Case No. 2020-05

UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

Al-Adab Al-Mufrad Care Services,

Petitioner

v.

Christopher Hartwell, in His Official Capacity as Commissioner of Department of Health and Human Services, City of Evansburgh,

Respondent.

On 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

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BRIEF FOR PETITIONER

Team 2
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals incorrectly ruled that E.V.C. § 42.-3(b) did not constitutionally violate Al-Adab Al-Mufrad Care Services's right to Free Exercise of religion under the First Amendment, and that the law is generally applicable and neutral toward religion.

2. Whether the notice condition of E.V.C. § 42.-4 and the requirement that Al-Adab Al-Mufrad Care Services certify same-sex couples as adoptive parents constitutes unconstitutional conditions that violate Al-Adab Al-Mufrad Care Services's First Amendment rights.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the case pursuant to 28 U.S.C. § 1331. The Fifteenth Circuit had jurisdiction of the case pursuant to 28 U.S.C. § 1291. The Fifteenth Circuit entered a judgment and reversed the District Court's decision to grant a Temporary Restraining Order and injunction order against the City of Evansburgh's Health and Human Services. Petitioner, Al-Adab Al-Mufrad Care Services, timely filed a petition for a Rehearing En Banc, which this Court granted. This Court has jurisdiction over this matter pursuant to the Federal Rule of Appellate Procedure 35(a)(2).

STATEMENT OF THE CASE

Statement of Facts

In the City of Evansburgh, Virginia resides a large refugee population with individuals from various countries including Ethiopia, Iraq, Iran and Syria. R. at 3. Many of the refugees suffer severe personal or economic hardships and cannot adequately provide for their children. *Id.* Because of this, Evansburgh has a chronic shortage of foster and adoptive homes. *Id.* There are approximately 17,000 children in foster care, but about only 4,000 of those children are available for adoption. *Id.*

Al-Adab Al-Mufrad Care Services ("ACCS") is a non-profit, private adoption agency located in Evansburgh. *Id.* The agency was formed in 1980 to provide community support to the refugee population, including adoption placement for war orphans and other children in need of permanent families. R. at 5. ACCS's mission statement provides that, "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an." *Id.* Following the theme of this mission statement, AACS places thousands of children into adoptive homes. *Id.* On any given day, AACS assists dozens of children ranging from those with special needs to those in need of trauma services. *Id.*

In response to the high number of children in need of foster care and adoption services and despite the numerous private agencies like AACS, Evansburgh charged the Department of Health and Human Services ("HHS") with establishing an adoptive and foster care system to best serve the well-being of each child. R. at 3. To accomplish this goal, HHS entered into contracts with 34 private child placement agencies in Evansburgh in order to promote and facilitate foster care and adoption services. *Id.*

The arrangement between HHS and the private agencies allow for the agencies to receive public funds to help better conduct their foster care and adoption services including home studies, counseling, and placement recommendations to HHS. *Id.* The private agencies maintain lists of available families, and when HHS receives a child into custody, it sends a "referral" to a private agency in order to receive possible matches for the child. *Id.* The private agencies provide HHS with information about the families, which HHS then compares with information about the child. *Id.* From the information provided by the private agencies, HHS determines which agency has the most suitable family for a foster care or adoption placement, based upon numerous factors including the child's age, sibling relationships, race, medical needs, and any disabilities. *Id.*

The East Virginia Code ("E.V.C.") empowers municipalities to regulate the foster care and adoption placements of children. *Id.* The code provides that "the determination of whether the adoption of a particular prospective adoptive parent or couple should be approved must be made on the basis of the best interests of the child." E.V.C. § 37(d). The code lays out considerations for agencies in deciding whether a family is in the best interest of the child. R. at 4. These considerations include (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 background;" and (4) "the ability of a child to be placed in a home with siblings and half-siblings." E.V.C. § 37(e).

East Virginia adopted the Equal Opportunity Child Placement Act ("EOCPA") in 1972, which imposes nondiscrimination requirements on private child placement agencies receiving

public funds in exchange for providing child placement services to HHS. E.V.C. § 42. Upon enactment, the EOCPA prohibited 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 of families." *Id*. § 42.-2. If an agency does not comply with the EOCPA, it is not eligible to receive municipal funds. *Id*. § 42.-2(a). Contradictorily, the EOCPA provides that when all other parental qualifications are equal, agencies must "give preference" to foster or adoptive families in which at least one parent is of the same race as the child needing placement. *Id*. § 42.-2(b). The reasoning for this is the belief that the parents must have a cultural background that can meet the needs of a child with such a background. R. at 4.

