does not require AACS to say that homosexuality is acceptable nor does the sign admit or support the viewpoint that being gay is acceptable. The sign simply says that agencies are not allowed to discriminate against homosexual children or homosexual prospective foster/adoptive parents. Furthermore, if AACS would like to state to its prospective parents and children that the agency is against homosexuality, AACS is well within its right to do so. AACS is able to state that its religious beliefs are against homosexuality. Therefore, the EOCPA did not prohibit AACS from sharing the agency's viewpoint regarding homosexuality.

AACS is arguing that the government's act of requiring all agencies to post a sign that says that state law deems it illegal for any agency to discriminate against any individual, 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 is unconstitutional. R. at 6. AACS does not want to service homosexual households, which is akin to the law school in *FAIR* not allowing recruiters on campus based on the military's stance on homosexuality. AACS argues that the posting of the anti-discrimination sign is requiring the agency to speak in support of a stance on a topic that the agency does not agree with due to AACS's mission being

aligned with that of the teachings of the Muslim faith. Therefore, the government requiring the agency to post that sign would be forcing the agency to make speech the agency has a right not to make. However, similar to the reasoning in *FAIR*, the HHS is not requiring AACS to make any speech or action support homosexuality. AACS is free to share its religious beliefs in any non-discriminatory manner it sees fit.

**B. The EOCPA is Regulating the Conduct of Discriminaiton Among All Fosters and Adoptive Agencies that are Contracted with HHS.**

Additionally, HHS concedes to the fact that the EOPCA requires AACS to display a sign reciting an anti-discrimination law at the agency's place of business. As a result, the action being regulated in the present case is conduct and not speech. The law is not requiring the agency to support homosexuality in any capacity. HHS, through the EOCPA, is requiring AACS to comply with the law as a prerequisite to receiving government funding. The mandate in this case is similar to the mandate given in *FAIR*, and the mandate requiring the posting of the sign is simply only a mandate to post the sign denouncing discriminaiton. The posting of the sign does not speak to AACS' religious beliefs. Consequently, AACS has the right to be in support or opposition of the message displayed on the sign. HHS is not forcing AACS to speak on its beliefs by mandating that the anti-discrimination law be posted.

**C. HHS Holds the Authority to Regulate Foster and Adoptive Services, and HHS Holds the Authority to Enforce Laws, Regulations, and Obligations Necessary to Fulfill the Governmental Function.**

Furthermore, AACS has contracted with the state to place children in a home based on what is in the best interest of the child. Ultimately, the government has the final say in which

home the child is going to be fostered in or adopted by. HHS has the power to employ the conditions necessary to further its mission of finding the best possible fit for the children. The health and safety of the state's citizens are substantial government interests. Therefore, the government has the authority to require measures be put in place in furtherance of working toward satisfying the substantial state interests. Additionally, AACS is bound to the terms of a contract with the government to place the children into homes. The government has the right to enforce an obligation to a party the government has contracted with. AACS agreed to comply with the terms of the contract making the terms enforceable. If AACS was opposed to posting the sign in its agency, the government would not have awarded the agency funding and sent the agency referrals. Refusing to place the sign in the agency means that AACS is not fulfilling an obligation required of it, and the government has the right to withhold its funding until conditions are met.

**D. HHS has the Power to Limit AACS' Scope of Speech Relating to the Services AACS is Obligated to Perform.**

Lastly, the government is allowed to limit the scope of speech to an organization that the government provides funding to. Similar to *Rust*, the government is allowed to fund and not fund agencies whether or not the government agrees with the agency's viewpoint which means the government is allowed to enforce non-discrimination policies if the agency is receiving money. AACS is entirely funded by the government. The government holds the position that no homosexual person or couple be discriminated against on the basis of their sexuality; it's codified into a statute. Because AACS is effectively discriminating against the homosexual demographic, HHS has the right to not fund AACS due to both viewpoints not being in

alignment just as the government had the right prohibit the allocation of abortion resosurces in *Rust*.

