REGENT UNIVERSITY SCHOOL OF LAW

20TH ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

No. 2020-05

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

CHRISTOPHER HARTWELL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, CITY OF EVANSBURGH
DEFENDANT-APPELLANT,

v.

AL-ADAB AL-MUFRAD CARE SERVICES,
PLAINTIFF-APPELLEE.

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

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF EAST VIRGINIA

AL-ADAB AL-MUFRAD CARE SERVICES, *Plaintiff*,	
v.	**Civ. Action No. 18-cv-02758**
CHRISTOPHER HARTWELL, In His Official Capacity as COMMISSIONER OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, CITY OF EVANSBURGH, *Defendant.*	

Memorandum Opinion and Order

Capra, D., District Judge:

Procedural Background

Al-Adab Al-Mufrad Care Services (AACS) brought this action against Christopher Hartwell, in his official capacity as Commissioner of the City of Evansburgh's Department of Health and Human Services (HHS), alleging that Hartwell's refusal to renew the City's adoption placement services contract with AACS violates AACS's First Amendment rights to freedom of religion and speech. Under the contract, AACS provided recruitment, training, and support for adoptive families in exchange for public funds. AACS filed a Motion seeking a Temporary Restraining Order against Hartwell's referral freeze and an injunction compelling Hartwell to renew AACS's contract. Based on evidence presented at an evidentiary hearing, and for the reasons that follow, the Plaintiff's Motions for a TRO and a permanent injunction are hereby **GRANTED**.

Factual Background

AACS is a non-profit adoption agency located in the City of Evansburgh. Evansburgh is the largest city in East Virginia with a racially and ethnically diverse population of approximately 4,000,000. Evansburgh has a large refugee population from various countries including Ethiopia, Iraq, Iran, and Syria. Although most refugees integrate into the community, many who have suffered severe personal or economic hardships cannot adequately provide for their children. Evansburgh has a chronic shortage of foster and adoptive homes. There are approximately 17,000 children in foster care, about 4,000 of whom are available for adoption. In response to the high number of children needing to be placed in foster care and adoption, the City has charged HHS with establishing a system that best serves the well-being of each child. HHS has entered into foster care and adoption service contracts with 34 private child placement agencies in Evansburgh to provide foster care or adoption services.

In exchange for public funds, the agencies provide services that consist of home studies, counseling, and placement recommendations to HHS. When HHS receives a child into custody, it sends a "referral" of the child to the private foster care and adoption agencies with which it has contracted. Private foster care and adoption agencies maintain lists of available families and, upon receiving a referral, notify HHS of potential matches. Agencies provide information about the family which HHS compares with information about the child. HHS then determines which private agency has the most suitable family, based upon the referred child's age, sibling relationships, race, medical needs, and disability, if any, when making foster care and adoption placements.

The East Virginia Code empowers municipalities to regulate the foster and adoption placements of children and provides that "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). In undertaking a best interests assessment when making placement decisions, an agency must consider, among other things: (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).

In 1972, East Virginia adopted the Equal Opportunity Child Placement Act (EOCPA) which imposes nondiscrimination requirements on private child placement agencies receiving public funds in exchange for providing child placement services to HHS. E.V.C. § 42. The EOCPA defines "child placement agencies" to include both foster care and adoption agencies. *Id.* § 42.-1(a). As originally enacted, the EOCPA prohibited child placement agencies from "discriminating on the basis of race, religion, national origin, sex, marital status, or disability when screening and certifying potential foster care or adoptive parents or families." *Id.* § 42.-2. No municipal funds are to be dispersed to child placement agencies that do not comply with the EOCPA. *Id.* § 42.-2(a). 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. *Id.* § 42.-2(b).

