Case No. 2020-05

UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

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

v.

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

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

BRIEF FOR APPELLEE

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Statement of Jurisdiction

The District Court had jurisdiction of the case that is docketed as Civil Action No. 18-cv-02758 pursuant to 28 U.S.C. § 1331. The District Court's federal question jurisdiction was based on an alleged violation of the First and Fourteenth Amendments to the United States Constitution. The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

Appellee Al-Adab Al-Mufrad Care Services' petition for rehearing en banc was timely filed in accordance with Federal Rule of Appellate Procedure 40(a)(1). The petition for rehearing en banc was properly granted pursuant to Federal Rule of Appellate Procedure 35(a)(2).

Statement of the Issues

1. Whether the Department of Health and Human Services Violated Al-Adab Al-Mufrad Care Services' First Amendment Right to Freely Exercise Its Religion When the Department Impermissibly Targeted Religious Conduct Through Individualized Exemptions to the Equal Opportunity Child Placement Act?
2. Whether the Department of Health and Human Services Unconstitutionally Conditioned Al-Adab Al-Mufrad Care Services' Public Funds Upon the Relinquishment of Its First Amendment Free Speech Rights When It Required Endorsement of a Viewpoint with Which the Agency Morally Disagreed?

Opinions Below

The District Court's Bench Opinion and Order appears in the record at pages 1-17. The opinion of the panel for the United States Court of Appeals for the Fifteenth Circuit appears in the record at pages 18-25.

Constitutional Provisions

The text of the First Amendment to the United States Constitution is provided below.

The First Amendment states:

> 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

I. Factual History

The City of Evansburgh is East Virginia's largest city, and home to a largely diverse population. R at 3. Refugees from countries such as Ethiopia, Iraq, Iran, and Syria comprise a vast number of this population. *Id.* As Evansburgh continues to expand, the need for adoptive and foster care continues to increase at a rate with which the City cannot keep up. *Id.* There are approximately 17,000 children in the Evansburgh foster care system, including 4,000 who are available for adoption. *Id.* Many children who need foster or adoptive care come from the refugee population. *Id.* To address this alarming issue, the Department of Health and Human Services ("HHS"), under the City's authority, has contracted with over thirty private child placement agencies throughout Evansburgh. *Id.* The agencies receive public funds from HHS in exchange for a variety of services, including child placement recommendations to HHS for children in the foster care or adoption system. *Id.*

The goal of the child placement system is to serve the best interests of the child. R at 3-4. Upon receiving a child into custody, HHS refers the child to one of the contracted private agencies. R. at 3. In turn, the agencies maintain lists of available families and inform HHS of potential matches for the child. *Id.* Agencies are also responsible for gathering information about the available families for HHS to compare with information about the child. *Id.* Based on this information, HHS decides which agency has the most suitable family. *Id.* HHS also considers such factors as the child's age, race, medical needs, disability needs, and sibling relationships when determining which family is most suitable. *Id.; see also* R. at 4 (discussing what East Virginia state law permits agencies to consider when conducting a "best interests of the child" assessment).

Families interested in fostering or adopting children initiate contact with a child placement agency. R at 4. Families may visit the HHS website to research potential adoption agencies. R at 5. The website emphasizes the family's freedom of choice in finding an agency, but also emphasizes the importance of finding the agency that can best meet the family's needs. *Id.* Finding the right agency is vital for the family to feel comfortable, confident, and supported throughout the parenting journey. *Id.* Importantly, the website describes that "[e]ach agency has different requirements, specialties, and training programs." *Id.* Nothing on the website indicates that these provisions apply only to "special [placement] programs." *Id.*

Under the contracts with HHS, the agency that recommended the foster or adoptive family must maintain supervision and provide support after the child has been placed. R at 4. Because the agency must provide support and other services throughout a family's parenting journey, it is equally important for an agency to match well with a family. *Id.* Therefore, agencies may typically refer a family that does not fit with the agency's profile and policies to another agency. *Id.*

Al-Adab Al-Mufrad Care Services ("AACS") is one agency with which HHS has contracted. *Id.* AACS has passionately supported the growing refugee population for nearly forty years. *Id.* at 5. In those years, AACS has helped innumerable war orphans and other children find permanent families in Evansburgh. *Id.* HHS most recently renewed its contract with AACS on October 2, 2017. *Id.* In the contract, AACS agrees to provide the necessary adoption services, certifies that adoptive families are properly screened, trained, and certified, and agrees to comply with the laws, ordinances, and regulations of the city and state. R. at 5-6. Every day, AACS assists dozens of children, each with their own differing needs, including trauma survivors and children with special needs. R. at 5. AACS provides its services in accordance with the teachings of the Qur'an and the Hadith and believes that "[a]ll children are a gift from Allah." *Id.*

The Equal Opportunity Child Placement Act

East Virginia adopted the Equal Opportunity Child Placement Act ("EOCPA") in 1972. R. at 4. The EOCPA aims to eliminate discrimination in the child placement process by prohibiting agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying" potential families. *Id.* The EOCPA applies to private child placement agencies who receive public funds in exchange for their services to HHS. *Id.* Agencies that do not comply with the EOCPA cannot receive public funding. *Id.* The EOCPA requires agencies to "give preference" to foster or adoptive parents "in which at least one parent is the same race as the child needing placement" where all other parental qualifications are equal. *Id.*

East Virginia is committed to combatting all forms of discrimination, no matter its underlying philosophy or ideology. R at 6. To further this goal, the EOCPA mandated two new requirements following the United States Supreme Court decision in *Obergefell v. Hodges*. First, East Virginia amended the EOCPA to forbid discrimination on the basis of sexual orientation in

the child placement process. *Id.* (citing E.V.C. § 42.-3(b)). This amendment contains an exception where the child needing placement has "an identified sexual orientation." R. at 6. In that circumstance, child placement agencies "must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." *Id.* (quoting E.V.C. § 42.-3(c)). Second, the EOCPA requires that all child placement agencies must sign and post at its business a notice stating that, under state law, it is illegal "to discriminate against any person, including any prospective or adoptive parent" for any reason, including sexual orientation. R. at 6. This notice must be posted before the agencies can receive funding. *Id.* Religious-based agencies may post on their premises a written objection to the policy. *Id.*

