No. 2020-05

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

v.

AL-ADAB AL-MUFRAD CARE SERVICES,
PLAINTIFF-APPELLEE

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

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STATEMENT OF THE ISSUES

I. Whether the Court should affirm the grant of the temporary restraining order and permanent injunction because the State statute and the Appellant's enforcement of the same, fail to be generally applicable or neutral and subsequently fails the test of strict scrutiny.

II. Whether the Court should affirm the grant of the temporary restraining order and permanent injunction because the Appellant violated AACS's First Amendment rights by placing a condition to certify same-sex couples and to display language in AACS offices on AACS instead of the child placement program itself.

STATEMENT OF THE CASE

Course of Proceedings and Disposition

The Appellee, Al-Adab Al-Mufrad Care Services ("AACS"), filed this suit against Christopher Hartwell, in his official capacity as Commissioner of the Department of Health and Human Services ("HHS") on October 30, 2018, seeking injunctive relief alleging HHS's enforcement of the Equal Opportunity Child Placement Act ("EOCPA") to impose a referral freeze and refusal to renew child placement contracts with AACS violated AACS's First Amendment rights. R. at 8. On April 29, 2019, the U.S. District Court for the Western District of East Virginia granted AACS's motion for temporary restraining order and permanent injunction. R. at 2. HHS appealed the grant of the motion and its accompanied injunctions. R. at 18. On February 24, 2020, the U.S. Court of Appeals for the Fifteenth Circuit reversed the District Court's grant of AACS's motion. R. at 19. AACS promptly petitioned this Court for a Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35(a)(2) to rehear the issues because it involved a question of exceptional importance. R. at 26. On July 15, 2020, AACS's petition for Rehearing En Banc was granted after a majority of non-recused active judges voted in favor of AACS's petition. R. at 26.

The Statement of the Facts

AACS is a nonprofit adoption agency in Evansburgh. R. at 3. The city of Evansburgh has a racially diverse population of four million people. R. at 3. Evansburgh's refugee population includes refugees from Ethiopia, Iraq, Iran, and Syria. R. at 3. Most refugees face personal and economic hardship and cannot provide for their children. *Id*. Evansburgh charged HHS with establishing a system that best serves the interest of the child. *Id*. HHS entered foster and adoption contracts with thirty-four private child placement agencies to provide home studies,

counseling, and placement recommendations to HHS. *Id*. HHS refers children to agencies and the agencies notify HHS of potential matches. *Id*. Determination of child placement must be made in the best interest of the child. R. at 4. The best interest of the child is determined by the following factors: 1) age of child and the prospective parents. 2) physical and emotional needs of the child in relation to the characteristics, capacities, strengths, and weaknesses of the adoptive parents, 3) cultural or ethical background of child compared to capacity of strengths and weaknesses of parents to meet the needs of the child with such a background and, 4) and the child's ability to be placed with siblings. *Id*. The EOCPA imposed nondiscrimination requirements on the child placement agencies that entered into foster care and adoption contracts with HHS. *Id*. The EOCPA prohibited discrimination on the basis of race, religion, national origin, sex, marital status, disability or sexual orientation. *Id*. In addition, EOCPA required child adoption agencies to give preference to families where at least one parent is the same race as the child. *Id*. The child placement agencies were contractually obligated to maintain support to ensure successful placement. *Id*. When the families did not fit the child agency's profile then the agency typically referred the family to another agency. R. at 5. AACS' mission statement expressed its following of the Qur'an. R. at 7. HHS required all of the private agencies to follow the EOCPA. R. at 6. In addition, the EOCPA required all adoption agencies to post a sign at the agencies' place of business which stated the EOCPA's nondiscrimination policy. R. at 6. AACS stated that same sex marriage was a moral transgression due to its religion. R. at 6. AACS has offered adoption services and placed thousands of children since 1980. R. at 5. In all of AACS's years, it has referred the same sex couples it denied to LGBTQ supportive agencies and have never received a complaint based on discrimination. R. at 7. In enforcing the EOCPA, HHS has allowed the following exceptions: 1) placed a white child with an African American family, 2)

placed Sunni children in Sunni homes and Shia children in Shia homes as a result of the cultural conflict between the Sunni and Shia sects, and 3) refused to place a five year old girl in a home with only a father and brother. R. at 8-9. In enforcing Evansburgh's overall interest in eliminating discrimination, HHS asserts the following interest: 1) ensure adoption services are available to all residents, 2) ensure adoption services are available to taxpayers, 3) Ensure the pool of adoptive parents are as diverse as the pool of children needing to be adopted and, 4) ensure children are adopted into qualified homes. R. at 9.

