Case No. 2020-05

20TH ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

DEFENDANT-APPELLANT,

v.

AL-ADAB AL-MUFRAD CARE SERVICES,

PLAINTIFF-APPELLEE.

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

TEAM 9

COUNSEL FOR THE APPELLEE

QUESTIONS PRESENTED FOR REVIEW

I. Whether HHS, under the Court's precedent in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), may use a facially neutral statute, which has the object of covert religious discrimination, to condition a public benefit upon the preclusion of AACS's free exercise of their sincerely held religious beliefs.

II. Whether, under the Court's precedent in *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013) and *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), HHS may use an anti-discrimination law to compel an agency with which it contracts to engage in speech it fundamentally disagrees with in exchange for public funding.

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STATEMENT OF JURISDICTION

The United States District Court for the Western District of East Virginia had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The District Court granted Appellee's motions for a Temporary Restraining order and an injunction under Fed. R. Civ. P. 65, finding that Appellants did violate Appellees First Amendment rights of Free Speech and Free Exercise. The Appellant appealed. The United States Court of Appeals for the Fifteenth Circuit asserted jurisdiction to review the District Court's judgment pursuant to 28 U.S.C. § 1292(a)(1). The Court of Appeals reversed the District Court's judgment. The Court of Appeals for the Fifteenth Circuit granted a petition for Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35(a)(2). This petition is being timely filed, "within 45 days after entry of judgment," pursuant to Federal Rule of Appellate Procedure 40(a)(1).

STANDARD OF REVIEW

In granting a petition for a rehearing en banc, the Federal Rules of Appellate Procedure allow for a case to be reviewed if "the proceeding involves one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1)(B). A petition for rehearing on this ground is limited to "only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 587 F.3d 156, 160 (2nd Cir. 2009).

Upon rehearing, the proper standard of review is *de novo*. *Alberti v. Klevenhagen*, 790 F.2d 1220, 1225 (5th Cir. 1986) ("[O]nce the facts are established, the issue of whether these facts constitute a violation of constitutional rights is a question of law that may be assayed anew upon appeal."). "Subsidiary legal questions . . . are likewise reviewed de novo." *Kosilek v. Spencer*, 774 F.3d 63, 84 (1st Cir. 2014). A *de novo* standard of review is one wherein the appellate court is not "wed to the district court's rationale but, rather, 'may affirm on any independent ground made

evident by the record.'" *Lawless v. Steward Health Care Sys.*, LLC, 894 F.3d 9, 21 (1st Cir. 2018) (quoting *González-Droz v. González-Colón*, 660 F.3d 1, 9 (1st Cir. 2011)). No facts are at issue in this case and the proper standard of review is *de novo*.

STATEMENT OF FACTS

Al-Adab Al-Mufrad Care Services ("Appellee" or "AACS") is a non-profit adoption agency run by Sahid Abu-Kane ("Abu-Kane") in Evansburgh, East Virginia whose goal is to "provide support to the refugee population." R. at 2. Since its inception in 1980, AACS, along with 34 other adoption agencies, has partnered with the Department of Health and Human Services of the City of Evansburgh ("Appellant" or "HHS") to provide foster care and adoptive services, particularly in response to the high numbers of refugee children being resettled in Evansburgh. *Id*. The refugee population comes from a variety of international backgrounds, which include Ethiopia, Iraq, Iran, and Syria. *Id*. In its mission statement, AACS states that "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." R. at 5.

The contract between AACS and HHS allows for AACS to receive public funding in exchange for its promise to "provide services that consist of home studies, counseling, and placement recommendations to HHS," R. at 3, and "provide appropriate adoption services, including certifications that each adoptive family is thoroughly screened, trained, and certified." R. at 5. One of the terms of the contract between the parties is that AACS comply with all "laws, ordinances, and regulations of the State of East Virginia and the City of Evansburgh" in order to maintain its public funding. R. at 5-6.

The Equal Opportunity Child Placement Act ("EOCPA") was enacted in 1972 to, in pertinent part under E.V.C. § 42.-2, proscribe "discrimination on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families" by child placement services. R. at 4. The EOCPA was amended in 2015 in response to the Court's decision in *Obergefell v. Hodges*, when ". . . the Governor of East Virginia directed the Attorney General to conduct a thorough review of all state statutes to identify which ones needed to be amended to reflect the commitment to 'eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry.'" R. at 6. It required that "before funds are dispersed pursuant to the contract with a governmental entity, the Child Placement Agency must sign and post at its place of business" the anti-discrimination provision of E.V.C. § 42.-2. R. at 6. Under the amended EOCPA, "religious-based agencies" may post "a written objection to the policy" on their property. *Id*. However, the EOCPA allows for discrimination by child placement agencies "where the child to be placed has an identified sexual orientation," at which point the agencies "must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." E.V.C. § 42.-3(c). R. at 6.

However, HHS has allowed for exceptions to the application of the EOCPA. R. at 8-9. "HHS placed a white special needs child with an African American couple. Three other adoption agencies had screened and certified white adoptive families for the child." *Id*. Furthermore, "HHS refused placement of a 5-year old girl with a family consisting only of a father and son, even though this family was otherwise certified by the sponsoring adoption agency." *Id*.

"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.

As a religious-based agency, AACS's beliefs prohibit it from working with same-sex couples as potential foster or adoptive parents. R. at 7. However, AACS has never been formally accused of discriminatory treatment by a same-sex couple seeking to adopt. *Id*. In its forty years of business, whenever a same-sex couple sought adoption services from AACS, it respectfully referred them to other agencies, including the four specific agencies that worked with the LGBTQ community in the state of East Virginia. R. at 7, 8.

In July 2018, Commissioner Christopher Hartwell ("Hartwell") of HHS sought to ensure that all religious-based agencies had been adhering to the amended EOCPA. R. at 6. AACS director Abu-Kane told Hartwell of the sincerely held religious beliefs of AACS, and Hartwell responded with a letter warning AACS that non-compliance with the amended EOCPA would result in non-renewal of their contract and a referral freeze on their adoption services. R. at 7. The referral freeze meant that "all other adoption agencies serving Evansburgh . . . would be ordered to 'refrain from making any adoption referrals to AACS unless AACS provided to HHS, within 10 business days, full assurance of its future compliance with the EOCPA." R. at 7-8.