Following these amendments to the EOCPA, HHS Commissioner Christopher Hartwell launched an investigation specifically into religious-based agencies' compliance with the recent EOCPA amendments. R at 6-7. AACS's Executive Director, Sahid Abu-Kane, explained AACS's religious beliefs to Commissioner Hartwell. R. at 7. Because AACS follows the teachings of the Qur'an and the Hadith, AACS cannot certify same-sex couples as prospective adoptive parents or perform home studies for same-sex couples. *Id.* Same-sex couples rarely approach AACS about its services, but on the few occasions they have, AACS has respectfully referred them to one of the four LGBTQ-based agencies. *Id.; see also* R. at 8 ("There are four adoption agencies that are expressly dedicated to serving the LGBTQ community in Evansburgh…[.]). Despite AACS's religious beliefs, no same-sex couples have ever filed complaints alleging discriminatory conduct against AACS. *Id.*

Following this investigation, HHS refused to renew its contract with AACS on the renewal date, October 2, 2018, after Commissioner Hartwell alleged AACS is not in compliance with the EOCPA. *Id.* Because AACS accepted public funds to provide a "secular social service" to the

community, Commissioner Hartwell alleges, AACS must comply with the EOCPA to continue receiving funding. *Id.* Further, HHS initiated an immediate referral freeze against AACS, despite the urgent need for more adoptive families in Evansburgh. *Id.; see also* R. at 8. The referral freeze is a direct result of AACS's policy against certifying same-sex couples. *Id.* The only option AACS had for avoiding the referral freeze is providing "full assurance" of its future compliance with the EOCPA. R. at 7-8. As a result of the referral freeze, no adoption agencies may make adoption referrals to AACS. R. at 7-8.

AACS filed this action against Commissioner Hartwell on October 30, 2018, seeking a temporary restraining order against the referral freeze. R. at 8. AACS also seeks a permanent injunction compelling HHS to renew its annual contract with AACS. *Id.* AACS asserts that enforcing the EOCPA against it violates its fundamental First Amendment rights to free exercise of religion and free speech. *Id.*

The March 2019 Evidentiary Hearing

The District Court conducted a three-day evidentiary hearing in March 2019. R. at 8. Numerous individuals, including those who have worked with HHS, those who have been impacted by the referral freeze, and HHS Commissioner Hartwell, testified at the hearing to establish the following facts. R. at 8-9.

First, testimony revealed that, dating back to 2014, HHS placed a white special needs child with an African American couple despite the fact that three other adoption agencies had screened and certified white families to adopt the child. R. at 8-9. Commissioner Hartwell defended the decision, explaining that E.V.C. § 42.2, requiring preference for placement with same-race families, is "intended only to preserve and protect *minority* children and families…[.]" R. at 9

(emphasis added). Next, in 2015, HHS refused to place a five-year-old girl with an otherwise qualified and certified family because the family consisted only of a father and son. *Id.*

As a result of the referral freeze, in October 2018, a young girl was separated from her brothers, who had been placed with a family by AACS. R. at 8. A different agency placed the girl with another family because of the referral freeze against AACS. *Id.* Additionally, in January 2019, a five-year-old boy with autism could not be adopted by the woman who fostered him for two years because of the referral freeze. *Id.* Commissioner Hartwell defended the purposes of enforcing the EOCPA against child placement agencies, explaining that child placement services "are accessible to all Evansburgh residents who are qualified for the services." R. at 9. Therefore, Hartwell explained, the pool of foster and adoptive parents is "as diverse and broad as the children in need of such parents." *Id.*

II. Procedural History

The District Court issued a memorandum opinion and order on April 29, 2019. The District Court granted AACS's motion for a temporary restraining order against Commissioner Hartwell's referral freeze and further granted AACS's motion for a permanent injunction compelling Commissioner Hartwell to renew its contract. Commissioner Hartwell appealed the District Court's ruling.

On February 24, 2020, a panel of the Court of Appeals for the Fifteenth Circuit reversed the District Court's ruling, holding in favor of Commissioner Hartwell on both issues. AACS timely petitioned for rehearing en banc, which Chief Judge Martin granted on July 15, 2020.

Summary of the Argument

Enforcing the EOCPA against AACS violates AACS's constitutional right to free exercise of religion. Under the Free Exercise Clause, the government cannot selectively impose burdens on conduct motivated by religious belief. The EOCPA is not facially neutral or generally applicable because HHS applies a system of double standards. Through granting individualized exemptions to secular agencies, AACS and other religious agencies bear the burden of HHS's ad hoc exemptions. A law cannot be facially neutral and generally applicable when it permits individualized exemptions. Even if this Court finds the EOCPA to be facially neutral and generally applicable, HHS's discretionary use of exemptions demonstrates an impermissible uneven application of the law. This Court must safeguard well-established, fundamental First Amendment rights and hold that HHS's conduct unduly burdened AACS's right to freely exercise its religion.

A law which burdens specific religious conduct, and lacks neutrality or general applicability, is subject to strict scrutiny. A regulation whose only purpose is to burden First Amendment protections cannot survive strict scrutiny. Although Evansburgh has a compelling interest in eradicating discrimination, the EOCPA is not narrowly tailored to achieve that interest because the statute is underinclusive. Enforcing the EOCPA against AACS not only damages its ability to find homes for the rising number of refugee orphans, but also inhibits HHS's ability to serve the LGBTQ community.

