ELON UNIVERSITY SCHOOL OF LAW
BILLINGS, EXUM & FRYE MOOT COURT COMPETITION
FALL 2020 PROBLEM

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.

EN BANC BRIEF FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

Brief for Defendant-Appellant

Team No. 18
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QUESTIONS PRESENTED

I. Does the EOCPA violate the Free Exercise Clause when: its (1) object is not to suppress religion, (2) exemptions do not permit refusal of child placements based on protected characteristics, (3) purpose is to eradicate discrimination, and (4) enforcement consists of merely mandating compliance?

II. Does the City of Evansburgh violate the Free Speech Clause by conditioning the receipt of adoption funds on compliance with the EOCPA when the statute: (1) has conditions that directly affect the administration of the service and (2) does not compel expressive speech?

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STATEMENT OF THE CASE

I. Statement of Facts

Child placement is a pressing issue in the City of Evansburgh ("the City"), the largest city in East Virginia, where there are 17,000 children in foster care and 4,000 children available for adoption. R. at 3. The need for adoptive families spiked in August 2018 due to an influx of children into foster care. R. at 8.

The East Virginia Code empowers municipalities to regulate foster and adoption placements of children. R. at 3; E.V.C. § 37(d). The City charged the Department of Health and Human Services ("HHS") with implementing a system that serves the well-being of each child in its care. R. at 3. To this end, HHS has entered into contracts with thirty-four child placement agencies ("CPAs") to provide foster care or adoption services in exchange for public funds. *Id.* Families seeking to foster or adopt children initiate contact with CPAs of their choice. R. at 4-5. CPAs screen and counsel potential families and maintain lists of qualified families that they have approved. R. at 4. Whenever HHS receives a child into custody, it sends a referral to all of the CPAs, who in return, send back potential matches for the child. *Id.* Finally, HHS evaluates these options and selects the most suitable match for the child based on a variety of considerations. *Id.*

East Virginia imposes nondiscrimination requirements on CPAs via the Equal Opportunity Child Placement Act ("EOCPA"). R. at 4; E.V.C. § 42. The EOCPA prevents CPAs from discriminating when screening and certifying potential foster care or adoptive parents or families. R. at 4; E.V.C. § 42.-2. While the list of prohibited bases of discrimination did not initially include "sexual orientation," following the Supreme Court's decision in *Obergefell v. Hodges*, the EOCPA was amended in 2015 to explicitly prohibit such discrimination by CPAs. R. at 6; *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (extending the fundamental right to

marry to same-sex couples). As the Governor of East Virginia expressed, this and other similar changes in East Virginia law reflect a commitment to "eradicating discrimination in all forms, particularly against sexual minorities." *Id.*

The amendments to the EOCPA also extended an earlier requirement that, when all other qualifications are equal, CPAs must give preference to families where at least one parent is the same race as the child needing placement; the amended version also requires a preference for parents that are the same sexual orientation as the child needing placement. R. at 4, 6. E.V.C. § 42.-2, 42.-3(c). Further, the amendments require that CPAs post a statement that discrimination against anyone—including any prospective foster or adoptive parent—on any protected grounds under the EOCPA, is illegal. R. at 6; E.V.C. § 42.-4. However, the amendment explicitly permits religious-based agencies to post a written objection alongside the policy. *Id.*

In early July 2018, it was brought to the attention of HHS Commissioner Christopher Hartwell ("Commissioner Hartwell") that the religious-based CPAs that contracted with HHS may not be complying with the amended EOCPA. R. at 6. While investigating this allegation, Mr. Hartwell discovered that one of the CPAs, Al-Adab Al-Mufrad Care Services ("AACS"), refused to comply with the EOCPA, citing a religious opposition to same-sex marriage. R. at 7. AACS had previously turned away same-sex couples that approached them, referring them to CPAs that served the LGBTQ community instead. R. at 7.

Under its contract with HHS, AACS was required to be "in compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6. After discovering that AACS refused to comply with the EOCPA—a law of the State of East Virginia—Commissioner Hartwell sent AACS a letter informing them that "while HHS respects your sincerely held religious beliefs," HHS could not renew its contract with AACS unless they

would certify that they would fully comply with the EOCPA in the future. R. at 7. The letter also explained that AACS would be subject to a referral freeze by which other agencies could not refer families to AACS, unless AACS agreed to comply with the EOCPA. R. at 7-8.

As Commissioner Hartwell testified, enforcing the EOCPA serves several governmental purposes. R. at 9. First, enforcement of the EOCPA furthers the broader purpose of enforcing state and local laws to which CPAs voluntarily agreed to be bound. *Id.* The three remaining highlighted purposes echo the Governor's statements about eradicating discrimination in the wake of *Obergefell*: making sure (1) child placement services "are accessible to all Evansburgh residents who are qualified for the services;" (2) the "pool of foster and adoptive parents is as diverse and broad as the children in need of such parents;" and (3) those who "pay taxes to fund government contractors are not denied access to those services." *Id.*

II. Procedural History and Disposition Below

On October 30, 2018, AACS filed this action against Commissioner Hartwell, seeking a temporary restraining order ("TRO") against HHS's imposition of the referral freeze and a permanent injunction compelling HHS to renew its contract with AACS. R. at 8. AACS alleged that enforcement of the EOCPA against it violated its First Amendment rights under both the Free Exercise Clause and the Free Speech Clause. *Id.* The District Court for the Western District of East Virginia found each of these allegations persuasive and granted both requested forms of relief on April 29, 2019. R. at 17. However, on February 24, 2020, a panel of the Court of Appeals for the Fifteenth Circuit reversed, finding that enforcement of the EOCPA was neither a violation of Free Exercise nor Free Speech rights. R. at 18, 25. This case is now before the Fifteenth Circuit for a rehearing en banc of Commissioner Hartwell's appeal from the District Court's order granting a temporary restraining order and permanent injunction.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit issued its opinion on February 24, 2020. R. at 18. The petition for writ of certiorari was granted on July 15, 2020. R. at 26. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2018).