Throughout AACS's forty year history, it has helped place thousands of children in loving adoptive homes, R. at 5, and maintains that it is "not discrimination to follow the teachings of the Qur'an because 'Allah orders justice and good conduct.'" R. at 7 (internal citations omitted).

Since the referral freeze was instituted against AACS, "HHS has issued an urgent notice to all Child Placement Agencies stating the need of more adoptive families because of a recent influx

of refugee children into foster care." R. at 8. Unfortunately, since the freeze, "a young girl whose two brothers had been placed by AACS with a family was placed with another family by another agency. . ." *Id*. Additionally, "a five-year-old autistic boy was denied adoption placement through AACS with the woman who fostered him for two years." *Id*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Free Exercise Clause and the Free Speech Clause of the First Amendment to the United States Constitution. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. Amend. 1.

This case also involves East Virginia's Equal Opportunity Child Placement Act (the "EOCPA"). R. at 4, 6.

STATEMENT OF THE CASE

AACS brought the original action in the United States District Court for the Western District of East Virginia, alleging a violation of AACS's First Amendment rights of both religion and speech. R. at 2. AACS moved for a Temporary Restraining Order against the referral freeze and an injunction compelling HHS to renew AACS's contract. *Id*. The United States District Court for the Western District of East Virginia granted AACS's motion, holding that AACS's First Amendment religion and speech rights had been violated by HHS. *Id*.

HHS appealed the district court's judgment to the United States Court of Appeals for the Fifteenth Circuit. R. at 18. The Court of Appeals reversed the district court's judgment, holding that the "[e]nforcement of the EOCPA against AACS does not violate either AACS's Free

Exercise or its Free Speech Rights." R. at 25. AACS filed a petition for rehearing in the United States Court of Appeals for the Fifteenth Circuit, pursuant to Federal Rule of Appellate Procedure 35(a)(2), and that petition was granted by this Court on July 15, 2020. R. at 26.

AACS respectfully requests that this Court affirm the judgment of the district court in granting AACS's motion for a Temporary Restraining Order and an injunction compelling HHS to renew AACS's contract for two reasons: First, the enforcement of the EOCPA against AACS is facially neutral, but infringes upon AACS's right to freely exercise their religion by compelling it to choose between their faith and their funding; and Second, because the enforcement of the EOCPA against AACS infringes upon AACS's right to Free Speech by imposing an unconstitutional condition on funding and compelling AACS to engage in speech with which it fundamentally disagrees.

SUMMARY OF THE ARGUMENT

AACS respectfully asks this Court to uphold the district court's order and hold HHS accountable for violating the Free Exercise Clause and the Free Speech Clause of the First Amendment.

I.

The district court appropriately determined that HHS violated the Free Exercise Clause of the First Amendment. While the EOCPA is facially neutral, transcribed in language that would appear to be generally applicable, the object of it is to covertly suppress the expression of certain intrinsic religious beliefs. This is evident by the fact that HHS allowed exemptions in the past, essentially undermining its own policy, but chose to strictly enforce the EOCPA against AACS when instituting the freeze on the agency. HHS's religious intolerance is further evident by the ultimatum they presented AACS with, to either comply with the EOCPA and forgo their religious

beliefs, or be shut down. The state government, or department enforcing the law, may not condition public funding on forced religious compliance, as such an ultimatum violates the Free Exercise Clause.

The EOCPA, through HHS's enforcement, must be held to strict scrutiny because of its covert religious discrimination. While HHS may be able to provide valid state interests as to why the EOCPA was created and amended, those interests are undermined by their conduct. HHS cannot shelter itself under the protection of a double standard, where exemptions are allowed that clearly defy the antidiscrimination purpose of the statute, but not for religious reasons. Furthermore, HHS's interests cannot be considered to be the least restrictive way of achieving those ends, evident by the freeze imposed on AACS who has never had a discrimination complaint in its forty-years of operation.

II.

HHS may not deny public funding on a basis that infringes AACS's constitutionally protected interests, especially if that interest is freedom of speech, as such an action is prohibited by the unconstitutional conditions doctrine. HHS denied public funding on the basis of forgoing a constitutional right, effectively attempting to coerce AACS to refrain from the proscribed speech. While the government is allowed to define the contours of the program that it participates in with non-governmental actors, it cannot tailor the definition of its program to suppress the speech of another.

Additionally, HHS may not prohibit AACS from speaking on behalf of its religious convictions, nor may it compel them to adopt a policy that is contradictory to their beliefs. In forcefully requesting that AACS adopt and proclaim a policy that is contrary to their sincerely held religious beliefs, HHS has violated and infringed upon the Free Speech Clause of the First

Amendment. As such, HHS must be subjected to strict scrutiny, requiring them to provide a compelling interest that is narrowly tailored to serve said interest. While HHS may purport to have compelling state interests, those interests are negated by the underinclusive nature of the EOCPA. The EOCPA fails to significantly restrict or compel other modes of speech that are also contradictory to their proclaimed anti-discriminatory purpose.

In sum, HHS cannot be permitted to foreclose upon AACS's constitutionally protected right to freely express, represent, and speak about their religious beliefs. To allow HHS to do so would be contrary to the holdings of the Supreme Court, our nation's founding fathers, and ultimately, the Constitution of the United States. For the aforesaid reasons, we respectfully request that district court's order be upheld.

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY DETERMINED THAT HHS VIOLATED THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BY STRICTLY ENFORCING THE EOCPA AGAINST AACS, WHICH UNCONSTITUTIONALLY LEFT AACS WITH THE OPTION OF CLOSING OR FORGOING ITS SINCERELY HELD RELIGIOUS PRINCIPLES.

The First Amendment of the United States Constitution, through the Free Exercise Clause, protects individuals from governmental interference with the exercise of religion[1]. U.S. Const. Amend. I. The First Exercise Clause of the First Amendment is applied to the individual states through the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"The constitution commits government itself to religious tolerance, and even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the

[1] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

rights it secures." *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). However, a "neutral and "generally applicable" law will not be subject to strict scrutiny, even if it burdens conduct or is motivated by religious or secular concerns. *Church of the Lukumi Babalu Aye v. Haleah*, 508 U.S. 520, 546 (1993); see also *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 878 (1990).

