

# 19-1715

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

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NEW HOPE FAMILY SERVICES, INC.,

*Plaintiff-Appellant,*

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.*

On Appeal from the United States District Court  
for the Northern District of New York  
Civil Case No. 5:18-cv-1419  
(Hon. Mae A. D'Agostino)

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**REPLY BRIEF OF APPELLANT  
NEW HOPE FAMILY SERVICES, INC.**

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**Appellant Requests Oral Argument**

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## ARGUMENT

New Hope Family Services is a Christian, private adoption agency that has placed over 1,000 children into permanent homes since it opened its doors more than 60 years ago. JA9–10. New Hope does not accept *any* funding from the State of New York. JA17. All that New Hope asks from the State is that it allow New Hope to keep its doors open so that it can continue to find homes for children in need.

But the State—through its Office of Children and Family Services (OCFS)—has decided that New Hope must violate its religious beliefs and speak messages it disagrees with or else permanently shut down its adoption ministry. OCFS does not argue that New Hope ever acts contrary to the best interests of the children New Hope places for adoption. JA281. Nor has it explained how forcing New Hope to close its doors could further the State’s interest in finding adoptive homes for more children, nor even how it could increase opportunities for *any* qualified adult to adopt.

Instead, OCFS demands that New Hope comply with a regulation that purports to prohibit discrimination based on various protected classes—including marital status and sexual orientation. Despite that “prohibition,” the same regulatory regime permits and even requires providers to discriminate based on several protected classes when the State and the providers believe doing so would be in the best interests of children. Not so for New Hope.

This double standard and statements made by OCFS officials demonstrate that the regulation is not generally applicable or neutral toward religion. And because it cannot survive strict scrutiny, enforcing it against New Hope violates New Hope’s right to exercise its religion. Similarly, OCFS’s insistence that New Hope speak messages it disagrees with about the types of homes that are best for children violates New Hope’s First Amendment right to free speech.

Like the district court below, OCFS on appeal tries to justify the dismissal of New Hope’s claims by distorting and ignoring the facts New Hope alleged, by weighing the record and drawing inferences against New Hope, and by misreading governing precedent. As OCFS has already conceded, the court below failed to conduct “a review of whether the allegations of the complaint satisfy pleading standards” when it dismissed. 2d Cir. ECF No. 36 at 6–7. New Hope is entitled to reversal and the opportunity to develop its case through discovery, and to receive the protection of a preliminary injunction as the case proceeds below.

**I. New Hope stated a claim that the challenged regulation violates its free exercise rights.**

**A. New Hope adequately alleged that the exception-riddled regulatory scheme renders the regulation not generally applicable.**

New Hope’s allegations state a free exercise claim under the test articulated in *Smith*. In *Smith*, the Court held that a law impairing free exercise of religion must undergo strict scrutiny if it is not “generally

applicable.” *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 885 (1990). In *Lukumi*, the Court held that a regulation is not generally applicable if it “fail[s] to prohibit nonreligious conduct that endangers [asserted governmental] interests in a similar or greater degree than” prohibited religious conduct. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

In dismissing New Hope’s free exercise claim, the district court found “nothing in the record suggest[ing] that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class.” JA265. That finding was flatly contrary to the allegations in New Hope’s complaint, which recite multiple statutory and regulatory permissions (and even requirements) that adoption providers discriminate based on protected classes. New Hope Br. 27–28. The court erred by ignoring these allegations and instead examining the undeveloped “record” at the motion-to-dismiss stage, where the court’s task was *not* “to weigh the evidence and evaluate the likelihood that [New Hope] would prevail,” but to assess whether New Hope had stated a plausible claim for relief. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

Indeed, OCFS has admitted this foundational error, correctly observing that the “dismissal was based on a *full review of the merits* of appellant’s constitutional claims and application of substantive law, *rather than* a review of whether the *allegations of the complaint satisfy*

*pleading standards.*” 2d Cir. ECF No. 36 at 6–7 (emphasis added).

