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 Appeal From An Order Of The United States District Court For The Western District Of East Virginia Granting A Temporary Restraining Order And A Permanent Injunction

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PETITION FOR A REHEARING EN BANC

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Jurisdictional Statement

On April 29, 2019, the District Court for the Western District of East Virginia granted AACS's motion seeking a Temporary Restraining Order against Commissioner Hartwell's referral freeze. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The Court of Appeals for the Fifteenth Circuit, pursuant to 28 U.S.C. § 1291 has jurisdiction for the appeal of the District Court's order. On February 24, 2020, the Court of Appeals reversed the decision of the District Court. Appellee made a timely appeal for a rehearing *en banc* from the Court of Appeals decision. On July 15, 2020, upon the vote of the majority of non-recused active judges, and pursuant to Federal Rule of Appellate Procedure 35(a)(2), the Petition of Appellee Al-Adab Al-Mufrad Care Services was granted.

STATEMENT OF ISSUES

1. Whether the State's refusal to extend a religious exemption to AACS, despite statutory and ad hoc exemptions in place, violates the Free Exercise Clause.
2. Whether HHS has violated AACS' First Amendment Right not to speak messages with which it disagrees by requiring a notice to be posted and to certify same-sex couples, both of which go against AACS' beliefs.

STATEMENT OF THE CASE

Factual Background

Al-Adab Al-Mufrad Care Services (hereinafter "AACS") is a non-profit organization formed in 1980 as a private child placement agency providing specialized support for the refugee population in Evansburgh. R. at 5. From war orphans to special needs children, AACS has assisted thousands of children in finding their forever home. *Id.* Throughout this time, it has provided these services in a manner consistent with the teachings of the Qur'an. *Id.* AACS looks to serve Allah through justice and good conduct in its services to the Evansburgh community. R. at 7. If potential adoptive families are unable to meet AACS's requirements, or AACS is unable to provide these services consistent with their religious beliefs, they refer the couple to a better suited agency. *Id.* For 38 years, AACS has provided support to a community currently facing a chronic shortage of foster and adoptive homes available for the large refugee population. R. at 3. With approximately 17,000 children in foster care, and approximately 4,000 available for adoption, Evansburgh addressed this problem by delegating to the Department of Health and Human Services (hereinafter "HHS") the authority to enter into contracts with private adoption agencies. *Id.*

HHS enters into contracts with these agencies to provide home studies, counseling, and placement recommendations in exchange for public funds. R. at 3. HHS sends a "referral" to the private agency, who then notifies HHS of any potential matches. *Id*. HHS then decides the best fit for the child, according to the factors laid out in E.V.C. § 37. *Id.* After placement, the private agency is required to continue to provide supervision and support. R. at 4. If the potential adoptive parents are not a good fit with the agency's specialties or policies, the family is referred to another agency, as stated on HHS's website page. R. at 5.

In 1972, the Equal Opportunity Child Placement Act (EOCPA) placed nondiscrimination requirements on private agencies in exchange for the ability to enter into a contract with HHS. R. at 4. However, the EOCPA also provides an exemption when all other factors are equal. *Id.* Private agencies must "give preference" to potential parents of the same race as the foster child. *Id.* The EOCPA was expanded after pressure from the Governor of East Virginia to cover discrimination based on sexual orientation. R. at 6. Again, this anti-discrimination statute contained an exception, providing that private agencies must "give preference" to potential adoptive families that are the same sexual orientation as the child. R. at 6.

The EOCPA was further amended to require private agencies to sign and post at its place of business a brief statement regarding the EOCPA anti-discrimination regulations. *Id.* HHS will not release any public funds until the private agency has posted the sign, but allows religious-based agencies to post written objections on the premises. *Id.*

In July 2018, an Evansburgh Times reporter questioned Commissioner Hartwell on whether religious private agencies were complying with EOCPA standards. *Id.* This launched an investigation by Commissioner Hartwell who discovered that AACS would not certify same-sex couples, but instead would refer them to another agency. R. at 7. The Executive Director of AACS assured Hartwell that the same-sex couples were treated with the utmost respect, but because the Qur'an considers same-sex marriage to be a moral transgression they would not be able to provide the intimate relationship necessary for certification. R. at 7.

Subsequently on September 17, 2018, Commissioner Hartwell sent a letter to AACS stating that HHS would not renew its annual contract with AACS due to this EOCPA violation. *Id.* The letter also stated that HHS was placing an immediate referral freeze on AACS.

Procedural History

After receiving the Commissioner's letter, AACS filed an action against Commissioner Hartwell seeking a temporary restraining order against HHS's referral freeze and refusal to renew its contract. R. at 8. After a decision by the District Court granting AACS's motion for a temporary restraining order, the Court of Appeals for the Fifteenth Circuit reversed. R. at 25. AACS brings two arguments upon appeal.