The rights enumerated in the First Amendment include the right to speak freely in addition to the right to refrain from speaking entirely. The notice requirement at issue directly contravenes well-established First Amendment precedent forbidding government from forcing individuals to speak. The government cannot force AACS to become a "billboard" for a message with which AACS does not agree. Content-based regulations that compel individuals to speak a particular

message, altering the content of their speech, are subject to strict scrutiny. Requiring AACS to publicly post a message with which it morally disagrees based on its religious beliefs is a content-based regulation which fails under strict scrutiny. The EOCPA's notice requirement hinders the core values of the First Amendment by stifling the marketplace of ideas and the search for truth.

The government may selectively fund one government program or service over another. However, the government is only permitted to condition funds within the scope of the specific program. HHS unconstitutionally conditioned AACS's public funding on complying with the EOCPA's amended nondiscrimination policy. The scope of AACS's contract with HHS extends only to providing child placement services. If the government conditions a benefit upon the relinquishment of a First Amendment right, the regulation must be reasonable and content neutral. In government funding cases, viewpoint-based regulations can be sustained only when they meet strict scrutiny, or when the government itself is the speaker. East Virginia cannot further its interests in a way that compels AACS to adopt the government's viewpoint regarding same-sex couples.

Argument

I. HHS violated AACS's First Amendment Right to Freely Exercise Its Religion When HHS Targeted Religious Conduct Through Individualized Exemptions to the EOCPA.

The First Amendment to the United States Constitution unequivocally states that "Congress shall make no law…prohibiting the free exercise [of religion]." U.S. Const. Amend. I. This right applies to the States through the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1990). This First Amendment guarantee, referred to as the "Free Exercise Clause," embraces two liberties: (1) the freedom to believe in a specific religion, and (2) the freedom to exercise that religion. U.S. Const. Amend. I. While "[t]he first is absolute, in the nature of things, the second cannot be." *Cantwell*, 310 U.S. at 303-04. Although the conduct of individuals remains subject to regulations, the Free Exercise Clause categorically prohibits the government from targeting or regulating religious beliefs. *See generally Cantwell*, 310 U.S. 296; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993); *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The term "exercise" denotes an action in some capacity. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, B.Y.U. L.Rev. 299, 300 (1986). The exercise of religion often encompasses each and every facet of human life. *Id.* "Exercise" is not limited solely to communication or worship. *Id.* Free exercise protects not only "the right to believe and profess" a religion, but also "performance (or abstention from) physical acts." *Smith*, 494 U.S. at 877. The Free Exercise Clause protects individuals "assembling with others" to worship, "participating in sacramental use" of food, and "proselytizing, [and] abstaining from certain foods or certain modes of transportation." *Id*.

Here, by enforcing the EOCPA against AACS, HHS violated AACS's constitutional right to free exercise. The EOCPA is not facially neutral or generally applicable because HHS applies a system of double standards. Through granting individualized exemptions for only secular purposes, AACS and other religious agencies bear the burden of HHS's ad hoc exemptions. Because the EOCPA is riddled with individualized exemptions for only secular purposes, it must be evaluated under strict scrutiny. The EOCPA fails strict scrutiny because HHS has not proffered any compelling state interests that are accomplished by narrowly tailored means. Its uneven enforcement of the EOCPA unduly burdens AACS and similar religious organizations. For this reason, the law is not narrowly tailored, and fails strict scrutiny.

a. The EOCPA is Not a Facially Neutral or Generally Applicable Law.

Under the Free Exercise Clause, a law burdening religious practice does not need to undergo strict scrutiny "if it is neutral and of general application." *Lukumi*, 508 U.S. at 521; *see generally Smith*, 494 U.S. at 872. A law is devoid of neutrality "if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. At a bare minimum, neutrality requires that "a law not discriminate on its face" against religion, *Id.*, meaning that the government cannot single out religion for uniquely adverse treatment. Steven Collis & Douglas Laycock, *Generally Applicable Law and the Free Exercise of Religion*, 95, Neb. L.R., 1, 9 (2016). Under this doctrine, a law is unconstitutional where "a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43. When the purpose of a law is to "infringe upon or restrict practices because of their religious motivation, the law is not neutral," and fails the requirements of the First Amendment. *Id.* at 534; *see also Smith*, 494 U.S. at 878-79.

The United States Supreme Court in *Church of Lukumi Babalu Aye v. City of Hialeah* established the standard for determining what constitutes a facially neutral and generally applicable law in the Free Exercise context. *See generally Lukumi*, 508 U.S. at 520. In *Lukumi*, the City of Hialeah adopted ordinances aimed to restrict the Church's First Amendment right to freely exercise the Santeria religion by criminalizing conduct the Church used to worship. *Id*. at 529-32. The ordinances, the Court held, were not neutral because "their object [was] the suppression of religion." *Id*. at 542. The Court reasoned that the City sought to target the Santeria religion through "gerrymandered" language targeting Santeria practice, yet excluding identical secular practice. *Id*. The ordinances were unconstitutionally underinclusive, as they "suppress[ed] much more religious conduct than is necessary." *Id*. at 544. Accordingly, the ordinances failed the First Amendment's requirements on its face and as applied because the City pursued its "governmental interests only against conduct motivated by religious belief." *Id*. at 545.

Lukumi provides the correct analysis for this Court to apply in determining whether a law survives a First Amendment challenge. *Lukumi* solidified the principle that, under the Free Exercise Clause, the government cannot selectively impose burdens on conduct motivated by religious belief. *Id.* at 542. This principle applies regardless of whether the government proffers legitimate interests. *Id*. at 543. Since *Lukumi*, numerous Courts of Appeal have held that a law cannot be facially neutral and generally applicable when it permits individualized exemptions. *See Tenafly Eruv Ass'n v. Borough of Tenefly*, 309 F.3d 144, 165-66 (3d Cir. 2002); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999); *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Where government officials "exercise discretion in applying a facially neutral law…they contravene the neutrality requirement if they exempt some

secularly motivated conduct but not comparable religiously motivated conduct." *Tenafly*, 309 F.3d at 165-66; *see also Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884.

i. HHS's discretionary use of exemptions demonstrates an uneven application of the EOCPA.