After HHS places a child with an adoptive family, the private agency that recommended the family is contractually required to maintain supervision and support to ensure a successful placement. Families seeking to foster or adopt children initiate contact with a child placement

agency. If a family does not fit with the agency's profile and policies, the family is typically referred to another agency. HHS includes a "choosing an adoption agency" section on its website which makes the following statement to prospective adoptive parents:

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

The page lists other requirements such as orientation, training, and background and reference checks. Hartwell contends that this provision on the website pertains only to special programs for children—like training prospective adoptive parents to handle special needs children—even though the website does not explicitly indicate that this is the case.

AACS was formed in 1980 to provide community support to the refugee population, including adoption placement for war orphans and other children in need of permanent families. AACS has helped place thousands of children into adoptive homes. On any given day, the agency assists dozens of children ranging from those with special needs to trauma survivors. AACS's mission statement provides, "All children are a gift from Allah. At Al-Adab Al-Mufrad Care Services, we lay the foundations of divine love and service to humanity by providing for these children and ensuring that the services we provide are consistent with the teachings of the Qur'an."

Contracts for adoption services between HHS and AACS have been renewed annually since 1980, and the most recent contract was executed on October 2, 2017. AACS agreed to provide appropriate adoption services, including certifications that each adoptive family is thoroughly screened, trained, and certified. Section 4.36 of the contract requires AACS to be "in

compliance with the laws, ordinances, and regulations of the State of East Virginia and City of Evansburgh."

Following the decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Governor of East Virginia directed the Attorney General to conduct a thorough review of all state statutes to identify which ones needed to be amended to reflect the commitment to "eradicating discrimination in all forms, particularly against sexual minorities, regardless of what philosophy or ideology drives or undergirds such bigotry." As a result, among other laws, the EOCPA was amended to prohibit Child Placement Agencies from discriminating on the basis of sexual orientation. E.V.C. § 42.-3(b). The amendment also provided that "where the child to be placed has an identified sexual orientation, Child Placement Agencies must give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." *Id.* § 42.-3(c).[1]

The EOCPA was further amended to require that before funds are dispersed pursuant to the contract with a governmental entity, the Child Placement Agency must sign and post at its place of business a 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 race, religion, national origin, sex, marital status, disability, or sexual orientation." The amendment permits religious-based agencies, however, to post on their premises a written objection to the policy. *Id.* § 42.-4.

In early July 2018, Commissioner Hartwell spoke with an Evansburgh Times reporter who inquired whether the religious-based child placement agencies who contracted with HHS were complying with the EOCPA amendments. Hartwell then contacted all religious-based

[1] Although this provision and the parallel provision regarding race could implicate Equal Protection concerns, no such claim is presented in this case.

agencies in the area, including AACS, to determine their policies and practices regarding placing children with same-sex couples. In a conversation with Sahid Abu-Kane, the Executive Director of AACS, Hartwell learned that AACS's religious beliefs prohibited it from certifying qualified same-sex couples as prospective adoptive parents. Abu-Kane explained further that AACS would not perform a home study for same-sex couples because the Qur'an and the Hadith consider same-sex marriage to be a moral transgression. Abu-Kane emphasized, however, that on the few occasions when a same-sex couple previously contacted the agency about its adoption placement services, AACS treated them with respect and referred them to other agencies that served the LGBTQ community. When Hartwell asked whether Abu-Kane understood AACS's practices violated the amended EOCPA, Abu-Kane replied that it was not discrimination to follow the teachings of the Qur'an because "Allah orders justice and good conduct." Qur'an, 16:90. Abu-Kane further stated, and Hartwell acknowledged, that no same-sex couples have ever filed formal complaints of discriminatory treatment against AACS.

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

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

The letter also explained that AACS's policy prohibiting it from certifying same-sex couples would necessitate an immediate referral freeze that would be communicated to all other adoption agencies serving Evansburgh. Such agencies would be ordered to "refrain from making any

adoption referrals" to AACS unless AACS provided to HHS, within 10 business days, full assurance of its future compliance with the EOCPA.

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

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.

