CAUSE NO. 2020-05

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

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

—v.—

AL-ADAB AL-MUFRAD CARE SERVICES,
Appellee.

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

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

Team #25

QUESTIONS PRESENTED

1. Whether the Free Exercise Clause prohibits the government from requiring child placement agencies to, in accordance with East Virginia Code § 42, refrain from discrimination on the basis of sexual orientation as a prerequisite for receiving municipal funds for its referrals to the Department of Health and Human Services?

2. Whether the Free Speech Clause prohibits the government from requiring child placement agencies to, in accordance with East Virginia Code § 42, display the plain language of the statute, even when expressly granting the agency permission to simultaneously communicate its own message?

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STATEMENT OF JURISDICTION

The District Court had federal question subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over a district court's granting or denying of a preliminary injunction per 28 U.S.C. § 1292(a)(1). This Court may order a rehearing en banc for questions of exceptional importance. FED. R. APP. P. 35(a)(2).

STANDARD OF REVIEW

In evaluating the denial of a preliminary injunction, the district court's decision is reviewed for abuse of discretion, recognizing that preliminary injunctions are extraordinary remedies involving the exercise of far reaching power that should be granted only sparingly and in limited circumstances. *Microstrategy Inc. v. Motorola, Inc*., 245 F.3d 335, 339 (4th Cir. 2001). The District Court's conclusions of law are reviewed de novo. *Id*. When a case presents a First Amendment claim, there is a constitutional duty to conduct an independent examination of the record as a whole. *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist*., 386 F.3d 514, 524 (3d Cir. 2004).

A plaintiff seeking a preliminary injunction must establish: (1) they are likely to succeed on the merits, (2) likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tip in their favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When addressing the second factor, a court must balance the likelihood or irreparable harm to the plaintiff against the likelihood of harm to the defendant. *Microstrategy Inc.*, 245 F.3d at 339. If the balance between the two is substantially equal, then interim relief is more likely to require a clear showing of likelihood of success. *Direx Israel, Ltd. v. Breakthrough Med. Corp*., 952 F.2d 802, 808 (4th Cir. 1991).

STATEMENT OF FACTS

A. Health and Human Services Facilitates Adoption by Offering Agency Contracts

Evansburgh, East Virginia, is a racially and ethnically diverse city with a population of approximately 4,000,000. R. at 3. There are approximately 4,000 children available for adoption and 17,000 more in foster care. R. at 3. To alleviate the shortage of foster and adoptive homes, Evansburgh's Department of Health and Human Services (HHS) contracts with thirty-four private child placement agencies to provide services that meet the best interests of the children within its system. R. at 3.

Secular and religious agencies perform home studies, counseling, and recommend placements to HHS in exchange for municipal funding. R. at 3. When HHS refers children in its custody to the contracting agencies, and after an agency considers the factors listed in East Virginia Code (E.V.C.) § 37(e), it sends HHS potential matches from its list of available families. R. at 3. Per E.V.C. § 37(d), HHS makes the final decision as to whether it agrees the suggested family satisfies the best interests of the child. R. at 3–4. After HHS places a child with an adoptive family, the agency supervises the process to ensure a successful placement. R. at 4. Parents and families initiate contact with the agencies contracted with HHS after browsing the list of affiliated agencies on HHS's website. R. at 4-5. In the event prospective parents seeking a child with special needs may not meet the policies of a listed agency, the agency may refer the parents to a more appropriate agency.

Compliance with the East Virginia Equal Opportunity Child Placement Act (EOCPA) (1972) has always been a condition to receiving municipal funds. R. at 4. The EOCPA originally 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 or families." R. at 4 (citing E.V.C. § 42.-2). Following the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Governor of East Virginia requested a review of East Virginia law to "eradicate discrimination in all forms." R. at 6. Accordingly, the legislature amended the EOCPA in three ways: 1) agencies are prohibited from discriminating on the basis of sexual orientation; 2) agencies must give preference to parents matching the same sexual orientation as the child needing placement; and 3) agencies must display a signed statement of the EOCPA's anti-discrimination policy at its place of business. R. at 4-6 (citing E.V.C. § 42.-3(c)). Religious agencies are permitted under the amended statute to display a written objection to the antidiscrimination policy. R. at 6.

B. AACS's Refusal to Comply with the EOCPA

Shortly after the EOCPA amendments, the media asked HHS Commissioner Hartwell whether religious agencies were complying with the amended policy. R. at 6. Commissioner Hartwell evaluated religious agencies for their current policies and practices regarding same-sex couples and discovered Al-Adab Al-Mufrad Case Services (AACS) refused to comply with EOCPA. R. at 6-7. AACS's Executive Director cited its Islamic beliefs as justification for turning away qualified same-sex couples as prospective clients. R. at 7. Prior to AACS's refusal to comply with the recent amendment to the EOCPA, HHS had renewed AACS's contract annually. R. at 5.

Commissioner Hartwell notified AACS that although HHS respected its sincerely held religious beliefs, HHS could not renew its contract if it did not comply with the EOCPA. R. at 7. After allowing AACS ten days to assure future compliance, Commissioner Hartwell placed an immediate referral freeze on AACS. R. at 7-8. A month after Hartwell gave AACS notice and the contract expired, AACS filed this action against Commissioner Hartwell alleging HHS's enforcement of the EOCPA violated AACS's First Amendment rights to Free Exercise and Free

Speech. R. at 8. A three-day evidentiary hearing established additional facts demonstrating the effect of the referral freeze on AACS's normal operations. R. at 8-9; *see* App'x A.

STATEMENT OF THE CASE

Al-Adab Al-Mufrad Care Services (AACS or Appellee) sued Christopher Hartwell in his official capacity as Commissioner of the City of Evansburgh's Department of Health and Human Services (HHS) for alleged violations of Appellant's First Amendment rights to freedom of religion and speech. R. at 2. Appellant filed a Motion seeking a Temporary Restraining Order (TRO) against Hartwell's referral freeze and an injunction compelling Hartwell to renew AACS's contract with the HHS. R. at 2. Following an evidentiary hearing, the district court granted Appellant's motions for a TRO and a permanent injunction. R. at 2. A panel for the Court of Appeals for the Fifteenth Circuit reversed the district court's decision. R. at 25. Appellant filed a Petition for Rehearing En Banc. R. at 26. In accordance with Federal Rule of Appellate Procedure 35(a)(2), the majority of non-recused active judges voted to grant Appellant's petition. R. at 26.

SUMMARY OF THE ARGUMENT

I.