Any time "the government makes a value judgment in favor of secular motivations, but not religious motivations" that action must survive strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 366. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the United States Court of Appeals for the Third Circuit held that the Newark Police Department's no-beard policy was not neutral because it allowed for individualized exemptions. *Id.* There, the Department implemented a policy requiring trimmed beards. *Id*. at 360. However, the policy allowed exceptions for medical conditions or certain undercover operations. *Id*. Sunni Muslim officers grew out their beards to comply with strict religious teachings of their faith and faced discipline from their employer. *Id*. at 360-61. The Third Circuit held that the categorical exemptions indicated that the Department made "a value judgement that secular [ ] motivations…are important enough to overcome its general interest in uniformity, but that religious motivations are not." *Id*. at 366.

Even neutral laws of general applicability must be applied evenhandedly. *Tenafly*, 309 F.3d at 168. In *Tenafly Eruv Ass'n v. Borough of Tenefly*, the Third Circuit revisited the Free Exercise Clause in another First Amendment challenge. *See generally Tenafly*, 309 F.3d at 144. The Borough of Tenafly had an ordinance prohibiting the affixing of "any sign or advertisement, or other matter upon," telephone poles. *Id.* at 151. This ordinance was seldom enforced. *Id*. at 151-52. The Borough's telephone poles were regularly strewn with private postings, including signs and decorations from local churches. *Id*. However, the Borough selectively enforced the ordinance against Orthodox Jewish residents seeking to adorn the telephone poles with religious sacraments.

Id. at 153-54. Although the ordinance was facially neutral and generally applicable, *Id.* at 172-74, the court held that it was not enforced evenhandedly because it "devalue[d] religious reasons for acting[.]" *Id*. at 169; *see also Midrash Sephardi, Inc*., v. *Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004) (holding that enforcing a zoning ordinance only against religious assemblies devalues religious reasons for assembling). This selective, discretionary application of the ordinance compelled the court to apply strict scrutiny. *Tenafly*, 309 F.3d at 169.

Referral policies must also be applied evenhandedly. The Sixth Circuit in *Ward v. Polite* discussed the constitutionality of individualized ad hoc exemptions to an anti-discrimination policy. *See generally Ward*, 667 F.3d at 740. There, a university expelled a counseling-program student after she referred a homosexual couple to another counselor based on her religious beliefs. *Ward*, 667 F.3d 731-32. The challenged policy did not prohibit referrals such as Ward's. *Id.* at 735. The point of the referral "was to *avoid* imposing her own values on gay and lesbian clients" and "respect[] the diversity of practicum clients," all while preventing any "negative impact on the client." *Id*. Although this policy was both facially neutral and generally applicable, the court concluded that the university's discretionary use of exemptions raised doubts as to its constitutionality. *Id*. at 739. Particularly, the court highlighted that the university granted "secular exemptions but not religious ones," and failed to apply the policy "in an even-handed, much less faith-neutral, manner to Ward." *Id*. Finally, the court emphasized in dicta that "exception-ridden" policies become a system of individualized exemptions: "the antithesis of a neutral and generally applicable policy that…must run the gauntlet of strict scrutiny." *Id*. at 740.

Here, as in *Fraternal Order* and *Tenafly*, HHS has the unfettered discretion to make exemptions in placement decisions, burdening AACS's free exercise rights. AACS exists to serve the best interests of Evansburgh's rapidly growing refugee community. The community has an

enduring lack of adoptive and foster homes due to the increasing refugee population. HHS acknowledged this problem when it issued an urgent notice for more adoptive families mere months before severing its contract with AACS. However, HHS's interest in serving the best needs of the child is completely undermined by how the EOCPA is applied to AACS. HHS routinely grants exemptions from EOCPA requirements for secular purposes. For example, on the basis of sex, when HHS refused to place a young girl with a certified family solely because the family consisted of only a father and son. Or, when HHS placed a white special needs child with an African American family, although three white adoptive families were certified. HHS allows referrals to other agencies if a family "does not fit with the agency's profile and policies." R at 5. Yet, HHS slashed AACS's funding, after almost forty years of AACS providing placement services, for simply making a referral. This uneven application of the EOCPA not only exacerbates the community's dire need for foster and adoptive families, but also encroaches upon AACS's First Amendment free exercise right.

Even if this Court finds the EOCPA to be facially neutral and generally applicable, HHS's discretionary use of exemptions demonstrates an uneven application of the law. Both the Third and the Sixth Circuits held that failing to apply a law in an even-handed, faith-neutral manner violates the Free Exercise Clause. In *Tenafly,* the Borough continuously granted exemptions to the challenged statute, yet refused to grant an exemption to the group of Orthodox Jewish residents. Analogous facts are presented here. The record shows HHS's systematic use of exemptions in placement decisions dating back to 2014, all of which explicitly violate the EOCPA. HHS has continued to award exemptions to other agencies for secular purposes, yet refused to grant one exemption for AACS. HHS is making a value judgment that secular motivations are significant enough to permit discriminatory placement decisions, yet religious motivations are not. The Third

and Sixth Circuits correctly held that value judgments burdening religious conduct are impermissible infringements upon free exercise. This Court must adopt this rationale and hold HHS's conduct unconstitutional.

Similarly to *Ward*, HHS allows referrals when families do not fit with an agency's profile and policies. HHS urges parents to "feel confident and comfortable with the[ir chosen] agency," acknowledging that each agency has different specialties. AACS specializes in finding homes for Evansburgh's large orphan refugee population, similar to the four agencies which specialize in serving the LGBTQ community. The referral challenged in *Ward* was implemented to avoid imposing Ward's own views on her clients, and the Sixth Circuit emphasized the respectful nature of that referral. Here, AACS referred the same-sex couple to ensure that the couple was placed with an agency that could best serve their needs. AACS does not impose their religious beliefs on a same-sex couple when making a referral, and no complaints have ever been filed in response to such a referral. This referral process ensures that both the agency and the family are comfortable and confident throughout the adoption process, a goal which HHS aims to accomplish.