OCFS attempts to walk back that admission, *see* OCFS Br. 32 n.11, but it cannot solve the problem that its earlier statement was accurate.

In its brief, OCFS tries to whitewash the district court’s error in two ways, neither of which succeeds.

*First*, OCFS tries flat denial, asserting that “the statutory and regulatory scheme . . . does not contain exceptions . . . that allow discrimination on the basis of other factors, while singling out the form of discrimination in which New Hope engages.” OCFS Br. 26. But it does. OCFS plays semantics, protesting that the provisions New Hope cites merely allow agencies to “focus” and “prioritize” recruitment and home study services and to make placement decisions based on “various factors (including religion).” OCFS Br. 27. But “prioritizing”—sending applicants to the back of the line or pulling others to the front—based on protected characteristics is “discrimination.” Granting “priority” to some means those at the back of the line may never be served. OCFS confirms this by emphasizing its “limited resources”—a limitation that OCFS invokes as somehow excusing the forms of “discrimination” authorized by statute and regulation.<sup>1</sup> OCFS Br. 27.

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<sup>1</sup> OCFS’s appeal to “limited resources” rings hollow given that it refuses to let New Hope use *its* limited resources to serve clients consistently with its religious beliefs “on its own time and dime.” *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 218 (2013).

*Second*, OCFS tries to obfuscate the types of discrimination that the statutory and regulatory regime allows. It is not true that all the referenced laws and regulations merely grant priority and do not “exclude applicants.” OCFS Br. 27. Contrary to OCFS’s denials, OCFS Br. 28 n. 10, DRL § 110 *disqualifies* some individuals from adopting based on marital status. A person otherwise eligible to adopt who is married and has been separated for less than a year may not adopt—precisely because of her marital status.

Similarly, OCFS misdescribes § 421.18(d)(2), stating that it only “require[s] the consideration of the *child’s* characteristics.” OCFS Br. 29. It does require that. But it also states that the “protected categories” of “[r]ace, color or national origin of . . . *the adoptive parent* may be considered” when agencies make placement decisions. N.Y. Comp. Codes R. & Regs. tit. 18, § 421.18(d)(2) (emphasis added).<sup>2</sup>

*Third*, OCFS claims that its many secular exceptions to its non-discrimination principle are not comparable to religious exceptions because the secular exceptions “are intended to serve the best interests of the child” and “obtain[ ] for each child the most appropriate

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<sup>2</sup> Likewise, *Amici* Civil Rights Organizations’ argument that New Hope’s position “would open the door to increased religious discrimination,” Br. for Civil Rights Organizations as *Amici Curiae* at 26, brushes over existing regulations that permit and even require agencies to consider adoptive parents’ religions in their recruitment efforts, adoption studies, and placement decisions—notwithstanding the alleged “prohibition” on such discrimination. New Hope Br. 21–22.

placement.” OCFS Br. 32, 27. But New Hope has equally alleged that its policy of seeking homes with a married mother and father serves the best interests of each child. Thus, in advancing this “defense,” OCFS is making an impermissible “value judgment in favor of secular motivations, but not religious motivations.” *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

New Hope’s allegations support a reasonable inference that because the legislative and regulatory regime provides numerous exceptions permitting “discrimination” based on protected characteristics for secular purposes, the ban on New Hope’s faith-based practice is not “generally applicable.” Accordingly, the allegations state a free exercise claim, and dismissal was improper.

**B. New Hope adequately alleged that the challenged regulation is not neutral.**

**1. New Hope alleged sufficient facts to support the inference that the regulation was motivated by hostility to religious beliefs and practices.**

At the outset, the constellation of secular exceptions mentioned above equally 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).

Further, OCFS’s long re-recitation of events leading up to the adoption of the regulation, OCFS Br. 34–37, represents, if anything, a chronicle of antipathy toward New Hope’s beliefs about marriage and

family. These, of course, are precisely the beliefs that the Supreme Court has recognized as “revered” “by decent and honorable people based on religious or philosophical premises,” and protected by the First Amendment. *Obergefell v. Hodges*, 135 U.S. 2584, 2602, 2607 (2015).