The EOCPA comports with the Free Exercise Clause because it is a neutral and generally applicable law that does not regulate religious beliefs or religiously motivated conduct. The EOCPA is neutral on its face because the explicit language of the law contains unambiguously secular language and does not reference a religious belief or practice. Additionally, the EOCPA is generally applicable because all agencies under contract with HHS, religious and secular, must comply with the Act as a prerequisite to receiving municipal funds for their child placement services. Contrary to AACS's characterization, the statutory mandate to weigh race and nationality as a factor when matching children with families—and HHS's ultimate discretion to agree or disagree with the agency—do not constitute secular exemptions that would render the otherwise generally applicable law unconstitutional. Because the EOCPA is both neutral and generally applicable, any incidental burden it imposes on religious practices does not excuse AACS from complying with it as an agency under contract with HHS.

Although HHS sympathizes with the consequences of the referral freeze on AACS, those consequences do not speak to the EOCPA's constitutionality. HHS's final discretion to place children with certain families is not at issue in this case, and the Court is not in the position to question the wisdom of the East Virginia Legislature.

II.

The EOCPA does not offend the Free Speech Clause of the First Amendment because it does not interfere with AACS's ability to express its own message. The EOCPA grants AACS freedom to post its own sign dissenting from the antidiscrimination statute, and the requirement to display the statute is only mandatory within the scope of HHS's program. AACS remains eligible

for its contract with HHS even if it disseminates a message of disagreement in both privately and publicly funded affairs. Additionally, the EOCPA does not interfere with expressive conduct because child placement is not inherently expressive conduct. Because the EOCPA leaves speech unaffected, and because the East Virginia Legislature had authority to establish the laws governing child placement agencies within the state, the unconstitutional conditions doctrine is inapplicable.

Assuming, *arguendo*, that the EOCPA does affect speech, the EOCPA is still constitutional because the government has discretion to define the terms of its subsidized programs. HHS's choice not to subsidize religiously motivated conduct does not equate to punishing that conduct. Further, the present controversy arose because of AACS's decision to contract with HHS. Circuit courts addressing similar controversies with child placement agencies heavily weigh whether an agency is receiving public funds for their services. This Court should follow suit and accordingly hold that AACS's recourse is to refuse municipal funds.

ARGUMENT

I. The Free Exercise Clause of the First Amendment does not prohibit the government from requiring AACS's compliance with the EOCPA as a condition for receiving public funds.

The Free Exercise Clause, "made applicable to the States by incorporation into the Fourteenth Amendment," ensures that Congress will not create laws inhibiting the free exercise of religion. U.S. CONST. amend. I; *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990). The First Amendment is implicated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The Supreme Court has long held, however, that laws of "neutral and of general applicability" need not be supported by a compelling governmental interest even where the law incidentally "burden[s] a particular religious practice." *Id.* at 531. Necessarily, this means the protections granted by Free Exercise Clause do not serve as a vehicle for citizens to avoid compliance with "an otherwise valid law." *Smith*, 494 U.S. at 878–79.

Antidiscrimination laws like E.V.C. § 42 are constitutional. *Hurley v. Irish Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572 (1995). The Supreme Court's First Amendment jurisprudence often recognizes the State's authority to enact legislation where the State suspects a "given group is the target of discrimination." *Hurley*, 515 U.S. at 572. This type of legislation comports with the First and Fourteenth Amendments. *Id.* at 572. In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court recognized the fundamental right of same-sex couples to marry. The Court's decision gave East Virginia "reason to believe" that "sexual minorities" were the target of discrimination. R. at 6. In response to the Court's decision, the

Governor of East Virginia sought to ensure the State's publicly funded agencies were refraining from "discrimination in all forms." R. at 6.

A. The Equal Opportunity Child Placement Act is neutral on its face and as applied.

Although Appellee challenges the original panel decision to overturn the temporary restraining order and permanent injunction, nothing within the EOCPA or its implementation warrant such drastic relief be granted because: 1) the government was not motivated by anti-religious sentiments, therefore the EOCPA is neutral; and 2) government enforcement against illegal conduct, regardless of religious affiliation, renders the law generally applicable. *Smith*, 494 U.S. at 879; *Masterpiece Cakeshop, Ltd. v. Co. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

The Free Exercise clause does not relieve "the obligation to comply with a 'valid and neutral law of general applicability.'" *Smith*, 494 U.S. at 880. As long as a neutral and generally applicable laws is not "motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct," it need not be "justified by a compelling government interest" under strict scrutiny. *Lukumi*, 508 U.S. at 531, 546. According to the standards outlined throughout First Amendment precedents, the EOCPA does no more than incidentally burden AACS from practicing its religious beliefs. Further, Appellee cannot show the EOCPA burdened Appellee *because* of its religion. *See id.* at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion[.]").

1. *The EOCPA is neutral on its face because the language within the statute does not target a specific religion or religious practice.*

Appellant should prevail because the EOCPA is neither overtly nor covertly biased against AACS's religious beliefs. Courts analyze laws for neutrality first by reading the text itself to assess whether the law is neutral on its face. *Id.* at 533. A law is facially neutral so long as it does not regulate a particular religious practice without a discernable secular meaning. *Id. Cantwell v.*

Connecticut presents an example of a clearly biased statute on its face. 310 U.S. 296 (1940). There, Connecticut state law prohibited solicitation for a "religious" cause. *Id.* at 301–04. The explicit reference to a prohibition on religious practice rendered the statute unconstitutional on its face. *Id.*

Then, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court analyzed a city ordinance for facial neutrality. 508 U.S. at 546. There, the Floridian city of Hialeah adopted ordinances prohibiting the religious practice of slaughtering animals. 508 U.S. at 546. Upon notice that a Santerían church would be opening in the city, the city council enacted an ordinance prohibiting animal slaughter. *Id.* at 534. Although the ordinance's intended purpose was to protect animal welfare, the Court looked to the ordinance's language to discern whether the words "sacrifice" and "ritual" referred to their religious or secular meanings. *Id.* at 534. Because the City defined the terms per their secular definitions, the Court could not conclude whether the law was unconstitutional on its face. *Id.* at 534.

In this case, the language of the EOCPA states child placement agencies are prohibited from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." E.V.C. § 42.-2. Unlike the state law in *Cantwell*, the EOCPA does not explicitly prohibit an activity for religious purposes. *Cantwell*, 508 U.S. at 301. Nor does the EOCPA include ambiguous or potentially religious terms like the ordinance in *Lukumi*.[1] *Lukumi*, 508 U.S. at 534. Because the EOCPA contains unambiguously secular language, the law is neutral on its face.