I. Free Exercise Claim

The Free Exercise Clause protects individuals from governmental interference with the exercise of religion, U.S. Const. Amend. I, and applies to the States the through the Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). AACS's free exercise claim requires examination of the Supreme Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), and *Masterpiece Cakeshop Ltd. v. Colorado. Civil Rights Commission*, 138 S. Ct. 1719 (2018). Several general principles are clear. The Free Exercise Clause forbids any regulation of beliefs. *Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 877; *see also Cantwell*, 310 U.S. at 303-04 (1940) (holding that the right to believe is absolute but the right to practice is, by necessity, limited). However, a "neutral" and "generally applicable" law is not subject to strict scrutiny, even if it burdens conduct, and regardless of whether it is motivated by religious or secular concerns. *Lukumi*, 508 U.S. at 546; *Smith*, 494 U.S. at 878. A law is "neutral" if it does not target religiously motivated conduct either on its face or as applied in practice. *Lukumi*, 508 U.S. at 533-40. A facially neutral government action that is motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct is unconstitutional. *Masterpiece*, 138 S. Ct. at 1737.

A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated. *Lukumi*, 508 U.S. at 543-46. "Where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884. In such cases, the law must satisfy strict scrutiny. *Lukumi*, 508 U.S. at 546; *Smith* 494 U.S. at 878.

For example, in *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), a municipal ordinance prohibited the posting of "any sign or advertisement, or other matter upon," among other things, telephone poles. *Id*. at 151. The municipality rarely enforced the ordinance, and residents frequently posted house number signs, lost animal signs, and holiday displays on the town's telephone poles. When Orthodox Jewish residents sought to post small religious objects on the poles, the town enforced the ordinance against them. The court held that the town violated the Free Exercise Clause. *Id*. at 168. Although the ordinance itself was general and neutral, it had not been enforced evenhandedly. The town's informal system of discretionary exemptions required the court to apply strict scrutiny which the town's actions could not survive.

Similarly, in *Ward v. Polite*, 667 F.3d 727, 749 (6th Cir. 2012), individualized ad hoc exemptions rendered an anti-discrimination policy "the antithesis of a neutral and generally applicable." Ward, a graduate counseling student, asked for permission to refer a client who sought counseling about a same-sex relationship to another student counselor. Ward explained that while she had no objection to counseling gay and lesbian clients on a wide range of other issues, her religious convictions prohibited her from affirming same-sex relationships as the school's "values based" counseling model required. *Id.* at 731. The school expelled Ward on the grounds that she violated an anti-discrimination policy prohibiting discrimination on the basis of sexual orientation. The court held that while the anti-discrimination policy was facially neutral and generally applicable, the counseling program's practice of permitting other client referrals "for secular—indeed mundane—reasons, but not for faith-based reasons," *id.* at 739, "severely undermine the university's interest in expelling Ward for the referral she requested." *Id.* at 740.

In this case, exemptions to the EOCPA's anti-discrimination provision occur both in the statute itself and in HHS's past placement decisions. The codified exemptions require child

placement agencies to favor some adoptive parents over others when the child is either a racial or sexual minority. E.V.C. § 42.-2(b) requires agencies to "give preference" to foster or adoptive families in which at least one parent is the same race as the child needing placement. The 2017 amendment to the EOCPA added an exemption for sexual orientation, requiring Child Placement Agencies, "where the child to be placed has an identified sexual orientation," to "give preference to foster or adoptive parents that are the same sexual orientation as the child needing placement." *Id.* § 42.-3(c). These two exemptions permit discrimination on the basis of race and sexual orientation in certain contexts for a secular reason—presumably because the state and its local agents believe such discrimination promotes the child's well-being.

Additionally, the factors that HHS must consider under East Virginia law in placing children in adoptive homes of necessity contemplate discrimination. HHS must 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." Application of the factors set forth in E.V.C. § 37(e) could potentially result in age discrimination, disability discrimination, and discrimination on the basis of ethnicity and culture, which in many cases could also implicate religious beliefs.