OCFS disagrees with the Supreme Court. It also disagrees with New York’s former governor, David Paterson. Interestingly, OCFS has no response to Governor Paterson’s official statement when signing the very legislation that OCFS says required it to adopt the regulation. In that signing statement, the Governor expressed a spirit of religious toleration consistent with that of *Obergefell* and denied that the legislation would require any faith-based adoption agency “to alter its present policies.” JA33–34. OCFS’s blatant disregard of this clear statement when it enacted the regulation further demonstrates its hostility to the very religious practices and policies that Governor Paterson identified as protected.

Similarly, OCFS readily admits that the “problem to be solved” by the regulation was primarily a religious one, asserting that

social services agencies with similarly discriminatory policies often have religious affiliations. After all, there is a long history of social service by religious institutions, as well as a history of opposition by certain religious groups to cohabitation outside of marriage and same-sex marriage.

OCFS Br. 39. OCFS is mistaken in believing that hostility to religious practices raises no concern so long as hostility to religion *per se* can

plausibly be denied. OCFS Br. 39–40. State action motivated by hostility towards a distinctly religious “practice[ ]” is not “neutral.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534, 547).

Nothing in *Rector, Wardens, & Members of Vestry of St. Bartholomew’s Church v. New York*, 914 F.2d 348 (2d Cir. 1990), is to the contrary. OCFS Br. 39–40. That decision followed extensive discovery and trial on the merits. *St. Bartholomew’s Church*, 914 F.2d at 352. Further, plaintiff conceded that 85% of the buildings affected by the preservation law at issue were secular, negating any inference that the law targeted *primarily* religious organizations. *Id.* at 354. Here, by contrast, New Hope’s allegations identify *only* faith-based adoption agencies closed as a result of the regulation (and OCFS did not identify any secular victims in its evidentiary submissions opposing New Hope’s request for preliminary injunction). JA43. New Hope’s allegations, accepted as true, support its contention that the regulation was motivated by animosity toward identified religious views and practices concerning marriage and family. “[T]he effect of a law in its real operation is strong evidence of its object.” *Lukumi*, 508 U.S. at 535.

Drawing all reasonable inferences from the allegations in New Hope’s favor, New Hope stated a claim that the regulation was motivated by hostility to religious practices and is thus not neutral within the meaning of *Smith*.

**2. New Hope adequately alleged that enforcement of the regulation has been tainted by animus against religious beliefs and practices.**

To escape strict scrutiny under *Smith*, a law must also “be *applied* in a manner that is neutral toward religion.” *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (emphasis added). New Hope alleged facts that raise a reasonable inference that OCFS’s enforcement of the regulation against New Hope and other faith-based adoption agencies has been anything but neutral.

New Hope’s allegation that a number of religious adoption agencies were eliminated from OCFS’s list of approved agencies at the same time that OCFS was leveling its “conform or close” threats against New Hope, JA43, combined with OCFS’s statement to New Hope that “Some Christian ministries have decided to compromise and stay open,” JA40, supports a reasonable inference that OCFS had specifically identified, and was pursuing in its enforcement, a category of Christian or religious adoption agencies.

OCFS admits that this and other statements made by OCFS were “arguably ambiguous,” OCFS Br. 44, and that “such statements ‘are susceptible of different interpretations,’” OCFS Br. 43 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1729). In other words, OCFS admits that its statements could be construed to demonstrate hostility against religious agencies and their faith-based beliefs about marriage and family. This is true and fatal. Under the Supreme Court’s “slight

suspicion [of] . . . animosity” and “subtle departure from neutrality” standard, *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534, 547), New Hope is entitled to discovery to probe that ambiguous animosity through discovery.<sup>3</sup>

These facts taken together support a reasonable inference that OCFS’s enforcement of the regulation has been non-neutral because it targeted religious organizations and practices. Accordingly, the district court’s dismissal of New Hope’s free exercise claim was error.

