NO. 2020-05

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

OCTOBER TERM, 2020

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 DEFENENDANT-APPELLANT

TEAM #10
ATTORNEY FOR DEFENDANT-APPELLANT

QUESTIONS PRESENTED

1. Whether the Equal Opportunity Child Placement Act (EOCPA) violates the Free Exercise Clause by imposing nondiscrimination requirements on child placement agencies who accept public funds in exchange for providing a secular social service to the City of Evansburgh.
2. Whether the Department of Health and Human Services (HHS) through adopting the EOCPA compels speech by requiring government funded agencies to certify same-sex couples and post the anti-discrimination law on their premises.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases Page(s)

United States Court of Appeals Cases

State Cases

Statutes

Rules

Other Authorities

STATEMENT OF JURISDICTION

The United States District Court for the Western District of East Virginia had jurisdiction pursuant to 28 U.S.C § 1331 and 42 U.S.C. § 1983. The District Court granted Appellee's motions under Fed. R. Civ. P. 65 for a temporary restraining order ("TRO") and a permanent injunction. R. at 17. Appellant appealed. R. at 18. The United States Courts of Appeals for the Fifteenth Circuit asserted jurisdiction to review the District Court's order pursuant to 28 U.S.C. § 1292(a)(1). On February 24, 2020, the Court of Appeals reversed the District Court's order. *Id*. Appellee filed a Petition for Rehearing En Banc. R. at 26. Upon the vote of a majority of non-recused active judges per Fed. R. App. P. 35(a)(2), Appellee's petition was granted by the Court of Appeals on July 15, 2020. *Id*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." Relevant statutory provisions are reproduced in the appendix to this petition.

STANDARD OF REVIEW

Whether the EOCPA's order unconstitutionally infringes on AACS' free exercise rights and freedom of speech as protected by the First Amendment is a question of law to be reviewed de novo. *Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P.3d 272.

STATEMENT OF THE CASE

I. Statement of Facts.

This case is about the City of Evansburgh's effort to "eradicate[e] discrimination in all forms, particularly against sexual minorities, regardless of [the] philosophy or ideology" of funded Child Placement Agencies ("CPAs"). R. at 6. The facts show HHS's effort to ensure that the best interests of the child are served by preventing discrimination of the child or prospective families on the basis of sexual orientation. R. at 6. Despite opportunities, Appellant, Al-Adab Al-Mufrad Care Services ("AACS"), failed to comply with the Equal Opportunity Child Placement Act ("EOCPA") and contract obligations of which AACS voluntarily assumed. R. at 3, 7.

For over forty years, HHS has provided meaningful adoption and fostering services to the growing refugee population in Evansburgh, East Virginia. R. at 5. Evansburgh is a racially and ethnically diverse population of approximately 4,000,000. R. at 3. Evansburgh has a budding refugee population from various countries, many fleeing contentious socio-political conflicts – a community that AACS is uniquely positioned to serve given their Islamic beliefs. R. at 9. HHS has shown a longstanding commitment to providing placement services to the area's most vulnerable children, including war orphans, refugees, and children with special needs. R. at 5. HHS, with the help of its CPAs, has placed thousands of children into loving adoptive homes. *Id*.

Evansburgh has a chronic shortage of foster and adoptive homes with approximately 17,000 children in foster care and 4,000 available for adoption. R. at 3. With this staggering need in mind, the City tasked the Department of Health and Human Services ("HHS") with developing a system that "best serves the well-being of each child." R. at 3. As such, HHS contracted with private CPAs in Evansburgh to provide foster care or adoption services. R. at 3. AACS is one of these agencies who assists dozens of children each day in an overburdened

placement system where merely thirty-four private CPAs are tasked to provide services to the 17,000 children in foster care – a 1:500 ratio. R. at 3. In exchange for funds, agencies provide services such as home studies, counseling, and placement recommendations. *Id.*

East Virginia Code. The State of East Virginia maintains a robust set of statutory and contractual requirements prohibiting discrimination. *See App.* The East Virginia Code ("E.V.C.") empowers the City of Evansburgh to charge HHS with establishing a system that best serves the well-being of each child. R. at 3-4; E.V.C. § 37(d). In making this assessment, HHS is required to consider a wide range of factors including the age of the child and parents, the child's special traits and needs, and the cultural and ethnic background. *See App.*; E.V.C. § 37(e).

HHS's Relationship with AACS. The EOCPA imposes nondiscrimination principles on the thirty-four private CPAs, including both foster and adoption agencies, that entered into foster care and adoption service contracts with HHS. R. at 3-4 (citing E.V.C. § 42). HHS renewed its contract with AACS annually since its founding in 1980. R. at 5. In exchange for public funds, AACS contracted to provide child placement services to the growing refugee population in Evansburgh. R. at 3. HHS contracts with CPAs of a wide ideological background in order to serve the best interests of the child, however, after *Obergefell v. Hodges*, 576 U.S. 644 (2015), and a societal interest in more progressive views, the Governor amended the EOCPA to reflect the state's commitment to eradicating discrimination in child placement services. R. at 5.

The most recent contract between AACS and HHS was renewed on October 2, 2017. R. at 5. The contract stated that AACS agreed to provide "appropriate adoption services, including certifications that each adoptive family is thoroughly screened, trained, and certified." R. at 5. Section 4.36 of the contract explicitly requires AACS to be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6. The

EOCPA was further amended to include a notice requirement in a fund recipient's place of business stating that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. The amendment provides a religious exemption, however, allowing religious-based agencies to post on their premises a written objection to the policy. R. at 6; E.V.C. § 42.-4.

II. Procedural History.

After AACS' blatant refusal to comply with the contract, on September 17, 2018, Hartwell sent a letter to AACS, stating "[a]lthough HHS respects your sincerely held beliefs," AACS was contractually obligated to follow the EOCPA. R. at 7. The letter stated that AACS's policy prohibiting certification of same-sex couples, violated the EOCPA and necessitated an immediate referral freeze, precluding other contracted CPAs from making referrals to AACS. *Id*. If AACS complied by the end of their contract and assured future compliance, the agency's contract would be renewed on the annual renewal date, October 2, 2018. R. at 7-8.

