No. 2020-05

# In the United States Court of Appeals for the Fifteenth Circuit

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

v.

AL-ADAB AL-MUFRAD CARE SERVICES,
*Plaintiff-Appellee*.

On Rehearing En Banc of an Appeal from
the United States District Court
for the Western District of East Virginia

**BRIEF FOR DEFENDANT-APPELLANT, CHRISTOPHER HARTWELL**

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## JURISDICTIONAL STATEMENT

The United States District Court for the Western District of East Virginia entered a memorandum opinion and order on April 29, 2019. The district court exercised jurisdiction over plaintiff's claim under 28 U.S. Code § 1331 because it alleged an infringement of a constitutional right. The United States Court of Appeals for the Fifteenth Circuit entered a judgement on February 24, 2020. The court of appeals had jurisdiction under 28 U.S. Code § 1291 because the district court entered a final decision and under 28 U.S. Code § 1294 because the Western District of East Virginia is a district court within the Fifteenth Circuit. The Fifteenth Circuit granted a Rehearing En Banc on July 15, 2020, after a vote of a majority of non-recused active judges, as allowed under Federal Rule of Appellate Procedure 35(a)(2) and 28 U.S. Code § 46.

## STATEMENT OF THE ISSUES

1. Whether a municipal agency may enforce state anti-discrimination laws against a private, government-funded agency under the Free Exercise Clause by withholding public funds until the contracted agency discontinues its discriminatory policy.

2. Whether a municipal agency has the right to define the limits of a government-funded program's speech under the Free Speech Clause by requiring a contracted agency to display a provision of the state's anti-discrimination law on its premises and to certify same-sex couples as adoptive parents.

## STATEMENT OF THE CASE

Statement of Facts

The City of Evansburgh's Department of Health and Human Services (HHS) administers the adoption and foster care systems for children who are in need of stable, permanent families. R. at 3. Currently, around 17,000 children are living in foster care and 4,000 are waiting for adoption. R. at 3. In August 2018, HHS declared that Evansburgh was in critical need of new adoptive families due to a sudden increase in children needing foster care. R. at 8.

HHS relies on the assistance of thirty-four private child placement agencies throughout Evansburgh to locate qualified families that can provide safe and responsible homes to children in need. R. at 3. HHS retains the authority to enter into contracts with private agencies to facilitate both foster care and adoption services. R. at 3. Private agencies screen interested families and provide that information to HHS. R. at 3. Then, HHS analyzes that information and uses it to place a child with the most ideal family that can meet the child's specific needs. R. at 3. After HHS matches a child with a family, the private agency that provided the recommendation is expected to support the new family through a successful integration. R. at 4.

The East Virginia Code requires HHS to make its placement determination based on "the best interests of the child." R. at 4 (quoting E.V.C. § 37(d)). When making a placement decision, HHS must examine the child's age in relation to the applicant parents' ages, the ability of the applicant parents to address and accommodate the child's physical and emotional needs, the child's "cultural or ethnic background" in comparison to the applicant parents' background, and the preference of the child to be reunited in a home with their siblings, among other factors. R. at 4 (quoting E.V.C. § 37(e)). East Virginia's Equal Opportunity Child Placement Act (EOCPA) of 1972 "imposes nondiscrimination requirements on private child placement agencies receiving public funds in exchange for providing child placement services to HHS." R. at 4 (citing E.V.C. §

42.). At that time, the EOCPA listed "race, religion, national origin, sex, marital status, [and] disability" as protected categories. R. at 4 (quoting E.V.C. § 42.-2). The EOCPA further requires agencies to "'give preference' to foster or adoptive families in which at least one parent is the same race as the child needing placement." R. at 4 (quoting E.V.C. § 42.-2(b)). The law prohibits private child placement agencies from receiving public funds if they are not in compliance with the EOCPA. R. at 4.

After the Supreme Court's landmark decision in *Obergefell v. Hodges*, East Virginia amended the EOCPA to include sexual orientation as a protected category. R. at 6. The amendment requires government-contracted, private agencies to post the state's anti-discrimination law on their premises. R. at 6. The law now states "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 (quoting E.V.C. § 42.-3(b) (emphasis added)). However, the statute specifically grants religious-based private agencies the ability to post a written objection to the state's anti-discrimination statement on their premises. R. at 6. East Virginia's Governor announced that this amendment served the government's goal of "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. Much like the original EOCPA, the amendment includes a provision giving preference to placing a child with "parents that are the same sexual orientation as the child." R. at 6.

Following the passage of the EOCPA amendment, Christopher Hartwell, the Commissioner of HHS, surveyed all the religious-based child placement agencies under contract with HHS to determine whether they were in compliance with the amendment to the EOCPA. R. at 6-7. One such agency was Al-Adab Al-Mufrad Care Services (AACS). R. at 7.

AACS operates as a non-profit adoption agency whose goal is to "provide community support to the refugee population." R. at 1, 5. More specifically, its mission statement declares that "[a]ll children are a gift from Allah" and "the services we provide are consistent with the teachings of the Qur'an." R. at 5. AACS's contract with HHS requires that it remain in "compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh" to receive public funds. R. at 5, 6.

In September 2018, the Executive Director of AACS, Sahid Abu-Kane, informed Commissioner Hartwell that Islamic religious beliefs prevent AACS from assisting same-sex couples with adoption services, regardless of how well-qualified the couple may be. R. at 7. Abu-Kane justified his agency's blanket refusal to work with same-sex couples by citing the teachings of the Qur'an and the Hadith, which believe "same-sex marriage to be a moral transgression." R. at 7. When a same-sex couple reaches out to AACS for help growing their family through adoption, they are denied assistance and referred to another agency. R. at 7.

Commissioner Hartwell inquired to Abu-Kane whether he knew that discriminating against same-sex couples because of their sexual orientation was illegal under the EOCPA. R. at 7. Abu-Kane rejected Hartwell's assertion and stated that "it was not discrimination to follow the teachings of the Qur'an because 'Allah orders justice and good conduct.'" R. at 7 (quoting Qur'an, 16:90). Shortly thereafter, Commissioner Hartwell notified AACS by letter that its contract with HHS would not be renewed on the basis that AACS was not in compliance with the EOCPA because it refused to assist same-sex couples. R. at 7. The letter further asserted that the other private child placement agencies in the city would be instructed to stop sending referrals to AACS. R. at 7-8. HHS afforded AACS ten days to comply with the full scope of the EOCPA before instituting the referral freeze. R. at 8. AACS refused to comply.

Proceedings Below

On October 30, 2018, in response to Commissioner Hartwell's letter, AACS filed suit requesting a temporary restraining order against HHS's referral restriction and a permanent injunction ordering renewal of AACS's contract with HHS. R. at 8. At an evidentiary hearing in March 2019, a set of undisputed facts were agreed upon, including that in August 2018 "HHS issued an urgent notice to all Child Placement Agencies stating the need for more adoptive families." R. at 8. At the hearing, Commissioner Hartwell testified that "when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced," and that HHS's enforcement of the EOCPA aims to ensure that "individuals who pay taxes to fund government contractors are not denied access to those services." R. at 8-9. The evidentiary hearing also documented a few instances of HHS exercising its discretion when placing children into new, permanent homes. R. at 8-9.

