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 PETITION FOR REHEARING EN BANC TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR
APPELLANTS

Team 8
Attorney for Appellant
Counsel of Record
Counsel's Office Address
E-mail Address
Telephone Number

Issues Presented

I. Why the Department of Health and Human Services' enforcement of the Equal Opportunity Child Placement Act did not violate the Free Exercise Clause of the First Amendment.

II. Why the Department of Health and Humans Services' enforcement of the Equal Opportunity Child Placement Act did not violate the First Amendment right to freedom of speech.

TABLE OF CONTENTS

ISSUES PRESENTED……………………………………………………………………ii

TABLE OF AUTHORITIES…………………………………………………………….. v

STATEMENT OF JURISDICTION………………………………………………….. 1

STATEMENT OF THE FACTS……………………………………………………… 1

STATEMENT OF THE CASE……………………………………………………….. 3

SUMMARY OF ARGUMENT……………………………………………………….. 3

ARGUMENT…………………………………………………………………………….. 4

I. THE EOCPA DOES NOT IMPOSE LIMITATIONS ON AACS THROUGH THE FREE EXERCISE CLAUSE BECAUSE THE LAW IS NEUTRAL AND GENERALLY APPLICABLE AND PASSES STRICT SCRUTINY……………………………………4

A. *The EOCPA does not infringe on AACS's rights in violation of the Free Exercise Clause because it is neutral and generally applicable.* ……………………………………..5

1. The EOCPA is neutral because it does not present any hostility towards religious conduct. ……………………………………………………………………..6

2. The EOCPA is generally applicable because it is evenly applied to all thirty-four contracted adoption agencies. …………………………………………………9

B. The EOCPA does not burden AACS's right to free exercise because it passes strict scrutiny. ………………………………………………………………………13

1. The EOCPA passes strict scrutiny because the interest regulated by the EOCPA is a compelling government interest……………………………….. 13

2. The EOCPA passes strict scrutiny because it is implemented in a narrowly tailored format………………………………………………………………16

II. THE EOCPA DOES NOT VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BECAUSE HHS DID NOT COMPEL AACS'S SPEECH AND AACS'S SPEECH IS GOVERNMENT SPEECH. …………………………………………...19

A. AACS's First Amendment right to freedom of speech was not violated because HHS did not compel AACS's speech. ………………………………………………………20

B. There was not a violation of AACS's First Amendment right to freedom of speech because AACS's speech is considered government speech. ………………………………23

1. The forum created by HHS and AACS is nonpublic because it is a restricted access platform. ……………………………………………………………….. 24

2. AACS's free speech rights were not infringed upon because it is a government speaker. ………………………………………………………………………27

CONCLUSION AND RELIEF SOUGHT ………………………………………………..32

TABLE OF AUTHORITIES

Constitutions:

U.S. Const. amend. I 4, 19

Cases:

Supreme Court

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,
570 U.S. 205 (2013)... 19, 20, 21

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014)..16

Cantwell v. Conn.,
310 U.S. 296 (1940).. 4, 19

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).. *passim*

Cornelius v. NAACP Legal Def. and Educ. Fund,
473 U.S. 788 (1985).. 24, 25

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

Johanns v. Livestock Mktg. Ass'n,
544 U.S. 550 (2005).. 27, 28

Locke v. Davey,
540 U.S. 712 (2004).. 19

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,
138 S. Ct. 1719 (2018)... 6, 10

Matal v. Tam,
137 S. Ct. 1744 (2017)... 27

Obergefell v. Hodges,
135 S. Ct. 2584 (2015)... 8

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983)... 23, 24, 26

Perry v. Sindermann,
408 U.S. 593 (1972).. 20

Pleasant Grove City v. Summum,
555 U.S. 460 (2009).. 28

Reed v. Town of Gilbert, Ariz.,
576 U.S. 155 (2015).. 16

Reynolds v. United States,
98 U.S. 145 (1879).. 9

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995).. 27

Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.,
547 U.S. 47 (2006)..19, 20 21

Rust v. Sullivan,
500 U.S. 173 (1991).. 20, 21, 23

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017).. 13, 14, 19

United States v. Lee,
455 U.S. 252 (1982)..9

Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,
576 U.S. 200 (2015).. 29

Wooley v. Maynard,
430 U.S. 705 (1977).. 20

Court of Appeals

Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,
2 F.3d 1514 (11th Cir. 1993)..17

Fulton v. City of Phila.,
922 F.3d 140 (3d Cir. 2019).. 7, 10, 11

Grosjean v. Bommarito,
302 Fed.App'x 430 (6th Cir. 2008).. 25

Ill. Bible Colls. Ass'n v. Anderson,
870 F.3d 631 (7th Cir. 2017)..19

New Hope Family Servs., Inc. v. Poole,
966 F.3d 145 (2nd Cir. 2020)………………………………………………………. *passim*

Teen Ranch, Inc. v. Udow,
479 F.3d 403 (6th Cir. 2007)………………………………………………………… 19, 27

Ward v. Polite,
667 F.3d 727 (6th Cir. 2012)…………………………………………………………17

Secondary Sources

Lyew, Samantha R. *Adoption and Foster Care Placement Policies: Legislatively Promoting the Best Interest of Children Amidst Competing Interests of Religious Freedom and Equal Protection for Same-Sex Couples*, 42 J. Legis. 186, 189 (2016)………………………………………….. 15

Whelan, Allison M. *Denying Tax-Exempt Status to Discriminatory Private Adoption Agencies*, 8 UC Irvine L. Rev. 711, 721 (2018)………………………………………………………….. 14

STATEMENT OF JURISDICTION

The United States District Court for the Western District of East Virginia possessed federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2020). Appellee, Al-Adab Al-Mufrad Care Services, filed a timely notice of appeal pursuant to 28 U.S.C. § 2107. After the United States Court of Appeals for the Fifteenth Circuit entered its judgment, Appellee filed a petition for Rehearing En Banc.

STATEMENT OF FACTS

Appellant Christopher Hartwell, in his duties as Commissioner of the Department of Health and Human Services ("HHS"), was responsible for implementing the Equal Opportunity Child Placement Act ("EOCPA"). R. at 4. The EOCPA was passed in 1972 to provide guidelines for privatized child placement agencies that contracted with HHS. Id. When first enacted, the EOCPA provided that no agency could discriminate based on "race, religion, national origin, sex, marital status, or disability." *Id.* HHS would not provide funds to agencies that failed to comply with the EOCPA. *Id.* The EOCPA allows agencies to receive referrals from HHS and provide recommendations for prospective parents back to HHS. R. at 3. HHS has contracted with thirty-four privatized child placement agencies to eradicate the chronic shortage of homes for children in HHS's custody. *Id.* Prospective parents can connect with contracted private agencies by visiting HHS's website and finding the best one for them. R. at 5.

