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 APPELLEE

TEAM NUMBER 7
COUNSEL OF RECORD
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Circuit Court of Appeals Cases

Statutory Provisions

STATEMENT OF JURISDICTION

This Court has jurisdiction over the case before it because this is an issue regarding the violation of fundamental Constitutional rights. Appellee asserts First Amendment rights were violated by Appellant, resulting in this action's suitability to be heard before this Court pursuant to 42 U.S.C. § 1983. This case is being re-heard en banc on appeal from an order of the United States District Court for the Western District of East Virginia, where it originated. This appeal is timely according to relevant Federal Rules and seeks review from a final order that disposes of all parties' claims.

ISSUES PRESENTED

I. Whether Mr. Christopher Hartwell, as Commissioner of Department of Health and Human Services, violated Al-Adab Al-Mufrad Care Services' First Amendment Right to freely exercise its religion when he cut off funding and banned other agencies from referring couples to the agency based upon its religious mission

II. Whether Mr. Christopher Harwell, as Commissioner of Department of Health and Human Services, violated Al-Adab Al-Mufrad Care Service's First Amendment protections that allow its freedom of speech.

STATEMENT OF THE CASE

I. *Statement of the Facts*

For the past forty years, non-profit adoption agency Al-Adab Al-Mufrad Care Services ("AACS") has operated in the city of Evansburgh and successfully provided consulting, counseling, and referral services to prospective adoptive and foster families amongst Evansburgh's racially and ethnically diverse population. R. at 3. AACS is a child placement agency (hereinafter "agency") which is uniquely tailored to work with refugee families, including those from Ethiopia, Iraq, Iran, and Syria. R. at 3, 5. AACS is one of thirty-four agencies in Evansburgh which seeks to match potential parents with a child through their best-matched agency. R. at 4. The Department Health and Human Services of the city of Evansburgh ("HHS"), selects a prospective family based upon each agencies' certification and recommendation. R. at 4. According to the East Virginia Code, HHS gives preference to families based on the following conditions: (1) "families in which at least one parent is the same race as the child needing placement"; (2) "ages of the child and prospective parent(s)"; and (3) "the cultural and ethnic background of the child . . ." E.V.C. § 42-2(b); E.V.C. § 37(e).

When families decide to adopt or foster a child, they contact an agency to receive counseling, training, and certification. R. at 3. If the family is better suited to the profile of another agency, it is commonplace for agencies to refer families to one another. R. at 5. The agencies must then perform home studies, training, and other services for these families to aid in the adoption or fostering process with the benefit of funding from the city. R. at 4-5. While the agencies in Evansburgh have various specializations, AACS was specifically formed to provide support to the refugee population, including war orphans, trauma survivors, and children with other special needs. R. at 5. AACS embodies the premise that all children are a gift and ensures that it "lay[s]

the foundations of divine love and service to humanity by providing for these children and ensuring the services [it] provide[s] are consistent with the teachings of the Qur'an." R. at 5.

Following the federal legalization of same-sex marriage, the Equal Opportunity Child Placement Act, or EOCPA, was amended to prohibit discrimination on the basis of sexual orientation. R. at 6. The EOCPA was further amended to require a posted statement in each agency that it could not discriminate on the basis of race, religion, national origin, sex, marital status, disability, or sexual orientation, notwithstanding the E.V.C.'s codified requirement that many families would be given preference based upon many of these same characteristics. R. at 6; E.V.C. § 42.-4; E.V.C. § 42-2(b); E.V.C. § 37(e). Over two years after passage of the amendment, Mr. Hartwell was approached by a news reporter who inquired if all agencies were in compliance with the amendments. R. at 6. Mr. Hartwell then decided to contact select agencies—notably, only those that were religiously affiliated—in order to "determine their policies and practices,". R. at 6-7.

After a discussion with Sahid Abu-Kane, Executive Director of AACS, Mr. Hartwell stated that because AACS referred same-sex couples to one of the four agencies in the city which served the LGBTQ community, it was in violation of the EOCPA. R. at 7, 8. Although no couples have ever filed a complaint of discriminatory treatment against AACS, Mr. Hartwell refused to renew AACS' contract, severing their access to funding, unless AACS both certified same-sex couples and posted the non-discrimination statement on its premises. R. at 7. Further, Mr. Hartwell issued a "referral freeze," which ordered all other agencies in the city to cease referring families to AACS. R. at 7-8.

Since the freeze and severance of funding, a startling number of events have shone a light on the harm caused by Mr. Hartwell's actions. Specifically, there has been a "recent influx of refugee children into foster care," yet AACS has been unable to assist these children despite is

unique ability to do so. R. at 8. HHS issued an urgent notice to all agencies alerting them of the need for adoptive families due to this influx, yet refused to allow AACS to assist. R. at 8. Further, HHS refused to place a young girl with her two brothers because the brothers had been placed with a family working with AACS. R. at 8. Instead, the child was placed with a different family in another agency specifically because of the "referral freeze" against AACS. R. at 8. A five-year-old autistic child, who had been fostered in the same loving home for over two years, was denied permanent placement with the family because he was initially placed with AACS. R. at 8. Notwithstanding these and numerous similar events, Mr. Hartwell refuses to allow referrals to AACS. *See* R. at 8-9.

II. *Procedural History*

AACS is seeking both a temporary restraining order against Mr. Hartwell's referral freeze and a permanent injunction to renew the contract between HHS and AACS because the actions by Mr. Hartwell violate AACS' right to freely exercise its religion while the EOCPA's policy compelling speech violates AACS' free speech rights. The United States District Court for the Western District of East Virginia held that the EOCPA is not neutral and generally applicable because it was enforced only against AACS. R. at 14. The District Court held Mr. Hartwell's actions unconstitutionally burden AACS' exercise of its religion because the EOCPA mandates discrimination on the basis of various factors and allows organizations to embody specialized missions, but Mr. Harwell is now punishing AACS for embodying its faith. R. at 14. Further, the District Court held by requiring agencies to post a non-discrimination policy, the state was imposing unconstitutional conditions on the receipt of government funds while simultaneously requiring compelled speech. R. at 16. Mr. Hartwell appealed the holdings of the District Court and a panel of Judges within this Court reversed. Now, these issues are being reheard en-banc.

SUMMARY OF THE ARGUMENT

Mr. Hartwell's actions against AACS violate both AACS' rights to freely exercise their religion and its right to free speech. The EOCPA is not neutral and generally applicable, thus its unconsititutional burden on AACS' exercise of religion must survive strict scrutiny. Since the EOCPA is neither narrowly tailored nor the least restrictive means to achieve a compelling government interest, its enforcement against AACS is unconstitutional. Further, Mr. Hartwell has unconstitutionally applied the EOCPA to AACS notwithstanding a strict scrutiny analysis because AACS is a religious organization which should be free to make decisions which guide its mission free from government interference. Additionally, because the EOCPA imposes a disability on the practice of religion, it cannot be constitutionally applied to AACS.