The Standard of Review

A district court's decision to issue a permanent injunction is reviewed by an abuse of discretion standard, but any determination underlying the court's decision is reviewed by the standard that applies to that determination. *United States v. Hovsepian*, 359 F.3d 1144, 1156 (2004) (en banc). However, when the injunction turns on a question of law, the district court's injunction is reviewed de novo. *Id*.

SUMMARY OF THE ARGUMENT

The United States Federal Courts have the peculiar duty to maintain and protect the Constitutional rights of its citizens from those who wish to encroach upon them. By allowing municipalities to infringe upon a citizen's First Amendment rights, this Court would fall short of fulfilling its prescribed role as a defensive mechanism against a government's attempt to limit free speech. In the instant case, HHS, a city governmental entity, has discriminately enforced the EOCPA statute in a manner that violates AACS's First Amendment rights because the statute and its enforcement was neither generally applicable nor neutral. Moreover, HHS placed an unconstitutional condition on AACS to certify same-sex couples as adoptive parents; as well as a condition to post signage in AACS offices containing language that conflicts with its religious views as a prerequisite to renew its contract with HHS to continue to engage in child placement operations within the City of Evansburgh in the State of East Virginia.

Under common law, injunctive relief can be appropriately granted by the District Judge, under the judge's discretion, if the judge finds high potential of a recurrent violation. What this Court should find is HHS, the enforcer of the EOCPA statute and sole granter of child placement contracts, occupies an extraordinary position to continually employ the EOCPA statute to coerce AACS and other ideological based child placement agencies into conforming to HHS's viewpoints at will while violating the agency's First Amendment rights in the process. Because HHS's enforcement of the EOCPA poses a recurrent threat to AACS's and other agencies' constitutionally protected rights, this Court should affirm the grant of the temporary restraining order and permanent injunction.

ARGUMENT

This Court should affirm the District Court's order granting AACS's motion for a Temporary Restraining Order and Permanent Injunction against HHS, because AACS has shown, to the District Court's satisfaction, that such relief is necessary to preserve AACS's First Amendment rights. Injunctive relief is appropriate when a District Court makes a determination that there exists some cognizable danger of recurrent violation, something more than mere possibility; in this instance, the District Judge's discretion is necessarily broad and a strong showing of abuse of discretion must be made to reverse it. *U.S. v. W. T. Grant Co.* 345 U.S. 629 (1953).

In the instant case, AACS has raised two claims under the First Amendment: a Free Exercise claim and an Unconstitutional Conditions claim. In regard to the Free Exercise claim, the District Court, in agreeance with AACS, correctly interprets and analyzes the law held in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (holding laws must be neutral and generally applicable or be subject to strict scrutiny). HHS proposed a different interpretation of the same law regarding this claim which was correctly denied by the District Court and incorrectly applied on appeal.

The unconstitutional conditions claim raised by AACS presents a similar yet distinct issue. Within the circuit, the District Court, again in agreeance with AACS, has correctly applied *Agency for Int'l Dev. v. Alliance for Open Society Int'l (AOSI)* (where government conditions restricting freedom of speech are a prerequisite to participating in the government funding, the condition is unconstitutional) as the governing law over this issue. *Agency for Int'l Dev. v. Alliance for Open Society Int'l,* 570 U.S. 205, 214 (2013). In conflict with this interpretation, HHS contends that *Rust*

v. Sullivan, governs this issue. *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding government conditions which do not exceed the scope of the program are constitutional).