However, although the E.V.C. provides funds for such referrals to private agencies through HHS, it is still the responsibility of the prospective families seeking to foster or adopt children to initiate contact with a child placement agency. R. at 4-5. If the family does not match the agency's profile and policies, the family is typically referred to another agency. R. at 5. In order to better help families find the right foster care or adoption agency, HHS includes a "choosing an adoption agency" section on its website which makes the following statement to prospective adoptive parents:

> Browse the list of foster care and adoption agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be important support to you during your parenting journey. Contact your preferred agency to find out how to begin the process. Each agency has different requirements, specialties, and training programs. R. at 5.

The page also lists other requirements such as orientation, training, and background and reference checks. *Id.* The page does not indicate that this provision pertains to specific programs, but rather seems to apply to the agencies generally. *Id.*

AACS was formed following the E.V.C.'s enactment of the distribution of municipality funds through a contract with HHS. *Id.* Therefore, contracts for adoption services between AACS and HHS have been renewed annually since AACS's opening in 1980, with the most recent contract executed on October 2, 2017. *Id.* As a part of the contract, HHS agreed to provide funds to AACS in exchange for AACS's foster care and adoption services, including certifications that each adoptive family is thoroughly screened, trained, and certified. *Id.* Additionally, AACS must be in "compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh." R. at 5-6.

Difficulties between AACS and HHS arose following the amendment of the EOCPA in accordance with the decision in *Obergefell v. Hodges*, 567 U.S. 644 (2015). R. at 6. The amendment, which prohibited child placement agencies from discriminating on the basis of sexual orientation, was made to reflect the commitment to abolishing all forms of discrimination, specifically involving sexual minorities. R. at 6. The amendment also provided that "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. § 43.-3(b).

The EOCPA was further amended to require that before funds are dispersed pursuant to a contract with a governmental entity, the child placement agency must sign and post at its place of business a statement reading that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." R. at 6. The amendment permits religious-based agencies, however, to post on their premises a written objection to the policy. *Id*.

It was not until 2018 that an issue with these amendments arose, following a news reporter questioning Commissioner Hartwell ("Hartwell") in regard to the religious-based agencies' compliance with the amendments. *Id*. This questioning lead Hartwell to further inquire about the religious-based agencies in the area, including AACS, in regard to their policies on placing children with same-sex couples. R. at 7. It was a result of these inquiries that Hartwell learned that the AACS's religious beliefs prohibited it form certifying qualified same-sex couples as prospective adoptive parents. *Id*. Executive Director of AACS, Sahid Abu-Kane ("Abu-Kane") explained that AACS would not perform a home study for same-sex couples because the Qur'an and the Hadith consider same-sex marriage to be a moral transgression. *Id*. Abu-Kane emphasized, however, that on the few occasions when a same-sex couple previously contacted the agency about its adoption placement services, AACS treated them with respect and referred them to other agencies that served the LGBTQ community. *Id*. When Hartwell asked whether Abu-Kane understood AACS's practices violated the amended EOCPA, Abu-Kane replied that it was not discrimination to follow the teachings of the Qur'an because "Allah orders justice and good conduct." *Id.* Abu-Kane further stated, and Hartwell acknowledged, that no same-sex couples have ever filed formal complaints of discriminatory treatment against AACS. *Id*.

On September 17, 2018, Hartwell sent a letter to AACS alleging that AACS was not in compliance with the EOCPA and that HHS would not renew its contract with AACS on the annual renewal date of October 2, 2018. *Id*. The letter reiterated much of Hartwell's discussion with Mr. Abu-Kane and stated further:

> Although HHS respects your sincerely held religious beliefs, your agency voluntarily accepted public funds in order to provide a secular social service to the community. AACS must comply with the State's EOPCA to be able to receive government funding and referrals. *Id*.