The EOCPA, as applied to AACS, also violates the free speech rights of AACS because it compels speech, specifically endorsements of ideologies with which AACS does not embody. Because the EOCPA requires the posting of speech on a private forum, private speech is being unconstitutionally converted into government speech. Additionally, HHS conditions government funding on the relinquishment of a fundamental right. Further, it denies a benefit to AACS unless they relinquish their right to speak freely, which is an unconstitutional condition. Because Mr. Hartwell's application of the EOCPA to AACS violates the First Amendment by both unconstitutionally burdening the free exercise of religion and freedom of speech, this Court should reverse the decision of the Appellate panel and grant AACS' request for a temporary restraining order and a permanent injunction.

ARGUMENT

I. MR. HARTWELL'S ACTIONS VIOLATED AL-ADAB AL-MUFRAD CARE SERVICES' RIGHTS TO FREELY EXERCISE ITS RELIGION BECAUSE THE EQUAL OPPORTUNITY CHILD PLACEMENT ACT IS NOT NEUTRAL AND GENERALLY APPLICABLE, NOR DOES IT DOES NOT PASS STRICT SCRUTINY, AND BECAUSE THE REFERRAL FREEZE IS UNCONSTITUTIONAL NOTWITHSTANDING A STRICT SCRUTINY ANALYSIS.

When a party challenges a law that burdens the free exercise of religion, courts must first determine whether the challenged law is both "neutral" and "generally applicable." *Employment Division, Department of Human Resource of Oregon v. Smith*, 494 U.S. 872 (1990). If the law is not neutral and generally applicable, the burden on the exercise of religion will only be permissible it survives a strict scrutiny analysis. *Id*. at _.

When assessing prohibitions that are not constitutionally permissible, the Supreme Court wrote that the government cannot "impose special disabilities on the basis of religious views or religious status." *Id.* at 877. This proposition ensures that those who exercise religion are not forced to give up other rights and benefits simply because of their faith. *Cantwell v. State of Conn.*, 310 U.S. 296, 303-304 (1940); *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). *But see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (holding that individuals must comply with valid and neutral law of general applicability that controls physical acts).

More recently, the Supreme Court also recognized that even if a law is both neutral and generally applicable, some decisions of religious organizations should not scrutinized as they are protected acts under the Free Exercise clause. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) (holding that matters which affect a religious organization's faith and mission are not subject to a *Smith* analysis).

In the present case, the challenged law is not neutral and generally applicable and it does not survive a strict scrutiny analysis. Additionally, the EOPCA imposes a special disability on

AACS because of its views. Finally, AACS as a religious organization should be insulated from government interference in matters which affect its faith and mission. Since the Constitution protects the free exercise of religion, Hartwell's actions against AACS are unconstitutional and this Court should reverse the decision of the Appellate Panel and grant the temporary restraining order and permanent injunction.

A. The EOCPA as applied to Al-Adab Al-Mufrad Care Services is not neutral and generally applicable because it does not respond similarly to religiously motivated conduct and comparable secularly motivated conduct and the system of individualized exemptions has not been extended to Al-Adab Al-Mufrad Care Services' religious hardship despite the absence of a compelling reason for the refusal.

To avoid violating the Constitution's protection of the free exercise of religion, a law that burdens the physical exercise of religion must be deemed neutral and generally applicable. *Smith*, at 879 ("the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") A statute lacks neutrality and general applicability when hostility toward religion is found in the intent, drafting or construction of the law. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, (1993); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1721 (2018). "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi*, 508 U.S. at 547. Therefore, courts must ensure the free exercise of religion when there is "even slight suspicion" of religious animosity. *Id.* at 547.

However, hostility toward religion is a sufficient condition of non-neutrality rather than a necessary condition. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding a condition requiring work on Saturday despite religious objection impeded the free exercise of religion, even when the court found no hostility or ill will in the challenged statute); *see also Hosanna-Tabor*

Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012) (resolving a Free Exercise claim without analyzing hostility); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding free exercise rights were violated without finding hostility or ill will).

1. The EOPCA does not respond similarly to religiously motivated conduct and comparable secularly motivated conduct.

"The Free Exercise clause protects religious observers against unequal treatment, and inequality results when . . . interests [the government] seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542–43 (internal quotation marks and citation omitted). Thus, the standard of neutrality and general applicability requires that government policies respond similarly to conduct that is religiously motivated and comparable conduct that is secularly motivated. *Lukumi*, 508 U.S. at 536. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (finding secular motivations were impermissibly treated as more important than religious motivations allowing beards under categorical medical exemption but not religious practice); *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) ("neutral enforcement of a legitimate [government interest] generally will satisfy this requirement; the selective enforcement . . . will not.) See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010); *Axson–Flynn v. Johnson*, 356 F.3d 1277, 1289–93 (10th Cir. 2004).

In determining whether a law is neutral and generally applicable a Court may examine "[r]elevant evidence includ[ing], among other things, 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 decisionmaking [sic] body." *Lukumi*, 508 U.S. at 540. *See Masterpiece*, 138 S. Ct.

at 1721 (reviewing the history of the law to determine if discriminatory intent in its passage or application).

In *Lukumi*, the Court found that the law passed by the city in response to an organization's plans to open a church was not neutral and generally applicable. 508 U.S. at 546. A not-for-profit organization filed petitions and permits to open a Santerían church. *Id*. at 526. In response, the city council enacted laws prohibiting the sacrificial killing of animals, which is a central tenet of the Santerían faith. *Id*. When the church argued that the ordinance violated the Free Exercise clause, the city defended the ordinance on the grounds that it was in the interest of public health and welfare. *Id*. at 529. The trial court concluded that the ordinance's effect on petitioners' religious conduct was merely incidental to the ordinances' secular purpose and effect. *Id.* at 529. The Supreme Court, however, found that since the ordinance applied only to sacrifice, rather than other forms of animal cruelty, it was underinclusive and thus did not meet the standard of general applicability. *Id*. at 544-46.