First, AACS asserts that strict adherence to the antidiscrimination requirements of the EOCPA, despite built in exemptions, violates their First Amendment right under the Free Exercise Clause. R. at 10. AACS argues that the statutory exemptions, combined with HHS's ad hoc exemptions require the law to undergo the most exacting scrutiny. R. at 8. The District Court granted AACS's motion, holding that the EOCPA failed to satisfy strict scrutiny. R. at 14. On appeal, the Fifteenth Circuit held that the EOCPA was a generally applicable law not subject to strict scrutiny, and reversed the order of the District Court granting a temporary restraining order. R. at 22.

Second, AACS argues that requiring the agency to certify same-sex couples, as well as post signs at their place of business, violates their First Amendment Free Speech rights. R. at 10. The District Court held that *AOSI* is the controlling precedent for this case, and the certification and sign posting violated AACS's First Amendment rights. R. at 16. On appeal, the Fifteenth Circuit held that the EOCPA does not compel AACS to say anything, nor does it interfere with AACS's ability to communicate its message. R. at 24-25.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fifteenth Circuit improperly held that HHS did not violate AACS' Free Exercise or Free Speech rights. This judgment should be reversed.

The Free Exercise Clause of the First Amendment protects against government intrusion into religious beliefs and conduct. Although conduct may be limited to an extent, the government may not foist its morals onto a third-party, and require the actor to act in opposition to their religious beliefs. HHS is requiring AACS to defy their religious beliefs and act as a government would. The Equal Opportunity Child Placement Act (EOCPA) places antidiscrimination regulations on private child placement agencies that contract with the government. However, because of both statutory exemptions and exemptions granted by the Department of Health and Human Services (HHS), the statute cannot be a generally applicable and neutral law.

East Virginia Code (E.V.C.) § 37 requires discrimination when choosing an adoptive family for a foster child. Furthermore, the EOCPA in § 42 contains built in exemptions for both racial and sexual identity discrimination when it is in the best interests of the child. Throughout the adoption process the decisions are centered around the best interests of the child. This principle alone guides HHS and private adoption agencies in the pursuit to alleviate the chronic shortage of foster and adoptive homes. HHS has continuously discriminated and approved discrimination by private agencies to satisfy this goal. However, in cases of religious hardship HHS refuses to extend this exemption.

A law which is devoid of exemptions, such as the EOCPA, can no longer be considered generally applicable and neutral. Despite AACS's sincerely held religious belief that same-sex marriage is a moral transgression, HHS wishes to require the private agency to certify and maintain intimate relationships with these couples. The EOCPA, as applied to AACS, substantially burdens the free exercise of religion and should be subject to strict scrutiny.

Because the EOCPA is subject to strict scrutiny, the government must show that the law is narrowly tailored to achieve a compelling interest. However, by placing a referral freeze on AACS

and refusing to renew their contract HHS has undermined its alleged interests. These interests would better be served by allowing a religious exemption, and creating a referral system similar to the procedure used by AACS. HHS fails to evidence a compelling interest that is furthered by enforcement against AACS, and therefore the law must fail strict scrutiny.

HHS has also violated AACS's First Amendment Right of Free Speech. The EOCPA's notice requirement in E.V.C §42-.4 places unconstitutional conditions on AACS's ability to provide foster care to the children of Evansburgh. Compelling AACS to certify same-sex couples is also protected speech. Both the notice requirement and the certification requirement are subject to strict scrutiny. HHS cannot articulate a compelling state interest; and even if HHS could, both requirements are not narrowly tailored to meet that interest. By mandating AACS to post messages with which it disagrees in order to remain in business and requiring AACS to certify same sex couples, HHS is essentially compelling AACS to speak; entirely going against the First Amendment.

ARGUMENT

I. STRICT ADHERENCE TO THE EOCPA UNCONSTITUTIONALLY INFRINGES ON THE FREE EXERCISE RIGHTS OF PRIVATE CHILD PLACEMENT AGENCIES.

A. The Enforcement of the EOCPA Against AACS Substantially Burdens Fundamental Free Exercise Rights Which Requires Strict Scrutiny.

The East Virginia Code, by statute, requires HHS to discriminate against prospective parents when choosing the best adoptive placement for a child. *See* E.V.C. § 37(e). To then enforce an anti-discrimination law against only private child placement agencies, specifically AACS, solely on their religious beliefs warrants this Court to apply strict scrutiny.