SUMMARY OF THE ARGUMENT

Commissioner Hartwell's referral freeze and decision not to renew its contract with AACS neither violated the agency's First Amendment rights under the Free Exercise Clause nor the Free Speech Clause. In a Free Exercise claim, a law must be neutral and generally applicable to receive low-level rational basis review. *Emp't Div. v. Smith*, 494 U.S. 872, 877-78 (1990). The EOCPA is neutral because its text does not draw distinctions between groups, the explanation for its enforcement is non-discriminatory, and there are only mild consequences that stem from the EOCPA's non-enforcement. Further, relevant government officials did not make discriminatory statements against AACS when enforcing the statute and Commissioner Hartwell evidenced great respect for AACS' religious beliefs throughout the attempted enforcement. In addition to its neutrality, the EOCPA is generally applicable because it does not allow any group to completely refuse a certification based on protected characteristics and its exemptions do not undermine the purpose of the statute. Although HHS considers protected characteristics when making child placements, this mere consideration does not defeat general applicability.

Notably, even if the EOCPA fails the neutrality and general applicability requirements and is subject to strict scrutiny, it will survive review. This standard requires that the government have a compelling interest and that the law is narrowly tailored to achieve this interest. The Supreme Court has established that eradicating discrimination based on sexual orientation is a compelling governmental interest as a matter of black-letter law. *Roberts v. U.S. Jaycees*, 468

U.S. 609, 623 (1984); *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1747 (2020). Both the amendment to the EOCPA preventing CPAs from discriminating based on sexual orientation and the enforcement of the statute were motivated by a government objective to eliminate discrimination. Further, the EOCPA is narrowly tailored to achieve this goal because it specifically targets discrimination, and mandating compliance with a nondiscrimination statute is the least restrictive means of achieving this objective.

Additionally, the City's adoption and enforcement of the EOCPA does not violate the Free Speech Clause by placing unconstitutional conditions on AACS. The government is permitted to place conditions, such as E.V.C. § 42.-3(b), on contractors who provide government services. The City's CPAs are obligated by contract to perform certification services for prospective foster parents and families. Thus, the City can require CPAs to conduct certification in accordance with statutes prohibiting discrimination on the basis of sexual orientation. Further, § 42-.4 does not unconstitutionally compel AACS's speech by requiring an affirmation of LGTBQ individuals in their capacity as prospective adoptive parents. Section 42.-.4 simply mandates that all CPAs post on their premises a written statement evidencing adherence with state law. Thus, § 42-.4 does not proscribe or prescribe expressive speech and does not unconstitutionally compel AACS to speak.

STANDARD OF REVIEW

This case involves questions of law, so the standard of review is de novo. *See, e.g.*, *United States v. Breeden*, 366 F.3d 369, 373 (4th Cir. 2004). Further, because this case also involves First Amendment issues, the appellate court has an "obligation to 'make an independent examination of the whole record.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1980) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

ARGUMENT

I. COMMISSIONER HARTWELL DID NOT VIOLATE THE FREE EXERCISE CLAUSE BY ENFORCING THE EOCPA AGAINST AACS BECAUSE THE EOCPA IS NEUTRAL, GENERALLY APPLICABLE, SERVES A COMPELLING GOVERNMENTAL INTEREST, AND IS NARROWLY TAILORED TO THAT INTEREST.

While the neutrality and general applicability requirements established by *Smith* overlap to some degree, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993), the Supreme Court currently interprets them as separate considerations. *Id.* at 532, 543 ("We begin by discussing neutrality . . . . We turn next to . . . general applicability."); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (mentioning both neutrality and general applicability but only analyzing neutrality). Neutrality concerns the motivation behind the law—the investigation of which requires critical analysis of the timeline leading up the law's formation and the dispute. *See Lukumi*, 508 U.S. at 534, 535, 540. On the other hand, general applicability involves the real-life operation of the law. *Id.* at 543-46. This consideration necessarily includes evaluating exemptions to the government's enforcement and the relationship of those exemptions to the law's purpose. *Id.*; *see Lukumi*, 508 U.S. at 543-46.

A. The EOCPA is neutrally applied because the object of the law is not to suppress religion.

1. The EOCPA is facially neutral because its language does not draw divisions between different groups of people.

A neutral law must not discriminate on its face. Generally, facially discriminatory laws "refer[] to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. Applied in the adoption context, this means that prohibitions apply uniformly between all adoption agencies. *New Hope Family Servs., Inc. v. Poole*, 966 F.3d

145, 163 (2d Cir. 2020). For example, in *New Hope*, New York enforced a state regulation, which prohibited "discrimination against applicants for adoption services on the basis of . . . 'sexual orientation,'" against a Christian adoption agency. *Id.* at 149 (citing N.Y. Comp. Codes R. & Regs. Tit. 18). The regulation's language is facially neutral because it does not single out any group of people, applying equally to all adoption agencies regardless of religious status. *Id.* at 163. Therefore, for a law or regulation to fail this standard, its text must draw distinctions between groups. *See Lukumi*, 508 U.S. at 533; *see New Hope*, 966 F.3d at 163.

The language of the EOCPA is facially neutral. It precisely mirrors that of the New York anti-discrimination regulation in *New Hope* by making it "illegal . . . to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's . . . sexual orientation." *New Hope*, 966 F.3d at 149; R. at 6. Further, like the New York regulation, the text of the EOCPA does not single out any groups, applying to all adoption agencies equally. *New Hope*, 966 F.3d at 163; *see* R. at 6. In this sense, given that the regulation in *New Hope* is facially neutral and nearly identical to the EOCPA, the EOCPA is also neutral on its face. *New Hope*, 966 F.3d at 163.

2. The EOCPA is neutral because there is a sufficient explanation for its non-severe enforcement, the City officials' statements were non-discriminatory, and there is evidence of the City's respect for AACS' religious beliefs.

Even if a statute is neutral on its face, it will not satisfy the neutrality requirement if its object "is to infringe upon or restrict practices because of . . . religious motivation." *Lukumi*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878–79). This inquiry considers the totality of circumstances surrounding the law for religious hostility—including the statute's operation, historical background, legislative history, and the series of events leading to its enactment. *New Hope*, 966 F.3d at 163 (citing *Lukumi*, 508 U.S. at 534, 535, 540; *Masterpiece Cakeshop*, 138 S.

Ct. at 1731); *see Fulton v. City of Philadelphia*, 922 F.3d 140, 157 (3d Cir. 2019), *cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104 (2020).

i. The City's explanation for its enforcement of the EOCPA three years after its adoption is sufficiently non-discriminatory.

