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

Brief for Defendant-Appellant, Christopher Hartwell, In His Official Capacity As Commissioner Of Department of Health And Human Services, City of Evansburgh

Team 4

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STATEMENT OF JURISDICTION

The district court for the Western District of East Virginia has jurisdiction over the plaintiff, Al-Adab Al-Mufrad Care Services ("AACS"), and the defendant, Christopher Hartwell, in his official capacity as Commissioner of the Department of Health and Human Services ("HHS"). The events of the case also occurred in the Western District of East Virginia, so both public and private interests are of concern to this court. The defendant, Christopher Hartwell, appealed to United States Court of Appeals for the Fifteenth Circuit, which has proper authority for appellate review of cases heard in the Western District of East Virginia. On appeal from the plaintiff, AACS, this case is being reheard En Banc by the Fifteenth Circuit.

QUESTIONS PRESENTED

1. Whether the government may condition governmental funding upon the postage of an anti-discrimination law and the certification of same-sex couples while allowing the agency to post its objection, if any exist.

2. Whether a state may condition governmental funding on compliance with an anti-discrimination law when following that law incidentally conflicts with a religious-based agency's practice of their religion.

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

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

U.S. Const. amend I.

> 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 bases of the best interest of the child.

E.V.C. § 37(d).

> In undertaking a best interests assessment when making placement decisions, 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.V.C. § 37(e).

> In 1972, East Virginia adopted the Equal Opportunity Child Placement Act (EOCPA) which imposes nondiscrimination requirements on private child placement agencies receiving public funds in exchange for providing child placement services to HHS.

E.V.C. § 42.

> 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.V.C. § 42.-3(b).

> Section 42.-4 requires adoption agencies to post on their premises before funds are dispersed pursuant to the contract with a governmental entity, the Child Placement Agency must sign and post at its place of business a statement that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." The amendment permits religious-based agencies, however, to post on their premises a written objection to the policy.

E.V.C. § 42.-4.

STATEMENT OF THE FACTS

There are approximately 17,000 children residing in foster care in East Virginia's largest city, the City of Evansburgh. R. at 3. Approximately 4,000 of which are available for adoption. R. at 3. Evansburgh struggles to maintain enough foster and adoptive homes to keep up with the City's demand. R. at 1. As a result of the high volume of children in foster care begging for adoption, the City has required that HHS establish a plan that will best serve the needs of these children. R. at 3.

HHS's plan helps to achieve the needs of these children by placing conditions on its funds. R. at 3. In exchange for public funds, the contracting agencies must provide the following services: (1) they must conduct home studies; (2) they must provide counseling services; and (3) they must make placement recommendations to HHS. R. at 3. After HHS receives a child, it contacts one of the many agencies that help to locate loving families. R. at 3. Thirty-four of these agencies are private. R. at 3. The private agencies possess list of available families. R. at 3. If there are any potential matches, the agency then contacts HHS. R. at 3. HHS takes several factors into consideration when determining which family is most suitable for each child. R. at 3. The factors considered are the child's age, sibling relationships, race, medical needs, and desirability. R. at 3. After HHS has placed the child with a family, the private agency that helped to match the parents and child must continue to maintain supervision and provide support to help ensure a successful placement. R. at 4. This is part of the contract. R. at 4.

If an agency feels that a family is unable to satisfy its profile and policies, it may refer that family to another agency. R. at 5. HHS provides the following statement on its website:

> Browse 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 parent 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.

Although not specifically stated, this provision is designed and pertains only to specific programs. R. at 5. Such as programs that help train parents of special needs children. R. at 5.

AACS is a non-profit adoption agency in the City of Evansburgh. R. at 1. Its mission statement is, "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 AACS' inception in 1980, HHS contracts annually with AACS. R. at 5. AACS was originally formed to provide community support to the refugee population. R. at 5. This includes helping to facilitate adoption placement for war orphans and other children in need of families. R. at 5. Evansburgh is racially and ethnically diverse, with a population of roughly 4,000,000. R. at 1. Despite its large and diverse population, there are only four adoption agencies in the City of Evansburgh dedicated to serving the LGBTQ community. R. at 8. Fortunately, several other agencies have complied with the EOCPA amendments when dealing with prospective adoptive parents. R. at 8. Commissioner Hartwell stated that the reason in which HHS enforces compliance with the EOCPA is to help ensure that several governmental objectives are achieved. R. at 9. These governmental objectives include: (1) that an adoption agency, such as AACS, complies with state and local laws; (2) that child placement services are available and accessible to all of the City's qualified residents; (3) that the pool of foster and adoptive parents are as diverse as the 4,000 children in need of families; and (4) that tax payer funds are not used in a way in which they cannot benefit. R. at 9.