The First Amendment, as applied to the States through the Fourteenth Amendment, protects the right to teach, speak, and act according to one's religious beliefs. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Although the right to act, unlike the right to believe, may be limited, the Supreme Court has long recognized that the First Amendment requires the government to "justify any substantial burden on religiously motivated conduct by a compelling state interest and narrowly tailored to achieve that interest." *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 894 (O'Connor, J., concurring); *see also Hernandez v. C.I.R.*, 490 U.S. 680 (requiring a compelling governmental interest to justify a substantial burden on a religious belief); *see also Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 141-142 (same).

The sincerity of a person's religious belief, no matter how illogical or incomprehensible to others, must still be provided First Amendment protection. *See Thomas v. Review Bd. of Indiana Emp't Security Div.*, 450 U.S. 707, 714-16 (1981) ("Courts are not arbiters of scriptural interpretation."). The government may not selectively enforce statutes due to religiously motivated conduct they believe are based in bigotry. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*

Com'n, 138 S. Ct. 1719, 1731-32 (2018); *see also* R. at 6. Therefore, AACS's religious belief in the traditional form of marriage is of no importance, and must be protected under the First Amendment free exercise rights.

The Supreme Court has consistently required a showing that a substantial burden on free exercise rights must be essential to accomplish an overriding government interest. *Thomas*, 450 U.S. at 719-20; *Wisconsin v. Yoder*, 406 U.S. 437 (1972) (holding that only government interests of the "highest order" which are unable to be served in a less restrictive way may defeat legitimate free exercise claims). For example, in *Burwell v. Hobby Lobby Stores Inc.*, the Supreme Court applied strict scrutiny when a for-profit corporation was forced to purchase health insurance for contraceptives which went against their religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696-67 (2014). The privately held corporation in *Burwell* was required to either engage in conduct that directly violated their religious belief or face substantial economic hardships. *Id.* Similar to the corporation in *Burwell*, either AACS can lose funding to continue its community support and adoption agency or comply with the government's moral viewpoints, and substantially violate their religious beliefs. R. at 7. This treatment in *Burwell* necessitated strict scrutiny, and similarly requires this Court to use the compelling interest test. *See Burwell*, 573 U.S. at 696-97.

Similarly, in *Hobbie v. Unemployment Appeals Commission of Florida*, a claimant was refused unemployment benefits because her religious beliefs proscribed her from working on the Sabbath. *Hobbie,* 480 U.S. at 141. Reaffirming the holding of *Thomas*, the Supreme Court in *Hobbie* found a state regulation unconstitutional because it denied an important benefit based on conduct proscribed, or mandated, by religious faith. *Id.* Our First Amendment free exercise jurisprudence is clear that when the government burdens free exercise of religion, whether intentionally or incidentally, there is a balancing test between the free exercise rights and the

government's interest. *See Hernandez,* 490 U.S. at 699 (1989); *see also Hobbie*, 480 U.S., at 141; *see also United States v. Lee*, 455 U.S. 252, 257-58 (1982); *see also Thomas*, 450 U.S. at 718.

Similar to *Thomas, Burwell,* and *Hobbie,* AACS is denied a contract renewal and future referrals, due to their sincere religious belief in the traditional form of marriage. *Hobbie,* 480 U.S. at 141; *see also Burwell*, 573 U.S. at 696-97; *see also Thomas,* 450 U.S. at 718. The State is placing AACS under substantial pressure to violate their sacred beliefs and modify their conduct to mirror the government. This impermissible infringement on a legitimate free exercise right can only be constitutional if there is both a compelling state interest and it is the least restrictive means to further said interest. *See Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). This compelling interest test recognizes that the freedom to act, unlike the freedom to believe, cannot be absolute. *See Cantwell,* 310 U.S. at 304.

Although the lower court here applied the generally applicable test developed in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, the rights at issue should lead this court to apply the compelling interest test used in the Supreme Court's prior First Amendment free exercise cases. *See* R. at 14; *see also Smith*, 494 U.S. at 883-84. In *Smith,* the Supreme Court reasoned that a generally applicable and neutral law does not require a compelling interest to be constitutional. *Id.* In reaching this conclusion, however, the Court disregarded the "consistent application of the free exercise doctrine involving generally applicable regulations that burden religious conduct." *Smith*, 494 U.S. at 892 (O'Connor, J., concurring). The decision in *Smith* distinguished prior Supreme Court decisions by labeling them "hybrid situations" in which strict scrutiny was only applied because the law infringed on both the Free Exercise Clause and another constitutional right. *Id.*

Even if this Court were to apply this "hybrid" approach, the issues at hand still require strict scrutiny. HHS is effectively forcing AACS to certify same-sex couples, despite their religious views in the traditional form of marriage. In *Masterpiece Cakeshop*, the Supreme Court held that baking a wedding cake was equal to a celebration of the marriage. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct., at 1728-29. Here, HHS is asking AACS to not only associate with these couples, but to maintain intimate relationships with them. R. at 4. AACS is required to complete a home study, provide specialized training, and provide support even after the adoption process. R. at 7. Similar to *Masterpiece Cakeshop*, this case also involves fundamental First Amendment free speech issues. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct., at 1728-29. To certify a couple is equivalent to baking a cake to celebrate same-sex marriage; each signifies support for same-sex marriage. This type of compelled speech, as discussed further in Section II *infra* is unconstitutional and is exactly the type of "hybrid situation" which *Smith* distinguished as fitting for strict scrutiny. *See Smith*, 494 U.S., at 881-82.