HHS did not impose an unconstitutional condition on AACCS because HHS is not requiring AACCS to make any speech nor to accept a viewpoint, HHS has the right to limit speech based on contract, HHS has the right to fund any agency that supports the government's viewpoint on any subject matter, and the state has the power to regulate adoption and foster services.

**IV. AACCS's Rights to Free Exercise of Religion Were Not Violated when HHS Required AACCS to Screen Same-Sex Parents to Adopt Children, Because the Exercise of a Religious Belief Does not Supercede Complying with Neutural and Generally Applicable Laws.**

The Free Exercise Clause of the First Amendment, which applies to the states under the due process clause of the Fourteenth Amendment, reserves the right of American citizens to engage and practice any religion, without imposing burdens on an individual, solely on the basis of that individual's religious beliefs. *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940); *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 872 (1990). While one cannot impose burdens on an individual simply for that individual's religious beliefs, the case of *Smith*, clarifies that "incidental" burden may occur, however as long as a law is neutral and generally applicable, it must be complied with. *Id.* at 878. The tests to determine the neutrality and general applicability of a law require the challenger to demonstrate that the law was created with the objective of burdening a particular religion. *Church of the Lukumi Babalu Aye, Inc. v.*

*City of Hialeah*, 508 U.S. 521,522 (1993). An exception to complying is when it is funded by the state. *Locke v. Davey*, 540 U.S. 712, 714 (2004).

An individual's religious beliefs are not enough to excuse the individual from complying with a valid and neutral law. In *Smith*, the court analyzed the constitutionality of denying an individual's unemployment benefits, based on an individual's participation in a religious, yet statutorily illegal, practice. *Id.* at 872, 873. The respondents in *Smith*, were employees of a private drug rehabilitation organization, but were fired for the use of peyote, a drug used for sacramental purposes in the Native American Church. *Id.* at 872. After being fired, the respondents applied for unemployment compensation through the state, but were denied, because their former employer, the rehabilitation center, considered the use of peyote a form of "misconduct". *Id.* The respondents filed suit against the state, alleging that the denial of unemployment benefits violated their right to exercise their religion. *Id.* The court's decision regarding the respondents' free exercise claim was contingent upon whether or not the use of peyote, was a violation of the State's substance control laws. *Id.* at 874. The State Supreme Court ultimately held that although the use of peyote was central to the Native Americans' religious gatherings, the use of peyote also violated the State's substance control law, and was not subject to an existing exemption. *Id.* at 878. Being that the use of peyote was deemed illegal, the United States Supreme Court rejected the respondent's free exercise claim, because the practice of religion does not trump an individual's responsibility to comply with neutral and generally applicable law. *Id.* at 879.

Law makers are required to provide neutral statutes that are general in their application, to ensure that members of religious organizations are not intentionally burdened. The test for determining whether or not a statute is valid and neutral requires the plaintiff to show whether or not this statute targets someone with a particular religious view, in addition to determining whether this statute treats all individuals the same, regardless of their religious views. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In *Lukumi*, the respondent, Church of the Lukumi Babalu Aye, Inc. (Lukumi), brought suit against the City of Hialeah for an ordinance, prohibiting the sacrifice of animals for religious purposes. *Id.* A central part of the Lukumi religion's practices, is sacrificing animals. *Id.* The city's purpose for the law was to prevent animal torture, and limited the slaughtering of animals for the purpose of consumption. *Id.* It was evident that the ordinance was not facially neutral based on the word selection in the ordinance, because the court found the ordinance only affected members of the Santoria religion. *Id.* at 521. Furthermore, the Court also found that the ordinance was not generally applied because the exemptions only applied to secular animal killings, which made the ordinance under inclusive. *Id.* Because this ordinance was not neutral or generally applied, it was subject to strict scrutiny, which requires the government to show that the ordinance was necessary, and the way which the government could address the compelling issue of animal cruelty. *Id.* at 521. Ultimately, the Court held the ordinance unconstitutional because the ordinance failed strict scrutiny. *Id.* at 522. The ordinance was not compelling or necessary to support the government's interest of protecting animals, because the ordinance failed to prohibit secular animal killings. *Id.*