The timing and explanation of the government's enforcement helps shed light on any religious hostility. *See New Hope*, 966 F.3d at 163. There must be a sufficient, non-discriminatory explanation for the enforcement action in order for the court to find that the enforcement was not made for hostile purposes. *See id.* at 167. In *New Hope*, the government began enforcing an anti-discrimination statute from 2013 against a religious adoption agency in 2018, changing its original position that the statute would not alter the current adoption standards. *Id.* at 163, 167. While the government stated that this decision stemmed from a "new policy" of reviewing private providers' procedures, the Second Circuit still found the change to be "unexplained" and that it constituted evidence of discrimination. *Id.* at 167. Similarly, in *Buck v. Gordon*, Michigan changed its original position to argue that a 2015 anti-discrimination law should be enforced against St. Vincent Catholic adoption agency. 429 F. Supp. 3d 447, 467 (W.D. Mich. 2019). Straying from *New Hope*, the court found reason for this change: Michigan's chief legal counsel, who stated that the law's supporters were "hate-mongers" and categorized the law itself as "indefensible." *Id*. at 467. According to the court, "her assessment of risk . . . led the State to move from defending St. Vincent's position to abandoning it[,]" which serves as evidence of religious hostility and a lack of neutrality. *Id.* On the other hand, in *Fulton*, the 2016 Fair Practices Ordinance was enforced against the CSS in 2018. *Fulton*, 922 F.3d at 146. Like *Buck*, this enforcement had a specific reason: a *Philadelphia Inquirer* reporter had contacted Human Services in 2018 to inform it of the adoption agency's noncompliance. *Fulton*, 922 F.3d at 146. However, unlike *Buck*, the Third Circuit found this explanation to be non-discriminatory,

declaring that "focusing her inquiries on religious agencies made sense[]" because there was no reason to suspect nonreligious agencies of the same actions. *Id.* at 157.

There is a non-discriminatory explanation for East Virginia's enforcement of the EOCPA against the AACS. Like *Fulton*, wherein the government only enforced the 2016 Fair Practices Ordinance in 2018 after a *Philadelphia Inquirer* reporter shared with Human Services that CSS was not complying, here, East Virginia only enforced the 2015 EOCPA in 2018 after an *Evansburgh Times* reporter inquired whether religious adoption agencies were complying with the statute. *Fulton*, 922 F.3d at 146; R. at 6. Given that, in *Fulton*, the Third Circuit found this explanation undercut arguments of discrimination, the explanation here similarly reflects non-hostile reasons for enforcement. *Fulton*, 922 F.3d at 157. Further, while one may argue that the three years between the adoption of the new EOCPA and its enforcement against AACS is unaccounted for and therefore could constitute evidence of discrimination, that argument will fail. Until the reporter approached Commissioner Hartwell, the government had no reason to believe that religious agencies were not following the EOCPA. *See* R. at 6.

ii. The City's referral freeze and refusal to renew its contract with AACS survives the neutrality consideration because it does not amount to closure of the agency.

Beyond the timing and explanation of the enforcement, courts also consider *how* the government enforced the law against the adoption agencies. *See New Hope*, 966 F.3d at 163; *Fulton*, 922 F.3d at 157. Religious hostility can be evidenced by the severity of the consequences of not following the government's directive. *See New Hope*, 966 F.3d at 148, 149; *Fulton*, 922 F.3d at 147-48; *Buck*, 429 F. Supp. 3d at 460. In *New Hope*, the government made New Hope choose between approving same-sex adoption or "clos[ing] its adoption services," eventually ordering the agency to close after fifty years of operation. 966 F.3d at 160. The Second Circuit

found that this factor gave "rise to the 'slight suspicion' of religious animosity" and thereby made dismissal premature. *Id.* at 165. Similarly, in *Buck*, the municipality threatened to revoke government funding, which St. Vincent asserted would create a significant financial burden and cause it to close. 429 F. Supp. 3d at 460, 466. Additionally, the government threatened to revoke the adoption agency's license—an action that would prevent it from providing any foster and adoption services. *Id.* at 465. On the other hand, in *Fulton*, the municipality did not offer a new contract to the agency but simultaneously emphasized that it did not want its "valuable relationship with CSS . . . [to] come to an end[.]" 922 F.3d at 150. Moreover, the municipality stopped referring new foster children to CSS ("intake freeze"). These actions would still permit CSS to operate, but without government funding. *See id.* at 147-48. Unlike in *Buck*, there are no claims that the removal of government funding would cause the agency to close. Further evidencing the municipality's lack of hostility, Human Services would grant exemptions to the referral freeze when "there were particularly strong reasons why CSS would be the best placement for an individual child—for example, if one of that child's siblings had already been placed with a CSS family." *Id.* at 149. Given *New Hope* and *Fulton*, the threshold for finding government discrimination is causing closure of the agency. *See New Hope*, 966 F.3d at 163; *Fulton*, 922 F.3d at 157.

East Virginia's enforcement of the EOCPA is far from severe, illustrating its lack of hostility towards AACS. *See* R. at 7-8. Like *Fulton*, wherein the municipality refused to offer a new contract to the CSS and instituted an intake freeze, here the HHS also refused to renew its contract with AACS and implemented a referral freeze. 922 F.3d at 146, 150; R. at 7-8. However, in *Fulton*, Human Services granted exemption requests to the referral freeze when CSS would be the best placement for the child, such as when a child's sibling was placed with a

CSS family. 922 F.3d at 149. Here, although a young girl was placed with a different family from her brothers due to the referral freeze against AACS, there is no evidence that any exemption requests were even filed. R. at 8. Regardless of whether any requests were filed, unlike New Hope and St. Vincent in *New Hope* and *Buck*, respectively, there is no evidence that the actions against AACS would either directly close the agency or create such a financial burden that the agency would be forced to close. R. at 7-8. Therefore, East Virginia's refusal to renew its contract with AACS and the referral freeze are in no sense severe measures.

iii. Given the Governor's lack of involvement with enforcement of the EOCPA, as well as the standard of review for a TRO and Permanent Injunction, those City officials enforcing the EOCPA made only neutral statements about AACS.