The letter also explained that AACS's policy prohibiting it from certifying same-sex couples would necessitate an immediate referral freeze that would be communicated to all other adoption agencies serving Evansburgh. *Id*. Such agencies would be ordered to "refrain from making any adoption referrals" to AACS unless AACS provided to HHS, within 10 business days, full assurance of its future compliance with the EOCPA. R. at 7-8.

On October 30, 2018, AACS filed an action against Hartwell, seeking a temporary restraining order against HHS's imposition of the referral freeze and a permanent injunction compelling HHS to renew its contract with AACS. R. at 8. AACS alleges that the enforcement of the EOCPA violates its First Amendment rights under the Free Exercise Clause and the Free Speech Clause. *Id.*

Procedural History

Pursuant to 28 U.S.C. § 1291, Respondent, Christopher Hartwell, in His Official Capacity as Commissioner of Department of Health and Human Services, City of Evansburgh, appealed the Decision and Order in the District Court for the Western District of East Virginia entered on April 29, 2019 by Honorable Capra, granting a temporary restraining order and a permanent injunction.

On appeal in the Fifteenth Circuit, Honorable Park reversed the decision of the District Court, holding that enforcement of the EOPCA against AACS does not violate either AACS's Free Exercise or its Free Speech rights on February 24, 2020. On July 15, 2020, upon the vote of a majority of non-recused active judges, and pursuant to Federal Rule of Appellate Procedure 35(a)(2), Honorable Martin granted AACS's petition for Rehearing En Banc.

SUMMARY OF THE ARGUMENT

Under the guise of enforcing its new ordinance, the city of Evansburgh seeks to force AACS to violate its sincerely-held religious beliefs and place children in homes that AACS believes would not be in the children's best interest. The First Amendment serves to protect organizations like AACS from this type of gross governmental overreach. The Fifteenth Circuit erroneously dismissed AACS's claim by ruling that E.V.C. §42.-3(b) does not infringe on AACS's right to Free Exercise of religion, and failed to fully consider AACS's claims. The First Amendment prohibits the government from infringing on the exercise of one's religious beliefs, even where a law appears neutral and generally applicable on its face. HHS has violated AACS's First Amendment right to exercise its religion because the law is neither neutral nor generally applicable, as evidenced by the HHS's failure to prohibit various forms of discrimination that the ordinance supposedly is meant to prohibit, as well as its targeting of solely religious organizations in the ordinance's enforcement. As a result, HHS fails to demonstrate that the ordinance meets strict scrutiny, and AACS is entitled to sustained protection under the Constitution, and to continue serving the children of the community within their best interests as it has for the last 40 years. The Fifteenth Circuit's ruling deeply curtails the sincere faith and mission of AACS's ministry, and unjustly deprives Evansburgh's children of a vital resource.

Additionally, the Fifteenth Circuit erred in reversing the District Court's grant of AACS's motion for a Temporary Restraining Order (TRO) against HHS's referral freeze and a permanent injunction compelling HHS to renew AACS's contract by deeming the EOCPA's notice requirement an extension of the contract between HHS and AACS and failing to hold that it was a violation of AACS's constitutional right to the freedom of speech. There is no clear precedent

on exactly what speech the government can regulate as well as whether such a regulation can be a prerequisite on which government funds are conditioned. Therefore, this Court should further its rulings in both *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Agency for Intern. Dev. v All. for Open Socy. Intern., Inc.* (*AOSI*), 570 U.S. 205 (2013) and hold that the enforcement of the EOPCA against AACS violates AACS's right to Freedom of Speech, thereby granting AACS's motions. In doing so, this Court would be establishing a standard for the difference in government speech and private speech, as well as the limitation that the government can put on speech when funding a certain program. The result would ultimately be to find EOCPA's notice requirement and ban on sexual orientation discrimination to be a violation of AACS's constitutional rights. This Court should therefore reverse the ruling below and uphold the temporary restraining order and permanent injunction, and retain religious freedom as a cornerstone of our constitutional integrity.

