

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NEW HOPE FAMILY SERVICES,
INC.,

Plaintiff-Appellant,

No. 19-1715

v.

SHEILA J. POOLE, in her official
capacity as Acting Commissioner for
the Office of Children and Family
Services for the State of New York,

Defendant-Appellee.

**APPELLANT’S REPLY IN SUPPORT OF ITS EMERGENCY
MOTION FOR INTERIM PROTECTION UNDER FEDERAL
RULE OF APPELLATE PROCEDURE 8**

Introduction

New Hope filed this emergency motion in response to OCFS’s abrupt about-face and attempt to shut New Hope down even before its appeal could be heard. Appellant’s Emer. Mot. for Interim Protection (Emer. Mot.) 1-4, ECF No. 52-1. After reading New Hope’s motion, OCFS reversed course yet again, and represented to this Court that “OCFS has agreed that during the pendency of this motion for a preliminary injunction, it will not seek to enforce the directive in the August 9, 2019 letter.” August 15, 2019 Letter from Etlinger to Clerk 1, ECF No. 61.

OCFS’s qualified commitment must be carefully parsed. OCFS represents that it will not act against New Hope while this motion is

pending, arguing that there is therefore no longer an emergency. Yet it limits its commitment to “while this motion is pending.” If the Court denies this motion in the belief that the emergency has passed, OCFS will immediately shutter New Hope before the appeal is heard, inflicting all the harms that New Hope has detailed. Emer. Mot. 8-10.

On the other hand, OCFS’s new commitment also opens a route to an orderly process. As further demonstrated in this brief, New Hope is entitled to the interim protection that it seeks, but the facts and issues involved almost entirely overlap with those being briefed—more fully—in the pending appeal. So, if the Court simply defers decision on this motion until it can hear the appeal, then (given OCFS’s new commitment) the status quo will be preserved throughout the appeal, the Court will have the benefit of full briefing and argument before making any decision concerning these important constitutional questions, and New Hope will commit to continue to accept *no new applicants* (Emer. Mot. 16) until its appeal has been decided, mooting any concerns about alleged “discrimination” against applicants in the meantime.

OCFS attempts to maintain some urgency on the entirely new theory that, even if there can be no “discrimination” against *applicants* during the appeal, unmarried or same-sex couples will nevertheless “be excluded from the opportunity to adopt any of the children New Hope is in a position to place.” Appellee’s Opp’n to Mot. for Prelim. Inj. (Opp’n)

24, ECF No. 101. But this makeweight argument comes with ill grace from a state agency that currently has responsibility for *more than 4000 children waiting to be adopted*. Compl. ¶¶ 32-33, ECF No. 52-4; Geyer Aff. at ¶ 26, ECF No. 52-3. As OCFS knows, New Hope has placed a total of two children since this litigation began. Jerman Decl. at ¶ 40, ECF No. 52-9.

That said, OCFS's opposition brief is revealing. OCFS now frankly states that the challenged regulations *do* prohibit New Hope from speaking and teaching what it believes within "the contours of its adoption program." OCFS's primary justification for this censorship is that all of New Hope's value-laden speech can be regulated as "governmental speech." This "governmental speech" argument cannot survive *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

Finally, OCFS now admits that the "problem" addressed by the challenged regulation is the "long history of social services by religious institutions" combined with "a history of opposition of certain religious groups to cohabitation outside of marriage and same-sex marriage." Opp'n 14. In other words, OCFS implicitly acknowledges that the regulation targets, and has particularly impacted, religious beliefs and practices with which the State disagrees.

In sum, OCFS's opposition brief strengthens the case for injunctive protection for New Hope.

Argument

- I. **New Hope will likely prevail on its claims of censorship and compelled speech.**
 - A. **OCFS plainly declares its intent to censor and compel New Hope’s speech.**

The district court asserted that “OCFS and the regulation simply do not compel speech,” and that “OCFS is not . . . compelling [New Hope] to change the message it wishes to convey.” Order 28-29, ECF No. 52-5. OCFS now says the opposite, carefully clarifying its view that its regulation does not “restrict New Hope’s speech *unrelated to its provision of adoption services*,” and “New Hope is not precluded from espousing its beliefs about marriage and family . . . *outside the contours of its adoption program*.” Opp’n 20, 21 (emphasis added). In other words, OCFS maintains that in their work with adoptive and birth parents, New Hope staff *may not* say what their faith tells them is true (that unmarried or same-sex couples cannot provide a “best interests” home for any child), and they *must* speak what their faith tells them is a lie. This is censorship and compelled speech straight up.