Discriminatory statements made by government officials directly involved in enforcement of the statute can serve as evidence of religious hostility. *Masterpiece Cakeshop*, 138 S. Ct. at 1730. In *Masterpiece Cakeshop*, a baker refused to make a wedding cake for a same-sex couple. *Id.* at 1724. In response, a member of the Civil Rights Commission—the body charged with neutral enforcement of Colorado's antidiscrimination law—compared the baker's "invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." *Id.* at 1729. Given that the Commission is the relevant body that "decides whether to initiate a formal hearing," the Supreme Court concluded that the individual member's statement not only disparaged the baker's religion, but also evidenced the entire Commission's religious hostility. *Id.* at 1725, 1730. Similarly, in *Lukumi*, the city council passed ordinances that had the effect of barring Santeria practitioners from religious sacrifice. 508 U.S. at 536. Numerous council members displayed extreme animosity towards the religion; for example, one member claimed that Santeria practitioners "are in violation of everything this country stands for." *Id.* at 541. Based on this and similar statements by the City Council, the Supreme Court held that the object

of the ordinances was to suppress religion. *Id.* at 542. Overall, as illustrated, discrimination must come from a person directly involved with the enforcement.

The single statement by the East Virginia Governor is not enough to constitute religious hostility. *See* R. at 6. Like *Masterpiece*, wherein a member of the Civil Rights Commission compared the baker's religious beliefs to defending slavery, the East Virginia Governor suggested in 2017 "that belief in the traditional definition of marriage equates to bigotry." R. at 6. However, unlike *Masterpiece*, in which the Civil Rights Commission was responsible for the enforcement of the anti-discrimination statute, here, the Governor of East Virginia had no such involvement with either the statute or in the action against AACS. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729; R. at 6-8. The Governor simply "directed the Attorney General to. . . . review . . . state statutes to identify which ones needed to be amended to reflect the commitment to [anti-discrimination]"; it has not been alleged that he was involved with the actual amendments or the enforcement of the statute. R. at 6. In this sense, the East Virginia Governor's isolated statement is not relevant to the neutrality consideration.

When government officials' statements can either be classified as discriminatory or non-discriminatory, the standard of review leads the determination. *See Fulton*, 922 F.3d at 1104 (declaring that, on a motion for a preliminary injunction, Appellant CSS had to demonstrate a reasonable likelihood of success); *New Hope*, 966 F.3d at 149 (finding that, on a motion to dismiss, the court must "accept all factual allegations pleaded by [Appellant] New Hope in its complaint as true, and . . . draw all reasonable inferences in its favor."). For example, in *Fulton*, the Third Circuit considered the City Council's resolution, which declared that the state "has laws in place to protect its people from discrimination that occurs under the guise of religious freedom" and that any "agency which violates [the statute] . . . should have their contract with

the City terminated with all deliberate speed." *Fulton*, 922 F.3d at 149. The court disagreed that these two statements were evidence of this hostility, contending that they could express contempt or simply be restating legal principles. *Id.* at 157. Given that there is no requirement to draw all facts in favor of CSS on a motion for a preliminary injunction, the court found that the City Council's resolution was neutral. *See id.* However, in *New Hope*, when the religious adoption agency protested the government's directive, officials stated that "[s]ome Christian ministries have decided to compromise and stay open." 966 F.3d at 158. As with *Fulton*, these statements were subject to different interpretations; although, since *New Hope* dealt with a motion to dismiss, the Second Circuit drew this fact in favor of New Hope and held that the statement was discriminatory. *Id.* at 149, 168. In this sense, parties arguing the sufficiency of a motion for injunction—including a permanent injunction—have a heavier burden than those fighting a motion to dismiss. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32, (2008) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that [in a motion for a permanent injunction] the plaintiff must show a likelihood of . . . actual success") (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 546, n. 12 (1987)). Temporary restraining orders also fall under the same standard as preliminary injunctions. *Sampson v. Murray*, 415 U.S. 61, 86 (1974) ("[a] temporary restraining order . . . must conform to the standards applicable to preliminary injunctions.").

While Appellee may argue that Commissioner Hartwell has made discriminatory statements, they cannot be classified as such on a Motion for Permanent Injunction and Temporary Restraining Order. *See* R. at 7. Like *Fulton*, wherein the agency sought a preliminary injunction against the municipality for enforcing the Fair Practices Ordinance, here the AACS seeks a permanent injunction and temporary restraining order against East Virginia for enforcing

the EOCPA. *Fulton*, 922 F.3d at 1104; R. at 2. Neither preliminary, permanent injunctions, nor temporary restraining orders require the court to draw the facts in favor of the Appellant. *See Winter*, 555 U.S. at 32; Sampson, 415 U.S. at 86; *Fulton*, 922 F.3d at 157. For this reason, although the City Council's statement in *Fulton* could be interpreted to be discriminatory or non-discriminatory, the court erred on the side of non-discriminatory, finding that they were simply restatements of legal principles. *Fulton*, 922 F.3d at 157. Similarly, even though Commissioner Hartwell's letter contends that "AACS must comply with the State's EOCPA to be able to receive government funding and referrals," which could be discriminatory or non-discriminatory, this letter will be classified as a non-discriminatory restatement of legal principles. *See* R. at 7.

iv. Commissioner Hartwell's respect for AACS illustrates the City's lack of hostility towards AACS and heavily weighs on the side of neutrality.

While the government's statements and the circumstances surrounding the enforcement are important inquiries, courts give significant weight to any evidence of the government's respect for the adoption agency's religious beliefs. *See Fulton*, 922 F.3d at 150. For example, throughout their enforcement, the City officials in *Fulton* repeated that they held "respect [for CSS'] sincere religious beliefs." *Id.* at 150. This made a difference in the Third Circuit's assessment of the case, prompting them to find that there was a lack of true religious discrimination. *Id.* at 157. *See New Hope*, 966 F.3d at 164 ("the Third Circuit found that the plaintiff was unlikely to succeed on its claim [in *Fulton*] because the record demonstrated [respect for] the plaintiff's sincerely held beliefs[.]"). However, in *New Hope* and *Buck*—wherein the court found evidence of religious hostility—there were no similar statements of respect for the agency.

Here, there is evidence of the government's respect for AACS' Muslim beliefs. As with *Fulton*, in which City officials stated that they held "respect [for CSS'] sincere religious beliefs[,]" Commissioner Hartwell likewise shared that "HHS respects [AACS'] sincerely held religious beliefs[.]" Given that the Third Circuit in *Fulton* heavily weighted this respect, leading to the conclusion that the Fair Practices Ordinance was neutral, Commissioner Hartwell's respect for the AACS will be given similar weight and lead the court to hold that the EOCPA is was neutrally enforced.

