No. 2020-05

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

AL-ADAB AL-MUFRAD CARE SERVICES

Appellant,

v.

CHRISTOPHER HARTWELL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, CITY OF EVANSBURGH

Appellee.

ON REHEARING EN BANC OF AN APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF EAST VIRGINIA
GRANTING A TEMPORARY RESTRAINING ORDER AND A PERMANENT INJUNCTION

BRIEF FOR APPELLEE

Team 31
Counsel for Appellee

QUESTIONS PRESENTED

1. Whether the enforcement of an anti-discrimination law against a child placement agency is a violation of the Free Exercise clause when a government official executes a neutral, generally applicable law.

2. Whether government funding regulations that require private foster family agencies to refrain from discriminating when carrying out their contractual responsibilities violates the First Amendment's Free Speech clause under the unconstitutional conditions doctrine when the regulations regulate conduct, not speech, and any effect on speech is incidental to the government's prohibition of discriminatory conduct.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 46(c) (2020); Fed. R. App. P. 35(a)(2). This Court entered its judgment on February 24, 2020. R. at 18. The case involves a perceived First Amendment violation. This Court granted the Petition for Rehearing En Banc on July 15, 2020. R. at 26.

STATEMENT OF THE CASE

Obergefell v. Hodges, 576 U.S. 644 (2015) prompted federal and state governments to create equitable protections for the LGBTQ community; East Virginia is no exception. R. at 6. The Governor of East Virginia recognized the necessity of amending some laws. R. at 6. The Governor tasked the Attorney General with identifying any law not in compliance with the mission of "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. The Equal Opportunity Child Placement Act (EOCPA) is an East Virginia statute that states any child placement agency that receives public funds must not discriminate according to race, religion, national origin, sex, marital status, or disability. R. at 4, 6.

After the Attorney General identified EOCPA as problematic, the recent amendment to the EOCPA adds sexual orientation to the list of classes child placement agencies cannot discriminate against. R. at 6. The East Virginia Code provides that any child placement agency that is not willing to comply with EOCPA will not receive any municipal funds. R. at 4. In addition, the EOCPA requires child placement agencies to post a sign stating the illegality of

discrimination against any group listed by EOPCA outside their principle place of business. R. at 6. However, religious child placement agencies are entitled to post a written objection. R. at 6.

The role of child placement agencies is to conduct home studies, counseling, and placement recommendations to the Department of Health and Human Services (HHS). R. at 3. When agencies receive information from HHS about a child in custody, called a "referral," agencies send back information about potential families that will match the child's needs. R. at 3. After receiving information about all the potential families, HHS then makes the final decision "based on the best interests of the child." R. at 3, 4. The agency must consider a myriad of factors about the families; but, if all other factors are equal, HHS must give preference to parents of the same race and sexual orientation as the child. R. at 4, 6. The District Court found a few examples where HHS acted using its discretionary powers to either place a child with a specific family or it chose otherwise. R. at 8.

After being asked by a reporter if all of the religious child placement organizations are complying with the new provisions of EOCPA, the Commissioner of HHS, Christopher Hartwell, reached out to every religious child placement HHS oversees. R. at 6–7. One of the agencies, Al-Adab Al-Mufrad Care Services (AACS), admitted that it was unable to work with members of the LGBTQ community. R. at 7. AACS is a Muslim-oriented child placement agency. R. at 7. AACS has refused service to same-sex couples, referring those couples to other agencies. R. at 7. AACS believes same-sex marriage is an improper act according to the Qur'an and the Hadith. R. at 7.

The CEO of AACS told the Commissioner that AACS was not committing discrimination or violating the EOCPA because "Allah orders justice and good conduct." R. at 7. However, AACS signed a contract with HHS, stating that AACS would operate "in compliance

with the laws, ordinances, and regulations of the State of East Virginia and the City of Evansburgh." R. at 5–6.

In response to this discussion, the Commissioner sent a letter stating AACS's non-compliance with EOCPA. R. at 7. The letter, which respects AACS's "sincerely held religious beliefs," says that HHS is unable to contract and provide public funds to any organization that does not comply with EOCPA. R. at 7. The letter also informed AACS that HHS would freeze adoption referrals to AACS because of AACS's policy towards same-sex couples. R. at 7–8. HHS conceded that it would not initiate the referral freeze if AACS informed HHS of their compliance with the EOCPA. R. at 8.