In the record in this case, there is evidence that HHS has engaged in several kinds of discrimination proscribed under the EOCPA when placing children. HHS discriminated on the basis of sex when it refused to place a young girl with an otherwise certified family consisting of a father and son. HHS approved discrimination on three occasions on the basis of religion when it agreed to withhold placement of a child with a family certified by AACS because the adoptive

parents were of the different sect than the child. And perhaps the most notable ad hoc exemption was when HHS placed a white special needs child with an African American couple even though there were three other white adoptive families certified and willing to adopt the child.

The lodestar guiding adoption placements is what serves the best interests of the child. The court does not question HHS's judgment that each of the placements discussed above best served the child's well-being, but HHS's ad hoc application of the anti-discrimination policy severely undermines the HHS's interest in withholding an exemption from AACS. The combination of the statutory exemptions and HHS's inconsistent grant of individualized exemptions undermines the argument that the EOCPA is neutral and generally applicable or that it is being applied consistently by HHS. *See Smith*, 494 U.S. at 884. A double standard is not a neutral standard. Thus, strict scrutiny must be applied to HHS's referral freeze and refusal to renew AACS's contract. *See Lukumi*, 508 U.S. at 546; *Smith* 494 U.S. at 878; *Ward*, 667 F.3d at 740 (holding the university's expulsion of Ward "must run the gauntlet of strict scrutiny").

Commissioner Hartwell does not contest that HHS's referral freeze and refusal to renew AACS's contract burdens AACS's sincerely held religious beliefs. Without the contract with and referrals from HHS, AACS is now precluded from carrying out a crucial part of its mission. Hartwell asserts, however, that enforcing the EOCPA serves the compelling state interests of eliminating all forms of discrimination by ensuring that 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. Hartwell asserts that successfully placing children in qualified adoptive homes is also a compelling state interest that is served by the EOCPA's anti-discrimination policy.

Assuming, *arguendo*, that those interests are compelling, the court does not accept that it is necessary to deny an exemption to AACS to further them. First, the adoption process is highly selective, and the factors HHS is required to consider under state law, *see* E.V.C. § 37(e), contradict Hartwell's argument that the EOCPA mandates an "all-comers" policy. Indeed, all prospective adoptive parents are on notice that individual child placement agencies have differing criteria and policies and that some agencies will be a better fit than others. This aligns with HHS's interest in ensuring that the pool of prospective adoptive parents is as diverse as the pool of children needing adoption.

Hartwell's argument is weakened further by the shortage of adoptive homes for children in the predominantly refugee community, an important segment of which AACS is uniquely situated to serve. It defies logic to assert that a shortage of adoptive families will be better served by eliminating a child placement agency that has served the community for decades. Finally, Hartwell's argument that terminating its contract with AACS is necessary to serve its compelling interests is belied by Evansburgh's contracts with 34 other child placement agencies, four of which are dedicated to serving the LGBTQ community. Terminating AACS's contract will not do anything to ensure that the LGBTQ community of potential adoptive parents is served, but it will significantly damage HHS's ability to find homes for children from its refugee population. Enforcing the EOCPA against AACS violates its free exercise rights.

II. Unconstitutional Conditions Claim

AACS also claims that HHS has violated AACS's First Amendment right not to speak messages with which it disagrees. First, the EOCPA's notice requirement in E.V.C. § 42.-4 requires AACS to post East Virginia's non-discrimination policy on its premises even though AACS disagrees with portions of the statement. Section 42.-4 requires adoption agencies to post

on their premises a notice stating that it is illegal under state law to "discriminate against any person, including any prospective foster or adoptive parent, on the basis of that individual's race, religion, national origin, sex, marital status, disability, or sexual orientation." Second, AACS argues that requiring AACS to certify same-sex couples compels it to promote a message that conflicts with its religious beliefs. AACS argues that conditioning its access to child placement service funds upon its endorsement of views that conflict with its religious beliefs violates the First Amendment under the unconstitutional conditions doctrine.