Ultimately, East Virginia HHS has a sufficient explanation for its non-severe enforcement of the EOCPA against AACS and only made non-discriminatory statements to the agency. Further, there is evidence of Commissioner Hartwell's respect for AACS' strongly-held religious beliefs. In this sense, the HHS does not demonstrate religious hostility towards the adoption agency and the EOCPA is neutrally applied.

B. **The EOCPA is generally applicable because its exemptions do not permit CPAs to *refuse* a child placement based on protected characteristics.**

A law that exempts or does not reach a substantial category of secularly-motivated conduct is not generally applicable and must be analyzed using strict scrutiny. *Lukumi,* 508 U.S. at 543-46. Further, a law is not generally applicable when the secular exemptions undermine the purpose of the law. *Id.* Such exemptions can be found within the text of the statute itself. *See id.* at 542. *Lukumi* considered exemptions found within the City of Hialeah's animal sacrifice ordinance, concluding that the law had the effect of exempting all non-religious animal sacrifice, as well as kosher slaughter of animals. *Id.* at 536. These exemptions undermined the purpose of the law, which was to protect "public health and prevent[] cruelty to animals." *Id.* at 538. In response, the Supreme Court held that Hialeah singled out religious practice, and Hialeah conceded that the ordinance was not generally applicable. *Id.* at 538, 544.

In addition to exemptions within the text, general applicability fails when the enforcers of the statute only grant exemptions for secular reasons. These situations are characterized by the government taking action against religious individuals and organizations, even though secular individuals and organizations are taking the same action. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 151 (3d Cir. 2002) (holding that selective enforcement of a municipal ordinance barring the posting of advertisements upon telephone poles defeated general applicability when it was only enforced against Orthodox Jewish residents).

Further, in the adoption context, general applicability survives so long as the statute's enforcers do not permit an agency to completely refuse individuals because of protected characteristics. *Fulton*, 922 F.3d at 158. For example, in *Fulton*, Philadelphia Human Services considered race and disability when placing a child in a foster home, thereby adding certain exemptions to the Fair Practices Ordinance. *Id.* The Third Circuit found that these exemptions neither undermined the purpose of the Ordinance (to prevent discrimination) nor rose to the level of defeating general applicability, given that "Human Services never refuses to work with individuals because of their membership in a protected class[] [but instead] . . . . seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Fulton*, 922 F.3d at 158, 164. In other words, if the government was to exempt an agency's complete refusal to work with those of certain races/religions/sexualities, that practice would be enough to defeat the purpose of the statute, as well as general applicability. *See id.* It is worth noting that, in *New Hope*, the state similarly "allow[ed] adoption providers to consider protected characteristics" but created an "'absolute bar' against consideration of sexual orientation[.]" *New Hope*, 966 F.3d at 164. Without giving any reasoning, the Second Circuit found that this practice,

combined with seven other instances, was "[]sufficient to state a plausible Free Exercise claim[.]" *Id.*

While there are exemptions to the EOCPA within the East Virginia Code and in HHS' placement decisions, they do not defeat general applicability. Unlike in *Lukumi*, wherein the Hialeah ordinance contained secular exemptions for animal sacrifice but completely prohibited religious animal sacrifice, here the EOCPA contains no exemptions—secular or religious—for *refusing* to work with a protected class. *Lukumi*, 508 U.S. at 536; R. at 3-4, 6. However, like *Fulton*, in which Philadelphia Human Services considered race and disability to provide the best placement for a foster child, the East Virginia Code does "require child placement agencies to favor some adoptive parents over others when the child is either a racial or sexual minority" in order to "preserve and protect minority children and families[.]" *Fulton*, 922 F.3d at 158; E.V.C. § 42.-2(b); R. at 8. Further, HHS also considers factors such as age, disability, culture, and ethnicity. R. at 3. Given that, in *Fulton*, the Third Circuit held that mere consideration of race and disability for the purpose of providing the child with the optimal home did not undermine the anti-discriminatory purpose of the statute and passed general applicability, HHS' similar consideration of race, sexual orientation, age, disability, culture, and ethnicity when placing a child also does not undermine the EOCPA's anti-discriminatory purpose and passes the general applicability requirement. *Fulton*, 922 F.3d at 164; R. at 3-4. Overall, an agency's consideration of protected characteristics when placing a child within a family passes the muster of general applicability, while an agency's complete *refusal* to place a child within a family based on protected characteristics is prohibited. *See Fulton*, 922 F.3d at 164.

Notably, although consideration of protected characteristics is acceptable, when the government explicitly prohibits the consideration of certain characteristics and not others, the

law is no longer generally applicable. *See New Hope*, 966 F.3d at 164. This differentiates AACS from New Hope. In *New Hope*, the government completely banned any consideration of sexual orientation but allowed for consideration of other protected characteristics, but East Virginia agencies are allowed to—and in fact, must—consider all protected characteristics. *Id.*; R. at 3-4. In this sense, there is no conflict between *New Hope* and this case.

Even though the EOCPA contains exemptions within its text and enforcement, they do not defeat the statute's purpose or general applicability for multiple reasons. For one, there are no secular exemptions for refusing to place a child within a foster home based on protected characteristics; neither religious nor secular reasons support such an exemption. Second, in deciding where to place a child, mere consideration of protected characteristics is acceptable. Lastly, HHS did not explicitly prohibit the consideration of certain characteristics and not others. Therefore, this situation aligns more closely to that of *Fulton* than *Lukumi* and *New Hope*.

C. In the alternative, the EOCPA meets strict scrutiny because eradicating discrimination is a compelling governmental interest and the EOCPA is narrowly tailored to achieve that goal.

Even if the Court applies strict scrutiny, eradicating discrimination is a compelling governmental interest and this provision is narrowly tailored to further that interest. Discrimination is the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring). "[I]t is the humiliation, frustration, and embarrassment that a person surely must feel when he is told that he is unacceptable as a member of the public." *Id.* at 292. Discrimination undermines the constitutional right to "equal dignity in the eyes of the law." *Obergefell*, 576 U.S. at 681. The EOCPA, both as originally enacted and as amended, aims

to eradicate such invidious discrimination by CPAs in the provision of a public service; it is narrowly tailored to meet that objective.

