No. 2020-05

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
(NO. 18-CV-02758)

EN BANC BRIEF FOR APPELLEE

TEAM 11
COUNSEL FOR THE APPELLEE,
AL-ADAB AL-MUFRAD CARE SERVICES

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of East Virginia had jurisdiction pursuant to 28 U.S.C. § 1331 (2020) because the claim raised by plaintiff-appellee Al-Adab Al-Mufrad Care Services ("AACS") arises under the Free Exercise Clause and the Free Speech Clause of the First Amendment. R. at 8. Venue was proper pursuant to 28 U.S.C. § 1391(b)–(c) (2020). The district court granted AACS's motion for a temporary restraining order and a permanent injunction on April 29, 2019. R. at 17.

Jurisdiction over the appeal to the United States Court of Appeals for the Fifteenth Circuit was proper under 28 U.S.C. § 1291 (2020), which grants United States Courts of Appeals jurisdiction over final decisions of the district courts of the United States. This Court has the power to rehear a case en banc pursuant to 28 U.S.C. § 46(c) (2020). The petition for rehearing en banc was timely filed within 14 days of this Court's judgement pursuant to Fed. R. App. P. 40(a)(1). This Court granted the petition on July 15, 2020.

STANDARD OF REVIEW

In First Amendment cases, appellate courts have "an obligation to make an independent examination of the whole record." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Appellate courts must also evaluate conclusions of law to determine whether a statute violates the United States Constitution. *Aptive Envtl., LLC v. Town of Castle Rock*, 959 F.3d 961, 978 (10th Cir. 2020). Thus, both factual findings and conclusions of law in First Amendment cases merit de novo review. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991); *Aptive*, 959 F.3d at 978.

ISSUES PRESENTED

I. Whether an anti-discrimination law violates the Free Exercise Clause of the First Amendment when government refuses to exempt a religious-based agency, creating a substantial burden on its sincerely held beliefs, but grants statutory and individualized exemptions for secular reasons.

II. Whether government violates the First Amendment's Free Speech Clause by conditioning child placement service funding upon the involuntary endorsement of government-mandated messages and viewpoints contrary to an adoption agency's freedom of speech.

STATEMENT OF THE CASE

Statement of Facts

AACS is a non-profit adoption agency that has served Evansburgh, East Virginia for 30 years. R. at 3, 5. Established in 1980, AACS was founded on the principles of the Islamic faith and is uniquely positioned to provide support to the ever-growing refugee population within the city. R. at 5. AACS provides adoption services that specifically cater to "war-orphans." R. at 5. To date, AACS has placed thousands of children into adoptive homes, and serves dozens of children on any given day. R. at 5. It's mission statement declares: "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." R. at 5.

Evansburgh's adoption system is run by its municipal Department of Health and Human Services ("HHS"). R. at 3. HHS's purpose is to design an adoption system that will best serve the well-being of each child. R. at 3. To this end, HHS contracts with 34 diverse private adoption agencies to help Evansburgh foster and place over 17,000 children in need of care. R. at 3. Each agency has different policies and specialties. R. at 5. HHS's website directs new prospective parents to peruse its list of partner agencies to find a fit that they are most comfortable and confident working with. R. at 5.

AACS is one of these partner agencies supporting successful child placements by screening and certifying potential adoptive parents, performing home studies, and providing counseling services. R. at 3, 4. HHS relies on partner agencies to curate a pool of certified parents from which each agency makes placement recommendations for new children who enter HHS's care. R. at 3. HHS then makes the final, best-interest placement determination based on which agency has the most suitable family for a particular child. R. at 3. HHS has contracted annually with AACS since

1980 to provide these services in exchange for public funds. R. at 4, 5. The most recent contract renewal was signed on October 2, 2017. R. at 5.

After the decision of *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Governor of East Virginia commenced a policy of "eradicat[ing] discrimination in all forms . . . regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. As a result, one of East Virginia's anti-discrimination statues, the Equal Opportunity Child Placement Act ("EOCPA"), was amended in 2017 to ban adoption agencies from discriminating based on sexual orientation when screening and certifying potential parents (the "Policy Requirement"). R. at 4, 6. A new provision was also added which requires child placement agencies to sign and post a policy statement on site that says it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation" (the "Notice Requirement"). R. at 6. Religious-based agencies may also post a written objection to the EOCPA policy. R. at 6. Child placement agencies must comply with the EOCPA requirements to receive municipal funding and benefits through HHS. R. at 4.

AACS has never had a complaint filed against it for discrimination of a sexual minority. R. at 7. The Commissioner of HHS, Christopher Hartwell ("Commissioner Hartwell"), did not start his own investigation of AACS until after an Evansburgh Times reporter contacted him in July of 2018 to inquire about the EOCPA compliance of religious-based agencies. R. at 6–7. Only then did Commissioner Hartwell contact AACS and discover it could not certify same-sex couples due to its sincerely held religious beliefs regarding same-sex marriage as a moral transgression. R. at 7. On the rare occasions that same-sex couples contacted AACS about its services, AACS respectfully referred them to agencies that specifically cater to the LGBTQ community. R. at 7. It

is common practice among Evansburgh's adoption agencies to refer potential parents to a more appropriate agency when they do not fit an agency's profile and policies, whether it be for secular or religious reasons. R. at 5.

HHS nevertheless refused to grant AACS a religious exemption and insisted that AACS comply with the amended EOCPA provisions or lose the benefit of contracting with HHS for childcare service funding. R. at 2, 7–8. In the past, however, HHS has allowed multiple exemptions to the EOCPA's anti-discrimination policies for various reasons. Several exemptions are explicitly stated in the text of the EOCPA, such as giving preference to prospective parents who are the same race as the child when all factors are equal, or preference when they are the same sexual orientation as the child. R. at 4, 6. HHS granted other exemptions through its discretionary power—for example, violating its own stated procedures and placing a white child with an African American couple, despite multiple white couples being certified; refusing to place refugee children of the Suuni faith with parents of the Shia faith and vice versa; and refusing to place a girl with a single father and his son. R. at 8–9.

HHS claims that enforcing EOCPA compliance against AACS serves the following governmental purposes:

> (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services.

R. at 8. But, at the same time that HHS chose to target AACS with EOCPA enforcement, Evansburgh was experiencing a chronic shortage of foster and adoptive homes, and an influx of refugee foster children. R. at 3, 8. In this climate, HHS refused to renew its AACS contract and froze all child referrals to AACS from itself and every other adoption agency in Evansburgh. R. at

7–8. HHS's referral freeze against AACS caused a five-year-old autistic boy's adoption by the woman who fostered him for two years to be denied and caused a young girl to be separated from her two brothers and placed with a different family. R. at 8.