AACS brought this action against the Commissioner of the HHS, stating that his refusal to contract with AACS was a violation of AACS's First Amendment rights to freedom of religion and speech. R. at 2. The District Court for the Western District of East Virginia agreed with AACS by stating the referral freeze was a violation of AACS's First Amendment rights. R. at 14, 16–17. On appeal, a Fifteenth Circuit panel reversed the lower court stating the enforcement of EOCPA was not a violation of either AACS's free exercise or free speech rights. R. at 25. AACS petitioned the Fifteenth Circuit for a Rehearing En Banc, which was granted. R. at 26.

SUMMARY OF THE ARGUMENT

Free Exercise Clause Claim. AACS has failed to show that the EOCPA was not a neutral law of general applicability. The Supreme Court lowered the standard of review used in Free Exercise Clause cases. The *Smith* test provides that neutral laws of general applicability that incidentally burden the exercise of religion are to be subject to a rational basis scrutiny. Thus,

because the EOCPA was both neutral and generally applicable in its purpose and enforcement, the EOCPA did not violate the Free Exercise Clause.

The mere fact that a neutral law contains exceptions does not automatically negate its general applicability. Here, the EOCPA's exceptions do not undermine the laws purpose. Moreover, because the government did not act with hostility, the EOCPA is still considered neutral law of general applicability that is subject to rational basis scrutiny.

While it might appear that faith-based organizations will not want to contract with the government if they cannot control who they work with, this has not been the case in other states where new organizations stepped up to cover the services of the faith-based organizations. Accordingly, the EOCPA is a neutral law of general applicability that fails to meet any justification for a higher level of scrutiny.

Unconstitutional Conditions Claim. Enforcement of the EOCPA's anti-discrimination conditions does not violate the First Amendment under the unconstitutional conditions doctrine because the government has broad leeway to impose condition when the purpose of its program is to promote a government message. HHS's purpose in contracting with AACS is simply to provide adoption and foster care services to the citizens of Evansburgh. Furthermore, AACS's work as an authorized adoption agency is an extension of HHS's own work. As such, AACS's speech, the extent any is required when performing its contracted services, constitutes governmental speech.

Because the anti-discrimination conditions solely apply within the scope of the government program, the conditions are permissible. The Supreme Court has made it clear that a funding recipient is generally obligated to comply with the conditions of the program when they fall within the scope of that program. Here, foster family certifications are part of the

government program, and the anti-discrimination requirement only applies to contracted foster agencies. In other words, because AACS is free to pursue child placement activities that exclude same-sex couples separately from the government funded program, the anti-discrimination conditions are constitutional.

Additionally, neither the anti-discrimination condition nor the notice requirement invokes the compelled speech doctrine because any speech is incidental to the regulation of conduct. Compelled speech that is incidental to the law's regulation of conduct has never been deemed an abridgment of free speech. The notice requirement also expressly allows includes a counterspeech remedy that allows AACS to present their own message. Lastly, the notice requirement consists of purely factual and uncontroversial information, differentiating this from an act of compelling a statement or endorsement of a belief.

ARGUMENT

I. THE FREE EXERCISE CLAUSE DOES NOT MANDATE THAT THE GOVERNMENT CONTRACT WITH A RELIGIOUS AGENCY THAT PARTICIPATES IN UNLAWFUL DISCRIMINATION OF SAME-SEX COUPLES.

The Court of Appeals for the Fifteenth Circuit correctly held that AACS failed to show the EOCPA, and its enforcement, was not a neutral, generally applicable law. AACS points to the language in the statute, individualized exemptions, and statements by officials to indicate a free exercise clause violation. However, none of these, alone or in the aggregate, are a violation of AACS's constitutional rights.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This Court ruled that the Free Exercise Clause applied to the states under the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The First

Amendment is at issue, therefore, this Court must do an independent examination of the record. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156 (3d Cir. 2002).

A. The EOCPA must be analyzed under the rational-basis test because it is a neutral, generally applicable law with the purpose of reducing discrimination, not suppressing religious practice or conduct.