This Court must safeguard well-established, fundamental First Amendment rights and hold that HHS's conduct unduly burdened AACS's right to freely exercise its religion.

b. <u>The EOCPA Fails Under Strict Scrutiny Because It Does Not Use Narrowly Tailored Means to Achieve The Government's Interests.</u>

A law which burdens specific religious conduct, and lacks neutrality and general applicability, is subject to strict scrutiny. *Lukumi*, 508 U.S. at 546; *Smith*, 494 U.S. at 884. A law without compelling governmental interests that are narrowly tailored fails the rigor of strict scrutiny and violates the Free Exercise Clause. *See Hobbie v. Unemployment Appeals Comm'n of Fla*, 480 U.S. 136, 141 (1987); *Lukumi*, 508 U.S. at 533; *McDaniel*, 435 U.S. at 628; *Sherbert*, 374 U.S. at 406; *see generally Smith*, 494 U.S. 872; *Tenafly*, 309 F.3d at 183; *Thomas v. Review*

Bd. Of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

The only defense a state may assert for burdening religious practice is that the discrimination was "the least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718; *see also Yoder*, 406 U.S. at 215. A compelling state interest is that "of the highest order." *Yoder*, 406 U.S. at 215. In *United States v. Lee*, the Supreme Court established that "[t]he state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an overriding governmental interest." *Lee*, 455 U.S. at 257-258 (emphasis added). The Court has elaborated on this notion, stressing that any "compelling governmental interest must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32; *see also McDaniel*, 435 U.S. at 628.

A regulation whose only purpose is to burden First Amendment protections cannot survive strict scrutiny. *See Lukumi*, 508 U.S. at 546-47 (holding that an interest cannot be considered compelling "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort…"). The Court in *Lukumi* found the City's ordinances to be "overbroad or underinclusive in substantial respects" reasoning that "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct." *Id*. at 546. Accordingly, the Court held that the City did not use the least restrictive means to accomplish its objective. *Id*.

Substantial burdens on the exercise of religion must be justified by identifiable narrowly tailored means. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 728 (2014). In *Burwell v. Hobby Lobby Stores, Inc*., the Supreme Court held that a mandate from the Department of Health and Human Services failed the least restrictive means prong. *Id.* at 691. Regulations promulgated

by HHS required employers' group health plans to pay for "preventive care and screenings." *Id*. at 682. Hobby Lobby argued that providing this insurance coverage for contraceptives burdened their religious beliefs. *Id*. at 686. Although the interest in guaranteeing cost-free access to the contraceptives is compelling, the Court held that HHS did not demonstrate "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion…" *Id*. at 728.

Like the laws in *Lukumi* and *Burwell*, the EOCPA fails on its face and as applied to AACS under strict scrutiny due to its underinclusivity. AACS does not contend that HHS lacks compelling state interests in enforcing the EOCPA. However, the language of the EOCPA is not drawn in narrowly tailored terms to accomplish these interests. The law prohibits discrimination, yet the text of the EOCPA expressly allows agencies to discriminate based on race and sexual orientation in certain circumstances. The language of the EOCPA is unconstitutionally underinclusive because it unnecessarily suppresses religious conduct, but not secular conduct.

Enforcing the EOCPA against AACS not only damages its ability to find homes for the rising number of refugee orphans, but also inhibits HHS's ability to serve the LGBTQ community. HHS seeks to eradicate all forms of discrimination by ensuring "the pool of adoptive parents is as diverse and broad as the children needing placement." R. at 9. However, the underinclusivity of the EOCPA not only destroys AACS's mission to find homes for refugee orphans, but also impairs the ability of LGBTQ-based agencies to receive referrals to better serve families within its community. The City of Evansburgh needs agencies like AACS to meet the demand for a diverse range of child placement services. AACS has dutifully served the refugee community since 1980 and has placed thousands of children into adoptive homes. Each day that HHS refuses to renew their contract, the number of refugee orphans increases. The referral freeze against AACS

contravenes HHS's mission to place children in qualified adoptive homes and unconstitutionally burdens free exercise of religion. Therefore, AACS urges this Court to maintain the integrity of the First Amendment and allow AACS to continue uniting families.

II. HHS Violated AACS's First Amendment Right to Free Speech When It Conditioned AACS's Funding Upon Endorsement and Public Posting of a Viewpoint Which Conflicts with Its Religious Beliefs.

The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . [.]" U.S. Const. amend. I. The Free Speech Clause in the First Amendment is made applicable to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The freedoms enumerated in the First Amendment shall not be infringed upon lightly. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 639 (1943). These freedoms are "susceptible of restrictions only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* Accordingly, this Court should hold that (1) requiring AACS to publicly post a message with which it morally disagrees based on its religious beliefs is a content-based regulation which fails under strict scrutiny, and (2) conditioning AACS's funding on their willingness to certify same-sex couples is an unconstitutional compulsion of speech.

a. The First Amendment Grants AACS the Right to Speak Freely and the Right To Refrain From Speaking Entirely.

The rights enumerated in the First Amendment include the right to speak freely in addition to the right to refrain from speaking entirely. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). First Amendment protections against compelled speech apply both to opinions and statements of fact. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act." *Barnette,* 319 U.S. at 642.

