Case No. 2020-05

In The

UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

September Term 2020

CHRISTOPHER HARTWELL, IN HIS OFFICIAL CAPACITY AS COMISSIONER 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 APPELLANT

Team 21

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September 14, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STANDARD OF REVIEW 1

ISSUES PRESENTED 2

STATEMENT OF THE CASE 3

Factual Background 3

Procedural Background 5

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. The requirement that AACS certify same-sex couples does not unconstitutionally infringe on its ability to freely exercise its religion 8

A. The non-discrimination statute is facially neutral and is not intended to act as a governmental guise for religious discrimination 9

B. AACS has not proven that the statute is not applied generally nor that it targets AACS specifically for its religious beliefs 11

1. Prior secular exceptions made by HHS are irrelevant to the general applicability of the statute because no exceptions have been made for other agencies 12

2. East Virginia has the authority to regulate the conduct of city contractors by requiring compliance with state statutes 13

C. Even considering prior instances of allowed discrimination as a non-general application, the compelling interest of eradicating discrimination is fulfilled through the statute's narrow construction 14

II. Requiring a city contractor to post a statutory notice does not qualify as compelled private speech and thus is not an unconstitutional condition 18

A. HHS is acting within the scope of the purpose of the program in requiring contracting agencies to post a governmental message 19

B. The notice provision is effectually regulating conduct, not speech, and does not require AACS to endorse same-sex relationships.....21

1. Only conduct that is symbolic speech and inherently expressive falls under strict scrutiny.....22

2. The notice provision is not inherently expressive and does not require contracting agencies to suppress their own beliefs.....23

CONCLUSION.....25

CERTIFICATE OF SERVICE.....26

TABLE OF AUTHORITIES

Page(s)

Cases

Agency for Int'l Dev. v. All. for Open Soc'y Int'l,
570 U.S. 205 (2013).....19

Bowen v. Roy,
476 U.S. 693 (1986).....9, 11

Cantwell v. Connecticut,
310 U.S. 296 (1940).....8

Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. School. Dist.,
386 F.3d 514 (3d. Cir. 2004).....1

Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez,
561 U.S. 661 (2010).....15, 16

Church of Lukumi Bablu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993).....passim

D&M Sales, Inc. v. Lorillard Tobacco Co.,
No. CIV.A.09-2644, 2010 WL 786550 (E.D. Pa. Mar. 8, 2010).....14

Emp. Div., Dep't of Human Res. of Or. v. Smith,
494 U.S. 872 (1990).....8, 9, 10

Garcetti v. Ceballos,
547 U.S. 410 (2006).....13

Gillette v. United States,
401 U.S. 437 (1971).....9

Gitlow v. New York,
268 U.S. 652 (1925).....18

Holt v. Hobbs,
574 U.S. 352 (2015).....15, 17

Legal Services Corp. v. Velazquez,
531 U.S. 533 (2001).....18, 19, 20

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n,
138 S. Ct. 1719 (2018).....17

McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC,
511 F.3d 350 (3d. Cir. 2007).....1

Minersville School Dist. v. Gobitis,
310 U.S. 586 (1940).....8

Perry v. Sindermann,
408 U.S. 593 (1972).....19

Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.,
547 U.S. 47 (2006).....21, 22, 23, 24

Rust v. Sullivan,
500 U.S. 173 (1991).....18, 19, 20

Texas v. Johnson,
491 U.S. 397 (1989).....21

Tinker v. Des Moines Indep. Cmty. School Dist.,
393 U.S. 503 (1969).....22

United States v. Lee,
455 U.S. 252 (1982).....8

United States v. O'Brien,
391 U.S. 367 (1968).....22, 23, 24

Ward. v. Polite,
667 F.3d 727 (6th Cir. 2012) 11

West v. Atkins,
487 U.S. 42 (1988).....13

West Virginia Board of Educ. v. Barnette,
319 U.S. 624 (1943).....18, 22

Winter v. Nat. Res. Defense Council, Inc.,
555 U.S. 7 (2008).....1

Wooley v. Maynard,
430 U.S. 705 (1977).....18

Statutes

28 U.S.C.A. § 1292(a)(1) 1

Constitutional Provisions

U.S. Const. amend I 8, 18

U.S. Const. amend XIV, § 1 .....10, 16

Other Authorities

Greg Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 Law & Contemp. Probs. 175, 177-78 (Summer 2004) 16

Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 Const. Comment. 71 (1996).....18

Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction*, § 45:1 (7th ed.) (Westlaw 2A Sutherland Statutory Construction § 45:1) 12

STATEMENT OF JURISDICTION

The United States District Court for the Western District of East Virginia entered final judgment on April 29, 2019. R. at 17. This Court exercises proper jurisdiction over that decision pursuant to 28 USCA § 1292(a)(1).

STANDARD OF REVIEW

The legal standard for reviewing a district court's granting of preliminary injunctive relief is an examination of the facts for clear error, and de novo for legal conclusions. *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 357 (3d. Cir. 2007). However, when the issues involve First Amendment rights, the standard shifts to de novo for a full examination of the record. *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. School. Dist.*, 386 F.3d 514, 524 (3d. Cir. 2004) ("… we have a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim.").