Exemptions should not be used to undermine the significance of a law. The existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling,

nor does it indicate a compelling interest may be outweighed in some circumstances by another even weightier consideration. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014). In *Burwell*, the court analyzed the constitutionality of a law requiring a Christian based business to provide health insurance coverage for methods of contraception that violate the business's religious beliefs. *Id.* at 688, 689. The U.S.S.C. quickly came to the conclusion that providing health care was a compelling government issue, but faced difficulty in deciding whether or not the mandate was necessary to achieve the government's purpose. *Id.* In the Court's analysis of whether the mandate was necessary, the court assessed whether or not the employees of the business could be provided coverage for contraception, without burdening the petitioner's freedom to practice Christianity. *Id.* at 686. Ultimately, the Court held that the mandate was in violation of the business's freedom to exercise religion because requiring the business to offer insurance coverage for contraception was not the least restrictive means of serving the government's interest. *Id.* at 691.

A condition placed upon the receipt of government funds that disfavors religion is not in itself a violation of one's right to exercise religion. A government funded program is not presumptively unconstitutional because it is facially discriminatory with respect to religion. *Locke v. Davey*. 540 U.S. 712, 720. In *Locke*, the U.S.S.C. analyzed the constitutionality of a state refusing to offer government funded scholarship to qualified recipients interested in studying theology. *Id.* at 712. Davey, a student in Washington, was awarded a Promise Scholarship, which was funded by the state. *Id.* Davey intended to use the scholarship to help pay for his tuition at a church-affiliated institution, to study pastoral ministry, but brought suit against the state, after learning that the scholarship could not be used to pursue a devotional



degree. *Id.* The Court rejected Davey's argument that the scholarship was unconstitutional simply because it was unfavorable to religion and facially discriminatory, because that argument was overly inclusive of the holding in *Lukumi*. *Id.* Under Davey's argument is an inaccurate application of *Lukumi*, because Davey's argument finds the government liable when religion is disfavored by government action, rather than when religion is burdened. *Id.* Ultimately the court did not find that the Davey's right to practice religion was violated by the condition placed on the scholarship, because the condition did not actually burden Davey's ability to practice religion in exchange for a publically funded scholarship. *Id.* Davey was not forced to choose between his religion, or receiving public funding, nor would any civil or criminal sanctions be brought against him for practicing religion. *Id.* at 712, 713, 720.

The Court of Appeals for the Fifteen Circuit's decision to reverse the judgment of the District Court in this case should be reaffirmed, because the Christopher Hartwell and the HHS did not violate AACS's right to practice religion, by freezing referrals to AACS for failure to comply with the EOCPA's non-discriminatory law. AACS alleged that EOCPA failed strict scrutiny, but the EOCPA is not discriminatory on its face or in application, and thus is not subject to strict scrutiny.

**A. The Facts of the Case before This Court are governed by *Smith*, not *Lukumi* because the EOCPA Retains no Language to AACS and the Laws in the EOCPA are Generally Applicable to ALL Foster and Adoptive Agencies.**

AACS relied on *Lukumi* to support their argument that the EOCPA is not a neutral or generally applicable law, however the facts in *Lukumi* are far too distinguishable from this case

to make that assertion. Concerning the neutrality of the EOCPA, the AACS failed to show how the EOCPA is discriminatory against them. In *Lukumi*, the city implemented an ordinance to reduce animal torture, but used words distinctly associated with religion such as “sacrifice” and “ritual” rather than using general words to prohibit all animal killings, both secular and religious, which made the statute facially discriminatory. *Lukumi*, 508 U.S. 520 (1993). Unlike *Lukumi*, the EOCPA did not use any particular words in their anti-discriminatory laws, to specifically burden the AACS. Furthermore, the EOCPA’s anti-discriminatory requirements apply to both secular and religious child placement organizations, it just so happens that AACS which is not in compliance with the EOCPA is also a religious organization. However, *Smith*, addresses “incidental” burdens which may occur when implementing a law, but that reassures the concept that as long as a law is neutral and generally applicable, it must be complied with. *Smith*, 494 U.S. 878 (1990).