In the present case, the EOCPA has not been applied in a manner that is neutral or generally applicable because Mr. Hartwell targeted AACS and treated their religious beliefs with hostility. In reviewing the specific series of events, as called for in *Lukumi*, it is clear that no complaint or standard review sparked this controversy over AACS's long time practices. R. at 6 Instead, Mr. Hartwell started an unorthodox quasi-investigation and condemned AACS's religious practices after being confronted by a reporter. R. at 7. The forty-year contractual relationship between HHS and AACS, paired with the absence of complaints from the community, indicates AACS provides satisfactory, if not exemplary, service to the children in need in Evansburg. Mr. Hartwell's harsh reaction to AACS's organizational practices intuitively brings slight suspicion of religious targeting and animosity. In addition to the irregularity in timing, the record indisputably reflects

that HHS only contacted religious organizations about their policy. R. at 6. This admission causes for to appreciable apprehension regarding Mr. Hartwell's motivation for the impromptu investigation of AACS. The apparent animosity toward the religious practices of AACS shows Mr. Hartwell's enforcement of the EOCPA is not neutral and generally applicable.

Furthermore, Mr. Hartwell's enforcement treats AACS unequally by prohibiting AACS from providing a religiously motivated referral to other agencies, but makes no similar restrictions on referrals with secular motivation. R. at 5. The unequal treatment of AACS is apparent throughout the record. First, as noted above, only religious organizations were surveyed regarding their current policies, thus religious organizations were singled out from the entire class of agencies. R. at 6-7. None of the agencies with secular missions were questioned along with the religious organizations. R. at 6-7. Second, HHS has indisputably embraced a system that allows an individual agency to set their own organizational policies and profiles, and additionally allows agencies to routinely refer families to other agencies when a family does not fit the established profile. R. at 5. This policy is shared with prospective parents on the official website for HHS. R. at 5. This discretion allows agencies to tailor their services to segments of the community they most wish to serve – such as the four agencies that specialize in serving LGBTQ families and AACS, who specializes in serving refugee families. Dictation of organizational policies has been traditionally enjoyed by all of Evansburgh's agencies, presumably because the practice helps ensure "a system that best serves the well-being of each child," as required by HHS's statutory mandate. R. at 3.

Routine referrals of prospective foster and adoptive parents to other, more suitable, agencies are a result of the discretion HHS allows to each agency to define its preferred mission. R. at 5. Despite the unfettered approval of referrals as a standard practice on the broad basis of

meeting a profile, HHS finds fault in AACS's mission and referrals, which are motivated by the organization's desire to follow the teachings of the Qur'an. R. at 7. Because AACS is not the best match for LGBTQ families it refers them to a better suited agency. R. at 7. AACS' practice of referring LGBTQ is consistent with the practices of referral by other agencies. R. at 5. Furthermore, the referrals have the same effect as the secular referrals of other agencies – finding a suitable agency to certify and service a potential foster or adoptive family. The record does not reflect any inquiry about the policies surrounding the profiles of other agencies; thus Mr. Hartwell cannot assert any distinction about what triggers referrals in the other thirty-three agencies – whether it be for a permissible reason or an impermissible reason. R. at 5. However, the record does reflect that each LGBTQ family who approached AACS for certification received respectful treatment and a referral to an agency special situated for their needs. R. at 7. In fact, there have been no complaints filed against AACS by any of these families. R. at 7. The unequal treatment of agencies' discretion to set a profile and make referrals is a policy outlined as a Constitutional violation, as outlined in *Lukumi* and destroys neutrality or general applicability the ordinance may have contained.

Furthermore, this law does not meet the logical standard for neutrality because it both prohibits and sanctions the same basis of discrimination. *Compare* E.V.C. § 42.-2 (prohibiting child placement agencies from "discriminating on the basis of race . . . when screening and certifying potential foster care or adoptive parents or families.") *with* E.V.C. § 42.-2(b) (Child Placement Agencies must "give preference" to foster or adoptive families in which at least one parent is the same race as the child needing placement, "when all other parental qualifications are equal."); *compare also* E.V.C. § 42.-3(b) ("the EOCPA was amended to prohibit Child Placement Agencies from discriminating on the basis of sexual orientation.") with E.V.C. § 42.-3(c) ("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."). Therefore, the explicit text of the EOCPA lacks neutrality because it simultaneously prohibits and requires discrimination on the basis of sexual orientation and race. Since the ordinance has been applied unequally and lacks neutrality, it unduly burdens the free exercise of religion and must be strictly scrutinized for its constitutionality.

2. *Individualized exemptions have not been extended to AACS's religious hardship despite the absence of a compelling reason for the refusal.*

In addition to hostility toward religion and unequal treatment of religious motivations, the Supreme Court's determination of general applicability often focuses on systems of "individual exemptions," finding that such exemptions must be extended to cases of religious hardship unless there is "compelling reason" for the refusal. *Smith*, 494 U.S. at 884 (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981)); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987). *See also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) (holding "selective, discretionary application" required a challenged statute to pass a strict scrutiny review); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) ("Because the ordinance requires an evaluation of the particular justification for the [conduct], this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct.") (internal quotation mark and citation omitted); *Ward v. Polite*, 667 F.3d 727, 737 (6th Cir. 2012) (finding a demonstrated history of willingness to allow referrals in order to avoid unsuitable matches should be extended to religious objector unless good reason existed for refusal). Hostility toward religion is also inferred from uneven application of laws that burden religious freedom. As the Supreme Court held in *Bowen v. Roy*, "refusal to extend an exemption to an instance of religious hardship

suggests a discriminatory intent. . . . [and] tends to exhibit hostility, not neutrality, towards religion." 476 U.S. 693, 708 (1986).

In *Ward*, a student counselor was expelled from a public university's graduate program after making an objection to counseling an LGBTQ patient about sexual relationships. 667 F.3d at 730. The student asserted that her First Amendment rights, particularly the freedom of speech and free exercise of religion, had been violated because a system of individualized exemptions allowed ad-hoc referrals on secular basis, but refused and punished her referral request, which was made on a religious basis. *Id*. The school argued that it had "enforced a neutral and generally applicable curricular requirement against Ward and did not target her because of her speech or religious beliefs." *Id*. at 732. The court held "even in the context of a secular university, religious speech is still speech, and discriminating against the religious views of a student is not a legitimate end of a public school." *Id*. at 734. The court reasoned that "it makes sense to allow a student, concerned about her capacity to stay neutral . . . to refer clients seeking such therapy," because both patient and counselor would benefit. *Id*. at 736. In review, the court weighed heavily the existence of a system of individualized referrals that, without good reason, was not extended to her. *Id*. at 734. ("Why treat Ward differently? That her conflict arose from religious convictions is not a good answer; that her conflict arose from religious convictions for which the department at times showed little tolerance is a worse answer.") The court held that "[t]he key problem with the university's position is not the adoption of this anti-discrimination policy, . . . [i]t is that the school does not have a no-referral policy . . . and adheres to an ethics code that permits values-based referrals in general." *Id.* at 730.