ARGUMENT

I. THE ORDINANCE IS SUBJECT TO STRICT SCRUTINY BECAUSE IT VIOLATES AACS'S FREE EXERCISE OF RELIGION BY COMPELING AACS TO PLACE CHILDREN IN A MANNER CONTRARY TO ITS BELIEFS

No government "official…can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Here, HHS deems some reasons for denying funding acceptable and others impermissible based on the "offensiveness" of their placement practices. However, such a vague standard gives the City far too much latitude to devalue religious reasons for denying funding. *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). By shutting down the agency, HHS has devastated the children of Evansburg on a whole scale level because AACS's conscience does not allow it to demonstrate support for same-sex relationships. Closing an authorized agency's operations is a remarkably serious step, and is all the more serious when the agency has, for many years, operated without objection by the City, and exercised its ability to respectfully recuse itself by referring applicants to suitable agencies to avoid rejecting applicants outright on the basis of its religious beliefs. As a result, the record indicates an extraordinary step out of line with the Free Exercise clause, and thus violates the AACS' constitutional rights. To justify the punishment of AACS for declining to violate their sincerely-held beliefs, would undermine First Amendment freedoms, and leave society less civil and less free for generations to come.

A. Laws That Burden the Free Exercise of Religion Must Be Neutral and Generally Applicable

The First Amendment prohibits the government from enacting laws that violate the Free Exercise of religion. U.S. CONST. amend. I. Thus, the Free Exercise Clause guarantees the "right to believe and profess whatever religious doctrine one desires," even doctrines that may be

opposed by a majority of the surrounding community. *Smith*, 494 U.S. at 877. Although the right to free exercise of religion is not unlimited, the First Amendment compels governments "not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1721 (2018). Furthermore, the First Amendment does not require courts to "sweep away all government recognition and acknowledgment of the role of religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989). The Supreme Court established in *Smith* that laws restricting religious exercise must be neutral and generally applicable to survive constitutional scrutiny. *Smith*, 494 U.S. at 880. A law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). As a result, "the *minimum* requirement of neutrality is that a law not discriminate on its face" against religion. *Masterpiece*, 138 S. Ct. at 1727 (emphasis added). A further exception is that a facially neutral law that is motivated by animus toward a particular religious group is unconstitutional. *Id*. at 1737.

Where a law is neither neutral nor generally applicable, it must be subject to strict scrutiny. *Lukumi*, 508 U.S. at 546. Furthermore, the Supreme Court has held that the First Amendment prohibits the application of a neutral, generally applicable law to a religious action if it involves the Free Exercise Clause in conjunction with other constitutional protections such as the Free Speech Clause. *Smith*, 494 U.S. at 872-73 (*See also Wisconsin v. Yoder*, 406 U.S. 205 (1972)). However, facial neutrality is only the first, and not the dispositive, step in a Free Exercise inquiry. *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (*See Lukumi*, 508 U.S. at 534). Government hostility toward religion may be "masked, as well as overt," and, thus, the court must proceed to a second step in the analysis to identify subtle

departures from neutrality." *Lukumi*, 508 U.S. at 534. These subtle departures are forbidden under the Free Exercise Clause, as well as "covert suppression of particular religious beliefs," and "the effect of a law in its real operation," which is "strong evidence of its object," in its neutrality analysis. *Id.* at 534, 535 (internal quotations omitted). Such factors will not be tolerated unless they meet strict scrutiny. *Id*. Lastly, the court must "survey meticulously" the totality of the evidence, "both direct and circumstantial." *Id*. at 534. The court must therefore carefully consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. at 540.

Laws that specifically target religion or conduct associated with religious beliefs unconstitutionally prohibit the free exercise of religion. *Smith*, 494 U.S. at 877-78. Laws that are "specifically directed at [one's] religious practice" are therefore subject to heightened scrutiny. *Id*. at 878. Although the Supreme Court in *Smith* held that the Free Exercise Clause offers no protection where a neutral, generally applicable law incidentally burdens religious practice, the Supreme Court established an exception for "hybrid rights" claims, in which both the right to free exercise of religion and another constitutional right are implicated. *Id*. at 881-82. Therefore, laws that incidentally burden the free exercise of religion will be subject to strict scrutiny, rather than heightened scrutiny, if the Free Exercise claim is combined with another constitutional claim. *Id*. Where a law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends[,] [i]t is not unreasonable to infer" that such a law "seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious

motivation." *Lukumi*, 508 U.S. at 538. As a result, neither the government's stated purpose nor the dominant effect of the law can be anti-religious. *Id.*

Consequently, the Supreme Court has established several formulations of the requirement that a government's laws must be neutral toward religion. A law is subject to strict scrutiny if it (1) overtly discriminates against religion; (2) if it is enacted for anti-religious motives; (3) if its dominant (and not merely incidental) effect is to suppress the exercise of religion; (4) if it exempts secular conduct but not religious conduct; or (5) if it treats religious reasons for acting less favorably than secular reasons for acting. *See Smith*, 494 U.S. at 872, 884 (establishing that overt discrimination, anti-religious motivation, or a suppressive incidental burden warrant strict scrutiny); *Lukumi*, 508 U.S. at 537 (explaining that a government contravenes the neutrality requirement if they exempt secularly-motivated conduct, but not comparable religiously motivated conduct).