On April 29, 2019, the United States District Court for the Western District of East Virginia granted AACS's temporary restraining order and permanent injunction. R. at 17. Commissioner Hartwell appealed the district court's decision to the United States Court of Appeals for the Fifteenth Circuit for *de novo* review. R. at 18-19. On February 24, 2020, the circuit court reversed the judgment of the district court and held that enforcing the EOCPA against AACS as a recipient of public funds is constitutional. R. at 25. AACS petitioned for rehearing en banc, which was granted by a majority vote of the non-recused active judges on July 15, 2020. R. at 26.

## SUMMARY OF THE ARGUMENT

The challenged portion of East Virginia's EOCPA does not violate the Free Exercise Clause or the Free Speech Clause under the First Amendment. As a threshold matter, the law is constitutional because it is neutral and generally applicable. The EOCPA is facially neutral in regard to the language used and constructively neutral through its intent and enforcement by HHS.

The EOCPA is neutral on its face because its language does not explicitly or implicitly target any religion or religious belief. Furthermore, the EOCPA is constructively neutral because its history and contemporary implementation reveal no intent to target AACS, adherents to the Muslim faith, or any other general religious framework. The EOCPA governs religious and secular child placement agencies that contract with HHS equally, which renders it a constitutional and generally applicable statute.

Similarly, enforcement of the EOCPA against AACS does not violate AACS's right to free speech. Requiring AACS to certify same-sex couples and display the EOCPA's anti-discrimination provision constitutes government speech. AACS is contracted and funded by the government, and the government's program did not intend to create a forum for private speech. Even if this Court finds that the AACS's speech as a government-contracted agency amounts to private speech, the EOCPA's certification and notice requirements do not violate the unconstitutional conditions doctrine, as they are permissible governmental limits on a government-funded program's speech. Lastly, the EOCPA does not unconstitutionally require AACS to endorse a specific message with which it disagrees. Therefore, this Court should affirm its prior decision and find that HHS's enforcement of the EOCPA against AACS was constitutional.

## ARGUMENT

### I. THE EQUAL OPPORTUNITY CHILD PLACEMENT ACT IS CONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE BECAUSE IT IS NEUTRAL AND GENERALLY APPLICABLE.

East Virginia's amendment to the EOCPA is constitutional under the Free Exercise Clause of the First Amendment because it is both neutral and generally applicable. Laws that affect the practice of religious beliefs are constitutional so long as they are neutral and generally applicable. *Emp. Div., Dept. of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263 (1982)). A neutral and generally applicable law is constitutional, even

without a compelling government interest. *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Here, the EOCPA is first neutral, both facially and constructively. Second, the EOCPA applies to all private child placement agencies that wish to contract with Evansburgh and HHS, making it a law of inherent general applicability. A strict scrutiny analysis is thus inappropriate to evaluate the EOCPA. However, even under strict scrutiny, the EOCPA remains constitutional because it serves a compelling government interest and is narrowly tailored to achieve that interest.

### A. The EOCPA Is Facially And Constructively Neutral Because Neither The Language Nor The Implementation Of The Law Targets A Religious Practice.

The EOCPA meets the highest standard of neutrality because it is facially neutral in its language and constructively neutral in its intent and implementation by HHS. A law is facially neutral when it does not refer to a "religious practice without a secular meaning discernable from [its] language or context." *Lukumi*, 508 U.S. at 533. However, mere facial neutrality "is not determinative," as the Free Exercise Clause bars even "subtle departures from neutrality." *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). To determine a law's constructive or practical neutrality, courts must consider additional factors. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Relevant factors include the law's history, underlying motivation, and "contemporaneous statements made by members of the decision-making body." *Lukumi*, 508 U.S. at 540. Here, the EOCPA is both facially and constructively neutral. First, the EOCPA is facially neutral because it contains no direct or indirect references to religious practices or beliefs. Secondly, the EOCPA is constructively neutral because nothing in its history, surrounding events, or application suggest even a "subtle departure from neutrality" by East Virginia lawmakers. *Gillette*, 401 U.S. at 452.

i. *The EOCPA is neutral on its face because the language of the statute does not explicitly identify or implicitly target a particular religion or religious belief.*

The EOCPA meets the constitutional standard of facial neutrality because its language neither explicitly nor implicitly targets a particular religion, particular religious belief, or general spiritual framework. To determine a law's facial neutrality, a court should conduct a two-pronged analysis of the law's text. *See Lukumi*, 508 U.S. at 533. A law that explicitly "target[s] religious beliefs as such" lacks facial neutrality; however, a law that indirectly targets a religious practice through connotation equally lacks facial neutrality. *Id.* Therefore, a court should evaluate the plain language of a law as well as any religious connotations supplied by the language used. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion); *see id.* If this textual analysis of the law reveals a targeting or restriction of conduct based on religion, then the law is not facially neutral. *See Smith*, 494 U.S. at 878-79.

In *Lukumi*, the Court addressed a Free Exercise challenge to an ordinance that banned some forms of animal slaughter but not others, implicitly targeting the animal sacrifices that serve an integral role in the Santería religion. *Lukumi*, 508 U.S. at 525, 527-28. The ordinance contained no explicit references to Santería, so the Court refocused its inquiry on references to "religious practice[s]" within the text of the ordinance that could not have an alternate, "secular meaning." *Id.* at 533. The ordinance included terms such as "ritual" and "sacrifice," which have "strong religious connotations." *Id.* at 533-34. However, the ordinance also included a provision providing secular definitions for those terms, making the law appear facially neutral. *Id.* at 534. The Court held that superficial neutrality alone is not dispositive and next moved to look for any "covert suppression of particular religious beliefs" in the law. *Id.* The Court found that the ordinance's

definitions, exceptions, and exemptions resulted in a "religious gerrymander," which operated to target the Santería religion specifically, while sparing other religious and secular actors. *Id.* at 535.

Alternatively, in *Smith*, the Court evaluated a series of Oregon criminal statutes that outlawed drug possession, including peyote, a hallucinogenic plant used as a sacrament in a Native American church. *Smith*, 494 U.S. at 874. Similar to the challenged ordinance in *Lukumi*, Oregon's criminal law contained no explicit references to a particular religion or its adherents. *See id.* at 878; *Lukumi*, 508 U.S. at 533. Unlike the challenged ordinance in *Lukumi*, however, the *Smith* Court could not identify any language within the law that offered even a modicum of "religious connotation." *Lukumi*, 508 U.S. at 534; *Smith*, 494 U.S. at 878. Furthermore, Oregon's criminal laws were not devised in such a manner to create a religious gerrymander that sought to restrict the religious practices of a specific group. The lack of religious targeting or use of language carrying a religious implication led the *Smith* Court to conclude that Oregon's prohibition on the possession of peyote was facially neutral. *See Smith*, 494 U.S. at 878.

As a threshold matter, the challenged portion of East Virginia's EOCPA contains no explicit references to Islam or any other religious framework. R. at 6 (discussing E.V.C. § 42.-3(b)-(c)). The EOCPA can be readily distinguished from the similarly facially neutral ordinance at issue in *Lukumi*. Unlike the ordinance in that case, the challenged portion of the EOCPA contains no references to religious practices or words that might present a "religious connotation," rendering an inquiry into possible redemptive "secular meanings" moot. R. at 6 (citing E.V.C. § 42.-3(b)); *see Lukumi*, 508 U.S. at 534. Further, the EOCPA is not designed to create a religious gerrymander to harm AACS while sparing other child placement agencies.