Procedural History

District Court. After Commissioner Hartwell refused to renew AACS's contract, AACS filed a motion with the district court on October 30, 2018, seeking both a temporary restraining order against Commissioner Hartwell's referral freeze and a permanent injunction to renew its contract. R. at 2, 7–8. AACS argued that Commissioner Hartwell's enforcement of the EOCPA violated AACS's First Amendment rights to freedom of religion and freedom of speech. R. at 2.

District Court Judge D. Capra granted AACS's motion, finding that the referral freeze and HHS's refusal to renew its contract placed a burden on AACS's sincerely held religious beliefs, and that enforcement of the EOCPA violated AACS's rights guaranteed by the Free Exercise and Free Speech clauses. R. at 13. Judge Capra reasoned that the EOCPA was neither neutral nor of general applicability due to the EOCPA's statutory exemptions and HHS's grant of individualized exemptions—each of which in combination violated AACS's rights under the Free Exercise Clause. R. at 13. Furthermore, following precedent set forth in *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205 (2013) ("*AOSI*"), Judge Capra found that the EOCPA's Notice and Policy Requirements reached outside the purpose of the adoption placement partnership, thus unconstitutionally compelling AACS to speak a message with which it disagrees as a condition for government benefits. R. at 16.

Panel Decision. On appeal, a panel for this Court ("the Panel") reversed the district court's holding, finding that the lower court's conclusions were not supported by either the Free Exercise Clause or Free Speech Clause. R. at 19. Departing from precedent, the Panel reasoned that AACS's

Free Exercise claim failed because AACS had not shown any evidence that it was treated less favorably than an agency that discriminates against same-sex couples for secular reasons. R. at 21. For the Free Speech claim, the Panel found that First Amendment protections do not apply because AACS's partnership with HHS allows AACS's speech to be restricted as government speech and that the Notice Requirement was not compelled speech. R. at 24, 25. In so holding, the Panel departed from the district court's following of *AOSI*, and instead ruled according to *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), and *Rust v. Sullivan*, 500 U.S. 173 (1991). R. at 23.

SUMMARY OF THE ARGUMENT

The First Amendment of the Constitution fiercely protects the free exercise of religion and freedom of speech. Commissioner Hartwell's enforcement of the EOCPA violates AACS's rights guaranteed under the Free Exercise and Free Speech clauses. First Amendment infringement requires that the EOCPA undergo the strictest judicial scrutiny—a threshold that the EOCPA inevitably fails to satisfy.

Laws burdening the free exercise of religion that are either not neutral or not of general applicability are subject to strict scrutiny. The EOCPA burdens AACS's free exercise of religion because it requires AACS to abandon its sincerely held beliefs on the morality of same-sex marriage. The Governor's position of blatant disregard for any burdened philosophy or ideology under the EOCPA and Commissioner Hartwell's allowance of numerous exemptions demonstrate that the statute lacks neutrality and general applicability. HHS cannot justify under the Constitution the religious burden that the EOCPA places on AACS's right to freely exercise its faith.

The EOCPA amendments additionally require AACS to relinquish its Free Speech rights as a condition to continue its contractual relationship with HHS. The two statutory conditions do

not stop at limiting AACS's use of public funds to the contours of Evansburgh's adoption program. They go farther by forcing AACS to alter its expression of who it is as a religious organization. This pushes the EOCPA funding conditions beyond the limits allowed by the Supreme Court in *Rust* and *FAIR* and into the realm of prohibited funding conditions struck down in *AOSI*. Neither does East Virginia have the direct power to impose the new EOCPA provisions under the First Amendment. The Notice Requirement compels AACS to act as an involuntary mouthpiece for a government message, and the Policy Requirement results in flagrant viewpoint discrimination. Both are content-based speech regulations that East Virginia cannot justify under strict scrutiny as the least restrictive means for ensuring the equal protection of sexual minorities in the adoption process. The EOCPA amendments are thus unconstitutional as applied to AACS under both the Free Exercise Clause and the Free Speech Clause.

ARGUMENT

The First Amendment passionately guards against government interference with AACS's fundamental freedoms of religion and speech. The "heart of the First Amendment [is] that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *AOSI*, 570 U.S. at 213. The Free Exercise and Free Speech clauses bind State and local government through incorporation into the Fourteenth Amendment. U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Free Exercise Clause bars government from interfering with a person's religious beliefs, coercing the adoption of views contradictory to one's faith, or "act[ing] in a manner that . . . presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)); *School Dist. Abington Tp. v. Schempp*, 374

U.S. 203, 223 (1963). The Free Speech Clause similarly bans government from making any law that "abridges the freedom of speech." U.S. Const. amend. I. Government is thus prohibited from commanding involuntary speech and from using conditions on the allocation of public funds to compel individuals to give up their free speech protection. *Janus v. American Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); *AOSI*, 570 U.S. at 213.

The EOCPA runs afoul of First Amendment protections when enforced against AACS. The Supreme Court applies strict judicial scrutiny to any government regulation that violates these most fundamental rights. *See Smith*, 494 U.S. at 888 (strict scrutiny review applies to laws burdening religion that are not neutral or generally applicable); *Reed v. Town of Gilbert*, 576 U.S. 155, 155 (2015) (content-based regulations of free speech are presumptively unconstitutional). Neither Commissioner Hartwell on behalf of HHS nor the state of East Virginia can justify their encroachment on the First Amendment under strict scrutiny analysis. It is "the proudest boast of our free speech jurisprudence that we protect speech that we hate" just as "it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive." *Masterpiece*, 138 S. Ct. at 1737 (Gorsuch, J. concurring) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017)).

The EOCPA's Free Exercise violations (Section I), unconstitutional conditions (Section II(A)), and Free Speech violations (Section II(B)) cannot stand constitutional muster and must be struck down by this Court.

I. HHS's unconstitutional enforcement of the EOCPA against AACS violates the Free Exercise Clause of the First Amendment.

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of any religious belief. U.S. Const. amend. I. Free exercise of religion is a fundamental right that ensures every individual "believe[s] and profess[es] whatever religious doctrine one

desires." *Employment Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Thus, the Free Exercise Clause prohibits "governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). As such, the Free Exercise Clause demands that government tolerate all forms of religious practice, including objections to same-sex couples as these are "protected views and in some instances protected forms of expression." *Masterpiece*, 138 S. Ct. at 1727.

The exercise of religion not only involves beliefs but also acts, which "cause hard questions [to] arise when people of faith exercise religion in ways that may be seen to conflict with," socially acceptable behavior. *Obergefell*, 576 U.S. at 711 (2015) (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting). Current Supreme Court precedent holds that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, 494 U.S. at 879. If a law is not neutral and of generally applicability and it substantially burdens the practice of a sincere religious belief, then government must demonstrate that the law "is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533.