Appellee, Al-Adab Al-Mufrad Care Services ("AACS"), was created in 1980 to provide support to refugee children. R. at 5. After its creation, AACS contracted with HHS to provide its adoption services to the city. *Id.* AACS has annually renewed contracts with HHS since, certifying that it will comply with laws imposed by the city. R. at 5-6. The most recent contract was renewed in October 2017. R. at 4.

The EOCPA provides a list of factors that agencies must take into consideration when selecting families. The factors include ages of both children and families; the physical and emotional needs of the child with the characteristics, capacities, strengths, and weaknesses of the adoptive parents; cultural and ethnic backgrounds of children and parents; and the possibility of placing children with siblings. R. at 4. In 2017 the EOCPA was amended to include sexual orientation as a protected class after the Supreme Court's decision in *Obergefell v. Hodges*, recognizing same-sex marriage. R. at 6, 12. The EOCPA amendment provides religious-based agencies the ability to post an optional written objection to the policy on its premises. *Id.*

In July 2018, HHS spoke with a local reporter who inquired about the compliance of religious-based agencies with the EOCPA. *Id.* After this inquiry, HHS confirmed with all religious-based agencies to verify individual compliance. R. at 7. When HHS spoke with AACS, it asserted that it would not certify same-sex couples. *Id.* When pressed further to confirm that it understood its noncompliance, AACS responded that "the Qur'an and Hadith consider same-sex marriage to be a moral transgression." *Id.* In September of 2018, HHS sent a letter informing AACS that its refusal to comply with the EOCPA warranted a referral freeze, and the contract would not be renewed unless there was compliance. *Id.*

Following the letter, AACS filed a complaint in the District Court for the Western District of East Virginia. R. at 8. The Court found that several child placement agencies have complied with the EOCPA amendments when dealing with prospective adoptive parents. *Id.* On two separate occasions, children were unable to be placed because AACS had refused to comply with the EOCPA. *Id*. On various occasions, HHS used its discretion to place children in homes that were best suited for them. R. at 8-9. HHS Chairman Hartwell testified that HHS policy enforcing the EOCPA served to ensure 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. R. at 9.

STATEMENT OF CASE

Upon receiving HHS's letter that HHS would no longer provide government funding and referrals, AACS filed an action with the District Court for the Western District of East Virginia. The complaint alleged that HHS violated its First Amendment Rights under the Free Exercise Clause and the Free Speech Clause. R at 8. AACS filed a motion for both a Temporary Restraining Order against the referral freeze by HHS and an injunction compelling HHS to renew AACS's contract. R. at 2. The District Court for the Western District of East Virginia granted Appellee's Motion. R. at 2, 17.

Appellants filed a timely appeal in the Court of Appeals for the Fifteenth Circuit. The Fifteenth Circuit reversed the decision of the District Court, citing that the EOCPA amendment did not violate the Free Exercise or Free Speech rights of the Appellee. R. at 25. The Appellee filed a timely Petition for a rehearing En Banc. R. at 26. The Fifteenth Circuit granted the Petition. Id.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Appellate Panel and reverse the decision of the District Court for the Western District of East Virginia because the Appellee cannot show that the Appellant hindered its First Amendment right to free exercise or freedom of speech beyond any designated limits. The evaluation of the burdening law takes two steps. First, if the law is

"neutral" and "generally applicable," then it is only subject to a rational basis review. Second, if the law fails to be "neutral" and "generally applicable," then it is subject to strict scrutiny. The EOCPA easily passes "neutral" and "generally applicable" standards, but even if it is subject to strict scrutiny, it likewise passes.

Additionally, there are two reasons why HHS did not infringe on AACS's rights to free speech. First, there was no compelled speech; the Appellant did not require Appellee to adopt a message which it did not endorse. Likewise, the Appellant did not condition Appellee's benefits on its endorsement. Second, the government can use private speakers to promote its message. Therefore, the contract between the two parties created a nonpublic forum. Any incidental speech that occurred was governmental speech and thus not subject to the same protections as private speech.

HHS has sufficiently satisfied its burden to prove that the EOCPA is both a "neutral" and "generally applicable" law that can, if necessary, pass strict scrutiny. There is also sufficient evidence in the record to support the finding of a nonpublic forum and government speech based on relevant Supreme Court precedent. HHS did not infringe on AACS's rights in either the free exercise or free speech contexts.

ARGUMENT

I. THE EOCPA DOES NOT IMPOSE LIMITATIONS ON AACS THROUGH THE FREE EXERCISE CLAUSE BECAUSE THE LAW IS NEUTRAL AND GENERALLY APPLICABLE AND PASSES STRICT SCRUTINY.

The Free Exercise Clause of the First Amendment provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause of the First Amendment is incorporated to the states through the Fourteenth Amendment. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). It is "recognized that

the freedom to act, unlike the freedom to believe, cannot be absolute." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 894 (1990). ("*Smith*")

A law must be "neutral" and "generally applicable" for the government to regulate an exercise of religious beliefs. *Id.* at 879. If neutral and generally applicable cannot be satisfied, the law must pass strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialea*h, 508 U.S. 520, 533 (1993). ("*Lukumi*") If the law can pass either test, then the law's implication on religion is permissible. The EOCPA is "neutral" and "generally applicable" because the rule applies to all adoption agencies that conduct business with HHS, regardless of their religious beliefs, and is not enforced selectively or with differential treatment. Additionally, since the EOCPA promotes a compelling governmental interest and is a narrowly tailored means, it passes strict scrutiny. The EOCPA finds asylum in both tests, and any incidental infringement is permissible.

A. The EOCPA does not infringe on AACS's rights in violation of the Free Exercise Clause because it is neutral and generally applicable.

The EOCPA passes a neutral and generally applicable inquiry, and therefore a strict scrutiny analysis is not needed. The first prong of the analysis provides "the general principle that a law that is neutral and of general applicability need not be justified by a compelling interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531 (quoting *Smith*, 494 U.S. at 872). The law must not be "overbroad or underinclusive." *Id.* at 546. On its face, the EOCPA is neutral to all conduct, both religious and secular. The motivations behind the EOCPA were not to target religious conduct.

Additionally, the EOCPA is not overbroad or underinclusive in what it classifies as prohibited conduct. Nor does it only include conduct that is considered religious. For these reasons, the EOCPA is both neutral and generally applicable, and it is not necessary to subject it to strict scrutiny.

1. The EOCPA is neutral because it does not present any hostility towards religious conduct.

The EOCPA is neutral because it does not target religion or seek to only impose on religious conduct. A law is not neutral if its objective "is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. The "minimum requirement of neutrality is that a law not discriminate on its face." *Id.* An evaluation of neutrality does not stop with the mere review of the statutory text. Instead, neutrality requires an assessment of "governmental hostility which is masked, as well as overt." *Id.* at 534.

"Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking [sic] body.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 540). "Religious and philosophical objections are protected" but not "to deny protected persons equal access to goods and services under a neutral . . . law." *Id.* at 1727. Since the EOCPA treats religious and secular conduct alike, the law is neutral.

The Supreme Court's decision in Smith is the nucleus of a neutral and generally applicable review. In Smith, respondents had participated in a ceremonial service where they partook in the religious usage of an illegal substance. *Smith,* 494 U.S. at 874. The Respondents were fired and denied unemployment benefits because of their alleged misconduct. *Id.* Respondents brought suit alleging that the denial of benefits was based on their religious conduct and thus a violation of the Free Exercise Clause. *Id.* at 876. The Court rejected the respondents' contentions stating that there is not a right to refuse to comply with an "otherwise valid law." *Id.* at 879. The law in question

was neutral because it was "constitutional as applied to those who use the drug for other reasons." *Id.*

In Lukumi, the petitioners brought suit alleging a Free Exercise Clause violation because the city had enacted ordinances that specifically targeted its religious practices. *Lukumi*, 508 U.S. at 528. The respondents had enacted three city ordinances that imposed restrictions on the killing of animals. *Id.* at 527-28. The regulations contained language that limited the types of killings to those classified as sacrifices and not any other secular animal killings. *Id.* at 528. The Supreme Court found that the enacted ordinances were a direct response to the petitioner's erection of a church in the respondent's city. *Id.* Only one of the ordinances was neutral on its face, but all the enacted ordinances, taken in conjunction with the history for enactment, none of them could stand to be religion-neutral. *Id.* at 534. The Supreme Court held that the ordinances imposed substantive restrictions on religious conduct but left secular conduct unphased, and such targeting cannot be neutral. *Id.* at 538.

The Appellant in *Fulton v. City of Phila*. alleged inter alia that the city's enforcement of its equal protection requirements violated its free exercise rights. 922 F.3d 140, 146 (3rd Cir. 2019). *cert. granted sub nom. Fulton v. City of Phila., Pa.*, 140 S. Ct. 1104 (2020). The Appellant was a religious-based foster care agency that contracted with the city to provide prospective parents when the city's foster care system needed to place a child. *Id.* at 147-48. Part of the contract required that the agency not discriminate against same-sex couples. *Id.* at 148. The agency refused to certify same-sex households because it was against their religious beliefs. *Id.* The Third Circuit held, "while religious beliefs are always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements." *Id.* at 159. Further,

the Appellant could not prove that the city had "treated it differently because of its religious beliefs." Id. at 156. The city only enforced the law because there was a "clear violation." *Id.*

Any contention that the EOCPA's enforcement is not neutral to AACS's conduct is misplaced. There are two reasons why the EOCPA is a neutral law. First, there is nothing within the statutory language that would navigate the reader to a conclusion of religious targeting; it is facially neutral. Second, a further in-depth analysis of the EOCPA yields the same result; the law is absent of any focus on religion. Whether the view is superficial or descriptive, the EOCPA is a neutral law.

The EOCPA lacks any categorical amplifiers that indicate its enforcement is only to religious-based organizations. The text of the EOCPA eludes to the type of facilities that it applies to "child placement agencies." R. at 4. The EOCPA is void of any language specifically targeting religious child placement agencies or conduct that is only practiced by religious child placement agencies. The EOCPA is unlike the laws of *Lukumi*, which set its sights on religiously motivated conduct and instead is more aligned with the law in *Smith*. The EOCPA, while different in substance, is similar in prohibition to the law of *Smith*. Both secular and non-secular sexual orientation discrimination is prohibited. Sexual orientation discrimination and religion are not coextensive. One can hold a negative belief about another's sexual orientation without attributing that belief to a religious value. But regardless of where the belief stems from, the EOCPA's prohibition of discrimination is a blanket application and lacks sufficient language to determine that it targets AACS's religious beliefs or conduct.

While the EOCPA is facially neutral, an in-depth analysis produces the same result. The record reveals the historical background of the EOCPA, which was implemented because of the crisis within the foster care system. R. at 4. Religion was not a deciding factor in determining the

need for the EOCPA. Likewise, religion was not involved in the determination of what conduct the EOCPA prohibits. The amendment to the EOCPA came after the Supreme Court's decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding the right to marry cannot be denied to same-sex couples because marriage is a fundamental right ensured by the constitution). R. at 6. As a result, the state of East Virginia recognized the need for laws to be inclusive of all persons. This is especially true for the EOCPA because its main focus is to provide the best possible homes for children in foster care.

The sexual orientation provision is similar to the prior provision on racial preference for placement of children. R. at 4. Further, it follows the state government's interest to heed to the directive provided to the states in *Obergefell*. It would be difficult to say that the 2017 EOCPA amendment is an ad-hoc exemption based on the perpetual need to refine HHS's holistic approach for the best needs of children and to prohibit same-sex discrimination for adoptive couples and foster children. The EOCPA is a neutral law based on a review of both its statutory language and the circumstances surrounding its enactment.

2. The EOCPA is generally applicable because it is evenly applied to all thirty-four adoption agencies.

The EOCPA is a generally applicable law because it applies to all thirty-four agencies that contract with HHS. A law "cannot in a selective manner impose burdens only on conduct motivated by religious belief[s]." *Lukumi*, 508 U.S. at 543. "'Laws' . . . 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.'" *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)). The law must "prohibit nonreligious conduct that endangers [government] interests [to] a similar or greater degree" as the restricted religious conduct. *Lukumi*, 508 U.S. at 543. The Free Exercise Clause does "not relieve an individual of the obligation to comply with a

valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith,* 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment). A law also needs to "consider 'the effect . . . in its real operation.'" *Lukumi*, 508 U.S. at 535.

Within Supreme Court cases, there is a common trend for neutrality to be discussed in conflation with general applicability when there is an explicit anti-religion motivation involved. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (holding the petitioner's religious objections were not observed with a neutral view when the respondent made a derogatory statement towards petitioners religious practice within the workplace because the blatant hostility towards the petitioner violated the requirement for a law to be neutral and generally applicable). *Lukumi*, 508 U.S. 520 (1993) (holding the cities ordinances were underinclusive when the conduct that was prohibited was conduct that was only practiced in a religious setting because the government was not advancing any legitimate interest by only burdening religious conduct).