Instead, the EOCPA resembles the criminal statute at issue in *Smith*, which flatly banned the possession of peyote without reference to religious belief. *Smith*, 494 U.S. at 878. Here, the

EOCPA broadly prohibits all adoption agencies from discriminating based on sexual orientation and commands all adoption agencies to "give preference" to parents who match the sexual orientation of the adoptive child. R. at 6 (quoting E.V.C. § 42.-3(b)-(c)). Like the criminal statute in *Smith*, the EOCPA contains no explicit references to religion and is devoid of any "religious connotations" like those found in the facially neutral ordinance in *Lukumi*. *See Smith*, 494 U.S. at 878; *Lukumi*, 508 U.S. at 534. Thus, the EOCPA is facially neutral.

*ii. The EOCPA is constructively neutral because its origin lacks a discriminatory intent and its implementation lacks a discriminatory effect.*

The EOCPA also meets the constitutional standard of constructive neutrality because its history and circumstances reveal no intent to target AACS, adherents to the Muslim faith, or any other religious framework. Because the "free exercise clause . . . extends beyond facial discrimination," courts must consider neutrality in light of a law's underlying intent and effect. *Lukumi*, 508 U.S. at 534. Mirroring an Equal Protection analysis, courts have looked to the history of the challenged law, its surrounding circumstances, and "contemporaneous statements" made by lawmakers. *Id.* at 540 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Constructive neutrality may likewise be gauged by examining the law "in its real operation." *Id.* at 535.

A finding of constructive non-neutrality in otherwise facially neutral laws is often due to a law's immediate history. *See e.g., id.* at 540. In *Lukumi*, the city council did not outlaw animal sacrifices until Santería adherents announced plans to construct a church. *Id.* This close temporal relationship indicated that the ordinances "were enacted *because of* their suppression" of Santería practices, which voided any claim of neutrality. *Id.* at 541 (emphasis added).

Constructive non-neutrality can arise when a facially neutral law is accompanied by statements that indicate government animus towards a particular religion, its specific practices, or

interpretations of its ideology. *Id.* at 541-42; *see e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1724. In *Lukumi*, numerous city council members made statements criticizing the Santería religion. 508 U.S. at 541. The city council president asked during a meeting if there was anything "we [the council] can do to prevent the Church from opening?" *Id.* Another councilmember stated that the people who practice Santería violate "everything this country stands for." *Id.* Similarly, in *Masterpiece Cakeshop*, Colorado officials described an individual's religious beliefs as "despicable" and attributed the religion to causing slavery and the Holocaust. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. In both *Lukumi* and *Masterpiece*, the Court held that such comments inherently betrayed any government claim of neutrality, as these statements evidenced overt disfavor directed at a particular religious framework. *See id.*; *Lukumi*, 508 U.S. at 540.

Selective enforcement – an example of the law in its "real operation" – can also support a Free Exercise claim. *Lukumi*, 508 U.S. at 535; *see New Hope Family Servs. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020). In *Poole*, a New York law imposed anti-discrimination requirements on adoption agencies, and violations resulted in the immediate and "total shutdown" of multiple agencies, all of which a shared a common religious affiliation and ideology. *Poole*, 966 F.3d at 169-70. The possibility that the law's enforcement "fell almost exclusively on adoption services holding [a] particular religious belief" caused the court to "suspect that the object of the law" was to target those beliefs, an intent suggestive of non-neutrality and creating a plausible claim of Free Exercise violation. *Id.* at 170. The court's suspicion was enough to "warrant 'pause' for discovery before dismissing New Hope's claim as implausible." *Id.* at 163.

East Virginia's amendment to the EOCPA was not motivated by the arrival of AACS or any other religious group. R. at 6. Rather, the EOCPA was amended to comport with the decision in *Obergefell v. Hodges* and to accomplish the anti-discrimination goals of East Virginia. R. at 6.

Furthermore, the amendment to the EOCPA was not accompanied by statements indicating animus towards Islam or any other religion. Here, the Governor of East Virginia stated an intent to "eradicate discrimination . . . regardless of what philosophy or ideology undergirds such bigotry." R. at 6. These words are antithetical to the hostile statements in *Masterpiece Cakeshop* and *Lukumi*. *Masterpiece Cakeshop*, 138 S. Ct. at 1729; *Lukumi*, 508 U.S. at 540; R. at 6. Instead, the Governor's statement reflects an opposition towards discrimination itself. R. at 6.[1] Finally, the enforcement of the amended EOCPA has not resulted in a suggestive or "exclusive" burden, unlike the law in *Poole*. *See Poole*, 966 F.3d at 169-70. Instead, AACS is currently legally able to operate and appears to be the sole Child Placement Agency that is failing to comply with East Virginia law. R. at 3. Thus, the EOCPA is also constructively neutral.

B. <u>The EOCPA is Generally Applicable In East Virginia Because It Governs All Child Placement Agencies That Contract With HHS, And Its Minor Exemptions Do Not Undermine Its General Applicability.</u>

The EOCPA also meets the constitutional standard of general applicability because it applies to all child placement agencies within East Virginia, regardless of religious or secular affiliation. This Court correctly identified the proper test for general applicability as "whether the plaintiff can show that they were treated more harshly than the government would have treated someone who engaged in the same conduct, but held different religious views." R. at 20. This approach mirrors that of other courts, which have held that the central question of general applicability is "whether a law treats religious observers unequally." *See e.g., Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020) (finding a law that applied to all students and school staff was generally applicable).

[1] East Virginia has explicitly expressed reverence for AACS's religious beliefs, as shown by Commission Hartwell's letter indicating that HHS "respects [AACS]'s sincerely held religious beliefs." R. at 7.

*i. Both secular and religious child placement agencies must comply with the EOCPA to receive municipal funds.*

The EOCPA governs religious and non-religious child placement agencies equally, making it a law of general applicability. A law is not generally applicable if, in practice, the law restricts "conduct motivated by religious belief" but does not govern "substantial [and] comparable secular conduct that would similarly threaten the government's interest." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 545).

In *Stormans*, a regulatory exemption framework applied to secular and religious pharmacies. *Id.* at 1071-73. The exemptions could be triggered by business events that occur in either setting. *See id.* This uniformity led the court to conclude that the regulatory scheme was inherently generally applicable. *Id.* at 1082. In contrast, underinclusive laws that allow secular, but not religious, conduct to infringe on the government's interest cannot be generally applicable. *Id.* at 1079; *see Lukumi*, 508 U.S. at 544. For example, the law in *Lukumi* allowed hunters to dispose of animal carcasses without issue but outlawed the methods used by Santeríans for animal sacrifice. 508 U.S. at 544-45. The Court ultimately concluded that the challenged ordinances could not be characterized as generally applicable because they effectively only outlawed the disposal of animal remains by Santería adherents and no one else. *Id.* at 545.