However, October 30, 2018, AACS filed suit against Hartwell claiming that HHS's enforcement of the EOCPA violated the Free Exercise and Free Speech Clause. R. at 8. AACS sought a temporary restraining order against HHS's imposed referral freeze and a permanent injunction compelling HHS to renew its contract with AACS. R. at 8. In March 2019, following an evidentiary hearing, the District Court granted AACS a TRO and a permanent injunction stating that the EOCPA was neither neutral nor generally applicable. R. at 18-19. Also, the EOCPA coerced AACS to engage in speech by certifying same-sex couples and posting Evansburgh's anti-discrimination message as a condition to receiving public funds, violating the unconstitutional conditions doctrine. R. at 19.

SUMMARY OF THE ARGUMENT

HHS' position is that no child should be denied a loving foster or adoptive home simply because a prospective parent is gay, lesbian, Jewish, Muslim, black or white. R. at 4. The District Court's ruling, however, is state-sanctioned and government-funded discrimination toward prospective same-sex parents. Moreover, allowing a state contractor, the ability to refuse to work with qualified prospective parents, effectually limiting the pool of prospective parents, is directly counter to the best interests of the children waiting for family placements. E.V.C. § 37(d).

The requirements in E.V.C. § 42.-4 are not a direct speech regulation, a speech compulsion, or an infringement on AACS' property rights in violation of AACS' First Amendment rights. Relying on Supreme Court decisions to address the compelled-speech doctrine, the District Court accepts the argument that the conditions under E.V.C. § 42.-4 were unconstitutional. R. at 15. However, the penalty for refusing to propagate the message in the cases relied upon by the court, was a denial of an already-existing public benefit. Further, the notice requirement was not an unconstitutional condition because the law intentionally left space for agencies like AACS to make public statements about their beliefs and objections to the policy. The only requirement is to provide a service to any and all prospective families. R. at 5.

ARGUMENT

I. AACS' RELIGIOUS CONVICTIONS DO NOT TRUMP ITS OBLIGATIONS TO COMPLY WITH THE EOCPA NONDISCRIMINATION REQUIREMENT

The Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." It protects individuals from governmental interference with the exercise of religion, U.S. Const. Amend. I, and applies to the States the through the Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *American Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2074 (2019). Differing secular and religious views should coexist, but "[h]ard questions arise … when, for example, … a religious adoption agency declines to place children with same-sex married couples." *Obergefell v. Hodges*, 576 U.S. 644, 712 (Roberts, C.J., joined by Scalia and Thomas, J.J., dissenting).

The level of scrutiny applied to a law is determined through an analysis of its "operation," as assessed in "practice terms." *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194-95 (2nd Cir. 2014). Here, AACS cannot be excused from complying with a valid and neutral regulation of general applicability, even if the nondiscrimination requirements prescribe conduct that its religion proscribes. *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment).

A. The EOCPA Non-Discrimination Requirement is a Valid, Neutral Law of General Applicability.

"[I]f prohibiting the exercise of religion … is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494

U.S. 872, 878 (1990). "Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction" where the harm only inhibits First Amendment rights incidentally. *Hohe v. Casey*, 868 F.2d 69, 73 (3rd Cir. 1989).

"When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). In choosing to contract with HHS, AACS agreed to be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh. R. at 5-6. Thus, AACS subjects itself to the neutral and generally applicable rules that govern all CPAs. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("[W]hile … religious and philosophical objections [to same-sex] marriage are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable [anti-discrimination] law.").

a. The EOCPA is a Neutral in Operation.

In evaluating a law's neutrality, courts first analyze the text and then, if the law is facially neutral, courts examine its effect in operation. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 535 (1993). A law is facial neutrality if its references to religion have a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. Yet, "[f]acial neutrality is not determinative," and "[a]part because the text, the effect of a law in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535.

On its face, the EOCPA's regulations do not "*by their terms* impose disabilities on the basis of religion," but instead prevent religious discrimination. *Lukumi* at 557 (1993) (Scalia, J.,

concurring in part) (emphasis in original). Rather than "infring[ing] upon or restrict[ing] practices because of their religious motivation," the object of the EOCPA is to ensure that CPAs serve prospective parents in a nondiscriminatory manner. *Lukumi*, 508 U.S. at 533. Thus, unlike in *Lukumi*, the EOCPA's language does not reveal "words with strong religious connotations" inferring facial discrimination. *Id*. at 534.

Moreover, there is no evidence that in adopting the amendments, East Virginia decided "that secular motivations are more important than religious motivations." *Fraternal Order of Police v. City of New York*, 170 F.3d 359, 365 (3rd Cir. 1999). In addition to the Free Exercise Clause limitations on regulations, governmental bodies themselves must be neutral decisionmakers and give full and fair consideration to religious objections. *Masterpiece Cakeshop*, 138 S. Ct. 1719, 1732 (2018).

The only evidence AACS points towards to show animus is the Governor's statement regarding the amendments. Yet, that statement hardly demonstrates animus towards religion. Following *Obergefell*, the Governor wanted to "eradicat[e] discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. Unlike in *Lukumi* and *Masterpiece*, where statements expressed explicit animus towards religion, the Governor's statement represented animus towards discrimination itself. *See Lukumi*, at 41 (noting hostility in a City Council member's question, "What can we do to prevent the Church from opening?"); *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (holding that Civil Rights Commissioners "disparaged Phillip's religion … by describing it as despicable"). Additionally, the Governor's statement was intentionally not directed towards any particular religion.

"[I]f prohibiting the exercise of religion … is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. 872, 878.

b. The EOCPA is Generally Applicable.

"The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439, 451 (1988). "It is well established that a generally applicable law that does not target religious practices does not violate the Free Exercise Clause." *Universal Church v. Geltzer*, 463 F.3d 218, 227 (2nd Cir. 2006).

The EOCPA nondiscrimination requirement is an "all-comers" condition that prohibits discrimination, whether for religious or non-religious reasons. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 670, 697 n.27 (2010). It does not selectively impose burdens only on AACS's conduct that is motivated by religious belief. *Lukumi*, 508 U.S. at 542-43. As the panel properly stated, the record is devoid of any evidence that would demonstrate AACS has been treated less favorably than any other CPAs. In fact, the evidence pertaining to the four CPAs expressly serving the LGTBQ community demonstrates that they have complied with the EOCPA Amendments. R. at 7.