HHS misapplies the law in ***Lukumi,*** by failing to correctly apply the test of neutrality and general applicability to the State statute because AACS was treated more harshly than the government treated the other child adoption agencies. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Furthermore, HHS' choice of authority governing the unconstitutional conditions claim is misplaced because *Rust* governs cases where the condition is applied to the government program itself without disturbing the private entity's right to engage in the prohibited speech so long as it is separate from the government program. *Rust v. Sullivan*, 500 U.S. 173 (1991). Here, the condition is placed on AACS pursuant to the State statute.

I. THIS COURT SHOULD AFFIRM THE GRANT OF THE INJUNCTION BECAUSE THE EOCPA VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

This Court should find the EOCPA and its enforcement violates the First Amendment Free Exercise Clause because the EOCPA and the State's enforcement of the EOCPA is not generally applicable or neutral, and the law subsequently fails to satisfy the standard of review of strict scrutiny. A law that fails to satisfy both the neutrality and general applicability requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, (1993).

A. This Court Should Affirm the Grant of the Injunction Because the Enforcement of the EOCPA was Neither Neutral Nor Generally Applicable as Applied to AACS and Violated Their Rights Under the Free Exercise Clause.

The Free Exercise Clause protects individuals from governmental interference with the exercise of religion, U.S. Const. Amend. I, and applies to the States through Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause forbids any

regulation of beliefs. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). A neutral and generally applicable law is not subject to strict scrutiny, even if it burdens conduct, regardless of whether it is motivated by religious or secular concern. *Id*. at 546. However, a law is only "neutral" if it does not target religiously motivated conduct either on its face or as applied in practice. *Id*. at 533-40. In circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Empl't Div. Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

Instances of selective exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (1999) ("Fraternal Order"). In *Fraternal Order*, upon receiving a notice of disciplinary action and potential removal from the force, two Sunni Muslim officers challenged the no-beard policy of the Newark Police Department ("Police Department"). *Id*. The two officers were devout Sunni Muslims who asserted that they were under a religious obligation to grow their beards. *Id*. The teachings of the Qur'an, which the officers followed, are not discretionary instructions; they are commandments. *Id*. The police department attempted to argue that the no-beard policy helped to foster a uniform appearance and allowing religious exemptions would undermine the force's morale; however, they made secular exemptions for officers with skin conditions. *Id*. In *Fraternal Order*, because the police department allowed secular exemptions to the no-beard policy, the court held that the failure to offer a religious exemption violated the Free Exercise Clause. *Id*. at 367.

While a law as written can be neutral, the law cannot be enforced in a neutral manner when one can make exemptions based on their own religious experiences and their own perceptions of

the religious beliefs of others. *Rader v. Johnston*, 924 F. Supp. 1540 (1996). In *Rader v. Johnston*, Rader, a devout Christian, argued that the University of Nebraska-Kearney's ("UNK") parietal rule requiring all full-time freshman to live on campus during their first year violated the Free Exercise Clause. *Id*. at 1543. Rader alleged that the UNK administrators were not enforcing the rule in a neutral manner because they made secular off-campus living exemptions for thirty-six percent of the incoming freshman, but refused to make a religious exemption for him. *Id*. at 1555. UNK argued that the parietal rule fosters diversity, increases graduation rates, and ensures full occupancy at the residence halls. *Id*. at 1548. In *Rader*, because the university administrators approved one-third of secular dorm arrangement requests without giving the same access to religiously motivated requests, the court held that the parietal rule violated the Free Exercise Clause. *Id*. at 1558.

A long history as an identifiable religious sect, and a long history as a successful and self-sufficient segment of American society can bolster an argument for religious exemptions. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972). In *Yoder*, several Amish families challenged a compulsory attendance law because they did not want to send their kids to school after eighth grade. *Id*. As devout followers of the Amish religion, the families believed that formal education after the eighth grade placed Amish children in an environment that was hostile to Amish beliefs with increasing emphasis on competition and pressure to conform. *Id*. at 209. The families cited their long-standing religion has a history of deep religious conviction, and their way of life is not merely a matter of personal preference. *Id*. at 210. The state made a speculative argument that they had an interest in requiring an additional one or two years of compulsory high school because of the possibility that some children will choose to leave the Amish community, and that they will be ill-equipped for life. *Id*. at 224. In evaluating the claim of the families, the court emphasized the

importance of determining whether the intrusion complained of was based on purely secular considerations, or deeply rooted in religious beliefs. *Id*. at 215. The court reasoned that evidence of one's religion that has not altered in fundamentals for centuries is the way to show that the intrusion complained of is deeply rooted in religious beliefs. *Id*. at 216. Since the state's interest in universal education was too speculative to outweigh the Amish families deeply rooted religious beliefs, the court held that the compulsory attendance law violated the Free Exercise Clause. *Id*. at 235.

