Team 13

No. 2020-05

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

v.

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

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

BRIEF FOR THE APPELLANT

September 14, 2020

Counsel for Appellant

QUESTIONS PRESENTED

I. Under the Free Exercise Clause, is the government allowed to uphold an anti-discrimination policy against a private religious entity that refuses to certify same-sex couples as foster parents?

II. Under the Free Speech Clause, is the government permitted to place conditions on government funds going to a private religious entity that voluntarily contracted with the government to provide a public service?

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CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fed. R. App. P. 35(a)(2) – En Banc Determination

When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

[. . .]

(2) the proceeding involves a question of exceptional importance.

E.V.C. § 37

(d) Empowers municipalities to regulate the foster and adoption placements of children and provides that the determination of whether the adoption of a particular child by a particular prospective adoptive parent or couple should be approved must be made on the basis of the best interests of the child.

(e) In undertaking a best interests assessment when making placement decisions, an agency must consider, among other things:

(1) the ages of the child and prospective parent(s);

(2) the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);

(3) the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background; and

(4) the ability of a child to be placed in a home with siblings and half-siblings.

E.V.C. § 42 – The Equal Opportunity Child Placement Act

(1)(a) Child placement agencies include both foster care and adoption agencies

(2) Prohibits child placement agencies from discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families.

(a) No municipal funds are to be dispersed to child placement agencies that do not comply with the EOCPA.

(b) When all other parental qualifications are equal, Child Placement Agencies must give preference to foster or adoptive families in which at least one parent is the same race as the child needing placement.

(3)(b) Prohibits Child Placement Agencies from discriminating on the basis of sexual orientation.

(c) Where the child to be placed has an identified sexual orientation, Child Placement Agencies must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement.

E.V.C. § 42 – The Equal Opportunity Child Placement Act (cont.)

(4) 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 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. The amendment permits religious-based agencies, however, to post on their premises a written objection to the policy.

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

Statement of Facts

The purpose of the foster care system is to serve the best interests and well-being of the child by providing stability through reunification or adoption services. R. at 3, 5. With approximately 17,000 children in foster care, the city of Evansburgh, East Virginia, has long struggled to meet the demand of foster and adoptive homes for children. R. at 3. The East Virginia Code ("E.V.C.") gives Evansburgh the power to regulate its foster care system, which it delegates to the Department of Health and Human Services ("HHS"). R. at 3–4; E.V.C. § 37(d).

The E.V.C. provides that "the determination of whether the adoption of a particular child by a particular prospective adoptive parent or couple should be approved must be made on the basis of the best interests of the child." R. at 3–4; E.V.C. § 37(d).

To assess prospective placements, HHS contracted with thirty-four private child placement agencies[1] ("CPAs") that must consider factors such as parties' ages; the child's physical, emotional, cultural, or ethnic needs with respect to parental capacity; and the ability to place a child with siblings and half-siblings. R. at 4; E.V.C. § 37(e). CPAs are bound by the Equal Opportunity Child Placement Act ("EOCPA"), which implements the state-mandated non-discrimination policy on CPAs receiving public funds in exchange for services. R. at 4; E.V.C. § 42. East Virginia adopted the EOCPA in 1972 and amended it in 2015, following the momentum of the Supreme Court's decision in *Obergefell v. Hodges*. R. at 4, 6; E.V.C. § 42; 576 U.S. 644 (2015). Initially, the EOCPA barred CPAs from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." R. at 4; E.V.C. § 42.-2. The amendment extended protections on the basis of sexual orientation to "eradicat[e] discrimination in all forms." R. at 6; E.V.C. § 42.-3(b). To receive government funds, the EOCPA requires CPAs to sign and post the anti-discrimination policy at its business; however, religious-based entities are allowed to post a written objection to the policy. R. at 6; E.V.C. § 42.-4. CPAs that refuse to comply with the EOCPA do not receive government funds. R. at 4; E.V.C. § 42.-2(a).

In addition to certifying potential parents, CPAs also provide services including conducting home studies, counseling, and placement recommendations in exchange for public funds. R. at 3. HHS encourages families interested in fostering or adopting to reach out to their

[1] A child placement agency includes both foster care and adoption agencies. R. at 4; E.V.C. § 42.-1(a).

preferred CPA and find the "best fit." R. at 5. CPAs refer families that do not fit its specific profile and policies to a different CPA for certification. R. at 5. When a child enters the foster care system, HHS sends a request to contracted CPAs to recommend potential matches from their list of certified parents. R.at 3. CPAs provide HHS with information about the families and HHS then determines compatibility based upon the child's best interests. R. at 3–4; E.V.C. § 37(d). When all other qualifications are equal, the EOCPA state that CPAs must "give preference" to families in which at least one parent is of the same race as the foster child or, if the child has an identified sexual orientation, CPAs must "give preference" to parents with the same sexual orientation. R. at 4, 6; E.V.C. § 42.-2(b); § 42.-3(c).[2] Once placed, the CPA that recommended the match is contractually obligated to supervise and support the family to ensure a successful placement. R. at 4.

Al-Adab Al-Mufrad Care Services ("AACS") is a non-profit, religious-based CPA serving the nearly 4,000,000 racially and ethnically diverse residents of Evansburgh. R. at 3. Founded in 1980, AACS focuses it work on supporting the city's large refugee population through providing community services, which includes adoption placements for foster youth. R. at 3, 5. AACS's mission statement declares that the services it provides "are consistent with the teachings of the Qur'an." R. at 5. Since its founding, HHS has contracted AACS to provide adoption services to the residents of Evansburgh. R. at 5. Part of the adoption services included certifying prospective families following a thorough screening and training. R. at 5. In addition to outlining the services AACS will provide HHS in exchange for government funds, Section 4.36 of the contract specifically requires that AACS be "in compliance with the laws, ordinances,

[2] Neither party has presented an Equal Protection claim in this case.

and regulations of the State of East Virginia and the City of Evansburgh." R. at 5–6. The contract was renewed annually until HHS allowed it to expire on October 2, 2018. R. at 5, 7.

In July 2018, a reporter with the *Evansburgh Times* asked the Commissioner of HHS, Christopher Hartwell ("Hartwell"), if any religious-based CPAs contracted with HHS failed to comply with the extended protections under the amended EOCPA. R. at 6. This question prompted an inquiry into all religious-based CPAs, including AACS. R. at 6–7. An investigation into AACS revealed that its practices and policies for certification was discriminatory against same-sex couples. R. at 7. Sahid Abu-Kane, the Executive Director of AACS, told Hartwell that the tenants of the Qur'an and the Hadith prohibited AACS from certifying same-sex couples even if they were qualified. R. at 7. AACS has refused to conduct home studies for same-sex couples, despite it being part of their contract to serve the residents of Evansburgh and not discriminate on the basis of sexual orientation. R. at 7. AACS has respectfully turned away multiple same-sex couples hoping to begin the certification process and referred them to a different CPA. R. at 7. While there are no formal complaints of discrimination yet, Hartwell determined that AACS violated the EOCPA. R. at 7.