B. HHS's Application of the Ordinance Infringes on a Hybrid of AACS's Free Exercise and Free Speech Rights

The Supreme Court established in *Smith* that strict scrutiny applies to a facially neutral law in "hybrid situations" where a Free Exercise claim is brought in conjunction with "other constitutional protections, such as freedom of speech." *Smith*, 494 U.S. at 881-82. Because the ordinance in the case at bar infringes on both AACS's Free Exercise and Free Speech rights, it is subject to strict scrutiny.

Under *Wooley* and *Barnette*, the Supreme Court noted that hybrid rights existed where "freedom of religion" and "compelled expression" were implicated together. *Id*. at 882 (citing *Wooley v. Maynard* 430 U.S. 705; *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624). Where a party's Free Exercise claim is connected with "communicative activity," as AACS's is here, strict scrutiny applies. *Id.* Although *Smith* lacks clarity as to the exact standard for a hybrid-

rights claim, the Fifth, Ninth, and Tenth Circuits all use this test. *See e.g. Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) (asking whether the party had "a colorable claim" on its companion right); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 705 (9th Cir. 1999) (explaining that a hybrid-rights claim requires the litigant to make a "colorable claim" that the companion right had been infringed); *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (explaining that the *Smith* hybrid-rights theory requires at least a colorable claim on the companion right, rather than a mere invocation of a general right).

Here, AACS has established a hybrid-rights claim as it has demonstrated a free speech claim in declining to put up the city-mandated signs with language that violates its religious beliefs about same-sex adoption, in addition to asserting a Free Exercise claim over its declining to certify same-sex couples on the basis of sincerely-held religious beliefs. As a result, the combination of AACS's free speech claim with its Free Exercise interest produces a hybrid-rights claim that subjects the ordinance to strict scrutiny.

II. THE ORDINANCE FAILS STRICT SCRUTINY BECAUSE IT IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST

A. The Ordinance As-Applied Burdens the Free Exercise of Religion Because it is Neither Neutral Nor Generally Applicable

i. The law is not narrowly tailored because it not generally applicable

The Supreme Court established in *Lukumi* and *Smith* that where a law is neither neutral nor generally applicable, it must undergo strict scrutiny. By punishing AACS while funding agencies that support adoptions into same-sex households, HHS has not demonstrated that the new law is either neutral or generally applicable as-applied.

The Supreme Court established in *Lukumi* that "official action that targets…religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Furthermore, as noted above, the Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id*. at 534 (internal quotations omitted). As a result, within the neutrality analysis, the court considers not just the face of the law, but "the effect of [it] in its real operation" and "the interpretation given to the ordinance" by the government. *Id*. at 535, 537. In addition, as noted above, the Supreme Court has held that relevant evidence of non-neutrality "includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. at 540. The Supreme Court recognized in *Obergefell* that the "First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Obergefell*, 576 U.S. at 679-80. Furthermore, the Court later recognized that the inability to consecrate a same-sex wedding is "well understood in our constitutional order as an exercise of religion, and exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. As a result, government actors must do more than

merely assert a broad nondiscrimination interest if the law punishes an organization for its religious exercises.

Here, the government has applied the law to target AACS's sincerely-held religious beliefs regarding same-sex marriage. Adoption agencies that support same-sex marriage are allowed to decline to oppose it, while agencies that oppose same-sex marriage must support it. The effect of HHS's uncompromising measure for enforcing E.V.C. §42.-3(b) falls exclusively on adoption services holding particular religious beliefs, and not on secular or other agencies. As a result, the object of the law is to target those beliefs, and exclude those who uphold those beliefs within their adoption processes. Consequently, this is not a neutral application of the law and subjects HHS's application of the new law to strict scrutiny.