The First Amendment safeguards the rights of individuals to hold viewpoints and opinions different from the majority of people. *Wooley,* 430 U.S. at 715. In *Wooley v. Maynard*, New Hampshire required all non-commercial vehicles to bear the state motto, "Live Free or Die," on their license plate. *Id.* at 707. The appellees, Jehovah's Witnesses, found the state motto to be "repugnant to their moral, religious, and political beliefs." *Id.* The Court held that requiring the appellees to use their personal property as a "mobile billboard" for an ideology they believed to be morally unacceptable "invades the sphere of intellect and spirit which is the purpose of the First Amendment to…reserve from all official control." *Id.* at 715; *see also Barnette,* 319 U.S. at 639 (holding public school students could not be forced to participate in daily public ceremonies honoring and saluting the flag). New Hampshire, the Court held, had a compelling state interest in identifying passenger vehicles and promoting appreciation for state pride. *Wooley*, 430 U.S. at 716. However, even where state interests are genuine and substantial, the means employed cannot be so broad to infringe on fundamental personal liberties. *Id.*

Courts cannot distinguish cases which involve compelled statements of opinions from cases which involve compelled statements of fact—both forms of compulsion burden protected speech. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 797-98 (1988). In *Riley v. Nat'l Fed'n of Blind*, North Carolina passed the North Carolina Charitable Solicitations Act which required a professional fundraiser to disclose information to potential donors. *Id.* at 785. The contested disclosure required the professional fundraiser to articulate the "average percentage of gross receipts actually turned over to charities…within the previous 12 months." *Id.* The factual information the disclosure would provide to potential donors would help either persuade or

dissuade donors from making a contribution. *Id.* at 798. However beneficial, the content-based regulation requiring the disclosure burdened protected speech. *Id.* North Carolina proffered compelling state interests, but did not use the least restrictive means to accomplish those interests. *Id.* Thus, the Court held that the state could not force the fundraisers to display a certain message in order to solicit funds. *Id.* at 800. Specifically, the Court relied on the idea that the freedom to speak freely and refrain from speaking entirely are integral to the concept of "individual freedom of mind." *Id.* at 797.

Here, as in *Wooley*, the government cannot force AACS to become a "billboard" for a message with which AACS does not agree. The notice requirement at issue directly contravenes well-established First Amendment precedent forbidding government from forcing individuals to speak. *Wooley, Barnette,* and *Riley* demonstrate the Court's prolonged opposition to government attempts to regulate speech throughout history. This Court must adhere to the most basic First Amendment principles and forbid HHS from forcing AACS to speak.

i. The content-based regulation requiring AACS to post East Virginia's nondiscrimination policy on its premises does not survive strict scrutiny.

In analyzing regulations on speech, the Supreme Court has adopted "content-based" regulations and "content-neutral" regulations, each with differing levels of scrutiny. *Nat'l Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Content-based regulations are subject to strict scrutiny, as they "target speech based on its communicative content." *Id.* at 2371, 2374. These regulations are presumed to be unconstitutional, unless the government demonstrates they are "narrowly tailored to serve [a] compelling state interest." *Id.* at 2371. The Supreme Court has applied a lower level of scrutiny to regulations that are content-neutral. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015). "The principal inquiry in determining content neutrality

. . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Brown v. City of Pittsburgh*, 586 F.3d 263, 270 (3d Cir. 2009).

Content-based regulations that compel individuals to speak a particular message, altering the content of their speech, are subject to strict scrutiny. *Nat'l Inst. Of Family & Life Advocates*, 138 S. Ct. at 2368. In *Nat'l Inst. Of Family & Life Advocates*, the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act required clinics which primarily cared for pregnant women to provide certain notices to patients. *Id.* These notices included information on access to FDA approved methods of contraception, prenatal care, and abortions for eligible women, as well as the licensure of the facility. *Id.* at 2368-69. The Court held the notice requirements were content-based regulations. *Id.* at 2371. Requiring pro-life crisis pregnancy centers to inform women on how they may obtain a state-subsidized abortion directly alters the content of the organization's speech. *Id.* Precedent indicates that regulating the content of speech poses an inherent threat that the government is attempting to prohibit the dissemination of unpopular opinions and ideologies, rather than to advance their legitimate state interests. *Id.* at 2374. If California's interest was to provide low-income women with information about state-subsidized services, the Court considered, the notice requirement is "widely underinclusive," as it only applied to certain clinics. *Id.* at 2375. Because California's regulation was not narrowly tailored, it could not satisfy strict scrutiny. *Id.* at 2376.

Like *Nat'l Inst. Of Family & Life Advocates*, the EOCPA amendment requiring AACS to post East Virginia's nondiscrimination policy on its premises is a content-based restriction which demands strict scrutiny review. The regulation requires AACS to post a notice certifying same-sex couples as prospective adoptive parents, despite their closely held religious belief that same-sex marriage is a moral transgression. The notice requirement forces AACS to endorse a viewpoint

with which it vehemently disagrees. While the government has a compelling state interest to eradicate discriminatory practices in East Virginia, requiring child placement agencies to post a notice endorsing the government's message on its premises is not the least restrictive means of achieving that interest. Further, the agencies' ability to post written objections to the policy does not rectify this content-based infringement on free speech. The agencies should not be required to speak a message which with they disagree, and the written objection acts as a meager consolation prize for the government stripping away this freedom. This cannot meet the rigorous standard of the least restrictive means. Accordingly, this content-based regulation on agencies' free speech rights cannot stand under strict scrutiny nor First Amendment precedent.

ii. The government's action of compelling speech stifles the free democracy.

The freedom of speech and the freedom to refrain from speaking are essential to our free democracy. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). However, when the government infringes upon these freedoms by thwarting an individual from saying what they believe, it undermines the freedom of speech. *Id.* Additional damage occurs when the government compels a free-thinking individual to speak or endorse ideas with which they morally disagree. *Id.* Such action is demeaning, coerces individuals to betray their convictions, and restricts the free marketplace of ideas. *Id.* "'The best test of truth is the power of the thought to get itself accepted in the competition of the market,' *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail." *Nat'l Inst. Of Family & Life Advocates*, 138 S. Ct. at 2375.