AACS received a letter from Hartwell on September 17, 2018, stating that HHS would not be renewing its contract with AACS because of AACS's failure to abide by the anti-discrimination policy in the EOCPA. R. at 7. In the letter, Hartwell wrote that, while HHS respects AACS's religion, AACS "voluntarily accepted public funds in order to provide secular social service to the community." R. at 7. Hartwell reminded AACS of the requirement codified within the EOCPA and that AACS must comply with this policy in order to receive government funding and referrals. R. at 7. As such, HHS instituted an immediate referral freeze and communicated this to the remaining CPAs. R. at 7–8. HHS gave AACS 10 business days to

provide assurance that it would abide by the EOCPA and no longer violate the anti-discrimination policy. R. at 8. AACS refused. R. at 8.

Procedural History

On October 30, 2018, AACS filed suit against Hartwell in the United States District Court for the Western District of East Virginia alleging that HHS's enforcement of the EOCPA violated its First Amendment rights under the Free Exercise and Free Speech clauses. R. at 8. AACS sought a temporary restraining order against HHS's referral freeze and a permanent injunction compelling the renewal of AACS's contract. R. at 8.

At an evidentiary hearing in March of 2019, the district court identified additional undisputed facts. R. at 8. Prior to HHS determining that AACS violated the anti-discrimination policy, four adoption agencies were committed to serving the LGBT+ community in addition to several others that abide by the EOCPA amendments. R. at 8. Additionally, HHS saw an influx of refugee foster youth and issued an urgent notice on August 22, 2018, calling for more certified adoptive parents. R. at 8. Using its discretion to place a child based on their best interests and well-being, HHS decided to place a white foster youth with disabilities with a certified African American couple rather than white adoptive placements, to not place a five-year old girl with a single father and son, and to delay three placements of Sunni and Shia refugee foster youth when tensions between the sects ran high. R. at 8–9.

After HHS implemented the referral freeze for AACS for failure to abide by the EOCPA, a young girl was denied placement with her brothers and a young boy with autism was denied adoption placement, both of which were a result of the families working with AACS. R. at 8. At the hearing, Hartwell testified that enforcement of the EOCPA fulfilled the government purposes of holding CPAs that voluntary contract with HHS accountable to the laws, preserving

accessibility of placement services for qualified residents and for taxpayers responsible for CPA funding, and maintaining a diverse and broad pool of prospective foster and adoptive parents to meet the needs of foster youth. R. at 9.

Following that hearing, the district court judge found that HHS's enforcement of the EOCPA violated both the Free Exercise and Free Speech clauses of the First Amendment. R. at 2, 8. The Free Exercise finding was made on the grounds that HHS had permitted other exceptions both for its own department and for other agencies, but refused to make an exception for AACS, which was further supported by the increasing shortage of adoption homes. R. at 13–14. The Free Speech finding was made on the grounds that under *Agency for International Development v. Alliance for Open Society International* ("*AOSI*"), 570 U.S. 205 (2013), the purpose of the contract between AACS and HHS is to perform adoption placements in the best interest of the child, not to carry out the EOCPA's anti-discrimination policy. R. at 16. The district court granted both motions. R. at 2, 17.

In accepting all of the district court's findings, the United States Court of Appeals for the Fifteenth Circuit reviewed the case *de novo* and reversed both decisions on February 24, 2020. R. at 18–19. The Fifteenth Circuit reasoned that because the EOCPA only governs CPAs, HHS did not violate the Free Exercise Clause by making decisions within their discretion. R. at 22. The Fifteenth Circuit further held that the EOCPA does not violate the Free Speech Clause because HHS is permitted to regulate the speech or conduct of a program that voluntary received government funds, pursuant to the Court's holding in *Rust v. Sullivan*, 500 U.S. 173 (1991). R. at 23–25. AACS applied for Rehearing En Banc, which this Court granted on July 15, 2020. R. at 26.

STATEMENT OF JURISDICTION

This Court has jurisdiction to rehear en banc the appeal of the order of the United States District Court for the Western District of East Virginia. Fed. R. App. P. 35(a)(2). This action arises under the First Amendment of the United States Constitution.

STANDARD OF REVIEW

The question of law at issue in this appeal is whether enforcement of the anti-discrimination policy of the EOCPA is permitted under the Free Exercise and Free Speech clauses of the First Amendment. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

This Court should hold that the EOCPA is constitutional under both the Free Exercise and Free Speech clauses. HHS is permitted to hold CPAs accountable to the law. CPAs like AACS are independent contractors. HHS exercising its discretion as a government agency does not dampen the neutrality or general applicability of the EOCPA. The district court hinged its decision on a false equivalency—that individual determinations by HHS constitute an exception to the EOCPA, despite the EOCPA only governing CPAs. Prior decisions have almost exclusively not been religiously motivated but are always made in the best interest of the child. Thus, because enforcement of the EOCPA is rationally related to HHS's legitimate government interest in holding CPAs accountable, preserving accessibility of placement services, and maintaining a diverse and broad pool of prospective foster and adoptive parents, HHS should prevail under rational basis review. Even if the law is not neutral and generally applicable, the government meets the standard of strict scrutiny. The EOCPA serves a compelling government interest in carrying out HHS's mission of ensuring that children can be placed into qualified homes and is narrowly tailored to achieve these goals. Allowing a CPA to categorically deny

certification for same-sex couples in open defiance of the EOCPA would only further harm an underrepresented community. As such, while the EOPCA meets the standards of neutrality, general applicability, and rational basis review, it also satisfies strict scrutiny. AACS should not be allowed to use the Free Exercise Clause as a means to justify discriminatory behavior in violation of the law.