HHS cannot show that the EOCPA passes the requisite constitutional standards to justify its violation of AACS's rights under the Free Exercise Clause. The sentiments underlying the Governor's statement and the actions of Commissioner Hartwell demonstrate the EOCPA is not a neutral law. R. at 6–9. But it is HHS's unequal implementation of the law that is the fatal blow undermining the general applicability of the statute. Thus, under Free Exercise jurisprudence, the EOCPA must pass strict scrutiny. Commissioner Hartwell failed to provide a compelling interest that necessitates enforcing the EOCPA, and as applied to AACS, the EOCPA is not narrowly

tailored. Thus, this Court should find HHS's enforcement of the EOCPA fails strict scrutiny and violates AACS's rights under the Free Exercise Clause.

A. The government's motivation to restrict AACS's free exercise of its religious beliefs belies the neutrality of the EOCPA.

The EOCPA fails under the first step of analysis in a Free Exercise claim—the requirement of neutrality. *See Lukumi*, 508 U.S. at 532 ("We begin by discussing neutrality."). This is the first step because a failure to satisfy the requirement of neutrality will always result in failure to satisfy the requirement of general applicability. *See id.* at 531 (recognizing that the concepts of general applicability and neutrality are interrelated); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *And The General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 866 (2001). Thus, neutrality is a necessary component of general applicability, but not itself definitive. *See Lukumi*, 508 U.S. at 543 (holding that a separate analysis of general applicability is not necessary when the standard of neutrality is not adequately met).

Neutrality turns on the object of the challenged law. The focus is whether the law "infringe[s] upon or restrict[s] practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. As a threshold matter, the law is invalid if the text of the statute is not facially neutral. *Id*. (explaining a law lacks facial neutrality if words in the text target religious practice with no other secular meaning). Even if a law is facially neutral, this finding is not dispositive. *Id.* at 534. The law also must not contain "subtle departures from neutrality" or "covert suppression of particular religious beliefs." *Id.*; *accord Masterpiece*, 138 S. Ct. at 1731. To uncover these transgressions, this Court must "survey meticulously" the totality of the evidence, considering "both direct and circumstantial" evidence. *Lukumi*, 508 U.S. at 534. For example, the Court should investigate "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." *Id.*

When the EOCPA was first adopted its text placed prohibitions on child placement agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability," when screening and certifying potential adoptive parents. E.V.C. § 42.-2 (2017). East Virginia amended the EOCPA 43 years later, adding "sexual orientation" to its list of protected classes. E.V.C. § 42.-3(b) (2017). East Virginia was prompted to amend the EOCPA by the *Obergefell* decision. 576 U.S. 644 (approving same-sex marriage as a fundamental right). With these amendments, the Governor vowed to "eradicat[e] discrimination . . . particularly against sexual minorities, regardless of what *philosophy* or *ideology* drives or undergirds such bigotry." R. at 6 (emphasis added).

The Governor's statement reveals the object of the EOCPA's amendments—a "covert suppression" of religious beliefs. Concern for ensuring that sexual minorities are afforded rightful protections is a valid objective, but not when it induces religious intolerance. *See Lukumi*, 508 U.S. at 547 (noting that "[t]he Free Exercise Clause commits government itself to religious tolerance"). The Governor's targeting of any "philosophy or ideology" evidences the Governor's contempt for any religious faith that is reluctant to accept sexual minorities. Had the Governor's approach been neutral in pursuing statewide eradication of sexual minority discrimination, such intentions would have been devoid of any references indicative of religious animosity. *See id.* ("[U]pon even slight suspicion that proposals . . . stem from animosity to religion . . . all officials must pause to remember their own high duty to the Constitution and to the rights it secures.").

The animus underlying the EOCPA's enforcement against AACS is also demonstrated by the actions of Commissioner Hartwell. After the Commissioner's conversation with an

Evansburgh reporter, one year after the EOCPA amendments, he contacted only the religious-based agencies in the area to ensure compliance with the EOCPA. R. at 6–7. Commissioner Hartwell did not contact any secular-based agencies to ensure their compliance as well. Neither were his actions provoked by any complaint against AACS. The only way he knew of AACS's objections to the EOCPA amendments was through his own investigation—one he only conducted on religious-based agencies. R. at 7. If it were truly HHS's objective to ensure compliance with the EOCPA across the board instead of suppressing unfavorable religious beliefs, it would have conducted a proper investigation of all agencies, not just religious-based ones.

The Governor's religious intolerance and Commissioner Hartwell's actions reveal the true object of the EOCPA amendments. The Panel erroneously held that this subversive oppression of AACS's faith is evidence of a neutral law. Thus, this Court should find the EOCPA fails the first standard set forth in *Lukumi* and must undergo strict scrutiny.

B. The EOCPA is not generally applicable because HHS's enforcement is riddled with exemptions.

The Panel's reasoning was a far departure from Supreme Court precedent under *Lukumi*. It completely ignored the neutrality requirement and then applied the incorrect test for the general applicability prong. R. at 20–22. According to *Lukumi* a law is subject to strict scrutiny if it fails either the neutrality or general applicability test. 508 U.S. at 546. By considering only one prong of the dual-part test, the Panel robbed AACS of its full protections guaranteed to it under the Free Exercise Clause. *Lukumi* dictates that a Free Exercise analysis must start with neutrality, and only if neutrality is satisfied can a court move on to an analysis of general applicability. *Id.* at 532, 543.

The key goal of the general applicability requirement is to "protect religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542; *see Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment). General

applicability requires a court to examine the underinclusiveness of the challenged law. *Lukumi*, 508 U.S. at 543. Underinclusiveness occurs when "religious exercise is burdened while non-religious behavior threatening similar legitimate interests of government is not." David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201, 209 (1997); *see Lukumi*, 508 U.S. at 543 (holding that a law is underinclusive when it fails to prohibit secular conduct that undermines the same interest supposedly protected by infringing upon a religious belief). Underinclusiveness focuses on the application and effectiveness of the law, not on the actual language. *See Lukumi*, 508 U.S. at 543 (discussing how a law is underinclusive if, in its application, it does not assist in furthering the interests for which the law was created). A law is not equally applied if the government selectively applies the law to "impose burdens only on conduct motivated by religious belief[s]," even while in pursuit of a legitimate interest. *Id.* Thus, there are two questions this Court must ask to correctly determine general applicability: (1) who is ultimately burdened by the challenged law; and (2) if government has selectively applied that law.