The Supreme Court applies a balancing test to determine whether a law violates an individual's right to freely practice their religion as provided by the First Amendment. (cite a case). When a state attempts to limit religious practice, the Court requires a state to prove either a "compelling interest," *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), or an "interest of sufficient magnitude," *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

The Supreme Court further defined the standard of review for would use in Free Exercise Clause cases. The Court held that neutral, generally applicable laws that incidentally burden the exercise of religion do not meet the standard of strict scrutiny. *Emp't Division v. Smith*, 494 U.S. 872, 879 (1990). The opinion stated that any level of scrutiny higher than rational basis would be "courting anarchy" because a society with "diverse religious beliefs" would be unable to pass any laws that did not incidentally affect a person's religion. *Id.* at 888. In response, Congress enacted the Religious Freedom Restoration Act (RFRA), which mandates strict scrutiny for Free Exercise Clause cases. 42 U.S.C.S. § 2000bb-1(b) (1993). However, the Court stood steadfast in its views that strict scrutiny does not apply to Free Exercise cases by stating Congress exceeded its powers under the Fourteenth Amendment–RFRA does not apply to state and local governments. *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997). Then Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C.S. § 2000cc (2000). However, the Court recognized that Congress implemented RLUIPA to apply "the same general test as RFRA but on a limited category of government actions." *Burwell v. Hobby Lobby Stores*,

573 U.S. 682, 689 (2014). In addition, the Supreme Court has affirmed the *Smith* standard twice. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); *Flores*, 521 U.S. 507, 532–34. If the Supreme Court or Congress wanted to standardize strict scrutiny for childcare services, instead of the test in *Smith*, they would have included it in precedent or legislation. Therefore, as this case is not concerning federal law, land use, or an institutionalized person, the case at bar is subject to the rational basis test described in *Smith*.

The Free Exercise Clause gives "the right to believe and profess whatever religious doctrine one desires," and the government is forbidden from creating laws with the intent to suppress religious practice. *Smith*, 494 U.S. 872, 877–78. Religion does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879 (*quoting United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). A law is considered neutral if it does not target religious conduct on its face or in its enforcement. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–40 (1993). Later, the Court solidified that this rule not only applies to the government but expands to private actors as "it is a general rule that [religious] objections do not allow business owners and other actors in the economy and society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. V. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

The Court held a law a violation of the Free Exercise Clause because its purpose was not neutral or generally applicable. *Lukumi*, 508 U.S. 520, 533. Here, under the appearance of animal rights legislation, the Council members implemented rules stopping "sacrifice" and "rituals" where the definition of sacrifice excluded all other killings of animals except by

religion. *Id*. at 534–36. However, these targeted words were not alone; they were coupled with an overt bias that the city's purpose was to "prohibit 'any and all [such] acts of any and all religious groups.'" *Id*. at 535. The Court recognized that the "object of [the] law" was to "infringe upon" the religious practice of an unpopular group, and therefore, the law was not neutral. *Id*. at 533.

In addition, the Supreme Court held that a public law school's anti-discrimination policy did not violate the Free Exercise Clause when a religious student organization alleged that the school's "accept all-comers policy" violated their religious views against "unrepentant homosexual conduct." *Christian Legal Soc'y Chapter of the Univ. Of Cal. v. Martinez*, 561 U.S. 661, 669–72 (2010). The Court stated that, by asking for an exemption from the anti-discrimination policy, the student organization was seeking preferential treatment, not equal treatment which was not supported by Free Exercise Clause jurisprudence. *Id*. at 669. To uphold the school's rule, the Court stated that it was permissible for the school to deny funding, generally reserved for registered student organizations, if the student organization was unwilling to comply with the school's neutral policy. *Id.* at 673, 690.

The Ninth Circuit stated that even though pharmacies with religious beliefs would be disproportionately burdened by a law concerning timing requirement for certain medications, including morning after pills, it does not automatically "undermine the rule's neutrality." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015). Because the law was neutral and applied generally, the court applied rational basis and upheld the law. *Id.* at 1084–85. This is similar to when the Supreme Court held that it was permissible for a state to decide not to disperse government funds to students pursuing a devotional degree. *Locke v. Davey*, 540 U.S.

712, 725 (2004). The Court stated that the state could chose not to fund a category of instruction and that was a compelling enough interest compared to the burden on scholars. *Id*.

B. A law containing exceptions can still be neutral and generally applicable as long as the exceptions do not undermine the law's purpose.

The creation of exceptions for a neutral law does not automatically diminish its general applicability. The Supreme Court stated that "statutes often include exemptions" and "such provisions have never been held to undermine the interests served by those statutes." *Burwell*, 573 U.S. 682, 763.