In *Parents for Privacy*, a religious group challenged a school policy that allowed transgender students to use the bathroom and locker room of their choice, while not extending the same right to non-transgender students. 949 F.3d at 1234-35. Finding that the regulation was not underinclusive, the court held that the purpose of the regulation was to prevent discrimination against transgender students, so the absence of a provision allowing the same right to non-transgender students did not make the regulation underinclusive in accomplishing the school's goal. *Id.* at 1236. Furthermore, the school policy did not force only religious students to use shared

accommodations with transgender students; the policy affected all students and staff equally. *Id.* The court correctly held that the policy did "not place demands on exclusively religious persons or conduct," making the policy generally applicable and constitutional. *Id.*

Here, the EOCPA is analogous to the generally applicable pharmacy regulations in *Stormans*, as it flatly applies to all child placement agencies within East Virginia, including those with religious or secular affiliations. *Stormans*, 794 F.3d at 1080; R. at 6. Additionally, the EOCPA can be readily distinguished from the underinclusive ordinance at issue in *Lukumi*, which allowed conduct with a secular motivation, while the EOCPA bans discrimination regardless of its motivation. *Lukumi*, 508 U.S. at 544-45; R. at 6. Ultimately, the EOCPA is most similar to the school policy at issue in *Parents for Privacy* because it is generally applicable to all parties regardless of religion or status and is solely motivated by East Virginia's asserted interest: preventing discrimination. *See Parents for Priv.*, 949 F.3d at 1246; R. at 6-7.

*ii. HHS may use discretion through minor exceptions to the EOCPA without affecting the law's general applicability.*

The Free Exercise Clause does not preclude HHS from making minor exceptions to the EOCPA on an ad hoc basis. Individual exceptions are only suspect when a possibility exists that "certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons." *Stormans*, 794 F.3d at 1082 (citing *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007)).

Courts have approved exceptions to generally applicable laws and regulations, finding that an exception or exemption that allows "minimal governmental discretion does not destroy a law's general applicability." *Id.* In *Stormans*, the court held that exceptions within a regulatory scheme were permissible because they could be triggered by business events in either a religious or secular pharmacy. *Id.* Because the exceptions could foreseeably happen in either setting, the exceptions as

written could not favor secular pharmacies over religious pharmacies. *Id.* Further, the exceptions did not favor secular or religious pharmacies in practice. *Id.* at 1083.

In contrast, a selective regime of exceptions or enforcement represents a *per se* failure of general applicability. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002); *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012). In *Tenafly*, a city began enforcing an ordinance banning public postings only after Orthodox Jews violated its provisions. 309 F.3d at 167. The court contrasted the city's sudden enforcement with the historical exception afforded to secular and non-Orthodox postings and found that it was "suggestive of discriminatory intent." *Id.* at 168. The court held that selective enforcement was an uncontestable example of the ordinance's non-general applicability. *Id.*

Similarly, in *Ward*, a college counseling department's sudden enforcement of a policy limiting referrals came only after a student-counselor requested a referral for religious reasons. *Ward*, 667 F.3d at 739. The counseling department refused to grant the student an exemption from the policy as it had previously done for students with secular motivations, which the court characterized as a "fail[ure]" of the college to "apply the policy in an even-handed manner," rendering the policy not generally applicable. *Id.* In both *Ward* and *Tenafly,* unequal access to exemptions removed any general applicability from the laws in question. *See Ward*, 667 F.3d at 739; *Tenafly*, 309 F.3d at 168.

In administering the EOCPA in East Virginia, HHS has yet to extend a single significant exemption from the requirements imposed by the amendment challenged here. R. 8-9. Moreover, the primary exception HHS has made – relating to racial matching between adoptive children and adoptive parents – had no basis in the religious or secular quality of the child placement agency. R. at 9. Thus, HHS's limited scintilla of discretion is akin to that of the regulators in *Stormans*,

who were allowed by law to grant exceptions equally in religious and secular pharmacies. *See Stormans*, 794 at 108; R. at 9. Critically, there is no evidence that HHS or any East Virginia official has engaged in the selective enforcement or discretionary exception-granting at issue in *Ward* and *Tenafly*. *Ward*, 667 F.3d at 739; *Tenafly*, 309 F.3d at 168. Instead, HHS has applied the EOCPA to both religious and secular adoption agencies, using only its "minimal governmental discretion" to extend minor exceptions where appropriate, making the EOCPA generally applicable. *Stormans*, 794 at 1082; R. at 4. Because the EOCPA is neutral and generally applicable, this Court should affirm its previous decision and hold that the EOCPA is constitutional.

C. If Applied, The EOCPA Satisfies Strict Scrutiny Because It Furthers A Compelling Government Interest And The Statute Is Narrowly Tailored To That Interest.

This Court is not required to apply strict scrutiny in this case; however, the EOCPA does satisfy a strict scrutiny analysis. Strict scrutiny is satisfied when a law or government action serves a compelling government interest and is narrowly tailored to achieve the stated interest. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (citing *Lukumi*, 508 U.S. at 546). In East Virginia, the EOCPA serves a compelling government interest: safeguarding child welfare through the prevention of discrimination. The EOCPA is also narrowly tailored because it does not place an excessive burden or penalty on religious-based child placement agencies. As a result, the EOCPA meets the highest standard of constitutional scrutiny.

*i. Ensuring the welfare of children by prohibiting discrimination through the EOCPA is a compelling government interest and may permissibly burden religion.*

When enacting and amending the EOCPA, East Virginia lawmakers sought to accomplish a compelling government interest: securing child welfare by prohibiting discrimination. "Not all burdens on religion are unconstitutional" and a state may justify "a limitation on religious liberty" by showing that it is connected to a compelling government interest. *United States v. Lee*, 455 U.S.

252, 257-58 (1982). While an exhaustive list of sufficiently compelling government interests does not exist, courts have specified that safeguarding the welfare of children is a legitimate interest. *See e.g., Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

Government actions that burden or limit religion may be constitutional if such burdens are unavoidable in achieving a compelling government interest. *Lee*, 455 U.S. at 257-58. In *Lee*, an Amish business owner refused to contribute to the federal social security system, claiming his potential contribution to government spending would violate his religious beliefs. *Id.* at 257. In rejecting his Free Exercise Claim, the Court took a pragmatic view, holding that while minor infringements on religious liberty are unfortunate, the federal social security system would cease to function if all religious groups could claim an exemption. *Id.* at 258.

Further, the government maintains a particular interest in the welfare of children, and the government's authority in that respect reaches further than its authority over adults. *Prince*, 321 U.S. at 168. In *Prince*, a Jehovah's Witness brough a Free Exercise Clause claim after being convicted of breaking child labor laws. *Id.* at 159. The Court rejected the claim because of the government's tremendous interest in protecting the well-being of children. *Id.* at 161-62. The Court reasoned that ensuring the well-being of children helps to ensure the continuation of a democratic society and held that the "family itself is not beyond regulation in the public interest" even if that regulation infringes on "religious liberty." *Id.* at 166.

However, not all governmental interests related to children trump the Free Exercise Clause, as the Supreme Court has carved a limited exception for the rights of parents within the realm of education. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). In *Yoder*, an Amish individual refused to comply with a compulsory education law that required parents to send their children to school until the child reached the age of sixteen. *Id.* Violations resulted in fines and imprisonment. *Id.*

Yoder brought a Free Exercise Claim against the state, arguing that education outside of the home violated his religious beliefs. *Id.* Recognizing a sacred tradition of parents educating their children, the Court held that in the realm of education, governmental interests "must yield to the rights of parents." *Id.* at 213-214. The Court categorized the parent-child relationship at issue in this context as largely protected by the Free Exercise Clause. *Id.* at 216.