The EOCPA does not violate the Free Speech Clause because HHS is permitted to condition funds for government programs promoting the government's message. AACS—as private entity that voluntarily contracts with HHS—provides assistance of the city's foster care program in exchange for taxpayers' dollars. As such, AACS must comply with any contractual obligations relevant to the government program's purpose to provide foster care services that are diverse, inclusive, and accessible to all residents of Evansburgh. The EOCPA only regulates conduct within the scope of the project. If HHS were to provide AACS funding and not hold AACS accountable, HHS would violate the Establishment Clause by financially endorsing a religious viewpoint. Additionally, the EOCPA's anti-discrimination notice requirement does not compel speech because it is a content-neutral law that regulates CPAs' conduct, not speech. The regulated conduct is limited to the function of the program and is not related to religious beliefs. By complying with the law, AACS is not making statements about the validity of same-sex marriage but rather they are performing as an independent government contractor. AACS's speech is not limited. The EOCPA's notice requirement should be examined under rational basis review and deemed constitutional. HHS declined to renew the contract of an independent contractor to perform a public service as a result of the contractor's refusal to abide by terms of the contract, without significance to the contractor's refusal based on religious beliefs.

ARGUMENT

I. THE FREE EXERCISE CLAUSE WAS NOT VIOLATED BECAUSE THE EOCPA IS NEUTRAL AND GENERALLY APPLICABLE AND SATISFIES BOTH RATIONAL BASIS REVIEW AND STRICT SCRUTINY.

The First Amendment protects the free exercise of religion. U.S. Const. amend. I. It prevents the government from favoring one religion over another, or religion over non-religion. *Everson v. Bd. Of Ed. Of Ewing Twp.*, 330 U.S. 1, 18 (1947). And while the government cannot regulate religious beliefs, it can regulate conduct "even when the action is in accord with one's religious convictions." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *Fowler v. State of R.I.*, 345 U.S. 67, 68 (1953). In other words, religious freedom does not absolve a person of the duty to follow neutral and generally applicable laws that conflict with religious principles. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). The Free Exercise Clause does not grant a person or organization unfettered religious freedom, particularly when the religious actor operates as an independent contractor. *Id.*; *see also Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 598 (2008).

In order to establish a Free Exercise Claim, the plaintiff must make a factual showing that the plaintiff espouses a bona fide religion, sincerely holds these beliefs, and that desired activity is essential to the practice of the plaintiff's religion. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972). Once the plaintiff has established a sincerely held and essential religious belief, courts must assess whether the law is neutral and generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993). Courts must assess whether the plaintiff can show that they would have been treated differently had they espoused different religious beliefs when engaging in the exact same conduct. *Id.*

If the contested law meets both standards of neutrality and general applicability, then the court must examine the law under rational basis review and determine whether the law is

rationally related to a legitimate government interest. *Lukumi*, 508 U.S. at 521. Historically, this has been a low bar to meet, and if met, there is no Free Exercise violation when the government holds the religious actor accountable. *Id.*; *see Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 371 (1988). Even if the contested law fails to meet either standard of neutrality or general applicability, the government would still prevail if it showed that the law met the standard of strict scrutiny: that (1) the law served a compelling government interest and (2) the law is narrowly tailored to achieve this interest. *Lukumi*, 508 U.S. at 522. Laws determined to be neutral and generally applicable are not subject to this standard of review. *Id.*

A. AACS Is an Independent Contractor, Which Grants HHS Heightened Flexibility to Act in a Managerial Capacity.

When it comes to evaluating constitutionality of government actions, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994). Such expanded power arises from the government's need to fulfill its role as an employer, which often requires the charging of agencies to carry out its will. *Id*. at 67475; *see also Engquist*, 553 U.S. at 598; *Connick v. Myers*, 461 U.S. 138, 150–51 (1983); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961). This level of heightened government discretion applies to contractors as well, as the important analysis examines the "jobs [contractors] perform, rather than their formal job status." *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 150 (2011). In *Nelson*, the Court held that because the contractors performed work that was "critical to NASA's mission," there were no "[r]elevant distinctions between" the contractors and a standard employee. *Id.* As such, the inquiry on contractor treatment and drug use was not prohibited by a constitutional right to privacy. *Id.* at 145. Not only does the government have heightened autonomy when overseeing employment-

related issues, but government employees and contractors enjoy reduced protections than they would in their capacity as private citizens. *Cafeteria & Restaurant Workers*, 367 U.S. at 896. And while constitutional rights do not vanish as a government employee or contractor, as with any other job, employees cannot simply dictate the terms of engagement for their duties. *Engquist*, 553 U.S. at 600; *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). As the employer, the government often must make individualized decisions to "'similarly situated' parties," requiring additional flexibility. *Engquist*, 553 U.S. at 604. Traditional standards of equal protection do not apply when the government acts as a manager or employer, as treating similar employees differently is entirely normal and acceptable in the employment context. *Id.* Thus, when it comes to Free Exercise claims against the government as an employer, the court should apply a less stringent review of the government's actions.

Here, AACS's contract with HHS falls under the umbrella of a government-contractor relationship, giving HHS heightened flexibility to carry out Evansburgh's goals of improving foster parent access for the city. In fact, the contract specifically required AACS to "provide appropriate adoption services, including certifications that each adoptive family is thoroughly screened, trained, and certified" while still being "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5–6. Like the contractors in *Nelson*, AACS's services are critical to Evansburgh's mission, and function in an almost-identical role. The written contract that provides AACS with funding in exchange for services highlights its role as a government contractor rather than a mere individual. R. at 5–6. AACS, as any other employee would, does not have to provide adoption services for HHS, nor does it need to receive public funding for doing so. But the law has clear requirements for agencies that do choose to receive public funding in exchange for child placement services, and

one requirement simply asks that CPAs do not discriminate on the basis of sexual orientation. R. at 6; E.V.C. § 42.-3(b). Should AACS decide that it does not want to follow this policy, it is free to forgo public funding for child placement services, as HHS has not prevented it from operating in other capacities. AACS cannot have its cake and eat it, too. When the government acts in its capacity as an employer, contractors that voluntarily take funding in exchange for services cannot dictate the terms of engagement as well.

B. The EOCPA Is Neutral and Generally Applicable.

That HHS exercised individualized discretion in its capacity as a government agency does not call into question the neutrality and general applicability of the EOCPA, particularly when the contested decisions run afield of any religious motivation. A law is not neutral if its object or purpose is to suppress religion or religious conduct. *Lukumi*, 508 U.S. at 524; *Smith*, 494 U.S. at 878–79. General applicability requires that a law be enforced evenly. "[A] law is considered neutral and generally applicable unless plaintiffs can make one specific showing: that the government would allow the same conduct by someone who 'held different religious views.'" *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015). Because HHS's application of the EOCPA satisfies both requirements even for a private individual, AACS' status as an independent contractor for HHS further undermines their Free Exercise claim.

