C.A. No. 2020-05

In The

UNITED STATES COURT OF APPEALS FOR THE

FIFTEENTH CIRCUIT

AL-ADAB-AL-MUFRAD CARE SERVICES,

***Plaintiff-Appellant*,**

v.

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

***Defendant-Appellee*.**

Appeal from

the United States Court of Appeals

for the Fifteenth Circuit

BRIEF FOR APPELLEE

Attorneys for Appellee

Team #5

Questions Presented

I. Whether the Equal Opportunity Child Placement Act ("EOCPA") violates Al-Adab Al-Mufrad Care Services' ("AACS") Free Speech under the First Amendment, when it requires AACS post a notice of compliance with the EOCPA on their premises and that AACS not discriminate against same-sex couples in their function as a government-funded a foster care and adoption agency.

II. Whether the EOCPA, as enacted and enforced against AACS, is neutral and generally applicable under the Free Exercise Clause of the First Amendment when HHS froze AACS's Government funding, because AACS failed to certify and provide home studies for prospective same-sex adoptive parents.

Table of Contents

Table of Authorities

Page(s)

United States Supreme Court

United States Court of Appeals

United States District Courts

Federal Statutes and Constitutional Provisions

East Virginia Statutes

Other Authority

Opinions Below

The opinion from the Western District of East Virginia District Court appears in the record at pages 2-17. The opinion of the United States court of Appeals for the Fifteenth Circuit appears in the record at 18-25.

Statement of Jurisdiction

This Court has jurisdiction to hear the instant case because all parties have waived any contests to jurisdiction, venue, and standing. Pursuant Federal Rule of Appellate procedure 35(a)(2), this Court has jurisdiction under 28 U.S.C. § 46(c) to review appellate decisions en banc. 28 U.S.C. § 46(c).

Constitutional Provisions

The instant case concerns the First Amendment to the United States Constitution, which reads: "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." U.S. Const. Amend. I.

Statement of the Case

The United States Supreme Court has consistently held that the Government has the ability to shape its programs through conditioned funds that accord with the program's ultimate policy. Supreme Court precedent has made clear that a Government can require agents to tailor their conduct or speech consistent with the objectives of the funded government program the agents are carrying out. The criteria attached to the funds provided to AACS through East Virginia's EOCPA wholly relate to the establishment of a nondiscriminatory adoption and foster care system. The eligibility criteria ensure the government's nondiscriminatory adoption and

foster care program is effective and in place. The criteria only restrict AACS's conduct in its capacity as a government agent. Further, the eligibility criteria ensures that the government's compelling interests are effectuated through their government agents. Allowing an exemption to AACS would convey a message of exclusion and impairs the delivery of services offered through public-private partnerships.

In the sphere of public appointment, the government may impose criteria on contractors carrying out a government program to ensure federal funds are used to institute that government program. The eligibility criteria attached to AACS's government contract are constitutional conditions because the restricted behavior affected is well-within the parameters of the program itself. Here, AACS is a government agent, communicating government speech. The government speech is strictly outlined by the thrust of the EOCPA and AACS's contract itself. The religious viewpoint of AACS is not silenced. AACS is only compelled to speak or to be silent in their capacity as a government actor.

Further, the notice requirement mandates that recipients of government funds are in accord with the government's policy to oppose discrimination. The requirement ensures funded agencies are complying with the intent of the adoption regime established and promoted by the East Virginia legislature and the city of Evansburgh. It dually ensures the government's message promoting antidiscrimination within their adoption regime is not distorted. The government's criteria neither creates a public forum for expression nor abolishes a certain viewpoint. Even if AACS's limited speech rights as a government agent are affected, there are adequate alternative channels for AACS to voice their opinion.

The language of the EOCPA, and the amendments which followed, do not include words or phrases with strong religious connotations that would suggest religious actions were targeted

for unique treatment by East Virginia lawmakers. Based on the neutral language of the EOCPA as enacted, the statute is facially neutral as applied to the religious practices of AACS. Additionally, the EOCPA's subsequent amendments embrace religious differences and do not target religious conduct through their statutory language. The language of the EOCPA bans discrimination stemming from any ideology – not just discrimination stemming from the religious teachings of the Qur'an or the Hadith. The motivations and actions that led to the enactment of the EOCPA were neutral, because they did not target the religious conduct of AACS for distinctive treatment. The EOCPA's neutral language was not espoused from prejudiced motivation and is not used to distribute distinctive treatment.

The East Virginia legislature made it clear that referring adoption agencies are prohibited from discriminating while screening and certifying potential adoptive parents or families. Conversely, HHS may exercise discretion and consider cultural, ethnic, or familial factors while making final placement decisions. HHS did not selectively impose burdens solely on the conduct of AACS while granting exemptions to other adoption agencies. The EOCPA's enforcement is not riddled with exemptions and the few exemptions that were granted were in the best interest of the child. The EOCPA is generally applicable because HHS does discriminate based on fundamental religious differences among adoption agencies; rather, it makes decisions based on the best interests of the child.

The Court must uphold the EOCPA and its amendments because the statutory regime is rationally related to multiple legitimate governmental purposes. Even if this Court finds that the EOCPA and its amendments are not neutral or generally applicable and evaluates the law under strict scrutiny, the Act is still valid under the Free Exercise Clause of the First Amendment because it is narrowly tailored to advance compelling government interests.

Factual History

East Virginia Adoption Law and the EOCPA

The East Virginia Legislature empowers municipalities to regulate the foster and adoption placements of children within their jurisdiction. R. at 3-4. A municipalities' discretion in establishing adoption and foster care services within their jurisdiction is determined through the scope of whether the system supports the bests interest of the child. *Id.* at 4. In undertaking a best interests assessment municipalities consider: (1) "the ages of the child and prospective parent(s);" (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);" (3) "the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background;" and (4) "the ability of a child to be placed in a home with siblings and half-siblings." *Id.* (citing E.V.C. § 37(e). If placement circumstances are not in the best interest of the child, HHS has the discretion to make alternative placements. *Id.* at 9. For example, between 2013-2015 HHS granted placement of adoptive children at the recommendation of AACS to avoid inflaming tensions between Sunni and Shia refugees. *Id.*

The EOCPA was adopted by the East Virginia Legislature in 1972. *Id.* The statute imposes nondiscrimination requirements on private child placement agencies receiving Government funds in exchange for providing home studies, counseling, and parent referral recommendations to the municipalities. *Id.* at 3,4 (citing E.V.C. § 42). The EOCPA applies to foster care and adoption agencies. *Id.* at 4 (citing E.V.C. § 42.-1(a). As originally enacted, the EOCPA forbid foster care and adoption agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." *Id.* (citing E.V.C. § 42.-2).