This Court should hold that the enforcement of the EOCPA was neither neutral, nor generally applicable, as applied to AACS, and therefore violates AACS' rights under the Free Exercise Clause. Similar to the two Sunni Muslim officers in *Fraternal Order* AACS is being denied the benefit of a religious exemption due to their religious beliefs; however, HHS is allowing secular exemptions. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (1999). In *Fraternal Order*, the officers received a notice of disciplinary action and potential removal from the force due to their beards. *Id.* at 360. AACS has received a similar letter threatening to cut funding if they refuse to service same-sex couples. *R*. at 7. AACS is an agency whose mission statement has always included the fact that it strictly follows the Qur'an. *R*. at 5. Following the teachings of the Qur'an includes the inability to certify same-sex couples as adoptive parents because the Qur'an considers same-sex marriage to be a moral transgression. *R*. at 7. *Fraternal Order* has stressed the importance of acknowledging that the teachings of the Qur'an are not discretionary, but commandments. *Id*. According to *Fraternal Order*, since HHS has allowed secular exemptions, but no religious exemptions, there should be some compelling justification. *Id*. HHS has attempted to argue that allowing same-sex couples to adopt Muslim children is in the child's best interest; however, HHS ignores available alternatives to reach their

goal of advancing same-sex couples without interfering with the religious freedom that AACS deserves. *R*. at 4. AACS has worked tirelessly in this community since 1980 and has not once received a formal complaint from a same-sex couple about mistreatment or the need to allow them access to adopt a Muslim child. *R*. at 5. AACS has maintained an excellent relationship with the same-sex community and often refers them to agencies who specialize in same-sex couples. *R*. at 7. Similar to the police department in *Fraternal Order*, HHS has allowed secular exemptions for its policy by violating provision E.V.C. § 42.2 when they placed a white special needs child with an African American couple. *R*. at 8. This Court should find that HHS has violated the Free Exercise Clause because they have allowed secular exemptions but have refused to give AACS a religious exemption.

Similar to the plaintiff in *Rader v. Johnston*, HHS is not enforcing the EOCPA in a neutral manner because HHS has the ability to make exemptions based on their own experiences and religious beliefs. HHS has chosen to grant exemptions on several occasions, even once based on the recommendations of AACS. *R*. at 9. The plaintiff in *Rader* had other dorms to choose from just as the parents in this case have thirty-three other agencies to choose from. *Radar*, 924 F. Supp. 1540 at 1534. HHS attempts to argue that all agencies should cater to same-sex couples. *R*. at 7. HHS fails to acknowledge that the adoption process is a very intimate one and if it desired to streamline the process it could have created one large agency; however, it chooses to seek out multiple agencies that each cater to a specific set of potential parents. Like the defendant in *Rader*, HHS's implementation of individualized exemptions dictate that religious exemptions can also be made since the law is not generally applicable. *Id*. at 1558. Similar to the defendant in *Rader*, HHS attempts to argue that the EOCPA fosters a diverse pool of foster and adoptive parents; however, they fail to acknowledge that AACS's mission for more than thirty years has always been to foster

relationships between strong Muslim faith individuals, and HHS has supported that mission by renewing the contract with AACS for the past thirty-eight years. *R*. at 9. This Court should hold that the failure of HHS to allow religious exemptions to a law that is not generally applicable violates the Free Exercise Clause.