When deciding whether or not to grant a motion for injunctive relief, the procedural framework that a court must consider is comprised of four factors: (1) the likelihood of the movant's success on the merits, (2) will the movant suffer irreparable harm without preliminary relief, (3) does the balance of equities tip in the movant's favor, and (4) is the injunction in the public interest. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The first two factors are considered threshold factors and must be met before a court engages in balancing all four as whole. *Id.*

ISSUES PRESENTED

I. Is a city contractor prevented from freely exercising its religious beliefs when it is prohibited from discriminating against certain swaths of the community that it is contractually obligated to provide a secular public service to?

II. Does the requirement to post a government notice qualify as compelled private speech when the government is operating within the purpose of the program in furthering its own message and contracting agencies are permitted to post their own notice of opposition?

STATEMENT OF THE CASE

Factual Background

Hierarchy of the Adoption System. East Virginia delegates the authoritative administration of foster and adoption services to municipalities. R. at 3. The City of Evansburgh has tasked Health and Human Services (HHS) with implementing a system that best serves the needs of the children who need to be placed in foster care or adoption. R. at 3. HHS integrated a system of subsidized contracts with thirty-four private agencies to provide foster care and adoption services. R. at 3. HHS provides funding to these agencies, and in return these agencies conduct home studies, counseling, and placement recommendations to HHS. R. at 3. These agencies are tasked with keeping lists of available families, so that when HHS receives a new child into the system, they can send out a referral to these agencies and receive potential family matches in return. R. at 3. These agencies do not pair children with families, but rather provide pre-screened family recommendations to HHS so that HHS can make the final determination based on the best fit for the child. R. at 3. After HHS makes this final determination and places the child with the adoptive family, the agency that recommended that family is contractually required to continue supervision and offer support. R. at 4.

History of AACS. Evansburgh is home to a large refugee population from countries including Syria, Iran, Iraq, and Ethiopia. R. at 3. In 1980, Adab Al-Mufrad Care Services (AACS) formed to provide support to this refugee community, including adoption placement and foster services. R. at 3. AACS's mission statement reflects the values with which it guides its agency, "All children are a gift from Allah. … the services we provide are consistent with the teachings of the Qur'an." R. at 5. HHS and AACS have been contractually involved since 1980, with annual renewal up until 2017. R. at 5. The contract between AACS and HHS mandates that AACS provide adoption

services, including assurance that each adoptive family has been thoroughly screened, trained and certified. R. at 5. The contract expressly states the requirement that AACS be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6.

East Virginia Code. The East Virginia Code mandates that foster and adoption "determination[s]… must be made on the basis of the best interests of the child." R. at 3-4. In order for HHS to make the best determination for placement, it must consider, among other factors: the age of the child and the age of the parent, the physical and emotional needs of the child, and the cultural or ethnic background of the child. R. at 4.

In 1972, East Virginia passed the Equal Opportunity Child Placement Act (hereinafter referred to as 'non-discrimination statue' or 'the statute'), which imposed non-discrimination requirements on the private placement agencies that receive public funds in exchange for their work with HHS. R. at 4. Originally, this prohibited agencies from discriminating on the basis of race, religion, national origin, sex, marital status, or disability when it came to screening and certifying potential families. R. at 4. However, after the Supreme Court *Obergefell v. Hodges* decision, East Virginia decided to update all statutes to prohibit discrimination based on sexual orientation. R. at 6. This resulted in an amendment to *the* statute, adding sexual orientation to the list of protected classes, and further requiring agencies to now post the State statute prohibiting discrimination ("the notice provision"). R. at 6. This amendment provided a caveat for religious based agencies, allowing them to post a written objection to the policy. R. at 6.

The Contract Termination and Subsequent Suit. In July 2018, Hartwell begin contacting all religious-based agencies in the area to determine their compliance with the updated statute. R. at 6-7. The Executive Director of AACS informed Hartwell that its religious beliefs prohibited them

from certifying same-sex couples as prospective families. R. at 7. Hartwell sought to clarify if AACS was aware that its actions violated the statute, and AACS maintained that its religious beliefs prevented them from performing home study or certifications for same-sex couples and thus it would not do it. R. at 7. The following September, Hartwell sent a notification letter to AACS stating that its contract would not be renewed due to its inability to comply with the statute. R. at 7. The notice also explained that an immediate referral freeze was necessary, and all agencies had been instructed to refrain from sending referrals to AACS. R. at 7. HHS did provide that these actions could be reversed if AACS would provide assurance of its commitment to fully comply with the statute. R. at 8.

Procedural Background

United States District Court for the Western District of East Virginia. In October 2018, AACS brought this action against Christopher Hartwell in his official capacity as Commissioner of the City of Evansburgh's Department of Health and Human Services. R. at 2. AACS alleges that Hartwell's refusal to renew the City's adoption placement services contract with AACS is in direct violation of AACS's First Amendment rights to freedom of speech and freedom of religion. R. at 2. AACS filed a Motion seeking a Temporary Restraining Order against Hartwell's referral freeze, as well as an injunction compelling Hartwell to renew the contract between AACS and the City of Evansburgh. R. at 2. An evidentiary hearing in March 2019 provided undisputed facts of other instances in which non-religious, secular motives had permitted defiance of HHS policy and the statute in HHS placements. R. at 8-9. Based on these findings, the Court determined that the requirement to certify same-sex couples violated AACS's First Amendment right to freely exercise its religion, and the notice requirement violated its First Amendment right to free speech. The Court granted both of AACS's motions. R. at 2.