1. The EOCPA Is Neutral Because Neither the Law Nor its Object Infringe Upon or Restrict Religiously-Motivated Practices.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532 (citing *Braunfeld*, 366 U.S. at 607 (plurality opinion); *Fowler*, 345 U.S. at 69–70). And while there are many ways to examine whether a law is neutral, the core requirement remains the same: neutrality is violated when "the

object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. This extends Free Exercise protections to laws that do not explicitly target a religion. *See, id.* At the very least, laws must be facially neutral, and cannot reference "a religious practice without a secular meaning discernable from the language or context." *Id.* But rarely are laws so coarsely crafted as to fail facial neutrality. Instead, courts look for more subtle signs of neutrality and object. *Id.*

In assessing neutrality, courts look to the historical background of the policy under challenge, the specific series of events leading to the enactment or official policy in question, and the policy's legislative or administrative history, including contemporaneous statements made by members of the decision-making body. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *see also Lukumi*, 508 U.S. at 540 (Kennedy, J., concurring). Any animus toward the religion in the law's text, history, or operation weighs against neutrality. *Locke v. Davey*, 540 U.S. 712, 725 (2004); *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (holding that land use plan was neutral because no evidence pointed to it being designed to infringe on religion). Signs of religious hostility are often needed to prove a lack of neutrality. *See, e.g., Masterpiece Cakeshop,* 138 S. Ct. at 1730 (statements and actions from the Commission revealed clear hostility toward cake shop owner's religion); *Lukumi*, 508 U.S. at 535 (statements from council, legislative timing, and uneven application of the ordinance reflected religious hostility).

In *Lukumi*, a city prohibited animal slaughter outside of specific exceptions. 508 U.S. at 524. The Supreme Court agreed that the ordinances used religiously-charged words like "sacrifice" and "ritual", but that there was enough secular meaning to still meet facial neutrality. *Id.* at 533. However, the city's legislative history strongly indicated that the law was passed to

specifically target practitioners of Santeria, who are required to sacrifice animals ritually. *Lukumi*, 508 U.S. at 524. The initial legislative sessions to discuss the law were held almost immediately after a Santeria church opened, and many documented statements from the meeting reflect animosity towards the religion and its practitioners. *Id.* The law was packaged as animal protection legislation but limited the actions to "sacrifices in a public or private ritual or ceremony." *Id.* at 527. The law did not apply to animals raised and killed specifically for food, but still prohibited ritual sacrifice even when animals were eaten as part of the ritual, as was common in Santeria. *Id.* In doing so, the city managed to shrewdly create a law that would prohibit only Santeria sacrifice, but left all other forms of animal killing, many of which were "no more necessary or humane," completely undeterred. *Id.* The Court held that the law violated the Free Exercise Clause, as it so obviously focused only on suppressing Santeria. *Id.*

Here, this type of deliberate and premeditated targeting does not exist. The challenged anti-discrimination policy of the EOCPA is facially neutral, as it makes no reference to any religiously-charged language, let alone have any secular distinctions. *See* R. at 4–6. The EOCPA and its amendments affect every CPA in Evansburgh, regardless of their religious beliefs. *See* R. at 4–6. This Court must ask whether AACS received any different treatment than non-Muslim childcare placement agencies that would have done the same thing. To date, nothing in the record reflects that AACS would have been treated differently than another agency who chose to discriminate against same-sex couples for another reason. Unlike in *Lukumi*, where the city passed laws that would only affect the core tenet of ritual sacrifice in Santeria, the attitude that Islam has on LGBT+ is not unique to the religion. In fact, though other religions denounce LGBT+, no other agencies, religious or secular, turned down parents from the LGBT+ community. *See, e.g.,* R. 89. Had AACS been a private citizen, HHS would still meet the

standard of neutrality and far surpasses it when the analysis is reviewed under the lens of an employer-contractor relationship.

Specifically, the EOCPA has been in effect since 1972, eight years before the formation of AACS, reflecting Evansburgh's longstanding commitment to eliminating bigotry. R. at 4–5. The additional anti-discrimination amendments created to protect the LGBT+ community were implemented in 2015, following standard set in *Obergefell*. R. at 6. By contrast, the city in *Lukumi* only passed its law following the establishment of a Santeria church, whereas the EOCPA's anti-discrimination provision came into effect both before HHS and AACS's most recent contract in 2017, and before AACS made it clear that it refused to serve same-sex couples. R. at 4–6.Notably, the city in *Lukumi* specifically asked during its legislative planning sessions how they could prevent the church from opening. 508 U.S. at 524. AACS here cannot proffer any such smoking gun, or any substantive evidence, for that matter, to corroborate that idea that EOCPA and its application were designed to target Muslim communities. In fact, in Hartwell's letter to AACS, he specifically mentions that he respects their freedom of religion but he cannot let them discriminate against an entire group of people. R. at 7. Unlike the church in *Lukumi*, there are no signs of targeting here, and neither HHS nor Hartwell exhibited any animosity towards AACS. The record does not indicate any other CPAs besides AACS that discriminate against same-sex couples and each of the four agencies that expressly serve the LGBT+ community have complied with every requirement from the EOPCA. HHS's decision comes irrespective of religious beliefs.

2. The Law is Generally Applicable Because It Is Neither Substantially Underinclusive Nor Does it Apply Exclusively to Religious Conduct While Failing to Regulate Nonreligious Conduct.

Laws burdening religious practice must also be generally applicable, meaning that it has the same effect on people and is enforced uniformly. *Lukumi*, 508 U.S. at 542–43. The Free

Exercise Clause protects religious observers against unequal treatment. *Lukumi*, 508 U.S. at 542–43. The government cannot selectively impose burdens only on a person's conduct that is motivated by religious belief. *Id.*; *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). In assessing general applicability, courts look at whether the law is substantially underinclusive, or it applies exclusively to religious conduct implicating a very small percentage of the total number of instances, while failing to regulate nonreligious conduct accounting for all other instances. *Lukumi*, 508 U.S. at 542.

In *Lukumi*, the policies were

> underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat[.] Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity.

Id. at 520.

Laws are "substantially underinclusive" if they do not consider other secular conduct and restrict the secular conduct in the same way it restricts the religious conduct, even though the secular conduct endangers the same alleged government interests. *Id.* at 544–45. The Free Exercise Clause prohibits the government from deciding that its secular motivations are more important than religious ones.

General applicability is also lessened when the government actively regulates religious conduct while permitting the same conduct when nonreligious, particularly when the religious actions only make up a small portion of all instances. *Id.* at 542. For example, in *Ward v. Polite*, the Sixth Circuit held that a university that expelled a graduate student who refused to counsel a same-sex couple, instead opting to refer them to other counselors, violated general applicability.