The Third Circuit held that the creation of medical, but not religious exceptions meant the law was not neutral or generally applied. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365–67 (3d Cir. 1999). The city's police force wanted a uniform look for their officers and banned facial hair. *Id.* However, they created an individual exception for officers that had a medical need but refused to adopt similar exceptions for Sunni Muslims on the police force. *Id.* at 360. The court reasoned that the creation of an exception for a secular purpose undermined the department's purpose of a uniform look for its officers and displayed a value judgment of the department. *Id.* at 366.

C. If the government acted with hostility, which is not present in this case, then the courts reject the *Smith* standard and apply strict scrutiny.

"A law failing to satisfy [neutrality and general applicability] requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. 520, 531–32. The courts generally apply this heightened standard when hostility or discrimination has been applied towards a religious group. *See generally*, *Masterpiece*, 138 S. Ct. 1719 (finding the enforcement of the non-discrimination law hostile because of its uneven enforcement and targeted language towards a religious petitioner); *Lukumi*,

508 U.S. 520 (finding the hostile and anti-religious purpose generated the adoption of laws which prompted the Court to apply strict scrutiny.); *City of Newark*, 170 F.3d 359, 365 (concluding that the refusal of religious exceptions was "sufficiently suggestive of discriminatory intent" and applied strict scrutiny).

The Supreme Court found a commissioner targeted a baker who refused to bake a wedding cake for a same-sex couple. *Masterpiece*, 138 S. Ct. 1719, 1730–31. The baker was diplomatic, stating his religion rendered him unable to make a wedding cake, but would create other baked goods. *Id*. at 1720. The Court found that the Commissioner targeted the baker because he was treated differently than other bakers who refused to bake cakes for same-sex couples but did not cite religion as the purpose. *Id.* at 1730–31. But, for the Court, the icing on the cake was when the Commissioner made a public statement displaying his disdain of religion by stating religion as a justification for egregious acts like the Holocaust and slavery. *Id.* at 1729.

In contrast, with facts similar to the case at bar, the Third Circuit found that the city "acted only to enforce its non-discrimination policy in the face of what it considers a clear violation." *Fulton v. City of Philadelphia*, 922 F.3d 140, 156 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020). *But see*, *Buck v. Gordon*, 959 F.3d 219, 223 (6th Cir. 2020) (The lower court reached a different conclusion than *Fulton*, but due to its similarities, the Sixth Circuit decided to wait until the Supreme Court resolves *Fulton*.). Catholic Social Services (CSS) refused to comply with the city's anti-discrimination law, specifically against the LGBTQ community, in a contract they voluntarily entered with the city. *Fulton*, 922 F.3d 140, 148–50. CSS alleged that the City Council's resolution was hostile towards CSS in its phrasing by stating, "Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom." *Id*. at 156–57. The Third Circuit compared this to *Masterpiece* and concluded that it

was not a "justification[] for discrimination," but instead consulted a letter sent to CSS as a continued emphasis that they "respected CSS's beliefs as sincere and deeply held." *Id*. at 157. Next, the court refused the argument that the City acted "inconsistently" because they would "consider factors such as race or disability when placing foster children with foster parents." *Id*. at 158. The distinction is CSS refuses to work with individuals "because of their membership in a protected class," whereas the City's intention of matching the child with a family that would be the "best fit." *Id*. Finally, the court points to CSS's flawed reasoning: "the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore, the City is targeting CSS for its religious beliefs." *Id*. at 159. This logic is contrary to the controlling precedent in *Smith* that religions gain no "special protections" from a "general, neutrally applied legal requirement[]." *Id*. The Third Circuit states that if a religious agency can say an enforcer has ill will towards them just because they are enforcing a neutral, generally applicable law, then "the nation's civil rights laws might be [dead] as well." *Id*.

D. Policy considerations favor this Court's affirmance.

It is logical to think that faith-based organizations will not want to contract with the government if they cannot control with whom they work. It follows that a reduction in these agencies will lead to a decrease in child placement, and potentially harming the city's child placement scheme more than discrimination ever could. However, this has not been the case for Massachusetts, Illinois, and the District of Columbia, where other organizations stepped up to cover the services of the faith-based organizations. Brief for Mass., et al. as Amicus Curiae Supporting Respondents at 30–35, *Fulton v. City of Philadelphia*, No. 19-123 (Aug. 20, 2020).