SUMMARY OF THE ARGUMENT

The non-discrimination statute, which provides that agencies who contract with the city to provide foster and adoption services do not discriminate against those seeking this public service, is complaint with the First Amendment. The First Amendment does not provide plenary protections surrounding conduct pursuant to religious beliefs. When a law is neutral and of general applicability, its burden on religious conduct is seen as incidental and reviewed using a rational basis. Should either prong be questioned as to its effect, the review shifts to strict scrutiny. The statute falls in the former category, as it is not facially biased nor does HHS apply it unevenly across agencies that are contractually obligated to comply with it. This is evidenced by the lack of language in the statute that points to any religious bias, and the fact that no other agency exceptions have been made by HHS for any agency under this contract. The lower court viewed exceptions made by HHS as an instance of non-general application, but this is an error based in a misunderstanding of the statutory requirements of the statute and who it applies to. Nevertheless, should the Court choose to examine the non-discrimination statute under a lens of strict scrutiny, the compelling government interest of eradicating discrimination within agencies that are under its authority to regulate as state actors is served through the narrow construction of the statute. The regulation of conduct, when that conduct is seen as state action, is well within the scope of East Virginia's governmental authority. The state has a compelling interest in preventing discrimination in services of public accommodation.

The notice provision can likewise not be seen as compelled private speech for similar reasons. HHS is acting within the scope of the program's purpose by requiring that all contracting agencies post a governmental message that no discrimination will be tolerated. Evansburgh is one of the largest, most diverse cities in East Virginia, and in furthering the goal of serving every sect

of the community and ensuring home placements that serve the interests of the child, HHS is solely conveying a government policy. While the speech of the provision is not unconstitutional because it is furthering a government message, the statute, in effect, is regulating conduct and not speech. The conduct being the ability to discriminate against large swaths of the community when they are seeking a public service provided by a state actor. The regulation of conduct pursuant to a government contract will not be seen as an unconstitutional condition unless it requires the agency to forfeit a constitutional right. The notice provision only provides that these agencies post the East Virginia statute in their window, signed to indicate their acknowledgment. This posting and signing is not requiring AACS to forfeit any right to believe what it sincerely holds, nor does it force them to speak to its agreement with the notice. The provision of the East Virginia code that mandates this notice requirement goes so far as to allow agencies who disagree with the policy to post their opposition. East Virginia has clearly carved out a statutory stipulation to ensure that agencies can still act pursuant to their First Amendment rights.

AACS has not demonstrated a likelihood of success on the merits, as it has not carried its burden of showing that the non-discrimination statute targets them specifically nor that it is applied in an inequitable manner. Further, AACS has made no showing of irreparable harm by forced compliance with the statute. These two factors alone demonstrate the necessity to deny its motions for injunctive relief. As a state actor, acting under the authority of the City of Evansburgh as delegated by the State of East Virginia, AACS is contractually required to abide by the policies that the city puts forth in serving the public.

ARGUMENT

I. The requirement that AACS certify same-sex couples does not unconstitutionally infringe on its ability to freely exercise its religion.

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, requires that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .." U.S. Const. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Precedent surrounding the Free Exercise Clause has interpreted it as dual pronged, encompassing not only the right to believe whatever religious ideology as one so chooses, but further the right to engage in practice of those beliefs. *Emp. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). However, absent from the historical preservation of individuals' religious rights is the notion that one is excused from complying with a "valid and neutral law of general applicability" in an area that the government has the authority to regulate. *United States v. Lee*, 455 U.S. 252, 262 (1982); *See also Smith*, 494 U.S. at 878-79. If the law in question is not aimed at the promotion or restriction of religious beliefs, there is no basis for relieving an individual from his obligation to comply with it. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 595 (1940).

The established rule is that if a law is neutral and of general applicability, yet burdens religion incidentally, it is subject to a rational basis standard of review, the highest level of deference afforded. *Smith*, 494 U.S. at 879. These two concepts are interrelated, and if one is not satisfied it is highly unlikely that the other will be. *Church of Lukumi Bablu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993). In those instances, the review shifts to strict scrutiny, and the government is required to demonstrate a compelling interest that is served by the law, and that the law is narrowly tailored to achieve that interest in the least restrictive means possible. *Id.*

A. The non-discrimination statute is facially neutral law and is not intended to act as a governmental guise for religious discrimination.

To determine neutrality, a court must look to the text of the law itself, as well as the conduct and intent of officials implementing the law. *Id.* at 534-35. By looking behind the "face" of the text, courts can determine "subtle departures from neutrality" that are acting as a "covert suppression of . . . religious beliefs." *Gillette v. United States,* 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986). In *Church of Lukumi Bablu*, a city adopted an ordinance aimed at prohibiting animal slaughter. 508 U.S. at 527-28. While the ordinance appeared facially neutral, despite the use of language such as "sacrifice" that seemed to indicate religious bias, when the court examined the circumstances under which the law was passed it was determined that the ordinance was put in place to target the local Church of Santeria. *Id.* At 534-35. Factors the court found significant in assessing the neutrality were the circumstances surrounding the enactment of the ordinance were comments made by city council, the officials responsible enacting the ordinance, as well as the fact that the city attorney sought an opinion on the legality of passing such an ordinance. *Id.* at 526-27.