[1] Webster's Dictionary, which the Court cited to define "sacrifice" and "ritual," defines "discrimination" as "the act, practice, or an instance of discriminating categorically rather than individually." *Discrimination*, MERRIAM-WEBSTER (last visited Sept. 11, 2020), https://www.merriam-webster.com/dictionary/discrimination.

2. *The EOCPA is neutral because the government did not amend it with hostile intent to regulate religiously motivated conduct.*

The next step in the neutrality test is reviewing whether a law is covertly discriminatory by surveying for signs of the government's hostility toward religious conduct. *Id.* at 534. To assess governmental hostility, courts consider the historical background and events inspiring the challenged law, such as the law's "legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop*, 138 S. Ct. at 1722 (quoting *Lukumi*, 508 U.S. at 540).

Here, AACS may contend the EOCPA is not neutral by mischaracterizing the government's motivations for amending the law. R. at 6. However, the record supports the conclusion that the East Virginia government neither expressly targeted religion nor hid its ulterior motives behind a "shield" of facial neutrality. *See Lukumi*, 508 U.S. at 534 (stating the government cannot "target religious conduct" behind a shield of facial neutrality).

The instant case is immediately distinguishable from Free Exercise cases in which the Supreme Court found government hostility against religion. For example, *Lukumi* illustrates an example of a law both discriminatory on its face and as applied. *Id.* at 541. In *Lukumi,* the city council held an emergency meeting for the explicit purpose of asking what it could do "to prevent the [Santerían] Church from opening." *Id.* at 541. At the meeting, the police department's chaplain ridiculed the church as "an abomination to the Lord." *Id.* Although the City purported the law was intended to protect animal welfare, the Court argued the councilmembers' comments reflected the City's hostile intent to regulate the practice of Santeria. *See id.* at 545–46. Because the City created the ordinance out of "animosity" toward Santeria followers, the Court declared the ordinances were not neutral. *Id.* at 542.

In this case, nothing in the record indicates the East Virginia lawmakers possessed motivations and sentiments similar to the councilmembers in *Lukumi*. Unlike the councilmembers in *Lukumi*, who disparaged Santeria as "abhorrent" compared to the councilmembers' Christian faith, Hartwell expressed HHS's respect for AACS's sincerely held religious beliefs. R. at 7. Thus, the East Virginia government lacked "ill will" toward religion when it amended EOCPA. *Lukumi*, 508 U.S. at 541–42.

Appellee may cite the East Virginia governor's comments as evidence of government hostility toward Appellee's religion. R. at 6. The governor instructed the state's attorney general to survey state laws for compliance with the Supreme Court's ruling in *Obergefell*, stating a desire to "eradicate[e] discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." R. at 6. It is true the governor vaguely referred to religion by referring to "philosophy or ideology," but it does not follow that the amendment itself intends to burden a specific religious practice or belief. Indeed, he explicitly orders the review of laws regardless of the philosophy undergirding the bigotry, be it secular or otherwise. Such general language is incomparable to the City's unmasked opposition to Santeria. *Lukumi*, 508 US. at 541. Further, the City of Hialeah, unlike the governor of East Virginia, had no reason to believe it needed to amend its antidiscrimination laws following a landmark Supreme Court decision; its ordinances were fueled by its explicit desire to squash a religious belief that differed from the majority. *Id.* at 541; R. at 6.

Additionally, neither the governor nor Commissioner Hartwell interfered with the government's "requisite religious neutrality" when it amended the EOCPA. *Masterpiece Cakeshop*, 138 S. Ct. at 1732. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* is instructive on the issue and demonstrates the nature of hostility that is absent from this case. *Id.*

In *Masterpiece*, a same-sex couple requested a wedding cake from Phillips, the owner of Masterpiece Cakeshop. *Id.* at 1724. Due to Phillips's devout Christian beliefs opposing same-sex marriages, he refused to bake a wedding cake for the couple but offered them other baked goods unaffiliated with same-sex marriage. *Id.* The couple filed a formal discrimination complaint, which Colorado law resolves through an administrative body. *See id.* at 1725 (explaining the complaint system under the Colorado Anti-Discrimination Act, in which the Colorado Civil Rights Commission can adopt the conclusions of a state Administrative Law Judge). Phillips's protested that making the cake would violate his First Amendment rights to Free Exercise and freedom of speech. *Id.* at 1729–30.

At the Colorado Civil Rights Commission's public hearings for Phillips's complaints, one commissioner compared Phillips's concerns to infamous justifications for slavery and the holocaust. *Id.* at 1729. The Court held the Commission's "inappropriate and dismissive comments" toward Phillips's religion, coupled with one commissioner's statement that religion was "one of the most despicable pieces of rhetoric that people can use," evinced the government's hostility toward religion. *Id.* at 1729–30. Consequently, the Court held the Commission violated the plaintiff's constitutional right to a neutral and respectful consideration of his First Amendment complaint. *Id.* at 1732 (describing the Commission's comments as "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion").

Whereas *Masterpiece Cakeshop* and *Lukumi* presented examples of blatant hostility, the instant case contains a thinly veiled reference to religion at best. First, the governor's comment generally referenced "bigotry," but this statement was not directed toward any individual as seen in *Masterpiece Cakeshop* and *Lukumi*. *Compare* R. at 6, *with Masterpiece Cakeshop*, 138 S. Ct. at 1732 (comparing an individual complainant's religious beliefs to Nazism), *and Lukumi*,

508 U.S. at 541 (accusing Santeria devotees of violating "everything this country stands for"). The governor's inspiration to amend the statute was in response to *Obergefell*, not to a controversy specifically involving AACS or any other religious agency. R. at 6.

Further, Justice Kennedy clearly distinguished comments made by lawmakers compared to those made by "an adjudicatory body deciding a particular case." *Masterpiece Cakeshop*, 138 S. Ct. at 1730. The Civil Rights Commission position as the authority presiding over Phillips's case weighed heavily in the Court's ruling. *Id.* The present controversy involves neither a lawmaker nor an adjudicatory body; the governor is an executive who initiated an investigation into the state's laws but otherwise did not write the law himself or play any role in Appellee's individual case. Even lawmakers' comments are debatably indicative of hostile intent, and the record is devoid of any comments made by the East Virginia Legislature leading up to the EOCPA's amendments. *See id.* at 1730 ("Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion."); R. at 6.