The First Amendment Free Speech Clause is made applicable to the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The unconstitutional conditions doctrine 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). When a State compels individuals "to voice ideas with which they disagree, it undermines [free speech]." *Janus v. American Federation of State, Cty., and Municipal Employees*, 138 S. Ct. 2448, 2464 (2018). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

Courts must examine the purpose of a government funding program when analyzing whether a government condition to participate in the program is constitutional under the First Amendment. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542, (2001). For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a prohibition on doctors' ability to

promote abortion in federal family planning family program because the program's purpose was to promote the government's message about family planning. The government's message about family planning expressly excluded promotion of abortion. *Id*. at 180.

By contrast, where the purpose of the program is to facilitate private speech, rather than to promote a government message, the restriction violates the First Amendment if speech is a prerequisite of participation in the program. *Velazquez*. 531 U.S. at 542-43. In *Agency for International Development v. Alliance for Open Society International* (*AOSI*), 570 U.S. 205, 214 (2013), the Court held that a funding program to combat the spread of AIDS around the world could not constitutionally require funding recipients to affirmatively condemn the practice of prostitution. The Court held that the anti-prostitution affirmation requirement reached outside the limits of the AIDS government program and compelled "grant recipients to adopt a particular belief as a condition of funding." *Id*. at 218.

The court agrees with AACS that *AOSI* governs this case. The purpose of the contractual arrangement between AACS and HHS is not to promote the EOCPA's non-discrimination policy. The purpose is to facilitate child adoptions that best serve the well-being of each child. Until 2018, the partnership functioned successfully without compelling AACS's endorsement of the state's non-discrimination policy. The EOCPA's notice requirement thus reaches outside the scope of the adoption placement partnership and compels AACS to affirm a message that it does not believe. The notice condition of E.V.C. § 42.-4 and the requirement that AACS certify same-sex couples as adoptive parents constitute unconstitutional conditions that violate AACS's First Amendment rights.

Conclusion

Because enforcement of the EOCPA against AACS violates AACS's Free Exercise and Free Speech rights, AACS's motions are hereby **GRANTED**.

Date: April 29, 2019

/s/ D. Capra

District Judge

Case No. 2020-05

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

February 24, 2020

Before Campbell, Overcash, and Park, Circuit Judges

Park, J., Circuit Judge:

OPINION

Appellee Commissioner Christopher Hartwell of the Evansburgh Department of Health and Human Services (HHS) appeals from the district court's judgment granting a temporary restraining order and permanent injunction to the Plaintiff, Al-Adab Al Mufrad Care Services ("AACS"). The district court held that the City's enforcement of a state anti-discrimination law, the Equal Opportunity Child Placement Act (EOCPA), as amended, against AACS violated its

rights under the Free Exercise Clause because statutory exemptions combined with HHS's grant of individualized exemptions rendered the law neither neutral nor generally applicable. The district court held further that enforcement of the law against AACS failed strict scrutiny.

With respect to AACS's free speech claims, the district court held that requiring AACS to 1) certify same-sex couples as adoptive parents and 2) post the City's anti-discrimination message on AACS's premises compelled AACS to engage in speech that violated its religious beliefs. The court held that coercing AACS's speech as a condition of receiving City funds in exchange for adoption services violated the unconstitutional conditions doctrine under the First Amendment. The district court entered a temporary restraining order against Commissioner Hartwell's freeze of referrals to AACS and issued an injunction requiring Hartwell to renew the City's contract with AACS.

We adopt the district court's statement of facts in its entirety. Because this case involves First Amendment issues, however, we review conclusions of law *de novo* and conduct an independent examination of the record as a whole. *Brown v. City of Pittsburgh*, 586 F.3d 263, 268-69 (3d Cir. 2009). For the following reasons, we **REVERSE** and hold that neither the Free Exercise Clause nor the Free Speech Clause supports the district court's conclusions.