- B. **New Hope’s speech is neither “conduct” nor merely “incidental.”**

OCFS’s assertions that its regulations target “conduct, not speech,” or only “speech incidental to conduct,” suffer a fatal omission: OCFS never identifies any “conduct.” New Hope has set out in detail

facts showing that what it does is essentially an “*all talk*” ministry: it instructs and counsels adoptive parents and birthmothers; it applies its judgment to a specific child and adoptive family, and makes—or declines to make—a representation that in its judgment that placement is in the best interests of the child. *See* Emer. Mot. 17-19; Opp’n 6. This is all speech. New Hope’s refusal to enter into this intimate all-talk working relationship with unmarried or same-sex couples is essential to preserve its right to refuse to “foster . . . an idea [New Hope] find[s] morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

OCFS identifies no “commerce or conduct” to which the restricted speech *could* be “incidental.” *NIFLA*, 138 S. Ct. at 2373-74. OCFS labels “adoption services” as “conduct,” but as New Hope’s detailed explication has shown, these “services” simply *are* talk. Emer. Mot. 17-19.

“[C]haracterizing speech as conduct is a dubious constitutional enterprise.” *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017).¹ This case does *not* involve regulation of non-verbal conduct such as providing a meeting room. *See Rumsfeld v. FAIR*, 547

¹ *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-28 (2010) (rejecting government’s attempt to recast “communicating a message” as “conduct”).

U.S. 47, 60 (2006). It *does* involve “government-mandated speech” contrary to the messages New Hope wishes to speak.²

C. OCFS cannot by government fiat transform New Hope’s speech into governmental speech.

OCFS’s most vigorous pitch is that because the State of New York has chosen to regulate the adoption process (Opp’n 5-7), New Hope’s privately funded ministry is transmogrified into a “public service” (Opp’n 20), and New Hope’s speech may thus be unabashedly regulated as governmental speech. But the Supreme Court rejected that argument in *NIFLA*, noting that if states could, by choosing to regulate certain activities, also “choose the protection that speech receives under the First Amendment . . .,” this would “give[] the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” 138 U.S. at 2375. In *Matal v. Tam*, the Court similarly rejected the claim that the existence of a regulatory trademark approval process “converts ... mark[s] into government speech,” explaining that to say otherwise would inflict “a huge and

² See also *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (2011). (antidiscrimination law cannot force parade organizers to alter their message by including gay group in parade); *Jian Zhang v. Baidu.com*, 10 F.Supp.3d 433 (S.D.N.Y. 2014) (antidiscrimination law cannot force website company to publish particular search results).

dangerous extension of the government-speech doctrine.” 137 S. Ct. 1744, 1760 (2017).³

Even OCFS concedes that the State cannot “require[] a program participant to espouse the government’s message on its ‘own dime and time.’” Opp’n 20 (quoting *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l*, 570 U.S. 205, 218–19 (2013)). New Hope does not receive a dime from the State of New York. And the State does not own its time. Accordingly, the State cannot force New Hope to espouse the State’s messages.

II. New Hope will likely prevail on its free exercise claim.

A. *Smith* neutrality would not be sufficient to defeat New Hope’s free exercise claim.

At the threshold, OCFS oversells *Smith*, declaring categorically that a neutral, generally applicable regulation can be enforced “even if [it] prescribes conduct that [an individual’s] religion proscribes.” Opp’n 9. That is a bold claim for Caesar, but it is not the law. Emer. Br. 13-14. It is *not* the case “that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause.” *Trinity Lutheran Church of Columbia v. Comer*, 137

³ See also *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 250-51 (2d Cir. 2014) (City may not use regulatory power to force private organizations to espouse government’s position on issues of public debate); see generally Emer. Mot. 19-21.

S. Ct. 2012, 2021 n.2 (2017). Instead, the Supreme Court has rejected—without even performing a *Smith* analysis—application of a neutral law in a manner that interfered with “the faith and mission of [a religious ministry] itself,” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012), and has stated that even a neutral law could not require clergy (who are licensed to perform legally binding marriages) to perform same-sex weddings. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 at 1727 (2018).⁴

OCFS cites no case—and we believe there is none—in which the Supreme Court has applied *Smith* to permit compulsion of speech abhorrent to the speaker’s religious beliefs. Here, New Hope’s religious beliefs about marriage, family, and the best interests of children rest at the very heart of its mission. If a state cannot force clergy to participate in the formation of same-sex marriages against conscience, it follows closely that New York cannot force New Hope to participate in the formation of unmarried or same-sex families against conscience.

⁴ OCFS’s suggestion that it has special power to regulate New Hope’s speech because that speech has legal consequences for “familial relationships, one of the most powerful legal structures in people’s lives,” Opp’n 20, cannot survive this clear teaching of *Masterpiece*.

B. The regulation is not generally applicable because it permits numerous secular exceptions to OCFS’s claimed nondiscrimination principle.