Although there may be consistency among Circuits regarding neutrality, general applicability awaits unanimity from the Supreme Court. The recent granting of a writ of certiorari by the Supreme Court in *Fulton v. City of Phila.* ("*Fulton*") is suggestive of a Circuit split in the understanding of how the *Smith* general applicability standard should apply. 922 F.3d 140 (3d. Cir. 2019), *cert. granted sub nom. Fulton v. City of Phila., Pa.*, 140 S. Ct. 1104 (2020). The decision in *Fulton* granted that the anti-discrimination law was neutral and generally applicable because the plaintiff "failed to make a persuasive showing that the [c]ity targeted it for its religious beliefs." *Id.* at 147. This appealed decision from the Third Circuit is a partial finding on neutral and general applicability under the generally applicable prong of the *Smith* standard because it concludes that

the government did not preferentially treat "someone who engaged in the same conduct but held different religious views." *Id*. at 153.

The Second Circuit in *New Hope Family Servs., Inc. v. Poole*, identified the *Smith* standard as pending further review under *Fulton*, yet applied the *Smith* standard in the light most favorable to the plaintiff. 966 F.3d 145, 162 (2d. Cir. 2020). ("*New Hope*") The decision pertained to a motion to dismiss for failure to state a claim regarding an adoption agency that was privately funded and not under government contract. *Id.* at 164. The complaint came five years after the implementation of the equal opportunity policy. The governing body had failed to raise an issue with the agency's practices even though they violated the law. *Id.* at 166. The Second Circuit reviewed "the effect of a law in its real operation" under Lukumi to find that the city did not adequately justify its closure of the privately funded adoption agency. *Id.* The Court came to this conclusion because, for years after the implementation of the equal opportunity policy, the governing body had failed to raise an issue with the agency's practices. *Id.* Additionally, the Second Circuit held that '[t]his case is not analogous to *Fulton* . . . because" the city did not identify the adoption agency "as a public accommodation." *Id.* Whereas in *Fulton*, the plaintiff fails to prove that the government has not tried to advance a legitimate interest by burdening only religious conduct.

The EOCPA is generally applicable on two grounds. First, it is not underinclusive of conduct that promotes HHS's interests. The conduct regulated by the EOCPA is not only applicable to religiously motivated conduct but also secular conduct. Second, the EOCPA has applied even-handedly to all adoption agencies. The operation of the EOCPA is generally applicable both in theory and in practice.

Unlike the laws of *Lukumi* that were substantially lacking in the prohibition of secular conduct, the EOCPA has a strict application across all platforms: discrimination is not tolerated. The record makes evident that there are certain classes of persons, besides same-sex couples that fall under the EOCPA's purview. R. at 6. The restrictions on discrimination put in place are not solely religiously motivated animosities. If the law was substantively lacking in inclusivity, then it could be perceived that the EOCPA's amendment was implemented to target or limit religiously motivated conduct. However, the EOCPA includes other protected classes of peoples and applies to all the child placement agencies that contract with HHS. Therefore, it is readily distinguishable that the overall operation of the EOCPA is a generally applicable standard.

The District Court contends that because HHS utilizes some form of discrimination when it places children, as noted in stipulated facts five and seven, that HHS is allowing "ad-hoc exemptions" from the policy. R. at 8-9, 13. This assertion is misplaced because the EOCPA does not govern HHS's conduct and ultimate discretion in placing children. Since the EOCPA does not apply to HHS, the determination of even applicability rests on its application to the agencies.

The record is devoid of a history of enforcement of the EOCPA. However, that should not skew this Court's decision that the EOCPA is a generally applicable law. The most recent amendment of the EOCPA occurred in 2017. R. at 12. HHS terminated AACS's contract one year later, for failure to comply with the most recent amendment. R. at 7. There is a sufficient lack of precedent on how far back a court must look to determine if the law was applied evenly. However, this lack of history, both pre- and post- amendment, coupled with the short amount of time the law has been in place, should lead this Honorable Court to conclude that thirty-four other adoption agencies comply with the EOCPA. Since there are thirty-four agencies holding contracts and none, to this point, are out of compliance, then the law is being generally applied and adhered to.

The EOCPA is generally applicable because it includes secular and non-secular conduct and because it was applied evenly without targeting religious conduct.

B. The EOCPA does not burden AACS's right to free exercise because it passes strict scrutiny.

The EOCPA is "neutral" and "generally applicable." However, even if it were subject to a strict scrutiny analysis, it would not violate the Free Exercise Clause. A two-component test assesses strict scrutiny: there has to be a "compelling governmental interest," and the compelling government interest must then be a "narrowly tailored" avenue to "advance that interest." *Lukumi*, 508 U.S. at 531-32. The interest in placing children is a compelling government interest. The EOCPA is enforced in the most narrowly tailored avenue possible to further this type of government interest. The EOCPA necessarily passes strict scrutiny. Compliance with the EOCPA is the least restrictive means the government can impose to advance that interest

1. The EOCPA passes strict scrutiny because the interest regulated by the EOCPA is a compelling government interest.

The interest posed by the EOCPA is compelling because it provides children in foster care with the opportunity to have a home that is just as diverse as they are. Government interests are not compelling when restrictions are placed "only [on] 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." *Lukumi*, 508 U.S. at 546-47. "The compelling interest standard . . . is not 'water[ed] down'" but must "really mean[] what it says." *Smith*, 494 U.S. at 888. Interests are not compelling if the very reason for the interest is to restrict religion. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). The EOCPA restrictions apply to both secular and non-secular agencies. Since the government's main interest in contracting with

privatized entities such as AACS is to provide homes for the children in foster care, the restrictions are a part of a compelling governmental interest.

The Supreme Court's decision in *Lukumi* sheds light on evaluating a law's compelling government interests. 508 U.S. at 538- 39. The respondents enacted laws that restricted the petitioner's right to practice its religion freely and were largely underinclusive. *Id.* at 547. The Court held that the respondent's attempted regulation was not a compelling government interest because the actions taken were "not to effectuate the stated governmental interest, but to suppress the conduct because of its religious motivation." *Id.* at 538.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the petitioner operated a religious-based childcare program. 137 S. Ct. 2012, 2017 (2017). The respondent offered grants to childcare facilities to replace the footing of playground facilities with recycled tires. *Id.* The petitioner applied in hopes of receiving one of those grants. *Id.* The respondent denied the petitioner's application to receive a grant because the respondents had a policy that rejected any grant benefit to religiously affiliated organizations because the state had a "constitutional tradition of not furnishing taxpayer money directly to churches." *Id.* at 2023. The Supreme Court held that the respondent's regulation that prohibited its ability to give a grant to a religiously affiliated childcare agency violated the petitioner's free exercise rights because it could not pass strict scrutiny. *Id.* The interest provided by the respondent was not compelling because "the state interest asserted here . . . achieving greater separation of church and State than is already ensured . . . is limited by the Free Exercise Clause." *Id.* at 2024.

The fact that HHS imposes a restriction upon AACS's contract that requires them to follow guidelines it may not agree with does not automatically flag HHS's conduct as violating a First Amendment right. There are two reasons that HHS's interests are compelling. First, providing

homes to children in the overworked foster care system is a public interest. Second, there is a significant interest in ensuring that there is a lack of bigotry when same-sex couples want to adopt.