**C. Satisfying the *Smith* test is necessary but not sufficient because the regulation unconstitutionally interferes with New Hope’s faith and mission.**

Even if New Hope had not adequately alleged that the regulation is not neutral or generally applicable, the regulation still would be unconstitutional as applied to New Hope because it intrudes into and impairs the very center of New Hope’s mission. The Supreme Court has repeatedly found that such intrusions violate protected free exercise quite apart from the test articulated in *Smith*. (New Hope Br. 16–19.) OCFS works hard to paint the leading example, *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171

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<sup>3</sup> By disparaging New Hope’s religious beliefs as “archaic, irrational, and bigoted,” *Amici American Atheists, et al.*, simply repeat and amplify the value judgments about and hostility toward those beliefs disclosed in OCFS’s own statements and actions. Br. for American Atheists, *et al.*, as *Amici Curiae* at 2; New Hope Br. 29–30.

(2012), as an arbitrary exception to *Smith* that should be cabined in every way possible. But *Hosanna-Tabor* was not a historical quirk. Rather, in applying the ministerial exception in that case, the Supreme Court implemented the broader and clearly stated principle that courts should respect “a spirit of freedom for religious organizations, an independence from secular control or manipulation,” which bars even neutral legislation from interfering with matters at the center of a religious organization’s “faith and mission.” *Hosanna-Tabor*, 565 U.S. at 185–86, 190 (discussing, e.g., the Court’s refusal in 1872 to resolve a property dispute between warring factions within the Presbyterian Church).

This case does not require the Court to discern the outermost applications of these principles because New Hope’s adoption ministry falls well within the protected core. That ministry obeys the Apostle James’s command to “look after orphans and widows in their distress.” JA9, JA15. And many Christian traditions teach as a fundamental tenet that families are best built around a married mother and father. *See Obergefell*, 135 S. Ct. at 2602.

Significantly, *all* of the post-*Smith* applications of these principles to protect religious organizations, as well as the Court’s earlier decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), have involved relations between men and women, marriage, and the formation of the next generation—matters central to the survival of any culture and sacred to

the leading world religions. New Hope’s effort to place children in families with a married mother and father—the setting New Hope views as God’s best plan for children—and its counseling of adoptive and birthparents consistently with that goal, are indeed at the center of its “faith and mission.” *Hosanna-Tabor*, 565 U.S. at 190.

OCFS attempts to neuter these principles of *Hosanna-Tabor* in multiple ways. None has merit.

*First*, OCFS argues that New Hope is not a “church” and is not led by “clergy.” OCFS Br. 23. This is true but irrelevant. *Hosanna-Tabor* itself involved a school—albeit a school operated by a church—and the Court repeatedly referred broadly to “religious organizations” in its analysis. 565 U.S. at 186, 187, 188, 189, 195.

*Second*, OCFS overreads *Hosanna-Tabor*’s distinction between “outward physical acts” and “internal decision[s]” affecting a religious organization’s “faith and mission.” 565 U.S. at 190. Almost all “internal decision[s]” manifest in some “outward physical acts.” Churches that define marriage as an opposite-sex union decline to perform same-sex wedding ceremonies. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727. And religious organizations like New Hope that care for orphans and widows in their distress will likewise decline to place children in homes that conflict with the organization’s religious convictions concerning family and the best environment for children.

In fact, by invoking the “physical acts” language of *Smith* to override New Hope’s core convictions, OCFS is attempting a do-over on precisely the argument asserted and rejected in *Hosanna-Tabor*. There, the EEOC urged that the ADA’s neutral and generally applicable nondiscrimination provision could be applied to punish a religious school’s “physical act” of discharging a teacher, “even when applied to religious entities and even when the entity claims a religious motivation for its actions.” Br. for Resp’t E.E.O.C, *Hosanna-Tabor*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 3319555, at \*24. The Supreme Court rejected that logic. *Hosanna-Tabor*, 565 U.S. at 190.