HHS did not reach out to agencies regarding compliance with the new ordinance until an Evansburgh Times reporter asked Hartwell specifically about compliance among religious agencies only, and not about whether all agencies were following the new law. R. at 6. As a result, Hartwell only contacted religious-based agencies, and not all agencies, in the area. R. at 6-7. Furthermore, for at least a year after renewing AACS's last contract, the City raised no objection to AACS's practices of referring same-sex couples to organizations that work with LGBTQ applicants. The City's apparent abrupt change of mind on AACS's practices demonstrates hostility toward AACS's particular religious beliefs, and a singling out of religious adoption agencies, violating AACS's First Amendment right to freely exercise its religion.

As a result, this unequal application of the law "single[s] out" a particular religious belief for "discriminatory treatment." *Lukumi*, 508 U.S. at 538; *see also*

Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165-68 (3d Cir. 2002). Like Phillips in *Masterpiece*, AACS did not receive "[t]he neutral and respectful consideration to which [it] was entitled," and instead city decisionmakers demonstrated "clear and impermissible hostility toward the sincere religious beliefs that motivated [its] objection." *Masterpiece*, 138 S. Ct. at 1729, 1721.

ii. HHS fails to advance a compelling state interest because the law is not generally applicable

Where the government fails to demonstrate that a law burdening Free Exercise is advanced by a compelling state interest, it fails strict scrutiny. *Lukumi*, 508 U.S. at 531-532. Under *Lukumi*, a law is not generally applicable if it fails to prohibit secular conduct that contradicts the state's asserted "interests in a similar or greater degree" than the afflicted party's religious interests and practices. *Id*. at 543. Thus, where a law burdening the Free Exercise of religion is not generally applicable, namely by allowing secular conduct while prohibiting the same conduct within a religious context, the government lacks a compelling interest and thus fails strict scrutiny. Furthermore, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id*. at 543. The generally applicability analysis established by *Lukumi* demonstrates that the City's ordinance is under-inclusive and rife with selective application of the law. *Id*. at 542-45. As a result, *Lukumi* establishes that the City's ordinance is not generally applicable.

Here, although the City purports that its state interest is to serve the best interest of the child in respect to adoption placement with qualified applicants, particularly by

considering the cultural backgrounds or ability to place the child with siblings, the ordinance is under-inclusive because the City has demonstrated strikingly inconsistent application of the ordinance when considering whether an adoption agency has violated the ordinance. For example, the City placed a white special needs child with an African American couple, even where there were qualified white adoptive families, and on three occasions placed refugee children with adoptive parents of the same religious sect upon recommendation of AACS. R. at 8-9. Furthermore, the City maintained funding for a non-religious agency that refused to place a girl with a household consisting of only a father and son, who were otherwise qualified, yet removed funding for AACS for declining to place children within single-sex homes. R. at 8, 7. As a result, the City's adoption ordinance provides exemptions for secular, nonreligious purposes for discrimination, and allows secular providers to consider other protected characteristics when making placements, yet imposed an absolute bar against AACS's consideration of sexual orientation among applicants. The City only bars discrimination when it appears to stem from religious reasons, yet refrains from doing so for non-religious reasons. Consequently, the City's failure to generally apply the law in respect to various forms of discrimination within protected categories constitutes a failure to effectuate a compelling state interest in upholding the best interests of the child. It must be noted that the City's policies enabled adoption agencies to offer adoption services not only for the benefit of prospective parents, but also to itself render a judgment on whether it is in the best interests of a child to be adopted by a particular applicant or applicants. The City seemed to both acknowledge and value AACS's judgment, particularly in respect to

ensuring that the scores of refugee children in the community were placed in optimally suitable homes. Furthermore, AACS asserts that no same-sex couples had ever filed formal complaints of discriminatory treatment against AACS, and their policies still leave many other agencies available to process the referred adoption applications. R. at 7. AACS's recusal from offering services against their sincerely-held religious beliefs would not diminish the number of children available for adoption. Rather, HHS's revocation of AACS's contract contradicts its stated goals of maintaining the best interests of the children by reducing the number of agencies by which the children may be placed.