B. The EOCPA is generally applicable because it applies to all adoption agencies in East Virginia, and HHS has never granted secular exemptions to the EOCPA.

The second reason the Court should uphold EOCPA's validity is because the law is generally applicable—meaning there is no intent to solely regulate religiously-motivated conduct. *See Smith*, 494 U.S. at 879 (upholding a law criminalizing the use of peyote because it was generally applicable and did not seek to discriminate against the religious consumption of peyote); *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (stating a law is generally applicable as long as it does not prohibit particular conduct "only or primarily when religiously motivated"). Courts may find a generally applicable law unconstitutional if the government shows a pattern of granting "individualized exemptions" to the law but refuses to grant

religious exemptions for the same conduct. *Lukumi*, 508 U.S. at 537. Whether there is such a pattern depends on the facts of the particular case. *Smith*, 494 U.S. at 884. Notwithstanding this exception, neutral and generally applicable laws need not withstand strict scrutiny. *Id.*

1. *AACS mischaracterizes the preferential treatment required by statute as secular exemptions.*

Here, AACS asserts the law is still unconstitutional even if it is neutral and generally applicable on its face per the "individual exemption" exception to the general rule. *Smith*, 494 U.S. at 884. Appellee contends that by abiding by the policies imparted to adoption agencies per section 37(d) of the E.V.C., HHS has engaged in "several kinds of discrimination" and does not generally apply the EOCPA. R. at 12. Appellee's contentions pertain to two separate provisions of the EOCPA, one governing the factors agencies must consider when examining potential parent matches with children in need of placement, and the other creating a general nondiscrimination policy that must be followed in order to receive municipal compensation. R. at 4, 6. When assessing the fitness of potential foster or adoptive parents and matching children in need of placement, the Code requires agencies to consider:

> (1) "the ages of the child and prospective parent(s);" (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);" (3) "the cultural or ethnic background of the child compared to the capacity of the adoptive parent to meet the needs of the child with such a background;" and (4) "the ability of a child to be placed in a home with siblings and half-siblings.

E.V.C. § 37(e); R. at 4.

Simultaneously, agencies are expected to comply with section 42, which prohibits "discriminat[ion] on the basis of race, religion, national origin, sex, marital status, or disability." E.V.C. § 42.–2(a).

AACS asserts the law is unconstitutional even if it is neutral and generally applicable on its face per the "individual exemption" exception to the general rule. *Smith*, 494 U.S. at 884; R. at 12 (contending that by abiding by the policies imparted to adoption agencies per section 37(d) of E.V.C., HHS has engaged in "several kinds of discrimination" and does not generally apply the EOCPA).

The district court cited to the Third Circuit's decision in *Tenafly Eruv Association v. Borough of Tenafly* to support its ruling in favor of Appellee, but the case is inapplicable due to this case's markedly distinguished facts. *See generally* 309 F.3d 144. In *Tenafly*, a New Jersey ordinance prohibited the placement of any sign on municipal property, including trees and poles. *Id.* at 151. Although the ordinance did not formally grant exceptions on a case-by-case basis, the law was loosely enforced against signs from local churches, lost animal signs, and holiday decorations. *Id.* at 151–52. Orthodox Jewish plaintiffs challenged the ordinance after the borough council voted against allowing the plaintiffs to install *lechis* on telephone poles (small black plastic strips that signaled "ceremonial demarcations in the area"). *Id.* at 152–54. Because the borough used its discretion to consider each violation individually, the court held the ordinance was not generally applicable and thus, strict scrutiny applied. *Id.* 166.

Unlike *Tenafly*, this is not a case in which the government "decid[ed] that secular motivations are more important than religious motivations." *Id.* at 165 (quoting *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). In *Tenafly*, the borough's "[s]elective enforcement" in favor of non-Jewish signs is what turned its neutral and generally applicable law unconstitutional. *Id.* at 166. The borough had neglected to enforce its ordinance "for many years" until it discovered the plaintiffs' proposal to install *lechis*. *Id.* at 172. Contrarily, there are no examples in the record of HHS granting other contracted agencies secularly motivated

exemptions to the EOCPA, and HHS did not ignore violations of the EOCPA for years—it promptly investigated compliance with the EOCPA following the legislative amendment. R. at 6. In ruling for AACS, the district court listed examples of HHS's placement decisions, in which HHS decided to "give preference" to certain criteria listed under 42-.2(b). R. at 12. However, the lower court erroneously mischaracterized HHS's decisions as "ad hoc exemptions" because the only parties bearing the burden to abide by the EOCPA are the *agencies*—not HHS. *See* E.V.C. § 42-.2 (applying to child placement agencies expressly); R. at 13. Such examples of "ad hoc" exemptions for agencies are not in the record.

Further, the Court should recognize there is a key distinction between turning away prospective foster and adoptive parents on the basis of sex, national origin, and sexual orientation, versus instructing agencies to *consider* those factors for placement purposes once the parents have been accepted as clients under the EOCPA's "all-comers" policy. *See* E.V.C. § 37(d) ("[T]he determination of whether the adoption of a particular child by a particular prospective adoptive parent or couple should be approved must be made on the basis of the best interests of the child"); R. at 14. The EOCPA is the threshold requirement before agencies get to consider the factors under section 37(d) for referral purposes. *See* R. at 4 ("The EOCPA, however, provides that, *when all other parental qualifications are equal*, Child Placement Agencies must "give preference" to foster or adoptive families in which at least one parent is the same race as the child needing placement.") (emphasis added) (citing E.V.C. § 42.- 2(b)).

An example of the two statutes working in harmony is one of the very examples the district court used against HHS: HHS has agreed with AACS on three occasions to avoid placing children with parents of different sects of Islam. R. at 12–13. In those situations, AACS complied with both statutes: first, it complied with the EOCPA by refraining from discriminating prospective

parents of different Islamic sects; and second, it properly considered religion when assessing matches per section 37. Thus, this example does not undermine HHS's interests, as AACS alleges; instead, it refutes the misconstrued assertion that HHS provides ad hoc exemptions to the EOCPA.