HHS's conduct is not regulated by the EOCPA, which, by its express terms,[1] solely applies to the conduct of CPAs. The EOCPA mandates that in order to receive public funds, contracted CPAs must comply with nondiscrimination principles "when screening and certifying

[1] As originally enacted in 1972, the EOCPA prohibited CPAs from "discriminating … when screening and certifying potential … adoptive parents[.]" R. at 4 (quoting E.V.C. § 42.-2). In 2017, the EOCPA was amended to prohibit CPAs from discriminating on the basis of sexual orientation. R. at 6 (citing E.V.C. § 42.-3(b)).

potential … adoptive parents" and under certain circumstances, "give preference" to child's race or identified sexual orientation. *See App.* Contrarily, HHS's conduct is regulated by the "best interests assessment,"[2] which the agency is required to perform when determining whether prospective parents should be approved. E.V.C. §§ 37(d), (e)).

Therefore, HHS's application of the "best interests assessment" factors does not impact the EOCPA, which regulates child placements services, not child placements. Further, any assertion that HHS's application of child placement discriminates is immaterial both as to the issue in this case and the EOCPA. The pertinent issue here is whether applying the nondiscrimination principle against CPAs violates the Free Exercise Clause. HHS's child placement decisions are not regulated by the EOCPA.

Additionally, the "give preference" exemptions do not require CPAs to discriminate on the basis of race and sexual orientation in certain circumstances for "presumably" a "secular reason." R. at 12. The "give preference" exemptions are within a statute created by East Virginia that applies to the process of certifying parents. "Local officials" in Evansburgh have no authority over whether state officials "presumably" adopted them for "secular reasons." HHS determines whether child placements promote the child's well-being and has no authority to exempt AACS applying the EOCPA. A facially neutral law does not violate the general applicability requirement merely because the government grants some exemption to the law. *Burwell v. Hobby Lobby*, 573 U.S. 682, 763 (2014).

[2] The best interests assessment requires the agency appointed by the municipality, which is HHS in Evansburgh, to 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." R. at 3-4 (citing E.V.C. § 37(e)).

The exemptions do no permit discrimination as they merely require that the CPAs, as HHS does with the "best interests assessment" factors, consider an individual child's characteristics when notifying HHS of potential matches in order "to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Fulton v. Philadelphia*, 922 F.3d 140, 158 (3rd Cir. 2019) (rejecting a similar argument).

This statutory scheme reflects the delegation of responsibility within the Evansburgh adoption placement system. East Virginia's overall goal is to ensure the child's best interests are being served. In order to do so, Evansburgh, and therefore HHS, is empowered to establish and regulate an adoption system that ensures adoption placements within its municipality are based on the child's best interests. Contrarily, AACS's role, as the panel correctly asserted, is more circumscribed. East Virginia adopted the EOCPA to regulate the conduct of the child placement agencies in performing adoption services.

Viewing HHS's role from this perspective, the ability to make discretionary decisions in crucial. "[T]he protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests." *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 860 (1977).

For instance, AACS understands the importance that discretion serves. On three separate occasions HHS approved AACS's recommendation regarding child placements with separate ethnic sects in order to avoid the tensions within the Islamic Community. R. at 9. AACS "cannot say that the State was required in this situation to find anything more than that the adoption...[was] in the 'best interests of the child." *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978).

Permitting an exception to the EOCPA would severely undermine the state's interests. If AACS could decline to serve same-sex couples, other agencies could assert religious objections in ways they deem sinful. *Jones Univ. v. United States*, 461 U.S. 574, 580 (1983). "No tradition ... allows a religion-based exemption when the accommodation would be harmful to others." *Burwell*, 573 U.S. at 763 (2014).

HHS is not required to subsidize CPAs engaged in discriminatory practices merely because it subsidizes other associations that do not discriminate. *Bob Jones*, 461 U.S. at 583; *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973). In seeking an exemption, AACS seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." *Christian Legal Soc'y*, 561 U.S. at 670, 697 n.27. *See*

The panel correctly determined that AACS's religious purpose does not excuse it from complying with a valid and neutral regulation of general applicability, even if the regulation prescribes conduct that its religion proscribes. *United States v. Lee,* 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment). "A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "Under *Smith*, neutral, generally applicable laws are not subject to First Amendment challenge no matter how severe an impediment they may be to the exercise of religion." Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819, 819 (1998).

A valid and neutral law of general applicability will be upheld if it is rationally related to a legitimate governmental purpose. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir.

2015). *See*, *e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."); *Illinois Bible Colleges Association v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017) (Applying rational basis to neutral and generally applicable statues that applied "equally to secular and religious post-secondary institutions).

In *Locke*, the Court was unable to find anything in either the history, text, or operation of Washington's Scholarship Program suggesting animus towards religion. *Locke v. Davey*, 540 U.S. 712, 725 (2004). Washington provided a scholarship program and based its eligibility on criteria such as college admission tests and family income, but did not allow students to pursue a devotional degree. *Locke*, 540 U.S. at 716. Recipients were free to use the funds at accredited religious and non-religious schools and thus, not required to "choose between their religious beliefs and receiving a government benefit." *Id*. at 716, 720-21. The Court upheld the program, reasoning that the student was denied the scholarship not because of who he was, but rather what he proposed to do. *Id*. at 721.

Further, the nondiscrimination requirements are rationally related to valid state interests. The regulation is rationally related to these legitimate state interests—prohibiting discrimination in the provision of adoption services; enforcing laws that CPAs voluntary contracted to be bound by; broadening and diversifying the pool of prospective parents; and ensure taxpayers that fund government contractors are not denied access to those services. R. at 9.

Further, HHS undoubtedly has a legitimate interest to ensure "individuals who pay taxes to fund government contractors are not denied access to those services." R. at 9. Further, the District Court incorrectly determined that "[i]t defies logic" to assert that terminating AACS's contract will do anything to ensure that the LGTBQ community is served. R. at 14.