The EOCPA protects one of the most protected classes of peoples in the United States, not the same-sex couples wanting to adopt, but the children that are vulnerable by the mere circumstance they find themselves in as wards of the state. HHS is ensuring that these children do not get overlooked when placed. The EOCPA provides various considerations when children are to be placed, including race, medical needs, disabilities, cultural backgrounds, and ethnicity. R. at 3-4. Removing same-sex persons from the list of prospective parents would make it even harder to provide these vulnerable children with the homes they need.

Since the EOCPA amendment came out, children that have identified as LGBTQ are given a preference to be placed in homes with like sexual orientation. R. at 6. Placing these children can pose more significant risks. There are no guarantees that heterosexual parents will receive these children in the same loving capacity that they would if placed with same-sex families. By continually allowing AACS to discriminate against same-sex couple's HHS would jeopardize the ability to have the homes needed to place these children. While it is progressive to consider LGBTQ families amongst the adoption and foster care platform, "placement in a family that can provide love and care is firmly in the child's best interest." Samantha R. Lyew, *Adoption and Foster Care Placement Policies: Legislatively Promoting the Best Interest of Children Amidst Competing Interests of Religious Freedom and Equal Protection for Same-Sex Couples*, 42 J. Legis. 186, 189 (2016) (discussing the foundational premises behind placing children in adoptive homes). As the responsibility of the government and the ultimate future of this nation, providing children with families in which they can flourish is absolutely a compelling government interest.

The EOCPA's amendment after *Obergefell*, while controversial to AACS, is vital to the overall facilitation of the child welfare program. The elimination of bigotry towards same-sex persons as a protected class is compelling in its own right. However, this particular class, filtered down to those who want to adopt, is substantially more compelling. "Same-sex couples are more likely to adopt 'hard to place children.' This term encompasses many scenarios, such as sibling groups, disabled children, older children, children with complex needs or behavioral issues, and children who are ethnic minorities." Allison M. Whelan, *Denying Tax-Exempt Status to Discriminatory Private Adoption Agencies*, 8 UC Irvine L. Rev. 711, 721 (2018) (discussing the place of same-sex couples within the adoption realm). Parenting is a hard job itself, but same-sex couples are willing to take the most challenging jobs necessary to become parents, and that should warrant their protection.

There are no guarantees that referred children are refugees. While AACS prides itself on the placement and care of refugee children, they must be readily available to place any child that comes its way. Additionally, refugee children may also have an identified sexual orientation. Since children within the system are diverse, and same-sex couples are ready and willing to support the diversity those children need, AACS and every adoption agency that contracts with HHS should be required to maintain a list of prospective parents that's as diverse and inclusive as the children needing placement. The city of Evansburgh and HHS take great responsibility in placing these children, and that is a compelling government interest.

2. The EOCPA passes strict scrutiny because it is implemented in a narrowly tailored format.

The strict scrutiny analysis then rests on the concept of a narrowly tailored law to forward the compelling governmental interest of finding foster care children homes. A compelling governmental interest will not be narrowly tailored when the content that the law seeks to restrict

is "underinclusive in substantial respects." *Lukumi*, 508 U.S. at 546. Moreover, the law cannot "leave[] appreciable damage to that supposedly vital interest unprohibited." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015). The government must also "show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion . . . ." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). Since the EOCPA regulations apply to both secular and non-secular conduct, it passes the narrowly tailored element of strict scrutiny.

In *Lukumi*, the Supreme Court held that even assuming the interests were compelling, which they were not, the laws would have failed strict scrutiny because they were "overbroad or underinclusive" of secular conduct. 508 U.S. at 546 (1993). The respondent's enacted laws only restricted the conduct of the petitioner's religious practice of animal sacrifice. *Id.* at 533-35. Since the laws were enacted to restrict the church's ability to exercise its religion freely; instead of limiting the slaughter of animals outside food consumption contexts by leaving conduct such as fishing or hunting outside the scope, the law was underinclusive of the proposed interests. *Id.* at 547.

The Eleventh Circuit held in *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, that the city ordinance did not satisfy a strict scrutiny analysis when the interest was not compelling nor was the ordinance narrowly tailored. 2 F.3d 1514 (11th Cir. 1993). The ordinance's purpose was to restrict the abilities of charitable organizations from being able to solicit for funds without filling out a specified form and providing specific information. *Id*. at 1523. The Court noted that certain provisions of the ordinance were narrowly tailored. *Id.* at 1547. Since the provisions were not narrowly tailored as a whole and there were other means less restrictive to further the interest of the government, the ordinance was not sufficient to pass strict scrutiny. *Id.*

In *Ward v. Polite*, the Appellee filed suit claiming the Appellant had infringed on her right to free exercise when they expelled her from a graduate program for referring a homosexual client because her religious convictions prevented her from affirming that type of relationship. 667 F.3d 727, 730 (6th Cir. 2012). The program had a history of allowing referrals for various secular reasons. *Id.* at 736. When the Appellee requested to refer a client based on religious values, the Appellant reprimanded her, which led to her ultimate dismissal from the program. *Id*. The Sixth Circuit held that the Appellant had failed to show a compelling interest, and the fact the Appellant had allowed referrals on various other occasions had undermined the ability to claim the denial was in furtherance of that interest. *Id.* at 740.

The EOCPA is the least restrictive avenue HHS can take to promote its compelling government interest. Therefore, the EOCPA is not underinclusive in regulating its compelling interest. Additionally, there are not any other logical means to further this interest while still allowing AACS to discriminate.

The enforcement of the EOCPA is not contradictory in its application. Unlike the laws of *Lukumi* and *Ward*, where the policy allowed so many exemptions that it was inherently obvious it targeted religious practices, the EOCPA does not allow for exemptions. AACS contends that it has not prevented same-sex persons from adopting; it merely refers them to an alternate facility. R. at 7. However, missing from the record is a policy explicitly allowing this practice and a history of other facilities doing it. Allowing AACS to practice exemptions is a slippery slope leading to an ultimate undermining of the law. This practice would allow anyone with a conscientious objection to serving a protected class the ability to discriminate.

Absent is another avenue for HHS to pursue the enforcement of its compelling interest. The most restrictive means for HHS to further its interests would be to deny a contract with AACS

in any capacity. That is not what is happening here. HHS is still willing to contract with AACS as long as they comply with the law; AACS has a religious objection available to them. R. at 6. While this objection does not relieve them of the duty for them to comply, it allows for transparency. This way, parents who wish to utilize AACS's services will understand fully that the EOCPA's statement of equal protection is not AACS's belief.