The EOCPA in East Virginia governs the conduct of child placement agencies, not parents, which makes the challenged amendment materially different from the challenged law in *Yoder*. *Yoder*, 406 U.S. at 213; R. at 6 (discussing E.V.C. § 42.-3(b)-(c)). Instead of, for example, commanding specific conduct by Muslim parents in East Virginia, the EOCPA regulates the thirty-four child placement agencies that contract with the state. R. at 6, 9. Moreover, the EOCPA is concerned with the welfare of children, as made clear by Commissioner Hartwell's statement that the "purpose" of the amendment "was to ensure that the pool of parents is as diverse and broad as the children in need of such parents." R. at 9. Thus, the EOCPA and its challenged amendment are akin to the permissible prohibition against child labor in *Prince*. *See Prince*, 321 U.S. at 168; R. at 9. As in *Prince*, East Virginia's goal in enacting the EOCPA and its amendments was to protect children – here, children in state custody who are eligible for adoption. *Prince*, 321 U.S. at 168; R. at 9. Lastly, similar to *Lee*, while the mechanics of the EOCPA may infringe on religious perspectives, this infringement is simply unavoidable to accomplish the compelling interest of East Virginia's government. *See Lee*, 455 U.S. at 257-58; R. at 6-7, 9. As a result, the EOCPA serves a constitutionally compelling government interest.

*ii. The EOCPA is narrowly tailored because it only removes state assistance from private child placement agencies that refuse to comply with state law.*

The EOCPA is narrowly tailored because it only requires government-contracted child placement agencies to comply with state law and post an anti-discrimination sign. A law is not

narrowly tailored when it is either underinclusive or less burdensome alternatives exist that can accomplish the same asserted government interest. *Lukumi*, 508 U.S. at 546. Failure to comply with the EOCPA results only in the withdrawal of government assistance, not a forced closure, which serves to achieve the state's anti-discrimination goal. R. at 6.

If a law fails to prohibit conduct that threatens the government's asserted interest, then it is underinclusive and thus not narrowly tailored. *Lukumi*, 508 U.S. at 546. In *Lukumi*, ordinances allegedly pursuant to a government interest in public health and sanitation failed to prohibit numerous secular forms of conduct that also threatened the government's asserted interest. *Id.* Provisions that effectively banned the ritual slaughter of animals in the name of public health allowed for their non-ritual secular slaughter, consumption, and disposal. *Id.* The ill-fit between the government's interest and the effect of the law in practice led the Court to conclude that the state had no "serious claim that [their] interests" justified the challenged ordinances. *Id.* at 547.

In addition, when less burdensome alternatives to a law exist, the law is overbroad and not narrowly tailored. *Id.* at 546. This standard undergirds the Court's decision in *Yoder*, where the Court recognized the tremendous burden that a compulsory education requirement imposed on the Amish "way of life," suggesting that it may even lead to the destruction of the community. *Yoder*, 406 U.S. at 216. Moreover, the Court conceded that the Amish claimants established that their alternative mode of education was "adequate" to meet the "overall interest" the State sought to secure. *Id.* at 206. The deep conflict between the law and Amish beliefs, coupled with the presence of a viable alternative to the State's asserted interest, led the Court to conclude that the challenged requirement could not comport with the Free Exercise Clause due to its overbreadth. *Id.* at 216.

Unlike the challenged ordinances in *Lukumi*, the EOCPA leaves no open avenues for discrimination. *See Lukumi*, 508 U.S. at 546; R. at 6 (discussing E.V.C. § 42.-3(b)-(c)). Rather

than allowing discrimination motivated by secular viewpoints while prohibiting discrimination motivated by religious beliefs, the EOCPA imposes a flat ban on discrimination in all forms. R. at 6 (discussing E.V.C. § 42.-3(b)-(c)). In addition, the EOCPA serves East Virginia's asserted interests with only a minimal intrusion upon religious liberty, making it not overbroad and fundamentally unlike the regulations at issue in *Yoder*. *See Yoder*, 406 U.S. at 216. Unlike the education mandates in *Yoder*, the anti-discrimination requirements of the EOCPA do not needlessly intrude upon the enshrined beliefs of any religious group. *See id.*; R. at 6 (discussing E.V.C. § 42.-3(b)-(c)).

Moreover, failure to comply with the EOCPA presents a far lesser burden than the potential, community-destroying burden discussed in *Yoder*. *Yoder*, 406 U.S. at 216. While child placement agencies that refuse to comply with the EOCPA surrender their government funding, they are permitted to continue operating. R. at 6-7. Finally, unlike in *Yoder*, the EOCPA cannot be characterized as overbroad because there is no less-burdensome alternative. *See Yoder*, 406 U.S. at 206; R. at 6. In conclusion, the EOCPA is constitutional and narrowly tailored because it uses the least restrictive means to achieve the government's compelling interest.

## II. THE EQUAL OPPORTUNITY CHILD PLACEMENT ACT IS CONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE BECAUSE IT ADDRESSES GOVERNMENT SPEECH AND DOES NOT VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

Enforcement of the EOCPA against AACS does not violate the Free Speech Clause of the First Amendment. AACS's certification of same-sex couples and postage of the EOCPA's anti-discrimination provision constitutes government speech, which is not protected by the First Amendment. Rather, the government "is entitled to say what it wishes" and select the views it wants to express. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Moreover, even if this Court finds that the AACS's speech as a government-contracted agency

amounts to private speech, the EOCPA's certification and notice requirements do not violate the unconstitutional conditions doctrine, which prohibits governments from conditioning benefits on a recipient's relinquishment of their constitutionally protected rights, including free speech. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). However, when the government funds a program, the government has the right to define the limits of that program's speech. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Furthermore, the government may place conditions on the private use of public funds as long as grant recipients are not required to adopt the government's views as their own. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l (AOSI)*, 570 U.S. 205 (2013). Here, HHS placed permissible governmental limits on a government-funded program's speech. Moreover, East Virginia's EOCPA does not require AACS to endorse a specific message with which it disagrees; therefore, the EOCPA does not infringe on AACS's First Amendment rights.

### A. The EOCPA's Anti-Discrimination Requirement Is Constitutional Because The Certification And Notice Provisions Are Government Speech.

The EOCPA's anti-discrimination requirement is constitutional because the certification and notice provisions constitute government speech. The Free Speech Clause of the First Amendment restricts only the government's regulation of private speech; it does not regulate government speech. *Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."). When the government speaks, it "is entitled to say what it wishes," and to select the views that it wants to express. *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 194. Viewpoint-based restrictions on speech may be sustained where the government itself is the speaker or subsidizer of the message. *Rosenberger*, 515 U.S. at 834. Thus, in analyzing whether government restrictions on speech are constitutional, a court must first analyze whether the government was engaging in its own speech or providing a forum for private speech. *Id*. at 469-70.

*i. The EOCPA's certification and notice provisions constitute government speech due to the history, government control, and government attribution of the EOCPA.*

The EOCPA's certification and notice provisions constitute government speech and are not subject to First Amendment scrutiny. The government's own speech is exempt from First Amendment scrutiny. *Johanns*, 544 U.S. at 553. Therefore, when the government is the speaker, it can choose what to say and select the views it wants to support. *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 194. When deciding whether certain speech constitutes government speech, courts analyze (1) whether there is a history of the government speaking in that manner, (2) whether the government retained control over the content of the message, and (3) to whom the public will likely attribute the message. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009).