Following the decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the EOCPA was amended to eradicate "discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." *Id.* at 6. Specifically, the EOCPA was amended to prohibit foster care and adoption agencies from discriminating on the basis of sexual orientation. *Id.* (citing E.V.C. 42.-3(b). The amended statute requires foster care and adoption agencies receiving government funds to sign and post a statement that it is "illegal under the 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." *Id.* (citing E.V.C. 42.-4). However, the funded foster care and adoption agencies may post a written objection to the policy. *Id.* Foster care and adoption agencies who fail to comply with the EOCPA do not receive government funds. *Id.* at 4 (citing E.V.C. § 42.-2(a).

Evansburgh and AACS

The City of Evansburgh is the largest city in East Virginia with a populace of approximately 4,000,000. *Id.* at 3. Evansburgh is home to a racially and ethnically diverse refugee population from various countries. *Id.* There are approximately 17,000 children in foster care, 4,000 of whom are seeking adoption. *Id.* Evansburgh placed the Department of Health and Human Services ("HHS") in charge of establishing a nondiscriminatory adoption and foster care system within the city, that best serves the well-being of each child. *Id.* HHS has entered into agency contracts with 34 private foster care and adoption agencies in the city. *Id.*

Foster care and adoption agencies maintain lists of available families. *Id.* When HHS receives a child into custody, it sends a "referral" of the child to the foster care and adoption agencies with which it has contracted. *Id.* The foster care and adoption agencies then refer

possible matches to HHS. *Id.* With the referral, the agencies provide HHS with information about the family. *Id.* HHS then determines if the possible match is in the best interest of the child. *Id.* If the match is in the best interest of the child, HHS exercises its discretion and grants the placement. *Id.* Families seeking to foster or adopt children initiate contact with a contracting foster care or adoptive agency. *Id.* at 4-5. HHS includes a "choosing an adoption agency" section on its website which makes the following statement to prospective adoptive parents:

> Browse the list of foster care and adoption agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be an important support to you during your parenting journey. Contact your preferred agency to find out how to begin the process. Each agency has different requirements, specialties, and training programs.

Id. at 5. Enforcing the EOCPA in Evansburgh serves the following governmental purposes: (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services. *Id.* at 9

AACS has contracted with HHS as a foster care and adoption agency for over 35 years. *Id.* AACS was formed to provide foster care and adoption support for the diverse population of Evansburgh in 1980. *Id.* Within AACS's contract with HHS, AACS agreed to provide appropriate adoption services, including certifications that each adoptive family is certified. *Id.* Section 4.36 of AACS's contract expressly requires "compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." *Id.* at 5-6. Each day, AACS assists dozens of children in the adoption system. *Id.* at 5.

After contacting AACS in July 2018, Christopher Hartwell, Commissioner of HHS, learned from Sahid Abu-Kane, the Executive Director of AACS, that AACS was choosing not to certify same-sex couples as prospective adoptive parents or perform home studies for same-sex couples. *Id.* at 6-7. AACS's mission statement provides: "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." *Id.* at 5. Abu-Kane told Commissioner Hartwell that supporting the ideal of same-sex marriage is a moral transgression under the teachings of the Qur'an and the Hadith. *Id.* at 7.

Following Commissioner Hartwell and Abu-Kane's conversation, on September 17, 2018, Hartwell informed AACS by letter they were not in compliance with the EOCPA. *Id*. The letter informed AACS that failure to comply with the EOCPA necessitates a freeze on their Government funding within 10 business days of receiving the letter. *Id.*

Procedural History

On October 30, 2018, AACS filed a complaint in the United States District Court for the Western District of East Virginia seeking a temporary restraining order against HHS's imposition of the referral freeze and a permanent injunction compelling HHS to renew its contract with the AACS. *Id.* On April 29, 2019, District Judge Capra of the District Court for the Western District of East Virginia, granted AACS's Motions to renew AACS's contract and to dissolve Commissioner Hartwell's referral freeze. *Id.* at 2. Commissioner Hartwell immediately appealed to the United States Court of Appeals for the Fifteenth Circuit. *Id.* at 18. On February 24, 2019, Circuit Judge Park reversed the District Court orders, holding the enforcement of the EOCPA against AACS does not violate either AACS's Free Exercise or its Free Speech rights. *Id.* at 25. Petition for Rehearing En Banc was granted to AACS on July 15, 2020. *Id.* at 26.

Argument and Authorities

I. The East Virginia Legislature May Institute The Limits By Which Their Agents Carry Out A Government Program, Including Setting Conditions For How The Government Program Functions.

AACS is not a private speaker expressing themselves publicly in Evansburgh, East Virginia. Rather, AACS is providing an extension of HHS's custodial service of establishing and facilitating a nondiscriminatory adoption and foster care system within the city of Evansburgh. AACS is a paid government contractor, like the 34 other nonprofit child adoption agencies the Government is funding in Evansburgh. AACS's First Amendment rights are not unique from the thousands of other private agents the government contracts with to carry out state programs. Government agents, like AACS, carry the intent and goal of a given program through their actions. In that sense, AACS's speech and conduct is defined under the First Amendment at the Government's discretion.

The United States Supreme Court has consistently held that the Government has the ability to shape its programs through conditioned funds that accord with their ultimate policy. *See e.g. United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003); *South Dakota v. Dole*, 438 U.S. 203, 206 (1987); *Rust v. Sullivan,* 500 U.S. 173, 190 (1991). For instance, Congress has wide latitude to attach conditions to the receipts of funding assistance in order to further broad policy objectives and carry-out government programs. *Dole*, 438 U.S. at 206. The Spending Clause of the Federal Constitution grants Congress the power and discretion to tax and spend for the general welfare, including by funding private agencies for state activities. *Agency for Intern. Development v. Alliance for Open Society Intern., Inc.,* 570 U.S. 205, 213 (2013) ("AOSI"). "That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends." *Rust v. Sullivan*, 500 U.S. 173, 195, n. 4 (1991).

These powers apply to the states through the Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"The receipt of [state] funds under typical Spending Clause legislation is a consensual matter: grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt." *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 596 (1983). "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *AOSI*, 570 U.S. at 214. Further, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977). "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193.