1. The EOCPA amendments only burden religious organizations such as AACS.

AACS adheres to a sincerely held religious belief of the Islamic faith that same-sex partnerships are immoral. R. at 7 (the Qur'an and the Hadith consider same-sex marriage a moral transgression). This belief is also a canon of several other religions. *See Romans* 1:26–27 (Contemporary English Version) (showing that the Bible, the central text for Catholicism and Christian sects, describes homosexuality as a sin); *The Book of Vayikra (Leviticus)* 18:22 (showing that the Tanakh, the Hebrew Bible containing the central texts of Judaism, describes homosexuality as a moral transgression). Although reluctance in endorsing same-sex marriage does not have to be religiously motivated, there is a heavy correlation between opposing same-sex marriage and

religious convictions. *Views About Homosexuality*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/views-about- homosexuality/ (last visited Sept. 14, 2020).

It is obvious that East Virginia and HHS anticipated the EOCPA would burden only religious-based agencies. A plain reading of the EOCPA displays its inherent religious burden. It only allows "religious-based" child placement agencies to post a written objection to its policy. R. at 6; E.V.C. § 42.-4 (2017). East Virginia would only include this provision if it believed the EOCPA amendments would exclusively burden religious-based agencies. Additionally, among the 34 child placement agencies that contract with HHS, only religious-based agencies have garnered Commissioner Hartwell's attention about their placement policies and practices regarding same-sex couples. R. at 3, 6–7. EOCPA violations by religious-based agencies were also the only object of inquiry by an Evansburgh Times reporter. R. at 6. The reporter's inquiry is indicative of the public's recognition that religious-based agencies are reluctant to accept same-sex marriage. Each of these acts do not evidence a mere coincidence, but instead, illuminate the innate ramifications of the EOCPA amendments—placing a burden on only Evansburgh's religious-based agencies.

2. The EOCPA is not generally applicable because HHS refuses to exempt AACS, despite previously allowing other exemptions.

HHS does not have a compelling reason for refusing to extend an EOCPA exemption to AACS. A law is not generally applicable if government creates a multitude of exemptions to its challenged law yet refuses to grant an exemption for a religious organization. *Smith*, 494 U.S. at 884 ("the State . . . may not refuse to extend [a system of exemptions] to cases of religious hardship without compelling reason"). The Panel incorrectly applied a different test for general applicability: "whether the plaintiff can show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views."

R. at 20; *see also Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015). The Panel further erroneously relied on the dissent from *Burwell v. Hobby Lobby* to conclude that "[a] facially neutral law does not violate the general applicability requirement merely because the government grants some exemption to the law." R. at 20; *Burwell v. Hobby Lobby*, 573 U.S. 682, 763–64 (2014) (Ginsburg, J., joined by Sotomayor, Breyer, and Kagan, JJ., dissenting). This reasoning is dicta. This Court should instead follow the current precedent of the Supreme Court which remains the rulings set forth in *Smith* and reaffirmed in *Lukumi*. *Lukumi*, 508 U.S. at 543; *Smith*, 494 U.S. at 888.

There are a number of exemptions explicitly written into the EOCPA that HHS abides by. One such exemption states that where all other qualifications are equal, agencies must "give preference" to families in which at least one parent is the same race as the child needing placement. E.V.C. § 42.-2(b). Another states that if a child has an identified sexual orientation, agencies must give preference to parents that identify as the same orientation as the child. E.V.C. § 42.-3(c). HHS is also required to assess additional factors such as the child's age, prospective parents' ages, sibling relationships, race, medical needs, emotional needs, and disabilities when ultimately deciding which family to place a child with. E.V.C. § 37(e) (2017).

HHS additionally grants a number of purely discretionary exemptions. HHS contradicted its own policies by placing a white special-needs child with an African American couple, despite multiple white families being certified. R. at 8–9. It also refused to place a girl with a certified family consisting of a single father and his son without stating any reason at all. R. at 9. Most recently, HHS took AACS's advice in discriminating between religious sects to prevent placing children of the Sunni and Shia faiths in households of the opposing faith. R. at 9.

HHS may have legitimate interests in granting these exemptions, but the Supreme Court has made it clear that when the government has granted exemptions for secular reasons, it cannot then refuse religious exemptions unless it serves a compelling state interest. A legitimate interest does not always rise to the level of a compelling one—that is the case here. *See* Robert Miller, *What Is a Compelling Governmental Interest?*, 21 J. Mkts. & Morality 71, 83 (2018) (explaining that a legitimate interest is the lowest "rank" of governmental interests while a compelling interest is the highest). Thus, absent any compelling interest, this Court should hold that HHS is not justified in refusing a religious exemption to AACS, and that the EOCPA fails the general applicability requirement. The EOCPA amendments should therefore be held to the strictest judicial scrutiny by this Court.

C. HHS's enforcement of the EOCPA against AACS cannot withstand strict scrutiny.

Commissioner Hartwell has not articulated a compelling state interest served by his selective enforcement of the EOCPA against AACS. It is essential under the Free Exercise Clause that a government, in pursuit of its interests, "cannot in a selective manner impose burdens only on conduct motivated by religious belief[s]." *Lukumi*, 508 U.S. at 543. A religious burden is substantial when there is a secular penalty for failing to comply with the law. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burden on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94, 94 (2017). When a law substantially burdens a sincere religious belief and is neither neutral nor of general applicability, it must therefore undergo the "strictest of judicial scrutiny." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *accord Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020); *Lukumi*, 508 U.S. at 546.

It is undisputed that both HHS and Commissioner Hartwell are aware of AACS's sincere religious belief regarding same-sex marriage. R. at 7. The burden that HHS has placed on AACS

by demanding compliance with the amended EOCPA is undoubtedly substantial, as AACS has suffered a secular penalty in the loss of its contract with HHS and its exclusion from Evansburgh's adoption system. R. at 7–8. Thus, since the EOCPA substantially burdens AACS's sincerely held religious beliefs, and is neither neutral nor generally applicable, it must be subjected to strict scrutiny.

Under strict scrutiny, courts consider whether a law is "justified by a compelling governmental interest and [is] narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. HHS has not demonstrated a compelling state interest in enforcing the EOCPA against AACS. In fact, HHS's "compelling interests" are essentially undermined by such enforcement. Neither is the amended EOCPA narrowly tailored. HHS has the ability to offer accommodations to AACS, which amounts to the same type of exemptions HHS already provides in other child placement decisions. Thus, Commissioner Hartwell's enforcement of the EOCPA against AACS fails strict scrutiny.

1. HHS cannot articulate a compelling government interest because enforcing the EOCPA against AACS hinders HHS's stated interests.