A law is considered "neutral" if it does not target religiously motivated conduct either on its face or as applied in practice. *Lukumi*, 508 U.S. at 533-540. Additionally, a law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts, or does not reach, a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct. *Id*. at 543-46. Furthermore, a facially neutral government action that is motivated by ill will toward a specific religious group or otherwise impermissibly targets religious conduct is unconstitutional. *Masterpiece Cakeshop*, 138 S. Ct. at 1737.

Expressly targeting religious beliefs is never permissible. However, the Free Exercise Clause nevertheless protects against facially neutral statutes or policies that are covertly religiously discriminatory. *Lukumi*, 508 U.S. at 533. The first step of determining the objectivity of a law is to consider the text. *Id*. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id*. However, facial neutrality is not determinative. *Id*. at 534. "The Free Exercise Clause . . . extends beyond facial discrimination" and forbids even "subtle departures from neutrality . . . and covert suppression of particular religious beliefs. *Id*. "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Smith*, 494 U.S. at 878-879. Additionally, such a law

". . . is invalid unless it is narrowly tailored to advance [a compelling] interest." *Lukumi*, 508 U.S. at 537.

A. The District Court Properly Determined that the EOCPA is Appropriately Evaluated Under *Lukumi* Because it is a Facially Neutral Statute that has the Object of Covert Religious Intolerance and Discrimination.

Given the vast protections that this nation and its founding fathers have given to freedom of religion, it is contrary to logic to believe that a state would be allowed to covertly discriminate against one's religious expression by cloaking it in facially neutral boilerplate language. *Lukumi*, 508 U.S. at 534. The Free Exercise Clause supports and aims ". . . to foster a society in which people of all beliefs can live together harmoniously," not a society devoid of religious beliefs and symbols. *New Hope Family Servs. v. Poole*, 966 F.3d 145, 160-61 (2nd Cir. 2020) (quoting *American Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2074 (2019)). Additionally, the Free Exercise Clause ensures that individuals have "the right to believe and profess whatever religious doctrines desired," including ones that are not in favor with a majority of fellow citizens. *Poole*, 966 F.3d at 161 (quoting *Smith*, 494 U.S. at 877).

The Supreme Court decided in *Smith* that "[t]he 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 conduct that his religion prescribes."[2] *Smith*, 494 U.S. at 882. However, *Smith* also notes that:

> A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.

[2] The Court's decision in *Smith* has prompted criticism almost from its pronouncement. *Poole,* 966 F.3d at 163*, see also Michael W. McConnell, The Origins and Historical Understandings of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1420 & n.43 (1990); *see also Keenedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, L. Joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari).

Id. at 893.

Smith recognized that "[i]t is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns."[3] Id.

Three years after *Smith*, in 1993, the Supreme Court determined in *Lukumi* that at the very minimum, ". . . the protections of the Free Exercise Clause pertain if the law at issue prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. The Supreme Court has gone to extensive measures to ensure that the government may not ". . . devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id*. at 547.

Lukumi held that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*. at 534. In *Lukumi*, the state created an ordinance that restricted the slaughtering of animals. *Id*. at 527. The ordinance was neutral on its face but had the effect of covertly discriminating against a local church that practiced the religion of Santeria. *Id*. The Court looked into the objectivity of the statute to determine whether the words, albeit neutral on their face, had a covert discriminatory effect and target on the church. *Id*. To decipher the object of the ordinance, the Court considered three things:

> (1) the historical background of the decision under challenge, (2) the specific series of events leading to the enactment or official policy in question, and (3) the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.

[3] Further, this case cannot be governed by *Smith* because it involves a Freedom of Speech claim in conjunction with the Free Exercise Clause. *Smith*, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other conjunction with other constitutional protections, such as freedom of speech and of the press." (internal citations omitted)).

Id. at 540.

In completing the aforesaid analysis, the Court found the state had received complaints from local citizens who disfavored the church's religious animal sacrifice which in turn led them to the task of carefully drafting an ordinance that disfavored the church's sacrifices without expressly addressing the church. *Id*. at 543. Further, the Court identified discouraging statements made by the state's governing body against the church's practice of animal sacrifice. *Id*. The Court determined that "[i]n sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion." Id. at 542.

In reviewing the historical background of the decision under challenge, AACS has never received a discrimination complaint from a member of the LGBTQ community in its forty years of operation. R. at 8. In fact, there is no evidence of even a complaint about AACS's demeanor, candor, professionalism, or policy of referring same-sex couples to more specifically suited adoption agencies within the state. *Id*. While *Lukumi* received citizen complaints about the church's practices, the fact that AACS has not works further in their favor. AACS provided no circumstance where their behavior or services justified drafting such a statute, or strictly enforcing such upon them.[4]

In regards to the specific events leading up the amendment of the EOCPA, in response to *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Governor of East Virginia directed the Attorney General to conduct a thorough review of all state statutes. R. at 6. As a result, the EOCPA was amended to prohibit Child Placement Agencies from discriminating on the basis of sexual orientation. *Id*. The Supreme Court in *Obergefell* ". . . traced how society's view of same-sex

[4] To justify a religiously discriminatory statute, the government must provide "persuasive support" that the purpose of the statute is being upheld through the implementation in question. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

marriage has evolved over the last forty-years" and took careful consideration not to fault religious views that differed, stating:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.

Obergefell, 576 U.S. at 672.

In fact, *Obergefell* emphasized that ". . . religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should be condoned." *Id*. at 679. As such, while HHS claims that it was abiding by the Court's decision in *Obergefell*, they are actually operating in opposition of the religious protections painstakingly ensured by the Court.