*Third*, OCFS urges that New Hope was not “incorporated for the purpose of inculcating a religious belief.” But this is irrelevant. New Hope has amply alleged that one of its *present* mission priorities is to obey and teach, “both expressly and by example,” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000), what it believes to be God-given principles affecting the best interests of children. JA25–26. Neither logic nor precedent suggests that a later-adopted but sincere mission is less protected than an earlier one.

*Finally*, OCFS claims a special power to infringe “the faith and mission” of religious adoption ministries because adoption is “now highly regulated.” OCFS Br. 22–23. But the Supreme Court has repeatedly rejected this sort of circular boot-strapping of governmental power at the expense of First Amendment liberties. *See* New Hope Br.

44–45; *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (rejecting argument that states can “reduce a group’s First Amendment rights by simply imposing a licensing requirement”). Otherwise, the ability to regulate would give States “a powerful tool to impose invidious discrimination of disfavored subjects.” *Id.*

Thus, even if New Hope had not adequately alleged that the regulation is not neutral or generally applicable (as it did), OCFS still could not constitutionally apply the regulation to force New Hope to violate religious beliefs at the heart of its faith and mission. New Hope Br. 16–19.

**II. New Hope stated a claim that the regulation violates its free speech rights and right of expressive association.**

**A. New Hope’s adoption ministry consists almost entirely of speech.**

OCFS asserts that the regulation “addresses conduct, not speech.” OCFS Br. 46. But OCFS can say that only by stopping its ears to New Hope’s extensive allegations detailing how its counseling and other speech about relational and family matters are part and parcel of New Hope’s work with birthparents and adoptive parents. New Hope Br. 38–39 (citing JA17–18, JA24, JA26, JA30, JA32, JA36, JA40, JA53–54).

OCFS’s attempt to deny that this extended conversation and counseling is “expressive activity,” OCFS Br. 49, despite its grudging admission that New Hope’s work with adoptive and birth parents

“likely entails verbal and written communications,” OCFS Br. 58, deprives words of meaning. *Amicus* The Becket Fund further details how New York law *requires* adoption agencies to engage in extensive discussion with adoption candidates about intensely personal topics, to engage in “critical thinking,” and then to express discretionary judgments about each individual applicant. Br. for The Becket Fund for Religious Liberty as *Amicus Curiae* at 5–8. This is protected speech.

Meanwhile, 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 speech. “[C]haracterizing speech as conduct is a dubious constitutional enterprise,” *Wollschlaeger v. Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017),<sup>4</sup> and effectively ignores the Supreme Court’s recent admonition against “mark[ing] off new categories of speech for diminished constitutional protection,” *NIFLA*, 138 S. Ct. at 2372.

OCFS’s invocation of *FAIR*, OCFS Br. 46, reads that case backwards. In *FAIR*, the Supreme Court held that Congress could require schools to provide military recruiters “equal access” to an empty conference room. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006). The regulation challenged here, however,

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<sup>4</sup> See also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-28 (2010) (rejecting attempt to recast “communicating a message” as “conduct”).

does not require New Hope to provide unmarried and same-sex couples “equal access” to an empty room.<sup>5</sup> Quite the contrary, OCFS seeks not only to force New Hope *into* that empty room and into an intimate counseling and evaluation relationship, but also to control what New Hope “may or may not say,” *FAIR*, 547 U.S. at 60, inside that room and in its subsequent recommendations to birthparents and the State. Such an intrusion into speech and content is precisely what the Supreme Court contrasted in *FAIR* as *impermissible*.<sup>6</sup>

**B. The challenged regulation will force New Hope to change or dilute its desired message, a point that OCFS no longer denies in this appeal.**

New Hope alleged in detail that it seeks to convey “a system of values about life, marriage, family and sexuality to both birthparents and adoptive parents” throughout its interactions with both, JA17–18, JA53; that the regulation requires New Hope “to engage in speech and expression it does not wish to convey,” JA53; and that the regulation

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<sup>5</sup> Nor is New Hope’s adoption ministry “commercial activity.” *United States v. Lee*, 455 U.S. 252, 261 (1982); see OCFS Br. 17. New Hope treats infants in need of homes, birthparents, and adoptive parents as participants in its ministry—not as customers or goods to be sold.