The First Amendment is based on the notion that the widest array of distribution from diverse and opposing viewpoints is essential for the welfare of our society. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 252 (1974) (citing *Associated Press*

v. United States, 326 U.S. 1, 20 (1945)). In *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, a Florida statute required that newspapers print a political candidate's reply to its criticism on the candidate's personal character or official record. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc.*, 418 U.S. at 244. The Court emphasized that one of the primary purposes of the First Amendment is the protection of governmental and political speech. *Id.* at 257. If a newspaper is faced with the possibility of penalties for publishing commentary arguably within the vicinity of the statute, editors may choose to avoid controversy on the side of caution and stifle their speech. *Id.* Therefore, with the Florida statute in effect, certain coverage and speech activities would be non-existent. *Id.*

Here, the EOCPA's notice requirement hinders the core values of the First Amendment by stifling the marketplace of ideas and the search for truth. The notice requirement thwarts AACS from expressing its true belief and thus dampens the free marketplace of ideas. Further, the requirement compels AACS to betray its deepest convictions and closely held beliefs or face a penalty for violating the law. This action is demeaning to AACS and misconstrues the purpose of these agencies: to serve the well-being of each child. Upholding the notice requirement would contravene a legacy of First Amendment precedent and severely undermine free speech protections.

b. <u>The Unconstitutional Conditions Doctrine Prohibits HHS from Conditioning AACS's Funding Upon Certifying Same-Sex Couples as Adoptive Parents.</u>

The Spending Clause in the Constitution gives Congress the power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Art. I, § 8, cl. 1. This clause grants Congress very broad powers to collect taxes to serve the general welfare. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). This spending power may include helping fund state and private

programs. *Id.* With their broad powers, Congress is permitted to impose limitations and conditions on the use of federal funds to ensure the funds are allocated in a way Congress intended. *Id.; see also Rust v. Sullivan*, 500 U.S. 173, 195 (1991) (allowing Congress to prohibit federal funds to be used in family planning methods and services where abortions were a method of family planning).

Generally, if a party objects to the limitations and conditions that Congress imposes on the use of federal funds, the party's alternative choice is to decline the federal government's assistance. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 214*; see United States v. American Library Ass'n., Inc.*, 539 U.S. 194 (2003) (holding that public libraries had the *option* to offer unrestricted Internet access, but in order to receive federal funding, must install filtering software on computers). "At the same time, however, we have held that the Government may not deny a benefit to a person on a basis that infringes the constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 214*; see Perry v. Sindermann*, 408 U.S. 593, 597 (1972). If the government were permitted to influence their spending in this manner it would limit or deny an individual the ability to exercise their constitutional freedoms. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019); *see Speiser v. Randall*, 357 U.S. 513, 518 (1958) (allowing the government to withhold tax exemptions from claimants "who engage in certain forms of speech is in effect to penalize them for such speech"). Further, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

i. Conditioning AACS's funding on certifying same-sex couples as adoptive parents is outside the scope of HHS's contract with AACS.

The government may selectively fund one government program or service over another. *Rust*, 500 U.S. at 193. In *Rust v. Sullivan*, Congress passed Title X of the Public Health Service

Act, which allocated federal funds only for "preventative family-planning services." *Id.* at 178. This Act prohibited practitioners, who received these federal funds, from advising their patients on abortion services. *Id.* at 179-80. Challengers of the Title X Act argued it unlawfully discriminated on the viewpoint of abortion, *Id.* at 192, and that Congress unconstitutionally conditioned the receipt of federal funds on relinquishing practitioner's rights to advocate for abortion services. *Id.* at 196. The Court disagreed, holding that Congress did not discriminate on the basis of viewpoint, it "merely chose[] to fund one activity to the exclusion of the other." *Id.* at 193. The Court further explained that the condition was necessary to ensure the federal funds were allocated in the manner Congress intended. *Id.* at 194-95.

However, the government is only permitted to condition federal funds within the scope of the specific program. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 213. In *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,* Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"). *Id.* at 208. This Act allocated billions of dollars to help combat the spread of HIV/AIDS around the globe. *Id.* Congress conditioned the use of federal funds by mandating that: (1) "no funds made available by the Act 'may be used to promote or advocate the legislation or practice of prostitution or sex trafficking,'' and (2) "no funds may be used by an organization 'that does not have a policy explicitly opposing prostitution and sex trafficking.'" *Id.*

Domestic organizations that received some of the Leadership Act's federal funds worried the government's stringent policy would "alienate certain host governments" and diminish the successful impact of their program. *Id.* at 211 (quoting *Rust*, 500 U.S. at 197). To receive the federal funds, the conditions required the domestic organization to adopt a policy opposing prostitution and sex trafficking. *Id.* The Court held that "demanding that funding recipients

adopt—as their own—the Government's views on an issue of public concern," demonstrates that the condition affects "protected conduct outside the scope of the federally funded program.'" *Id.* at 18 (quoting *Rust*, 500 U.S. at 197); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399 (1984) (holding "[t]he prohibition thus went beyond ensuring that federal funds not be used to subsidize 'public broadcasting statin editorials," and "instead leveraged the federal funding to regulate the station's speech outside the scope of the program."). Accordingly, the regulation was an unconstitutional condition upon funding that violates the First Amendment. *All. For Open Soc'y Int'l Inc.*, 570 U.S. at 221.

Here, like *All. for Open Soc'y Int'l, Inc.* and *FCC v. League of Women Voters of Cal.*, HHS unconstitutionally conditioned AACS's public funding on complying with the EOCPA's amended nondiscrimination policy. The government established the scope of the EOCPA in 1972. Although the government can limit the scope of public funds, like in *Rust*, here, the latitude of AACS's contract with HHS extends only to providing child placement services. The thirty-four agencies exist to serve the best interests of each child, not to further the government's agenda. Evansburgh is home to a large and diverse population. Multiple, diverse agencies are essential to facilitate these child placements to ensure the child's best interests are served and the families feel comfortable throughout the adoption process. AACS has fulfilled its duties under the contract for nearly forty years by placing thousands of refugee children into foster and permanent homes.