The District Court contends that strict scrutiny should apply in this case due to alleged secular exemptions HHS has made to its policy. R. at 10. The District Court's contention rests upon a passage from *Smith* in which the Court addressed earlier religious exemption cases in which it applied strict scrutiny in the unemployment context, "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." *Smith*, 494 U.S. at 884.

However, the "individual exemptions" is only applicable in situations where "government officials exercise discretion in applying a facially neutral law." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 166 (3rd Cir. 2002). The situation here is more similar to *Fulton v. City of Philadelphia*, 922 F.3d 140 (3rd Cir. 2019), where there was no "gerrymandering as in *Lukimi*, and there [was] no history of ignoring widespread secular violations as in *Tenafly*, or the kind of animosity against religion found in *Masterpiece*." *Fulton*, 922 F.3d at 158-59.

In *Locke*, the Court refused to "extend the *Lukumi* line of cases well beyond … their reasoning" when a student alleged was denied scholarship funds after pursuing a devotional degree. *Locke v. Davey*, 540 U.S. 712, 720 (2004). Washington provided a scholarship program and based its eligibility on criteria such as college admission tests and family income, but did not allow students to pursue a devotional degree. *Locke*, 540 U.S. at 716. Recipients were free to use the funds at accredited religious and non-religious schools and thus, not required to "choose between their religious beliefs and receiving a government benefit. *Id*. at 716, 720-21. The Court upheld the program and reasoned that the student was denied the scholarship not because of who he was, but rather what he proposed to do. *Id*. at 721.

As in *Locke*, HHS is conditioning all CPAs with an opportunity to perform a particular function on the CPAs' willingness to abide by the EOCPA nondiscrimination principles. HHS (Evansburgh, East Virginia) focus is not on what AACS believes, but on whether AACS would act in accordance with the law. The EOCPA has no impact on AACS's private activity outside of the government services it chooses to perform for the City of Evansburgh. Per the terms of the contract AACS voluntarily executed, AACS must be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6. If AACS does not wish to contract with HHS, on the terms the EOCPA requires for any CPA hired to perform this government function, it is not required to do so. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds.").

AACS is contractually required to certify prospective parents that "choose" AACS as their "best fit." Although HHS's website does not say so explicitly, the statement within the "choose your agency" section unequivocally implies that the parents decide whether or not to work with a certain agency. Parents initiate contact, the agency must provide them with information about their agency, and if the parents select the agency, it is "contractually required to maintain supervision and support to ensure a successful placement." While family's that do not "fit with the agency's profile and policies" are "typically referred to another agency," the parents choose "the best fit for [them]." To be clear, this means that AACS may only refer parents to another agency if the parents determine AACS is not their "preferred agency." Parents need "to feel confident and comfortable with the agency [*they*] choose." (emphasis added).

In other words, if a same-sex prospective couple contacted AACS, AACS is required to provide the couple with information regarding their agency, and the same-sex couple would then

make the final decision regarding whether they "fit with the agency's profile and policies." AACS may inform same-sex couples that their "services [AACS] provide[s] are consistent with … the Qur'an," which considers "same-sex marriage to be a moral transgression." R. at 7. Yet, contrary to AACS's current discriminatory practice, AACS could only "refer[the same-sex couple] to other agencies that served the LGTBQ community" if the couple, not AACS, decides not to work with AACS. *Id.*

For the foregoing reasons we ask this Court to reverse the decision of the lower court.

II. THE EOCPA'S REQUIREMENTS ARE NEITHER A DIRECT RESTRICTION ON SPEECH NOR AN OBLIGATION TO AFFIRM A GOVERNMENT MESSAGE, BUT RATHER A PERMISSIBLE CONDITION ON THE RECEIPT OF FUNDS.

AACS contends that the EOCPA unconstitutionally requires the agency to change the contents of its message by compelling the endorsement of same-sex adoptive couples and that the notice requirement in E.V.C. § 42.-4 compels AACS to post EOCPA's non-discrimination message. AACS further argues that enforcing the EOCPA against it as a condition of receiving funds to perform its contractual placement duties constitutes an unconstitutional condition.

A. The EOCPA as Amended Does Not Implicate the Compelled Speech Doctrine Because It Does Not Oblige an Entity or Individual to Personally Affirm a Message with Which They Disagree.

Through the judicial branch, principles of equality supported by state non-discrimination laws have been interpreted to prevent places of public accommodation from denying same-sex couples services when such services would not reasonably be seen as an affirmation on the part of the service provider. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (AOSI)*, 570 U.S. 205 (2013). The EOCPA as amended does not violate the compelled speech doctrine because it does not force CPAs like AACS to express any support for same-sex marriage or its moral nature. Educational institutions need only provide same-sex prospective parents the same access to child placement services as they provide to different-sex prospects.

a. AACS' Compelled Speech Claims are Without Merit Because Selection, Training, and Certification of Prospective Adoptive and Foster Parents Are Part and Parcel of the Contractual Duties AACS Voluntarily Assumed.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 716 (1977). "Public policy favoring freedom of contract and efficient resolution of disputes applies equally to contractual waivers of First Amendment, U.S. Const. amend. I, rights." *Perricone v. Perricone*, 292 Conn. 187, 208 (2009).

The District Court's reliance on *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) is inapposite. R. at 15. In *Janus*, a state employee refused to join a union because he opposed many of its positions, including those taken in collective bargaining. *Janus*, 138 S. Ct. at 2461. The governor, who similarly opposed, filed suit challenging the constitutionality of the state law authorizing agency fees. *Id.* The Court held that a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes positions that have powerful political and civic consequences. *Id.* at 2464.

Janus, relying on *National Institute of Family and Life Advocates v. Becerra,* a decision made just one day prior, did not involve speech occurring as part of a government contract. *Id* at 2487. In fact, the statute under review in *Becerra* specifically exempted any entity that had a contract with the government. *See* 138 S. Ct. at 2369. Other seminal cases citing to compelled speech similarly do not involve contractual speech. *See Hurley v. Irish-American Gay,* 515 U.S. 557, 566 (1995) (private parade); *Wooley*, 430 U.S. at 716 (license plates); *Frudden v. Pilling*, 742 F.3d 1199, 1201 (9th Cir. 2014) (school uniform policy).