III. THE FIFTEENTH CIRCUIT ERRED IN REFUSING TO GRANT A TEMPORARY RESTRAINING ORDER AND PERMANENT INJUNCTION BECAUSE HHS HAS VIOLATED AACS'S FIRST AMENDMENT RIGHT NOT TO SPEAK MESSAGES WITH WHICH IT DISAGREES.

A bedrock principal of freedom and one of the most important constitutional rights enjoyed by Americans is the right to free speech found in the First Amendment's Free Speech Clause, which is made applicable to the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Within the Free Speech Clause is the right to freedom of thought, also protected by the First Amendment against state action. *Wooley*, 430 U.S. at 705. Freedom of thought "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714; *Barnette*, 319 U.S. at 642. Overall, it is axiomatic that the Free Speech Clause prohibits the government from mandating the words and ideas that people must speak. *Janus v. Am. Fed'n of State, City & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018).

The "unconstitutional conditions doctrine" within the First Amendment requires that the government not condition benefits on the relinquishment of a constitutionally protected right,

especially the right to freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). However, the Constitution's Spending Clause grants Congress broad discretion to fund private programs or activities for the "general Welfare," (U.S. CONST. ART. I, § 8, cl. 1), including authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan*, 500 U.S. 173, 195, n. 4, 111 (1991). As a general matter, if a party objects to those limits, its recourse is to decline the funds. *AOSI*, 570 US at 206. In some cases, however, a funding condition can result in an unconstitutional burden on First Amendment rights. *Id.* A distinction emerged between conditions that define the limits of the Government spending program—those that specify the activities Congress wants to subsidize and conditions that seek to leverage funding to regulate speech outside the contours of the federal program itself. *Id.* Therefore, it is imperative to determine whether a government condition to participate in a government funding program is constitutional under the First Amendment. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

The Fifteenth Circuit erred in reversing the District Court's grant of AACS' motion for a temporary restraining order against Hartwell's referral freeze and a permanent injunction compelling Hartwell to renew AACS's contract with HHS. In doing this, the Fifteenth Circuit erred by deeming AACS's speech as government speech, as well as compelling AACS to promote a message that it does not wish to promote because the message goes against its beliefs. Compelling AACS to display the EOCPA's anti-discrimination message violates the First Amendment because HHS is requiring AACS, a private adoption agency, to voice ideas with which it does not agree, undermining the right to free speech. Enforcing the EOCPA against AACS as a condition for receiving funds to perform its placement services constitutes an unconstitutional condition because HHS has conditioned its distribution of child placement

service funds to AACS, a private adoption agency, upon AACS's endorsement of views that conflict with its religious beliefs. *AOSI* governs this case and therefore, the HHS is violating the First Amendment under the Unconstitutional Conditions Doctrine. Subsequently, this Court should reverse the appellate court's decision.

A. Because the HHS Requires AACS, a Private Adoption Agency, to Voice Ideas with Which It Disagrees, the HSS Undermines the Right to Free Speech Under the First Amendment.

When a State compels individuals "to voice ideas with which they disagree, it undermines [free speech]." *Janus*, 138 S. Ct. at 2464. The Court in *Wooley* discussed the idea of freedom of thought which falls within the interest in freedom of speech. *Wooley*, 430 U.S. at 714. The issue dealt with individuals covering a slogan on their New Hampshire license plate. *Id.* at 707. As followers of the Jehovah's Witnesses faith, they considered the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore asserted it objectionable to disseminate this message by displaying it on their automobiles. *Id*. The Supreme Court was faced with "the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. The Supreme Court held that a State may not do so because "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* The Supreme Court concluded that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'" which falls within the rights guaranteed by the First Amendment. *Id.* In making this decision, the *Wooley* Court relied on the decision in *Barnette*, in which the Supreme Court stated if "there is any fixed star in our

constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wooley*, 319 U.S. at 642.

However, it is not always clear when the government is speaking for itself instead of unconstitutionally restricting others' speech. For example, the Supreme Court held that when the government funds a program helping impoverished individuals attain legal counsel, the government may not forbid attorneys in the program from helping the individuals challenge or amend welfare laws. *See Velazquez*, 531 U.S. 533. However, the Court held that when the government funds family-planning programs, it may forbid healthcare providers in the program from answering pregnant women's questions about abortion. *See Rust*, 500 U.S. at 173.