The referral freeze has hindered the entire child placement process. Most notably, children AACS had previously helped place have been left in limbo. For example, AACS could not commence adoption proceedings for a five-year-old boy with autism with the woman who fostered him for two years. Additionally, a young girl was separated from her brothers, who had been placed with a family by AACS. A different agency placed the girl with another family because of the

referral freeze against AACS. This is a far cry from serving the best interest of the voiceless children. HHS's enforcement of the EOCPA against AACS has not only burdened AACS's fundamental rights to free speech, but also torn sacred relationships apart.

Similar to *All. for Open Soc'y Int'l, Inc.*, HHS cannot force AACS to adopt a certain belief to receive public funding. Here, unlike *Rust*, HHS is not "funding one activity to the exclusion of" another: HHS is impermissibly adding a condition for public funding. Endorsing a nondiscrimination policy is not within the scope of AACS's agreement with HHS. As such, coercing AACS to endorse the government's ideology falls outside the scope of the contract and outside the authority of HHS.

ii. The government impermissibly conditioned AACS's funding by compelling it to espouse the government's viewpoint on same-sex couples.

Congress cannot regulate private speech on the basis of its content or the speaker's viewpoint. *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Viewpoint-based restrictions pose an even more egregious threat to First Amendment protections because they impermissibly compel speech by affirmatively requiring an individual to espouse the government's ideology. *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 274 (S.D.N.Y. 2006), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013). These blatant regulations are presumed to be unconstitutional, unless the government demonstrates they are "narrowly tailored to serve [a] compelling state interest." *Nat'l Inst. Of Family & Life Advocates*, 138 S. Ct. at 2371.

If the government conditions a benefit upon the relinquishment of a First Amendment right, the regulation must be "reasonable and content-neutral." *Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F. Supp. 2d 936, 948 (E.D. Pa. 2012). In *Cradle of Liberty Council, Inc. v. City of Philadelphia*, a local council of the Boy Scouts denied membership to openly homosexual males based on their Scout's Oath. *Id.* at 939. The Philadelphia City Council approved the eviction of the Boy Scouts from their regional headquarters due to discriminatory practices. *Id.* The Boy Scouts had one of three options: "(1) it could continue its rent-free use of the building if it changed its policy with respect to homosexuals; (2) it could remain in the building and continue to discriminate if it paid rent in the amount of $200,000 per year; or (3) it could vacate the building." *Id.* The City argued that it was not required to "subsidize private speech" and that it may "condition participation in its programs on compliance with its nondiscrimination policies." *Id.* at 948.

The court found ample evidence in the record to conclude that the City unconstitutionally discriminated on the viewpoint of the speaker and impermissibly conditioned the rent-free use of the building on the Boy Scouts abandoning their practice of excluding homosexuals. *Id.* at 947, 954. The City improperly attempted to regulate speech by forcing the Boy Scouts to accept homosexuality within their organization. *Id.* at 947. The City, being in a higher position of power, had "an unfair advantage in advancing its agenda…" *Id.* at 954. Finally, the court determined that, based on the evidence presented, the jury could have found that the City had a compelling interest in enforcing their non-discrimination policies. *Id.* However, regardless of that interest, "it could not use the promise of a benefit to coerce [the Boy Scouts] into relinquishing its First Amendment rights in such a categorical manner." *Id.* at 949.

In government funding cases, viewpoint-based regulations can be sustained only when (1) they meet strict scrutiny, or (2) when the government itself is the speaker. For example, in *Legal*

Services Corporation v. Velazquez, the Supreme Court struck down a viewpoint-based restriction because the government was not the "speaker". *Velazquez*, 531 U.S. at 541. There, Congress enacted the Legal Services Corporation Act ("LSC") in 1974. *Id.* at 536. The LSC helped fund non-profit organizations whose goal was to provide legal services for indigent individuals. *Id.* However, Congress limited the use of those funds by prohibiting them from being used to challenge or attempt to change existing welfare laws. *Id.* at 536-37. The Court held the viewpoint-based regulation to be unconstitutional. *Id.* at 548. "Viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker… or instances… in which the government 'used private speakers to transmit information pertaining to its own program.'" *Id.* at 541 (quoting *Rosenberger*, 515 U.S. at 833). However, the attorneys were speakers for their indigent clients, not for the government. *Id.* at 542. Therefore, the speech at issue was private speech. *Id.* at 541. Accordingly, the Court reasoned that "where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas…[.]" *Id.* at 548-49.

Similar to *Cradle of Liberty Council, Inc.* and *Velazquez*, the government impermissibly regulated the viewpoint of AACS by forcing it to endorse same-sex couples as prospective parents. AACS does not contend that East Virginia does not have a compelling state interest in eradicating discrimination. However, the state cannot further that interest in such a way that compels AACS to adopt the government's viewpoint regarding same-sex couples. Although the agencies provide a vital service to the government, the agencies are private organizations who speak for the interests of the *child*, not the government. Like the attorneys in *Velazquez*, their speech remains private. HHS's attempt to regulate the viewpoint of AACS's private speech poses an egregious threat to its fundamental First Amendment rights.

HHS cannot condition the benefit of AACS's funding upon forcing AACS to relinquish its view on same-sex marriage. In *Cradle of Liberty Council, Inc.*, the City of Philadelphia could not require the Boy Scouts to forsake their long-standing membership policy and adopt the viewpoint in order to continue using the building rent-free. Like the City of Philadelphia, HHS is in a higher position of power to unfairly advance its agenda. AACS should not be required to relinquish its First Amendment right to speak its own message in order to receive the benefit of public funding. Therefore, because the EOCPA unduly burdens AACS's right to free speech, the condition is unconstitutional. AACS urges this Court to uphold a legacy of First Amendment precedent and protect the fundamental right to free speech.

Conclusion

For the foregoing reasons, AACS respectfully asks this Court to vacate the opinion of the panel for the United States Court of Appeals for the Fifteenth Circuit. AACS further asks this Court to grant a temporary restraining order against HHS's imposition of the referral freeze and grant a permanent injunction compelling HHS to renew its contract with AACS.

Respectfully Submitted,

Team 6
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