Contrast that absence of neutrality with the facts in *Smith*, where two Native-American men claimed that the criminalization of peyote prohibited them from freely exercising their religion. 494 U.S. at 878. Respondents in that case argued that their religious motivation for using the controlled substance excused them from complying with the law. *Id.* The Court refused to stretch the Free Exercise Clause to encompass that interpretation, likening the situation to an individual who sought to evade taxes based on a religious belief that organized government in sinful. *Id.* Our facts more closely align with *Smith*, as allowing AACS to evade compliance with an otherwise valid, neutral law would be to expand the Free Exercise Clause in a way the court has refused to before. *Id.*; R. at 6. Unlike in *Lukumi*, there is no language in the statute that gives

any indication that the Attorney General wrote it with AACS or any religious beliefs in mind. 508 U.S. at 534; R. at 6. The statute's language is facially neutral, stating "it is illegal under state law to discriminate against any person, including 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. Prohibiting discrimination is well within a State Government's authority, just as regulating illegal narcotics was in *Smith. See* U.S. Const. amend. XIV, §1 (specifically, the equal protection clause as enforced against the states in regulating discrimination); 494 U.S. at 879.

While the record does reflect that in 2017, the Governor made a disparaging statement regarding bigoted thinking that undermines beliefs similar to those held by AACS, he has no hand in drafting or implementing the law. R. at 6. The Attorney General wrote the revised statute, and HHS is responsible for oversight; unlike in *Lukumi* where the individuals responsible for the prejudicial commentary acted as both judge and jury. 508 U.S. at 527; R. at 6. Further, compare the statement made by the Governor to those made by President Trump against Muslim immigrants while campaigning. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018). After taking office and enforcing a travel ban against countries with high Muslim populations, plaintiffs questioned the constitutionality of this order under the Free Exercise Clause. *Id.* The Court held that the statements the President made while campaigning were irrelevant to the neutrality determination because at the time, he was not in a position to effectuate their enforcement. *Id.* at 2418. If the President-to-be can make condemning statements about an entire religion before evolving into his position of supreme power and it does not violate the neutrality of a law, then the Governor of East Virginia certainly clears that same standard. *Id.* at 2417-418, R. at 6. The degrees of separation between the Governor and the implementation of the statute insulate any possibility that his statements should be considered in the neutrality determination. R. at 6.

B. AACS has not proven that the statute is not applied generally nor that it targets AACS specifically for its religious beliefs.

Another determinative issue with the ordinance in *Lukumi* was that the ordinance seemed to only target the practice of Santeria. 508 U.S. at 535. The effect of the law in operation pointed to a lack of general applicability, as it made exceptions for every instance of animal killing except for that of religious sacrifice. *Id.* at 535-36. The Court notes that if secular exemptions to the law are permitted, the same exemptions cannot be denied to those seeking them for religious purpose. *Id.* at 537; *See also Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). However, when no parties are granted exemptions to an otherwise valid law, the Court has held that not granting an exemption based on religious belief does not interfere with the Free Exercise Clause of the First Amendment. *See Bowen*, 476 U.S. at 693.

In *Bowen*, a family seeking government assistance refused to obtain a Social Security number for their two-year-old, citing their religious beliefs as the reason for abstaining. *Id.* at 696. As a result of their decision, their government funding was suspended, as utilization of Social Security numbers for all members of the household was a prerequisite to receiving that funding. *Id.* The Court held that the requirement of applicants to provide a Social Security number applied to all applicants seeking government benefits, and Congress had made no exemptions available to any individuals. *Id.* at 708. Likewise, HHS has required all contracting agencies to comply with the statute. R. at 6. In fact, Commissioner Hartwell called all of the religious based agencies in contract with HHS to inquire about compliance with the statute, yet the record reflects no indication of issue with any agency aside from AACS. R. at 6-7. This general inquiry of all agencies who were founded with religious initiatives in mind demonstrates that the statute was not designed to target AACS or its beliefs, nor that HHS or Commissioner Hartwell intended to apply it for that purpose specifically. R. at 6-7.

1. Prior secular exceptions made by HHS are irrelevant to the general applicability of the statute because no exceptions have been made for other agencies.

While the record does list out numerous secular exemptions to the statute that were permitted, all of these exemptions were actions taken by HHS themselves, not other contracting agencies. R. at 8. By its express terms, the statute does not apply to HHS, but only to child placement agencies under its umbrella. R. at 4. Courts must resolve disagreements regarding how statues affect parties involved. Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 45:1 (7th ed.) (Westlaw 2A Sutherland Statutory Construction § 45:1). By distinguishing "interpretation" from "construction", courts can separately assess the meaning of the words, the interpretation, from the construction, which provides the application of the statute. *Id.* The question in our case rests on the construction, hinging on if the statute applies to the HHS, the agencies that are under contract, or both. R. at 6-9.