Evansburgh also has a very large refugee population, with refugees from several countries. R. 1. These countries include Ethiopia, Iraq, Iran, and Syria. R. 1. AACS has helped place thousands of children over the years. R. at 5. In 2017, AACS and HHS entered into a contract. R. at 5. This contract provided, in part, that AACS would provide appropriate adoption services. R. at 5. These services include certification that each adoptive family is trained, has been thoroughly screened, and is certified. R. at 5. In addition, the contract provides that AACS must be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5.

After *Obergefell v. Hodges,* 576 U.S. 644 (2015) was decided, the Governor of East Virginia mandated that the Attorney General determine which state statutes were in need of amending. R. at 6. The goal was to "eradic[ate] discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. In turn, the Equal Opportunity Child Placement Act ("EOCPA") was amended. R. at 6. Its amendment included that child placement agencies could not discriminate based on sexual orientation. R. at 6. It further provided that, "where the child to be placed has an identified sexual orientation, that the agency must take that into consideration when placing the child with foster or adoptive parents." R. at 6. If there are adoptive parents of the same sexual orientation as a child, they are preferable. R. at 6. In addition, the EOCPA requires that before funds are afforded to a contracting governmental entity, that the agency signs and post at its establishment 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, religious agencies are permitted to post their written objection to the policy, if any exists. R. at 6.

In early July 2018, Commissioner Hartwell contacted each of the religious-based agencies in Evansburgh to ensure that their policies and practices were in compliance with the EOCPA. R. at 6-7. The Executive Director of AACS, Sahid Abu-Kane, noted that it would go against AACS's religious beliefs if it were to certify qualified same-sex couples as prospective adoptive parents. R. at 7. As a result, Abu-Kane explained that AACS would not be able to comply with HHS's conditions. R. at 7. When Commissioner Hartwell inquired about whether Abu-Kane understood that AACS's practices were in violation of the EOCPA, Abu-Kane argued that AACS was not acting in a discriminatory way and that the Qur'an teaches that "Allah orders justice and good conduct." R. at 7.

HHS has a respectful history in working with AACS in the past. R. at 8. For example, from 2013 to 2015, when there were tensions between Sumni and Shia refugees in the City, HHS approved AACS's recommendation that children were not to be placed with otherwise qualified adoptive parents from other sects. R. at 8. Instead, HHS approved that delayed placement was lawful until a family of the same sect as the child in need was found. R. at 8. On September 17, 2018, Commissioner Hartwell contacted AACS by mail. R. at 7. In his letter, Commissioner Hartwell informed AACS for a second time that it was not in compliance with the EOCPA and that HHS would not be able to renew its contract unless it agreed to comply with HHS's conditions. R. at 7. Specifically, the letter provided:

> Although HHS respects your sincerely held religious beliefs, your agency voluntarily accepted public funds in order to provide a secular social service to the community. AACS must comply with the State's EOCPA to be able to receive government funding and referrals. R. at 7.

In addition, the letter explained that failing to certify same-sex couples would be reason for HHS to immediately freeze AACS's ability to make referrals. R. at 7. All other adoption agencies in

Evansburgh would then be notified that they must refrain from making any referrals to AACS for its failure to comply. R. at 7-8. However, if AACS was willing to comply with HHS's conditions within 10 business days and provide its assurance for future compliance, other agencies would not be provided the above notice and would be free to make adoption referrals to AACS. R. at 7-8.

On October 30, 2018, AACS filed a claim against Commissioner Hartwell. R. at 8. AACS sought a temporary restraining order against HHS as a result of the referral freeze, as well as a permanent injunction in which HHS would be required to renew its contract with AACS. R. at 8. It is AACS's position that HHS's condition in requiring compliance with the EOCPA is a violation of its First Amendment rights under the Free Exercise Clause, as well as the Free Speech Clause. R. at 8. As a religious agency, AACS retains the right to post its objection to the EOCPA if it so desires, while still comporting with HHS's conditions. R. at 6.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fifteenth Circuit should uphold its decision because E.V.C. § 42-4's notice requirement specifically provides that religious agencies, such as Al-Adab Al-Mufrad Care Services "AACS", may communicate their objection to the Equal Opportunity Child Placement Act "EOCPA" if they so desire. Therefore, AACS's First Amendment rights have not been violated. The Supreme Court has long recognized the government's ability to condition its funding. This is lawful so long as there is a nexus between the government's objectives and the conditions in which it places to help achieve its goal. For example, one way to eradicate discrimination against members of the LGBTQ community is to condition government funds based upon the agreement that the recipients will post and comply with a state's anti-discrimination law. Another example may include the government conditioning its funds to states who increase the drinking age, so as to reduce the number of teenage drunk drivers on the road.