1. Eradicating discrimination is a compelling governmental interest because the Supreme Court has recognized it as such as a matter of black-letter law.

In *Roberts v. U.S. Jaycees*, the Supreme Court held that eliminating discrimination and assuring equal access to publicly available goods and services are "compelling state interests of the highest order." 468 U.S. 609, 623 (1984). The Court reasoned that eradicating discrimination on the basis of sex is equally as compelling as eradicating discrimination on the basis of race. 468 U.S. at 625 ("[T]he denial of equal opportunities . . . is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."). The Court further reasoned that discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* at 625. The state's compelling interest is not limited to purely tangible services because a state "enjoys broad authority to create rights of public access on behalf of its citizens." *Id.*

The recent Supreme Court decision in *Bostock v. Clayton County, Georgia* clarified that discrimination on the basis of sex by necessity includes discrimination based on sexual orientation. 140 S. Ct. 1731, 1747 (2020) ("[A]s we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."). Therefore, eradication of discrimination on the basis of sexual orientation is a compelling governmental interest within the meaning of *Roberts*, and the Supreme Court would consider the EOCPA to further a compelling governmental interest.

East Virginia updated its nondiscrimination statutes in the wake of the *Obergefell* decision to reflect the state's commitment to "eradicating discrimination in all forms, particularly

against sexual minorities." R. at 6. The EOCPA was thus amended to explicitly prevent discrimination on the basis of sexual orientation by private CPAs in screening and certifying potential foster care or adoptive parents or families. R. at 4, 6. As Commissioner Hartwell testified, enforcement of this law serves several relevant governmental interests: ensuring that child placement services are "accessible to *all* Evansburgh residents who are qualified" and that taxpayers "are not denied access." R. at 9 (emphasis added). Therefore, this law reflects both of the compelling governmental interests established in *Roberts* as black-letter law: eliminating discrimination and assuring equal access to publicly available goods and services.

Several public policy justifications support considering eradication of discrimination against LGBTQ individuals a compelling governmental interest. First, as highlighted in *Roberts*, discrimination deprives individuals of their dignity and denies society the benefits of their participation in public life. 468 U.S. at 625. Allowing child placement agencies to discriminate based on sexual orientation exposes same-sex couples to potential humiliation and stigma that they are somehow unfit to parent. Second, the manner in which potential LGBTQ foster parents are treated conveys a harmful message to LGBTQ children about their value in society. *See Obergefell*, 576 U.S. at 668 ("children suffer the stigma of knowing their families are somehow lesser"). The risk of internalized stigma is heightened because LGBTQ youth make up a disproportionate share of the foster care population in America. *See* Am. Bar Ass'n, Report Recommending the Adoption of Resolution 104B, at 2 (2007).

While AACS may try to frame the government's interest as simply maximizing the number of child placement agencies that do not discriminate against LGBTQ individuals, that interpretation misses the mark. The government has a compelling interest to *eliminate* discrimination, not simply to reduce it. *See Fulton*, 922 F.3d at 164 ("The government's interest

lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do."). The harm "is the discrimination itself." *Fulton*, 922 F.3d at 164.

Furthermore, if this Court grants AACS a religious exemption to the EOCPA in this instance and allows it to discriminate against same-sex couples on religious grounds, there would be no limits on the other religious exemptions that other organizations could utilize in the future. The Supreme Court has emphasized that it is "unacceptable" to evaluate the "relative merits of differing religious claims" and that courts "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Therefore, a finding for AACS would open the door to a plethora of other potential religious claims for exemption. Courts would not be entitled to evaluate the centrality of the asserted religious belief or even whether it is plausible. The government would be required to allow exemptions on any asserted religious ground, which would entitle CPAs to refuse to work with certain individuals on any basis that could be tied to their religion. For instance, CPAs could refuse to work with prospective parents of different faiths, citing the objective of their own religion to further that particular faith. CPAs could categorically refuse to work with prospective parents on almost any ground, so long as they assert a religious basis.

CPAs are government contractors, providing a public service in exchange for public funds. Allowing them to refuse to perform these services on any grounds possibly justified by their religious beliefs would cause this government service to grind to a halt. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every

citizen's religious needs and desires."). Therefore, HHS meets its burden of establishing a compelling governmental interest for the EOCPA.

2. Enforcement of the EOCPA is narrowly tailored because mandating compliance specifically targets eradicating discrimination.

Courts must determine "whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004). In pursuing the compelling interest of eradicating discrimination, "mandating compliance is the least restrictive means." *Fulton*, 922 F.3d at 163-64. The primary thrust of the EOCPA is to prevent the humiliation and indignity that occurs when a prospective parent is turned away before even being screened, and the EOCPA narrowly targets that concern.

The EOCPA is narrowly tailored to the objective of eradicating discrimination. The EOCPA furthers the compelling government interest of preventing private contractors–who perform a public service in exchange for public funds–from discriminating against individuals on prohibited grounds. The EOCPA specifically prohibits CPAs from discriminating against prospective parents in the process of "screening and certifying" potential families. R. at 4. In other words, it focuses on the act of CPAs turning away prospective parents at their doorstep based on nothing more than being a member of a protected class. This statute explicitly targets that specific act of discrimination and is therefore narrowly tailored to achieve its goal. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("The government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race and prohibitions on racial discrimination are *precisely tailored* to achieve that critical goal.") (emphasis added). Mandating compliance with this non-discrimination statute is the least restrictive means of pursuing the compelling governmental interest of eradicating discrimination. *See Fulton*, 922 F.3d at 163-64.

While it might be suggested that the EOCPA's stated preferences for parents of the same race or same sexual orientation of the child render the act underinclusive by allowing "discrimination," there is no merit to this argument. These provisions come into effect at a later stage in the parent-child matching process. The EOCPA's non-discrimination requirements for CPAs target the outright refusal of an agency to work with a prospective parent due to their race or sexual orientation. R. at 6. The preference consideration is not relevant for this threshold evaluation. It only comes into play when the CPA receives a referral from HHS and suggests a potential match for the child from their pool of qualified families. Furthermore, a preference only kicks in when all other qualifications are equal. Preferences are not dispositive, and they should be viewed as a tiebreaking factor amongst an array of potential qualified families on the back end, as opposed to discrimination on the front end.