1. The history of the EOCPA reflects the Government of East Virginia communicating its view on discrimination.

The history of the EOCPA illustrates that, since its enactment, the law has served to communicate the government's view on discrimination and anti-discrimination enforcement. In analyzing whether speech constitutes government speech, courts must consider whether history shows that "[g]overnments have long used [that form of speech] to speak to the public." *Id.* at 470.

In *Summum*, the Court held that privately donated monuments displayed on government property were considered government speech, in part because "[g]overnments have long used monuments to speak to the public." *Id*. For example, the Court explained, monuments have historically been used to commemorate military victories and events of civic importance. *Id*. The Court noted that, "[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Id*. Similarly, in *Walker*, the Court held that a private organization's specialty license plate design

constituted government speech. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 210 (2015). The Court reasoned that "the history of license plates shows that . . . they have long communicated messages from the states," including state emblems like Texas's Lone Star and slogans like Wisconsin's "America's Dairyland." *Id*. at 210-11.

Since 1972, when East Virginia enacted the EOCPA, the government has communicated anti-discrimination message through the requirement that private child placement agencies receiving public funds comply with the EOCPA by certifying prospective adoptive parents without discriminating on the basis of race, religion, national origin, sex, marital status, or disability. R. at 4. The government of East Virginia reaffirmed its commitment to combat discrimination when it amended the EOCPA to prohibit government-funded adoption agencies from discriminating on the basis of sexual orientation. R. at 6. This amendment reflected the state's commitment to "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. Since HHS began contracting with AACS in 1980, AACS has agreed to provide adoption services, including certification, in compliance with the EOCPA. R. at 5-6. As such, the history of the EOCPA reflects the government of East Virginia's intent to communicate its view on discrimination through its state-funded and government-contracted adoption agencies.

2. The Government of East Virginia retains ultimate control over the messages communicated by its government-contracted child adoption agencies.

HHS maintains final control over the messages communicated through its government-contracted child adoption agencies during the adoption process. Whether certain speech constitutes government speech depends in part on whether the government exercised control over the messages conveyed. *Summum*, 555 U.S. at 471. If the government controls a message "from

beginning to end," and maintains "final approval authority" over the message, the message is government speech. *Johanns*, 544 U.S. at 560-61.

In *Johanns*, the Supreme Court held that a federal marketing slogan for beef products was government speech because the federal government controlled the entire scope of the promotional campaign's messaging. *Id*. at 560 ("The message set out in the beef promotions is from beginning to end the message established by the Federal Government."). The Secretary of Agriculture retained "final approval authority over *every* word used in every promotional campaign." *Id*. at 561 (emphasis added). Similarly, in *Walker*, the Court held that specialty license plates constituted government speech because the state retained "sole control over the design, typeface, color, and alphanumeric pattern for all license plates." *Walker*, 576 U.S. at 213. There, a governmental board approved all specialty license plate designs, thereby exercising "final approval authority" over the selection of all designs. *Id*. Likewise, in *Summum*, the Court held that the city "effectively controlled" the messages sent by monuments displayed in a public park because the city had "final approval authority" over the selection of monuments, even though the monuments themselves were privately designed, built, and donated. *Summum*, 555 U.S. at 473.

On the other hand, in *Poole*, the Third Circuit held that the New York adoption process did not constitute government speech. 966 F.3d at 175. The court reasoned that the messages conveyed by a private adoption agency not receiving public funding were not controlled "from beginning to end" by the state government such that they could qualify as government speech. *Id*. The court emphasized that, "no New York officials engage directly with private authorized agencies as they recruit, instruct, evaluate, and ultimately recommend adoptive parents." *Id*. Furthermore, nothing in the pleadings indicated that government officials were ever required to "review, edit, or reject a

private authorized agency's best-interests assessment before a child's placement in an adoptive family." *Id.*

In this case, like in *Johanns*, the Government of East Virginia maintains "final approval authority over every word" used in the EOCPA. *See Johanns*, 544 U.S. at 561. The message set forth in the EOCPA, including the anti-discrimination provision that child placement agencies are required to post, is "from beginning to end the message established by the Government." *Id.* at 560. Moreover, the Government of East Virginia has given municipalities "sole control" over the regulation of foster and adoption placements through contracts with private adoption agencies to provide adoption services. *See Walker*, 576 U.S. at 213; R. at 3. In particular, the City of Evansburgh has charged HHS with establishing a system for providing adoption services to its citizens. R. at 3. The fact that HHS has entrusted some responsibility for providing such services with private child placement agencies through contracts does not diminish its control over the program's speech. *See Summum*, 555 U.S. at 473. Rather, similar to *Summum*, HHS maintains "final approval authority" over the selection of the agencies with which it contracts, and thus retains ultimate control over the program's message. *Id.*

Additionally, HHS works directly with its adoption agencies in each step of the adoption process, which is substantially different from the adoption process in *Poole*. R. at 3; *Poole*, 966 F.3d at 175. When HHS receives a child into custody, it notifies the agencies with which it has contracted. R. at 3. The agencies then inform HHS of potential matches for the child based on their lists of available families, and HHS analyzes that information to place the child with the most suitable family. R. at 3. Finally, HHS determines which private agency has the most suitable family based on the child's age, sibling relationships, race, medical conditions, and other needs. R. at 3.

Further unlike the State in *Poole*, the undisputed facts here show that HHS has, on at least five separate occasions, reviewed and then either accepted or denied an authorized adoption agency's placement assessment.[2] HHS's conduct is entirely distinguishable from that of the government officials in *Poole*, who never engaged directly with the private adoption agencies as they recruited, instructed, evaluated, and recommended adoptive parents to the court. *Poole*, 966 F.3d at 174; R. at 3. Instead, HHS works in tandem with AACS and other authorized adoption agencies "from beginning to end" in the adoption process. *Poole*, 966 F.3d at 174; R. at 3. Ultimately, HHS retains "final approval authority" over the placement of the child, rendering the EOCPA's anti-discrimination requirements government speech. *Poole*, 966 F.3d at 174; R. at 3.

#### 3. The public will likely attribute AACS's compliance with the EOCPA's anti-discrimination provision to the government, especially if AACS posts its own written objection to the policy, as it has the right to do.

When AACS, a government-contracted child placement agency, certifies same-sex couples and posts the EOCPA's anti-discrimination provision on its premises, the public will likely attribute this speech to the government itself. The final, and perhaps most important, factor in the government speech analysis is whether the speech is "often closely identified in the public mind with the government." *Summum*, 555 U.S. at 472.

In *Summum*, the Court noted that "persons who observe donated monuments routinely–and reasonably–interpret them as conveying some message on the property owner's behalf." *Id.* at 471. There, the Court held that the public would likely attribute the message of monuments in a public

[2] On November 4, 2014, HHS placed a White special needs child with an African American couple, despite three adoption agencies' certifications of White adoptive families for the child. R. at 8. On three occasions between 2013-2015, HHS approved AACS's recommendation that children should not be placed with otherwise qualified adoptive parents from a different Islamic sect as the child. R. at 9. On March 21, 2015, HHS elected not to place a 5-year old girl with an exclusively male family that was otherwise certified by the sponsoring adoption agency. R. at 9.

park to the government, even if those monuments are privately designed and donated. *Id.* Likewise, the Court in *Walker* noted that Texas license plate designs are "often closely attributed by the public to the State." *Walker*, 576 U.S. at 201. Specifically, the Court reasoned that, because license plates serve as governmental identification for vehicles, and the State's name is displayed prominently at the top of every plate, "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message." *Id*. at 212.