Moreover, when pairing a child with a potential family, the government body tasked with the seamless placement must have discretion. Discretion is critical for the child, as well as essential for procedural and jurisdictional issues such as the doctrines of sovereign immunity and separation of powers. Daniel L. Hatcher, *Professional Article: Purpose v. Power: Parens Patriae and Agency Self-Interest*, 42 N.M.L. Rev. 159, 168 (2012).

Here, the panel correctly determined that ACCS did not meet its burden in attempting to show that EOCPA is not a neutral, generally applicable law. EOCPA, under *Smith*, is a neutral, generally applicable law, that does not gain a heightened level of scrutiny. EOPCA meets rational basis as this law carries out the city's interest in protecting same-sex couples and children from discrimination. This is the correct outcome because the law does not meet any of the justifications for a higher level of scrutiny: through targeted statutory creation, individualized religious exceptions, or hostility against religious practice.

First, this law is a facially neutral law in its creation and has been generally applied in its enforcement. Unlike the law in *Lukumi*, where the city, through tactical statutory construction, adopted a law with the primary objective of effectively stopping a part of the Church's practice, EOCPA's amendment was not targeted at a religion or religious practice. R. at 6. The amendment gave same-sex couples protections against discrimination by making them a protected class. R. at 6. At best, this law is an incidental burden on AACS's religious practices. As stated in *Smith* and *Stormans*, incidental burdens are not enough to gain "special protections" from an otherwise neutral law. Thus, the statutory creation is not a Free Exercise Clause violation. On the other hand, AACS may argue that this was not generally applied because this statute was only enforced against religious agencies. R. at 6–7. However, when a reporter asked the Commissioner whether or not religious-based agencies were following the new law, he

responded by following up with phone calls to politely ask if these agencies were compliant, which AACS's CEO responded negatively. R. at 6–7.

Moreover, AACS is voluntarily contracting with HHS to receive public funds. Here, the EOCPA states that no municipality funds can be dispersed to any agency that does not comply with EOCPA. R. at 4. *Locke*, where the state can be selective when deciding which programs it will finance and *Martinez*, where a public university can refuse to fund a religious organization that does not follow the university's anti-discrimination policy, show that HHS's compelling reason of anti-discrimination is enough to stop the dispersal of funds.

Second, Unlike *City of Newark*, the exceptions were granted in favor of religious entities. R. at 6. If the child placement organizations' religion does not allow them to work with same-sex couples, the law provides for these organizations to post a written statement on their premises. R. at 6. The Supreme Court stated in *Hobby Lobby* that exceptions were allowed as long as they did not undermine the law's purpose. The presence of laws that state a child placement agency must "give preference" to pairing a child with a family of the same race or sexual orientation is not an exception, which renders the law partial. R. at 4, 6. In child placement, the purpose of any law is to pair a child with a "best fit" family. R. at 4. These exceptions support HHS's mission, not undermine the statute's purpose. Here, in contrast to *City of Newark*, the city allowed for religious exceptions proposed by AACS, where they would not allow Muslims of other sects to adopt children of another sect. R. at 9. Thus, these exceptions are part of the distinct nature of child placement, not against religious practice.

Next, there was no hostility against ACCS. In *Masterpiece*, the government official pointed to religion as the cause of historic atrocities: the Holocaust and slavery. Here, the Governor did not stage such an aggressive attack on religion, but rather, in the wake of

Obergefell, stated his support of eradicating bias against same-sex couples. R. at 6. Similar to *Fulton*, the Governor's statements made in support of the LGBTQ community can be construed as hostile against AACS's religious beliefs, but the Commissioner, who directly communicated with the agency in his phone call and his letter, respected the sincerely held beliefs of the agency. R. at 6–7. However, like the court in *Fulton*, this court should recognize that a government agent tasked with the enforcement of laws is not hostile against an organization by doing his/her job of upholding a neutral law.

Finally, in three cities where a similar law has been passed and religious agencies failed to follow the law and their contract, the data does not show a decrease in child placement because other organizations filled the gap in services. This can be duplicated in the City of Evansburgh where the other 33 law and contract abiding agencies can fill the gap. In addition, HHS operates within a system that relies heavily on the discretion, within the lawful bounds of the East Virginia Code, of the employees at HHS. R. at 4, 8. It is necessary this Court maintain both the doctrine of sovereign immunity and separation of powers when analyzing the facts found at trail.