667 F.3d 727, 738 (6th Cir. 2012). The court reasoned that because the university had allowed for referrals for other, "mundane" reasons, like simply not being able to pay, the university applied its policy to only a small subset of instances. *Id.*

It's clear that the EOCPA and its amendments are not substantially underinclusive. The relevant anti-discrimination policies apply to all CPAs, religious or secular. *See* R. 4–6. Unlike in *Lukumi*, HHS has not refused to enforce the EOCPA on secular CPAs. That AACS is the only CPA to have been held accountable as far as the record shows says more about AACS than it does about the general applicability of the EOCPA. Out of the thirty-four CPAs in Evansburgh, many of which are religious as well, AACS stands alone in its refusal to serve same-sex couples, further punctuated by the fact that they have categorically declined to ever certify a same-sex couple, regardless of qualifications. R. at 7; *see also* R. at 89. And while the record does indicate that Hartwell only asked religious CPAs about EOCPA compliance, his actions were entirely in line with what employers may ask their employees. R. at 6. After all, because employers may choose to treat similar employees differently, the sheer fact of his inquiry does not strike down general applicability.

Further, the fact that the EOCPA only applies to child placement agencies and not to HHS or its employees is a function of how the industries work. HHS must be allowed to exercise discretion, beyond what CPAs are afforded, in order to properly place children into suitable homes. CPAs, on the other hand, are tasked with vetting families for suitability, not with making final decisions on placement. *See* R. at 3. There is no need for agencies like AACS to have the same degree of discretion given to the HHS. The district court erroneously equates HHS's placement discretion to AACS's unconditional denial of same-sex certification. R. at 12–13. While HHS does indeed make discretionary calls, they are not at all the "exceptions" that the

district court makes them out to be. Unlike *Ward*, HHS has never allowed other CPAs to violate the EOCPA, regardless of their reasons. *See* R. at 8–9. As such, the implementation of EOCPA meets the standard of general applicability.

C. The EOCPA is Constitutional Under Either Rational Basis Review or Strict Scrutiny.

A law is subject to rational basis review if it meets the standard of neutrality and general applicability, and subject to strict scrutiny if it fails the standard. *Lukumi*, 508 U.S. at 525; *Smith*, 494 U.S. at 877. Rational basis review requires that the government's actions be rationally related to a government interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Strict scrutiny requires the government to show that the law served a compelling government interest and is narrowly tailored to achieve this interest. *Lukumi*, at 508. Preserving the welfare of children in foster care and ensuring that the LGBT+ community has equally access to public resources are both well-recognized compelling interests. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727; *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

Here, the enforcement of the EOCPA reasonably furthers the government's interests in child welfare and eliminating all forms of discrimination. In light of the landmark decision in *Obergefell*, the state of East Virginia wanted to review its statutes and update them to better reflect their interests in "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. AACS's refusal to certify all same-sex couples cuts against HHS's goals of maintaining a wide a diverse pool of prospective parents to serve the needs of foster youth. R. at 46. Since the founding of the foster care system, anti-discrimination has been a central tenant of the government's program in order to meet the best interests of the child and community. R. at 46.

Thus, holding CPAs accountable is rationally related to the government's interests, satisfying rational basis review.

While HHS meets the standards of neutrality and general applicability, its enforcement of the EOCPA would hold up even under strict scrutiny. The EOCPA is narrowly tailored to meet the government's interests in foster care and anti-discrimination. If EOCPA and its enforcement were any more narrow, it would undermine the government's ability to preserve these interests. Short of sacrificing their compelling interest, HHS had no other recourse if it wanted to keep AACS in line with the other agencies. Hinging contract renewal on cooperation was the least restrictive alternative for HHS while still maintaining their goals. HHS does not intend on infringing upon AACS's religious liberties—it merely seeks to regulate an independent contractor by upholding a longstanding law and commitment to equality. In doing so, HHS's actions are narrowly tailored to serve a compelling government interest, satisfying strict scrutiny review.

II. HHS DID NOT VIOLATE THE FREE SPEECH CLAUSE BY CONSTITUTIONALLY CONDITIONING FUNDS FOR THE INDEPENDENT CONTRACTORS BECAUSE THE EOCPA ONLY REGULATES CONDUCT WITHIN THE PROGRAM'S PURPOSE.

The First Amendment right to Free Speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 403 U.S. 705, 714 (1977). While this right is fundamental, it is not absolute. *Whitney v. Cal.*, 274 U.S. 357, 373 (1972); *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)) (This right "may be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'"). The federal and state government cannot compel private citizens to "voice ideas with which they disagree," but it can

put conditions on funding for government programs. *Janus v. American Federation of State, Cty., and Municipal Employees*, 138 S. Ct. 2488, 2464 (2018); *see Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The Free Speech Clause is applicable to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The Court has held that government employees cannot claim a First Amendment right to unrestricted speech when "performing their official duties." *Garcetti*, 547 U.S. at 423 citing to *Pickering v. Board of Education*, 391 U.S. 563, 565 (1968); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996) (applying *Pickering* to independent contractors). Such restrictions are necessary to ensure the effective performance of the contract and the government program. *Snepp v. United States*, 444 U.S. 507, 516 (1980). These restrictions do not implicate the unconstitutional conditions doctrine because private entities that voluntarily contract with the government to provide public services are subject to the regulations on speech within "the limits of [a] government spending program." *AOSI*, 570 U.S. at 214–15. Speech within a government spending program is considered an extension of government speech, and the government "is entitled to say what it wishes." *Garcetti*, 547 U.S. at 422; *see Fulton v. City of Philadelphia*, 922 F.3d 140, 162 (3d Cir. 2019), (*cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104 (2020)). It is only when the government attempts to extend its reach and compel the individual's speech when acting as a private citizen or outside the confines of the government program that it infringes upon the First Amendment right to free speech. *AOSI*, 570 U.S. at 214–15; *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*").

A. Because AACS Is an Independent Government Contractor, HHS Can Assert Control Over AACS's Performance of Government Functions.

The right of the government to regulate speech of an individual or entity differs depending on the relationship between the parties. *Garcetti*, 547 U.S. at 422–23. The government is not allowed to restrict the speech of a private citizen simply because it disagrees with it. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). However, when an organization carries out their contractual responsibilities not "as a citizen" but as contractor providing services on behalf of the government, the organization's speech can be regulated because the rights of an independent contractor are more attenuated when acting on behalf of the government. *Garcetti*, 547 U.S. at 423; *Cafeteria & Restaurant Workers*, 367 U.S. at 896. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 438. The Court reasoned that the government, like private employers, needs a substantial amount of control over its employees. *Id*. at 418. Without this control, the facilitation of public services would be extremely inefficient. *Id*. Any organization that refuses to accept the terms of the government contract is welcome to reject the funding. *AOSI*, 570 U.S. at 214.