I. Free Exercise Clause Claim

The Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The Free Exercise Clause does not, however, "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879 (internal quotations and citations omitted). Religious convictions cannot trump the obligation to comply with

generally applicable civil rights laws as long as those laws are applied neutrally. Thus, "while . . . religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable [anti-discrimination] law." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

A facially neutral law does not violate the general applicability requirement merely because the government grants some exemption to the law. "Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes." *Burwell v. Hobby Lobby*, 573 U.S. 682, 763 (2014). Furthermore, "[n]o tradition … allows a religion-based exemption when the accommodation would be harmful to others." *Id*. at 764.

Under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the appropriate test for determining whether a law is neutral and generally applicable is whether the plaintiff can show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views.

In *Lukumi*, a Florida city adopted an ordinance prohibiting the slaughtering of animals except in certain circumstances. The law's history demonstrated that the law was an attempt to suppress the Santeria religion which requires ritualistic animal sacrifice. *Id.* at 524. The emergency legislative sessions that led to the ordinance were held immediately after a Santeria church first tried to open in town, and certain statements at the sessions manifested hostility toward the religion. That hostility was reflected in the statutory terms even though the law was labeled as an animal welfare law. Its restriction on animal killing was limited to "sacrifice," and

was further limited to the context of "a public or private ritual or ceremony." *Id*. at 527. Although the ordinance did not apply if the killing was "for the primary purpose of food consumption," or if the animals were "specifically raised for food purposes," the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as frequently occurred in Santeria sacrifices. *Id*. at 527-28. The net result of the statute was that "few if any killings of animals are proscribed other than Santeria sacrifice.... Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id*. at 536. The Court held that the law violated the Free Exercise Clause because the law was obviously targeted toward suppression of the Santeria religion.

Lukumi requires us to focus on whether AACS has been treated differently than secular childcare placement agencies in Evansburgh. AACS has not shown any evidence that it has been treated less favorably than an agency that discriminates against same-sex couples for secular reasons. Apparently, there is no such agency. AACS has certainly not shown any evidence of religious hostility or targeting here. Although the agency points to a statement by the East Virginia governor in 2017 suggesting that belief in the traditional definition of marriage equates to bigotry, such an isolated comment made by an official who plays no role in enforcing the EOCPA against the agency does not rise to the level of impermissible hostility sufficient to defeat the law. *See id*. at 541 (noting hostility in a City Council member's question, "What can we do to prevent the Church from opening?"); *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (holding that Civil Rights Commissioners "disparaged Phillips's religion . . . by describing it as despicable, and also by characterizing it as . . . something insubstantial and even insincere").

The district court's holding that the statutory exemptions in E.V.C. §§ 42.-2(b) and 42.-3(c) rendered the EOCPA not generally applicable is erroneous for two reasons. First, the EOCPA does not apply to HHS or any of its personnel; by its express terms it applies only to child placement agencies. Second, the exemptions in E.V.C §§ 42.-2(b) and 42.-3(c) are essential to the state's goal of serving the child's best interests and do not undermine the EOCPA's purpose, which is to regulate the conduct of child placement agencies.

The individualized exemptions must be viewed in the light of HHS's important role that is distinct from the role that child placement agencies play. The state has charged HHS with the delicate task of placing children in homes where they will hopefully remain and thrive. The potential "discriminatory" consequences that might flow from the guiding factors set forth in E.V.C. § 37(e) is essential to the discretion HHS must have to effectively serve the children in its custody.

By contrast, child placement agencies, like AACS, have a much more circumscribed role. Their function is to screen and certify prospective adoptive families, not make ultimate placement decisions. HHS does not refuse to work with an entire class of persons because of their membership in a protected class, and there is no instance in the record of HHS knowingly permitting any other foster agency to do so. Because AACS has failed to meet its burden of showing that the EOCPA is not neutral and generally applicable, it must comply with this law.