Therefore, because of the language and purpose of the law, the exceptions, and the lack of hostility, this Court should affirm the panel's conclusion that AACS could not meet its burden of showing that EOCPA is not neutral or generally applicable.

II. THE PURPOSE AND SCOPE OF THE GOVERNMENT PROGRAM, ALONG WITH THE FAILURE TO COMPEL ANY SPEECH, SUPPORT THE FINDING THAT ENFORCEMENT OF THE EOCPA'S ANTI-DISCRIMINATION CONDITIONS DID NOT VIOLATE THE FIRST AMENDMENT UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

The Fifteenth Circuit properly denied AACS's alternate contention, that enforcement of the EOCPA's funding conditions against AACS violated the First Amendment Free Speech

Clause. The Fifteenth Circuit also properly held that the EOCPA does not implicate the unconstitutional conditions doctrine. "The 'unconstitutional conditions' doctrine is premised on the notion that what a government cannot compel, it should not be able to coerce." *Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 988 (7th Cir. 1984). Pursuant to this doctrine, the government must refrain from placing a condition on the receipt of a benefit that infringes upon the recipient's constitutionally protected freedom of speech. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l (AOSI)*, 570 U.S. 205, 212 (2013); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 59 (2006); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Because the EOCPA's funding condition does not infringe on AACS's constitutionally protected freedom of speech, this Court, *en banc*, on de novo review, *see Brown v. City of Pittsburgh*, 586 F.3d 263, 268-69 (3d Cir. 2009), should affirm the Fifteenth Circuit's judgment denying AACS's motions for a temporary restraining order and permanent injunction.

A. If the purpose of a government funded program is to promote a government message, the government has broad leeway to impose conditions on its contractors.

Despite its long history, courts have continued to struggle with when to apply the unconstitutional conditions doctrine. *See Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting). The Supreme Court has instructed that courts must examine the purpose of a government funded program when determining whether a government condition that is required for an agency to participate in the program is constitutional under the First Amendment. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). As such, where the purpose of the program is to facilitate private speech, as opposed to promoting a government message, the restriction violates the First Amendment if speech is a prerequisite of participation in the program. *See id.* at 542–43.

In *Velazquez*, a group of lawyers employed by the New York City Legal Services Corporation argued that Congress's imposition of a funding condition on legal services was an unconstitutional restriction on their freedom of speech. *Id.* at 536. The condition prohibited the lawyers from using federal funds to amend or challenge existing welfare law. *Id.* at 536–37. In determining that the funding condition was unconstitutional, the Court noted that the program was "designed to facilitate private speech, not promote a governmental message." *Id.* at 542.

Here, in contrast to the government funded program in *Velazquez*, HHS's purpose in contracting with AACS is to provide adoption and foster care services to the citizens of Evansburgh. R. at 9. Moreover, the contract is not intended to create a forum for private speech or to facilitate private speech. Rather, AACS's work as an authorized adoption agency is an extension of HHS's own work. Consequently, AACS's speech, to the extent any is required when performing its services as an authorized agency, constitutes governmental speech. *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 697 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020); *see also Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 840 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2007). Accordingly, HHS is permitted to "take legitimate and appropriate steps to ensure that its message," that adoption services are provided to all citizens of Evansburgh consistent with the anti-discrimination policy set forth in section 42.-3(b) of the East Virginia Code, was and is "neither garbled nor distorted by" AACS. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *see also Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting) (stating that government entities have substantial latitude to regulate their employees' speech).

1. The anti-discrimination conditions solely applied within the scope of the government program.

The EOCPA's requirement that agencies refrain from discriminating on the basis of sexual orientation is a permissible condition on how government contractors must carry out the government's certification process because the conditions apply solely within the scope of the government program. The Supreme Court of the United States has held that the government may not impose conditions "prohibiting the recipient from engaging in the protected conduct *outside* the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis added). However, within the scope of the government funded program, a funding recipient is generally obligated to comply with the conditions of the program. *Id.* at 193. Accordingly, the relevant distinction is between conditions that specify the limits of the government program, and conditions that attempt to leverage funding as a means to regulate speech outside the scope of the program itself. *AOSI*, 570 U.S. at 214-15.