Furthermore, this court has historically restricted the government's ability to control religious affairs, beliefs, conduct, and teachings. *See Wisconsin v. Yoder,*, 406 U.S. 205 (1972) (right to religious freedom in raising children); *see also Masterpiece Cakeshop, Ltd.*, 138 S. Ct., at 1727 (recognizing the importance of allowing churches to maintain their marriage practices); *see also Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (protecting the right for a private orphanage to raise children with a religious education.). Even where the government is determining wholly discretionary funding programs, it is still restricted by the free exercise constraints. *See Thomas*, 450 U.S. 707 (1981); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). Many of these fundamental principles are implicated through the unwavering enforcement against AACS.

For example, the case at hand implicates the rights of a church to provide religious education and morals when given the power to care for orphans. *See Pierce,* 268 U.S. at 531-32. In *Pierce*, a religious organization with the responsibility of caring for orphan children challenged a law that restricted the organization's ability to raise the orphans consistent with the Catholic religion. *Id.* There the court ordered an injunction against the enforcement of an otherwise generally applicable education law. *Id.* Similar to *Pierce*, AACS is a non-profit religious organization set out to provide support for the community and provided services consistent with the teachings of the Qur'an. R. at 5. The ability of AACS to certify parents and provide homes for foster children in accordance with their religious beliefs is severely infringed by a contract refusal and referral freeze. R. at 7. The right to freely raise children in accordance with any religious belief has been, and should continue to be given the utmost protection by this Court. *See Pierce*, 268 U.S. at 531-32.

In addition to infringing on the religious decisions regarding marriage and child upbringing, HHS is using its power to contract with agencies for services in exchange for public funds to exclude a disfavored religious actor. In *Trinity Lutheran*, the Supreme Court recognized that *Smith*'s rule does not cover all free exercise claims, and the court must consider specific facts and circumstances surrounding the regulation and enforcement. *Trinity Lutheran*, 137 S. Ct. at 2021. There, the Court was presented with a generally applicable law denying grants to religiously affiliated applicants. *Id.* at 2021. Although the decision involved fully discretionary funds to private organizations, just as HHS was deciding discretionary funding, the Court held that the challenge was subject to the strictest scrutiny. *Id.* Similarly, in *Thomas*, the Supreme Court held unconstitutional a law conditioning an important government benefit on proscribing, or mandating, conduct in direct conflict with a person's religious beliefs. *Thomas*, 450 U.S. at 717-18. These

cases are all too similar to the issue at hand to diverge from long recognized free exercise jurisprudence and apply *Smith's* general applicability test.

In fact, *Smith* can be clearly distinguished from the case at hand. In *Smith*, the Court was faced with a criminal law, banning the use of a Schedule I drug. *Smith*, 494 U.S. at 874. The decision in *Smith* was particular to the law at issue, an "across-the-board criminal prohibition on a particular form of conduct." *Smith*, 494 U.S. at 878-80. Furthermore, as discussed in greater detail in Section B, *infra*, *Smith* does not apply to laws which fail to be generally applicable or neutral both on its face and in enforcement. *Id.* Nor does it apply to laws that utilize a system of individualized exemptions, yet refuse to extend such a system to cases of religious hardship. *Id.* at 884. Instead, this Court should hold that the rights involved in this case are so fundamental that they require the highest standard of scrutiny.

B. *Smith* Does Not Apply Because the EOCPA is Neither Generally Applicable nor Neutral in its Application.

Due to the inherent conflict between the EOCPA and E.V.C., as well as the disparate enforcement by HSS, the EOCPA cannot be a generally applicable law. In *Employment Div., Dept. of Human Resources of Oregon v. Smith*, the Supreme Court applied a categorical approach to a criminal law that infringed on First Amendment free exercise rights. *Smith*, 494 U.S. at 887-88. There, the Court held that a generally applicable, facially neutral law does not have to pass the compelling interest test. *Id.* Instead, the Court stated that if the law's effects of the free exercise of religion is merely incidental, the First Amendment is not infringed. *Id.*