East Virginia's interests in eliminating discrimination are not compelling when they undermine HHS's interest in providing for the well-being of each child it serves. To overcome the constitutional safeguards of the Free Exercise Clause, a law that fails to be either neutral or of general applicability must "advance interests of the highest order." *Lukumi*, 508 U.S. at 546. This requires a government to "identify an 'actual problem' in need of solving, and the curtailment of [the religious right] must be actually necessary to the solution." *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011). But when a law "leaves appreciable damage to that supposedly vital interest unprohibited," such a law cannot be said to serve a compelling government interest. *Lukumi*, 508 U.S. at 547.

HHS fails to satisfy the compelling interest standard because its enforcement of the EOCPA against AACS undermines its stated interest in the well-being of Evansburgh's children. HHS asserts several purposes for enforcing the EOCPA:

> (1) ensuring state and local laws are enforced when a child placement agency voluntarily agrees to abide by them; (2) maintaining accessibility to child placement services to all qualified Evansburgh residents; (3) keeping the pool of adoptive parents as diverse and broad for the children needing placement; (4) safeguarding child placement services for individuals who pay taxes to fund government contractors; and (5) the successful placement of children in qualified homes.

R. at 9, 13. Although HHS's purposes for enforcing the EOCPA may seem beneficial, these interests should not overshadow HHS's primary goal, which is to provide foster homes for a large population of children in need. R. at 3.

HHS is failing in this goal by barring AACS from participation in the adoption program. Evansburgh is currently in severe need of foster and adoptive homes with over 17,000 children in need of childcare services. R. at 3. AACS has long been part of the mission to find adoptive homes for these children. R. at 5. Eliminating AACS as a partner agency only exacerbates HHS's chronic shortage of resources. Thus, HHS is hindering itself from furthering its stated interests. This Court should find that HHS has not articulated a compelling government interest because its enforcement of the EOCPA against AACS causes an "appreciable damage to [its] vital interest" in providing for the well-being of children. *Lukumi*, 508 U.S. at 547.

2. HHS's EOCPA enforcement is not narrowly tailored because it can achieve its purpose without encroaching on AACS's religious freedom.

Not only has HHS failed to articulate a compelling state interest, but it also cannot prove that the EOCPA is narrowly tailored to meet any of its purported interests. HHS must "demonstrate that it does not unnecessarily circumscribe," *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002), AACS's religious rights when attempting to meet its stated interests, or that enforcing the EOCPA is "the least restrictive means among available, effective alternatives." *Ashcroft v.*

American Civil Liberties Union, 542 U.S. 646, 666 (2004). Furthermore, a statute that fails to regulate activities posing the same threat to the government's stated interests as the conduct being prohibited is not narrowly tailored as it is "underinclusive." *See City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994) (noting that underinclusiveness, in the context of strict scrutiny, undermines the credibility of the government's rationale for restricting a protected right).

HHS's enforcement of the EOCPA against AACS leaves the agency with an all or nothing dilemma: either conform to HHS's demands or lose its public funding *and* be expelled from participation in the adoption program through HHS's referral freeze. This my-way-or-the-highway approach is not the "least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666. HHS could instead grant AACS an exemption for its religious beliefs, which would further HHS's primary interest of providing foster homes for children in need without infringing on First Amendment rights.

Moreover, HHS contradicts its goal in prohibiting discrimination through enforcement of the EOCPA because it allows other forms of discrimination to exist. In 2015, HHS refused an otherwise qualified foster home for a young girl because the household consisted of a father and son. R. at 8. HHS also requires child placement with same-race families, claiming that it is "to preserve and protect minority children." R. at 9. Thus, HHS's enforcement of the EOCPA is underinclusive because it allows other forms of discriminatory practices, which pose the same threat to its supposed interests as AACS's non-compliance. Therefore, this Court should find that the EOCPA amendments are unconstitutional because they are not narrowly tailored, but rather an impermissibly broad proscription on AACS's religious freedom.

II. The EOCPA's unconstitutional public funding conditions violate AACS's Free Speech protections.

The unconstitutional conditions of the EOCPA force AACS to abdicate its freedom of speech in return for the benefit of continued public funding as a childcare services provider for Evansburgh's refugee community. Government can "make no law . . . abridging the freedom of speech." U.S. Const. amend. I. 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). Compelled speech is particularly damaging when "individuals are coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2465.

The unconstitutional conditions doctrine prohibits government from conditioning a government benefit on the relinquishment of constitutionally protected rights—especially Free Speech rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *FAIR*, 547 U.S. at 59 (reaffirming the unconstitutional conditions doctrine). The Supreme Court's enforcement of this doctrine prevents government from using conditioned benefits to regulate enumerated rights in ways that are otherwise invalid under the Constitution. *Perry*, 408 U.S. at 597; *see also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1377 n. 4 (2018). East Virginia thus cannot use funding conditions to indirectly produce a result it could not directly achieve under the Constitution. *FAIR*, 547 U.S. at 59.

The 2017 EOCPA amendments place two unconstitutional conditions on AACS's access to adoption services funding. First, AACS is required to post a signed Notice of the EOCPA anti-discrimination law on its premises. E.V.C. § 42.-4. Second, AACS is required to affirmatively certify same-sex couples for adoption rather than refer them to available LGBTQ agencies. *Id*. § 42.-3(b). AACS cannot comply with these compelled speech conditions due to its religious convictions about same-sex marriage. R. at 7, 14. HHS's enforcement of the EOCPA against

AACS thus compels it to express an abandonment of its sincerely held beliefs in return for the benefit of government funding and full participation in Evansburgh's adoption program. R. at 7–8. It is not the place of HHS, or the state of East Virginia, to "prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The Panel erred in holding that the EOCPA conditions are valid under *Rust* (Part A(i)) and *FAIR* (Part A(ii)). R. at 23. This case is correctly governed by *AOSI* because the challenged conditions "go beyond defining the limits of the [] funded program to defining [AACS]" itself. *AOSI*, 570 U.S. at 218. Further, neither condition is justified under the requisite strict scrutiny standard (Parts B & C). This Court should thus affirm the district court's decision under *AOSI*.

A. The Notice and Policy Requirements are unconstitutional conditions under *AOSI*.

The Notice and Policy Requirements force AACS into relinquishing its freedom of speech outside the bounds of HHS's contract, surpassing the constitutional limits of government's public funding power. Government may only infringe upon enumerated rights when it has the direct power to do so under the Constitution. *FAIR*, 547 U.S. at 59. The Panel was correct that government may use its Spending Clause power to limit funding recipients' free speech to the intended scope and purpose of a government funded program. *Rust*, 500 U.S. at 195. The Supreme Court, however, has ruled that the First Amendment also prohibits the use of this power when funding conditions allow government to regulate free speech outside the contours of the funded program. *AOSI*, 570 U.S. at 214–15. Government may not place unconstitutional conditions on free speech even when the recipient has no entitlement to the government benefit or can arguably decline the funding. *FAIR*, 547 U.S. at 59 (quoting *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003)).