In the present case, a system of individual exemptions, namely the organizational policies that dictate when it is appropriate to refer, is not being extended to AACS's religious hardship and

no compelling reason exists for the refusal. R. at 5-7. The policies of each agency, which may trigger a referral, acts as a system of individualized exemptions. R. at 5. Overall, the policy regarding referrals in Evansburgh's system of child placement places no burden on the referring child placement agency to identify the reason for the referral. R. at 5. One can reasonably assume that the reason HHS allows the referrals so freely is that the referrals ensure individual organizational requirements are met before a potential foster or adoptive family is trained or certified. R. at 5. An agency may believe that a family is better matched with an organization that shares the family's religious beliefs or is familiar with the family's cultural practices. Considering Evansburgh's sizeable refugee population, it would be reasonable to assume this is the very reason that AACS has the opportunity to make such a meaningful impact in assisting dozens of children on any given day. R. at 5.

While it may be speciously arguable that the sanctioned discrimination is to protect minority populations, this reasoning does not impart the general applicability that is required. Furthermore, this argument for general applicability falls flat on two points. First, when the law was commissioned, the state specifically declared the intention was "eradicating discrimination in all forms, . . . regardless of . . . philosophy or ideology;" thus, the philosophies of discrimination to favor racial and sexual minorities based on lofty ideologies would also be targeted if the law were neutral. R. at 6. However, the state has understandably found that such discrimination should be exempt from the law because it helps accomplish the ultimate goal – finding suitable homes for the city's most vulnerable children. R. at 6. Second, the record shows, ad-hoc discrimination on the basis of sex and religion has also been practiced by HHS with no sanction from law. (e.g. HHS's refusal to place a 5-year old girl with a family on the basis of sex; HHS's repeated refusal to place a child with a family on the basis of religion) R. at 9. However, those discriminatory

decisions, both of which are explicitly prohibited by the EOCPA, have been judged by HHS to be unworthy of any action or reprimand. The record thus reflects the EOCPA has been applied to AACS unequally and falls short of the standard of general applicability.

AACS does not attempt to demonstrate that HHS or any other agency discriminates against same-sex couples for secular reasons because such a demonstration is not required to show that the law does not meet the requisite neutrality. Rather, AACS can show that the response to conduct that is religiously motivated (i.e. AACS's ability to refer families to agencies with more amenable policies) and comparable conduct that is secularly motivated (i.e. all other agencies ability to refer families to agencies with more amenable policies) is met with unequal treatment. AACS is merely asking to continue the standard practice of referring clients who do not fit their profile and Mr. Hartwell fails to offer any reason why exemptions have been offered to all other agencies, yet the EOPCA applies only to AACS. Because AACS's right of free exercise of religion is violated by Mr. Hartwell's application of the EOCPA as the law burdens religious practice and is not neutral and generally applicable, the EOCPA is subject to analysis under strict scrutiny.

B. The EOCPA as applied to Al-Adab Al-Mufrad Care Services does not pass strict scrutiny because it burdens religion but is not narrowly tailored to further a compelling state interest.

The standard of strict scrutiny is a high bar to meet but it is required when a non-neutral law burdens religion. "If [a] law . . . is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the law satisfies the First Amendment only if it advances interests of the highest order and is narrowly tailored in pursuit of those interests." *Ward*, 667 F.3d at 738 (quoting *Lukumi*, 580 U.S.at 546) (internal quotations omitted). Additionally, to meet the requirements of strict scrutiny, laws restricting religious exercise must also "restrict other conduct producing substantial harm or alleged harm of the same sort, [otherwise] the interest given in

justification of the restriction is not compelling." *Lukumi*, 580 U.S. at 547. The Supreme Court has also held that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id*. Moreover, looking "beyond broadly formulated interests" purported to justify the general applicability of laws burdening religion, the court should scrutinize government interest in light of the asserted harm of granting "specific exemptions to particular religious claimants*" Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The Supreme Court's rulings culminate in the premise that "[t]he values underlying [the Constitutional] provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

In *Yoder*, the Court recognized the State's paramount interest in imposing reasonable regulations regarding education but ultimately found that the regulation was impermissible. *Id*. at 235. The plaintiffs argued that a rule requiring school attendance intruded upon their free exercise of religion because the "Amish religious faith and their mode of life [are] . . . inseparable and interdependent." *Id*. at 215. The Court stated that despite the understandable priority, the state's interest in education "is by no means absolute to the exclusion or subordination of all other interests." *Id*. at 215. Under *Yoder*, the religious freedoms of the Constitution had been established "[l]ong before there was general acknowledgment of the need for universal formal education . . . ." *Id*. at 214. Weighing the constant nature of the religious practice, the Supreme Court found that "the values and programs of the modern secondary school [were] in sharp conflict with the fundamental mode of life mandated by the Amish religion." *Id*. at 217. The exposure to "worldly influences in terms of attitudes, goals, and values contrary to beliefs" created a substantial

interference with religion occurred which contravene[d] the basic religious tenets and practice of the Amish faith . . . ." *Id*. at 216.

In the instant case, the EOCPA cannot pass strict scrutiny because the law is riddled with exemptions via the allowance of referrals. Furthermore, HHS cannot adequately allege compelling reason for the restriction. Mr. Hartwell provides various reasons to enforce the EOCPA; yet none are compelling reasons to enforce the EOCPA by way of denying AACS the same exemption as everyone else. R. at 9. Additionally, some of these reasons demonstrate why AACS should be allowed to continue its service. R. at 9.

First, the government asserts that child placement contractors voluntarily agree to be bound by state and local laws, therefore those laws are enforced; however, the law can be enforced using a religious accommodation which AACS is entitled to by way of the system of individual exemptions. R. at 5. Second, the government goes on to claim an interest in ensuring that child placement services are accessible to all Evansburgh residents who are qualified for the services; however, all residents who are qualified for service have had access to child placement service, including LGBTQ families who are serviced by one of the four Agencies that specialize in LGBTQ families or one of the other agencies who have not voiced any objection to full compliance with the EOCPA. R. at 7. Next, the government claims the EOCPA must be enforced to ensure the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; however, the pool of foster and adoptive parents is not broadened by losing a community partner of forty years. R. at 3. The pool is arguably lessened as the record does not indicate any other agency in Evansburgh who is specially situated to certify and counsel immigrant families. R. at 3, 5, 7. Furthermore, there is no evidence that AACS's religious exercise has prevented or deterred anyone from becoming a foster or adoptive parent. R. at 7. Finally, strict enforcement is touted to

ensure that individuals who pay taxes to fund government contractors are not denied access to those services; however, LGBTQ tax payers have not been denied the service for which they pay. R. at 7. AACS has merely referred them to other agencies who are more suitable, which is a solution that is likely deemed satisfactory for all involved parties. This analysis shows that AACS's prohibited referrals cannot pose any different alleged harm as the allowed referrals. Thus, the justifications of the restriction, as stated by Mr. Hartwell on the record, are not compelling and the law does not pass strict scrutiny.