To further illustrate, HHS's actions are distinguished from *Ward v. Polite*, in which a student counselor prevailed in her First Amendment claim after her graduate school ejected her for referring out a homosexual client for religious reasons. 667 F.3d 727, 730 (6th Cir. 2012). The court did not take issue with the university's anti-discrimination policy, but rather the university's decision to eject Ward even though it had recognized secularly based referrals several times before in addition to its policy permitting faith-based exemptions to the general policy. *Id.* at 739. The present case is distinguishable because unlike the university in *Ward*, HHS is not merely tolerating "multiple types of referrals" and thus undermining its anti-discrimination statute. *Id.* at 740. Although HHS's contracted agencies have referred parents to other agencies, the record does not suggest those agencies refused to serve those parents on the basis of sexual orientation or any characteristics in the E.V.C. R. at 5. The only recorded instances of referrals have been due to parents not meeting the training and background requirements needed for adopting special needs children. R. at 5. This type of referral, however, does not violate the EOCPA. *See* E.V.C. § 42. Further, in *Ward*, "the only policy governing practicum students was the ACA code of ethics, which . . . contemplate[d] referrals," whereas here there is no additional independent code governing the actions of child placement agencies—only the E.V.C. *Ward*, 667 F.3d at 737.

Additionally, unlike the referral request in *Ward*, which did not negatively impact the client because the client was unaware of the referral, rejected clients who approach AACS are completely aware that they have been refused service. *Id.* at 735; R. at 7. Although AACS may act respectfully

in turning away same-sex couples, rejected clients face "stigmatizing injury."[2] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

The same distinction from *Tenafly* appears in *Ward*; HHS used its discretion to either agree or disagree with its contracted agencies' suggestions for parent-child matches—not to allow its agencies to refuse service to parents on an ad hoc basis. *Ward*, 667 F.3d at 739; *see also New Hope Family Servs, Inc. v. Poole*, 966 F.3d 145, 151 (2d Cir. 2020) (stating agencies are granted "considerable discretion in determining the best interests of a child"); R. at 3 (explaining that HHS ultimately decides where to place a child based on recommendations).

In short, the record is devoid of any examples showing that HHS granted non-religious child placement agencies secular exemptions to the nondiscrimination statute; all agencies are expected to comply with the law to be eligible for contract renewal with the city. The mere fact that an example of a secular agency violating the EOCPA has yet to occur does not mean HHS would fail to enforce it if it did occur. Further, the record does not present HHS's "abrupt . . . change of mind" to target religious agencies after years of permitting discrimination on the basis of sexual orientation. *New Hope*, 966 F.3d at 167. What it does show is a state's attempt to honor the Supreme Court's *Obergefell* opinion. R. at 6. For these reasons, the Court should recognize that Appellant has not participated in "religious gerrymander[ing]" warranting a temporary restraining order or permanent injunction. *Lukumi*, 508 U.S. at 537.

[2] Justice Kennedy referenced a similar stigma faced by children in his *Obergefell* opinion as further justification for recognizing same-sex couples' rights to "marry, establish a home and bring up children." *Obergefell*, 576 U.S. at 668 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)). "Without the recognition . . . marriage offers, children suffer the stigma of knowing their families are somehow lesser." *Id.* at 646.

2. *The consequences of the referral freeze have no bearing on the constitutionality of the EOCPA.*

The court should disregard AACS's attempts to conflate the issue at stake with HHS's reasonable disagreement with its agencies' suggestions. AACS negatively portrays multiple examples of family placements as "ad hoc," essentially questioning the HHS's subjective judgment, which is expected under East Virginia's child placement statute. R. at 12–13. The wisdom of HHS's ultimate decisions is not at issue, and this Court should decline to question it. *Drummon v. Fulton Cnty. Dep't of Family and Children's Servs.*, 563 F.2d 1200, 1206 (5th Cir. 1977) ("This Court does not have the professional expertise to assess the wisdom of that type of inquiry[.]").

Additionally, HHS recognizes some preferred placement opportunities were unavailable as a result of AACS's temporary referral freeze. *See* R. at 8–9. However, AACS had the opportunity to come into compliance with the EOCPA and thereby end the referral freeze. While HHS sympathizes with the inconvenience resulting from the freeze, child placement is a complex process in which HHS must exercise discretion to ensure all children's needs are met pursuant to both its expertise and options available at a given time. *See Drummon*, 563 F.2d at 1212 (Brown, J., concurring) (lamenting a child's adoption "is not as blissfully simple as cutting the baby in half"). HHS has simply sought compliance with the East Virginia Code as it was written by the legislature, and the Court is not in a position to question "the wisdom, need, and propriety of laws that touch . . . social conditions." *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Thus, the relief AACS seeks is with the East Virginia Legislature, not the Court.[3]

[3] Indeed, several states have enacted statutory exemptions for religious child placement agencies allowing them to refuse service to same-sex couples and single LGBT persons. *See* Jordan Blair Woods, *Religious Exemptions and LGBT Child Welfare*, 103 MINN. L. REV. 2343, 2347 n.20

II. AAC'S unconstitutional conditions argument lacks merit because HHS gives AACS liberty to openly dissent to East Virginia's antidiscrimination statute.

"The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech." U.S. CONST. amend. I; *Janus v. Am. Fed'n of State, Cty. & Mun. Emps*., 138 S. Ct. 2448, 2464 (2018). Freedom of speech also includes the freedom to refrain from speaking. *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943). The U.S. Supreme Court's compelled-speech analysis has focused on whether "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. F. for Acad. & Inst. Rts, Inc. (FAIR)*, 547 U.S. 47, 63 (1991).

The unconstitutional conditions doctrine provides that the government cannot require individuals to surrender constitutional rights as a condition for receiving benefits. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In analyzing whether the government has violated the doctrine, courts examine the purpose of a government funding program. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542, (2001). "It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." *Rumsfeld*, 547 U.S. at 52.

The Court should uphold its original panel decision denying AACS the temporary restraining order and injunction because: (1) The EOCPA does not affect AACS's freedom of speech because it allows AACS freedom to disagree; and (2) the State had authority to define the scope of HHS's contract, which AACS agreed to in order to receive municipal funding.

(2019) (citing statutes and proposed legislation). However, this trend does not reflect the notion that such exemptions are constitutionally required.

A. The EOCPA explicitly allows AACS freedom of expression; therefore, the funding condition of HHS's contracts is constitutionally permissible.

AACS mischaracterizes the nature of this controversy by framing its argument under the unconstitutional conditions doctrine. However, the Supreme Court has made clear that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." *Id.* at 59–60. Asking contracted agencies to sign and post the neutral language contained in E.V.C. § 42 is distinguishable from compelling agencies to affirm the State's preference for a certain policy. While the EOCPA requires its contracted child placement agencies to sign and post at its place of business a standardized statement that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's . . . sexual orientation," AACS does not have to express agreement with the policy inspiring the law. Additionally, the law permits religious agencies to express their dissent by posting a written objection to the policy, leaving AACS's speech unaffected. E.V.C. § 42.-4; R. at 6. Because AACS's freedom of expression remains uncompromised, this case does not trigger the unconstitutional conditions doctrine. *Rumsfeld*, 547 U.S. at 59–60.