The *AOSI* Court laid out that a funding condition is valid when it acts to necessarily limit the use of funds within a government program to the program's purpose. *AOSI*, 570 U.S. at 214–15. But, a condition that "seek[s] to leverage funding to regulate speech outside the contours of the program itself" is unconstitutional. *Id*. at 206. Critical to this case, the Court held that compelling a recipient of public funds to adopt a particular government viewpoint as its own on an issue of public concern imposes a condition that "by its very nature affects protected conduct outside the scope of the [] funded program." *AOSI*, 570 U.S. at 219. The existence of this exact compulsion on AACS under the EOCPA conditions eliminates both *Rust* and *FAIR* as controlling precedent. This Court should thus find the EOCPA conditions unconstitutional under *AOSI*.

1. The EOCPA conditions restrict AACS's free speech outside the boundaries of HHS's adoption program.

The Panel relied erroneously on *Rust* because the EOCPA conditions mandate that AACS entirely adopt a particular belief as its own. These conditions go beyond the limited proscription of free speech allowed within a publicly funded program as approved under *Rust*. 500 U.S. at 194. The condition in *Rust* prohibiting doctors within government funded family planning projects from promoting abortion illustrates this distinction with clarity. *AOSI*, 570 U.S. at 216. The statutory restrictions on doctors' speech in *Rust* functioned to limit the use of government grants to the express purpose of the funded projects, which explicitly excluded abortion as a viable method of family planning. 500 U.S. at 179. Thus, funding conditioned on the restriction of speech within the program to approved prenatal methods of family planning was a permissible government regulation of speech. *Id*. at 193–94. The conditions in *Rust* did not violate the First Amendment because they left the recipient "unfettered" to engage in its preferred speech whenever acting outside of the government funded program. *Id*. at 196.

The policy conditions in *AOSI*, however, contrast sharply with the structural ones in *Rust*. The government grants in *AOSI* were conditioned on the entire relinquishment of a specific belief, not on compliance with limited speech restrictions within the recipient's grant-funded project. *AOSI*, 570 U.S. at 213 (requiring "[explicit agreement] with the Government's policy to oppose prostitution"). The Court held that a requirement on recipients to adhere to a particular belief "goes beyond defining the limits of the federally funded program to defining the recipient." *Id*. at 218. In comparing *AOSI* to *Rust*, the Court explained that unconstitutional conditions are those where the government improperly places a condition of funding on the recipient itself as opposed to on the funded program. *Id*. at 219.

The EOCPA conditions here are analogous to those struck down as unconstitutional in *AOSI*. AACS's identity as an adoption agency is founded on providing services consistent with the Qur'an's teachings. R. at 5. AACS cannot continue that mission "unfettered" when it is required to speak against its beliefs as a condition for access to Evansburgh's adoption program. The Notice Requirement compels AACS to affirmatively endorse with its signature and post on its premises a government policy with which it disagrees. E.V.C. § 42.-4. The Policy Requirement compels AACS to act contrary to its sincerely held beliefs by certifying same-sex couples as AACS-approved potential parents. E.V.C. § 42.-3(b). Both conditions require AACS to "avow the belief dictated by the [EOCPA when performing the HHS contract], and then turn around and assert a contrary belief" in its independent activities. *AOSI*, 570 U.S. at 219.

Thus, the EOCPA conditions go beyond defining the limits of the adoption program and unconstitutionally compel AACS to adopt East Virginia's imposed policy position as its own. East Virginia may not force AACS into complete capitulation to the government's chosen policy in return for public participation as an adoption services provider. This Court should hold that such

conditions compelling the involuntary affirmation of government speech and viewpoints are not governed by *Rust*, but are unconstitutional under *AOSI*.

2. AACS's speech targeted by the EOCPA is distinguishable from the expressive conduct regulated in FAIR.

The Panel incorrectly applied *FAIR* in this case because the EOCPA funding conditions are distinguishable regulations of speech, rather than of conduct, that must undergo strict scrutiny analysis. *FAIR* concerned the preliminary doctrinal hurdle of whether government has direct power to constitutionally impose the challenged conditions independent from the publicly funded program. 547 U.S. at 59–60. If so, there is no unconstitutional condition. *Id*. (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). In *FAIR*, the Court held that a condition on law schools to "provide military recruiters [equal] access" to students in return for certain funding was not an unconstitutional condition on free speech. *Id*. at 52, 70. This condition was in fact a regulation of conduct because it "neither limits what law schools may say nor requires them to say anything" and leaves law schools "free under the statute to express whatever views they may have . . . while retaining eligibility" for funding. *Id*. at 60.

None of the reasonings in *FAIR* relied on by the Panel lead to the same approval of the EOCPA conditions here. The Panel correctly noted that posts with factual information like those challenged in *FAIR* are not compelled speech requiring First Amendment strict scrutiny. R. at 24; *FAIR*, 547 U.S. at 62 (discussing email notifications sent to students by the school about military recruiters' arrival on campus). First Amendment protection was not triggered because the challenged speech was not the focus of the government regulation, but was merely "incidental" to the regulated conduct. *Id.* at 62; *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501 (1949) (free speech protections are not triggered by a negligible effect on speech secondary to valid regulation of conduct). The schools were only required to treat all recruiters the same—the

statute did not require schools to send email notifications, make any communications to students, or affirm any government message at all. *FAIR*, 547 U.S. at 62.

Neither of the EOCPA compelled speech conditions in this case can be similarly categorized as incidental to other regulated conduct. Unlike in *FAIR*, AACS is explicitly mandated by statute as a condition for funding to sign and post the EOCPA anti-discrimination policy. That signature is an express statutory compulsion to endorse a government-mandated message contrary to AACS's beliefs. This was not a statutory condition on the law schools in *FAIR* and makes the Notice Requirement compelled speech that is both the focus and primary intent of the EOCPA regulation.

The Policy Requirement likewise compels AACS to endorse East Virginia's message of approval for same-sex couples by personally certifying them as adoptive parents. That certification is not an act—it is speech. It is an expressive documentation that reflects AACS's discretion and judgment that child placement with a particular parent would serve the best interest of that child. Thus, *FAIR* cannot control this case because the compelled speech here is not incidental to other regulated conduct, but is exactly what is required from AACS by the EOCPA.