Furthermore, the availability of numerous other child placement agencies in Evansburg and the usual ability of agencies to refer prospective parents to one another further show that the law is not narrowly tailored. R. at 5. The State has no justified cause to require AACS to abandon its closely held beliefs when potential foster and adoptive parents have a plethora of options to accomplish the goals stated by Mr. Hartwell; especially considering that Mr. Hartwell has asserted no potential harm in granting a specific exemption to AACS. R. at 7. Although the goal of reducing discrimination is of high social importance, as was the case in *Yoder*, it cannot here override AACS's right to freely exercise religion when such exercise warrants zealous protection. 406 U.S. at 214; East Virginia's understandable interest in preventing discrimination, does not exclude to or subordinate AACS's religious interest in abstaining from the certification of potential LGBTQ foster and adoptive families. R. at 6. Furthermore, the values required to certify these families is in sharp conflict with those mandated by the Qur'an, thus by applying the EOCPA to AACS, Mr. Hartwell creates a substantial interference with religion because it contravenes the basic religious tenets and practice of the faith. Additionally, the EOCPA "cannot be regarded as protecting an interest 'of the highest order' because it leaves appreciable damage to th[e] supposedly vital

interest [of eliminating discrimination] unprohibited" by requiring discrimination on the basis of race and sexual orientation. R. at 5.

C. Mr. Hartwell's conduct infringes on AACS's constitutional freedom to exercise their religion notwithstanding a strict scrutiny analysis because AACS is a religious organization with the right to decide matters which affect its faith and mission and the EOCPA imposes special disabilities on the basis of religion.

HHS asserts that the EOCPA is neutral and generally applicable. However, no matter how the Court decides the neutrality of the statute, the Supreme Court has made "clear that the Free Exercise Clause does guard against the government's imposition of special disabilities on the basis of religious views or religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (quoting *Smith,* 494 U.S. at 877) (internal quotations omitted).

1. *AACS is a religious organization with the right to decide matters which affect its faith and mission*.

The Supreme Court has recognized that even in the case of a neutral law of general applicability, some decisions of religious organizations should not be subject to a *Smith* analysis. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) (resolving a free exercise issue without a *Smith* analysis); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (holding free exercise rights were violated without employing a Smith analysis). This exclusion, is based in ideals from antiquity that call for "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id*. at 186 quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); referring to *Watson v. Jones*, 13 Wall. 679, 20 L.Ed. 666 (1872).

Smith controls laws governing the physical acts that are the result of the free exercise of religion. *See Smith*, 494 U.S. at 877 (distinguishing between physical acts and regulation of beliefs and practices); *see also Hosanna-Tabor*, 565 U.S. at 190 (recognizing the language of Smith directed toward physical acts). In *Smith*, the Supreme Court listed several specific acts of which performance or abstention may constitute the physical "exercise of religion" including "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation." *Smith*, 494 U.S. at 877. The Court also specifically noted several instances of beliefs and practices wherein the government may never interfere, specifically, that "[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Id*. (omitting internal citations); as well, the government would not be allowed to "ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." *Id*. at 877-78. Both the list of physical acts and the list of untouchable beliefs and practices appear to be exemplary rather than exhaustive, leaving open the recognition that additional beliefs and practices once recognized by the Court may still be exempt from the control of government under the First Amendment. One such exception, recognized by *Hosanna-Tabor*, is the ministerial exemption. *Id*. at 190 ("The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.")

Most cases regarding this distinction between regulation of physical acts and that of non-physical practices, focus on hiring practices and the ministerial exception but the Court has resolved other questions about non-physical practices. *See United States v. Lee*. 455 U.S. 252

(1982) (considering that the Constitution may require accommodation of religious activity for a tax law). Although precedent on the matter is limited regarding the distinction between regulation of physical acts and that of non-physical practices, the Supreme Court set forth a test applicable to claims of government burdening non-physical acts of religion by determining whether a religious accommodation is constitutionally required, as was established by the Court in *United States v. Lee*. 455 U.S. 252 (1982). Under *Lee*, "[t]he preliminary inquiry in determining the existence of a constitutionally required exemption is whether the [challenged law] interferes with the free exercise rights" of the religious organization making the constitutional claim. *Id*. at 256-57. If an interference of rights is found to occur, "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." Id. at 257 (1982). The final inquiry is "whether accommodating the . . . belief will unduly interfere with fulfillment of the governmental interest." Id. at 259. ("Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature.")

Both statute and precedent demonstrate that exemptions and accommodations to allow the exercise of religion are permissible and desirous for those who are controlled by the government. *See Id*. (quoting *Braunfeld v. Brown*, 366 U.S. 599 (1982) ("to make accommodation between the religious action and an exercise of state authority is a particularly delicate task ... because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing ... prosecution.")); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) ("we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens"); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that religious accommodation was not prohibited by the Constitution); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327,*

329-30 (1987) (holding government may exempt secular nonprofit activities of religious organizations from policy prohibiting religious discrimination in employment); *United States v. Lee*, 455 U.S. 252, 259 (1982) (holding religious beliefs can be accommodated, as long as the policy makers are not "radically restricted in operating latitude").

In *Hosanna-Tabor*, a lawsuit was filed when a church minister was terminated and the Court found that relevant employment law did not apply to such a decision of a religious organization. The plaintiff argued that no special rule was warranted because religious employers are protected by invoking the implicit right to free association. *Id*. at 189. The Court found that the ministerial exception was proper because the case involved "an internal church decision that affects the faith and mission of the church itself." *Id*. at 190.

In *Lee*, an Amish employer objected, on religious basis, to paying Social Security tax. 455 U.S. at 255. The Court found that because existing statutory exemptions did not reach him, as an employer, the only way he could be exempt is under a "constitutionally required exemption." *Id*. at 256. The Court used a three prong test finding "a conflict between the Amish faith and the obligations imposed by the social security system," an apparent government interest in enforcing the system, but foresaw that it would be "difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." *Id*. at 257-60. Reasoning that the accommodation would be too burdensome on the system, the Court held that no Constitutional exemption existed. *Id.* at 260.

In the present case, a *Smith* analysis not required because AACS's decision to participate in the ministry of child placement services is not subject to an analysis applied to outward physical acts of religious exercise. AACS's decision to apply the teachings of the Qur'an to its ministry of serving foster and adoptive children falls in the category of an internal decision that affects the

faith and mission of the religious organization, as in *Hosanna-Tabor*, rather than the outward physical acts of an individual in *Smith*. Thus, the application of *Smith* is invalid in the determining the constitutionality of the EOCPA as to AACS.