Examining the final prong of the *Lukumi* test, the Governor of East Virginia made disparaging comments in regards to any person who opposed same-sex marriage. R. at 6. The Governor directed the Attorney General to review all state statues and identify which ones needed to be amended to reflect the commitment to "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what *philosophy* or *ideology* drives or undergirds such *bigotry*." (emphasis added). *Id*. To include AACS's faith under the umbrella of "bigotry" is to disparage their religious faith and act to propagate an intolerance for religious beliefs that differ from the viewpoint of the Governor. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

Furthermore, the state government, or department enforcing the law, may not condition public funding on forced religious compliance, as such an ultimatum is in violation of the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). In *Comer*, a church applied for a state-ran reimbursement grant that was open to qualifying nonprofit organizations that purchased playground surfaces made from recycled tires. *Id*. at 2016.

The state ultimately awarded 14 grants. *Id*. at 2018. The church ranked fifth out of forty-four applicants yet was deemed ineligible because the state would not grant funds directly to a church. *Id*.

The Supreme Court held that the state department violated the Free Exercise Clause by conditioning the benefit of a public program on the church's operation as a religious institution. *Id*. at 2024. The Court reasoned that ". . . this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Id*. at 2019, *quoting McDaniel*, 435 U.S. at 628. The Court further reasoned that ". . . the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution," and while the church still has a choice, that choice ". . . comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the [church] is otherwise fully qualified." *Id*. at 2022. Finally, "[t]o condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *Id*. (quoting *McDaniel*, 435 U.S. at 626).

Like in *Comer*, HHS must be prohibited from conditioning a public benefit upon AACS's compliance with a facially neutral statute that directly targets their religious beliefs. Similar to *Comer*, HHS conditioned a public benefit on AACS's religious beliefs. R. at 6. Additionally, mirroring *Comer*, HHS left AACS with the "freedom" to choose between the holdings of their religious convictions or essentially closing their adoption agency altogether. R. at 7. As prescribed by the Supreme Court, such an ultimatum is in direct violation of the Free Exercise Clause, which

protects against "indirect coercion or penalties on the free exercise of religion." *Lyng v. Northwest Indian Cemetery Protective* Association, 485 U.S. 439, 450 (1988).

In further recent support, *Poole* found that a religiously affiliated adoption agency had a Free Exercise Clause claim against a state enforcing an anti-discrimination statute. *Poole*, 966 F.3d at 160. In *Poole*, an adoption agency operated for fifty-years as a Christian adoption ministry, and in accordance with their religious beliefs, did not take adoption requests from unmarried or same-sex couples. *Id*. at 157. Rather, identical to the present case, the agency referred such applications to other adoption agencies within the state. *Id*. at 158. The agency never received a complaint about their placements, nor did they receive complaints about any discriminatory conduct or effect with the services they provided. *Id*.

In turn, the state adopted an identical statute to the EOCPA and informed the agency that their policy of referring adoption applications of unmarried or same-sex couples violated a state regulation prohibiting discrimination against, among other things, sexual orientation. *Id*. The state gave the agency the ultimatum of either changing their policy to conform with the regulation and forgoing their religious beliefs, or close their adoption agency. *Id*. at 159. The Second Circuit held that:

> A court construing the pleadings in the light most favorable to [the agency] could not conclude as a matter of law that [the state] was simply applying a valid neutral law of general application when it instructed New Hope either to agree to approve unmarried and same-sex couples as adoptive parents or to close its fifty-year adoption ministry.

Id. at 166.

The court reasoned that "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously," not a society devoid of religious beliefs and symbols. *Id*. at 160 (quoting *American Legion*, 139 S. Ct. at 2074). Further, that court reinforced

that no government "official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Poole*, 966 F.3d at 161 (quoting *West Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

HHS violated the Free Exercise Clause when it strictly enforced the EOCPA, a facially neutral law, against AACS by way of an ultimatum to either comply or have its agency shut down. Like in *Poole*, AACS is a religiously affiliated adoption agency that has dutifully served East Virginia for forty years. R. at 5. AACS also has a policy that prohibits them from certifying same-sex couples as prospective parents, and instead refers the couples to the four other adoption agencies that specifically service the LGBTQ community within East Virginia. R. at 7. Furthermore, AACS has also never had a complaint filed by a same-sex couple against them for these practices. *Id*.

As such, HHS cannot arbitrarily determine what religious beliefs and practices may be constitutionally accepted. Furthermore, in congruence with *Poole*, HHS may not foreclose upon the religious freedoms constitutionally afforded to AACS by presenting them with the decision of either complying with their statute by foregoing their religious beliefs, or being forced to shut down.

The district court's decision should be upheld because HHS has unconstitutionally violated the Free Exercise Clause. HHS must be prohibited from hiding under the protection of a facially neutral statute that covertly oppresses another's religious values. In further discord with the holdings of the Supreme Court, HHS cannot be allowed to condition public funding upon the unsavory platter of an ultimatum that asks AACS to either defy their religious convictions or have their agency shut down. Finally, if HHS is permitted to continue the freeze imposed upon AACS an entire population of children will be displaced to agencies that are not as familiar with their

respective religious beliefs or equipped to handle the trauma that refugee children specifically face. For these reasons we respectfully request that this Court rule in favor of upholding the district court's decision.

B. The District Court Appropriately Determined that Strict Scrutiny Applies to HHS's Enforcement of the EOCPA Because, while Facially Neutral, it has the Object of Covert Religious Intolerance and Discrimination.

When an individual or organization is disqualified from a public benefit solely because of its religious character, the state, or entity enforcing the disqualification, is inherently violating that individual's free exercise of religion. *McDaniel*, 435 U.S. at 628. When a state acts in such a manner ". . . the State has imposed a penalty on the free exercise of religion that must withstand the most exacting scrutiny." *Id.* Additionally, "[w]here the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the to the protection of the rights guaranteed by the Free Exercise Clause." *Id*. at 544.

Contrary to adverse contention, *Burwell v. Hobby Lobby* is neither determinative or dispositive in this case. 573 U.S. 682 (2014). *Hobby Lobby* states that "[f]ederal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes." *Id*. at 763. *Hobby Lobby* is not determinative because the present issue regards a state statute, not federal. Rather, *Lukumi* is controlling, finding that, if the enforcer of the statute devalues religious reasons for exemptions, considering them to be of lesser importance than nonreligious reasons, the religious practice is being singled out "for discriminatory treatment" and is in violation of the Free Exercise Clase. *Lukumi*, 508 U.S. at 538.