However, this decision would only be applicable if the EOCPA can pass the general applicability test determined in *Lukumi. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Free Exercise Clause protects not only against facial discrimination, but

also forbids against even the slightest departure from neutrality or suppression of particular religious beliefs. *See Gillette v. United States*, 401 U.S. 437, 452 (1971); *see also Bowen v. Roy*, 476 U.S. 693, 703 (1986). When other statutes, or the application of the law, have created a series of individualized exemptions, the regulation can no longer be generally applicable and the government may not refuse to extend an exemption to religious hardships without compelling reason. *See Lukumi* 508 U.S. at 537; *see also Smith*, 494 U.S. at 994. The decision in *Smith* was limited to this specific type of law by the Supreme Court in *Lukumi*. *Id.* The only time a law which substantially burdens religiously motivated conduct will be subject to lesser scrutiny is when it is neutral and generally applicable both on its face and through enforcement. *Id. Smith* contained a criminal ban on a Schedule I drug, which only contained a medically prescribed exemption. *Smith*, 494 U.S. at 874. Unlike the single exemption in *Smith*, HHS, through its enforcement of the EOCPA, has created a system of exemptions and should be required to show a compelling interest to prohibit extensions to cases of religious hardship.

HHS was given the task of establishing a system to enter into contracts with private child placement agencies and foster care services in Evansburgh to address the chronic shortage of foster and adoptive homes. Yet it exempts itself completely from adhering to the anti-discrimination requirements of the EOCPA. In fact, HHS must exempt itself from enforcement because the E.V.C. creates a statutory exemption. *See* E.V.C. § 37. Pursuant to E.V.C. § 37(d) "the determination of whether the adoption of a particular child by a particular prospective adoptive parent or couple should be approved must be made on the basis of the *best interests of the child*." E.V.C. § 37(d) (emphasis added). The factors HHS must use when making its evaluation require age, race, disability, ethnicity, race, and sexual identity discrimination. *See* E.V.C. § 37(e). HHS, as a

governmental agency, is engaging in discrimination daily but refuses to extend this exemption to a child placement agency whose free exercise rights would be severely burdened.

Similarly, in *Tenafly Eruv Association v. Borough of Tenafly*, the municipal ordinance at issue was, on its face, a generally applicable, neutral law. *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). However, through its application, it became clear that the municipality was only enforcing the ordinance against religiously motivated conduct. *Id.* at 168. Despite having a neutral ordinance, the enforcement against only religiously motivated conduct created a system of exemptions which necessitated strict scrutiny. *Id.* Here, although EOCPA is facially neutral, the record evidences that the enforcement was anything but neutral. HHS has allowed itself and others to discriminate in the best interest of the child, but will not allow a religious exemption to AACS and instead demands compliance. R. at 7-8.

Furthermore, the EOCPA itself creates an exemption for agencies, and expects them to "give preference" to foster or adoptive parents of the same race as the child. E.V.C. § 42.-2(a). This same exemption was expanded to sexual orientation in the 2017 EOCPA amendment. R. at 6. While allowing agencies to discriminate for secular reasons, HHS refuses to extend this exemption to avoid suppressing religious exercise. *See* R. at 8-9. For example, HHS has allowed discrimination on multiple occasions during the 2013-2015 Sunni-Shia tensions. During these times, HHS delayed placement and allowed AACS to find adoptive parents of the same religious denomination. R. at 9. These facts are most similar to the Sixth Circuit decision in *Ward v. Polite*, where a school allowed client referrals except in cases where the reason was based on religion. *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012). In *Ward*, a graduate counseling student asked to refer a client because her religious convictions prohibited her from affirming same-sex relationships, as required by the school. *Id.* at 731. The court held that although the anti-

discrimination law was facially neutral and generally applicable, the exemptions made by the programs to allow referrals for "secular-indeed mundane-reasons," undermined the school's interests. *Id.* at 740. As the court did in *Ward*, this Court should require a compelling reason for denying a religious exemption to AACS despite the many statutory exemptions in place. *Id.*

To add onto these statutory exemptions, HHS has continuously created ad hoc exemptions for child placement. HHS has discriminated based on race when it placed a white special needs child with an African American couple because, as stated by Commissioner Hartwell, E.V.C. § 42.2 was "intended only to preserve and protect minority children and families." R. at 9. This is also not the first time that AACS has asked for a religious exemption from the EOCPA. *Id.* In 2013-2015, when tensions between Sunni and Shia refugees arose, HHS approved AACS's recommendation to delay placement until a family of the same religious sect was certified. *Id.* Moreover, HHS discriminated based on sex when it refused to place a girl with an otherwise certified family consisting of a father and son. *Id.* These instances of exemptions by HHS, in conjunction with the built-in statutory exemptions, should lead this court to apply strict scrutiny.