Applying the test set forth in *Lee*, demonstrates that HHS is required by the Constitution to provide a religious accommodation allowing AACS to continue its ministry in serving children in need of foster and adoptive homes. As has been established, AACS's free exercise rights are infringed by unequal enforcement of the EOCPA because the requirement to certify same-sex couples infringes on AACS's right as a religious organization to decide matters which affect its faith and mission. Even if this Court agrees with the disputed contention that the "limitation on religious liberty . . . is essential to accomplish an overriding governmental interest," it must also have to find that granting an accommodation to AACS would radically restrict the operating latitude of the legislature. However, since the exception AACS needs to meet Mr. Hartwell's enforcement of the law, is simply an extension of an already established exception (i.e. referral to another agency), and no evidence has been presented to show that the exemption would be harmful, the Court would be hard-pressed in so finding.

2. *The EOCPA imposes special disabilities on the basis of religion*.

When asserting the proposition in *Smith*, the Court cited cases of religious activity that was hindered by statute on the basis of a religious viewpoint or religious status. 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978) (holding that a state law disqualifying ministers of the Gospel from service in the legislature was unconstitutional)); *Fowler v. State of R.I.*, 345 U.S. 67, 69 (1953) (finding that a law was unconstitutionally construed and applied when a minister of the Jehovah's Witness faith was arrested but a minister of another faith would not have been); *Larson v. Valente*, 456 U.S. 228 (1982) (finding that a church was unconstitutionally disabled from

soliciting contributions). These cases support a line of precedent that when the government imposes conditions that hinder religious activities which would be otherwise allowed or otherwise prohibit secular activities on the basis of religious views or status, an impermissible special disability has been imposed. As demonstrated by the Court's examples, a myriad of activities may be so protected such as holding political office, as in *McDaniel;* ministering in a park, as in *Fowler*; or soliciting contributions, as in *Larson*.

In *McDaniel*, the Supreme Court held that a state law disqualifying a minister from political office because of his religious work, had encroached upon McDaniel's right to freely exercise his religion. The Supreme Court found that McDaniel could not "exercise both rights [the right to the free exercise of religion and the right to seek political office] simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.'" *McDaniel*, 435 U.S. at 626 (1978).

Here, an impermissible special disability has been imposed on AACS in the construction and application of the EOCPA because HHS has construed the statute to mean that AACS may not refer potential adoptive and foster families who are LGBTQ to other agencies, thus completely disqualifying AACS from participation in the ministry and service of child placement. The application of the EOCPA as to AACS exemplifies governmental imposition of conditions that prohibit secular activities on the basis of religious views, namely continued service as a child placement agency. R. at 7. As explained in *McDaniel*, "[AACS] cannot exercise both rights [the right to free exercise of religion and right to continue its ministry of child placement] simultaneously because the State has conditioned the exercise of one on the surrender of the other" therby forcing AACS to choose between standing by its religious beliefs or certify and counsel

potential LGBTQ foster and adoptive families against those beliefs. Therefore, because HHS has imposed a special disability on AACS, the EOCPA as applied is unconstitutional.

II. HHS' POLICIES INFRINGE ON AACS' RIGHT OF FREE SPEECH UNDER THE FIRST AMENDMENT BECAUSE IT COMPELS SPEECH AND IMPOSES UNCONSTITUTIONAL CONDITIONS ON THE RECEIPT OF GOVERNMENT FUNDS.

The First Amendment protects the right of Americans to speak freely without government interference or retribution. U.S. Const. amend. I. The First Amendment's Free Speech clause is applied to the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); U.S. Const. amend. XIV. Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Supreme Court emphasizes that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). Thus, "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

Additionally, the Supreme Court has held that the protections of the First Amendment shield religious observers from denial of state benefits on the basis of religious conduct or activity. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–35 (1995) (holding that the First Amendment precluded state actor from denying funding based on publication's religious viewpoint). The Court has "emphasized that conditions upon public benefits cannot be sustained if they . . . inhibit or deter the exercise of First Amendment freedoms." *Sherbert*, 374 U.S. at 405 citing *Speise v. Randall*, 357 U.S. 513. This proposition is the basis of the unconstitutional conditions doctrine. *Id.* The EOCPA compels speech because it attempts to force AACS to voice

ideas with which the organization disagrees. Furthermore, it creates an unconstitutional condition because eligibility can only be attained by inhibiting AACS's First Amendment rights in order to be eligible for a government benefit.

A. Requiring AACS to certify and counsel LGBTQ families compels speech that is against the organization's core beliefs.

"The government may not … compel the endorsement of ideas that it approves." *Knox v. Service Employees*, 567 U.S. 298, 309(2012). The government may not compel "individuals to mouth support for views they find objectionable," *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); or "compel affirmance of a belief with which the speaker disagrees," *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). When a state compels individuals "to voice ideas with which they disagree, it undermines [free speech]." *Janus* 138 S. Ct. 2448, 2464 (2018). Compulsion may take the form of a direct threat of punishment or "indirect discouragement" such as "imprisonment, fines, injunctions or taxes." *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 402, (1950). *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (holding that compulsion existed where it was "abundantly clear" that a student would not be able to continue her program of study if she refused to say words with which she was uncomfortable). Compulsion of speech may include imposition of injuries such as "denial of state bar admission, e.g., *Baird v. State Bar*, 401 U.S. 1, 5 (1971); loss of employment, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 592 (1967); and the conditioning of employment on a vague oath, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 361 (1964)." *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1248 (10th Cir. 2000).

The government may not "require [an] individual to participate in dissemination of ideological message" even when a legitimate and substantial purpose is present. *Wooley*, 430 U.S. at 716-17 (holding that a state may not compel an individual to participate in dissemination of

ideological message via license plate); *but see Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 219 (2015) (holding that license plates do constitute government speech based on the states historic control over license plates issuance).

Additionally, the government may not constitutionally enforce a requirement that individuals "alter the content of their speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFL"*) (quoting Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 795 (1988)). "Content-based regulations target speech based on its communicative content." Id. (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)) (internal quotation marks removed).

In *NIFL*, workers in crisis pregnancy centers opposed a law requiring the workers to give clients notification that state funded family planning services, including abortion, were in existence and may be available for the patient. *NIFL*, 138 S. Ct. at 2369. NIFL argued that the required speech altered the content of their message and mission, which was to discourage abortion; thus, the requirement to advise clients about the availability of abortion was an unconstitutional regulation of content-based speech. *Id*. at 2371. The lower court found that the required speech was "professional speech", thus exempt from the protection of the First Amendment. *Id*. at 2371. The Supreme Court held that there was no category of professional speech that was exempt from the protections of the constitution. *Id*. at 2371-72. The Court stated precedent supports a requirement for "professionals to disclose factual, noncontroversial information in their commercial speech." *Id*. at 2372 (internal quotation marks omitted). However, the government is not allowed to require the speaker to alter the content of their speech. *Id*. at 2371.