This remains true even when "a condition may affect the recipient's exercise of its First Amendment Rights." *Id.* (citing *American Library Ass'n, Inc.,* 539 U.S. at 212). For example, where government conditioned subsidies are not aimed at the suppression of dangerous ideas, its "power to encourage actions deemed to be in the public interest is far broader." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550 (1983) (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). However, Congress may not place conditions on funding that restricts an individual's free speech or has "the effect of coercing the claimants to refrain from the proscribed speech." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 59 (2006) ("*FAIR"*).

Where conditions for funding outline the conceptual limits of the government program being instituted, rather than silence the private speech of the individuals instituting that

government program, the conditions are constitutional. *Rust*, 500 U.S. at 199-200. For example, government subsidies are strictly construed when restricting speech in areas that have "been traditionally open to the public for expressive activity." *United States v. Kokinda*, 497 U.S. 720, 726 (1990).

The unconstitutional-conditions doctrine is an exception to the broad authority the Spending Clause grants the Government. *AOSI,* 570 U.S. at 214. The distinction between constitutional and unconstitutional conditions is found "between conditions that define the limits of the government spending program," which are permissible, and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself," which are unconstitutional. *FAIR*, 547 U.S. at 59. For example, a funding condition that leaves open an alternate channel for the grantee to exercise their First Amendment rights outside the government program may be constitutional. *AOSI*, 570 U.S. at 215-17; *see FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (holding a condition that left no channel for First Amendment expression was unconstitutional).

a. The Government Is Entitled To Set Criteria To Assist In The Performance Of A Government Function Or Program.

The Court has made clear that a Government can require its agents to tailor their conduct or speech consistent with the objectives of the funded government program the agents are carrying out. *Rust*, 500 U.S. at 194-95. For example in *Rust*, the Court held criteria restricting the speech of Title X funding recipients was proper given the scope of the criteria attached to the funds. *Id.* The criteria restricted funding recipients from advocating for abortion as a method of family planning. *Id.* at 175-76. It explained conditions could be constitutional where the "Government refused to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* There, the Court found the criteria attached to the funding

was constitutional because the criteria related to the intent of the project funded, which was to promote health and family services. *Id.* It broadened the Government's authority in *Legal Services Corp. v. Velazquez*, where it discussed conditions restricting a viewpoint "can be sustained in which the government is itself the speaker," 531 U.S. 533, 541 (2001), or in which the Government "use[s] private speakers to transmit specific information pertaining to its own program." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

AACS is a nonprofit organization funded by the Government. When a private agent like AACS chooses to contract and assist in the performance of a governmental function, the Government may articulate its expectations and parameters for the services provided. *See Rust*, 500 U.S. at 193; *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("FAIR"). The City of Evansburgh has put HHS in charge of establishing a foster care and adoption system in the city. R. at 3. In exchange for public funds, the 34 private child placement agencies provide home studies, counseling, and placement recommendations to HHS, contingent on the criteria set forth in the EOCPA and their service contracts. R. at 3, 4. The scope of the government-agent relationship of HHS and AACS is tailored by the government's discretion. Here, the scope of the instituted program is to provide accessible, diverse, and nondiscriminatory foster care and adoptive services to the city of Evansburgh. This enforcement is within the ambit of power the Government has over its agents, under the statutory scheme enforcing the nondiscriminatory adoption policies. *See Obergefell v. Hodges*, 576 U.S. 644 (2015); *Rust*, 500 U.S. at 193.

If AACS wants to discriminate in the course of their adoptive parents selection, it can decline the government funds and operate strictly as a private entity. *See AOSI,* 570 U.S. at 214. The Government cannot be indifferent to AACS, because the EOCPA has been enforced on

other private adoption agencies in Evansburgh. R. at 8. AACS should not be an exception to the rule, because of their religious conviction and belief. Granting an exemption leverages AACS's mistaken personal interest against the Government's broad power in "managing its internal operation." *See Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 599 (2008) (holding government's managerial power is broad and subjective to the wide array of individualized goals the government seeks to attain). While the Court has upheld some limits on the Government's "ability to place conditions on the receipt of funds, *FAIR*, 547 U.S. at 59, he who "pays the piper" gets to "call the tune." *Democratic Senatorial Comm. V. FEC,* 660 F.2d 773 (D.C. Cir. 1980). Granting AACS the exemption they desire severely undercuts the Government's power to manage the contractors it pays. *See also* R. at 9 (Chairman Hartwell stating "when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced").

i. The Criteria Attached To AACS's Funds With The Government Wholly Relates To The Government Programs' Functions.

The eligibility criteria ensures the government's nondiscriminatory adoption and foster care program is effective. The criteria attached to AACS's contract are consistent with the scope of the Government program, designed to ensure that the limits of the Government program are observed. *See Rust*, 500 U.S. at 193. The Court reaffirmed this principle in *AOSI*, 570 U.S. at 214-215, holding "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program, --those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."

The non-discrimination criteria only restricts AACS's conduct in its capacity as a government agent. The criteria does not leverage funding to regulate speech outside the contours

of the program. Specifically, the criteria requires nondiscriminatory behavior in referring adoptive parents and providing home studies. This requirement is well within the nondiscrimination adoption and foster care statutory regime Evansburgh is enforcing. *See* R. at 4. The reasoning from the Court's determinations in *Rust* and *AOSI* exposes this truth. There the Court found opposite results in two cases that had similar facts, because of the nature of the criteria attached to the funds and the scope of the government programs involved. In *Rust*, Congress prohibited agencies from receiving Title X funds if their agency offered abortion as a method of family planning. *Rust*, 500 U.S. at 197. The court determined the conditioned funds were for public health purposes, which was within the scope of intent of Title X. *Id.* The Court in *AOSI* applied a similar lens on the issue of "whether the condition manipulates recipients beyond that which is necessary to protect the purpose" of the federally funded program. *AOSI*, 133 at 2328. In *AOSI*, the Court held that the criteria to expressly denounce prostitution, to receive funding under the Leadership Act, which was legislated to eradicate AIDS, was unconstitutional. *Id.* The Court found the conditions leveraged funding to limit the pronouncement of ideas outside the scope of the federal program. *Id.* Prostitution was an activity outside the scope of AIDS eradication. *Id.*

Here, the criteria placed upon AACS's contract with HHS is in line with the purpose of establishing a nondiscriminatory adoption and foster care system. In fact, Section 4.36 of AACS's contract with HHS mandates AACS be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and the City of Evansburgh." *See* R. at 5-6. The EOCPA and its subsequent amendments are part of this mandate. The funding is to establish a regime in Evansburgh, free from discrimination and in the best interests of the child. R. at 3-4. The criteria to avoid discrimination in selecting adoptive parents is in accord with the end the EOCPA was

legislated to achieve, because it sets a limit on a government funded agencies' conduct. The express restriction applies directly to AACS, as a government agent. Like in *Rust*, where the agents of the government's program "must perform their duties in accordance with the regulation's restrictions" in order to receive government funding, AACS must comply with the criteria attached to their funding to continue receiving government funds. *See Rust*, 500 U.S. at 198.