Lastly, similar to equal protection cases, the Court may look to both direct and circumstantial evidence in determining if the law is neutral, including "contemporaneous statements made by members of the decision making body." *Lukumi*, 508 U.S. at 540. For example, in *Masterpiece Cakeshop* there was discussion amongst members of the Civil Rights Commissioners which described Phillips's religion as "despicable" and "something insubstantial and even insecure."*Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727. The Court emphasized the importance of allowing religions to practice their own marriage practices, and took notice of the disparate treatment of religious beliefs that are against the current ideological climate. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727. In a similar fashion in 2017, the EOCPA amendment was

enacted due to pressure from the East Virginia governor who stated any belief in traditional marriage is bigotry. R. at 6. Of course, AACS is not asking this Court to hold a single comment made by the Governor to be dispositive. But it should be noted that AACS did not have a single complaint by a same-sex couple against them since its formation. R. at 7. Moreover, the investigation only began when a reporter asked HHS whether the religious organizations were in compliance with the EOCPA. R. at 6-7. This is exactly the type of uneven enforcement which requires this Court to evaluate the law under strict scrutiny. Religiously motivated conduct was singled out by the reporter and by Commissioner Hartwell, whereas secular misconduct was treated as being in the best interest of the child. R. at 6; *see also* R. at 8-9 (listing occasions of discrimination by HHS and private adoption agencies). The series of events leading up to the enforcement of the EOCPA against AACS, in addition to the multitude of statutory and ad hoc exemptions that HHS has in place, requires the State to provide a compelling interest of the "highest order" to outweigh the substantial burden on the free exercise of religion. *Yoder*, 406 U.S. at 215.

C. The Government fails to show the EOCPA is Narrowly Tailored to Achieve a Compelling Interest.

AACS has served the Evansburgh community for thirty-eight years before this action took place. R. at 3. It was formed to provide specialized support to an area with a racially and ethnically diverse population, many of which are refugees. R. at 5. In a fight against a chronic shortage of foster and adoptive homes, AACS has shown its support to the community through its placement of thousands of children into adoptive homes, ranging from war orphans to special needs children. *Id.* Throughout these years, its mission statement has explicitly stated that it provides services and teachings consistent with the Qur'an. *Id.* Only recently has HHS decided to enforce this exception

riddled law against AACS, and in doing so has substantially burdened their rights under the Free Exercise Clause. Commissioner Hartwell does not refuse this fact, but claims that strict enforcement of the EOCPA against AACS is necessary. R. at 13.

To justify such an intrusion of the First Amendment, the law "must undergo the most rigorous of scrutiny." *Lulumi*, 508 U.S. at 546. The State must produce interests of the "highest order" and must narrowly tailor the law to achieve this purpose. *Yoder*, 406 U.S. at 215. If there is a less restrictive means of achieving the state's interest, then the law will not be constitutional. *Id*. Comissioner Hartwell claims that strict enforcement of the EOCPA serves the compelling state interests of eliminating all forms of discrimination. R. at 13. The EOCPA does so by ensuring that qualified Evansburgh residents can access child placement services and providing a broad and diverse pool of potential adoptive parents. *Id.*

However, HSS is unable to show that its inability to make exceptions in times of religious hardship, that its interests are compelling. HHS has consistently discriminated while placing children into foster and adoption homes, as well as approved multitudes of exemptions to private child placement agencies. R. at 8-9. As stated by the Supreme Court in *Lukumi*, a law that specifically targets religious conduct, or only advances legitimate interests against religiously motivated conduct, will rarely survive strict scrutiny. *See Lukumi*, 508 U.S. at 546. This type of treatment is clear in the record, when HHS approved AACS to discriminate based on religious belief claiming the best interest of the child, but now claims a legitimate anti-discrimination interest. Just as the Supreme Court held in *Lukumi*, this Court should find that the failure to restrict similar conduct by other private child placement agencies and HHS renders the interest to be uncompelling. *Lukumi,* 508 U.S. at 547. On November 4, 2014 HHS racially discriminated when it placed a white special needs child with an African American couple, stating that the same-race

provision of the E.V.C. was only intended to protect minorities. R. at 13. In 2013-2015, on three separate occasions HHS endorsed AACS to discriminate based on religious sects and delayed placement of children. R. at 9. And if these instances were not enough to show a double standard, HHS discriminated in 2015 when it refused placement of a five-year-old girl with a certified family because the adoptive family consisted of a father and son. *Id.* AACS does not contest that these decisions were made in the best interests of the child. Rather, it asks this Court recognize the double standard created by HHS which severely undermines the government's interests.