In *Wooley*, the Supreme Court held that a "state could not constitutionally require individuals to participate in dissemination of ideological message by displaying it on his private

property." 430 U.S. 705, 713. In *Wooley*, an automobile owner challenged a law as being unconstitutional which required passenger-car drivers to display the message "Live Free or Die" on their license plates. *Id*. at 709. The automobile owner asserted that he was being "coerced" by the state to endorse a slogan which he found "morally, ethically, religiously and politically abhorrent." *Id*. at 13. The state asserted that it had legitimate interest in facilitating the identification of passenger vehicles and promoting appreciation of history, individualism, and state pride. *Id*. at 716. The Court found that although the requirement compelled "the passive act of carrying the state motto on a license plate," it was a matter of degrees from more "serious infringement upon personal liberties." *Id*. at 715. The Court held that a State's legitimate interest to disseminate an ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id*. 717.

In the present case, Mr. Hartwell has attempted to compel AACS to endorse an ideology which it finds abhorrent by requiring AACS to certify LGBTQ families and post the non-discrimination message. This endorsement was compelled with direct threat of non-payment and denying a renewed service contract. The Executive Director of AACS, Mr. Sahid Abu-Kane, explained to Hartwell that the requirement to service LGBTQ families, rather than refer them to another agency, was prohibited by the organization's religious belief. R. at 7. Thus, the requirement to certify LGBTQ couples was coercion by the state to endorse a slogan which he found morally, ethically, and religiously abhorrent, as was the case in *Wooley*. This compulsion is not constitutional. As in NIFL, the requirement to certify, rather than refer, LGBTQ families alters the content of AACS's speech, because AACS's services are based on the Qur'an, which opposes such behavior.

The EOCPA also unconstitutionally compels the agency to post a notice in their place of business to advise of the non-discrimination statute. Here, the state has asserted interest in eliminating discrimination and ensuring that tax payers have access to the services for which they pay. Whether or not this Court finds those interests legitimate, the requirement to post the non-discrimination statute, it is still a passive act of carrying a state message, which is a matter of degrees from more serious infringement, but unconstitutional none-the-less. That this compulsion is imposed by injury of non-payment is further evidence that the statute unconstitutionally regulates speech.

B. Requiring AACS to choose between its constitutional rights and its participation in child placement service creates an unconstitutional condition.

A violation of constitutional rights exists where the government conditions receipt of benefits on the forfeiture of a constitutionally protected right. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "To deny [a government benefit] to claimants who engage [or refuse to engage] in certain forms of speech is in effect to penalize them for such speech . . . ." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). Such a denial of benefits offends the protection of the First Amendment, thus creating an unconstitutional condition. *Perry*, 408 U.S. at 597 (finding government may not deny a benefit on a basis that infringes constitutionally protected interests).

Government benefits include many categories including subsidies, tax exemptions, and program funding. See *Rust v. Sullivan*, 500 U.S. 173, 175 (1991) (recognizing Title X grantees and programs benefit from receipt of Title X funds); *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 401 (1984) (recognizing a non-commercial education broadcaster's benefit in receipt of Corporation For Public Broadcasting funds); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (contemplating subsidies through tax-exemption as government benefits); *Perry*, 408 U.S. 593, 601 (finding a protectable benefit in terminated employment contract);

McDaniel v. Paty, 435 U.S. 618, 626 (1978) (finding "access to the ballot" a government benefit that is protected from unconstitutional conditions). *See also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

Constitutionally protected speech may only be prohibited in the administration of government programs when those activities are within the scope of the program and do not inhibit the activities of the organization that are outside the government funded program. See *Rust*, 500 U.S. at 197 (1991). "The distinction between conditions that define a [government] program and those that reach outside it is not always self-evident," *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 206 (2013); but clearly, the government may not enforce restrictions that distort or alter the traditional role of government contractors. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) ("[r]estricting [Legal Services] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys . . . .").

Distinguishing the scope of the program may also require determining whether the compelled speaker is a government speaker or a private speaker. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). The Supreme Court has rejected the idea that a state authorization system "converts [private speech] into government speech." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id*. at 1758. The court has identified a multi-factor test to determine what constitutes a government message which includes: 1) history of use to convey government

message, 2) whether the public closely identifies the entity with the state, and 3) whether the government maintains effective control over the messages conveyed. *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 208 (2015). *See also Matal*, 137 S. Ct. at 1744.

In *Rust*, doctors who were subsidized by government funding to promote specific methods of family planning brought an action challenging the constitutionality of a law prohibiting them from sharing information about abortion. 500 U.S. at 173. The doctors argued that Congress had imposed an unconstitutional condition on recipients of government funds by requiring them to relinquish their right to engage in abortion advocacy and counseling in exchange for funding. *Id*. at 196. The Court found that the program was intended to be "dedicated to advance certain permissible goals, [which] . . . necessarily discourages alternative goals . . . ." *Id*. at 194. Thus, because the scope of the program was narrowly defined and the speech was within that scope, the prohibition on speech was permissible. *Id.*

In *Legal Services*, government funded attorneys for indigent clients argued that a statute, construed as prohibiting the attorneys from addressing any legal concern related to amending or otherwise challenging any existing welfare law, violated their First Amendment right to free speech. *Legal Servs*., 531 U.S. at 538. The funding recipients argued that the program was intended to fund "a broad array of private speakers" to provide legal representation. *Legal Services Corp. v. Velazquez*, 2000 WL 991809 (U.S.), 21 (U.S.Resp.Brief,2000).

In *Matal*, the Supreme Court ruled that trademarks do not constitute government speech. The Court drew a distinction between *Walker*. The court applied the multi-factor test established in *Walker*. First, unlike the license plates in *Walker*, the government did not have a history of using trademarks to promote a governmental message. *Id.* Second, the court reasoned that the government did not maintain control over the message conveyed by the trademarks. Lastly, the

public did not closely identify the trademarks with the state. *But see Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) (holding that the public generally does perceive monuments as government speech).