1. *The EOCPA does not require AACS to affirmatively agree with East Virginia's policy.*

Because the E.V.C. does not mandate affiliated agencies to adopt the policy behind the recent amendments, it only requires agencies display the "purely factual" language of the E.V.C. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Oh.*, 471 U.S. 626, 651 (1985). Thus, *Agency for International Development v. Alliance for Open Society International (AOSI)* is inapplicable. 570 U.S. 205, 214 (2013). *AOSI* concerned the Leadership Act of 2003, which enacted objectives to combat the HIV/AIDS pandemic. *Id.* at 208. Federal agencies appropriated funds to private organizations that would help fulfill the Act's goals. *Id.* at 209–10. In AOSI, the conditions for

funding were twofold: first, recipients could not use funds to promote or advocate prostitution, and second, recipients had to explicitly oppose prostitution. *Id.* at 205. The second condition, known as the "Policy Requirement," mandated agencies to affirm they opposed "prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." *Id.* at 210 (quoting 45 C.F.R. § 89.1(b) (2012)). Because the Leadership Act mandated explicit agreement with the policy behind the Act, the Court held Congress imposed an unconstitutional condition on receiving federal funds. *Id.* at 213.

AACS's reliance on AOSI is misplaced because, unlike the Policy Requirement, which demanded *agreement*, the E.V.C only requires acknowledgement—bypassing the issue of compelled speech altogether. *See* E.V.C. § 42.-4. Further, E.V.C. § 42.-4 does not contain a policy statement of the government's mission, unlike the Policy Requirement. *Compare AOSI*, 507 U.S. at 210 (conditioning funds on the agreement as to the "psychological and physical risks" prostitution poses—an opinion-based statement), *with* R. at 6 (requiring a sign displaying the factual statement that it is "illegal under state law to discriminate against any person, including any prospective foster or adoptive parent, on the basis of . . . sexual orientation" but not requiring an affirmation of the government's rationale).[4] The crux of this issue is this: AACS is not required by law to officially endorse the merits of same-sex parenthood as a prerequisite to contract eligibility. *See Fulton*, 922 F.3d at 161.

[4] AACS may reference the Attorney General's personal comments wishing to "eradicate[e] discrimination in all forms." R. at 6. However, the Attorney General's opinions are not reflected in the language of the E.V.C., unlike Congress' opinions appearing the Policy Requirement in *AOSI*.

2. *AACS's freedom of speech is unaffected because it can simply post a message of disagreement.*

Significantly, the East Virginia Legislature permits religious agencies to simultaneously express disagreement while remaining eligible for HHS's funds. *Id.* This is a stark contrast from the program in *AOSI*, in which recipients could not "avow the belief dictated by the Policy Requirement when spending Leadership Act funds and then turn around and assert a contrary belief . . . when participating in activities on its own time and dime." *AOSI*, 570 U.S. at 218. Here, AACS's freedom as a religious agency to disagree means the law does not interfere with AACS's ability to voice its own message, thereby leaving it unaffected and outside the scope of the Free Speech Clause. *See Rumsfeld*, 547 U.S. at 63.

The instant facts stand in stark contrast to examples of the government stifling freedom of expression. In *AOSI*, participating organizations feared the Leadership Act's Policy Requirement would "require them to censor their privately funded discussions in publications, at conferences, and other forums." *AOSI*, 570 U.S. at 211. In contrast, nothing in the E.V.C. threatens AACS to compromise its religious speech in privately funded contexts; theoretically, AACS could attend a conference for religious agencies and share its disagreement with the EOCPA's mission all while remaining eligible for its contract. *See Rumsfeld*, 547 U.S. at 60 ("[L]aw schools 'could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests[.]' As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."); R. at 6. Thus, HHS's prerequisite for appropriating funds does not "seek to leverage funding to regulate speech outside the contours of the program itself." *AOSI*, 570 U.S. at 214–14.

The U.S. Supreme Court recognized this type of avenue for expression as a valid compromise for compliance with state law in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). In *Pruneyard*, high school students solicited support for their movement against "Zionism" by distributing pamphlets Pruneyard shopping center, a private business. *Id*. at 77. Pruneyard argued the State could not compel the shopping center to allow third-party speech on its premises, but the U.S. Supreme Court rejected Pruneyard's position because Pruneyard could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.* at 88. This freedom to publicly dissociate with the petitioners' message refuted the allegation that the state was compelling Pruneyard to affirm their beliefs. *Id.* In this case, AACS is likewise free to express its disagreement with the EOCPA's antidiscrimination policy. R. at 6. Although this case differs from *Pruneyard* in that Pruneyard had to host other private citizens' speech and not a sign of a state statute, the effect is the same because in both cases, the freedom to disagree contributed to the state laws' constitutionality. *Pruneyard Shopping Ctr.*, 447 U.S. at 88.

Decades later, the Supreme Court affirmed the notion of open dissent in *Rumsfeld*. 547 U.S. at 57. The Solomon Amendment was constitutional even if hosting military recruiters was inconsistent with the law schools' own values because they "remain[ed] free under the statute to express whatever views they may have . . . all the while retaining eligibility for federal funds." *Id.* The Solicitor General even suggested law schools could openly dissent by organizing student protests and posting signs nearby. *Id.* at 60. Here, AACS and other religious organizations are granted a similar freedom under statute to disagree with the EOCPA, "all the while retaining eligibility for [municipal] funds." *Id.* Therefore, the EOCPA is constitutional because it does not restrict on religious agencies' freedom of expression.

3. *The EOCPA does not interfere with AACS's expressive conduct because child placement is not inherently expressive.*

The First Amendment provides for the "right to eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463. However, the Supreme Court has stated the First Amendment only protects "inherently expressive" conduct. *Rumsfeld*, 547 U.S. at 65. Examples of expressive conduct include flag burning, *see Texas v. Johnson*, 491 U.S. 397, 406 (1989), and parades, *see Hurley*, 515 U.S. at 568. These examples meet the definition of expressive conduct because they contained sufficient "elements of communication" considering the factual context. *Spence v. Washington*, 418 U.S. 405, 409–10 (1974). Flag burning in the context of a political demonstration contained elements of communication because it was "intentional and overwhelmingly apparent." *Johnson*, 547 U.S. at 406. Likewise, parades are intended to make a "collective point," viewed by bystanders. *Hurley*, 515 at 568.