As a threshold matter, AACS' First Amendment speech claim fails because the reason for HHS' withdrawal from the contract was AACS' inability to comply with the government contract, not its speech. AACS has no right to a contract under East Virginia law. There is no

burden on AACS' religious belief, no coercion, and no compulsion, because AACS voluntarily reached into the public sphere to contract with HHS to provide family foster care, a government social service. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1943) (distinguishing "compelled" speech from speech of persons who voluntarily enroll in a program, because "those who take advantage of…opportunities may not on grounds of conscience refuse compliance with such conditions."). If HHS allowed all of its contractors to impose religious criteria and discriminate against same sex couples, HHS could be liable for that conduct. *See Blum v. Yaretsky*, 457 U.S. 991 (1982). AACS voluntarily contracted with HHS and to follow the laws of the state, so it cannot now claim a religious entitlement to city subsidization of that contractual activity while directly contravening the goals and provisions of the City's program. This Court should reject AACS' arguments for this reason alone.

AACS' obligation to the public under the contract is to evaluate prospective foster parents in a home study. R. at 3. This activity is not speech on a matter of public concern. *See, e.g.*, *Gorum v. Sessoms*, 561 F.3d 179, 187-88 (3d Cir. 2009) (professor's speech was pursuant to official duties, and not speech on a matter of public concern). Religious objectors like AACS cannot be excused from duties that they took on as a part of a job or contract. *See Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019) (when a Kentucky clerk refused to sign marriage licenses for same-sex couples and sued, the court found that the requirement to sign marriage certificates was merely a part of her job, not a substantial burden of her religious freedom under the First Amendment.). Providing services to all customers is not approval of same-sex marriage, but rather that such services are done in compliance with the law. *Miller v. Davis*, 123 F. Supp. 3d 924, 941, 944 (E.D. Ky. 2015) (vacated on other grounds).

The record is devoid of any evidence demonstrating that HHS targeted AACS for its beliefs. To the contrary, HHS was acting to ensure that its contractors treat all prospective foster parents equally and in align with state and federal law as required by the contract.[3] HHS has maintained a longstanding contractual relationship with AACS and remains willing to offer AACS a full contract so long as AACS agrees to comply with non-discrimination requirements as required by law. R. at 5. HHS' willingness to accommodate AACS' religious convictions is evident in the liberal religious exemptions policy under E.V.C. § 42.-4. R. at 6. Even further, HHS never ended AACS's contract. R. at 7-8. The contract required AACS to be "in compliance with the laws, ordinances, and regulations of the State of East Virginia." R. at 5-6. HHS gave AACS until the day before its annual contract renewal date to provide assurance of future compliance with the EOCPA, rather than do so AACS filed a lawsuit. *Id*. at 7-8.

By requesting an exemption, AACS "seeks not parity with other [CPAs], but a preferential exemption" from the nondiscrimination requirement. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 669 (2010) (emphasis in original). While, to be clear, AACS has not been discriminated against in this case, the agency alleges it has been. Thus, AACS's proposed rationale for an exemption seems not only to be merely replacing one form of discrimination with another but asking the government to endorse and fund their discrimination.

The discrimination AACS asks HHS to endorse would cause massive disruption to the overburdened child placement arena. Same-sex adoptive parents are seven times more likely than different-sex parents to have an adopted child.[4] Thus, the act of denying same-sex couples public accommodations clogs the system narrowing opportunities for certain families and creating an

[3] "Section 4.36 of the contract requires AACS to be 'in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh.'" R. at 5-6.
[4] "How Many Same-Sex Couples in the US Are Raising Children?" *Williams Institute*, 29 July 2020, williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/.

increased strain on an already exhausted system. Thus, this court should subscribe to the bed rock of East Virginia Code dictating foster and adoption placement matters: focusing on the best interests of the child, not the religious preferences of its adoption agency. E.V.C. § 37(d).

b. E.V.C. § 42.-4 is Not Unconstitutional Under the Rationale That It Does Not Compel AACS To Speak with Respect to Same-Sex Parental Rights.

The District Court reasoned that the funding condition is impermissible because it affirmatively compels speech by the recipients of the funds. R. 16. In *Riley v. National Fed'n of the Blind of N.C., Inc.*, the Supreme Court held that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance." 487 U.S. 781, 796 (1988). There is no reason that such a distinction should be determinative in the context of funding conditions where recipients "can simply decline the subsidy." *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991).

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc (FAIR)*, the Supreme Court upheld the Solomon Amendment, which provides "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." 547 U.S. 47, 51 (2006). FAIR, barred military recruiting on their campuses because of the military's discrimination against homosexuals, challenged the Solomon Amendment as violating the First Amendment. FAIR claimed that it forced schools to choose between enforcing their nondiscrimination policy and continuing to receive specified federal funding. *Id.* at 53. The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything…. It affects what law schools must *do*—afford equal access to military recruiters." *Id.* at 60.

Furthermore, in *Pruneyard Shopping Ctr. v. Robins*, a privately-owned shopping center and its owner argued that their First Amendment rights were infringed in light of *Barnette*. 447

U.S. 74, 88 (1980). In *Pruneyard*, high school students seeking to solicit support for their opposition to a United Nations resolution set up a table in a corner of a large commercial shopping center to distribute pamphlets. *Id.* at 80. The Court found that the reliance on *Barnette* was inapposite where *Barnette* involved the compelled recitation of an *affirmation* of a belief. Such a compulsion was unconstitutional because it "[required] the individual to communicate by word and sign his acceptance" of political ideas, whether or not he endorsed them. *Barnette*, 319 U.S., at 633. In *Pruneyard*, however, the shopping center owner failed to identify any personal expression to the shopping center itself, making it implausible that a patron would associate the student's speech as the owner. *Id.* The challenged law merely required him to open his property to speakers without forcing him to speak. *Id*. at 76-78. The requirement that individuals be permitted to exercise state-protected rights of free expression did not infringe the owner's property rights because the exercise of those rights did not compel the shopping center owner to affirm a belief in any governmentally prescribed position or view. *Id.* at 99-100.