In this case, the public will likely view the display of the EOCPA's anti-discrimination provision on AACS's premises as government speech because the notice states that "it is illegal under *state law* to discriminate against any person." R. at 6 (emphasis added). Because the notice simply quotes state law verbatim, this Court can reasonably conclude that the public will understand that the "State has endorsed that message." *Walker*, 576 U.S. at 212; *see* R. at 6. This is especially true given that the EOCPA provides an express allowance for religious-based agencies to post a written objection to the government's policy on their premises, thereby reinforcing their disassociation with the government's message. R. at 6. Similarly, the public will likely associate AACS's certification of same-sex couples as government speech because AACS is a government-contracted agency. *See* R. at 5.

*ii. HHS's purpose in contracting with AACS is to provide adoption services, not to create a forum for private speech.*

This Court correctly held that HHS did not intend to create a forum for private speech nor facilitate private speech when it contracted with AACS for the sole purpose of providing adoption services to the citizens of Evansburgh. R. at 23. When analyzing the constitutionality of a government condition on a program's speech under the First Amendment, courts must examine the purpose of the government funding program. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). When the government funds a program to promote a government message rather

than create a forum for private speech, the government may impose restrictions on that program's speech without infringing on the First Amendment. *See id*. at 543. Here, this Court correctly held that "AACS's work as an authorized adoption agency is an extension of HHS's work, and AACS's speech as an authorized adoption agency qualifies as government speech." R. at 23-24.

In *Rust*, the Court upheld a challenge to HHS regulations that limited the ability of Title X fund recipients from engaging in counseling or making referrals for abortions, while requiring the clinic to provide information about continuing a pregnancy to term. *Rust*, 500 U.S. at 177, 192. The Court reasoned that the Title X program aimed to encourage family planning, a goal which inherently precluded the promotion of abortion by doctors and clinics. *Id*. at 180.

On the other hand, in *AOSI*, the Court ruled that a government 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 221. The Court held that the anti-prostitution affirmation went beyond the limits of the government's program because the government did not have an express policy regarding prostitution as a part of its AIDS program. *Id.* at 214, 218. There, the Court reasoned that the purpose of the program was to facilitate private speech rather than promote a government message, making the speech requirement unconstitutional. *Id*. Unlike in *Rust*, the government in *AOSI* did not simply direct grant-recipients on how to use the government's money; it required them to affirm their express agreement with the government's policy, which violates the First Amendment. *See Fulton v. City of Philadelphia*, 922 F.3d 140, 161 (3d Cir. 2019) (discussing Supreme Court precedent involving government contracts and freedom of speech).

In the adoption agency context, the Third Circuit upheld the government's requirement that an agency must certify prospective foster parents in compliance with the state's anti-discrimination

laws. *Id.* at 160. There, the court reasoned that the state's law was constitutional because the speech occurred within the context of the agency's performance of a public service pursuant to a contract with the government and the city's non-discrimination requirements pertained to the program receiving government money. *See id.*

This Court correctly held that *AOSI* does not govern this case. R. at 23. Here, AACS's contract with HHS aims to facilitate unbiased adoption services, not to create a forum for private speech. R. at 23. Speech occurs only because AACS has chosen to partner with HHS to help provide a public service. R. at 23; *see also Fulton*, 922 F.3d at 161. The district court established, through its evidentiary hearing, that HHS's purpose for enforcing the EOCPA included ensuring that (1) child placement contractors who voluntarily agree to be bound by state and local laws are in compliance with the law; (2) "child placement services are accessible to all Evansburgh residents" who qualify for the services; (3) "the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents;" and (4) Evansburgh's taxpayers are not denied access to services they pay for. R. at 9. Given the governmental purposes of the state adoption program, this Court correctly analogized this case to *Rust*. R. at 23. Further, this Court correctly noted that HHS's purpose in contracting with AACS was to provide non-discriminatory adoption services to the citizens of Evansburgh, *not* to create a forum for private speech or facilitate private speech. R. at 23. Moreover, this purpose inherently precludes discriminatory practices by authorized adoption agencies. R. at 23. Therefore, this Court should affirm its previous decision and hold that HHS's enforcement of the EOCPA against AACS was constitutional.

B. Even If This Court Finds That The EOCPA Governs Private Speech, The Certification And Notice Provisions Do Not Violate The Unconstitutional Conditions Doctrine Because The Government Is Entitled To Define The Limits Of Its Program's Speech And The EOCPA Does Not Compel AACS To Endorse A View With Which It Disagrees.

If this Court determines that AACS's certification of same-sex couples and display of the EOCPA's anti-discrimination policy constitute private speech rather than government speech, the EOCPA remains constitutional because it does not violate the unconstitutional conditions doctrine. The unconstitutional conditions doctrine prohibits governments from conditioning benefits on a would-be recipient's relinquishment of their constitutionally protected rights, including free speech. *Perry*, 408 U.S. at 597. However, when the government funds a program, it has the right to define the limits of that program's speech. *Rust*, 500 U.S. at 194.

*i. The EOCPA's certification and notice requirements are constitutional because the government has the right to define the limits of speech for a program it funds.*

The EOCPA's certification and notice requirements are constitutional limits on a government-funded program's speech. When the government funds a program, the government maintains the right to set the boundaries of that program's speech. *Id*. at 194. If a party objects to a condition on the receipt of government funds, the appropriate recourse is to decline the funds. *AOSI*, 570 U.S. at 206. This remains true even when the objection to the condition involves the recipient's exercise of its First Amendment rights. *Id*.

In *Rust*, the Court upheld conditions that required federal grant recipients to refrain from providing counseling or general information about abortion. *Rust*, 500 U.S. at 193-200. The Court determined that the government was rightfully exercising its authority to subsidize family planning services that will lead to conception and childbirth, while declining to subsidize clinics that promote or encourage abortion. *Id*. at 193. In doing so, the government was simply choosing to "fund one activity to the exclusion of the other." *Id*. The Court held that "a refusal to fund protected activity, without more, cannot be equated to the imposition of a 'penalty' on that activity." *Id*.

Since *Rust*, the Court has routinely upheld the government's right to selectively fund programs that comply with their viewpoints. For example, the Court upheld legislation that required public libraries receiving government funds to filter Internet access to prevent access to obscene images or child pornography. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 199 (2003). The Court reasoned that the government was not denying a benefit to the libraries for refusing to comply, but "simply insisting that public funds be spent for the purpose for which they are authorized." *Id.* at 211. In that case, the government sought to help public libraries obtain appropriate materials for educational and informational purposes. *See id*. at 211-12.

Similarly, the Court upheld a provision of the Internal Revenue Code that prohibited non-profit organizations receiving tax deductible contributions from engaging in lobbying. *See Regan v. Tax'n with Representation of Wash. (TWR)*, 461 U.S. 540, 542 (1983). The Court noted that "[t]he Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any benefit on account of its intention to lobby." *Id*. at 545. The government did not preclude TWR from engaging in lobbying; TWR was free to use its own money and resources to do so. *See id.* Rather, Congress merely refused to use public funds to pay for the lobbying. *Id*.