Furthermore, even if *Hobby Lobby* was to be considered in the present case it would not be dispositive. *Hobby Lobby* states that "[n]o tradition . . . allows a religion-based exemption when the accommodation would be harmful to others." *Id*. at 764. This is not dispositive on the present case because there is no factual basis to support that granting AACS this exemption or "accommodation" would be "harmful to others." AACS has respectfully referred same-sex couples to LGBTQ specified agencies within the state and has never received a complaint in its forty-years of operation. R. at 6. In fact, it could reasonably be determined that denying AACS this exemption, and enforcing the freeze on its adoption agency, is harmful to others. This is evidenced by the fact that at least four children have already suffered at the hands of HHS's decision, and potentially many more if AACS is unable to appropriately navigate child placement within the sects of the state's Islamic community. R. at 9.

Tenafly Eruv Association v. Borough of Tenafly determined that a government cannot contravene the neutrality requirement of the Free Exercise Clause to allow secularly motivated conduct but not comparable religiously motivated conduct. 309 F.3d 144 (3rd Cir. 2002). In *Tenafly* a municipal ordinance prohibited the posting of "any sign or advertisement, or other matter upon," among other things, telephone poles. *Id*. at 151. The municipality rarely enforced the ordinance, allowing residents to frequently post house number signs, lost animal signs, etc. *Id*. However, the municipality enforced the ordinance against Orthodox Jewish residents who posted small religious objects on telephone poles.

The court recognized that *Smith* was not controlling in *Tenafly* because the municipality expressly granted exemptions from the ordinance for various secular reasons but was now denying an exception for its Orthodox Jewish residents. *Id*. at 167.[5] Rather, the court applied *Lukumi* and

[5] The court stated ". . . because Ordinance 691 is neutral and generally applicable on its face, if the Borough had enforced it uniformly, *Smith* would control and the plaintiffs' claim would accordingly fail." *Tenafly*, 309 F.3d at

held that the municipality violated the neutrality principle because it devalued religious reasons for posting signs on the telephone poles by "judging them to be of lesser importance than nonreligious reasons." *Id*. at 168. The court reasoned that, as in *Lukumi*, the municipality's decision to allow exceptions for secular and religious reasons, and inversely its decision to strictly enforce the ordinance against its Orthodox Jewish residents, was "sufficiently suggestive of discriminatory intent," to which strict scrutiny must be applied. *Id*. The court further explained that while the government may be able to provide interests that are rationally compelling, those interests are compromised when exceptions are allowed that undermine those same reasons. *Id*.

Similarly, HHS cannot curb the requirement of strict scrutiny by hiding in the shadow of facially neutral language. HHS, like in *Tennafly*, allowed an exception to its policy when it refused to place a young girl with an otherwise certified family consisting of a father and son. R. at 9. Additionally, on three occasions, HHS allowed religious exemptions when it agreed to withhold placement of a child with a family certified by AACS because the adoptive parents were of a different religious sect than the child. R. at 8. Finally, HHS allowed an exemption when it placed a white special needs child with an African American couple even though there were three other white adoptive families certified and willing to adopt the child. R. at 8, 9. HHS cannot reap the benefit of allowing exemptions for itself and in turn strictly enforcing the EOCPA against AACS for religious reasons, as such behavior is a a hypocritical and unconstitutional double standard.

In *Ward v. Polite* the court determined that a facially neutral policy that creates a "double standard" for individualized exemptions must be subject to "the gauntlet of strict scrutiny." 667 F.3d 727, 740 (6th Cir. 2012). Ward was a devout Christian graduate student taking a counseling student practicum at her university. *Id*. at 729. The university had a "ACA code of ethics" that

167. However, because the municipality allowed exceptions for secular reasons and not religious the plaintiff was in turn governed by *Lukumi*. *Id*.

prohibited discrimination based upon many things, including sexual orientation. *Id*. at 735. The university asked Ward to counsel a gay client and Ward asked to either refer the client to someone else or allow her to refer the client if the counseling session turned to relationship issues because Ward's religious beliefs prohibited her from affirming same-sex relationships. *Id*. at 729. The university ultimately expelled Ward stating that she violated their anti-discrimination policy. *Id*.

Ward held that the university's policy ". . . permitted secular exemptions but not religious ones" and that "failing to apply the policy in an even-handed, much less a faith-neutral, manner to Ward supported a Free Exercise Clause claim." *Id*. at 739. The court reasoned that the university could not provide a compelling interest for the way that they enforced the policy that was also applied in the least restrictive way, stating that "[t]he multiple types of referrals tolerated by the counseling profession severely undermine the university interest in expelling Ward for the referral she requested." *Id*. at 740; see also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-37 (2006).

HHS, like the university in *Ward*, cannot justifiably claim that their compelling interests are being enforced through the EOCPA by the least restrictive means. HHS presents four compelling state interests that are each undermined by their own actions. R. at 9. HHS's interest of ensuring that child placement services are accessible to all qualified residents is severely undermined by the fact that two months after HHS recognized an urgent need for more adoptive families because of an influx of refugee children into foster care, they terminated AACS's contract, the only adoption agency that specifically catered to the refugee population. R. at 8. HHS's interest of ensuring that the pool of adoptive parents is as diverse as the children needing placement is also severely undermined by implementing the freeze on AACS, the only adoption agency in the state that caters specifically to the Muslim and refugee community. *Id*. HHS's interest in ensuring that

individuals who pay taxes are not denied access to government services is not being fulfilled by implementing a freeze on AACS because there are four agencies expressly dedicated to serving the LGBTQ community, to which AACS respectfully makes referrals to when same-sex couples apply to their agency. R. at 9. Finally, HHS's interest of placing children in qualified homes cannot be justified by enforcing the freeze on AACS. In enforcing the freeze, HHS denied a five-year old autistic child an adoption placement through AACS with the woman who fostered him for two years. R. at 8. To add insult to injury, HHS also separated a young girl from her siblings, who were placed by AACS with a family, by placing her with another agency during the freeze. *Id*.