The Panel also relied on the *FAIR* Court's holding that compelling law schools to host or accommodate military recruiter messages did not violate free speech because the law schools' own speech was not affected by accommodating the compelled message. *Id*. at 64. This type of violation occurs when the statutory compulsion interferes with or alters the speaker's desired message. *Id*. at 63–64; *see Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 566 (1995) (compelling inclusion of alternate messages interferes with the expressive nature of parades); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (compelling publications in newspapers altered the papers' desired messages by commandeering space that

could be used for other expressions). The Court held that inclusion of military recruiters in campus recruitment events does not rise to compelled speech because it does not sufficiently interfere with a school's message since the school itself is not speaking and recruiting events are not inherently expressive. *FAIR*, 547 U.S. at 64. The Court also highlighted that the public could readily distinguish between military and school messages so there was no "plausible fear" of misattribution. *Id*. at 65 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)).

In contrast, AACS's message is materially altered by the EOCPA's compelled speech conditions. Both requirements affect inherently expressive mediums deserving of First Amendment protection. The Notice Requirement alters AACS's message because it must be openly posted on its premises, a space where businesses traditionally have almost complete freedom to communicate desired messages to patrons. AACS is similarly required to promote—as its own—a contrary government viewpoint under the condition that it give its personal stamp of approval on certifications for same-sex couples. Both conditions require AACS itself to speak. The compulsion to include the government's messaging in its own speech thus substantially alters AACS's desired self-expression.

Both conditions also create more than a plausible fear that the government's messages will be misattributed to AACS. Even though AACS is permitted to also post a written objection to the EOCPA, it is nonetheless required to publicly endorse that policy as its own with its signature. That signature fatally undermines the opposing religious message that AACS desires to express. The same result is reached if AACS is compelled to certify same-sex couples. By their very nature, the compelled certifications communicate AACS's agreement with East Virginia's approach for ensuring inclusion of sexual minorities in the adoption process. These conditions force AACS's

messages to reflect shallow religious convictions and insincere dedication to its purpose of providing adoption services consistent with those beliefs. AACS cannot be expected to comply with what some may see as insignificant administrative hurdles when the required affirmations carry the price of AACS's desertion of its public identity to remain eligible for funding.

FAIR cannot govern this Court's determination of the EOCPA conditions' constitutionality because the free speech implications under the EOCPA are distinguishable from those in *FAIR*. The EOCPA dictates exactly what AACS must say about its policies and AACS must affirm them in word and deed in order to be eligible for funding. This Court should thus rely on controlling precedent under *AOSI* to find both conditions unconstitutional.

B. East Virginia has no direct constitutional power to impose the EOCPA conditions.

The EOCPA amendments are unconstitutional under the Free Speech Clause even if this Court does not find them to be impermissible funding conditions. The government's own speech is not regulated by the First Amendment. *Matal*, 137 S. Ct. at 1757; *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005); *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). The Supreme Court is adamant, however, that government cannot dictate what other people "must say" or compel them to "mouth support for views they find objectionable" without clear violation of the Free Speech Clause. *Janus*, 138 S. Ct. at 2463; *AOSI*, 570 U.S. at 213. This principle holds especially true when government hijacks the speech of individuals to promote its own messages. *Wooley*, 430 U.S. at 715. Even more egregious is government discrimination against an individual's particular view on a subject. *Rosenberger*, 515 U.S. at 829. The First Amendment does not permit government to "regulat[e] speech when the specific motivating ideology or the

opinion or perspective of the speaker is the rationale for the restriction." *Id*. at 829 (citing *Perry*, 408 U.S. at 46).

Any government compulsion on individuals to speak a particular message or view is presumptively unconstitutional as a content-based regulation of free speech. *Reed*, 576 U.S. at 163. Such laws can only be justified "if the government proves that they are narrowly tailored to serve compelling state interests." *Id*.; *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 798 (1988) (the same level of scrutiny applies to compelled statements of fact, opinion, and ideology). Both EOCPA conditions fail under strict scrutiny and cannot be imposed on AACS.

1. The Notice Requirement is presumptively invalid as compelled government speech.

The Notice Requirement impermissibly forces AACS to use its private property to disseminate a government message about marriage that it disagrees with. The First Amendment "stringently" restricts the government's power to compel a private speaker to express a government message contrary to its own belief. *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 219 (2015). A message is government speech when the government completely controls the message and the words that it requires to be disseminated. *Johanns*, 544 U.S. at 562. First Amendment protections are triggered when government forces an individual to use their private property as a "billboard" to advertise public adherence to a particular government message with which it disagrees. *Wooley*, 430 U.S. at 715. Laws compelling a person to speak or distribute a particular message are de facto content-based regulations of speech because such requirements inherently alter the content of an individual's message. *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Laws of this type are presumptively invalid and subject to strict scrutiny. *Reed*, 576 U.S. at 163.

The Supreme Court set forth qualifying characteristics for government speech in *Johanns*, where the federal government created a program to promote beef products through advertisement. 544 U.S. at 561. While private beef production companies contributed to the content of the advertisements, the ads were deemed "government speech" because government officials had complete control over the message and content of each ad. *Id*. Precedent under the Supreme Court's traditional compelled-speech cases also prohibits outright compulsions to affirm government speech. In both *Wooley* and *Barnette*, the Court prohibited government from forcing an individual to express a government message with which they do not agree. *Barnette*, 319 U.S. at 634 (government cannot compel recital of the pledge of allegiance); *Wooley*, 430 U.S. at 709, 713, 715 (government cannot compel display of the state motto "Live Free or Die" on an individual's license plate).

The EOCPA Notice Requirement parallels the government compulsions in these cases. As in *Johanns*, the words and messages of the Notice Requirement are completely controlled by the East Virginia legislature. This alone qualifies the Notice as government speech. Further, just as in *Barnette* and *Wooley*, the purpose of the government speech at issue is to promote adherence to a particular belief that the government deems important. The compulsion on AACS to affirm East Virginia's preferred ideology word for word at the expense of its own expression is just as impermissible as the governments' objectives in *Barnette* and *Wooley*. The Notice Requirement is therefore compelled government speech and is presumptively invalid.

2. The Policy Requirement is forbidden viewpoint discrimination under the Free Speech Clause.

The EOCPA Policy Requirement is invalid because it categorically bars AACS from expressing its viewpoint that the welfare of adopted children is best served by placement in a traditional household. The Panel correctly noted that government has discretion to use public funds

to only create programs that support its own viewpoint, ideology, or policy, while at the same time declining to subsidize the free expression of others' opposing views. *Rust*, 500 U.S. at 193. But, government discretion to selectively fund certain viewpoints stops when the choice of who to fund is made "in such a way as to aim at the suppression of dangerous [or disfavored] ideas." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983).