The construction of the East Virginia code leaves no room for debate. R. at 4. The statute, E.V.C. §42, imposes non-discrimination requirements on *child placement agencies*, prohibiting these agencies from "discriminating on the basis of race, religion, national origin, sex, [sexual orientation], marital status, or disability when screening and certifying potential foster care or adoptive parents or families." R. at 4, 6 (altered to include the updated provision). The code further clarifies the construction by providing the definition of "child placement agencies" to include both foster care and adoption agencies. R. at 4. While other provisions of the East Virginia Code apply to HHS and its responsibilities, it is clear that E.V.C. §42 and its amendments, which compromise the statute, are constructed to only apply to the child placement agencies that contract with HHS. R. at 4. Even considering the single instance where the allowed discrimination, and implied exception to the non-discrimination initiative, was recommended by an agency, HHS still reserved the final say in the manner and thus it reserved the authority to make that determination. R. at 9.

These exceptions do not demonstrate a lack of general applicability, because they were not exceptions offered to other similarly situated agencies at the same level as AACS. R. at 8-9. Should the Court wish to examine the policies of HHS and the calculated diversity factors that it utilizes when determining the placement that best serves the interest of the child, that question should be addressed as a separate matter. The heart of the issue in this case solely pertains to contractor exceptions that permit them to discriminate and the HHS exceptions are a sufficiently different analysis such that it lies outside the scope of this argument.

2. East Virginia has the authority to regulate the conduct of city contractors by requiring compliance with state statutes.

AACS contracting with HHS, and by association—the city effectively makes them an arm of the state—an actor on the state's behalf. R. at 4. The definition of acting under state law, and thus being a state actor, is whether the power invested in the actor comes directly from state law. *West v. Atkins*, 487 U.S. 42, 49 (1988). State actions are those that are wielded with that right or privilege created by the law, or by a person for whom the state is responsible. *Id.* AACS contracts with the City of Evansburgh, under a power conferred to the city by the State of East Virginia, which fits the textbook definition of state actor. R. at 3. The government retains a significant degree of control over the actions of its employees, as necessary to regulate internal procedures that provide services to the public. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006). The statute is regulating the conduct— an action by any other name—of these state actors under contract to provide this government service, pursuant to the authority that East Virginia possess to regulate internal procedure. *See* discussion *infra* Section II.B. (discussing how the notice provision effectively regulates non-speech conduct more so than speech itself). Because AACS operates under a contract with the city, pursuant to an authoritative grant from the State of East Virginia, AACS, and all other agencies, are state actors. R. at 3. Compliance with the statute thus is not a

matter of exceptions to the rule nor possible infringement on individual rights, but rather a question of the extent that the city can regulate its contractors to abide by the color of the law and not discriminate against protected classes.

AACS and all other agencies signed a contract with HHS in which section 4.36 of the contract requires them to provide services in compliance with the statute. R. at 3-4. The contract is clear in the ramifications for those agencies who do not comply, calling for no municipal funds to be dispersed. R. at 4. "When the words of an agreement are clear and ambiguous, the court will ascertain the intent of the parties from the language used in the agreement." *D & M Sales, Inc. v. Lorillard Tobacco Co.*, No. CIV.A.09-2644, 2010 WL 786550, at *3 (E.D. Pa. Mar. 8, 2010). The statute is unambiguous in its interpretation and construction, resulting in the contract being similarly clear in the obligations it calls for; it leaves no room for AACS to debate whether it understood the terms by which it was to be bound. R. at 4. This contract is the regulation of city procedure as it pertains to the conduct of those within city employment or acting under the authority of the city. R. at 3. This regulation of city procedure is within the purview of East Virginia in furthering the goals of its own programs. *See supra* p. 12, *see* discussion *infra* Section II.A (discussing how serving the diverse population of the city requires that HHS employ a non-discrimination requirement in its public services).

C. Even considering prior instances of allowed discrimination as a non-general application, the compelling interest of eradicating discrimination is fulfilled through the statute's narrow construction.

As established, if a law is neutral and of general applicability, there is no requirement that the government justify the law with a compelling interest. *Lukumi*, 508 U.S. at 534. However, if it fails on either prong, the government is required to satisfy a standard of strict scrutiny and demonstrate a compelling interest that is served by the law, and that the law is narrowly tailored

to achieve that interest in the least restrictive means possible. *Id.* at 546. Compelling interests have been defined by the Supreme Court as "interests of the highest order." *Lukumi*, 508 U.S. at 546.

In *Holt v. Hobbs*, a prisoner filed a complaint regarding the Arkansas Department of Corrections grooming policy that prohibited prisoners from growing beards. 574 U.S. 352, 358. The prison would make exceptions for inmates with dermatological issues but provided no religious exceptions. *Id.* at 359. The Court held that not allowing the prisoner to grow a beard under a religious exemption infringed on his religious beliefs when the prison was making similar accommodations for secular purposes; as well as focusing on the fact that multiple other prisons allowed beards at minimal lengths. *Id.* at 368-69. The Court was not persuaded by the prison's argument that beards posed safety risks for officers, the compelling interest cited for the basis of this rule, holding that if other prisons could eliminate the safety risks of beards then the compelling reason cited could be achieved through less restrictive means. *Id.* at 368. The concurrence drove home the point that "accommodating petitioner's religious beliefs would not detrimentally affect others who [did] not share [those] beliefs." *Id* at 370.