In *Rust*, the Court considered a government spending program that provided funding to private organizations to assist in the operation of family-planning services. 500 U.S. at 178. Among the conditions for the funding, the government prohibited the organizations from using the funds in programs where abortion was a method of family planning. *Id.* at 179. The Court held that the conditions did not violate the First Amendment, explaining that when the government funds a program, the government is entitled to define the limits of that program. *Id.* at 194. The Court reasoned that by restricting the organizations from engaging in abortion-related activities when acting under the auspices of the government funded program, the organizations remained free to pursue abortion-related activities separately from the government funded program. *Id.* at 198. Likewise, in a case remarkably similar to the instant case, the Third Circuit held that prohibiting a foster care agency from finding an applicant unqualified on the

basis of their sexual orientation or same-sex relationship did not violate the agency's First Amendment freedom of speech. *Fulton*, 922 F.3d at 160-61.

Similar to the funding conditions in *Rust* and *Fulton*, the EOCPA's funding conditions solely apply within the confines of the child placement program. The EOCPA simply imposes the anti-discrimination requirements on private agencies that receive public funds in exchange for providing child placement services to HHS. R. at 4. Foster family certifications are part of the government program, and the anti-discrimination requirement only applies within the scope of the government program. R. at 4. As such, just like in *Rust*, AACS is free to pursue child placement activities that exclude same-sex couples separately from the government funded program. Therefore, the anti-discrimination conditions were permissible conditions and did not violate AACS's free speech rights.

2. By merely requiring AACS to refrain from discrimination when carrying out its public service duties pursuant to a government contract, AACS was not compelled to endorse a message that conflicts with its religious beliefs.

AACS's unconstitutional conditions claim must also be dismissed on the grounds that HHS and the regulations of the EOCPA do not compel speech. At the district court level, AACS argued that "requiring AACS to certify same-sex couples compels it to promote a message that conflicts with its religious beliefs." R. at 15. Contrary to AACS's argument, no such message is being compelled. Nothing in the EOCPA requires AACS to "endorse" foster parents' relationships. Rather, application of section 42.-3(b) as applied to AACS simply prohibits discrimination against potential foster care or adoptive parents on the basis of marital status and sexual orientation. R. at 4, 6. Thus the main message conveyed by certifying an unmarried or same sex couple for adoption is that, by applying the regulatory criteria mentioned above, placement with such a couple would be in the best interest of the child. *See* R. at 3–4.

In addition, as the record makes clear, HHS is not in any way compelling AACS to change the message it wishes to convey. AACS is not being forced to state that it approves of non-married or same sex couples. Rather, the only statement being made by certifying such couples is that they satisfy the criteria set forth by the state, notwithstanding any views as to the martial status or sexual orientation of the couple. In fact, nothing prevents AACS from sharing its religious beliefs throughout the entire process. *See* R. at 6. All that is forbidden is discrimination against prospective adoptive parents on the basis of their marital status or sexual orientation. R. at 4, 6.

Further, the Supreme Court has consistently expressed that if a party objects to a condition on the receipt of government funding, its recourse is simply to decline the funds. *AOSI*, 570 U.S. at 214; *see also U.S. v. Am. Library Assn., Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion) (holding that the First Amendment was not violated by requiring public libraries to install a filtering software as a condition for funds for internet access, noting that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance"). Accordingly, AACS was not compelled to promote any message that conflicts with its religious beliefs.

B. The Notice Requirement of the EOCPA does not invoke the compelled speech doctrine because any speech is incidental to the regulation of conduct, expressly allows for counter speech, and involves purely factual and uncontroversial information.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving expression, consideration, and adherence. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). The Supreme Court has been especially cautious when the government attempts to compel the endorsement of ideas that is approves. *See Knox v. Svc. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

Nonetheless, the notice at issue here is nothing like the types of compelled statements that the Supreme Court has previously disapproved of. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that students could not be compelled either to pledge allegiance to the United States or to engage in the symbolic expression of saluting the American flag); *Hurley v. Irish Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (holding that the government cannot require private citizens who organize a parade to include a group whose message the organizers do not wish to convey).

1. The notice requirement merely regulates conduct, not speech.

Notwithstanding the ample amount of precedent, the distinction between speech and conduct continues to be difficult to discern. Clay Calvert, *Is Everything a Full-Blown First Amendment Case After Becerra and Janus? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 Mich. St. L. Rev. 73, 76–78 (2019). The Supreme Court has made clear that states may regulate professional conduct, even though that conduct incidentally involves speech. *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018); *see also FAIR*, 547 U.S. at 62 ("The compelled speech . . . is plainly incidental to the [law's] regulation of conduct, and 'it has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part . . . carried out by means of language, either spoken, written, or printed.'").