Health and Human Services' ("HHS") conditions do not constitute compelled speech, as the government retains the right to condition its funds. When it does, the recipient then becomes a government agent. As a result, it is not AACS's speech; it is the government's speech. AACS and all other religious agencies retain the right to post their objection to the EOCPA if they so desire. AACS will still remain eligible for government funding, so long as it complies with the same conditions as all other recipients. This includes but is not limited to, compliance with the EOCPA's anti-discrimination law. More importantly, if AACS does not wish to comply with the conditions as set forth by HHS, it may continue to operate how it so desires. Evidently, it will not qualify for government funding, however, if it does not comport with the government's conditions.

There are approximately 4,000 children waiting to be adopted right now in the City of Evansburgh. These children originate from many countries throughout the world. Thus, it is vital that adoption agencies provide a pool of prospective adoptive parents as diverse as the children it is designed to place. As of this moment, there are only four agencies that are expressly dedicated to serving the LGBTQ community. HHS's conditions to post an agency's compliance with the EOCPA and to certify *all* qualified parents is rationally related to achieving several government objectives. These include finding parents for the 4,000 parentless children in Evansburgh, as well as protection from discrimination based on sexual orientation.

Even if heightened scrutiny were applied, HHS's anti-discrimination requirement would satisfy it because it is the least restrictive means of achieving several compelling government interests. HHS provided clear and unambiguous terms by which its recipients are to abide by. If agencies do not wish to comply with HHS's terms, they may simply opt not to contract with HHS. The choice is ultimately up to them and there is no punitive consequence for making that determination. HHS has specifically noted that these are the conditions for all, not simply one or two agencies.

Finally, it is in the best interest of society to ensure that members of the LGBTQ community are afforded protection from anti-discrimination as they are a protected class under law. For centuries, the Court has recognized the importance of providing protection for specific classes. Not long ago, this protection was expanded to include members of the LGBTQ community as well. Not only are there LGBTQ parents hoping to adopt, but there are LGBTQ children in need of loving homes, as well. The Court has also recognized the importance of protecting certain classes and as a result, it would do society an injustice to deny that protection to the LGBTQ community.

This court should also affirm its prior ruling that the EOCPA does not violate AACS's free exercise rights under the rational basis test. The purpose of the EOCPA is to serve the community of Evansburgh by providing the best homes for the foster and adoptive children. In order to accomplish that task, there must be satisfactory screening of foster and adoptive parents. Preventing discrimination in this process is rationally related to providing the best homes for all children. HHS must consider race, gender, sexual orientation, and other factors in placement when necessary for the welfare of the child, but the adoptive agencies that HHS uses to certify parents must not when selecting prospective parents. There is no direct or intended adversity toward AACS or the Muslim faith. Therefore, the rational basis test should be applied to the facts at hand, not strict scrutiny.

However, if the compelling interest test were to apply, the EOCPA would still be deemed valid by this court. Serving the community and providing safe, appropriate homes for children is a compelling interest that the government wants to satisfy. If this court allowed AACS to be an exception to this rule, that interest would not be best served; only a small subset of the foster and adoptive population would be able to find the best homes for their needs.

AACS may be incidentally burdened by the EOCPA, but this type of burden is overlooked and allowable under law if third parties are harmed. In the current case, the citizens of Evansburgh, foster and adoptive parents, and children needing homes would be greatly harmed by having an agency that discriminates against potential parents, especially when those parents are LGBTQ, which is a protected class. By having diversity in the pool of adoptive parents, there are more options for HHS to choose from when placing children and children are placed in homes that will allow them to flourish.

ARGUMENT

I. HHS MAY PLACE CONDITIONS ON STATE FUNDING WITHOUT VIOLATING THE FIRST AMENDMENT WHEN A BUSINESS, LIKE AACS, RETAINS THE ABILITY TO POST ITS OBJECTION.

A. Under Supreme Court precedent the government may condition funding so long as there is a rational basis for doing so.

There are currently four-thousand children waiting to be adopted in the City of Evansburgh. R. at 3. Under the rational basis test, the government may condition spending so long as the conditions serve a legitimate state interest and there is a nexus between the statute's objectives and such conditions. *City of Cleburne, Tex. V. Cleburne Living Ctr.,* 473 U.S. 432, 442, 105 (1985). In *South Dakota v. Dole,* 483 U.S. 203 (1987), the Supreme Court held that it was constitutional to condition federal highway funding to states with a drinking age of twenty-one. *Id.* The Court reasoned that subjecting federal highway funds with an increased drinking age served the purpose of reducing the number of teenage drunk drivers on the road. *Id.* Further, the Court held that this condition promoted general welfare and that its method of achieving its goal was rationally related to a legitimate interest in safety. *Id.* Similarly, in this case, HHS's conditions are closely and rationally related to achieving its objective in finding adoptive parents for the four-thousand parentless children in the City of Evansburgh. In addition, its conditions are rationally related to HHS's other objective: Compliance with the EOCPA's anti-discrimination law. R. at 6. Such law ensures the general welfare to all adoptive parents. R. at 6. HHS has provided that in order to receive its funding, recipients must conduct home studies, provide counseling services, and make placement recommendations. R. at 3. In addition, recipients must certify same-sex couples and display their compliance with the anti-discrimination law. R. at 6.