Conversely, in a case involving a student religious organization, the Court held that requiring the group to comply with the "all comers" policy was not a violation of its rights to freely exercise its religion. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 698 (2010). The group of students formed a chapter of the Christian Legal Society (CLS) at this law school, requiring members to sign documents stating they would "exclude … anyone who engages in unrepentant homosexual conduct." *Id.* at 672. When the leaders went to register CLS as a student organization, they refused to adopt the non-discrimination policy because it conflicted with their membership bylaws stated above. *Id.* at 673. The CLS students sued the law school, positing that the mandatory adoption of the all-comers policy for

student organizations violated their freedom to exercise their religion, among other First Amendment claims. *Id.* The Court held that the question wasn't if the law school *could* provide an exemption to CLS, but whether it *had* to; the answer to that question is no. *Id.* at 694. The law school's requirement to adopt a non-discrimination policy was held constitutional, despite its incidental infringement on CLS's beliefs. *Id.* at 698. Not only did the school have the authority to require such a measure, but it had a compelling interest in ensuring equal opportunities and protections to all students who wished to attend. *Id.* at 688-90.

The facts of *Martinez* are comparable to the facts of our case, as the statute's requirement that agencies serve individuals from all walks of life may incidentally impair AACS's religious beliefs, but it does not do so unconstitutionally. *Id.*; R. at 6. While the record and applicable law supports that the statute is neutral and applied generally, it is undisputed that the exceptions made by HHS give pause to those evaluating this case. R. at 8-9. Entertaining the idea that this statute was not applied generally, HHS and Hartwell still clear the threshold of strict scrutiny, as eradicating discrimination is a compelling government interest. R. at 6. Like the Supreme Court noted in *Martinez*, the question is not if HHS should make the exception for AACS, but whether it is constitutionally required to. 561 U.S. at 694. The compelling interest of rooting out discrimination in all forms, against any individual, is an interest of the highest order established by the fact that we amended the Constitution of this country in order to make it so. *See* U.S. Const. amend. XIV, § 1.

The Equal Protection clause has been interpreted as preventing discrimination in various forms: outlawing racial segregation, ensuring women have similar opportunities to men, and to prevent states from treating residents from other states differently. *See* Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 Law & Contemp. Probs. 175,

177 (2004) (discussing how the history of the Fourteenth Amendment has influenced its current applications). While religious liberty and First Amendment protections are fiercely protected by the Constitution, it is a general rule that these protections are not used to allow business owners and other economic actors to "deny protected persons equal access to goods and services…." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). To permit AACS to object to serving same-sex couples on the basis of religious belief would be the effect of the government condoning a public service treating gay couples as social outcasts who are inferior in dignity and worth. *Id.*

East Virginia enacted its state non-discrimination statute in order to grant that equal protection of the law to a class of individuals, striking at the very heart of how our nation's courts have construed the Fourteenth Amendment. *Id.* Unlike in *Hobbs*, allowing AACS to have a religious exemption would adversely affect others, specifically it already has affected the same sex couples that it directed to other agencies after refusing to serve them. 574 U.S. at 370; R. at 7. The statute is not overbroad when you consider its monumental purpose, evidenced by the lack of other agencies voicing their inability to comply with the amendment's inclusion of sexual orientation as a protected class. R. at 3-9. East Virginia has narrowly constructed this statute to apply to agencies who serve the public and limit their discrimination to certain groups of individuals. R. at 3-9. The compelling interest of preventing discrimination is a societal interest that overrides the incidental effect on AACS's religious freedoms resulting in the statute satisfying the standard of strict scrutiny through its narrow construction, despite it being a neutral law of general applicability. R. at 6-8.

II. Requiring a city contractor to post a statutory notice does not qualify as compelled private speech and thus is not an unconstitutional condition.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . .." U.S. Const. amend. I. While this amendment was applied to the states via the Fourteenth Amendment in 1925, the freedom to speak one's beliefs has never been held as an absolute right. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Common exceptions to the protections of the First Amendment include disclosure of protected secrets (trademark violations), maliciously false rumors (defamation), and hate speech that is deemed "fighting words." Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 Const. Comment. 71, 73 (1996). Much of the precedent surrounding the boundaries of the First Amendment involve the limits of what the government can compel citizens to say or prevent them from saying. *See, e.g.*, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Courts have recognized a significant impairment on freedom of speech in cases where a government compels individuals to adopt a viewpoint, or comply with governmental messaging at the risk of losing funding. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). However, if the individual contractually agrees to comply with the condition as a component of the government's program, this has generally been upheld as constitutional. *See generally Rust v. Sullivan*, 500 U.S. 173 (1991) (Where the Court held that abortion was not included as a family planning method within the purpose of the program, so the government was permitted to limit recipient's speech on the matter). Unconstitutional conditions can still violate the First Amendment rights of individuals and organizations, the dispositive factor resting on whether the government is compelling private speech or operating within the scope of the purpose of its program. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l* (AOSI), 570 U.S. 205, 214 (2013).

A. HHS is acting within the scope of the purpose of the program in requiring contracting agencies to post a governmental message.