**B. The EOCPA’s Non-discriminatory Requirement is, in fact, Applied Generally across All Foster and Adoptive Agencies Contracted with HHS.**

In regards to the general applicability of the EOCPA, AACS also failed to show how the EOCPA’s nondiscriminatory requirement is not applied generally to all of the child placement agencies. At the district level, AACS attempted to undermine the EOCPA’s interest in prohibiting discrimination by referencing the individualized discrimination allowed by the E.V.C. R at 12. The court in *Lukumi* found that the overwhelming number of secular exemptions to the ordinance prevented the ordinance from being generally applicable, but that is far different from the individualized discrimination permitted by the E.V.C.. *Lukumi*, 508 U.S. 522 (1993).

Unlike the exemptions to the law in *Lukumi*, the discrimination set forth in the E.V.C. does not discriminate against an entire class of people. All members of the Santoria religion in *Lukumi* were prohibited from sacrificing animals, while the discrimination in this case varies upon the needs of the adoptive child. *Id.* at 520.

**C. The Law Imposed by the EOCPA is Necessary to Serve a Compelling Government Interest, and Would Therefore Pass a Strict Scrutiny Analysis.**

Assuming *arguendo* that the statute in this case is either discriminatory on its face, or in application, and thus subject to strict scrutiny, the law in question would still be constitutional, because unlike *Lukumi*, the EOCPA's anti-discriminatory law is necessary to serve a compelling purpose. Evaluating an applicant's age, race, and sexual orientation promote the government's interest of ensuring compatibility amongst the children and adoptive parents. The state could require that the adoptive parent simply be qualified, but without considering the child's compatibility to the adoptive, the HHS would be doing the adoptive children a huge disservice. Discriminating against a parent for their age, race, sexual orientation and gender is used to best match the children to the parent, not to discriminate against an entire class of people. The discrimination used to find parents for children will almost never be the same across the board, and varies on a case by case basis. In *Lukumi*, the court prohibited a central part of Santoria's religion, without demonstrating a compelling reason but in this case, ensuring the child's well-being is a compelling interest because the HHS's entire purpose rests on finding homes for the children. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 521 (1993).

**D. AACS did not Prove that Complying with the EOCPA would Burden AACS' Ability to Freely Practice its Muslim Faith.**

Furthermore, AACS has not shown that complying with the EOCPA is a burden to their ability to practice religion, like the members of the Santroria religion in *Lukumi*. In *Lukumi*, the people of the Santoria religion were being criminally sanctioned for performing a central aspect of their religious practice, while here, AACS is losing government funding due to their refusal to comply with the law, but the actual practice of their religion is not affected. *Id.* at 520.

AACS relied on *Lukumi* to support their contention that they have been burdened by the EOCPA's laws, however this case is far different from *Lukumi*. In *Lukumi*, the people of the Santoria religion were being criminally sanctioned for performing a central aspect of their religious practice, while here, AACS is losing government funding due to their refusal to comply with the law, not for practicing religion. *Locke v. Davey* draws a distinction between a law disfavoring a law, and burdening a law. *Locke v. Davey*. 540 U.S. 724, 725. Here, Chris Hartwell and the HHS's refusal to publicly fund a program not in compliance with a non-discriminatory requirement that is unfavorable to the AACS, but not a direct burden on them to practice their religion, similar to what happened to the petitioner in *Locke*. *Id.* at 725.

Thus, this court should reaffirm the Appellate Court's decision, because AACS has failed to show requiring AACS to comply with the EOCPA in exchange to receive referrals and public funding has violated the AACS's right to practice religion.

**CONCLUSION**

The EOCPA requiring all foster and adoptive agencies to post a law in its building was not an unconstitutional condition and did not restrict AACS' ability to freely practice its religion.

Neither was Mr. Hartwell's enforcement of the EOCPA. Additionally, AACS has not satisfied the procedural requirements needed to be entitled to injunctive relief. The District Court erred in granting AACS a TRO and a permanent injunction. Therefore, the District Court's decision should be vacated and reversed.