HHS's conditions do not constitute compelled speech, as the government retains the right to condition its funds. *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988). In *Rust v. Sullivan,* 500 U.S. 177, 111 (1991), Congress enacted Title X of the Public Health Service Act, which provided federal funding for family-planning services. The Act provided the Secretary with authority to make grants to and enter into contracts with public or nonprofit private entities to help assist in the establishment, as well as the operation of voluntary family planning. *Id.* In order to receive the grant, the receiving parties were required to comport with the government's conditions, one of which limited its ability to discuss abortion. *Id.* at 193. The Court held that this was not an unconstitutional condition because the restriction was in relation to the federally funded program and was thus not considered "outside the scope." *Id.* at 197. Similarly, in this case, AACS must comport with the same conditions as all other parties contracting with HHS. R. at 7. The conditions at issue are within the scope of the states funded objectives, which include finding adoptive parents for the 4,000 children in need, and in ensuring that the adoptive parents are not discriminating against when working with these agencies. R. at 6. Thus, these requirements are rationally related in achieving these goals and are not considered compelled speech in turn.

The government is free to define the contours surrounding its programs. *Bd. of County Comm'rs v. Umbehr,* 518 U.S. 668, 684 (1996). In *Natl' Endowment for the Arts v. Finley,* 524 U.S. 569, 588 (1998), the Court held that it was constitutional when the National Foundation of the Arts and Humanities Act required the National Endowment for the Arts to provide grants to those who had artistic excellence. *Id.* The Court reasoned that it was not a violation of the First Amendment to allocate competitive funding according to the above criteria as Congress holds wide latitude in determining how best to distribute its funds. *Id.* at 588. In *United States v. Am.*

Library Ass'n, Inc., 539 U.S. 194, 123 (2003), the Court held that it did not violate the First Amendment when the Children's Internet Protection Act required a public library to install software that would block images of child pornography and other obscene images from the library's computers. The Court held that the Act's conditions were rationally related to its objective in protecting minors from gaining access to images and material that was harmful to them. *Id.* Similarly, in this case, one of the EOCPA's objectives is to ensure those of the LGBTQ community are protected from discrimination. By HHS requiring its recipients to display the anti-discrimination law, as well as to certify same-same couples as adoptive parents, it is taking rationally related steps to achieve these goals. R. at 6.

State legislators may tax and spend for the general welfare, including by funding particular state or private programs or activities. *Agency for Int'l Dev. v. All for Open Soc'y Int'l, Inc.,* 570 U.S. 205, 133 (2013). However, it may not violate a party's constitutional rights when doing so. *Id.* When the government disburses public funds to private entities to achieve a governmental objective, it may take legitimate and appropriate steps to ensure that its objective is neither "garbled nor distorted". *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995). In *FCC v. League of Women Voters,* 468 U.S. 364 (1984), the Court held it unconstitutional to condition a provision of federal funding to public broadcast television, and radio stations on an agreement not to editorialize. The Court proffered that acceptance of any funds from the government denied stations the ability to participate in *any* editorializing. *Id. FCC* is distinguishable from the case before the Court today. In this case, AACS still retains the ability both to practice its religion and to vocalize its objection to the EOCPA, while still complying with HHS's conditions. R. at 6.

The government may lawfully condition its funds, even if it incidentally burdens members of a particular group. *Glickman v. Wileman Bros & Elliot*, 521 U.S. 457, 472 (1997). In *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006), the Court held that Congress's Solomon Amendment was not a violation of the First Amendment. The Solomon Amendment required law schools receiving federal funding to allow the military to conduct recruiting activities on campus. *Id.* One school argued that it was a violation of the First Amendment to require it to comport with the Solomon Amendment as it opposed the government's policy on homosexuals in the military. *Id.* at 61. The Court held that this condition was constitutional and did not violate the First Amendment. *Id.* The school retained the right to express its disagreement with those policies while still remaining eligible for federal funds. *Id.* at 60. Similarly, in this case, AACS retains the ability to display its objection to the EOCPA if it so desires while still remaining eligible to receive government funding. R. at 6.