Commissioner Hartwell also claims that enforcing the EOCPA furthers the government's interests in enforcing local and state laws, making child placement services accessible to all Evansburgh residents who are qualified, refusing to deny taxpayers access to government funded contractors, and providing a diverse pool of foster and adoptive parents. R. at 13. However, none of these interests would be furthered if this Court finds the EOCPA constitutional as applied to AACS.

First, creating an exemption for times of religious hardship would not hinder the government's ability to enforce local and state laws against contractors who agree to be bound. There is no evidence that this exemption, similar to the many exemptions HHS has already made, would cause an influx of requests. Moreover, HSS can not prevail by arguing that a religious exception would be a slippery slope. As the Supreme Court's precedent shows, mere speculation about potential harms are not enough to support a refusal for a religious exception. *See Thomas*, 450 U.S. at 719 (rejecting the State's reasoning for lack of evidence). This type of argument is unconvincing and can be made in almost every free exercise case. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 947 (1989)("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to

each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."). Granting this religious exception to AACS would not significantly impact, or restrict, the ability of HSS to continue to enforce its anti-discrimination laws. Instead, this Court should follow Supreme Court precedent in rejecting this type of argument. *See Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 835 (1989); *see also Thomas*, 450 U.S. at 719.

Second, the insistence on ending the private child placement contract with AACS would not help the government ensure that taxpayers are not denied services. Not a single same-sex couple or taxpayer has filed a complaint against AACS for continuing to support the community while practicing its free exercise rights. R. at 7. In fact, the few instances where a same-sex couple has come to AACS, the Executive Director would explain that because of the intimate relationship between the child placement agency and the adoptive parents AACS would not be able to perform a home study. *Id.* The couple would then be referred to another agency in the Evansburgh area that served the LGBTQ community. *Id.* HHS alleges that AACS has denied service and thus the taxpayer is denied service, however it fails to recognize that each agency has its own requirements, specialties, and training despite it being posted on an HHS run website. *Id.* A taxpayer simply did not meet the requirements for AACS, because AACS would not be able to maintain and support a belief against their religion. The taxpayer instead was reffered to a different adoption agency. *Id.* On the other hand, closing another adoption service, especially one that specializes in placing children in foster homes from refugee families, only limits the taxpayers ability to access these services. At a time where Evansburgh is facing a large refugee influx coupled with a chronic shortage of foster and adoption homes this interest is not furthered by refusing to place any more children with AACS. R. at 3.

Lastly, HHS can not claim that refusing to work with AACS would broaden the pool of potential foster or adoption parents and provide a vast number of diverse homes. AACS, similar to the four LGBTQ private agencies, expands the diversities among prospective parents. AACS provides parents from diverse cultural and ethnic backgrounds and serves Evansburgh in a unique and much needed way. R. at 5. The agency has helped AACS find homes to best provide for the child in 2013-2015, when ties between the two religious sects were uneasy. R. at 9. Formed in 1980 to provide community support to the refugee population and adoption placement for children, AACS is filling a much-needed role in the Evansburgh community. R. at 5. A referral freeze and denial of future contracts would do nothing to further this purported interest.

Compared to the burden placed on AACS, and all currently certified parents associated with AACS, these interests are uncompelling. A referral freeze does not only impact AACS's ability to certify future parents, it strips couples that have been certified but not yet received placement of any opportunity for adoption unless it were to complete the application process a second time. R. at 8. This action is in direct opposition to the best interests of the child. For instance, on two separate occasions, a child was blocked from either reuniting with their siblings or being adopted by their foster parent. R. at 8. And in further juxtaposition to the alleged interest, a month before AACS was placed on a referral freeze, HHS issued an urgent notice stating the need for more adoptive parents for refugee children. R. at 8. AACS was formed to specialize in placing war-orphans and other refugee children in homes that were the best fit for the child. R. at 5. HHS now takes away an important channel for citizens to complete the adoption process and diminishes the amount of adoptive families. This substantial infringement on the free exercise rights of AACS and potential adoptive families significantly outweighs all of the alleged government interests.

Even if HHS was able to show that it has a compelling interest in enforcement of the EOCPA against AACS, it would not be the least restrictive means available. *See Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (requiring the government to show the burden on the free exercise of religion is the least restrictive means available). Here, AACS could continue to follow the same procedure it had in place since its inception. R. at 7. If there were to be an instance where AACS, due to religious beliefs, was unable to certify potential parents they could refer them to one of thirty-three other private agencies in the Evansburgh area. *Id.* As stated above, extending the system of exemptions that HHS has put in place to AACS due to religious hardship would not further any government interest. However, a referral system would achieve all the government's goals while minimizing, in fact neutralizing, any infringement on free exercise rights. Therefore, even assuming HHS has a compelling interest of the highest order for enforcing the EOCPA in this instance, the law would not be narrowly tailored to achieve the interests.