1. The HHS Has Compelling Reasons To Enforce Criteria On Agents Like AACS.

The eligibility criteria ensures that the government's compelling reasons are effectuated through their government agents. *See AOSI*, 570 U.S. at 214. The eligibility requirements ensure that prospective foster parents are treated equally, not "as social outcasts or as inferior in dignity and worth" because of their sexual orientation, sexual identity, or other protected characteristics. *See Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719*,* 1727 (2018) (discussing ramifications of community-wide stigma "inconsistent with the history and dynamics of civil rights laws that ensure" equal rights, if sexual orientation were allowed to be legally discriminable). The criteria maximizes the number of qualified and willing adoptive parents available to address the "chronic shortage of foster and adoptive homes." R. at 3, 9. The criteria also guarantee that AACS, and private agencies like them, will not use their state-endowed funds to discriminate against opposite-sex marriages or otherwise, subjecting the City itself to liability. *See Obergefell*, 576 U.S. at 676-77.

Further, granting an exemption to AACS would convey a message of exclusion and impairs the delivery of services offered through public-private partnerships. Prohibiting discrimination by its agents conveys the government's message that all members of the community are of value and entitled to service and support. In fact, the Government has an

interest "of the highest order" to eliminate all forms of discrimination. *See Roberts v. U.S. Jaycees,* 468 U.S. 609, 624 (1984) (holding restricting speech to forbid discrimination was a compelling interest "of the highest order"). When a government agent, under a government contract, instructs a couple to seek adoption services elsewhere, because of the color of their skin, substance of their beliefs, or their sexual orientation or preference, it communicates a notion of exclusion. In one fell swoop, AACS's denying same-sex couples as prospective adoptive parents falsely refuses publicly funded services to individuals, couples, and foster children in need, and communicates that the Government prefers exclusion over inclusion. An AACS exemption does not further the compelling interests sought by Evansburgh's nondiscriminatory adoption and foster care system.

2. If AACS's Exemption Is Granted, The Best Interests Of The Child Are Substantially Harmed.

As the Court noted in *Obergefell*, same-sex couples create "loving and nurturing homes" for "hundreds of thousands of children." 576 U.S at 667-68. Allowing AACS to exclude them will hurt the best interest of the child, by lowering the child's odds at finding potential successful matches. Barring same-sex couples from fostering adopted children deprives vulnerable children of parents who are well-positioned to contribute to their "[i]dentity development, self-concept, self-esteem, [and] self-efficacy"—all critical to promoting the best interests of their well-being.[1] Under AACS's desired exemption, same-sex couples are more likely to be treated unfairly by the

[1] *See e.g.* U.S. Dep't of Health & Human Servs., Admin. on Children, Youth & Families, *Information Memorandum*, ACYF-CB-IM-12-04 (2012), https://tinyurl.com/y5wxlejl (LGBTQ youth are disproportionately represented in the foster care system); Christina Wilson Remlin, et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care*: Children's Rights, Lambda Legal & Ctr. for the Study of Soc. Policy 2 (2017) (*Safe Havens*), https://tinyurl.com/y52m8yjn (LGBTQ youth make up 25% of child welfare system population).

system.[2] AACS's compliance with the EOCPA serves the best interests of the child; therefore, an exemption should not be granted.

ii. There Are Crucial Distinctions Between Permissible Eligibility Criteria And Unconstitutional Conditions

In the sphere of public appointment, the Government may impose criteria on contractors carrying out a government program to ensure "federal funds will be used only to further the purposes" of that government program. *Rust*, 500 U.S. at 198. "[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Ore. Dep't of Agriculture,* 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). However, criteria "outside the scope of [a] federally funded program" is unconstitutional. *Id.* at 193. Like in *AOSI*, conditions are unconstitutional, when used to leverage "speech outside the contours of the program itself." *AOSI*, 133 S. Ct. at 2328.

The eligibility criteria attached to AACS's government contract are constitutional conditions because the restricted behavior affected is well-within the "contours of the program itself." *See AOSI*, 133 S. Ct. at 2328. The intent of the funds used to establish a nondiscriminatory adoption and foster care system in Evansburgh is to serve the best interests of the child in a nondiscriminatory manner. The criteria attached to the funds is aimed at delivering this end. By rooting out discrimination in the selection of adoption parents, HHS is promoting the ideal that all qualified adoptive parents have an equal chance at finding a match, no matter their sexual orientation or preference.

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[2] Human Rights Campaign, *LGBTQ Youth in the Foster Care System* 3, https://tinyurl.com/y3r8gt9k (last visited Sept. 13, 2020) (footnote).

Unconstitutional conditions are found when a recipient does not have an adequate venue through which to express the restricted speech, *FCC v. League of Women Voters of California*, 468 U.S. 364, 382 (1984), where the conditions seek to silence an entire viewpoint, *Rosenberger*, 515 U.S. at 833, or a condition requires a recipient to affirmatively and expressly espouse the government's viewpoint, *W.V. State of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Here, AACS is a government agent, communicating government speech. The government speech is strictly outlined by the thrust of the EOCPA. However, the Government allows funding recipients to voice their objection to the criteria by posting a written objection to the policy on their premises. R. at 6. The religious viewpoint of AACS is not silenced. Executive Director of AACS Sahid Abu-Kane is not restricted from practicing his beliefs as a free citizen or teaching those involved with AACS, including the foster children, the teachings of the Qur'an or the Hadith. Rather, he is only restricted from effectuating those beliefs in his capacity as a government agent providing home studies and referring adoptive parents to HHS. He is only compelled to speak or to be silent in his capacity as a government actor. As an individual, Sahid Abu-Kane is free to discriminate on the basis of his religious beliefs outside the scope of his government employment.

b. The EOCPA Notice Requirement Ensures That The Government's Agents Are Effectively Implementing Their Government Funding.

The notice requirement mandates that recipients of government funds are in accord with the government's policy to oppose discrimination. *FAIR*, 547 U.S. at 61. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible . . . so long as the neutral regulation promotes . . . a government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). "When the government disburses public funds to private entities to convey a governmental message, it may take

legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833.