It is not a violation of the constitution to create a condition for government funds if the receiving parties retain the right to deny participation. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. at 205. In *Alliance,* the Court held that it was not a violation of the First Amendment to require its funding recipients to instill a policy explicitly opposing prostitution and sex trafficking as a prerequisite. *Id.* at 2088. Additionally, the Court held that public expression of ideas may not be prohibited simply because the ideas themselves are offensive to others. *Street v. New York,* 394 U.S. 576, 592 (1969). In *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. Of the Law v. Martinez*, 561 U.S. 661 (2010), the Court held that a public university policy requiring registered student organizations to accept all interested students did not violate the constitution. In *Hastings*, the University of California, Hastings College of Law provided that, in order for a student organization to receive the benefits of being a school-

recognized registered organization, it must afford membership to any student who sought acceptance. *Id.* at 696. The Christian Legal Society Chapter argued that this condition was a violation of its First Amendment. *Id.* The Court held that it was constitutional and that the policy did not prevent the Christian Legal Society from engaging in speech or from admitting members according to its own standards. *Id.* at 682. However, it also may not enjoy the benefits that accompany being a registered student organization if it so chooses. *Id.* at 691. Similarly, if AACS would prefer not to comply with the EOCPA, it may opt not to contract with HHS. (R.6). As a result, it also may not receive the funding it desires. *Id.*

B. Even if heightened scrutiny applied, HHS's anti-discrimination requirement would satisfy it because it's the least restrictive means of achieving a compelling government interest.

Under strict scrutiny, laws are upheld if they are narrowly tailored to achieve a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). A law is narrowly tailored when there is no other non-discriminatory way to achieve the same government interest. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). In *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015), the Court held that a state law did not violate the First Amendment when it prohibited elected judges and judicial candidates from personally soliciting funds for their campaigns. The Court provided that this restriction was narrowly tailored and helped serve the compelling interest of protecting the integrity of the judiciary. *Id.* Also, the restriction helped to maintain the public's confidence in an impartial judiciary. *Id.* Similarly, in this case, HHS has narrowly tailored its conditional funding by providing clear terms. R. at 6. HHS has specifically stated that in order for an agency to receive government funding, it must, "sign and post at its place of business a statement that it is 'illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of […]

sexual orientation.'" R. at 6. Not only is this narrowly tailored, but it also serves the compelling government interest in preventing discrimination against a protected class. Further, HHS's condition satisfies the least restrictive requirement, as a religious-based agency may simultaneously post its opposing views. R. 6.

HHS's condition that all adoption agencies must abide by its anti-discrimination requirement, is narrowly tailored and is the least restrictive way of ensuring that all citizens who are qualified for adoptive services receive them. (R. 9). In *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000), the Court held that it was a violation of the First Amendment to require cable television operators to sensor sexually explicit channels or to limit its ability to show such content absent a compelling government interest. The Court noted that, if had it been argued that displaying such content on select channels and at certain times was harmful to viewing children, as well as that this was the least restrictive means of achieving that compelling government interest, that it would have found such restrictions constitutional. *Id.* Unlike in *Playboy*, HHS *has* narrowly defined its conditions so as to further the compelling governmental interest in ensuring that adoptive services are accessible to all qualified Evansburgh residents. R. at 9. By simply asking its recipients to post a sign providing that it comports with the EOCPA's anti-discrimination law and to certify all qualified adoptive parents is the least restrictive way of ensuring that goal is achieved.

HHS's anti-discrimination requirement is narrowly tailored and is the least restrictive way of ensuring that the foster and adoptive parents are as diverse and broad as the children in need. R. at 9. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), a group of perspective law students challenged a race-related admissions policy of a state university law school. The group argued that the race-conscious policy was a violation of their equal protection rights and is therefore subject to strict

scrutiny. *Id.* In that case, the law school's admission program considered the race of its applicants when determining which students would receive admittance. *Id.* at 334. The Court held that the policy was constitutional because it helped facilitate the educational benefits that arise as a result of a diverse student population. *Id.* at 328. Similarly, in this case, HHS argued that its conditions are in place so as to facilitate a diverse adoptive parent pool to best serve the children in need. R. at 9. In *Troxel v. Granville*, 530 U.S. 57, 66 (2000), the Court noted the importance of serving the best needs of a child, especially in relation to the parent and child relationship. There are about seventeen thousand children in foster care. R. at 3. Approximately 4,000 of which, are eligible for adoption. *Id.* These children come from various countries throughout the world. *Id.* As a result, HHS has provided specific and express conditions to help ensure that its adoptive parent pool is as diverse as the many children it is composed of. R. at 9.