HHS's enforcement of the EOCPA on AACS is because of its contract, which makes the adoption services it provides a public commodity. Since the contract is paid with public funds, the public should have access to the services they are paying for, regardless of their sexual orientation or status in a protected class. HHS has narrowly tailored its restrictions by allowing AACS to believe and make its religious message transparent, while still complying with the law.

II. THE EOCPA DOES NOT VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BECAUSE HHS DID NOT COMPEL AACS'S SPEECH AND AACS'S SPEECH IS GOVERNMENT SPEECH.

The enforcement of the EOCPA upon AACS did not violate AACS's First Amendment right to freedom of speech under the Unconstitutional Conditions Doctrine because their speech was neither compelled by HHS and any subsequent speech is government speech. "Congress shall make no law . . . abridging the freedom of speech" U.S. Const. Amend. I. "Freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47 (2006)).

The Supreme Court and various Circuit Courts of Appeals have addressed the situation of free speech claims when government funds are involved and have noted unilaterally that the source of the money is unimportant. Federal rules still apply when the financial pocket is the state. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Locke v. Davey*, 540

U.S. 712 (2004); *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631 (7th Cir. 2017); *Teen Ranch, Inc. v. Udow,* 479 F.3d 403 (6th Cir. 2007). Additionally, the freedoms that are encompassed by the First Amendment are incorporated to the states by the Fourteenth Amendment and also protected in that capacity. *Cantwell v. Conn.*, 310 U.S. 296, 303-04 (1940).

The EOCPA does not compel AACS to speak a message with which they disagree. Additionally, the purpose of the contract is not to facilitate private speech, but to facilitate placement of children with prospective parents. R. at 3, 23. HHS did not violate AACS's First Amendment rights to freedom of speech when it required AACS to comply with the valid provisions of the EOCPA.

A. AACS's First Amendment right to freedom of speech was not violated because HHS did not compel AACS's speech.

Since the contract between AACS and HHS did not compel AACS to speak or adopt a message that it did not agree with, AACS's First Amendment rights to freedom of speech were not violated. The First Amendment provides that a person has "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The protections of freedom of speech "prohibits the government from telling people what they must say." *Agency Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47 (2006)). Alternatively, the government cannot force one to "adopt the government's views as their own," or require that the organization's funding is contingent upon the adoption of that view. *Id.* at 218. However, when the government funds a program, "it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). That does not mean that the government has the right to "deny a benefit to a person on the basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

The Supreme Court held in *Rust v. Sullivan*, that the regulations imposed on Title X recipients were allocable under the law. Recipients of Title X funding were not allowed to provide statements about abortion as a method of family planning since the government authorized Title X funding to provide access to "preventative family planning services." *Id.* at 178-79. One of the complaints was that the restriction was a violation of First Amendment rights because, among others, the regulation placed a burden on their right to free speech. *Id.* at 192. The Supreme Court rejected that argument on the grounds the government was only placing restrictions on speech that occurred during programs that were supported by government funding. *Id.* at 196. The recipient still possessed the ability to speak about abortion when conducted in environments "that are separate and independent from the project that receives Title X funds." *Id.* at 197.

The Supreme Court also found in *Rumsfeld v. Forum for Acad. And Inst. Rights, Inc.*, that the Solomon Amendment did not create unconstitutional conditions by placing certain restrictions on the receipt of federal funds. 547 U.S. 47, 60 (2006). The coalition of law schools attempted to discredit the Solomon Amendment as a violation of their respective rights to freedom of speech. *Id.* at 53. The Solomon Amendment required that for schools to receive federal funding, the military must have recruiting access that "is at least equal in quality and scope . . . that is provided to any other employer." *Id.* at 55. The Court noted that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse. *Id.* at 62. In this capacity, the law school's speech was not regulated because it was not "inherently expressive" or "restrict[ed] what the law schools may say about the military's policies," it merely required that military recruiters be offered the same access as other recruiters. *Id.* at 65.

Agency Int'l Dev. v. All. for Open Soc'y Int'l, Inc., shows the other side of government contracts, the government cannot make funding contingent on an organization adopting the

government's position. 570 U.S. 205, 218 (2013). ("*AOSI*") The government conditioned funding on the requirement that organizations "explicitly oppos[e] prostitution and sex trafficking." *Id.* at 210. The Supreme Court would note that the issue presented was different than that of *Rust*. The recipients of these funds could not oppose prostitution and sex trafficking while utilizing government funding and then subsequently claim a "contrary belief . . . when participating in activities on its own time and dime." *Id.* at 218.

The facts of *AOSI* make it distinguishable from what is present in this case. In *AOSI*, the government was requiring that the funded organization specifically denounce something, without any exemption. The government, in this case, is giving AACS multiple avenues to find compliance. First, AACS can post the equal opportunity portion required by the statute and certify couples even when their marital status is against its religious beliefs. Second, AACS can post its religious objections to the equal opportunity portion on its premises and continue to provide services while making it known that the statements do not conform with AACS's religious beliefs. Finally, AACS could choose to decline the government's monetary benefit because it does not agree with either. Multiple available pathways for compliance does not equate to forcing AACS to comply.

Since the facts are readily distinguishable from *AOSI*, *Rust* aligns more favorably to the facts of this case and should be controlling. HHS can define the terms and conditions of its contracts with private companies and has been working in conjunction with thirty-four privatized child placement agencies according to those terms and conditions. R. at 3. After noticing the shortage of adoption and foster care homes available, the city facilitated these contracts. *Id.* AACS was formed in 1980, eight years after the state adopted the EOCPA. R. at 4-5. AACS operates to provide community services to refugee children, including services as both a privatized child

placement agency and a government utilized agency, bringing it into the focus of *Rust*. R. at 5. AACS can abide by the government's contractual requirements by either posting a sign noting their compliance with all of the EOCPA, including the equal protection it provides to same-sex couples, or AACS can post a "written objection to the policy" on its premises. R. at 6. AACS is refusing to do either.

Similar to the Solomon Act of *Rumsfeld*, the EOCPA does not require AACS to expand its speech to include messages beyond what it would like to say. HHS is not contending that AACS promotes a belief that it does not condone because there is an objection available. If HHS desired to compel the beliefs of AACS, it would not offer an avenue for compliance while still upholding the agency's religious objections. Additionally, posting the written objection allows any onlooker to note that the requirements imposed by the EOCPA are not viewpoints of AACS, thus eliminating any argument that others may interpret the sign to be the viewpoint of the agency. Since there is no ambiguity as to the viewpoint of AACS, there is no compelled speech. As a result, there was not a violation of AACS's First Amendment right to free speech.

B. There was not a violation of AACS's First Amendment right to freedom of speech because AACS's speech is considered government speech.