An individual's viewpoint is also not subject to government regulation—even when receiving a government subsidy—when the purpose of the public funds is to "encourage a diversity of views from different speakers" rather than to speak directly for itself. *Rosenberger*, 515 U.S. at 834; *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (contrasting the government purpose of facilitating private speech with promoting a government message). When a funded program relies on the private speech of individuals in its design, any speech restrictions must be necessary for the program's purpose and limits to be valid. *Velazquez*, 531 U.S. at 543–44; *see Rust*, 500 U.S. at 194. Whether a restriction on such private speech is allowed depends on the traditional usage of the medium of expression being regulated. *Id*. at 543.

In *Velazquez*, the Supreme Court held that a government funded program providing legal support to indigent welfare recipients could not place content restrictions on what kinds of arguments attorneys were allowed to make. *Id*. at 536–37. The Court held that the attorneys' speech, although government funded, retained protection as facilitated private speech because the attorneys were speaking on their clients' behalf, not the government's. *Id*. at 552 (the government delivers its own message as a separate part of the legal process). The Court ruled that government may not impose restrictions on private speech within a medium it seeks to use for its own benefit when such regulation impairs the traditional function of that medium. *Id*. at 544 (holding the speech restriction invalid because it "distort[ed] the legal system by altering the traditional role of

the attorneys"). A regulation funding only certain viewpoints within a government program that facilitates private speech thus cannot be "aimed at the suppression of ideas thought inimical to the Government's own interest." *Id*. at 549.

East Virginia's purpose for providing subsidies to private adoption agencies through HHS contracts does not allow for the Policy Requirement's restriction on private speech. Similar to the program in *Velazquez*, Evansburgh's adoption program is designed to facilitate the private speech of adoption agencies in assisting HHS in the best interest placement of children. R. at 3–4. The initial certification of prospective parents is the exclusive, traditional role of adoption agencies. R. at 3. HHS is only speaking in the adoption process when it decides that an agency's recommended placement is suitable for a particular child. R. at 3. The certification process and results are thus not government speech, but the private speech of each agency.

East Virginia nevertheless uses the Policy Requirement to fund only the agencies whose private certification decisions reflect its own viewpoint that same-sex couples are suitable candidates for child placement. HHS cannot create a program that relies on AACS's free expression and then proceed to regulate that speech by mandating what views will be tolerated. HHS's very purpose in enforcing the EOCPA conditions is to create a pool of parents to meet the diverse needs of children needing placement. R. at 9. Yet, its enforcement results in HHS refusing to fund an agency uniquely positioned to serve a wide subset of Evansburgh's refugee population. The Policy Requirement cannot be necessary to the adoption program's purpose when enforcement directly undermines it. Thus, the Policy Requirement is invalid because it unnecessarily discriminates against AACS on the sole basis that its viewpoint on same-sex marriage conflicts with the government's.

3. Both EOCPA conditions collapse under strict scrutiny.

Commissioner Hartwell cannot justify either EOCPA funding condition as a narrowly tailored approach in pursuit of a compelling state interest. Free Speech strict scrutiny prohibits government from "dictat[ing] the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 800; *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). A sufficiently compelling interest under Free Speech strict scrutiny must be an "immediate and urgent" state interest in "preventing a clear and present danger . . . the State is empowered to prevent." *Barnette*, 319 U.S. at 633.

Commissioner Hartwell contends that EOCPA enforcement against AACS serves two compelling government interests: eliminating discrimination and successful placement of children in qualified adoptive homes. R. at 13. These interests must be balanced, however, against AACS's equally vital interest in exercising its Free Speech rights as codified under the Constitution. Successful child placement is a state interest that both AACS and HHS support. But, HHS's interest in eliminating discrimination from the adoption system is "not as great as [it] might initially appear." *Riley*, 487 U.S. at 798. There is no evidence that anti-discrimination measures are necessary to protect sexual minorities or ensure their access to services in the adoption system. In fact, there are several agencies in Evansburgh that specifically cater to the LGBTQ community. Nor have same-sex couples ever complained about AACS referring them to another agency rather than certifying them itself. R. at 7. Yet, Commissioner Hartwell proceeded with EOCPA enforcement which unnecessarily burdens AACS's free speech.

The EOCPA's fatal flaw is that neither funding condition is the most precise option available for promoting the inclusion of same-sex couples in the adoption process. Assuming that a policy Notice to parents has any anti-discriminatory effect, notice could be achieved without

violating AACS's free speech rights through a web posting on HHS's website in the same place where HHS notifies parents of available adoption agencies. R. at 5. The additional signature endorsement does nothing but force AACS to express a betrayal of its own beliefs. Thus, the Notice Requirement is not narrowly tailored to serve an anti-discriminatory purpose.

The Policy Requirement also has a minimal effect on promoting the inclusion of same-sex-couples in the adoptive parent pool. HHS contracts with 33 other agencies, four of which specialize in supporting LGBTQ parents throughout the adoption process. It is not necessary to require every agency to certify same-sex couples, especially when doing so violates protected fundamental rights. HHS can more precisely ensure the access of sexual minorities to the adoption process by requiring referral to appropriate agencies—a method already heavily practiced within Evansburgh's adoption industry. The Policy Requirement is thus an impermissibly broad, prophylactic rule that fails to meet the precise standard of regulation demanded under strict scrutiny.

The most detrimental effect of Commissioner Hartwell's enforcement of the EOCPA conditions is HHS's inability to fulfill its even more compelling interest—providing for the well-being of Evansburgh's most disadvantaged children. Since Commissioner Hartwell's unnecessary blockade of AACS, HHS failed to make adoption placements that were in the best interest of at least four children. The negligible effects that the EOCPA conditions have on anti-discrimination efforts do not justify the weighty burden they place on the needs of Evansburgh's foster children and AACS's protected expression of its faith.

East Virginia cannot "sit in judgment of religious beliefs" by unconstitutionally imposing its preferred ideology on AACS as a condition for participation in Evansburgh's adoption program. *Masterpiece*, 138 S. Ct. at 1737 (Gorsuch, J., concurring). This Court should refuse to expand the

government's ability to leverage funding powers in pursuit of its own interests at the expense of individuals' fundamental rights to free exercise of religion and freedom of speech guaranteed under the Constitution.

CONCLUSION

For the foregoing reasons, Appellee AACS respectfully requests that this Court grant AACS's motion seeking a Temporary Restraining Order against Commissioner Hartwell's referral freeze and grant a permanent injunction compelling Commissioner Hartwell to renew AACS's contract with HHS.

Dated: September 14, 2020

Respectfully Submitted,

TEAM 11

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