In contrast, conduct cannot constitute speech simply because one intends conduct to "express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Spence*, 418 U.S. at 409. For example, in *Rumsfeld*, the Supreme Court held that hosting military recruiters on campus was not an inherently expressive activity. *Rumsfeld*, 547 U.S. at 64. Here, it is true that AACS has a religious mission, but it does not follow that placing children in foster and adoptive homes is "an intrinsically religious activity under [East Virginia] law." *Fulton*, 922 F.3d at 163. As evident by the fact that thirty-four Evansburgh agencies are affiliated with HHS, adoption and foster care services can be performed by "either a religious person or by a secular one." *Id.* In comparison to cases like *Johnson* and *Hurley*, where conduct was overtly intended to be communicative, AACS's mission lacks the elements of communication necessary to demonstrate that its goal is to express a message. *Johnson*, 547 U.S. at 406; *Hurley*, 515 at 568. For this reason, the EOCPA does not trample on any of AACS's expressive conduct.

4. *Because the EOCPA leaves AACS's speech unaffected, the unconstitutional conditions doctrine is inapplicable.*

The unconstitutional conditions doctrine is inapplicable to the instant case because the East Virginia government had authority to require child placement agencies to provide equal access to qualified parents of all backgrounds. *See New Hope*, 966 F.3d at 150 (describing adoptions within the state as a "creature of statute"). As the Supreme Court stated in *Rumsfeld*, the unconstitutional conditions doctrine only applies if the government could not impose the condition in the first place. 547 U.S. at 60.

In *Rumsfeld*, the Court upheld the Solomon Amendment,[5] which required higher education institutions to refrain from discrimination against military recruiters on campus as a condition to receiving federal funding. *Id.* at 52. FAIR, an association of law schools, claimed the acceptance of military recruiters on campus forced schools to agree with Congress's laws pertaining to homosexual servicemembers. *Id.* at 52.

The Court rejected FAIR's argument and concluded the Amendment did not violate the unconstitutional conditions doctrine because the condition was "constitutionally imposed." *Id.* at 59–60. Mandating law school campuses to afford military recruiter's equal access to publicly funded campuses was pursuant to Congress's authority. *Id.* The Court contrasted the Solomon Act to *Speiser v. Randall*, where California mandated taxpayers to sign an oath as a condition of obtaining a tax exemption—an act prohibited by the Federal Constitution. *Id.* at 59–60 (citing

[5] "No funds . . . may be provided by contract or by grant to an institution of higher education . . . if the Secretary of Defense determines that that institution . . . has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents the [military] from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer[.]" 10 U.S.C. § 983(b).

Speiser v. Randall, 357 U.S. 513, 515, 526 (1958)). In *Speiser*'s example, the law imposed an unconstitutional condition because California did not have the authority to contravene the U.S. Constitution. *Id.* at 526. In contrast, Congress had authority to require universities to provide equal access to military recruiters. *Rumsfeld*, 547 U.S. at 59. Thus, *Rumsfeld* demonstrates the government may deny funding to institutions that refuse to comply with the requisite statutes without encroaching the unconstitutional conditions doctrine. 547 U.S. at 52.

Here, there is no contention against East Virginia's authority to amend the EOCPA to guard against discrimination on the basis of sexual orientation. *See Hurley*, 515 U.S. at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . . [.]"). Additionally, such amendments are pursuant to East Virginia's authority to define the terms of its own municipally funded program—and here, those terms must fulfill HHS's goal meeting the best interest of children in HHS's custody, including those of differing sexual orientations. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); R. at 4. Thus, AACS cannot viably assert that the EOCPA imposes an unconstitutional condition because the amendment was created pursuant to the East Virginia Legislature's authority.

B. Even assuming HHS limits AACS's freedom of expression, HHS has the authority to define the terms of its contractual agreements with child placement agencies

Governments are "entitled to define the limits" of any program in which it provides public funding. *Rust*, 500 U.S. at 194. Additionally, the State "has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Id.* at 201. Historically, courts have distinguished between penalties and non-subsidies when analyzing whether an unconstitutional condition exists. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1439 (1983) ("'Penalties' coerce; '[non-subsidies]' do not."). "As a

general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds" even when the condition "may affect the recipient's exercise of its First Amendment rights." *AOSI*, 570 U.S. at 214 (citing *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 212 (2003)). Thus, in this case, AACS's primary method of recourse to any effect on its freedom of speech is to decline HHS's funds.

1. *The government has authority to define the terms of its subsidized program, and the contract's terms serve the program's scope.*

The Court should refuse to recognize an unconstitutional condition in this case because HHS has merely declined to subsidize a right, not punish the exercise of that right. As enumerated by the Supreme Court, legislatures may impose conditions for receiving government moneys based on their own "value judgment[s]." *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)); *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 548–49 (1983).

This Court should heavily consider the factual circumstances of this case. This is not a situation in which the government made a baseless request to disseminate a policy statement—the controversy in this case arose because AACS agreed to contract with HHS to provide referrals in exchange for government funds to fulfil the purpose of "provid[ing] foster care or adoption services," and the legislature believed the EOCPA's notice requirement would fulfill that purpose.[6] *See Rust*, 500 U.S. at 199 (recognizing Title X participants' limited expression was the "consequence of their decision to accept employment in a project"); R. at 3, 6. Because this case

[6] Commissioner Hartwell described the purpose of its contract program as ensuring: "1) child placement services are accessible to all Evansburgh residents who are qualified for the services; 2) the pool of adoptive parents is as diverse and broad as the children needing placement; and 3) individuals who pay taxes to fund government contractors are not denied access to those services." R. at 13.

involves a contractual relationship between the government and an agency providing a service, the government has undeniable authority to decide what it chooses to subsidize. *Regan*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *New Hope*, 966 F.3d at 163 (quoting *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019)).