HHS's anti-discrimination requirement is narrowly tailored and is the least restrictive way to ensure that taxpayer money is not used in a discriminatory way against them. R. at 9. In *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 (2015), the Court addressed whether it violated the First Amendment when a town attempted to inconsistently restrict what signs and advertisements were and were not permissible. *Id.* at 171. In *Gilbert*, the town argued that, by allowing certain political signs, and not religious ones, that it was serving two compelling government interests: Preserving the town's aesthetic and traffic safety. *Id.* Here, the Court held that, while the two governmental interests were valid, the town's enforcement of these restrictions was not. *Id.* at 172. As a result, the Court held that it was a violation of the First Amendment to restrict a church from posting advertisements or directions about its services. *Id.* The Court proffered that the town could not support that limiting temporary directional signs was a necessary government interest because it eliminated threats to traffic safety if it did not also

limit the posting of other signs as well. *Id.* Unlike the town in *Gilbert*, HHS is enforcing the same condition to all of its recipients. R. at 6. It is immaterial that AACS is a private, religious agency. If AACS would prefer to publicly note its disfavor towards the EOCPA's anti-discrimination law, it may do so. However, HHS is not selectively enforcing its requirements and is therefore constitutional.

C. It is in the best interest of society to ensure that members of the LGBTQ community are afforded protection from anti-discrimination as they are a protected class under law.

Eradicating discrimination is a compelling government interest and HHS's anti-discrimination condition is the least restrictive means of protecting same-sex individuals from unconstitutional treatment. *Robert v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that the Due Process Clause afforded homosexual individuals a liberty right to engage in sexual activity without government intervention. *Id.* at 578. Additionally, in *Obergefell v. Hodges*, 576 U.S. 675, 644 (2015), the Court held that it was unlawful to deny same-sex couples the fundamental right to marriage. Finally, in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), the Court addressed whether Title VII of the Civil Rights Act included protection for homosexual and transgender individuals in the workplace. *Id.* The Court found that it did and provided that to deny homosexual and transgender individuals this protection would be to discriminate based on sex. *Id.* Since sex is a protected class under law, it follows that discrimination against sexual orientation is in turn discrimination against a protected class. *Id.* Thus, this discrimination would be unconstitutional. *Id.* In this case, HHS's anti-discrimination condition is the least restrictive way to ensure that members of the LGBTQ community are not discriminated against when working with adoption agencies.

It is in the best interest of society to afford protection to members of the LGBTQ community, as they are members of a protected class. In *Plyer v. Doe*, 457 U.S. 202, 210 (1982), the Court addressed whether it was lawful to deny free public education to children not legally admitted into the United States. Because alienage is a protected class under law, this question was addressed under strict scrutiny. *Id.* The Court held that it was not lawful for states to deny free public education to children, even those who were undocumented. *Id.* at 220. Just as how members of the LGBTQ community do not choose their sexual orientation, children of immigrants do not typically have a choice regarding their entrance into the United States and whether it is done lawfully. *Id.* As a result, it would be unjust to punish those children. *Id.* In addition, the Court failed to recognize the following as legitimate state goals that were best served by this denial: (1) that this denial would help to end undocumented immigrants moving into the state of Texas; (2) that this denial would increase the quality of public education in the state; and (3) that this denial is supported because undocumented aliens are less likely to remain in the state. *Id.* at 230. Just as how the Court found that there was not enough evidence to support that the above goals were best achieved by denying a free education to undocumented children, there is not enough evidence to support that requiring AACS to post HHS's anti-discrimination policy will result in harm to the agency. However, there is evidence to support that, without HHS's enforcement of this policy, members of the LGBTQ community may be subject to discrimination when working with adoptive agencies. The fact that AACS brought this claim before the Court today highlights this very risk.

Members of the LGBTQ community should be afforded protection, as they are members of a protected class. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court addressed whether a state could lawfully prevent marriage between two people on the basis of race. The Court held that it

could not because race is a protected class under law and, Virginia's claim was subject to strict scrutiny. *Id.* at 11. The Court proffered that Virginia's statute was motivated by its desire to restrict marriage by race and that it did not serve a compelling governmental interest. *Id.* Further, the Court noted that this motivation was a threat to equality. *Id.* at 12. Similarly, AACS's claim is a threat to equality among all potential adoptive parents. There are approximately 4,000 children in need of adoption at this very moment in Evansburgh. R. at 3. To deny readily available and qualified parents from adopting any of these children would be a disservice to these children and a disserve to the state. Unlike in *Loving*, HHS's anti-discrimination requirement is motivated by its desire to ensure equality is not denied. R. at 6. Since members of the LGBTQ community are a protected class, it is in the best interest of society to ensure that they are afforded protection from discrimination.