The EOCPA is the "least restrictive means among available, effective alternatives." *See Ashcroft*, 542 U.S. at 666. This statute specifically addresses the facially discriminatory behavior of a CPA that refuses to certify or even screen a potential family due to a protected characteristic. It would be difficult to imagine a more targeted means of effectively achieving this end than enforcing a non-discrimination requirement. Since the EOCPA is narrowly tailored to achieve the compelling governmental interest of eradicating discrimination, it survives strict scrutiny.

II. THE EOCPA DOES NOT PLACE UNCONSTITUTIONAL CONDITIONS ON AACS'S SPEECH BECAUSE HHS IS PERMITTED TO PLACE CONDITIONS ON RECEIPT OF PUBLIC FUNDS TO FURTHER AN IMPORTANT GOVERNMENT SERVICE.

The government can impose restrictions on its own programs and operations administered by contractors to promote efficiency. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). Sometimes, the government must do so because "a state may not . . . promote private persons to accomplish what it is constitutionally forbidden to accomplish." *See Lee v. Macon*

Cty. Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967). In short, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418; *see also Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (allowing the government to place a condition on the recipient of government funds, while "leav[ing] the grantee unfettered in its other activities").

By enforcing the EOCPA, the City prohibits adoption-agency contractors 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." E.V.C. § 42.–2. In addition, the City requires its adoption agency contractors to sign and post at their place of business a statement certifying that is "illegal under state law to discriminate against any prospective foster or adoptive parent, on the basis of race, religion, national origin, sex, marital status, or disability." HHS is entitled to determine the parameters of the very services for which it contracts, reflecting the City's judgment regarding how best to meet its residents' needs. Further, HHS is permitted to require adoption agency contractors to post written notices acknowledging compliance with state law.

A. The City did not place unconstitutional conditions on AACS because it is permitted to place conditions on contracts to administer government services when the condition relates to the service itself.

When the government contracts with private organizations to provide services administered by the City, it may place certain conditions on the receipt of funds which serve plainly legitimate interests. Such interests include ensuring that government-contracted services are offered to all residents regardless of sexual orientation. This concern is substantially amplified when the government service administered is providing suitable homes for children in state custody during a period of chronic shortages of foster and adoptive homes. It is only natural

that in the furtherance of this end the government be able to prevent discrimination in the administration of public programs and services.

It is well-established that the Free Speech Clause of the First Amendment protects both the right of the citizen to speak freely, and to refrain from speaking at all. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). However, public employees, as well as private organizations authorized by contract to *administer* government functions, cannot "perform their jobs however they see fit." *Garcetti*, 547 U.S. at 422. According to the Supreme Court, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id*. at 418. The government's interest in achieving its goals as effectively and efficiently as possible is elevated when it acts as employer, and it "must have authority to restrain employees who frustrate progress towards the ends they have been required to achieve." *Borough of Durea v. Guarnieri*, 564 U.S. 379, 389 (2011). When speech occurs within the scope of a contractor's performance of a public service pursuant to a government contract, the Supreme Court has consistently upheld conditions placed on the receipt of public funds. *See Rust*, 500 U.S. at 193; *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) [hereinafter "*FAIR*"]; *Fulton*, 922 F.3d at 160-61.

In *Fulton*, the Third Circuit reinforced the notion that the government may place restrictions on contractors who receive public funds in exchange for administering a government service. 922 F.3d at 161. The City of Philadelphia had a contractual relationship with thirty foster care agencies, including CSS. *Id*. at 147. The contract between the City of Philadelphia and CSS incorporated language from the city's Fair Practices Ordinance, which prohibits discrimination based on sexual orientation when reviewing and certifying prospective parents for adoption. *Id*. at 148. Despite the contract, CSS refused to certify same-sex couples due to its deeply-held

religious convictions. *Id*. Reports of CSS' discriminatory policies were made public, and the Department of Health and Human Services instituted an "intake freeze," ceasing new referrals of foster children to CSS. *Id*. at 149.

After deciding that CSS's Free Exercise claim was without merit, the Third Circuit similarly disposed of its claim that the City of Philadelphia had imposed unconstitutional conditions by compelling speech. *Id.* at 161. Specifically, CSS claimed forbidding agencies from finding applicants unqualified for discriminatory reasons forced it "to make written endorsements that violate[d] its sincere religious beliefs." *Id.* at 160. The Court disagreed, noting that "[t]he problem with this argument is that the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government." *Id.* The Court further explained that, because the condition directly pertained to the program receiving government funding, the speech "occur[ed] only because CSS ha[d] chosen to partner with the government to help provide . . . a government service." *Id.* at 161. Ultimately, the government is permitted to place conditions on the receipt of government funds if the conditions are inextricably related to providing a government service. *Id.*

Here, the City did not place unconstitutional conditions on AACS by compelling speech. Like in *Fulton*, wherein CSS contracted with the City of Philadelphia to receive funding to help provide the government service of adoption, AACS similarly contracted with the City of Evansburgh to receive funding for the purpose of providing adoption services. *Fulton*, 922 F.3d at 147; R. at 2, 7. Additionally, both the Fair Practices Ordinance and the EOCPA placed conditions on government funding. *Fulton*, 922 F.3d at 148-49; R. at 4, 6. Specifically, the Fair Practices Ordinance required agencies not to discriminate on the basis of sexual orientation during the process of certifying and working with prospective parents for adoption, and the

EOCPA similarly required agencies not to discriminate on the basis of sexual orientation during the process of "screening and certifying potential foster care or adoptive parents or families." *Fulton*, 922 F.3d at 148-49; R. at 4, 6. In this context, the act of certifying prospective parents is intimately tied to the government service of providing adoption services; without certification, there will be no child placement. *See Fulton*, 922 F.3d at 148; R. at 5. Given that, in *Fulton*, the Third Circuit found that the City of Philadelphia's conditions were not unconstitutional because the certification process was inextricably related to the government service, here the City of Evansburgh's conditions are also not unconstitutional conditions given that they also regulate the certification process. *Fulton*, 922 F.3d at 148-49, 161; R. at 4, 6.