HHS cannot survive the gauntlet of strict scrutiny because the interests it provides are undermined through its own actions. HHS cannot seek the protection of a standard that benefits them when they choose and persecute others when they express opposing religious views. To do so is to covertly suppress the religious freedoms granted and protected by the United States Constitution. In conjunction, HHS cannot support an argument that could reasonably justify the freeze imposed on AACS. The freeze imposed on AACS is drastic, unjustified and highly restrictive. HHS cannot be imposing the least restrictive means by closing an agency that has dutifully served the refugee population within the state for forty years, leaving those children to be misplaced into agencies who are not as familiar with the religious beliefs of the children and surrounding community. For these reasons, the district court's decision should be upheld.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT HHS'S SPEECH COMPULSION AND CONDITIONS ON FUNDING THROUGH THE EOCPA ARE UNCONSTITUTIONAL AS APPLIED TO AACS.

Ensconced perpetually as among the first rights added to the founding document of this republic, the First Amendment's Free Speech Clause enshrines the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It is a long-held principle of First Amendment Speech litigation that "the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable." *Tex. v. Johnson*, 491, U.S. 397, 414 (1989). See also *Cohen v. California*, 403 U.S. 15 (1971). It is central to the American experience that "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The Court has also found that the prohibition against speech restrictions has a corollary in that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). This fundamental right was incorporated to the States through the Due Process Clause of the Fourteenth Amendment in *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that "[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

A. The Application of *Rust* to the Present Case is Inapposite Because the Condition Imposed on AACS is Unconstitutionally Outside of the Scope of the Program between HHS and AACS.

The unconstitutional conditions doctrine prohibits the government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Any denial of a benefit which is conferred on the basis of forgoing a constitutional right "will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'" *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (quoting *American*

Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)). The Court in *Regan v. Taxation With Representation* ruled that "[w]here governmental provision of subsidies is not '"aimed at the suppression of dangerous ideas,"' *Cammarano v. United States*, 358 U.S. 498, 513 (1959), its 'power to encourage actions deemed to be in the public interest is necessarily far broader.' *Maher v. Roe*, 432 U.S. 464, 476 (1977)." 461 U.S. 540, 550 (1983).

A determination must be made by courts, in every case which alleges an abridgement of First Amendment speech rights due to the imposition of an unconstitutional condition, whether the condition is one of "those that specify the activities [the Legislature] wants to subsidize" or "conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321, 2329 (2013). The Court has held that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). However, state and federal legislatures are prohibited from "recast[ing] 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 Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

In *Regan v. Taxation With Representation*, the Court found the condition of a prohibition on political lobbying in exchange for a federal tax-exemption to be of the former distinction because the charity was able to obtain its tax-exempt status by breaking into a dual-structure organization and therefore only receiving federal funds for the part of its business that did not lobby to any branch of the government. 461 U.S. 540 (1983). In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Court found the condition of a prohibition on editorializing by noncommercial broadcast radio stations for federal funds to be of the latter distinction because

"the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." *Agency for Int'l Dev.*, 133 S. Ct. 2321, 2329, (2013) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. at 400).

The conditions imposed upon AACS fall within the latter distinction, like in *League of Women Voters of California*, because there is no known route for AACS to express its private views of "public importance" while maintaining its public funding. Unlike the federal Tax Code, which allowed the petitioners to maintain their tax-exempt status *and* lobbying agenda in *Taxation With Representation*, there is no legal route for AACS to create a distinct entity which would allow it to keep its funding, short of creating a completely separate adoption agency which has no public funding: an untenable and impractical solution. Additionally, there is no evidence in the record that suggests that the speech that HHS seeks to compel (anti-discrimination against prospective same-sex adoptive parents) is such a significant part of the partnership between AACS and HHS that, if not compelled, the goals of that partnership could not be accomplished.

AACS argues that *Rust v. Sullivan* does not govern the disposition of this case because the factual backgrounds between the present case and *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013) are so similar that that case should control. Like the present case, *Agency for International Development* involved the contractual relationship between the government and an independent agency aimed at accomplishing humanitarian efforts. *Id*. In *Agency for International Development*, the goal between Congress and the respondents, Alliance for Open Society International Inc., was set out in the The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003. Its mission was to work together "to combat the spread of HIV/AIDS around the world." *Agency*

for Int'l Dev., 133 S. Ct. at 2324. In the present case, the humanitarian effort is to assist the high number of children in foster care, many of whom are refugees, in being placed in loving, appropriate, and safe adoptive homes. R. at 5.

Additionally, the conditions at issue in both cases are nearly identical. In *Agency for International Development*, "[t]he Act impose[d] two related conditions on that funding: First, no funds made available by the Act 'may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.' And second, no funds may be used by an organization 'that does not have a policy explicitly opposing prostitution and sex trafficking.'" *Id*. (internal citations omitted). The dual conditions, both anti-advocacy and policy, mirror those of the EOCPA. First, "section 4.36 of the contract [between AACS and HHS] requires AACS to be 'in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 6. The Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015) resulted in the amendment of the EOCPA to include sexual orientation as a protected ground in its anti-discrimination law. R. at 6. This change in the EOCPA created a condition on HHS's grant of public funds that AACS must work with prospective same-sex adoptive families. Second, the EOCPA also included a requirement "that before funds are dispersed pursuant to the contract with a governmental entity, the Child Protection Agency must sign and post at its place of business a statement that it is 'illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6.

In addition to the intended goals of the contracts and the imposed conditions on funding in both cases, the clientele and concerns of AACS and Alliance for Open Society International Inc. mirror one another. Because of Alliance for Open Society International Inc.'s work with

international governments, they were concerned that the anti-advocacy and policy conditions "may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS." *Agency for Int'l Dev.*, 133 S. Ct. at 2325. In the present case, AACS is an openly religiously-motivated service whose mission is to "lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services [they] provide are consistent with the teachings of the Qur'an." R. at 5. Because the "Qur'an and the Hadith consider same-sex marriage to be a moral transgression," R. at 7, the large refugee population from Muslim majority countries in Evansburgh is likely to agree with the policy of AACS. It then follows, that if AACS were to adhere to HHS's conditions, AACS may alienate the refugee children in need of adoptive homes and therefore defeat the purpose of the contract between AACS and HHS altogether: placing these children in adoptive homes.