AACS entered into a contract with HHS to provide a secular public service to HHS, and the scope of that contract created a nonpublic forum that was not intended for the use of private speech, precluding the claim of a free speech violation. There are limitations on the government's ability to control speech when it occurs in particular forums. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). The government also can use private speakers to promote its public message when it funds a program. *Rust v. Sullivan*, 500 U.S. 173 (1991). Since the contract between HHS and AACS was to provide referrals and not to promote any public forum

and because AACS's speech was not private, its First Amendment rights to free speech were not violated.

1. The forum created by HHS and AACS is nonpublic because it is a restricted access platform.

HHS did not create a public forum by contracting with AACS because in no way is the platform created by the two recognized as a public forum. The creation of nonpublic forums occurs when there is "selective access," and the forum is "unsupported by evidence of a purposeful designation for public use." *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985). ("*Cornelius*") There are two guiding factors to determine if limitations on government speech in nonpublic forums are allowed; (1) "the regulation . . . is reasonable" and it must "not [be] an effort to suppress expression merely because public officials oppose the speaker's view" *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). ("*Perry*") Even when expressive activity occurs within the nonpublic forum, it does not automatically convert into a "public forum for First Amendment purposes." 473 U.S. at 805.

In *Perry*, the Appellee brought suit claiming that a school district's restriction of teacher's mailboxes violated its First Amendment rights. 460 U.S. at 41. The Supreme Court held that a school's internal mail system was a nonpublic forum, and the restrictions of the Appellee's access were authorized. *Id.* at 49. The school used the mail system for school-to-school information and communications from the district. *Id.* at 39. The school would occasionally allow outside organizations to use its internal mail system to provide information. *Id.* When the school officially unionized with the Appellant, it restricted access to mailboxes only to the Appellant's union. *Id.* The school did allow selective access to organizations that provided information geared towards the students. *Id.* at 47. The Court rejected Appellee's argument that it should be granted access to the mailboxes because the school has opened them to organizations geared towards students and,

in doing so, created a limited public forum. *Id.* The Court reasoned that even if it were a limited forum, the Appellee's organization would not fall within a class allowed to use that limited public forum. *Id.* There was also a sufficient lack of evidence that the school had purposely restricted Appellee's viewpoint. *Id.* at 48. Further, the Court noted that allowing certain types of communication does not automatically trigger a forum change. *Id.* at 47.

In *Cornelius*, the respondent brought suit alleging that the petitioner's restriction of respondent's organizations was a violation of their First Amendment rights. 473 U.S. at 795. Petitioners were legal defense organizations who were explicitly excluded from participation in respondents "charity drive aimed at federal employees." *Id.* at 790. The Supreme Court had determined the type of forum the charity campaign created as a nonpublic forum. *Id.* at 805-06. The first reason behind the nonpublic forum determination was that the purpose of the campaign was not to allow "expressive activity." *Id.* at 805. The second reason was that the government's practice of selecting which organizations could participate and which ones could not be sufficient to show the selective access the campaign provided. *Id.* at 806. In light of this finding, the Supreme Court noted that the petitioner had exercised reasonable restrictions; however, the Court remanded the case to ultimately determine if the organizations were exiled because of their viewpoints. *Id.* at 813.

In *Grosjean v. Bommarito*, Appellants brought suit claiming their First Amendment rights were infringed by restricting what they were allowed to say in Appellee's benefits program. 302 Fed.App'x 430, 432 (6th Cir. 2008). Appellee's program was to assist with appeals in worker's compensation cases by providing the information of advocates that could help with the process. *Id.* at 432. The appellants filled out templates provided by Appellees and in their information included biblical verses. *Id.* at 434. The Appellee's had a clear rule that they could edit the

information at their discretion. *Id.* After discovering the religious passages, Appellee edited the passages out of the information provided and likewise edited other submitted information to exclude details deemed unrelated. *Id.* The Sixth Circuit held that the information provided by the Appellees was a nonpublic forum because there was a limited ability for participation, and the requirements to even be able to participate were so narrowly tailored that there was no way to infer that there was an intended public forum. *Id.* at 440.

Forum determination is like selecting which type of filter applies to speech. A public forum is the same as saying that speech goes unfiltered. A public forum provides access to everyone, and there are very few, if any, restrictions allowed. *Perry*, 460 U.S. at 48. As the filtration of speech progresses, a designated forum is created. Designated public forums provide less access to everyone, which allows for more restrictions on what can freely be said. *Id.* Further filtration of a forum offers for the most restrictive medium, a nonpublic forum. Nonpublic forums allow more significant restrictions on speech, only requiring the restriction to be reasonable and not because of the speaker's viewpoint. *Id.* at 46.

As held in *Cornelius,* the forum does not have to be property, but instead can be a "means of communication." *Id.* at 802. In this instance, the forum was the contract between HHS and AACS and the communication between the two parties to provide referrals. The forum created by the contract between HHS and AACS was a nonpublic forum. Similar to the forum created by *Grosjean*, it cannot be said that this type of contract, which requires AACS to maintain certain requirements and "seek permission" to be a part of it, is analogous to a situation that creates a public forum. Not every member of the general public can take advantage of the government contract; they merely can take advantage of the benefit the contract provides to the public, further annotating the restrictive ability of the forum.

Since this is a nonpublic forum, there are only two limitations on HHS's ability to restrict speech. First, the government is imposing a reasonable restriction on AACS speech while engaging in its governmental contract. The restriction is reasonable because HHS allows AACS to object to the EOCPA, which emphasizes the fact that AACS's free speech rights are not being violated. Second, the reason for the restriction is not to impose upon AACS's sincerely held religious beliefs but is instead to ensure that all classes of prospective parents are treated equally, ensuring that the most diverse group is available. The forum creates a platform for conduct. Even though speech occurs in the nonpublic forum, the Supreme Court has long held that the mere presence of it does not require a finding that the forum is, or was turned into, a public or designated public forum.

A nonpublic forum allows for the most restrictions on speech, and all HHS must show is that the limits are reasonable and that it is not discriminating against AACS solely because of their religious beliefs. The restrictions are well within the means of the government's power. Additionally, there is nothing in the record to show that HHS is enforcing the EOCPA because of AACS's viewpoints. Therefore, the contract between HHS and AACS created a nonpublic forum.

2. AACS's free speech rights were not infringed upon because it is a government speaker.

AACS's speech was government speech and, therefore, not subject to First Amendment violations. The creation of a contract between the government and a private person does not automatically regulate speech as private speech. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007). Additionally, the government is not excluded from utilizing the "government-speech doctrine" when it receives "assistance from nongovernmental sources . . . ." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005). This concept does not, however, give the government the ability to provide its "seal of approval" on private speech to "silence or muffle the expression of

disfavored viewpoints." *New Hope*, 966 F.3d 145, 171 (2d Cir. 2020) (quoting *Matal v. Tam*, 137 S. Ct. 1744 (2017)).