While the District Court held that *Agency for International Development v. Alliance for Open Society International* governed the disposition of this case, it is distinguishable from this case. 570 U.S. 205 (2013) [hereinafter "*AOSI"*]; R. at 16. *AOSI* illustrates that the government cannot compel the affirmation of a belief that is outside of the scope of a government program. 570 U.S. at 221. In *AOSI*, the Court held that a government program, which allocated funds to help combat the spread of AIDS, could not require recipients to affirmatively condemn prostitution. *Id*. at 214. The Court reasoned that an affirmation of condemning prostitution fell outside the scope of the government program and constituted compelling private speech rather than affecting speech related to administration of the program's aims. *Id*. at 218; *but see id*. at 217 (noting that the government may impose conditions on its spending programs when the condition is limited to speech relating to the program's goal).

The EOCPA's conditions fall within the scope of the government program at issue in this case. Like in *AOSI*, wherein the government funded organizations to help combat the spread of HIV/AIDS, here the City of Evansburgh funded AACS to provide children with homes. *Id.* at

214; R. at 3-4. In *AOSI*, the government placed conditions on funding by requiring organizations to affirmatively condemn prostitution, which was outside the scope of its services. *AOSI*, 570 U.S. at 218. However, here, the conditions required under the EOCPA relate directly to the administration of government services. *See* R. at 3-4. Certification of prospective adoptive families is the single most important task AACS has been contracted to perform. In fact, the East Virginia Code empowers municipalities to regulate the foster and adoptive placement of children, meaning that the certification process exists solely because the state requires it. R. at 3-4. Therefore, it is axiomatic that conditions which regulate the certification process impact the very essence of the services which the state has contracted to be administered by private foster care and adoption agencies such as AACS. Given that the key facts of this case differ fundamentally from those in *AOSI*, this case does not govern.

In conclusion, the City is permitted to place conditions on government contracts to provide taxpayer funded services when those conditions are related to the administration of those services. The EOCPA's nondiscrimination policy places conditions on family certification – the most important contractual obligation between the City and AACS. Thus, the City is permitted to place conditions on the certification process, especially conditions that ensure the fair and equal administration of government services.

B. **E.V.C. § 42.-4's nondiscrimination written notice requirement does not unconstitutionally compel AACS's speech because it simply acknowledges compliance with state law and is minimally invasive.**

The government is constitutionally permitted to require agencies with whom it contracts services to post notices on their premises acknowledging that services are being provided in accordance with state law. This is especially true when the notice requirement also allows contractors to post written objections to the policy. The EOPCA's non-discrimination notice

requirement exhibits both these characteristics, and thus does not unconstitutionally compel AACS's speech.

All speech inherently "involves choices of what to say and what to leave unsaid." *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986). However, the government may prescribe speech by requiring the dissemination of "purely factual and uncontroversial information." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-387 (1973). Further, the government can regulate *conduct* indirectly by requiring affirmations or limitations on speech. *See R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992).

An important distinction exists between compelling expressive speech and compelling speech that acknowledges purely factual information like adherence with state law. The Supreme Court recognized this distinction in *FAIR*, disposing of a challenge to a federal law requiring that institutions of higher learning allow military recruiters to recruit on their campuses. *Id*. at 60. Disagreeing with the military's policy of denying admission to homosexuals, certain law schools refused to disseminate information regarding the recruiting services and denied recruiters campus access. *Id.* at 56. The government responded by withdrawing certain funds, and the law schools sued, alleging that the law unconstitutionally compelled speech contrary to their beliefs. *Id.*

The Supreme Court disagreed, concluding that the law "[does not] limit what law schools may say . . . [and that] law schools remain free under the statute to express whatever views they may have . . . all while retaining eligibility for federal funds." *Id*. at 60. The Court further reasoned that "[t]he compelled speech to which the law schools point is plainly incidental to the [law]'s regulation of conduct, and it has never been deemed an abridgment of speech . . . to make

a course of conduct illegally merely because the conduct was . . . evidenced by means of language either spoken, written, or printed." *Id*. at 62.

Like the federal law at issue in *FAIR*, the E.V.C.§ 42-.4's notice requirement does not limit what adoption can agencies privately express. The notice requirement mandates that adoption agencies post on their premises that "it is illegal under state law to discriminate against any person, including a prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." E.V.C. § 42.-4. Careful examination reveals that § 42.-4 does not require agencies to say that the agency itself does not hold discriminatory views, only that state law deems it illegal to discriminate in the administration of adoption services.

A comparison can be made between § 42.-4 and federal laws that prohibit racial discrimination in businesses which serve the public. For instance, the government is permitted to prohibit restaurant owners from posting "Whites Only" signs on their premises. *See generally* 42 U.S.C. § 2000a(b). In doing so, the government is restricting speech incidental to conduct. *See, e.g. FAIR*, 527 U.S. at 62 (asserting that a law requiring an employer to remove a "White Applicants Only" sign should "hardly . . . be analyzed as one regulating the employer's speech rather than conduct").The same is true of § 42.-4, which only requires that CPAs post an acknowledgement of their adherence to state law; it does not require agencies to affirmatively espouse support of same-sex relationships.

Rather, § 42.-4 explicitly allows adoption agencies to post written objections to the policy. Nothing is stopping religiously affiliated agencies such as AACS from posting an objection next to or near the post acknowledging state law. It is entirely possible for AACS to promote its private religious message while maintaining compliance with § 42.-4. Outside the

context of the adoption services it provides, AACS is permitted to advocate with sincere conviction that same-sex marriage should not be condoned. *See Obergefell*, 576 U.S. at 679 ("[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). § 42.-4 simply requires CPAs to communicate an existing regulation on conduct through a written acknowledgement, and it is not an attempt to compel expressive speech.

In essence, AACS wants to have its cake and eat it too. Not only do the petitioners wish to continue discriminating against same-sex adoptive parents, but AACS also feels entitled to receive federal funding. In providing foster care, state and local governments are responsible for recruiting, training, and overseeing adoption agencies contracted to administer that important aim. Nondiscrimination requirements ensure that adoption agencies best serve the community, and conditions placed on adoption agencies are done so to protect the interest of the state's most vulnerable children.

CONCLUSION

For the reasons stated above, Appellant Commissioner Christopher Hartwell respectfully requests that the judgment of the United States District Court for the Western District of East Virginia be reversed.

Respectfully submitted,

/s/

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Team 18
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