In *FAIR*, an association of law schools challenged a law that required them to host military recruiters on campus, alleging that this compelled the schools to say something against their beliefs. 547 U.S. at 53. Specifically, the schools argued that providing email notifications of the recruiters' scheduled presence conveyed an implicit endorsement of the recruiters' message.

Id. at 64–65. The Court rejected this argument, holding that the speech was incidental to the regulation of conduct. *Id.* at 62.

Here, just as in *FAIR*, the notice requirement is aimed at specifically regulating conduct, not speech. The EOCPA simply requires that the anti-discrimination policy be posted "before funds are dispersed pursuant to the contract." R. at 6. Thus, by its very terms, the requirement limits how AACS preforms its services for the government, and nothing more. Accordingly, any compelled speech is incidental to the EOCPA's regulation of conduct.

2. The notice requirement expressly allows for AACS to present their own messages.

The disclosure required by the EOCPA will be readily understood as coming from the state. The statement AACS is required to post at its place of business reads that it is "illegal under state law to discriminate against any person." R. at 6. By expressly mentioning that the anti-discrimination policy is pursuant to state law, there is little or no risk that the disclosure will be misunderstood as implying anything about AACS's own views. Additionally, this risk is further diminished by the fact that the EOCPA also permits religious-based agencies, like AACS, to post on their premises a written objection to the policy. *Id.* Therefore, potential foster parents are able to understand the agency's role in serving as a conduit for such disclosures is not self-expression.

The counterspeech doctrine, as Justice Louis Brandeis explained, contends that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In other words, whenever more speech has the possibility of eliminating a feared injury, more speech is the constitutionally mandated remedy. Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the*

Old Remedy For "Bad" Speech, 2000 BYU L. Rev. 553, 553 (2000). As such, by expressly allowing AACS to post written objections to the policy, the EOCPA includes a counterspeech remedy to negate any First Amendment claim.

In addition, contrarily to *Hurley*, and similarly to *FAIR*, the notice requirement here lacks a sufficient expressive quality of a parade because the notice does not interfere with any message of AACS. *See FAIR*, 547 U.S. at 64 (explaining that a law school's recruiting services lack the expressive quality of a parade because the accommodation does not sufficiently interfere with any message of the school). Moreover, as opposed to *Barnette*, the act of delivering what is clearly a government notice conveyed in response to legal requirements does not amount to a government mandated pledge. Thus, because the disclosure required by the EOCPA does not restrict what AACS may say about same-sex foster parents, the notice requirement does not invoke the compelled speech doctrine.

3. The notice requirement consists of purely factual and uncontroversial information.

Lastly, East Virginia's adoption of the anti-discrimination notice requirement does not violate the First Amendment's freedom of speech because the disclosure consists of purely factual and uncontroversial information about the terms under which AACS's services will be available. The Supreme Court has stated that although "unjustified and unduly burdensome disclosures requirements offend the First Amendment," there is only a "minimal" constitutionally protected interest in not providing "factual and uncontroversial information" regarding the terms under which one's services will be available. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). In other words, requiring a statement or the endorsement of a belief is not the same as requiring purely factual

information. *See FAIR*, 547 U.S. at 65 (holding that merely posting factual information about the recruiters' arrival did not affect the schools' speech).

Here, the notice requirement states that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. This clearly falls within the ambit of purely factual information. The issue is whether this information is uncontroversial. While it may be argued that an individual's sexual orientation is a controversial topic, purely factual information about the state's anti-discrimination policy is a very different matter. *See Becerra*, 138 S. Ct. at 2388 (Breyer, J., dissenting) ("Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth."). Therefore, by consisting of purely factual and uncontroversial information, the notice requirement does not violate AACS's First Amendment rights.

CONCLUSION

Because enforcement of the EOCPA against AACS failed to violate either AACS's Free Exercise or Free Speech rights, this Court should affirm the ruling of Fifteenth Circuit.

Respectfully submitted,

Team 31

Counsel for Appellee

APPENDIX

U.S. Const. amend. I.

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

CERTIFICATION OF SERVICE

I hereby certify that on this 14th day of September, 2020, I served a copy of the Brief for Appellee as required by Rule 3.9.

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Team 31
Counsel for Appellee