Because of the similarities between *Agency for International Development* and AACS, the district court's holding that that case controls should be reapplied and the conditions imposed on AACS should be struck down as unconstitutional because, to quote Chief Justice Roberts, "[t]his case is not about the Government's ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding." *Agency for Int'l Dev.*, 133 S. Ct. at 2330.

However, even if this Court finds that *Agency for International Development* does not control, it should still use its discretion to issue a favorable decision for AACS because, even if *Rust* controls, HHS's conditions are unconstitutional as applied to AACS. In *Rust*, Congress conditioned funds for Title X family-planning medical centers on the prohibition of counseling women on abortion-related resources or referrals. 500 U.S. 173 (1991). The Court ruled that the

conditions imposed by Congress were not unconstitutionally viewpoint-based. *Id*. The Court reasoned that, *inter alia*, that case was not a "case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id*. at 195-6. The present case is the type of case that the *Rust* Court foresaw, which countenances unconstitutionality. The amendments to the EOCPA at issue are laws of general applicability. The law does not facially apply to any particular group or individual. However, it does disproportionately affect a sweeping category of people who have been historically opposed to the state-sanctioned institution of same-sex marriage: religious practitioners. The effect of this law is that it is unlawful for religious practitioners, such as AACS, to remain steadfast in practicing their faith while maintaining public funding.

Additionally, there is no evidence in the record that AACS's speech exists outside of the scope of the project between AACS and HHS. To the contrary, AACS has been operating in the same manner since its inception in 1980, and has accomplished the goal of placing "thousands of children into adoptive homes." R. at 5. It was only in 2015 when the Court's ruling in *Obergefell v. Hodges* affected the EOCPA that HHS began to question AACS's adherence to the project's goals. Because the present case does involve a generally applicable law that singles out religious individuals, *Rust* compels a ruling in AACS's favor.

The *Rust* Court also supported its ruling with the reasoning that "[t]he Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities." *Rust*, 500 U.S. at 196. This reasoning plainly does not apply to the present case. AACS has been working with HHS since 1980. There is no evidence in the record to suggest that AACS conducts business as an

adoption agency outside of its business with HHS or that it participates, as an adoption agency, in *any* other activities that are "separate and distinct" from its activities with HHS. This is distinct from *Rust* where the petitioners did in fact offer medical services which did not relate to the Title X funds it received through the Public Funds Service Act. *Id*. at 179.

The conditions imposed by HHS are unconstitutional as applied to AACS because they are outside of the scope of the program instituted between the two parties and because the conditions burden the speech of religious practitioners who contract with the City of Evansburgh.

B. Any Reliance on *Rumsfeld* is Misplaced because HHS's Speech Compulsion Requires Further Speech By AACS Disavowing the Government's Message and Does not Restrict Other Speech that also Harms East Virginia's Interest in Anti-Discrimination.

The Court has long held that, although the First Amendment only addresses speech in that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. Amend. 1, Congress is likewise prohibited from compelling one to speak. *Wooley*, 430 U.S. at 714 (holding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") The individual protection that the First Amendment provides also extends to corporations, for "[w]ere the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 16 (1986). "Just as the State is not free to 'tell a newspaper in advance what it can print and what it cannot,' the State is not free either to restrict [one's] speech to certain topics or views or to force [one] to respond to views that others may hold." *Pacific Gas & Electric Co.*, 475 U.S. at 11 (quoting *Pittsburgh Press Co*. v. *Human Relations Comm'n*, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting)).

HHS argues that *Rust v. Sullivan* disposes of this case because AACS has contracted with HHS and is therefore beholden to the speech compulsions and restrictions that it imposes. However, for reasons discussed in the previous section, *Agency for International Development* should govern the disposition in this case, and not *Rust*, which makes the speech compulsion enforced by HHS subject to strict scrutiny.

HHS also contends that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)* 547 U.S. 47 (2006) governs the disposition of the compelled speech issue. AACS argues that *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) so governs, in line with the holding of the district court. However, this Court should issue a disposition favorable to AACS in either case, because the law as applied to the facts of *Rumsfeld* are so distinct from the facts of the present case that that decision could not support a different outcome.

Hurley governs the disposition of this case because of its factual and legal similarities. In *Hurley*, the Court ruled that the Massachusetts public accommodations law was unconstitutional as applied to the petitioner because it compelled the South Boston Allied War Veterans Council to include the Irish-American gay, lesbian, and bisexual group GLIB in the St. Patrick's Day parade in a way that interfered with their expressive message, which violated the Free Speech clause of the First Amendment. 515 U.S. 557 (1995). The Court reasoned that the case ". . . boil[ed] down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. First, the public accommodations law at issue in *Hurley* is nearly identical to the anti-discrimination statute of the EOCPA. The difference being that the EOCPA expressly outlaws discrimination against "any prospective foster or adoptive parent" in a way that the *Hurley* law did not. R. at 6.

Second, the issue in *Hurley* involved inclusion of a LGBTQ group into a confessedly religiously-affiliated group. Third and most importantly, in *Hurley*, ". . . the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding." 515 U.S. at 561. The fact that the parade was publicly funded is of great significance because HHS relies on government funding in *Rust* to support its conclusion that it has the authority to compel AACS to display the EOCPA's anti-discrimination provision.

Although the Court in *Hurley* ruled that the St. Patrick's Day parade was inherently expressive speech, *Id*. at 570, it nonetheless applies here because, as noted in *Hurley* and as has been established by the Court prior, that ". . . the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id*. at 573. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995); *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781 (1988). Because of the myriad similarities between the facts and the law at issue in *Hurley* and the present case, this Court should find that *Hurley* does govern a favorable disposition for AACS.

In contrast to *Hurley*, *Rumsfeld* presents a situation so distinct from the case at issue that its application today would be misplaced. In *Rumsfeld*, the Court held that the Solomon Amendment did not infringe upon the First Amendment rights of law schools because it did not compel any speech, but instead, regulated law schools' conduct by mandating that they allow military recruiters on their campuses. 547 U.S. 47 (2006). The Court reasoned that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id*. at 65.