Where an agency's compelled speech is "plainly incidental" to the statute regulating the agency's conduct, that agency's freedom of speech is not abridged "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *FAIR*, 547 U.S. at 62 (citing *Giboney v. Empire Stotrage & Ice. Co.*, 336 U.S. 490, 502 (1949)). In *FAIR*, a group of law schools faced losing funding because of refusal to comply with the Solomon Amendment. *Id.* at 53. The Solomon Amendment specified that "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the institution would lose certain federal funds." *Id.* at 51. The law schools challenged the criteria for withholding federal funds under the Amendment, arguing that required inclusion and equal treatment of military recruiters infringed upon their First Amendment freedoms of speech. *Id.* at 47, 51. The Court disagreed. *Id.* at 70. It reasoned that Congress has wide latitude to enforce government programs through conditioned funds. *Id.* at 63. For example, Congress can prohibit employers from discriminating on hiring on the basis of race by forcing the employers to take down signs that read "White Applicants Only". *Id.* The Court held taking down or putting up signs "hardly means [a] law should be analyzed as one regulating the employee's speech rather than conduct." *Id.*

Here, the notice requirement ensures funded agencies are complying with the intent of the adoption regime established and promoted by Evansburgh. While it is compelling the agencies to physically post a sign exhibiting compliance with the law, it is merely to enforce compliance with the funding criteria and the laws that govern the adoption and foster care system as a whole. HHS is not compelling AACS to speak. If AACS wants to continue receiving government

funding, AACS cannot discriminate under the color of the law. Like in *FAIR*, posting the notice is plainly incidental to regulating AACS's state-funded behavior.

Further, the requirement that child placement agencies post their recognition of the EOCPA ensures that the government's message is not distorted. It is imperative that the public funds distributed to AACS and those similarly situated are not "garbled" or "distorted" by the agency. *See Rosenberger*, 515 U.S. at 833 (discussing where the Government funds a program, it may take legitimate steps to ensure the specific information pertaining to the program is communicated to the public clearly). Here, HHS is using private agencies like AACS to transmit specific information pertaining to its government program. The notice requirement of the program ensures the specific information is communicated to the community at large, in a clear manner. "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *See Rosenberger*, 515 U.S. at 833. The notice requirement ensures AACS and other government agents are communicating what the government wishes.

i. The Notice Requirement Neither Creates A Public Forum For Expression Nor Abolishes A Certain Viewpoint.

When a government agency contracts out for services it does not create a forum for private speech, but rather creates an instrument for fulfilling its commitments to serve the public. *Rosenberger*, 515 U.S. at 813; *see also Teen Ranch v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007) (holding a private contractor does not have a First Amendment right to adapt government services to accord their own views or beliefs); *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006) (stating "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen; rather, it simply reflects the exercise of employer control over what the employer itself

has commissioned or created."). Where a regulation attempts to restrict a public forum of speech or the collective or individual expression of persons, the regulation may violate the First Amendment. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 589 (1995).

The Court in *Rosenberger*, where the issue involved a university policy selectively denying funds to independent publications espousing religious viewpoints, held the withholding of such funds was a violation of the First Amendment, because it restricted the entire viewpoint of the publication's religious beliefs. *Id.* However, in *Rosenberger*, the University funding was creating a "limited public forum," the university publications. 515 U.S. at 839. Not only were the state funds in *Rosenberger* creating public forums for expression, the criteria attached to the funds went outside the scope of the program, as opposed to "preserving the scope of the program." *Id.*

Adoption agencies are not well-recognized forums for public speech, like a student newspaper or public space at a State University. There are no collective or individual voices restricted by the enforcement of the EOCPA. Here, the government agents observe the requirement notice to ensure their compliance with the criteria by which they received their funding. These agencies are the conduit of the government's mission. The notice requirement ensures this conduit is correctly in place. Here, Evansburgh's creation of a nondiscriminatory adoption and foster system is neither creating a limited public forum for speech nor abolishing a viewpoint from the marketplace of ideas. *See Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (stating the purpose of the First Amendment is to preserve an uninhibited marketplace of ideas). Conversely, the Government is asserting itself in the marketplace, by way of the notice requirement.

1. AACS May Speak Their Mind Through The Alternative Channels Available.

Where alternative channels for expression are available to a speaker, a restriction on speech may not be unconstitutional. *F.C.C.*, 468 U.S. at 395 (holding a condition was unconstitutional, because it did not allow for adequate alternative channels for expression); *Regan*, 461 U.S. at 522 (holding a condition constitutional, because alternative channels were still available for the fund recipient); *Rust*, 500 U.S. at 198. AACS has alternative channels to express their religious beliefs or their disagreement with the EOCPA mandates outside of their capacity as a government agent. In fact, the East Virginia legislature statutorily endorsed an alternative channel for AACS to voice their disagreement with the notice requirement. R. at 6. AACS has numerous alternative channels to express their beliefs. Therefore, the criteria attached to the funding AACS receives to establish a nondiscriminatory adoption and foster care system in Evansburgh are constitutional.

II. The EOCPA Is Neutral And Generally Applicable As Enforced Against The Discriminatory Conduct Of AACS.

The EOCPA and its subsequent amendments do not include any statutory language aimed at religious beliefs, actions, or practices. Rather, the EOCPA's neutral language does not target AACS, or any other government-funded adoption agency in the City of Evansburgh, for distinctive treatment. East Virginia lawmakers were impartial to AACS's religious practices before, during, and after the adoption of the Act and any exemptions to its enforcement were granted evenhandedly in the best interests of the child. HHS was granted the power by the state legislature to make final child placement decisions based on the best interests of the child. Enforcing the EOCPA is in the best interests of the child.

Despite the important Free Exercise protection of the First Amendment, individuals may be obligated, in some circumstances, to comply with otherwise valid laws that limit religious practices or actions. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). For example, the Court has consistently held the Government can regulate certain religious practices, but cannot interfere with religious beliefs or opinions, *Reynolds v. United States*, 98 U.S. 145, 166 (1878), with the exception that some interferences of religious practice are unconstitutional. *See generally Smith*, 494 U.S. 872 (1990); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

The Court has established that a law which is "neutral and of general applicability" is valid even if the law has the incidental effect of burdening a religious practice. *Lukumi*, 508 U.S. at 531. Additionally, "[n]eutrality and general applicability are interrelated and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* Courts have consistently employed this test to determine if a law limiting religious practice offends the Free Exercise Clause of the First Amendment. *Id.*

a. The Facial Language Of The EOCPA Does Not Target The Religious Conduct Of AACS.