Rust v. Sullivan is the controlling precedent in this case because it demonstrates the government's authority to define the scope of its own programs. *Rust*, 500 U.S. at 192–93. Under Title X of the Public Health Service Act, private family-planning agencies could contract with the government for agencies, but no funds could be appropriated if the agencies suggested abortion as a method of family planning. *Id.* at 179 (citing 42 C.F.R. § 59.8(a)(1) (1989)). The regulation also prohibited contracted agencies from abortion activism. *Id.* The petitioners argued the regulation violated the First Amendment because it compelled speech encouraging pregnant women to carry to term and thus placed "discriminatory conditions on government subsidies." *Id.* at 192. The Court rejected the petitioners' argument and held the Government may "selectively fund a program to encourage" its preferred policies. *Id.* at 193. The Court further explained that refusing to fund abortion-related services did not constitute a penalty on those who provided those services. *Id.*

These same principles are apparent in this case. Here, the state legislature believed prohibiting discrimination on the basis of sexual orientation would serve the EOCPA's purpose of ensuring a diverse pool of qualified parents, which contributes HHS's ultimate goal of facilitating adoptions and foster care. R. at 13. Consistent with this objective, HHS has chosen to fund adoption agencies that are willing to abide by the EOCPA. By opening the doors to parents of all sexual orientations, East Virginia uses its nondiscrimination law as a means to increase "the

effectiveness" of placing children in homes that meet their best interests. *Rumsfeld*, 547 U.S. at 67; *see also Am. Libr. Ass'n, Inc.*, 539 U.S. at 212 (upholding the mandatory use of filtering software because it helped fulfill Congress's goal of excluding pornographic material from government-funded libraries); R. at 5. HHS's has clearly established means to achieve the goal of its program, unlike laws that limit freedom of speech without a "programmatic message." *See Velazquez*, 531 U.S. at 548 (striking down a law prohibiting welfare recipients from challenging the validity of existing welfare laws when the program was supposed to facilitate litigation involving welfare benefits).

To contrast, *Wooley v. Maynard* is a First Amendment case in which—unlike this case—the state required individuals to disseminate a message, but not within the scope of a voluntary, municipally subsidized program. 430 U.S. 705 (1977). In *Wooley*, private motor vehicle drivers were statutorily required to bear the New Hampshire state motto "live free or die" on their license plates. *Id.* at 706–07. Because the statute forced individuals to "foster[] public adherence to [the state's] ideological point of view" lest they faced criminal penalties, the statute violated the First Amendment. *Id.* at 715. AACS may cite *Wooley* to assert the general notion that individuals may refuse to foster a certain point of view. *Id.* at 715. However, *Wooley* lacked the consensual, contractual agreement between the state and participants performing a service for a subsidy. *Id.* Therefore, unlike *Wooley,* AACS has recourse for whatever limitations affect its speech: AACS may simply decline municipal funding. *AOSI*, 570 U.S. at 214 (citing *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003)).

AACS's duty to post the EOCPA within its agency is only required as "a consequence of [AACS's] decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Rust*, 500 U.S. at 199; *see also* Sullivan, *supra*, at 1427 ("[T]he

condition might be imposed in the form 'recipients of this benefit may not do *x*, or 'must do *y*' so long as the benefit lasts, where *x* or *y* are normally matters of the recipient's constitutionally protected choice."). Thus, HHS is "simply insisting that public funds be spent for the purposes for which they were authorized"—which is funding agencies that comply with state law. *Rust*, 500 U.S. at 196; *see also* R. at 6–7 (quoting section 4.36 HHS's contract, which mandates compliance with state and city law).

2. *Circuit court opinions reflect a trend in recognizing the contractual nature of partnerships between the government and child placement agencies.*

Other circuits have considered whether a child placement agency accepts government funding to compensate for their services in assessing similar First Amendment complaints. *See New Hope*, 966 F.3d at 149; *Fulton*, 922 F.3d at 147–48. In *Fulton*, a Catholic child placement agency participated in a similar contract with Pennsylvania's Human Services wherein the agency would receive government funding as compensation for its referrals. 922 F.3d at 147–48. The Third Circuit upheld Pennsylvania's decision to withhold funding due to the agency's refusal to comply with the city's Fair Practices Ordinance, which similarly prohibited sexual orientation discrimination. *Id.* at 148. Like the instant case, the speech in *Fulton* "only occur[red] because [it] ha[d] chosen to partner with the government to help provide what is essentially a public service." *Id.* at 161. To contrast, in *New Hope Family Services*, the Second Circuit held a private Catholic child placement agency had a potential First Amendment complaint at the pleadings stage, in part because the agency had not accepted government funding as part of a contract, distinguishing itself from *Fulton*. *New Hope*, 966 F.3d at 149. This Court should follow suit and place similar weight on the contractual nature of this case in upholding its original panel decision.

CONCLUSION AND PRAYER

For the forgoing reasons, Appellant respectfully request this Court affirm its initial panel judgment reversing the District Court on both issues.

Respectfully submitted this 14th day of September 2020.

/s/ *Team 25*
_____
Team #25
Counsel for Appellant

APPENDIX A

After a three-day evidentiary hearing in March 2019, the following additional facts are undisputed:

1. There are four adoption agencies that are expressly dedicated to serving the LGBTQ community in Evansburgh and several others that have complied with the EOCPA amendments when dealing with prospective adoptive parents.

2. On August 22, 2018, HHS issued an urgent notice to all Child Placement Agencies stating the need for more adoptive families because of a recent influx of refugee children into foster care.

3. On October 13, 2018, a young girl whose two brothers had been placed by AACS with a family was placed with another family by another agency because of the freeze against referrals to AACS.

4. On January 7, 2019, a five-year-old autistic boy was denied adoption placement through AACS with the woman who fostered him for two years because of the referral freeze.

5. On November 4, 2014, HHS placed a white special needs child with an African American couple. Three other adoption agencies had screened and certified white adoptive families for the child. Nevertheless, Chairman Hartwell explained in writing that HHS interpreted the provision in E.V.C. § 42.-2 requiring preference for placement with same-race families to be intended only to preserve and protect minority children and families and thus the presumption did not govern that placement.

6. Relations within sects of the Islamic community in Evansburgh historically have been quite positive and cooperative. However, in 2013-15, tensions arose between Sunni and Shia refugees in the City at a time of an influx of members of both sects. On three occasions during this aberrational period, HHS approved AACS's recommendation that children should not be placed with otherwise qualified

adoptive parents from the other sect and instead delayed placement until a family of the same sect as the child could be found.

7. On March 21, 2015, HHS refused placement of a 5-year old girl with a family consisting only of a father and son, even though this family was otherwise certified by the sponsoring adoption agency.

8. HHS Chairman Hartwell testified that HHS policy enforcing the EOCPA served to ensure the following governmental purposes: (1) when child placement contractors voluntarily agree to be bound by state and local laws, those laws are enforced; (2) child placement services are accessible to all Evansburgh residents who are qualified for the services; (3) the pool of foster and adoptive parents is as diverse and broad as the children in need of such parents; and (4) individuals who pay taxes to fund government contractors are not denied access to those services.