However, when speech is deemed government speech, the government is entitled "to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 833 (1995). There are several elements on the weight of the factors to assist the Court in evaluating speech according to its appropriate category. Governmental speech is often found when the "government sets the [] message . . . and approves every word." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005). ("*Johanns*") The government is controlling speech when it "sets the overarching message" and retains "final approval authority." *Id.* at 561.

In *Johanns*, respondents brought suit alleging that the government was infringing on their first amendment rights by forcing them to subsidize speech they disagreed with. 544 U.S. at 556. Respondents were organizations whose responsibility was to assess and collect checkoffs for a nationally-funded campaign. *Id.* at 555. Checkoffs were then used for various projects, including advertisements. *Id.* The petitioner was in charge of appointing members to the board, authorizing advertisements, and general supervision of the program. *Id.* at 559-61. The Supreme Court rejected the respondent's argument citing that the speech in question is government speech. *Id.* at 560. The government maintained the ultimate control of the entire program since it set the "overarching message" and retained "final approval authority," *Id.* at 561-62. The Court held that the government still "effectively controlled" the program and that it merely "solicit[ed] assistance" from outside sources. *Id.* at 562.

In Pleasant Grove City v. Summum, the respondent brought suit alleging that the petitioner had infringed on its rights to free speech by refusing the respondent's proposal to place a monument that portrayed a religious message in the city park. 555 U.S. 460, 464 (2009). The respondent relied

on the fact that the petitioners had previously placed monuments that were donated by private entities to support its allegation that the respondents were discriminating against its viewpoint. *Id.* at 466. The Supreme Court rejected this allegation, citing that while a public park is typically a public forum where all have the full protections of the First Amendment, the speech required by the erection of a monument would be government speech and thus not subject to First Amendment protections. *Id.* at 472. The monuments were deemed government speech because an onlooker would associate the monument with the viewpoint of the government; the messages were effectively controlled by the city, and the city retained final approval authority. *Id.* at 472-73.

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., a non-profit organization, brought suit alleging that its First Amendment rights had been violated when the state rejected its design for a proposed license plate. 576 U.S. 200, 207 (2015). The Supreme Court held that the license plates in question presented government speech. *Id.* at 208. The license plates were government speech for three reasons: history, identification with the state, and state control. *Id.* at 210-13. The Court noted that there was a long history with license plates conveying state-supported messages. *Id.* at 210. Additionally, the license plates were produced by the state to promote a "governmental purpose." I*d.* at 211. Finally, the government retained control over specialty license plates and had the authority to accept or reject various designs or patterns as they pleased. *Id.* at 212-213.

In *New Hope*, the Appellant adoption agency filed suit alleging that its right to free speech was infringed upon when the Appellee imposed a law that prohibited them from discriminating against same-sex couples even though it was against the Appellant's religious beliefs. 966 F.3d 145, 149 (2d Cir. 2020). The district court dismissed the free speech claims citing that the speech involved was government speech; the Second Circuit reversed. *Id.* at 171. The Appellants were

not government-funded and had specifically refused government funds to maintain its religious message. *Id.* at 172. The Court held that the "subsidized speech" precedent would not govern and remanded the free speech claim for further proceedings on three grounds. *Id.* at 174. First, adoption was not a historic government means of communication. *Id.* Second, the Appellant had established its own "private identit[y]" and could not be seen as conveying a state's message. *Id.* Third, the Appellant retained final approval authority on its decisions to place children. *Id.* at 175.

AACS's speech is government speech for three reasons: HHS controls the overarching message of the program; in this instance, adoption is readily identifiable with the state; and at all relevant times, HHS maintains control. Similar to the government's position in *Johanns*, HHS is in control of the overall message of the program. If HHS was not controlling the overarching message of the program, then AACS would be free to select recommendations based on whatever criteria that it saw fit. However, that is not what happens within this program. HHS has implemented four standards that agencies must use as its guide to select families for recommendation. R at 4. The specific set of criteria is applicable because AACS has sought a contract with HHS and would not be controlling upon AACS if it were acting without any governmental assistance. No precedent binds this Court to the conclusion that because AACS is not itself a governmental entity that it is exempt from abiding by the terms of a governmental contract. The terms of the contract between HHS and AACS allowed HHS to hold control over the message of the program by implementing operating criteria and controlling the overall outcome of operations.

For many years private adoption agencies have long operated alongside the government with little to no oversight. Recognizing the overrun system needed support, HHS has reached across the line between government and private to provide the best available options for finding

foster and adoptive homes. While AACS remains a privatized agency, there are two reasons why it and other agencies that contract with HHS are easily identifiable with the state. First, AACS is getting some of its children from HHS. That fact is made readily identifiable when a family browses HHS's webpage and finds AACS's contact information. R at 5. When this family reaches out to AACS, they are aware that their prospective child is most likely coming from HHS, not from a selection of children that AACS has. Additionally, if a family is lucky enough to be recommended, they will then be aware that the child they are receiving is in HHS care. If the prospective pool of people who are willing to adopt are aware their child is most likely coming from the state, then it should be held that adoption is readily identifiable with the government. Second, the EOCPA is not a hidden law that is restricted from the public's view. The Evansburgh Times is aware of the EOCPA and the requirements it has. R. at 6. In addition to the news media being aware and making the public aware, AACS is listed on HHS's website. R. at 5. This makes it readily transparent that private agencies and HHS are working together, allowing for the reasonable inference by the public that adoption is a state-run program.

While AACS is in control of its organization, it is not in control of the overall exercise of the adoption process. HHS retains the final authority to deny a placement. R. at 3. AACS can make recommendations, but HHS is the end-all-be-all. HHS exercised this authority on numerous occasions. While HHS has taken agency recommendations, like AACS's recommendation about the placement of refugee children in homes of a different sect, it has retained the right to implement the program how it sees fit. R. at 8. AACS was fully aware of HHS control over the program and consistently ratified HHS control when it entered into a new annual contract over the last forty years. R. at 5. While AACS has the ability to make recommendations, the final authority has always belonged to HHS.

Finally, the present case is readily distinguishable from the facts of *New Hope*. The precedents of the government speech doctrine did not apply to *New Hope* because there was not a relationship between the adoption agency and the government. Here, there is a contractual obligation between HHS and AACS. That contractual obligation, taken into account with the total control HHS exercises in implementing its program, is sufficient to warrant government speech doctrine cases controlling. It must follow then that AACS's First Amendment right to freedom of speech was not violated.

CONCLUSION AND RELIEF SOUGHT

For these reasons, the Appellant respectfully requests this Court to uphold the decision of the Appellate Panel and reverse the decision of the District Court of the Western District of East Virginia.

Dated: September 14, 2020

Respectfully Submitted,

Team 8
Attorneys for Appellant