The language of the EOCPA, and the amendments which followed, do not include words or phrases with strong religious connotations that would suggest religious actions were targeted for unique treatment by East Virginia lawmakers. *See Lukumi*, 508 U.S. at 533. The Court has reasoned that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Moreover, "if the object of a law is to infringe upon or restrict practices because of their religious motivation" the law is not neutral. *Id.*

The use of language with strong religious connotations is one factor for courts to consider when determining if a statute is facially neutral. *Id.* at 533-34. In *Lukumi,* city ordinances were

challenged as unconstitutional, in part, because they included language that often carries strong religious connotations. *Id.* The Church of the Lukumi Babalu Aye and its congregants practiced a religion known for animal sacrifices. *Id.* at 525-26. Members of the public became concerned and the city council held an emergency meeting. *Id.* at 526. The city council "adopted [a resolution], which noted the 'concern' expressed by residents of the city. . .and declared that '[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.'" *Id.* The city further enacted four additional anti-sacrifice ordinances; three of which were drafted to include the words "sacrifice" and "ritual." *Id.* at 527-28, 533-34.

The Court held that the use of "ritual" and "sacrifice" are "consistent with the claim of facial discrimination." *Id.* at 534. Additionally, the use of "ritual" and "sacrifice" within the city ordinances violated the First Amendment because the language targeted the religion for distinctive treatment and was not generally applicable. *Id.* at 534-35, 543-45.

Based on the neutral language of the EOCPA as enacted, this Court must find that the statute is facially neutral as applied to the religious practices of AACS. The language of the EOCPA does not include words with strong religious connotations intended to target religious practices or organizations. R. at 4. The EOCPA, as enacted, prohibits child placement agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." *Id.* (quoting E.V.C. § 42-2). This objective language advances the government's interest of preventing discrimination, regardless of the ideology behind the discrimination. The East Virginia legislature intended the EOCPA to reach all forms of discrimination, not just discrimination of a religious origin. *See Fulton v. City of Philadelphia*, 922 F.3d 140, 158-59 (3d

Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19-123, 2020 Term) (holding that the language of an anti-discrimination provision as applied to a government-contracting adoption agency was constitutional because it did not burden conduct for religious reasons or secular reasons). As a result, the language used in the drafting of the regulation sends a clear message: discrimination of any form or origin directed toward potential adoptive parents will not be tolerated.

Additionally, the EOCPA's subsequent amendments embrace religious differences and do not target religious conduct through their statutory language. The sexual orientation amendment to the EOCPA does not include any language targeting religious conduct or organizations for distinct treatment. The language does not target a specific ideology's beliefs regarding same-sex relationships. Rather, the amendment prohibits child placement agencies from discriminating "on the basis of sexual orientation." R. at 6 (citing E.V.C. § 42.-3(b); *see also Obergfell*, 576 U.S. at 679-80. There is nothing in the amendment's language to suggest it was passed to counter the actions of any religious organization, including AACS.

The EOCPA was also amended to require foster and adoption agencies to post a statement describing the EOCPA's anti-discrimination message. R. at 6. The statement does nothing more than accurately express the current state of anti-discrimination law in East Virginia and ensure government-funded agencies are accurately portraying the government's message, in order to shield the Government from liability. *See Obergefell*, 576 U.S. at 676-77. The statement does not target the practices of specific religions; in fact, it does the opposite. Along with requiring agencies to post the anti-discrimination statement, the amendment allows religious-based agencies, like AACS, to post their objections to the policy. *See* R. at 6. This proves, on its face, the amendment embraces diverse religious beliefs.

Similarly, the language of the EOCPA bans discrimination stemming from any ideology – not just discrimination stemming from the religious teachings of the Qur'an or the Hadith. As in *Smith*, the EOCPA in the current case does not include any language targeting religious practices or beliefs. *See Smith*, 494 U.S. at 874-876 (holding that a criminal statute regarding controlled substance was constitutional as enforced against religious peyote use because the statute was neutral and generally applicable; specifically, the language was not aimed at any religion). The language of the statute in *Smith,* banned peyote use for *any* purpose – not just use in the context of Native American religious sacramental purposes. The same can be said for the EOCPA, making it facially neutral.

i. The EOCPA's Neutral Language Was Not Espoused From Prejudiced Motivation And Is Not Used To Distribute Distinctive Treatment.

The First Amendment protects against unwarranted distinctive treatment masked by neutral language. *Id.* at 534. To ensure the language on the face of the statute is not masking distinctive treatment, courts consider the context in which the statute was crafted. *Lukumi*, 508 U.S. at 540. Contextual factors that inform the court's decision include: historical background of the regulation; the specific series of events leading to its enactment; and, the legislative or administrative history of the regulation, including "contemporaneous statements made by members of the decision making body." *Id*. A government regulation that is facially neutral may still be in violation of the First Amendment if the regulation targets religious actions for distinctive treatment. *Id.* However, where distinctive treatment is not apparent, a facially neutral statute is constitutional. *Id.*

Where anti-religious comments are made during the enforcement of an otherwise neutral statute, the statute may target religious actions for distinctive treatment. *Masterpiece*, 138 S. Ct. at 1729-30. In *Masterpiece*, a Colorado same-sex couple visited a bakery to inquire about

ordering a cake for their wedding reception. *Id.* at 1723. The owner said he would not make the cake because he religiously objected to same-sex marriage, in violation of the Colorado Anti-Discrimination Act. *Id.* The same-sex couple then filed a complaint with the Colorado Civil Rights Commission. *Id.*

At the Commission's formal hearing regarding the claim, several members of the Commission made anti-religious comments. *Id.* at 1729. At a subsequent Commission meeting, one member stated:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id. The Court held that the Colorado Anti-Discrimination Act was unconstitutional as applied to the cakeshop owners because the owner's "religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Id.* at 1731.

The decision-making body in East Virginia did not make specific and targeted anti-religious comments while adopting or amending the EOCPA. Unlike the shop owner in *Masterpiece,* AACS was not the target of comments linking its religious practices to slavery or the Holocaust. The record does not suggest that anti-religious statements were made by East Virginia lawmakers, Commissioner Hartwell, or any other government official during the enactment or enforcement of the EOCPA or any of its subsequent amendments. There is nothing in the record to suggest AACS was subjected to any negative comments made at any time, by anyone. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002) (finding distinctive treatment in the form of comments made by city council members and residents of the community regarding Orthodox Jews "taking over" was a factor in finding a government

regulation unconstitutional). On the contrary, the only comment relating to the purpose of the EOCPA sexual orientation amendment was made by the Governor of East Virginia, who suggested that discrimination of all forms should be prohibited.