In *Legal Services*, The Supreme Court found that statutory restrictions created a distortion in the duties of the attorneys because it interfered with the ability to give the advice as the attorneys best saw fit. *Legal Servs*., 531 U.S. at 543. In analogizing previous cases that address the relationship between government funding and government regulation of speech, the Court wrote, "[j]ust as government in [previous] cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, it may not design a subsidy to effect this serious and fundamental restriction of attorneys . . ." *Id*. at 544. The Court in *Legal Services* distinguished itself from *Rust* by finding that the scope of the speech was different because the lawyer was not the government's speaker. *Id*. at 542. The Court reasoned that the "attorney defending the decision to deny benefits will deliver the government's message in the litigation. The . . . lawyer, however, speaks on the behalf of his or her private, indigent client." *Id*.

In the instant case, the requirements of the EOCPA as applied to AACS imposes an unconstitutional condition for the receipt of government benefit. Participating in child placement services is itself protected speech. First, the writing and speech involved with referring, training, certifying, counselling, and supporting potential foster and adoptive families constitutes speech. Using *Legal Services* as an analog AACS is not the government's speaker. During screening, training, and certification, AACS speaks on behalf of organizational belief that placement with a potential foster or adoptive parent is in the best interest of the referred child. In this way, AACS speaks to the government, not for the government. Until HHS selects a family for placement, HHS

is the party who delivers the government's message in matters of child placement. Like *Rust*, the scope of the program is narrowly defined; however, unlike *Rust* that scope is not simply to disseminate the government's message. As was true in *Legal Services*, the system for child placement consists of a broad array of private speakers. Therefore, at the very least, AACS's speech in training, referring, and certifying can be deemed protected speech.

Furthermore, AACS has a forum for private speech which restricts the regulation may place on the agencies speech. When applying the multi-factor test that is used in *Walker* and *Matal*, AACS's message regarding adoption does not constitute government speech. First, AACS has not been used historically to convey the government's message. AACS is free to promote its own message. HHS gives the agencies the freedom to post their own message regarding the adoption process. R. at 5. This is further evidenced by the fact that if a family does not fit with the agency's profile and policies, the family typically is referred to another agency. R. at 5. Second, as a privatized religious based organization it is unlikely that AACS will be viewed by the public as being closely related with the state. The United States has long upheld the doctrine of separation of church and state. Lastly, the HHS does not maintain control over the message conveyed by AACS. As a contractor of the state, AACS has the freedom to educate, counsel, train, and engage with adoptive families as they see fit. HHS does not maintain any level of control over the message conveyed by AACS. Similar to *Matal*, AACS's message as an adoptive agency cannot be deemed government speech. AACS can be viewed more so as an independent contractor of the government. An independent contractor is someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. INDEPENDENT CONTRACTOR, Black's Law Dictionary (11th ed. 2019). As the program is designed HHS has created a forum for private speech. Therefore, the government is required to maintain a

neutral viewpoint when it regulates AACS's private expression. Here, HHS has not maintained a neutral viewpoint. For HHS to compel AACS a religious group with a moral conviction opposed to same- sex marriage to post its anti-discrimination message, a policy that will only affect religious-based organizations, "selects for disfavored treatment" *Rosenberger*, 515 U.S. at 831. Therefore, the anti-discrimination policy cannot be deemed viewpoint neutral rather viewpoint discriminatory. The EOCPA as applied to AACS is unconstitutional.

Having established that the activities involved in child placement as protected speech, the speech must be compared to the purpose of the program, along with AACS's traditional role as a child placement agency. The purpose of the government funded program was defined when the agency was charged with "establishing a system that best serves the well-being of each child" in the city's care. R. at 3. The child placement program does not dictate what the agency should say or not say, as was the case in *Rust*. Neither is it, dedicated to endorse narrowly defined permissible goals and discourage alternative goals. Instead, the program charges AACS with using its organizational judgment to certify whether or not a family is suitable for a particular child placement. First, the speech of referral is covered by the scope of the program, because the referral itself furthers the purpose of serving the well-being of each child. However, restricting AACS from advising potential parents that another CPA is a more suitable match alters the child placement process by failing to provide the best information available.

Second, requiring AACS to certify potential parents who, in its organizational judgment, cannot provide a placement in the best interest of the child distorts the child placement system by prohibiting speech necessary to the proper functioning of the child placement system, specifically the judgment of the organization making the certification. Furthermore, requiring AACS to certify potential parents that, in its organizational judgment, are not in the best interest of the child distorts

the child placement system by supplanting AACS's judgment with that of the government. HHS mandating that AACS endorse it anti-discrimination policy goes beyond the state's inters in the program. The contractual agreement between HHS and AACS is to certify adoptive families who AACS deems qualified to meet the best interest of foster children. R at 3. The contractual agreement was not created to promote HHS's anti-discrimination message. When applying the factors set forth in Dole, the conditions imposed on AACS can be deemed illegitimate because they are unrelated to the state's interest in finding foster children in adoptive homes.

"Of course, [AACS] is free to continue operating as a [religious organization], just as McDaniel was free to continue being a minister. But that freedom [to operate within the confines of its beliefs] comes at the cost of automatic and absolute exclusion from the benefits of a public program for which [AACS] is otherwise fully qualified." Trinity Lutheran, 137 S. Ct. 2012, 2021–22 (2017). Moreover, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404.

Therefore, the EOCPA as applied to AACS imposes an unconstitutional condition by requiring them to relinquish the First Amendment right to engage in child placement advocacy in a manner that does not offend organizational principles for the benefit of government funding.

CONCLUSION

The Supreme Court's First Amendment holdings show that Mr. Hartwell's actions violate AACS's fundamental rights to the free exercise of religion and the freedom of speech. By interfering with internal decisions that affect AACS' mission as a religious organization, Mr. Hartwell has placed an unconstitutional burden on AACS' free exercise right. The quasi-investigation into the beliefs of religious agencies implicates hostility rather than neutrality toward religion; certainly, the EOCPA has not been applied generally; it has been enforced only against AACS. Further, Mr. Hartwell's actions have unconstitutionally infringed on AACS' constitutionally-protected free speech rights. By requiring AACS to relinquish a fundamental right in order to receive government funding, Mr. Hartwell has created an unconstitutional condition which must be rectified. The EOCPA is additionally attempting to unconstitutionally convert public speech into private speech. In accordance with the aforementioned abundance of Supreme Court precedent, this Court should reverse the decision of the Appellate panel and grant a permanent injunction renewing the contract between AACS and HHS and a temporary restraining order prohibiting HHS from continuing the referral freeze against AACS.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September 2020, I served a copy of the Appellees' Brief to all other schools/teams participating in the Leroy R. Hassel, Sr. National Moot Court Competition.

/s/_____
Team 7
Attorneys for Appellee

APPENDIX A

CONSTITUTION OF THE UNITED STATES OF AMERICA

First Amendment

Amendment I

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 petition the government for a redress of grievances.

Fourteenth Amendment

Amendment XIV

Section One
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Two
Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section Three
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section Four
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for

the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section Five
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.