The unconstitutional conditions doctrine prohibits the government from conditioning monetary benefits on the recipient forfeiting a constitutional right. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (". . . especially, his interest in freedom of speech."). To determine whether a government condition is unconstitutional, courts must look to the purpose of the program. *Velazquez*, 531 U.S. at 542. In *Rust v. Sullivan*, a group of doctors and other recipients of program funds brought suit challenging the government's ability to prohibit them from speaking about abortion. 500 U.S. at 181-82. The purpose of the governmental program was to provide federal funding for family planning services, and it was specified within the provisions of the program that none of the funds were to be used in programs where abortion was considered a method of family planning. *Id.* While this, in effect, did prevent the doctors from talking about abortion to patients seeking services, the Court held that this condition did not interfere with plaintiff's First Amendment rights because it was directly within the scope of the program's purpose. *Id.* at 192-95. The Court did not view this as "discrimination against a specific viewpoint" or the denial of a government benefit, but rather insisting the public funds be spent for the purposes that have been expressly authorized. *Id.* at 196.

Contrarily, in *Velazquez*, a government program was providing funding for indigent defendants in non-criminal cases through a series of private agencies that hired attorneys. 531 U.S. at 536. Congress placed various subject matter limitations on the use of the money, including, but not limited to, prohibiting using the money for cases involving welfare determinations. *Id.* at 537. The Court held this condition unconstitutional, drawing a sharp distinction between the purpose of the program and the effect of the condition. *Id. a*t 540. The goal of the program was to provide funding for indigent clients who could not otherwise afford counsel, and the effect of this condition

was interfering with assigned counsels' ability to advocate on behalf of their client. *Id.* at 542. The Court drew sharp distinctions between this infringement of compelling private actors' speech, and governments requiring individuals to purport government messaging as a fundamental purpose of the program. *Id.* at 541. Further, the Court rejected Velazquez's reliance on *Rust*, in which the government was speaking to promote its own policies. *Id.*

Turning to the analysis of the statute, East Virginia imposed nondiscrimination requirements from its inception, as the goal of HHS was to ensure the well-being of each child in a city that is the diversity hub of the state. R. at 3-4. The notice provision is comparable to the facts of *Rust*, since it is clear that posting a government non-discrimination policy seeks only to promote a government policy or message, and is not compelling private speech on behalf of the private agencies. R. at 6. This notion is further supported by the fact that the statute permits agencies who disagree with the policy to post their objection on the premises. R. at 6. Permitting religious agencies to voice their own views in disagreement can hardly be seen as compelling the speech of private actors. R. at 6. Since HHS is not compelling private speech, the notice provision cannot be construed as an unconstitutional condition. *Velazquez*, 531 U.S. at 542; R. at 6.

Further, the notice provision cannot be seen as discrimination against a specific viewpoint because HHS allows agencies to post their opposing viewpoints in compliance with the statute. R. at 6. Given HHS's interest in ensuring the best fit for every child in a city with a multitude of diverse backgrounds, the express language within the contract that specifies compliance with the statute, and government's encouraged allowance of religious agencies to post their opposition to the provision, it would be a stretch of the jurisprudence to consider the notice provision the compelling of private speech or an unconstitutional condition. R. at 3-6. Non-enforcement of the statute would effectively allow AACS to recite the narrative that same-sex parents would never be

in the best interest of any child, and the authority to make that determination lies with HHS, not the contracting agencies. R. at 3.

B. The notice provision is effectually regulating conduct, not speech, and does not require AACS to endorse same-sex relationships.

While the notice provision requires agencies to sign off on East Virginia's message that it is "illegal under state law to discriminate against any person, including prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation", this regulation by HHS is truly more comparable to the regulation of conduct and not speech. R. at 6. The provision effectively regulates the actions of the contracting agencies, prohibiting them from discriminating against or turning away individuals based on the listed criteria; this makes the notice provision regulatory of non-speech conduct more so than of actual speech elements. R. at 4, 6.Though it is clear that HHS is not impermissibly regulating or compelling speech of private actors through the notice provision requirement, the court still must examine if the expressive nature of the conduct is such that it falls within the First Amendment protections and could still constitute an unconstitutional condition. *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 65 (2006).

The First Amendment protections surrounding free speech extend beyond words themselves to protect certain forms of conduct that is referred to as "symbolic speech" that is seen as "inherently expressive". *Id.* at 65-66. Conduct that the Supreme Court has deemed worthy of these constitutional protections includes actions such as burning of the American flag, the right to abstain from the pledge of allegiance and other perfunctory flag salutes, and students wearing armbands in protest of government action. *Texas v. Johnson*, 491 U.S. 397, 416-17 (1989); *Barnette*, 319 U.S. at 642; *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 508 (1969). These types of conduct combine both "speech" and "nonspeech" elements, requiring the

court to closely analyze if the ideas that the conduct is intending to express warrant First Amendment protections. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to express an idea.").

1. Only conduct that is symbolic speech and inherently expressive falls under the strict scrutiny.

The Supreme Court laid out the test for analyzing if conduct is protected in *O'Brien,* stating that if conduct contains both speech and nonspeech elements, a substantial governmental interest in regulation may be justified if (1) the regulation is within the constitutional power of the government, (2) the regulation furthers an important governmental interest, (3) the government's interest is unrelated to the suppression of free speech, and (4) the restriction on alleged First Amendment freedoms is no greater than necessary. *Id.* at 376-77. This case is regarded as the guiding lodestar for analysis of expressive conduct; however, the Court has held in subsequent interpretations that this test need not be applied to conduct that is not inherently expressive. *FAIR*, 547 U.S. at 65.