The court in *Wisconsin v. Yoder* identified that the presence of a long history as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society can bolster an argument for religious exemptions. 406 U.S. 205 (1972). Similar to the families in *Yoder*, AACS's Muslim teachings have been acknowledged as a whole for over 1,000 years, and AACS has been in the State of East Virginia for over 30 years. Similar to the Amish families who had evidence of a long-standing religion and ties to the community, AACS has contributed to the placing of thousands of Sunni and Shia refugee children in safe and religiously motivated homes, and this longstanding history deserves the protection of the Free Exercise Clause. R. at 3. HHS argues that its contracts employ the service of adoption, not the teachings to go along with it; however, HHS has allowed each agency to craft their own websites and allow potential parents to shop around. R. at 5. HHS also acknowledges that four agencies specifically cater to same-sex couples and has chosen to renew AACS's contract for several decades. R. at 8. This Court should hold that AACS's long history as an identifiable religious sect bolster's its argument in favor of finding HHS's enforcement of the EOCPA to be a violation of the Free Exercise Clause.

Consequently, this Court should hold the enforcement of the EOCPA to be a violation of the Free Exercise Clause because it is neither neutral nor generally applicable due to HHS's decision to make secular exemptions while refusing to make a religious exemption for an identifiable religious sect.

B. HHS Did Not Show that the Referral Freeze and Terminating the Contract is Narrowly Tailored to Further a Compelling Government Interest Because All Evansburgh Residents Can Adopt Through HHS's Adoption Program, Diversity Among Adopting Parents is Unaffected, Child Placement into Qualified Homes is Prevented, and HHS's Enforcement of the EOCPA was Underinclusive.

A law burdening religious practice that is not neutral or not of general applicability must undergo the most rigorous scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

The government must justify its burden upon the particular religious practice by demonstrating that its actions are narrowly tailored to further a compelling governmental interest. *Rader v. Johnston*, 924 F. Supp. 1550. In *Rader*, UNK asserted that its purposes for the parietal rule were to increase academic performance, foster diversity, promote tolerance among students, and have full occupancy of the dorms. *Id*. at 1553. The court reasoned that there was no connection between the purpose of the parietal rule and UNK's enforcement of the rule because the off campus Christian house was close to campus. *Id*. at 1558. Thus, academic services were still readily available to students who lived in the Christian house. *Id.* The court reasoned that the Christian house contributed to diversity and tolerance among the students because many of the students who lived in the Christian house were from various countries. *Id*. Therefore, the court held that neither the mandatory housing requirement nor it's exceptions were narrowly tailored to justify UNK's stated interest. *Id.*

In *Rader*, UNK asserted increased academic performance among students as an interest in support of its mandatory housing requirement. *Rader,* 924 F. Supp. at 1553. Here, the EOCPA prohibited child placement agencies from discriminating on the basis of race, religion, national origin, sex, marital status or disability when the agency screened or certified potential foster care or adoptive families. R. at 6. In addition, HHS asserted the following state interests in terminating

the contract and AACS's referral freeze to enforce the EOCPA: 1) ensure child placement services are available to all residents, 2) ensure the pool of adoptive parents is as diverse as the pool of children who need placement services, 3) ensure individuals who pay taxes to fund government contractors are not denied access to those services and, 4) ensure children are placed in qualified homes. R. at 9. The court in *Rader* held UNK's enforcement of the parietal rule was not connected to UNK's interest because academic services were still readily available to students who lived in the Christian house. *Id*. at 1558. Similarly, this Court should reason that HHS' enforcement of the EOCPA was not connected to HHS's stated interests.

First, adoption services were available to all residents without terminating the contract between AACS and HHS because HHS provided a "choosing an adoption agency" section on its website. R. at 5. Furthermore, the website allowed all couples, including those of the same sex, to have the ability to sift through the provided information about the other thirty-three adoption agencies. R. at 5. In addition, AACS referred same sex couples to agencies that served the LGBTQ community. R. at 7. Moreover, because only a few same sex couples have contacted AACS and out of that select few, no same sex couple has ever filed a formal discrimination complaint against AACS, AACS's religious beliefs did not hinder HHS's interests. R. at 7. Therefore, adoption services were already available to all Evansburgh residents; thus, this Court should reason HHS's enforcement of the EOCPA did not justify HHS's stated interest. Second, because adoption services were still available to same sex couples and those same sex couples were Evansburgh taxpayers, this Court should find HHS's enforcement of the EOCPA did not justify HHS's interest in ensuring adoption services are available to tax payers.