Here, the HHS's enforcement of the EOCPA falls directly in line the government's role as manager. AACS voluntary contracted with HHS in 1980 and agreed to provide adoptive placement services including the screening, training, and certifying of prospective parents in exchange for taxpayer dollars, services that it would otherwise be unable to perform. R. at 5. The contract terms also dictated a clear requirement in Section 4.36 that all CPAs, including AACS, must comply with the law. R. at 5–6. Additionally, the EOCPA only prohibits discriminatory conduct when fulfilling the contractual duty of certifying prospective adoptive

parents. R. at 4–6; E.V.C. § 42. The policy does not affect AACS's speech or conduct in any other capacity as a private citizen. The only limitation here is how AACS—as a contractor—performs its services on behalf of the government in accordance with its contract. As such, HHS is empowered to hold AACS accountable for violating the contract and the law.

B. Under *Rust*, HHS Can Condition Government Funding to Independent Contractors for Government Programs to Promote the Government's Message.

"When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). The Court recognizes that, while the government typically cannot impose conditions that would violate the First Amendment, the government is permitted to do so on government-funded programs. *AOSI*, 570 U.S. at 214. The Court articulated the difference in funding conditions as those that promote the government's message versus those that facilitate speech outside the program. *Id*. at 216. The *AOSI* Court further identifies *Rust* as illustrative of this distinction. *Id*.

1. The condition is constitutional because it regulates speech within the government program.

In *Rust*, the Court held that a content-based restriction on what funding recipients could tell patients in a government program was constitutional because the recipients were voluntarily facilitating the program and the restriction on speech pertained to the program. 500 U.S. at 199. When the government is in the managerial role, it has broader discretion to establish conditions than when regulating private conduct or providing a benefit to the general public. *Id.*; *see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (defining a benefit as "[w]hen the government chooses to offer scholarships, unemployment benefits, or other affirmative assistance to its citizens" to subsidize a private activity.). Akin to public

employment, the Court held that the government can impose conditions on independent contractors to ensure the funds are "used only to further the purposes of [the payments]." *Rust*, at 198. These conditions on free speech are unconstitutional outside the scope of the program but, inside the program, the recipient is required to comply with the program's conditions. *Id*. at 193, 197; *see Elrod v. Burns*, 427 U.S. 347, 360–63 (1976). The recipient is also free to decline the government funds and not be bound by the condition. *AOSI*, 570 U.S. at 214.

Similar to *Rust*, here, the government was responsible for facilitating a foster care program. To support in providing these services, HHS contracted private entities to serve as CPAs which are required to follow the EOCPA's anti-discriminatory policy to receive funds. R. at 3, 5–6. The district court erred in applying *AOSI* instead of *Rust* when determining whether the EOCPA is an unconstitutional condition because the regulation was within the scope of the program by ensuring neutrality and accessibility of foster care services to the city's diverse population. AACS's ability to provide adoption placement services is not a right, but a delegated government duty upon an independent contractor. Absent the contractual relationship with HHS, AACS would not be able to provide adoptive placement services, even if doing so is consistent with its religious beliefs.

a. The purpose of the program is to promote the government's message, not to facilitate private speech.

If the purpose of the program is to promote private speech rather than the government's message, the condition for funding violates the First Amendment. *Velazquez*, 531 U.S. at 542–43. The *Velazquez* Court held that a funding condition that prohibited legal services corporations from using federal funds to challenge existing welfare law was unconstitutional because the purpose of the law was to facilitate private speech and attorneys speaking to their clients cannot be classified as governmental speech. *Id.* The holding affirmed that "viewpoint based funding

decisions can be sustained in instances in which the government itself is the speaker, or in instances . . . in which the government use[s] private speakers to transmit information pertaining to its own program." *Velazquez*, 531 U.S. at 541. The purpose of the program here is to promote the government's message of finding placements in the child's best interest for the high number of foster youth in Evansburgh. R. at 9. Hartwell identified the many legitimate interests of the city's foster care system which are regulated and promoted by the EOCPA. R. at 9. The district court's interpretation of the free speech clause would force the government to identify a forum for private speech any time it made a financial decision, leading to inefficiency and inadequate functioning of government programs. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 237 (1948).

b. The government's compelling interests substantially outweigh the harm AACS may incidentally face.

HHS has several compelling reasons related to the government program's purpose of serving foster youth that warrant prohibiting CPAs from discriminating when fulfilling their delegated government duties. Mainly, the Court has emphasized that "urgent interest in the welfare of the child" and protecting their psychological and physical well-being are compelling interests. *Santosky*, 455 U.S. at 766; *see also, e.g., Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The anti-discrimination policy in the EOCPA ensures that all prospective parents and foster youth are treated equally by CPAs, not "as social outcasts or as inferior in dignity and worth" because of their sexual orientation. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. The policy also satisfies the program's purpose to maintain a broad and diverse pool of prospective parents that are willing and able to care for the foster youth of Evansburgh. Additionally, the EOCPA protects HHS from potential liability for allowing CPAs—which use their delegated government power to confer benefits upon the residents of Evansburgh—to use

their authority to discriminate against same-sex couples. *See Obergefell*, 135 S. Ct. at 2605; *West v. Atkins*, 487 U.S. 42, 49, 56 (1988). Further, this may open the floodgates to discrimination in all types. Discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 623–25 (holding that "eradicating discrimination" is a compelling government interest and that the enforcement of a regulation that does not substantially interfere with the organization's expression is constitutional.); *see also, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964). If AACS is permitted to not abide by the EOCPA, other CPAs could assert faith-based objections to any identity or characteristic they deem conflicting with their beliefs such as inter-racial marriage or sinful conduct. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage.").

2. Providing taxpayer dollars to AACS would improperly endorse a religious viewpoint in violation of the Establishment Clause.

The Court has recognized that the government is not allowed to delegate power or funds to endorse any religion or favor religion in general under the Establishment Clause. *Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590–91 (1988); *Flast v. Cohen*, 392 U.S. 83, 103 (1968). The Court explained that even the appearance of joint authority may relay support of a religion. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125–26 (1982). When a faith-based child services provider lost its contract with the state government agency because of the provider's noncompliance with the contract and policy, the court held that the government's actions prevented a violation of the Establishment Clause. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406 (6th Cir. 2007). In *Teen Ranch*, following a quality assurance review, the agency discovered significant violations by the provider because, despite not forcing the youths to

participate in religious practices, it was "improper [for the provider] to incorporate religious teachings into the on-going daily activities of youth and their treatment plans" as it is preempted by state or federal law. *Teen Ranch*, 479 F.3d at 406–07. The agency issued a moratorium on placements with the provider and requested the provider modify their practices to comply with the law. *Id*. at 406.