The East Virginia governor's statement exhibits the state's commitment to "eradicating discrimination of all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. The first portion of the Governor's statement shows that his comment was not aimed at religious practice, instead it was broadly aimed at any discrimination of any form, both religious and secular. The term "bigotry" does not carry strong religious connotations; in fact, the governor's comment as a whole shows their concern with eradicating discrimination in all forms.

The EOCPA's neutral language was not espoused from prejudiced motivation and is not used to distribute distinctive treatment. The facial neutrality of the EOCPA was not negated by any distinctive treatment realized through its enactment and implementation by the East Virginia legislature. *See Lukumi*, 508 U.S. at 535. In *Lukumi,* emergency city council meetings were scheduled, and ordinances were passed in direct response to the Church wanting to build a campus and practice animal sacrifices. *Id.* at 526. Here, AACS has been practicing its religious beliefs through adoption services in Evansburgh since 1980. R. at 5. The EOCPA was adopted in East Virginia 8 years prior, in 1972. *Id.* at 4. The EOCPA could not have been enacted in direct response to AACS. Moreover, the sexual orientation amendment to the EOCPA was not adopted until 2015. *Id.* at 6. Finally, it was not until 2018 that HHS discovered that AACS was in violation of the EOCPA. *Id.* at 7. Based on the timeline of events, it is clear that the EOCPA was not adopted or amended in direct response to the actions or any perceived threats by AACS.

b. The EOCPA Is Generally Applicable Because It Does Not Impose Burdens Only On Conduct Motivated By Religious Beliefs.

HHS did not selectively impose burdens solely on the conduct of AACS while granting exemptions to other adoption agencies. *See Smith*, 494 U.S. at 878; *See also Lukumi*, 508 U.S. at 543 (stating animal sacrifice ordinances were burdening only religious conduct while exemptions were granted for secular animal killings, like fishing or pest extermination). In weighing a regulation's general applicability, courts consider if, to whom, and why exemptions to the regulation are granted. *See Tenafly*, 309 F.3d at 151-52. If the law appears to be neutral and generally applicable on its face, but in practice is "riddled with exemptions" or is "a veiled cover for targeting a belief or a faith-based practice," the law must survive strict scrutiny. *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (citing *Lukumi*, 508 U.S. at 546); *see also Smith*, 494 U.S. at 890. However, where the Government does grant exemptions on a certain regulation, the regulation can be generally applicable, if the exemptions serve the purpose of the intent of the government regulation and the exemptions are granted even-handedly. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1080 (9th Cir. 2015) (holding that exemptions to a rule requiring pharmacies to deliver medications further the goal of "ensuring timely and safe patient access to medications").

In the present case, it is important to recognize that the EOCPA expressly applies to "child placement agencies," not HHS. R. at 4. This distinction is important because of the distinct role adoption agencies have. In the current system, the child placement agencies make parent referrals to HHS and HHS makes final placement decisions based on the best interests of the child. *Id.* at 3. While making the final pairings, HHS considers a child's age, sibling relationships, race, medical needs, and disability. *Id*. It is HHS's mandated responsibility to make

final placement decisions based on the best interest of the child. *Id.* at 4 (quoting E.V.C. § 37(d). HHS, not the individual adoption agencies, were granted this power by East Virginia lawmakers.

The EOCPA applies only to the adoption agencies making parent referrals. Conversely, HHS may exercise discretion while making final placement decisions. Because of lifestyle and cultural differences among potential adoptive parents and children, the provisions allow HHS to exercise its discretion and make placement decisions that are best for the child. It is inevitable that some decisions will seem to contradict the EOCPA. However, in determining whether the EOCPA is generally applicable, this Court need not consider the final placement decisions made by HHS, only the referral decisions made by AACS and similar agencies.

It is not the role of the adoption agencies to make final decisions about what is in the best interest of the child; the role of the agencies is to refer qualified potential parents to HHS. Alternatively, the East Virginia legislature made it clear that referring adoption agencies are prohibited from discriminating based on race, religion, national origin, sex, marital status, disability, or sexual orientation while screening and referring potential adoptive parents or families. *See Fulton*, 922 F.3d at 165 (holding a regulation that enforced similar nondiscriminatory behavior was constitutional). The EOCPA was enacted for the sole purpose of eliminating discrimination in the referral process. In turn, the EOCPA also advances the best interest of foster children by creating a diverse pool of applicants and directing agencies to refer qualified parents from all religious, racial, or ethnic backgrounds.[3]

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[3] *Safe Havens supra 1* (discussing eliminating discriminatory barriers to adoption "helps ethnically and religiously diverse families by decreasing rejection of youth and resulting risks while increasing support to help parents promote their LGBTQ+ children's well-being").

Although HHS has allowed for exemptions to the EOCPA in the past, the Act is still generally applicable because those exemptions were granted without burdening individual religious agencies. The EOCPA does not impose burdens solely on religious conduct. In fact, on the three separate occasions exemptions were granted to AACS when tensions arose between Sunni and Shia refugees in the City. R. at 9. Those exemptions were in the best interests of the child. *Id*. The HHS was not granting exemptions to secular groups while, at the same time, denying similar exemptions to religious groups. *See Ward*, 667 F.3d at 739 (invalidating a university counseling program's anti-discrimination policy because it permitted client referrals for secular reasons but not religious ones). The record does not include any exemptions recommended by other non-religious adoption agencies. Likewise, the EOCPA is not riddled with exemptions. AACS itself assists dozens of children in the adoption system each day. R. at 5. There are only three situations on record where exemptions to the EOCPA have been granted since 1980, all of which were granted at the recommendation of AACS and at the discretion of HHS. *Id.* at 9.

There was one common goal among all exemptions to the EOCPA granted by HHS: they advanced the best interests of the child. There is no evidence in the record to suggest that any of the exemptions sought by AACS were treated differently simply because of their religious nature. Exemptions to the EOCPA are granted evenhandedly if the exemption promoted the best interest of the child. AACS's discrimination against same-sex couples does not promote the best interest of the children. Instead, it deprives children of the loving and stable family structure a same-sex couple could offer. As a result, here, HHS did not grant AACS an exemption. The EOCPA has been enforced evenhandedly.

Finally, the EOCPA is generally applicable because HHS does not discriminate based on fundamental differences among adoption agencies. The "choosing an adoption agency" section on the HHS website states, "[b]rowse the list of foster care and adoption agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose." *Id.* at 5. This shows that HHS promotes diverse ideological differences within the agencies they fund, including differences among religious beliefs. *See Locke v. Davey*, 540 U.S. 712, 724 (2004) (finding a scholarship program did not create hostility toward religion because the scholarship permitted students to attend religious institutions). In effect, HHS is communicating to adoption agencies that they are free to express their unique and valuable beliefs, but they are not authorized to discriminate in providing home studies and referring adoptive parents. This message applies to both secular and religious agencies; therefore, the EOCPA is generally applicable.