In *Pacific Gas & Electric Co. v. Public Utilities Comm. (PG&E)*, a Commission ordered "a privately-owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." 475 U.S. 1, 4 (1986). The Commission's order impermissibly burdened appellant's First Amendment rights because it forced appellant to associate with the views of other speakers. *Id.* at 12. The use of appellant's billing envelope was "an intrusion onto appellant's property that exceed[ed] the slight incursion permitted in *Pruneyard*." *Id.* at 25.

The notice requirement in E.V.C. § 42.-4 is not a direct speech regulation, a speech compulsion, or an infringement on AACS' property rights. Relying on the Supreme Court's decisions in *Wooley* and *Barnette* to address the compelled-speech doctrine, the District Court accepts the argument that the conditions under E.V.C. § 42.-4 were unconstitutional. R. at 15.

However, "[i]n each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. [Neither] involved the government's selective funding of organizations best equipped to communicate its message." *DKT Int'l,* 477 F.3d at 762 n.2. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education, *Barnette*, 319 U.S. at 629, or access to public roads, *Wooley*, 430 U.S. at 715." *Id.* (internal citations omitted).

Finally, the minor intrusion made onto AACS' property through the notice requirement is not so intimately associated with AACS' function as to be construed as an affirmation by its mere presence. Unlike the mailing requirement in *PG&E*, the notice requirement still allows AACS to contribute to the "discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster," by permitting religious-based agencies to post on their premises a written objection to the policy, making this case more aligned with that of *Pruneyard*. *PG&E*, 475 U.S. at 8 (internal quotations omitted); E.V.C. § 42.-4; R. at 6.

B. E.V.C § 42.-4 Does Not Impose an Unconstitutional Condition on the Receipt of State Funds Because HHS May Impose Limits to Ensure That Distribution of Funds Are Used to Advance its Compelling Interest in Eliminating Discrimination in Child Placement Services.

The "government speech doctrine" recognizes that a government entity "is entitled to say what it wishes" and to select the views that it wants to express. *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 829, 833 (1995). The government could not "function" if the government could not favor or disfavor points of view in enforcing a program. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

The unconstitutional conditions doctrine, however, arises from the Constitution's prohibition against *penalizing* an individual for the exercise of a constitutional right, balancing

the government speech doctrine. *See Connick v. Myers*, 461 U.S. 138, 142 (1983). Recognizing that constitutional violations may arise from the chilling effect of governmental efforts that fall short of a direct prohibition of our rights, "our modern unconstitutional conditions doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech." *Umbehr*, 518 U.S. at 674.

Because its relationship with HHS is purely contractual, AACS' can raise a claim under the unconstitutional conditions doctrine, however HHS will still prevail because the doctrine specifically allows a state agency to impose conditions, even on fundamental rights like free speech, when those conditions are reasonably necessary to accomplish the objectives of a contract. *Bd. of Cnty. comm'rs v. Umbehr*, 518 U.S. 668, 675-676 (1996).

a. E.V.C. § 42.-4 does not impose an unconstitutional condition because it simply subsidizes conduct that the state wishes to incentivize and does not leverage funding to regulate speech outside the contours of the activity itself.

"[T]he relevant distinction that has emerged from our [unconstitutional conditions doctrine] is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize," which are generally permissible, "and conditions that seek to leverage funding to regulate speech outside the contours of the program itself," which are not. *AOSI*, 570 U.S. at 214-15. In other words, a state may not condition the benefits of a contract on terms that unreasonably restrict speech or conduct. *Id.*; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). If the court establishes that a restriction is reasonably necessary for the effective performance of the contract, the unconstitutional conditions doctrine will not apply, and the court will uphold the contractual speech restriction. *Id.* This doctrine allows agencies like HHS, to increase conditions attached to fiscal appropriations in an attempt to alter public behavior toward the advancement of societal goals.

Furthermore, the government cannot use a financial incentive to discourage unfavorable speech if said speech is in no way related to the performance of the contract. *See e.g.*, *Elrod v. Burns* 427 U.S. 347 (1976) (a city cannot offer employment as a police officer on the condition that they refrain from making off-duty speeches that are critical of the mayor's political views.). In *Regan v. Taxation With Representation*, the Supreme Court upheld a restriction on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions. 461 U.S. 540, 550 (1983). The Court held that Congress did not violate the First Amendment by choosing "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id*. at 544.

In *Rust v. Sullivan* abortion-related speech restrictions were attached to federal funding for providers of family-planning services. 500 U.S. at 197. The agency announced federal funding legislation that would deny funding to any recipient who *in the funded program* offered abortion counseling or encouraged abortion as a family planning method. *Id.* at 179-181. The Court upheld the abortion-related restrictions finding that the government is free to use its purse to support certain views that it approves, so long as it does not prevent the disfavored views from being expressed. *Id.* at 194. The majority held that selectively funding a program is not viewpoint discrimination, but rather, it is within Congress' discretion to fund one activity and not another. *Id.* ("within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."). "[I]n [*Regan*] we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts." *Id*. at 197. The majority held that "the condition that federal

funds will be used only to further the purposes of a grant does not violate constitutional rights," because it was within the contours of the program. *Id.* at 198. *Rust* thus, limited the scope of disputes over claims relating to unconstitutional conditions.

In *Legal Services Corporation v. Velazquez*, Legal Services Corporation, which distributed funds to grantees who provide legal assistance to indigent clients, conditioned the receipt of federal funds on an unconstitutional speech restriction. 531 U.S. 533, 536 (2001). The challenged restriction prevented grantees from, during the course of their representation, arguing that a state statute violated a federal law, or that a state or federal statute violated the Constitution. *Id.* at 538-539. The Court found the restriction to be viewpoint-based suppression of speech, violating the First Amendment. *Id.* at 537. The Court distinguished *Rust*, viewing *Rust* as involving a decision to not fund speech outside of the scope of the program, rather than an attempt to favor a particular viewpoint. *Id.* at 540. In *Velazquez*, however, by limiting how lawyers may try cases and advocate for clients under the funding scheme, the condition distorted the legal system by cutting off avenues of judicial oversight and review of congressional legislation, "insulat[ing] the Government's laws from judicial inquiry." *Id.* at 546.