The case turned on whether the provider's funding was direct or indirect. *Id*. at 408. Direct funding is where a government program provides aid directly to religious institutions through the "unmediated will of government." *Mitchell v. Helms*, 530 U.S. 793, 810–14 (2000) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734 , 743 (1973) (forbidding direct funding for "specifically religious activit[ies]" even within "an otherwise substantially secular setting). Indirect funding involves "true private choice" in which government funds aid religious institutions "only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citing *Mueller v. Allen*, 463 U.S. 388 (1983)). The Court held that only indirect funding with true private choice is valid. *Mitchell*, 530 U.S. at 816–17; *see also Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."). The Sixth Circuit rejected all of the provider's claims and affirmed that the youth's ability to opt out of the religious programming did not equate to true private choice since the state government selects the youth's placement and selecting the provider would endorse a particular religious viewpoint, running afoul of the Establishment Clause. *Teen Ranch*, 479 F.3d at 409–10.

Similar to *Teen Ranch*, if HHS provided government funds to AACS, in spite of AACS's religiously-motivated denouncement of the EOCPA, it would be considered direct funding to a religious institution, running afoul of the Establishment Clause. HHS, as a government agency, cannot endorse a religious view using taxpayer dollars. Here, it is not indirect funding because there is no true private choice. Rather, HHS determines a foster youth's placement with a CPA. R. at 3. As such, HHS must be mindful of endorsing a religion with its decision, which would occur if, because of its beliefs, AACS were exempted from the anti-discrimination policy despite being a government contractor. To put simply: HHS has decided to not partner with, and provide taxpayer dollars to, a CPA who uses funds to promote their religious beliefs and discrimination that subverts the program's purpose. The purpose of the government program here mirrors that of *Teen Ranch*, to provide services to youth in need, not to facilitate the private speech and beliefs of AACS. Thus, the EOCPA condition on funding is constitutional as it prevents HHS from potentially violating the Establishment Clause by financially endorsing a religious viewpoint such as AACS's discrimination against same-sex couples.

C. The EOCPA's Notice Requirement Does Not Compel AACS to Affirm a Viewpoint it Disagrees With Because it is a Content-Neutral Law that Regulates Government Conduct, not Private Speech.

In order to preserve an actor's First Amendment protections against compelled speech, the government must prove that "the State's countervailing interest is sufficiently compelling." *Wooley*, 403 U.S. at 716. However, laws that implicate speech are constitutional if it regulates conduct or is content-neutral. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *FAIR*, 547 U.S. at 62. The EOCPA regulates the conduct of all CPAs, regardless of religion, and promotes the state-wide anti-discrimination mindset within the city's foster care program.

1. *FAIR* permits regulating conduct in government funded programs.

While the Court has determined that ease of identifying types of vehicles and promoting state pride are not "sufficiently compelling," the Court hinged its decision on the interest not being ideologically neutral. *Wooley*, 403 U.S. at 717. In *Wooley*, a married couple—acting as private citizens—were criminally convicted for violating a state statute when they taped over the state motto "Live Free or Die" on their license plates because it was "repugnant to their moral, religious, and political beliefs." *Id.* at 707. The Court held that these convictions violated the couple's First Amendment rights because the state's statute effectively required the couple to use their private, personal property, as a "mobile billboard" to display the state's message or be penalized. *Id.* at 715. The Court analyzed the state's interest of disseminating a non-neutral ideology as unable to outweigh a private citizen's right to Free Speech. *Id*. at 717. Similarly, the Court held that a state statute which required public school students to publicly perform the pledge of allegiance each day violated the First Amendment by reasoning that it demanded "affirmation or belief in attitude of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–36, 642 (1943). In both cases, the Court protected a private citizen's First Amendment right to not be required to foster a clear and specific ideological viewpoint that conflicted with their personal beliefs. *Id.*; *Wooley*, 430 U.S. at 715; *see also Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (holding that the anti-discrimination law could not force the parade organizer to include a group in the parade when the group's message went against the parade organizer's message).

However, the *FAIR* Court established a key difference to these protections for when the government regulates conduct instead of speech. 547 U.S. at 62. There, the Court identified that an anti-discrimination policy prohibits conduct, not speech, and should be analyzed as such. *Id.* at 62. The Solomon Amendment—which prevented the Department of Defense from funding

any higher education institution that prevents the entry of military recruiters on campus—did not force law schools to endorse a viewpoint they did not agree with because it regulated conduct, not speech. *Id.* Rather, it simply required law schools to notify students when and where military recruiters would be located on campus without restricting the schools' abilities to express their disfavor toward military practices. *Id.* The Court rejected the law schools' argument that the notification implicitly expressed an endorsement of the military's message. *Id.* at 64–65. Unlike the speech in *Wooley* and *Barnette*, the Court held that the Solomon Amendment was "a far cry from compelled speech" because, unlike the laws in those cases, it does not dictate the speech's content. *Id.* at 62. The Court reasoned that the alleged compelled speech is

> plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Id. (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).
The Court analogized this to Congress prohibiting employers from hiring on the basis of race, noting that the employer's act of taking down a "White Applicants Only" sign hardly permits review of the law as regulating speech rather than conduct. *Id*.; *see R. A. V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct.").

Here, the notice is not compelled speech as seen in *Wooley* and *Barnette*. Rather, it is more akin to the regulated conduct in *FAIR*. The written notice of the EOCPA anti-discrimination policy is similar to the email notifying law students of military recruiter presence on campus. The notice simply informs the relevant community of factual aspects of government funded programs, such as not discriminating when certifying prospective parents. Additionally,

the posting of a notice—which is an action required by all CPAs, regardless of their religious affiliation—is the equivalent to the removal of an employer's "White Applicants Only" sign. While this entails the affirmative placement of a sign, it is functionally identical to the removal of a prohibited sign, as both involve inclusion or exclusion of written words that violate laws regulating conduct.

2. Rational basis is the proper standard of review because displaying the anti-discrimination notice is conduct, not speech.