Third, AACS's denial of same sex couples had no effect on the diversity of the adoptive parent pool. In *Rader*, the court held that the enforcement of UNK's parietal rule did not justify its

interests of fostered diversity and increased tolerance among students because many students from various countries lived in the off campus house. *Id.* HHS will likely argue that AACS's religious practice decreased the pool of diverse adoptive parents because it denied a diverse group of adoptive parents, same sex couples, of the ability to adopt. However, the court in *Rader*, reasoned that because many diverse students lived in the house and all of the students learned to live together, the Christian house fostered diversity and promoted tolerance among the students. *Id.* Like *Rader*, this Court should reason that because AACS referred same sex couples to agencies that serve the LGBTQ community, same sex couples were not precluded from the adoption program and still made up part of the diverse pool of adoptive parents. Therefore, this Court should find the referral freeze and contract termination had no effect on HHS's interest of diversity within the pool of adoptive parents because same sex couples could participate in HHS's program regardless of whether AACS denied the couple. Thus, this Court should find HHS's act of terminating the contract and placing the referral freeze was not justified.

Fourth, HHS will argue its actions were justified because AACS prevented qualified parents from adopting children when it refused to screen same sex couples. However, HHS's child placement decisions were dependent on four HHS factors which included the physical and emotional needs of the child in relation to the qualities of the adoptive parents, and the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background. R. at 4. Furthermore, all of the placement factors invite discrimination within HHS's adoption program. R. at 4. Evidenced by the language in the third factor, "the capacity of the adoptive parents to meet the needs of the child with such a [cultural] background", this Court should reason that because many of the children are Middle Eastern refugees, and Islam is a predominate religion in the Middle East, child placement with same sex

parents likely will not meet the needs of that child's cultural background and instead strip the child of any sense of cultural familiarity. Moreover, when a refugee child is placed into a home whose lifestyle conflicts with the Islamic based discretion of AACS, the child's placement may result in the same sort of conflicts that would arise if a Sunni child were to be placed into a Shia home. Thus, this Court should reason HHS's actions were not justified in ensuring children are placed in qualified homes.

Where the government only restricts constitutionally protected conduct and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. at 546-547 (1993). In *Church of Lukumi Babalu Aye*, a Santeria church was set to open in a small city. *Id* at 527. The Santeria church (Lukumi) practiced religious animal sacrifices. *Id*. The city council passed four ordinances to prevent Lukumi from the practice of religious animal sacrifice. *Id*. The city's stated interest behind the ordinances were to protect public health and prevent animal cruelty. *Id.* at 528. The court reasoned the ordinances were underinclusive in that they had exemptions that allowed other secular animal killings such as hunting. *Id.* at 536-538. The court further reasoned that the secular killings would cause the same harm to public safety and animal cruelty that the city allegedly aimed to prevent because there were no hunting regulations in the ordinances. *Id*. Therefore, the court held the city's interest in public health and animal cruelty were not compelling. *Id*. at 537-538

The court in *Lukumi* reasoned that animal killings posed the same public health risks regardless of whether the killings were commercial or sacrificial because it did not impose hunting regulations. *Id*. Thus, the court held the city's interest was underinclusive and, therefore, not compelling. *Id.* Like *Lukimi*, HHS's adoption program invited discrimination regardless of

whether AACS had a referral freeze because the EOCPA required agencies to give preference to adoptive parents who were of the same sexual orientation as the child. R. at 6.E.V.C 42.3(b). In addition, HHS refused placement of a young girl with an all-male family who was otherwise qualified. R. at 9. Furthermore, HHS authorized AACS's recommendation to deny otherwise qualified homes that were of the opposing sect of the child because the Sunni and Shia sects were in deep conflict with each other. R. at 4. R. at 9. Therefore, this Court should reason HHS's enforcement of the EOCPA was underinclusive because it allowed all of the other agencies to discriminate in their discretion for successful child placement yet prevented AACS from upholding its Islamic religion in its discretion to do the same. Thus, this court should find HHS's stated interest was not compelling to satisfy strict scrutiny.