<sup>6</sup> See *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (explaining that *FAIR* involved the mere “facilitation” of someone else’s speech rather than direct compulsion to speak oneself).

inevitably “would change New Hope’s message and counseling to adoptive families and birthparents,” JA54.

In the district court, OCFS met this allegation with flat denial, asserting, “Nothing about the regulation limits what message [New Hope] may convey, or what views it wishes to express,” Dist. Ct. ECF No. 37 at 9, and claiming that the regulation “neither compels nor prohibits New Hope from expressing its beliefs [to a gay or lesbian couple] . . . no matter how uncomfortable that conference room conversation might be,” JA233.

Erroneously crediting OCFS’s representations rather than New Hope’s allegations, the district court premised its ruling on similarly categorical findings that “OCFS and the regulation simply do not compel speech,” that “OCFS is not . . . compelling [New Hope] to change the message it wishes to convey,” and that “nothing is preventing New Hope from continuing to share its religious beliefs [about marriage and family] throughout the entire process.” JA268–70.

In fact, as New Hope alleged, New Hope’s decision not to enter into all-talk counseling and advisory relationships with unmarried and same-sex couples, include them in group discussions with other adoptive parents, or recommend them as adoptive parents is essential to preserving its right not to “foster . . . an idea [it] find[s] morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). It was error for the court below to find otherwise on a motion to dismiss.

Moreover, with the district court’s ruling in its pocket, OCFS has done a U-turn and signaled its intent to censor that “uncomfortable . . . conference room conversation,” stating in a more recent brief to this Court that the regulation does not “restrict New Hope’s speech *unrelated to its provision of adoption services*,” and that “New Hope is not precluded from espousing its beliefs about marriage and family . . . *outside the contours of its adoption program*.” 2d Cir. ECF No. 101 at 20, 21 (emphasis added). In its most recent brief, OCFS turns coy, asserting that “the extent of any restriction on New Hope’s expressive activities within the contours of its provision of adoption activities remains unclear.” OCFS Br. 54. But OCFS’s intentions are not unclear; it has shown its cards, and they are as New Hope originally alleged. OCFS intends to regulate New Hope’s expression of its beliefs “[*in*]side the contours of its adoption program.” 2d Cir. ECF No. 101 at 21.

This much is clear: the district court erred by accepting OCFS’s representations rather than New Hope’s allegations at the motion-to-dismiss stage, and it further erred by relying on a false premise—a premise now disavowed by the State. Compelling New Hope to counsel unmarried or same-sex couples about adoption and parenting, and to recommend them to birthparents as adoptive parents, will compel speech and change or dilute New Hope’s desired messages concerning marriage and the best environment for children. New Hope Br. 40–42. The First Amendment denies the State that power.

**C. OCFS’s attempts to justify the regulation’s intrusion on free speech misread binding precedent.**

**1. Precedents relating to non-discrimination laws do not authorize application of the regulation to violate New Hope’s speech rights.**

OCFS asserts a general power for nondiscrimination laws to override free speech rights. OCFS Br. 46–50. But the relevant precedents support no such doctrine.

OCFS quotes from *Hurley* only to reverse its import. OCFS Br. 47. While the *Hurley* Court acknowledged the government’s general power to legislate against discrimination in “public accommodation, resort, or amusement,” it unanimously rejected the State’s attempt to use that power to “violate[ ] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,” including the right not to be forced to affirm “a belief with which the speaker disagrees.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). Requiring New Hope to counsel and recommend unmarried and same-sex couples as adoptive parents would have just that effect, forcing it to affirm a belief—that adoption by unmarried and same-sex couples can be in a child’s best interest—“with which [New Hope] disagrees.” *Id.*<sup>7</sup>

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<sup>7</sup> The informed consent disclosure approved in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), consisting as it did of a disclosure of indisputably “truthful, nonmisleading information” in connection with a surgical medical procedure, *id.* at 882, has nothing in common with the subjective and value-laden speech inherent in the