To determine whether a law that implicates speech is constitutional, the court must first determine which standard of review applies. *See, e.g. Turner Broad Sys. Inc. v. F.C.C.*, 512 U.S. 622 (1994); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 784 (2007). When a law does not implicate speech whatsoever, courts apply a rational basis standard. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Strict scrutiny, the most protective of speech, applies to laws that directly regulate expression, including laws that compel a private citizen to affirm a viewpoint that conflicts with their personal beliefs. *See Turner*, 512 U.S. at 623; *Wooley*, 430 U.S. at 714. For laws that fail to fall within either categories, the court uses an intermediate standard of review. Bhagwat, *supra*, at 784. Intermediate review has become so common that Justice Scalia has described it as a "default standard." *Id*. Here, the notice of the anti-discrimination policy does not trigger strict scrutiny because it does not directly regulate speech but instead facilitates the government's purpose. The most stringent level of review this Court should apply is intermediate review if it deems that displaying the notice has expressive elements.[3] However,

[3] Courts consider conduct expressive if, "considering 'the nature of[the] activity, combined with the factual context and environment in which it was undertaken,' we are led to the conclusion that the 'activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (quoting *Spence v. Washington*, 418 U.S. 405, 409-10 (1974)).

the proper standard of review is rational basis because the notice does not implicate speech whatsoever as it only regulates the conduct of all CPAs.

a. Strict scrutiny is not triggered, and, at most, intermediate review applies.

Content-based regulations of protected speech are usually subject to strict scrutiny because they "are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate." *City of Laude v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring). However, content-neutral regulations do not pose such a danger. *Id.* A regulation is content-neutral when the government regulation of the speech is not based on approval or disapproval of the conveyed message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As such, content-neutral laws, including regulations of symbolic or expressive conduct, require a less stringent, intermediate level of review. *Turner*, 512 U.S. at 642 (reviewing the content-neutral law at an intermediate level); Adam Wrinkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 844 (2006). And, unlike strict scrutiny which requires the least restrictive means to achieve government interest, intermediate review only requires that the means chosen not be substantially broader than necessary to achieve the government interest. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004).

The EOCPA's notice requirement is not protected speech because AACS is an independent contractor that has been delegated governmental duties it would not otherwise have without the contract. As a function of the government's foster care system, the notice is not the government's attempt to facilitate private speech, but rather promote the program's purpose. Thus, because it is not protected speech, the notice is not subject to strict scrutiny. Even if this

Court finds the notice to possess enough expressive elements to qualify as speech, it should still be reviewed under a lesser standard as content-neutral regulations of speech merit intermediate level review. *Turner*, 512 U.S. at 642. The notice is content-neutral because it represents no discernable ideology or message, and it is placed in publicly accessible locations providing public services. In fact, it explicitly reflects the need for neutrality by not discriminating in any form. There is no danger that AACS is being forced to affirm a viewpoint that conflicts with its beliefs, a requirement to prove AACS's compulsion to speak, because it is content-neutral and accessible to the public. The Court has distinguished privately owned and publicly accessible properties from cases like *Barnette* and *Wooley* because the public nature of the property eliminates the danger of ascribing viewpoints expressed on the property to the owner.[4]

Additionally, AACS is permitted to not only express its disapproval of the message in all other areas of its operation, but also display an additional notice expressing their disapproval. R. at 6. E.V.C. § 42.-4. AACS alleges that the EOCPA notice requires them to effectively endorse same-sex couples by certifying them as prospective parents. R. at 2. The EOCPA does no such thing. Rather, it requires AACS to fulfill its contractual duties in accordance with the law—not imbue its certifications with meaning prohibited by the law. Finally, displaying a sign in the window or outside of an office space is not only within the less-than-substantially-broad means required for intermediate review, but it also satisfies the least restrictive means for strict scrutiny by being passively placed and allowing for a written declaration of disagreement alongside it.

[4] *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980) (holding that a state provision permitting individuals to exercise their free speech rights on the property of a privately owned, publicly accessible shopping mall did not violate the shopping mall owner's rights; also noting that had the shopping mall owner disapproved of the expressed message on his property, he could have posted a sign disavowing the message and still be protecting his rights).

b. Rational basis is the proper standard of review.

Even when expressive conduct falls within the scope of First Amendment protection, the government has greater latitude to regulate such conduct than it does speech. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The Court in *O'Brien* established a four-prong test to determine whether a regulation of conduct is constitutional under the First Amendment. *O'Brien*, 391 U.S. at 377. To withstand a First Amendment challenge, the court must find that: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial government interest; (3) government interest be unrelated to the suppression of free expression; and (4) the restriction on First Amendment freedoms must be no greater than necessary to further the interest. *Id.* The Court has applied the *O'Brien* test when examining the constitutionality of content-neutral regulation of speech with rational basis review. *Barnes*, 501 U.S. at 566–67. Under rational basis review, the government's actions must be rationally related to a legitimate government interest. *Schweiker*, 450 U.S. at 230.

Here, the notice requirement of the EOCPA withstands the First Amendment challenge because it satisfies all four prongs of the *O'Brien* test. To the first prong, the regulation is within the constitutional power of the government as delegated to it by the E.V.C. R. at 3–6; E.V.C. § 42. The E.V.C. permits the city of Evansburgh to create a foster care system as it sees fit and in accordance with the law. R. at 3–6; E.V.C. § 42. As such, the city delegated the power to HHS which, in turn, hired independent contractors such as AACS to fulfill the duties. R. at 3. The EOCPA was within the power of the state government to enact and has been delegated to HHS to enforce on CPAs. To the second and third prongs, the regulation furthers an important or substantial government interest unrelated to the suppression of free expression by providing placements to foster youth with their best interest and well-being in mind. The purpose of the government program and the EOCPA is to hold CPAs accountable to the laws, preserve the

accessibility of the public program, and ensure a diverse and broad pool of prospective parents to meet the needs of youth in the foster care system. R. at 9. To the fourth prong, the restriction of the freedom is no greater than necessary to furthering the government's interest because the conduct is only limited to the times AACS is fulfilling its duties of certifying parents as adoptive placements. Under the *O'Brien* test, the EOCPA's notice requirement satisfies rational basis review because it reasonably furthers the government's interest in providing diverse, accessible, and inclusive foster care services. AACS is able to fully enjoy and exercise its First Amendment rights outside of its responsibilities as an extension of the government.

CONCLUSION

Accordingly, this Court should REVERSE the decision of the District Court for the Western District of East Virginia and DENY AACS's motions for a temporary restraining order and a permanent injunction. In its managerial capacity, HHS's enforcement of the EOCPA is both neutral and generally applicable and satisfies both rational basis review and strict scrutiny. HHS is permitted to condition the receipt of funds to independent contractors to ensure fulfillment of the government program's purpose and does not compel speech by regulating conduct through content-neutral regulation. Thus, HHS's enforcement of the EOCPA does not violate the Free Exercise or Free Speech clauses.

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Respectfully Submitted,

s/ Team 13

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