The regulation likely is also unconstitutional under a traditional *Smith* analysis. New York’s laws and regulations are riddled with exceptions to the claimed antidiscrimination principle. Emer. Br. 12–13.⁵ OCFS concedes that agencies can “consider various factors”—including “protected characteristics”—in the adoption process. Opp’n 11-12 & n.5. But OCFS asserts that “there are significant differences between” New Hope’s referral policy “and allowing agencies to consider protected characteristics in placement decisions in order to find the best fit for each child.” *Id.* at 12 (internal quotation marks omitted).

OCFS never explains what those alleged differences are, nor can it. New Hope also “find[s] the best fit for each child” when it places children for adoption. *Id.* Its religious beliefs merely lead it to conclude that the presence of a married mother and father in the home is always relevant to that analysis. OCFS disagrees, but OCFS may not “make[] a value judgment in favor of secular motivations, but not religious motivations.” *Fraternal Order of Police v. City of Newark*, 170 F.3d 359,

⁵ Contrary to OCFS’s assertion (Opp’n Br. 12 n.5), New York’s statutory ban on adoption by married-but-separated couples cited by New Hope (Emer. Br. 12-13) has neither been repealed nor judicially invalidated.

366 (3d Cir. 1999) (Alito, J.). The regulation likely is not generally applicable.

C. OCFS’s brief strengthens the conclusion that the regulation is not neutral as designed or as applied.

The regulation likely is also not neutral toward religion.

First, the exceptions mentioned above demonstrate that the regulation is not neutral toward religion. “A double standard is not a neutral standard.” *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

Second, OCFS’s repeated statements evincing animus against or distrust of traditional religious beliefs about marriage (Emer. Br. 15) are indeed similar to those cited by the Supreme Court in *Masterpiece*. *See* 138 S. Ct. at 1729.

Third, OCFS’s opposition brief provides new evidence of the regulation’s non-neutrality toward religion. OCFS acknowledges that the “discriminatory policies” it seeks to extinguish “often” come from religious social service agencies because certain religious groups have a “history of opposition” to “cohabitation ... and same-sex marriage.” Opp’n 14. OCFS essentially pleads “no contest” to New Hope’s allegation that OCFS has used the regulation to shut down multiple faith-based agencies. *Id.* OCFS believes that so long as its hostility is directed against policies rather than against religion *per se* then it is “neutral,” *id.*, but that is incorrect. A law is not “neutral” if it was motivated by animus against religion or “*distrust of its practices.*”

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540-42, 547 (1993).

Finally, OCFS’s contrived justification for why it must urgently shut down New Hope—even while the ministry is not accepting *any* new applicants—is itself a new outburst of animus, manifesting a determination to find any excuse to punish those whom OCFS views as unenlightened, regardless of the cost to children.

Together, these facts raise well more than a “slight suspicion” that OCFS’s enforcement of the regulation against OCFS “stem[s] from animosity to religion or distrust of its practices.” *Masterpiece*, 138 S. Ct. at 1731.

III. New Hope will likely prevail on its expressive association claim.

OCFS attacks New Hope’s expressive association claim mainly by highlighting distinctions without a difference.

It is neither true nor relevant that the right to expressively associate “is infringed only when an organization is forced to alter its selection of members or constituents.” Opp’n 22–23. New Hope’s adoptive parents are its “constituents,” with whom New Hope associates with an important purpose of advocating New Hope’s “private [faith-based] viewpoints” about marriage and children. Emer. Br. 21-22. More, the Supreme Court has firmly held that the “generous zone” of associational rights of organizations, *In re Primus*, 436 U.S. 412, 431

(1978), extends beyond “members” to potential clients. *NAACP v. Button*, 371 U.S. 415, 428–29, 437 (1963). In *Roberts v. U.S. Jaycees*, the Court emphasized that the law there “impose[d] no restrictions on the organization’s ability to exclude individuals with ideologies . . . different from those of its existing members.” 468 U.S. 609, 627 (1984). The challenged regulation does exactly that.

It does not matter whether New Hope was “organized for the purpose of engaging in expressive activities.” Opp’n 22. New Hope does “not have to associate for the ‘purpose’ of disseminating a certain message in order to” form a protected expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

New Hope’s uncontradicted evidence establishes that the regulation “will impede the organization’s ability to engage in . . . protected [expression] or to disseminate its preferred views.” *Roberts*, 468 U.S. at 627. And courts must “give deference to an association’s assertions regarding the nature of its expression” and “to an association’s view of what would impair its expression.” *Dale*, 530 U.S. at 653. Affording New Hope that proper deference, it likely will prevail on its expressive association claim.

Conclusion

The Court should grant the interim relief that New Hope requests. In the alternative, for the reasons stated in the introduction, the Court

should consolidate this motion with New Hope's pending appeal and decide it when the Court decides the appeal on the merits.

Dated: August 30, 2019

Respectfully submitted,

s/Roger G. Brooks

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Dated: August 30, 2019

s/ Roger G. Brooks
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I hereby certify that on August 30, 2019, a copy of this response was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ Roger G. Brooks
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