II. WHETHER A STATE MAY CONDITION GOVERNMENTAL FUNDING ON COMPLIANCE WITH AN ANTI-DISCRIMINATION LAW WHEN FOLLOWING THAT LAW INCIDENTALLY CONFLICTS WITH A RELIGIOUS-BASED AGENCY'S PRACTICE OF THEIR RELIGION.

The First Amendment states that "congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . ." U.S. Const. Amend. 1. This court has seen much conflicting litigation regarding free exercise, and there have been many sweeping changes in the past five years, especially following the enactment of the Affordable Care Act. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). This court should find that the Equal Opportunity Child Placement Act ("EOCPA") does not violate Al-Adab Al-Mufrad Care Services' ("AACS") free exercise rights because it is not discriminatory towards AACS; AACS themselves are being discriminatory towards LGBTQ couples, and, as such, the rational basis test should apply, not strict scrutiny.

A. AACS's refusal to certify same-sex couples as prospective adoptive parents is discriminatory and not in accordance with state law, which is a requirement to receive the contingent state funding.

Under East Virginia law, "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 bases of the best interest of the child." E.V.C. § 37(d); R. at 4. Some of the factors the agency must consider in prospective adoptive homes include:

> (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 place in a home with siblings and half-siblings. E.V.C. § 37(e).

The EOCPA expanded upon these factors by requiring private child placement agencies that receive public funds to be nondiscriminatory "on the basis of race, religion, national origin, sex, marital status, or disability." R. at 4. As a consequence of *Obergefell v. Hodges*, which held that same-sex marriage would be recognized and discrimination based on sexual orientation was unlawful, an amendment was added to the EOCPA stating 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.V.C. § 42-3(c).

"No tradition…allows a religion-based exemption when the accommodation would be harmful to others." *Burwell*, 573 U.S. at 764. In *Burwell*, a privately held corporation whose owners were Christian objected to providing insurance coverage for four birth control methods to its female employees that it considered "abortifacients" on the basis of free exercise of religion. *Id*. The Supreme Court held that if the owners self-certified their opposition, then they would be

allowed to opt out of providing this coverage. *Id*. If the court would have found fully in favor of Hobby Lobby, its female employees would have been drastically harmed by not being provided with adequate and comprehensive reproductive health coverage, mandated by the Affordable Care Act ("ACA"). *Id*. This third-party harm is greater than the religious burden on Hobby Lobby's owners.

The current case is similar because the harm created by AACS not following the EOCPA mandate is greater than any purported incidental religious burden. AACS's refusal to certify LGBTQ prospective adoptive parents harms all Evansburgh children, especially those who could potentially have the same-sexual orientation and would be best served by being placed in a home with a parent of similar background.

There is a seemingly contradictory portion of the EOCPA that states that child placement agencies must "give preference" to families in which at least one parent is the same race as the child needing placement. E.V.C. § 42-2(b). One may view this as the EOCPA specifically sanctioning discrimination in certain cases to specific protected classes that are not religiously motivated. "Where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990). There, the law should be subject to strict scrutiny.

HHS made exceptions and accommodations placing children in the past because it wanted to place as many children as possible in the best homes for their needs. However, HHS is not subject to the same standards as the agencies it funds. Thus, HHS is not subject to the EOCPA, so the actions of HHS should not be subjected to strict scrutiny. Additionally, HHS is the ultimate decisionmaker in child placement, not the respective agencies that it allows to

certify adoptive and foster parents. The child placement agencies may not discriminate based on the EVC/EOCPA factors, but HHS must use its discretion and consider preferential treatment towards certain protected groups. However, this can only occur when it is in the child's best interest, such as when it delayed placement of a child when tensions were high between Sunni and Shiite Muslim communities and it needed to find a home of the same sect. R. at 9.

HHS gives funding to many placement agencies with many different values systems, making the pool of prospective adoptive parents as expansive as possible. By AACS selectively only serving the Muslim refugee community and being exclusionary towards same-sex couples, they are making the pool of prospective parents smaller and not serving the best interests of all children.

B. Applying the rational basis test, the EOCPA is a facially neutral and generally applicable anti-discrimination law and is not targeted towards any one religion.

The rational basis test should apply to the EOCPA. A law must be rationally related to the interest it is trying to serve and a general law of neutral applicability. In determining whether a law is neutral and generally applicable, this court must consider, "whether the plaintiff can show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U. S. 520 (1993). Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id*. at 540.