Consequently, because HHS's enforcement of the EOCPA was not connected to three of HHS's stated interest and hindered the interest of ensuring child placement into qualified homes, this Court should find that the termination of the contract between HHS and AACS as well as the referral freeze placed on AACS was not narrowly tailored to satisfy strict scrutiny.

II. THIS COURT SHOULD AFFIRM THE GRANT OF THE INJUNCTION BECAUSE HHS PLACED AN UNCONSTITUTIONAL CONDITION ON THE RECEIPT OF GOVERNMENT CONTRACTS.

This Court should affirm the grant of the temporary restraining order and permanent injunction because HHS placed a condition on AACS, a recipient of government contracts, that forces AACS to alter its speech by compelling AACS to certify same-sex couples and display a sign which contradicts its religious beliefs. R. at 23. Under the unconstitutional conditions doctrine, the Supreme Court has stated, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights." *Agency for Intern. Dev. v. All. for Open Socy. Intern., Inc.,* 570 U.S. 205, 212 (2013) ("*AOSI*").

When a government program condition goes beyond preventing recipients from using private funds in a way that would undermine the federal program, but instead requires the recipient to pledge allegiance to the government's policy, that condition is unconstitutional. *Id.* at 220. In *AOSI*, the Court found the government violated a private agency's First Amendment rights when the government placed a condition on the agency that compelled the agency to adopt a policy explicitly opposing prostitution in exchange for government funding. *Id.* at 221. By demanding that funding recipients adopt – as their own – the Government's view on an issue of public concern, the condition by its very nature affects protected conduct outside the scope of the federally funded program. *Id.* at 206. Therefore, the Court reasoned by requiring the agency itself to profess a specific belief both inside and outside the scope of the government program, the condition went beyond the limits of the federally funded program to defining the agency. *Id*. at 218. The Court held the private agency's speech was effectively limited by the government's funding condition because the condition limited the entity's speech on a certain subject matter to a specific viewpoint, as opposed to limiting the condition to the program itself. *Id.* at 221.

The State cannot constitutionally require an individual to participate in dissemination of ideological messages by displaying it on private property in a manner and for the express purpose that it be observed and read by the public. *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, a plaintiff sought declaratory and injunctive relief after being arrested in the State of New Hampshire for covering up the words "Live Free or Die" on the state license plate which offended the plaintiff's religious convictions. *Id*. at 707. The right to speak and the right to refrain from speaking are complimentary components of the broader concept of individual freedom of mind. *Id*. at 714. The Court reasoned even if the State's purpose was legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly

achieved. *Id.* The Court in *Wooley* held that the statute requiring the plaintiff to display the message on his license plate violated the plaintiff's First Amendment right to Free Speech by compelling the plaintiff to espouse a message notwithstanding of the plaintiff's personal freedoms to refrain from the same. *Id.* at 717.

When the government creates a speech regulating condition and limits that condition to the scope of the government program itself, the government funding recipient's right to the regulated speech is not affected outside the scope of the program and the condition is constitutional. *Rust v. Sullivan,* 500 U.S. 173 (1991). In *Rust*, the government granted a planned parenthood facility Title X funds on the condition that the Title X funded operations not involve abortion. *Id.* at 175. The Court reasoned that because the facility was free to engage in abortion so long as the abortion-involved operations were kept separate from the Title X funded operations, the condition did not exceed the scope of the program. *Id.* at 198. The Court held that because the condition did not exceed the scope of the program, the condition was constitutional and the facility was free to engage in abortion so long as those activities were separate from the federally funded activities. *Id.* at 199.