Similarly, the Supreme Court in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, rejected the argument that providing email notifications of a military recruiters' scheduled presence on law schools' campuses conveyed an implicit endorsement of the recruiters' messages. *FAIR*, 547 U.S. 47, 64-65 (2006). The Supreme Court concluded 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 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.* at 62. In addition, the Supreme Court noted that merely posting factual information about the military recruiters' arrival did not affect the law school's speech. *Id.* at 65. "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65.

In the case at bar, E.V.C. § 42.-4's notice requirement unconstitutionally compels AACS's speech, as this case parallels that of *Wooley* and is easily distinguishable from *FAIR*. Similar to *Wooley*, the notice requirement forces AACS to disseminate an ideology on its private property for the purpose of being read and interrupted by the public. The notice requirement compelling the posting of the EOCPA's non-discrimination law is more than merely posting factual information about the law analogous to the simple email in *FAIR* informing the public of when the recruiters would be on campus. Rather, the notice requirement compels AACS to display the language of the actual policy itself on its private property, as was the case with the New Hampshire motto in *Wooley*. This requirement stretches far beyond a simple email or sign asking the public to read the EOCPA's non-discrimination policy as in *FAIR*.

Therefore, because it is within AACS's constitutionally protected First Amendment right to refrain from broadcasting speech and, along with it, an ideology with which they do not align, this Court should rule as it had in *Wooley*, deeming the EOCPA's notice requirement to be unconstitutional.

B. Because HHS has Conditioned its Distribution of Child Placement Service Funds to AACS, a Private Adoption Agency, upon AACS's Endorsement of Views that Conflict with its Religious Beliefs, *AOSI* Governs this case and Therefore, HHS Violated the First Amendment under the Unconstitutional Conditions Doctrine

"Under the "unconstitutional conditions doctrine," 'government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.'" *FAIR*, 547 U.S. at 59 (quoting *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003)); U.S. CONST amend. I. However, the Court in *Rust* held that when the government funds a program, the government has the right to define the limits of that program's speech. *Rust,* 500 U.S. at 194. Therefore, the Court must examine the purpose of a government funded program when analyzing whether a government condition to

participate in the program is constitutional under the First Amendment. *See Velazquez*, 531 U.S. at 542. In *Rust*, the Court upheld a prohibition on doctor's ability to promote abortion in a federal family planning program because the program's purpose was to promote the government's message about family planning, which expressly excluded promotion of abortion. *Rust,* 500 U.S. at 180.

"Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *AOSI*, 570 U.S. at 215. For this reason, it is important to distinguish between the government's ability to regulate speech and the constitutional rights protected by the First Amendment. While *Rust* stands for the proposition that the government has the ability to limit speech when it funds the program, where the purpose of the program is to facilitate private speech rather than promote a government message, the restriction violates the First Amendment if speech is a prerequisite of participation in the program. *Velazquez*, 531 U.S. at 542.

In *AOSI*, the Supreme Court held that a funding program to combat the spread of AIDS around the world could not constitutionally require funding recipients to affirmatively condemn the practice of prostitution. *AOSI*, 570 U.S. at 214. The Supreme Court concluded that the anti-prostitution affirmation requirement reached outside the limits of the AIDS government program and compelled "grant recipients to adopt a particular belief as a condition of funding." *Id.* at 218.

The contract between AACS and HHS is not to promote the EOCPA's non-discrimination policy. Rather, the contract is between a private adoption agency and a government agency in order to provide the best adoption services to children in HHS's custody. As a part of this contract, private foster care and adoption agencies "provide services that consist

of home studies, counseling, and placement recommendations to HHS." R. at 3. Although HHS provides these private agencies with public funds and referrals, these private agencies maintain lists of available families and notify HHS of a potential match on their private lists. *Id.* HHS then has the ability to determine which private agency has the most suitable family. *Id.*

While there is a contract between a government agency and a private agency, AACS's work as an authorized agency is not an extension of HHS's work, but rather a contract with the purpose to facilitate child adoptions that best serve the well-being of each child. Because AACS remains a private adoption agency, not a government program, the speech of AACS remains that of private speech and does not in any way qualify as government speech. Therefore, compelling AACS to display the EOCPA's non-discrimination policy, a policy with which the private agency does not agree, violates their right to the freedom of speech under the First Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment below, and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Team 2,
Team 2
Counsel for Petitioner