III. The Court Must Give Deference To The Appellant's Enforcement Of The Equal Opportunity Child Placement Act Against The Discriminatory Conduct Of AACS.

Courts have made it clear that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. Instead, "[s]uch laws need only survive rational basis review." *Stormans*, 794 F.3d at 1084 (citing *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999)). Under rational basis review, Courts grants deference where regulations "are rationally related to a legitimate governmental purpose." *Id.* (citing *Gadda v. State Bar of Cal.*, 511 F.3d 933, 938 (9th Cir. 2007)). This Court should apply a rational basis review to the EOCPA, because the East Virginia regulation is neutral and generally applicable.

a. The EOCPA Is Rationally Related to Legitimate Government Interests.

The Court must uphold the EOCPA and its amendments because they are rationally related to multiple legitimate governmental purposes. *Id.* As applied to adoption agencies, the EOCPA has three governmental purposes: 1) to make sure child placement services are accessible to all Evansburgh residents who are qualified for the services; 2) to ensure the pool of adoptive parents is as diverse and broad as the children needing placement; and 3) individuals who pay taxes to fund government contractors are not denied access to those services. R. at 9. These important government interests eliminate discrimination in the community while providing the best opportunity for adopted children to succeed.

The first governmental purpose is rationally advanced by the EOCPA. Without the Act, prospective adoptive parents who are otherwise qualified may find it difficult to access government-funded child placement services simply because an adoption agency chooses to discriminate against them. Without the EOCPA, many potential qualified parents could be denied the opportunity to raise children simply because of their race, religion, national origin, sex, marital status, disability, or sexual orientation. Here, AACS desires to discriminate against potential qualified parents based on their sexual orientation. Given the command and intent of the EOCPA, this cannot be allowed.

If adoption agencies were able to push potential parents and children away based on these backgrounds, the diversity within the pool of prospective parents would be adversely affected and children would suffer. *See Fulton*, 922 F.3d at 165 (holding that the government purpose of creating a diverse pool of foster parents and resource caregivers is of "paramount public interest"). The City of Evansburgh is a diverse community with many races, religions, martial statuses, and sexual orientations. As the diversity of the community increased, the East Virginia

legislature found it necessary to expressly prohibit discrimination. Prohibiting discrimination increases the likelihood that more adoptive families will be available for placement. *See* R. at 8 (stating Evansburgh's need for more adoptive families).

Finally, the EOCPA rationally advances the government's goal of making sure individuals who pay taxes to fund government contractors are not denied access to those services. Residents of Evansburgh, regardless of background, pay taxes which support many government programs, including adoptions agencies like AACS. Organizations like AACS should not be given the ability to discriminate against the very taxpayers who support their mission, religious or otherwise. AACS, a nonprofit, tax-exempt, government-funded agency, should not receive preference over the common taxpayer, for want of religious conviction. Furthering the EOCPA advances the best interest of adoptive children and the best interest of the public as a whole.

The EOCPA is neutral and generally applicable and must be reviewed under rational basis. The Government has identified three key government purposes it wishes to advance. The EOCPA is rationally related to all three government purposes and this Court should find its enforcement against AACS valid under the Free Exercise Clause of the First Amendment.

b. The EOCPA Is Narrowly Tailored To Advance The Compelling Government Interest Of Preventing Discrimination.

Even if this Court finds that the EOCPA and its amendments are not neutral or generally applicable and evaluates the law under strict scrutiny, the Act is still valid under the Free Exercise Clause of the First Amendment because it is narrowly tailored to advance compelling government interests. *Lukumi*, 508 U.S. at 546 (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

The EOCPA was narrowly tailored to advance the compelling interest of preventing discrimination within the foster and adoption systems and promoting a diverse group of applicants. *See Lukumi*, 508 U.S. at 546. Adoptive parents and families come from diverse backgrounds, especially in the community of Evansburgh. These families may face discrimination on many fronts, not just from religious groups like AACS. Discrimination comes in many forms - from race to political affiliation - and no one legislative enactment could prohibit all conceivable forms of discrimination. However, certain types of discrimination continue to reoccur throughout the history of this country. Americans have been discriminated against based on race, religion, national origin, sex, marital status, sexual orientation, or disability. These categories encompass many individual acts of discrimination, but few would argue that these categories include every conceivable act of discrimination. These recurring varieties of prejudice were carefully contemplated and included in the EOCPA. R. at 4, 6. Anything less would be insufficient. Anything less would leave large percentages of the modern population without protection from harmful intolerance and bias.

The EOCPA advances "'interests of the highest order'" and is "narrowly tailored in pursuit of those interests." *See McDaniel*, 435 U.S. at 628 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). On its face, the EOCPA seems broad but in action it is deceivingly narrow. The EOCPA protects the most vulnerable members of society from the most common types of discrimination without burdening moral, ethnic, or philosophical differences. Drafting an anti-discrimination statute any more narrowly would allow unacceptable discrimination to slip through the cracks. The EOCPA includes all types of discrimination that are likely to plague the adoption setting – without burdening all religious beliefs or practices in the name of anti-discrimination.

Finally, the EOCPA was narrowly tailored to advance the compelling government interest of preventing bias against same-sex people seeking to adopt in the City of Evansburgh. *See Lukumi*, 508 U.S. at 546. The Court in *Obergefell* made it clear that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, 576 U.S. at 675. This language from *Obergefell* establishes a clear and compelling government interest: preventing discrimination based on sexual orientation. Regarding a same-sex couple's right to marry, the Court went on to say "[n]o longer may this liberty be denied to them." *Id.* As with marriage, a same-sex couple should not be denied the right to adopt simply because of their sexual orientation or preference.

Even if the EOCPA is subject strict scrutiny, this Court must find it valid under the Free Exercise Clause of the First Amendment because it is narrowly tailored to advance the compelling government interest of preventing discrimination in all forms. The Court in *Obergefell* established the compelling government interest of preventing the discrimination based on sexual orientation, and the East Virginia legislature advanced this interest through the narrowly tailored EOCPA and is subsequent amendments.

Conclusion

For the foregoing reasons, Appellee, respectfully requests this Court affirm the Fifteenth Circuit Court of Appeals.

Respectfully submitted,

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Team 5

Counsel for Appellee