This Court correctly held that "*Rust* disposes of AACS's claim that the EOCPA's ban on discrimination against same-sex couples compels AACS to espouse a viewpoint with which it disagrees." R. at 23. In this case, HHS chose not to renew its contract with AACS because AACS refused to comply with the anti-discrimination requirements of the EOCPA. R. at 7. As a government-contracted child placement agency, AACS "voluntarily accepted public funds in order to provide a secular social service to the community." R. at 7. Thus, by choosing to renew its

contracts only with agencies that comply with the EOCPA's non-discrimination provision, HHS merely chose to "fund one activity to the exclusion of the other." *Rust*, 500 U.S. at 193; R. at 7.

HHS is entitled to ensure that the public funds dispersed to its contracted child placement agencies are "spent for the purpose for which they are authorized," namely ensuring a non-discriminatory adoption process for children and potential adoptive parents. *Am. Library Ass'n Inc.*, 539 U.S. at 203-04. Moreover, HHS did not deny AACS their right to operate as an adoption agency as a result of their refusal to certify qualified same-sex couples based on their sincerely-held religious beliefs; HHS just chose not to pay for such discriminatory adoption services with government money. R. at 7-8; s*ee TWR*, 461 U.S. at 545. In fact, AACS remains free to operate as a private adoption agency with their own money and resources. R. at 7-8; s*ee TWR*, 461 U.S. at 545. Thus, the certification and notice requirements of the EOCPA are constitutional limits on the government-funded program's speech.

*ii. The EOCPA's certification and notice provisions do not violate the unconstitutional conditions doctrine because they do not compel AACS to endorse same-sex marriage.*

The EOCPA does not require AACS to unconstitutionally endorse or adopt a subjective belief. The government may place conditions on the private use of public funds as long as it does not require grant recipients to adopt the government's views as their own. *AOSI*, 570 U.S. at 218. While the Free Speech Clause prohibits governments from telling people what they must say, the government may require a private entity to post factual information without violating the party's right to speak. *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

In *Rumsfeld*, a group of law schools alleged that a federal law denying funding to schools that prohibited military recruiters from tabling on campus violated their First Amendment rights. *Id.* at 51. The schools argued that the law compelled them to endorse the military's policy

prohibiting LGBTQ+ from serving in the military. *See id*. at 55. The Court rejected this argument, reasoning that requiring law schools to provide military recruiters access to campus in a manner consistent with the access provided to any other employer did not violate the unconstitutional conditions doctrine because it "neither limits what law schools may say nor requires them to say anything." *Id.* at 56, 60. Rather, the law affected what law schools must *do* – provide equal access to military recruiters – not what they may or may not *say*. *Id*. In fact, "nothing about recruiting suggests that law schools agree with any speech by recruiters," and the law did not restrict what the schools could say about the military's policies. *Id*. at 65.

The law schools further alleged that providing email notifications to the student body of the military recruiters' scheduled presence conveyed an implicit endorsement of the recruiters' message. *Id*. at 64-65. The Court rejected the schools' argument because the speech they challenged was merely "incidental to the [law]'s regulation of conduct." *Id.* at 62. Moreover, the Court explained, First Amendment rights are not automatically violated "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* The Court ruled that posting factual information about the military recruiter's arrival did not affect the law school's speech, as nothing in the law restricted what the law schools may say in opposition to the military's policies. *Id*. at 65. On the other hand, in *Hurley*, the Court held that a state anti-discrimination law could not require a parade to include a group whose message the parade organizer did not wish to send, as the parade organizer's own message was directly affected by the speech it was forced to accommodate. *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 566 (1995).

In contrast, in *AOSI*, the Court held that requiring recipients of public funds allocated for global AIDS prevention to also explicitly agree with the government's policy condemning

prostitution violated the unconstitutional conditions doctrine. *AOSI*, 570 U.S. at 218. The Court held that the anti-prostitution affirmation requirement reached beyond the limits of the AIDS program and compelled "grant recipients to adopt a particular belief as a condition of funding." *Id*. Unlike in *Rumsfeld*, the government in *AOSI* did not only tell grant recipients how to use the government's money but also required them to affirm their own agreement with the government's policy. *Fulton*, 922 F.3d at 161 (discussing Supreme Court precedent involving government contracts and freedom of speech).

In *Fulton*, a government-contracted adoption agency claimed that the state's requirement that it certify same-sex couples in compliance with a state anti-discrimination law required it to endorse a view that contradicted their sincere religious beliefs. *Id.* at 160. "The problem with this argument," the court noted, "is that the ostensibly compelled speech occurs in the context of [the agency's] performance with a public service pursuant to a contract with the government." *Id*. Moreover, the court found that the anti-discrimination requirements supported the government's program, unlike the anti-prostitution requirement in *AOSI*, which went beyond the limits of the AIDS funding program. *See id*. at 161. Hypothetically, the court surmised, the city would violate the unconstitutional conditions doctrine if it refused to contract with the private adoption agency unless the agency expressly and officially proclaimed *its own* support of same-sex marriage. *Id*. However, that was not the case; the city simply required that the agencies "abide by public rules of nondiscrimination in the performance of its public function under any foster-care contract." *Id*.

In this case, this Court correctly held that East Virginia's EOCPA aligns more with the law in *Rumsfeld* than in *AOSI*. R. at 23. Similar to *Rumsfeld*, HHS only requires that AACS afford same-sex couples the same access to adoption services as heterosexual couples by certifying them as potential adoptive parents. R. at 6-7; *see Rumsfeld*, 547 U.S. at 55. In fact, nothing about the

certification process suggests that AACS agrees with same-sex marriage. Moreover, unlike the policy in *AOSI*, the certification requirement does not force AACS to adopt a particular belief regarding same sex marriage. *See AOSI*, 570 U.S. at 218. Rather, like in *Fulton*, HHS is requiring AACS to "abide by public rules of nondiscrimination in the performance of its public function under any foster-care contract," and the speech in question only occurs because AACS has *chosen* to partner with HHS to help provide a public service. *Fulton*, 922 F.3d at 161; R. at 23.

Furthermore, the EOCPA's requirement that AACS post the EOCPA's anti-discrimination provision verbatim at its place of business does not violate the unconstitutional conditions doctrine either. Here, like in *Rumsfeld*, AACS is merely required to post a factual statement from East Virginia's anti-discrimination law, labeled as such. *Rumsfeld*, 547 U.S. at 65; R. at 23. Specifically, the notice requirement of the EOCPA requires that each government-contracted child placement agency post 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 (emphasis added). Unlike in *Hurley*, this requirement does not compel AACS to say anything, nor does it interfere with their ability to express its disagreement with the government's message. 515 U.S. at 566; R. at 23. In fact, the notice requirement in E.V.C. Section 42.-4 explicitly *permits* AACS to post its own written objection to the policy. R. at 6, 24. Therefore, the EOCPA does not violate the unconstitutional conditions doctrine.

## CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully requests that this Court affirm its prior decision and find that HHS's enforcement of the EOCPA against AACS was constitutional.

Respectfully Submitted,

____________________/s/

Team 24

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