In *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (AOSI)*, the government sought to compel agencies who accepted HIV/AIDS prevention funds to adopt a policy statement explicitly opposing prostitution. 570 U.S. at 205. AOSI and other groups fighting HIV/AIDS wanted to maintain their policies of neutrality on the issue of prostitution for fear that adopting such a policy would alienate certain host governments, and even diminish the effectiveness of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. *Id*. at 217-18. The Court held that the Policy Requirement compels as a condition of federal funding the *affirmation* of a belief that by its nature cannot be confined within the scope

of the Government program. *Id.* at 205. Mandating an anti-prostitution policy as a condition of receiving funds violated the First Amendment because the condition improperly affected the recipient's protected conduct outside of the federal program. *Id.* at 206.

The Supreme Court concluded that the required statement in *AOSI* "goes well beyond the funding condition in [*Rust*] because it compels Plaintiffs to voice the government's viewpoint and to do so as if it were their own." *Id.* at 237. "Plaintiffs do not have the option of remaining silent or neutral. Instead, they must represent as their own an opinion – that they affirmatively oppose prostitution – that they might not categorically hold." *Id.*

Unlike *AOSI*, AACS and its employees were not compelled to affirm their belief in any governmentally prescribed position or view. They were in fact free to publicly dissociate themselves from the law and the views of the state or federal government if they chose. E.V.C. § 42.-4. The contract simply asks AACS to evaluate any members of the public who request it, and to certify as foster parents any applicants who are qualified under the governing state law criteria, not their religious ideals of parental competency. This is not a violation of AACS' First Amendment right not to speak messages with which it disagrees, because a reasonable person would not interpret providing a product or service as condoning the lifestyle choices of all of its patrons. The notice requirement under E.V.C. § 42.-4 is not an affirmation of gay union, but rather a communication by the government that rejects discrimination of all marginalized and minority identities and a commitment by AACS to abide by state and federal law.

Furthermore, AACS has not shown that this notice would result in an alienation of certain communities or an adverse reaction from another financial base. AACS may argue that because their agency provides placement services to a large portion of the Evansburgh refugee population holding similar religious convictions, that these individuals would feel alienated. R. at 9. Should

individuals seeking placement services for refugee children reject AACS' approval of the non-discrimination messaging, they may seek services elsewhere, only to find that most, if not all of the reputable family placement services in Evansburgh post the same notice. The individuals may return to AACS finding that AACS is *best* suited to their needs. This hypothetical dilemma is unequivocal to the legitimate concerns posed in *AOSI* where the population it seeks to actually support is treated with abhorrence and specifically rejected within the fibers of the statutory language that the supporting agency is required to affirm. 570 U.S. at 211.

Moreover, the notice requirement does not force grantees to adopt and espouse as their own the government's non-discrimination messaging, nor does it prohibit inconsistent words or conduct when spending their own private funds. Like *Rust*, the regulatory scheme at issue is constitutional because it requires grantees like AACS to refrain from discriminatory speech *only* within the government-funded project – that is, child placement services. 500 U.S. at 196. The notice requirement "[leaves AACS] unfettered in its other activities." *Id*.; E.V.C. § 42.-4.

b. E.V.C. § 42.-4 is a non-coercive funding condition, not a direct speech regulation threatening to drive AACS' views out of the marketplace of ideas.

The District Court reasoned that the EOCPA's non-discrimination funding condition is impermissible because it compels recipients to speak rather than remain silent with respect to same-sex rights. The funding condition, however, is not analogous to laws requiring employees to contribute fees to unions for political activity, *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977); drivers to display a state motto on their license plate, *Wooley*, 430 U.S. at 707; or schoolchildren to recite the Pledge of Allegiance and salute the flag, *Barnette*, 319 U.S. at 642.

In *Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), the Court held that plaintiffs were likely to succeed in their claim that a state law unconstitutionally compelled speech by requiring crisis pregnancy centers, established to prevent abortions, to disseminate

prescribed government notices about public funding for abortion services. 138 S. Ct. 2361, 2379 (2018). Justice Kennedy concurring stated that "it is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable." *Id*. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Brush & Nib Studios, LC v. City of Phx.*, 448 P.3d 890, 915 (Ariz. 2019).

Unlike these illustrations of direct speech regulation, E.V.C. § 42.-4 does not force AACS employees to express particular views relating to sexual orientation or gender expression or risk forfeiture of a preexisting public benefit. R. at 6; *See DKT Int'l, Inc. v. USAID*, 477 F.3d 758, 762 n.2 (2007) ("Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education or access to public roads."). Rather, the test explained in the Supreme Court's subsidy cases assesses whether the denial of the subsidy threatens "to drive certain ideas or viewpoints from the marketplace." *Finley*, 524 U.S. at 587 (internal quotation marks omitted).

There is nothing in the record showing that it is practically impossible for AACS to decline funds or why if they accept the funding that it would unduly skew the marketplaces of ideas. The condition imposed is neither a compelled nor suppressed speech restriction, rather the condition offers CPAs an *incentive* to participate in the funding scheme in furtherance of a compelling government interest – to eradicate discrimination in child placement services. R. at 13. Adopting AACS' pessimistic view of subsidy incentives would force society into stagnation as state legislatures may avoid offering subsidies to faith-based agencies due to the risk of

litigation or non-compliance. This in turn would undermine the state's compelling interest in providing a pool of adoptive parents as diverse as the children needing placement. *Id.*

The notice requirement intentionally allows space for agencies like AACS to make public statements about their beliefs and even objections about the requirement itself. R. at 6. Likewise, the notice requirement does not interfere with AACS employees' ability to communicate their own message. R. at 6. Employees are free to donate to causes they support and to indicate their disagreement with the non-discrimination policies of the EOCPA. *Id.* The only requirement is simply to provide a service to any and all prospective adoption or foster families. R. at 5.

c. Even if AACS could show a substantial burden, the notice requirement is the least restrictive means of advancing the City's compelling interest in eradicating discrimination from child placement services.