There was no overt hostility towards either the Muslim faith or AACS in the enacting of the EOCPA. The purpose of HHS enacting the EOCPA is both to prevent discrimination against protected classes and allow the pool of adoptive agencies to be deep and varied, giving children the best home. This is distinguishable from *Church of the Lukumi Babalu Aye* where a Florida court enacted a law limiting killing of animals that directly targeted the Santeria faith's use of ritual animal sacrifice, because that law clearly came about only to be discriminatory toward the Santeria religion; there was no other purpose served by this law. *Id.*

In this case, AACS has not been able to demonstrate other instances of religiously motivated discrimination on the part of HHS. In fact, other agencies that have disagreed with HHS in the past were still able to be funded because they have complied with HHS regulations.

In *Masterpiece Cakeshop*, a bakery refused to make a wedding cake for a same-sex couple on the basis of free exercise of religion, violating a state anti-discrimination policy. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). The Supreme Court found that the bakery owners were within in their rights to object to making the cake and were neutral and respectful of the couple. *Id.* Additionally, in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission disparaged the religion of the bakery owners on the record and the court found that this went against their free exercise rights. *Id.* Here, the record is respectful and neutral toward AACS and the Muslim faith; there is no direct or overt discrimination towards them.

C. If strict scrutiny were to apply, the EOCPA serves the compelling government interest of ensuring the best interest of the child, and therefore, does not violate AACS's free exercise rights.

HHS claims that enforcing the EOCPA serves 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.]

Accommodating AACS's beliefs would go against the compelling government interest of placing children in the most appropriate homes.

> "(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification;" 42 U.S.C.S. § 2000bb.

The EOCPA is a neutral law, but it still incidentally burdens AACS. However, there is compelling justification for its enactment: providing safe, loving homes for Evansburgh children.

Justice Ginsberg's dissent in *Burwell* states that "law that incidentally burdens free exercise should not also burden third parties." *Burwell*, 573 U.S. 682. The government has other means of providing cost-free contraceptives to women "without imposing a substantial burden on the exercise of religion by the objecting parties." *Id*. AACS is claiming it would be substantially burdened by complying with the EOCPA and certifying LGBTQ couples, but this is not true. The burden is only incidental, and not specifically targeting AACS or the Muslim faith, unlike in *Church of Lukumi Babalu Aye*.

However, the third parties that have an overriding interest in this case are the foster and adoptive children of East Virginia. Additionally, the community and taxpayers of East Virginia would not be properly served if the EOCPA were only to apply selectively and HHS were to allow AACS to make religious-based exceptions. It would be a slippery slope opening the door to free exercise objections on a whim because the government cannot question the validity of a

person's religious beliefs. LGBTQ couples would also be burdened because they would be less likely to be chosen to be prospective adoptive parents.

For example, what if there was a Muslim LGBTQ child in need of a home? How would HHS be able to best place them? It is not so outrageous to believe that a family certified by AACS would potentially be accepting of such a child, even if AACS themselves was not.

HHS does not want to stop funding AACS, especially when AACS does uniquely serve specific subsets of the Evansburgh population and HHS has had a seventeen-year-long positive history of placements through them. AACS is well-geared toward providing loving homes for Muslim, refugee, and trauma-survivor populations. However, sexual orientation is now a class that is constitutionally protected from discrimination, following the decision in *Obergefell*, and, as a protected class, their needs override AACS's incidental religious burdens. If AACS wants to act in ways that do not comport with the EOCPA and HHS's regulations, then it should seek private funding; not state funding.

In *Little Sisters of the Poor Saints Peter and Paul Home v. Commonwealth of Pennsylvania*, 140 S. Ct. 2367 (2020), the Supreme Court held that a religious-based organization could be exempt from an Affordable Care Act-mandated provision that provided contraceptive coverage for women, and the Religious Freedom Restoration Act of 1993 should apply (the government should avoid substantially burdening the free exercise of religion). Additionally, the organization did not have to self-certify to opt out of providing the coverage, expanding upon the holding in *Burwell*.

This court should follow the reasoning Justice Ginsberg's dissent. "Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious

rights to the nth degree." *Little Sisters of the Poor Saints Peter and Paul Home*, 140 S. Ct. at 2400. In providing for religious accommodations, the court allowed substantial harm to come to hundreds of thousands of women by their losing access to the reproductive health coverage that they are due under the ACA. *Id*. Here, the harm created is far greater than the burden on AACS. Thousands of Evansburgh children are harmed by AACS not following the EOCPA as well as the LGBTQ community and the City of Evansburgh.

CONCLUSION

For the foregoing reasons, the United States Court of Appeals for the Fifteenth Circuit should uphold its decision because it is lawful for the government to place conditions on its funds and is not a violation of the First Amendment to require a contracting agency, such as AACS, to comport with state law. This court should also affirm its prior ruling that the EOCPA is a neutral law of general applicability, and its application did not violate AACS's Free Exercise rights.

Respectfully submitted,

Team 4

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