II. Unconstitutional Conditions Claim

In support of its First Amendment claim, AACS contends that the EOCPA is unconstitutional as applied to it because it forces the agency to change the content of its message in two ways. First, AACS alleges that the EOCPA's ban on sexual orientation discrimination compels it to endorse same-sex couples as adoptive parents, even though AACS believes, as a

matter of religious conviction, that same-sex couples should not be certified. Second, AACS asserts that the notice requirement in E.V.C. § 42.-4 compels AACS to post EOCPA's non-discrimination message. AACS argues that enforcing the EOCPA against it as a condition of receiving funds to perform its placement services constitutes an unconstitutional condition.

It is axiomatic that the Free Speech Clause prohibits the government from telling people what they must say. *Janus v. Am. Fed'n of State, Cty. & Mun. Emps*., 138 S. Ct. 2448, 2464 (2018). However, we disagree with the district court's holding that *Agency for International Development v. Alliance for Open Society International (AOSI)*, 570 U.S. 205, 214 (2013) governs this case. The speech in question is outside the scope of AACS's contract with HHS and occurs only because AACS has chosen to partner with the HHS to help provide a public service.

This case therefore aligns more with *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006) and *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). *Rust* disposes of AACS's claim that the EOCPA's ban on discrimination against same-sex couples compels AACS to espouse a viewpoint with which it disagrees. *Rust* held that when the government funds a program, the government has the right to define the limits of that program's speech. 500 U.S. at 194. The Court upheld conditions on government grants under a federal program preventing grant recipients from providing counseling or information about abortion. *Id*. at 193-200. Rejecting the argument that the conditions were an impermissible restriction on speech, the Court held that the government is free to fund only those programs that comport with its own view on matters such as abortion.

In this case, HHS's purpose in contracting with AACS is to provide adoption services to the citizens of Evansburgh. The contract is not intended to create a forum for private speech or to facilitate private speech. Because AACS's work as an authorized adoption agency is an

extension of HHS's work, AACS's speech when serving as an authorized adoption agency qualifies as governmental speech. *See Rust*, 500 U.S. at 194.

Similarly, *FAIR* requires rejection of AACS's claim that E.V.C. § 42.-4's notice requirement unconstitutionally compels AACS's speech. In *FAIR*, a consortium of law schools claimed that a federal law requiring them to host military recruiters on campus compelled them to say something they did not want to say. They alleged that providing email notifications of the military recruiters' scheduled presence conveyed an implicit endorsement of the recruiters' message. *Id*. at 64-65. The Court rejected the argument. "The compelled speech to which the law schools point is plainly incidental to the [law]'s regulation of conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id*. at 62.

FAIR further disposes of AACS's claim that posting the non-discrimination policy on its premises impedes its message that same-sex couples should not be certified as adoptive parents. AACS's reliance on *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 566 (1995) is misplaced. In *Hurley*, the Court held that a state anti-discrimination law could not require a parade to include a group whose message the parade's organizer does not wish to send because parade organizer's own message was affected by the speech it was forced to accommodate. In *FAIR*, however, the Court held that merely posting factual information about the military recruiters' arrival did not affect the law schools' speech. "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id*. at 65. Similarly, the mere act of posting a factual statement about East Virginia's anti-discrimination

law does not compel AACS itself to say anything nor does it interfere with AACS's ability to communicate its own message. To the contrary, E.V.C. § 42.-4's notice requirement explicitly permits AACS to communicate its own message about the merit of the EOCPA's provisions. AACS's First Amendment claim is without merit.

Conclusion

Enforcement of the EOCPA against AACS does not violate either AACS's Free Exercise or its Free Speech rights. The judgment of the District Court is therefore **REVERSED**.

Overcash, J., dissenting:

For the reasons in the District Court's well-reasoned opinion, which I adopt in full, and which the majority has not persuasively refuted, I would affirm the decision of the court below.

Case No. 2020-05

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

Martin, Chief Judge:

Upon the vote of a majority of non-recused active judges, and pursuant to Federal Rule of Appellate Procedure 35(a)(2), the Petition of the Appellant Al-Adab Al-Mufrad Care Services for Rehearing En Banc is hereby **GRANTED**. The panel disposition in this case shall not be cited as precedent during this en banc proceeding.

Dated: July 15, 2020