II. HHS has Violated AACS's First Amendment Right not to Speak Messages with which it Disagrees.

HHS has also violated AACS's First Amendment Right of Free Speech. The EOCPA's notice requirement in E.V.C §42-.4 places unconstitutional conditions on AACS's ability to provide foster care to the children of Evansburgh. By mandating AACS to post messages with which it disagrees in order to remain in business and requiring AACS to certify same sex couples, HHS is essentially compelling AACS to speak; entirely going against the First Amendment.

A. The Notice Requirement and Certification of Same Sex Couples are Protected Forms of Speech Held to Strict Scrutiny.

The unconstitutional conditions doctrine of the First Amendment requires that the government not condition benefits on a would-be recipient's relinquishment of a constitutionally protected right, "especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This Court has repeatedly reaffirmed that the government does not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018). In *National Institute of Family & Life Advocates (NIFLA) v. Becerra*, the Court held that the notice requirement for licensed clinics is a content-based regulation of speech. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech, making the mandate a content-based regulation of speech. *Id.* at 2371 (quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

Content-based regulations of speech have long been protected by the First Amendment and held to strict scrutiny. Only in very limited cases has the Court applied lower levels of scrutiny, none of which apply here: disclosure requirements under *Zauderer*, and regulations of professional conduct that incidentally burden speech. *Becerra* at 2372. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Court emphasized that warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception in advertisements.

Here, the notice that HHS is asking AACS to post is not merely a disclosure; it is not limited to only factual and uncontroversial information about the terms of the service. *Becerra* at 2372 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (explaining that *Zauderer* does not apply outside of these circumstances)). Thus, the *Zauderer* standard does not apply here. Nor is this notice a regulation of professional conduct

that incidentally burdens speech. This notice does not just apply to the process of placing a child with a family; it applies to all interactions within the facility whether a child is placed with a family or not. *Becerra* at 2373. EOCPA's notice requirement regulates all speech, not just professional speech. Thus, strict scrutiny must be applied.

Compelling AACS to certify same-sex couples is also protected speech. Asking AACS to ignore the sexual orientation of the couple is compelling AACS to speak in a way that they do not and cannot be forced to believe in, regardless of the fact that it is their job to certify couples for adoption. Where the component parts of a single speech are "inextricably intertwined," the speech cannot be parsed out and different tests be applied. *Riley*, 487 U.S. at 796. Because HHS is regulating AACS' content, strict scrutiny must be applied here as well.

B. The Notice Requirement and Certification of Same Sex Couples are not Narrowly Tailored for HHS's Compelling State Interest.

While HHS has a compelling state interest in a child's best interest, this notice requirement is not narrowly tailored for that interest. The fact that a written objection can be made and posted shows how overinclusive this notice requirement is. Moreover, HHS has allowed adoption agencies to be able to place same-race children and families to have preference for each other in order to protect the families. R. at 9. Allowing adoption agencies to discriminate against race and not against religion undermines the message of the very notice that AACS is opposing. *See, e.g. Becerra*. Additionally, there are several adoption agencies that are dedicated to serving different communities: four agencies serve the LGBTQ+ community, there are agencies that place children among their particular religious sects, and HHS has testified that there is an increased need for families to adopt refugee children. R. at 8. If this notice requirement is to be adopted in full and

posted on doors, the child's best interest will not be served as they cannot be placed into homes that can best suit their identities. For these reasons, this notice cannot stand.

AACS's involvement in the adoption process goes far beyond merely certifying couples for adoption. After certification, AACS is contractually required to maintain supervision and support to ensure a successful placement. R. at 4. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court noted that that other bakeries were permitted to decline to create cakes with anti-gay messages, and that it would be inconsistent to treat the Petitioner's case differently on the basis of that speech. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (2018). If the Court can determine that a simple message on a cake cannot stand, then a process as complicated as permanently placing a child with a family goes far beyond certifying couples.

Moreover, HHS's compelling interests actually are best served if AACS continues to contract with them. HHS states that having child placement services available to all Evansburgh residents and having a diverse and broad pool of foster and adoptive parents are two state interests. R. at 9. Assuming that these are in fact compelling interests, having AACS as an adoption agency best suits both interests. It is noted that there is a chronic shortage of adoptive families in Evansburgh, particularly among the refugee population. R. at 3. Removing one of the few agencies best suited for that population, and for adoption placement in general, undermines HHS's desire to put the child's best interest first.

CONCLUSION

For the foregoing reasons, Al-Adab Al-Mufrad Care Services respectfully request that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

Counsel for Appellee

APPENDIX A

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

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