In *FCC v. League of Women Voters*, 468 U.S. 364 (1984) and *Legal Services Corporation v. Velazquez*, 531 U.S. at 542, 548, the Supreme Court invalidated federal funding conditions under the First Amendment, relying on the absence of any alternative channel for the restricted expression. *See Velazquez*, 531 U.S. at 546-547 ("[W]ith respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust.*"). Furthermore, in both cases, the Court found that the funding conditions attempted "[to] suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543. Restricting lawyers from advancing certain arguments as a condition of funding "distorts the legal system" and "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id*. at 544-545.

Finally, in *Speiser v. Randall*, the government could not use the denial of benefits to "produce a result which [it] could not command directly." 357 U.S. 513, 526 (1958). In *Speiser,* the state property tax exemption at issue – which required veterans to swear an oath not to advocate overthrow of the federal or state government – had "the effect of coercing the

claimants to refrain from the proscribed speech." *Id*. at 519. The *Speiser* exemption thus "frankly aimed at the suppression of dangerous ideas." *Id.* Similarly, in *Perry v. Sindermann,* a state college professor alleged that his employment contract had not been renewed "based on his public criticism of the policies of the college administration." 408 U.S. 593, 595 (1972).

E.V.C. § 42.-4 is unlike the restrictions at issue in *Speiser* and *Perry;* it does not require respondents to swear an oath of loyalty or retaliate against them for public criticism of the government's policies. E.V.C. § 42.-4 simply requires respondents, as a condition of receiving state funds, to support the state, federal, and public's notions of commons decency in providing equal services to all persons under the law. R. at 6. Accordingly, the Supreme Court's Spending Clause jurisprudence makes clear that E.V.C. § 42.-4 is permissible, because it does nothing more than induce CPAs to oppose discrimination broadly when they receive funds to carry out a public service. It does not coerce AACS to accept those funds; it does not fundamentally distort AACS' expression related to their religious convictions; and it does not aim at the suppression of "dangerous ideas." *Speiser*, 357 U.S. at 519.

Finally, unlike the restrictions in *Velazquez* and *League of Women Voters*, the EOCPA has not restricted AACS' ability to seek other avenues in expressing or advocating for their teachings of the Qur'an outside of the funded activity of providing child placement services. AACS can simultaneously contract with other agencies whose beliefs align more closely with their religious convictions and they can continue to hold services freely spreading the teachings of the Qur'an because the medium by which they offer services has not been disrupted by simply posting East Virginia's non-discrimination policy. R. at 14. Permitting AACS to discriminate against same-sex parents in the funded activity of child placement services, however, could have

the tragic effect of radically reshaping Evansburgh's approach to child welfare services, even prompting them to stop contracting with the other four faith-based agencies altogether. R. at 8.

The notice requirement in E.V.C. § 42.-4 ensures that EOCPA's non-discrimination policy is effectively implemented by its funding recipients. The contracted services provided by CPAs are only to assess the family's competency as caregivers. AACS undermines this policy by expressing who they will and will not accommodate. No private agency or donor would partner with an entity that did not share its goals and objectives, yet AACS claims a constitutional entitlement to that type of adversarial relationship. Furthermore, this case involves an even less direct kind of government speech than seen in *Rust*. After its initial amendment, the EOCPA, specifically §42.-4, was further amended to require merely that CPAs sign and post at its place of business an anti-discrimination statement, while also permitting religious-based agencies to post on their premises a written objection to the policy. R. at 6; E.V.C. § 42.-4. The notice provision didn't even mandate where or how the notices were permitted to be posted. This amendment indicates HHS' desire to have its private partners adhere to the state's progressive ideals, while allowing space for the religious agency to exercise its viewpoint as well. *See*, *e.g., DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution.").

The notice requirement the subject of the funding condition opposing discrimination, is not only germane to the goals of the funding program, see *South Dakota v. Dole*, 483 U.S. at 208, but integrally related to the state's objective to eradicate discrimination in all forms. R. at 6. Discriminatory agencies may claim that religious exemptions allow contracts with a larger pool of CPAs, like faith-based agencies, furthering the government's interest in serving more children. This claim is flawed. The agencies' ability to turn away qualified families undermines

the state's interest in providing as many permanent, loving homes as possible. Not contracting with discriminatory CPAs may offer opportunity to provide more substantial funds to CPAs that are in compliance with the law. Thus, providing more adequate services through other existing avenues, ultimately serving the state's most guiding star – "the best interest of the child." E.V.C. § 37(d).

Here, the District Court did not and could not conclude that the condition in E.V.C. §42.-4 was aimed at suppressing expression concerning religious ideals of marriage. The amendment in § 42.-4 in fact permits private organizations to advocate for or be neutral toward such topics. *Id.*; R. at 6. The state legislature has simply made the judgment that if organizations contractually awarded and using funds to implement child placement services could at the same time condone discriminatory *practices or activities* hostile to the achievement of its goal, it would undermine the government's program and create a rippling effect across the public service sphere.

The District Court's decision is a direct assault upon the fundamental rights of prospective same-sex parents. In a system already struggling to grow roses from concrete, Evansburgh, East Virginia child placement agencies should promote more opportunities for child placement services, not less. For the foregoing reasons we respectfully pray for this Court to reverse the decision of the lower court and remand for further judgment.

CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully request this Court to reverse the decision of the District Court.

Respectfully submitted this 14th day of September 2020.

/s/ Team 10

Team 10
Counsel for Defendant-Appellant

APPENDIX A

E.V.C. § 37(d)

The East Virginia Code empowers municipalities to regulate the foster and adoption placements of children and provides that "the determination of whether the adoption of a particular child by a particular prospective adoptive parent or couple should be approved must be made on the basis of the best interests of the child."

E.V.C. § 37(e)

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. § 42

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. The EOCPA defines "child placement agencies" to include both foster care and adoption agencies. *Id*. § 42.-1(a). As originally enacted, the EOCPA prohibited child placement agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." *Id*. § 42.-2. No municipal funds are to be dispersed to child placement agencies that do not comply with the EOCPA. *Id*. § 42.-2(a). The EOCPA, however, provides that, when all other parental qualifications are equal, Child Placement Agencies must "give preference" to foster or adoptive families in which at least one parent is the same race as the child needing placement. *Id*. § 42.-2(b).