This Court should find the State of East Virginia placed the condition of certifying same-sex couples as adoption parents on AACS, as opposed to placing the condition on the State adoption program itself; thereby prohibiting AACS from enjoying its protected religious speech outside the scope of the adoption program. R. at 7. In *AOSI*, the government compelled the private agency itself to adopt speech as opposed to limiting that speech to the actual program. *Agency for Intern. Dev. v. All. for Open Socy. Intern., Inc.*, 570 U.S. 205, 212 (2013). Here, the State derives the condition of certifying same-sex couples as adoptive parents from the EOCPA statute which imposes nondiscrimination requirements on private child placement agencies receiving public

funds in exchange for providing child placement services to HHS. E.V.C. § 42. R. at 4. The EOCPA defines "child placement agencies" to include both foster care and adoption agencies. *Id*. at §42-1(a); R. at 4. By its express language, the statute firmly places the condition not on the adoption program itself, but on the private agencies. Therefore, the government placed a condition on AACS to profess or adopt the speech of certifying same-sex couples as adoption parents in exchange for child adoption contracts despite AACS's religious beliefs. R. at 7. When the government places this condition on AACS to receive the contract, the government has effectively compelled AACS to adopt a speech that contradicts its religious convictions. Thus, because the government has forced AACS to adopt this speech, the government has violated AACS's First Amendment right to free speech and *AOSI* governs.

Furthermore, the government overstepped its bounds by compelling AACS to display a sign at AACS's office stating *inter alia* it is illegal under state law to discriminate against any person, including any prospective foster or adoptive parent based on that person's sexual orientation. E.V.C. § 42-4.; R. at 6. Like in *Wooley*, where a State government compelled its private citizens to display speech or face legal penalty, AACS is faced with a similar dilemma. *Wooley v. Maynard*, 430 U.S. 705. Here, AACS is faced with the predicament of displaying language which offends its religious beliefs or lose the contract that legitimizes and enables AACS as a private child placement agency. A government actor forcing AACS to forfeit its right to refrain from speech or cease substantially all operation of its agency stifles the fundamental liberties of AACS. R. at 7. It is appropriate for the Court in the instant case to follow the reasoning in *Wooley*, because notwithstanding whether HHS has a legitimate and substantial purpose for invoking this legislation, the government must be required to find a more narrow means of its accomplishment as opposed to offending the basic concepts of civil liberty constructed in the Bill

of Rights or render it unconstitutional. Therefore, this Court should find the condition unconstitutional if no other interpretation of the requirement can reasonably be reached.

HHS mistakenly relies on the contention that the Court's holding in *Rust* governs the case at bar. R. at 23. HHS' reliance on *Rust* is misguided. In *Rust*, the government imposed a condition on the Title X funding program that private agencies receiving funds exclude abortion activities and operations from the agency's Title X funded activities. *Rust v. Sullivan,* 500 U.S. 173. Two key distinctions between *Rust* and the instant case are, *Rust* adjudicates a controversy where (1) the government condition is placed on the program itself and (2) the agency is free to engage in the prohibited conduct in the agency's other ventures. *Id.* Here, as stated above, the statute places the condition on AACS, and the government applies the condition on AACS. R. at 4. Moreover, the State has expressly and exclusively empowered HHS to carry out the activity of child placement and adoption within the State. R. at 3. HHS accomplishes this task by contracting with private agencies such as AACS. R. at 3. Therefore, because HHS exclusively holds this power, without its contract with HHS, AACS would no longer be able to engage in child placement at all. In *Rust,* and all cases aligning with it, the Court recognized the private entity had other recourse to exercise its speech outside the scope of the government programs. *Rust v. Sullivan,* 500 U.S. 173. Therefore, this case is distinguished from *Rust* and does not apply because AACS is left with no other recourse but to comply with the condition to receive the government contract.

In conclusion, this Court should affirm the grant of the temporary restraining order and permanent injunction because the State statute and HHS's enforcement of the same was not generally applicable nor neutral, the statute also was not narrowly tailored to further a compelling government interest, and the conditions to certify same-sex couples and post signage in agreeance

with same-sex couples is unconstitutional, because the conditions violates AACS's right to refrain from speech which does not align with its religious beliefs.

CONCLUSION

For all the foregoing reasons, Al-Adab Al-Mufrad Care Services, Appellee, requests that this Court affirm the District Court for the Western District of East Virginia's Order dated April 29, 2019.

Respectfully submitted this 14th day of September, 2020.

Team 33
Counsel for Appellee

CERTIFICATE OF SERVICE

This is to certify that I am counsel for AACS, Appellee, and that on this day I have served opposing counsel a copy of this Brief.

Respectfully submitted this 14th day of September, 2020.

Team 33
Counsel for Appellee