In *O'Brien*, a young man burned his selective service registration card (draft card) and was prosecuted under a congressional act. *Id.* at 368. While the conduct was inherently expressive, and the Court acknowledged his argument that the prosecution of his actions infringed on his First Amendment rights, the Court still held that the four criteria above were met. *Id.* at 377-78. Congress was within its authority to classify individuals for military service and maintain a system of registrants. *Id.* Destroying the draft cards would make the maintenance of this system difficult by making it difficult to verify registrations; the government's sole interest was preserving the functionality of this system. *Id.* at 380. Further, service men who were required to register in the system were still permitted to voice their opposition; the congressional act only prohibited

destruction of the draft cards, not all expressions of disagreement with the Selective Service. *Id.* at 384-86.

Comparatively, in *FAIR*, a similar argument was made by law schools who claimed that the requirement that military recruiters be allowed on campus and they post factual information about their presence was an unconstitutional condition because it regulated conduct that was expressly protected by the First Amendment. 547 U.S. at 53. The Court held that the congressional act regulating this conduct was constitutional, largely due to the fact that the conduct being regulated was not protected by the First Amendment. *Id.* at 66. The expressive nature of conduct is not created by the conduct itself, but by the speech that it represents. *Id.* Allowing military recruiters on campus and announcing their presence did not prevent the law school from voicing any opposing beliefs, and the Court held the conduct could not be construed as the law school agreeing with any speech. *Id.* at 65. Unlike in *O'Brien*, where the action of burning a draft card sends a strong message about the beliefs of the individual taking part in the conduct, the law school allowing a governmental entity to be present on its campus does not send that same, expressive message. 391 U.S. at 377-78; *FAIR*, 547 U.S. at 65-66. The lack of expressive nature inherent in the conduct, paired with the fact that allowing the military recruiters on campus did nothing to prevent the law school from promoting any message or speech of its own were dispositive factors in the Court's determination. *FAIR*, 547 U.S. at 69-70. The Court held that any attempt to align the facts of *FAIR* with other protected expressive conduct was a stretch of First Amendment doctrines, "well beyond the sort of activities these doctrines protect." *Id.* at 70.

2. The notice provision is not inherently expressive conduct and does not require contracting agencies to suppress their own beliefs.

Similarly, to the facts of *FAIR*, the notice provision does not fall under the O'Brien test as inherently expressive conduct. R. at 6. The requirement to post the non-discrimination notice is

conduct, but it does not send any message on behalf of AACS. R. at 6. Like the presence of military recruiters on campus and the requirement that their presence be announced was not seen as the law schools' agreeing with any speech made by the recruiters, logic implores that the mere posting of a government statute in a business window likewise does not express any agreement with the government speech. *FAIR*, 547 U.S. at 65; R. at 6. Even considering the signature of the agency on the notice provision as regulated conduct, it is comparable to the law schools' requirement to announce the presence of the military recruiters, merely indicating acknowledgement of a governmental message. *FAIR*, 547 U.S. at 65-66; R. at 6. The notice provision is easily distinguishable from the inherently expressive conduct that the Court stringently analyzes in *O'Brien*, as there is no subliminal message communicated by the act of posting a government statute in a place of business. 391 U.S. at 377-78; R. at 6.

Further aligning our case with *FAIR* is the fact that HHS explicitly provides, in the amendment containing the notice provision requirement, that religious agencies are allowed to post on their premises a written objection to the policy. R. at 6. The requirement to post the notice does nothing to suppress the speech of AACS, as it is still permitted to voice its own beliefs, even those in opposition to the government messaging. R. at 6. The notice provision is not inherently expressive, thus is not protected under the First Amendment, and again fails to amount to an unconstitutional condition. *O'Brien*, 391 U.S. at 378; *FAIR*, 547 U.S. at 65; R. at 6. To extend First Amendment protections to this conduct would, as the Court stated in *FAIR*, stretching First Amendment doctrine into areas beyond its protection. 547 U.S. at 70; R. at 6.

CONCLUSION

We respectfully request that this Court reverse the decision of the lower court and deny both motions for preliminary injunctive relief on behalf of AACS. The arguments in this brief demonstrate that AACS did not adequately carry its burden of proof and demonstrate its likelihood of success on the merits. The statute is a neutral law of general applicability, and even held to a stricter standard of scrutiny, the compelling interest of rooting out discrimination in all forms is of significant interest to the government, specifically when it comes to services of public accommodation. Further, AACS did not make any showing of irreparable harm absent the preliminary relief. These first two factors are the threshold for granting relief, and without a showing of their satisfaction, the remaining two factors need not be considered. AACS's inability to demonstrate its success is clear indication that HHS has not unconstitutionally infringed on either area of its First Amendment rights. East Virginia is within its authority to regulate discrimination within businesses of the state, providing the authority to HHS to ensure that city contractors comply with state law in order to meet the needs of the adoption and foster program.

CERTIFICATE OF SERVICE

We certify that a copy of Appellant's brief was served upon the Appellee, the United States, through the counsel of record by certified U.S. mail return receipt requested, on this, the 14th day of September 2020.

Team 21

Attorneys for Appellant