First, the Solomon Amendment may hardly be characterized as a public anti-discrimination law. It was enacted by Congress in response to law schools who had begun ". . . restricting the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military." *Id*. at 51. The Solomon Amendment was designed to abate a very specific problem. However, in this case, there is no evidence in the record to suggest that any members of the LGBTQ community have been discriminated against by the private agencies that HHS has contracted with. In fact, AACS ". . . emphasized . . . that on the few occasions when a same-sex couple previously contacted the agency about its adoption placement services, AACS treated them with respect and referred them to other agencies that served the LGBTQ community" and both parties have stipulated that "no same-sex couples have ever filed formal complaints of discriminatory treatment by AACS." R. at 7. Therefore, the Solomon Amendment bears no similarities to the anti-discrimination law here.

Second, the Court held that the Solomon Amendment ". . . affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Rumsfeld*, 547 U.S. at 60. The Court distinguished *Rumsfeld* from *Barnette* and *Wooley* because "[t]he Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id*. at 62. In contrast, the very core of the issue in this case is that HHS is mandating exactly what AACS must say, resembling the mandates in both *Wooley* and *Barnette*.

Third, the clerical speech that the law schools were required to engage in in *Rumsfeld* is distinct from the speech that AACS is forced to engage in and the speech that will inevitably result

therefrom. In forcing AACS to post the EOCPA anti-discrimination provision, HHS goes much further than compelling "scheduling emails" *Id*., it compels posting a government-mandated message, a response from AACS itself disavowing their genuine agreement with that message, and further speech from AACS complying with that message in its business making recommendations about potential foster and adoptive families. Because the speech resulting from the legislation in *Rumsfeld* is miniscule compared to the speech that AACS is compelled to engage in, that ruling is not applicable here.

The application of *Hurley* to the present case requires this Court to affirm the District Court's judgment because, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Both the content-based speech compulsion of posting the EOCPA provision and the compelled response by AACS trigger the highest level of scrutiny. In *PruneYard Shopping Ctr v. Robins*, the Court held that

> To require the owner to specify the particular ideas he finds objectionable enough to compel a response would force him to relinquish his 'freedom to maintain his own beliefs without public disclosure.' Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 (1980) (internal citations omitted).

Content-based speech restrictions and compulsions ". . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

The just application of *Hurley* to the present case is of the utmost importance because that Court found that the alleged interest of Massachusetts was not compelling. *Hurley*, 515 U.S. at 579. *Hurley* held, *inter alia*, that ". . . produc[ing] speakers free of the biases" is "a decidedly fatal objective." *Id*. However, even if this Court finds that East Virginia's interest is compelling, the anti-discrimination law and the policy requirement should be struck down as being underinclusive.

The relevant provisions of the EOCPA fail to restrict a significant amount of speech that also implicates East Virginia's alleged interest in eliminating discrimination, which indicates that East Virginia is simply favoring one form of speech over another, thus invalidating its interest and making it less than compelling. In *First Nat'l Bank v. Bellotti*, a statute was enacted with respect to campaign speech and money which provided that "[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted, even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978). The Court held that this provision of the statute was unconstitutional, and it reasoned that "[t]he fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject." *Bellotti*, 435 U.S. at 793.

The underinclusiveness of the EOCPA is illustrated by the fact that it allows for discrimination along lines of race and sexual orientation. HHS contends that:

> Enforcing the EOCPA serves the compelling state interests of eliminating all forms of discrimination by ensuring that 1) child placement services are accessible to all Evansburgh residents who are qualified for the services; 2) the pool of adoptive parents is as diverse and broad as the children needing placement; and 3) individuals who pay taxes to fund government contractors are not denied access to those services. Hartwell asserts that

> successfully placing children in qualified adoptive homes is also a compelling state interest that is served by the EOCPA's anti-discrimination policy.

R. at 13.

However, ". . . the EOCPA. . . provides that, when all other parental qualifications are equal, Child Placement Agencies must 'give preference' to foster or adoptive families in which at least parent is the same race as the child needing placement." R. at 4. As a result of the amendments of the EOCPA, sexual orientation was added to that provision. R. at 6. Therefore, although the purported interests of HHS are to eliminate discrimination on a number of protected grounds, it allows for discrimination on those same grounds in the same instances. Because AACS believes that it is "in the best interest of" foster children to be placed in homes with opposite-sex partners as foster or adoptive parents, they are in violation of the EOCPA. However, it is within the bounds of the EOCPA for AACS to, in the same breath, place an adoptive child who has identified as heterosexual in the adoptive home of an opposite-sex couple because it would be "in the best interests of the child." The evident underinclusiveness demonstrates that HHS's interest is not to eliminate discrimination, but instead to forbid discrimination that the State has not deemed appropriate. Such an interest can serve no purpose other than impermissibly "disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 787 (2011).

Because HHS, through the EOCPA, has enforced an unconstitutional condition for public funding on AACS that is outside of the scope of the program between the parties, and the speech compulsion required by the EOCPA fails to survive strict scrutiny for underinclusiveness, AACS respectfully asks that this Court reaffirms the District Court's judgment for AACS.

III. CONCLUSION

The First Amendment has long been regarded as ". . .a guarantor of a free marketplace of ideas," *Bellotti*, 435 U.S. at 810, with myriad purposes such as ". . .secur[ing] religious liberty in the individual by prohibiting any invasions thereof by civil authority," *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963), and ". . .bar[ing] the government from skewing public debate." *Rosenberger v. Rector & Vistors of the Univ. of Va.*, 515 U.S. 819, 894 (1995). Government-imposed burdens on those goals devalue that marketplace and reduce the First Amendment to a legal fiction. This Court should rule therefore that the First Amendment protects AACS's right to freely exercise their sincerely held religious beliefs and express their free speech rights, and in so doing reaffirm the district court's judgment that the EOCPA is unconstitutional as applied to AACS.

Respectfully submitted this 14th day of September, 2020,

/s/ Team 9

Counsel for the Appellee