OCFS also ignores the Supreme Court’s decision in *Dale*.<sup>8</sup> There the Court held that “the application of New Jersey’s public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts’ freedom of expressive association.” *Dale*, 530 U.S. at 656. The Court recognized that in earlier cases it had held that “States have a compelling interest in eliminating discrimination against women in public accommodations.” *Id.* at 657. But the Court went on to conclude that in each of those cases “the enforcement of [the challenged] statutes would not materially interfere with the ideas that the organization sought to express.” *Id.* On the other hand, in cases where, as here, a state’s non-discrimination requirement “would significantly burden [an] organization’s right to oppose or disfavor [certain] conduct,” the “state interests embodied in [that requirement] do not justify such a severe intrusion” on the organization’s free speech. *Id.* at 659.

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counseling relationship that OCFS is trying to force New Hope to engage in here. *See NIFLA*, 138 S. Ct. at 2373 (“Indeed, the requirement that a doctor obtain informed consent to perform an operation is firmly entrenched in American tort law.”).

<sup>8</sup> The *Amici* Civil Rights Organizations ignore *both Dale* and *Hurley* in their argument that the State’s interest in prohibiting discrimination justifies severely intruding on New Hope’s speech. Br. for Civil Rights Organizations as *Amici Curiae* at 16–25.

## **2. The impact on New Hope’s free speech rights cannot be dismissed as incidental.**

Repeatedly, OCFS attempts to dismiss the impairment of New Hope’s free speech rights as merely “incidental,” OCFS Br. 2, 15, 50, echoing the district court’s dismissal of that burden as “slight,” JA272. But courts are required to “give deference to an association’s view of what would impair its expression.” *Dale*, 530 U.S. at 653.

In *Dale*, the Supreme Court recognized that Dale’s mere “*presence* in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world,” of approval of homosexual conduct. *Id.* (emphasis added). Therefore, the Court held that forcing “the Boy Scouts [to] retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct.” *Id.* at 659. Similarly in *Hurley*, the Court recognized that the very “*presence* of the organized marchers” would impermissibly superimpose a message that the parade’s organizer’s did not wish to communicate. 515 U.S. at 574–75 (emphasis added).

Equally here, forcing New Hope to counsel unmarried and same-sex couples about parenting, forcing it to recommend such couples to birthparents, and forcing it to affirm to the State that such adoptions are in the best interests of individual children would significantly burden New Hope’s ability to express messages at the very heart of its ministry and beliefs. JA17–18, JA53–54.

The “First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” *Obergefell*, 135 S. Ct. at 2607. Destroying that “proper protection,” as OCFS seeks to do, would place much more than an “incidental” burden on New Hope’s First Amendment rights.<sup>9</sup>

**D. New Hope adequately alleged that the regulation violates its rights of expressive association.**

New Hope has alleged in great detail the message that it conveys to birthparents and adoptive parents concerning its “system of values about life, marriage, family, and sexuality.” New Hope Br. 39. New Hope has alleged that adoptive parents and birthparents choose to work with New Hope precisely because they value New Hope’s counseling from this Christian perspective. JA46. And including unmarried and

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<sup>9</sup> OCFS also briefly acknowledges the district court’s alternative ruling that New Hope’s speech is “governmental speech.” JA268; OCFS Br. 52. But OCFS urges the Court not to “address such a hypothetical question.” OCFS Br. 52. And OCFS manages at best a half-hearted defense of the court’s ruling—recycling its circular and unbounded argument that it can regulate New Hope’s speech because “New York long ago chose to” regulate private adoption providers. OCFS Br. 52, 53–54. New Hope’s speech is not government speech, and OCFS has no right to regulate it as if it were. *See* New Hope Br. 44–45. Finally, OCFS’s invocation of cases concerning government funding is misplaced given OCFS’s recognition that “New Hope operates as a privately funded agency.” OCFS Br. 53.

same-sex couples in its counseling sessions, recommending them to birthparents, and placing children with them for adoption would inevitably change or dilute New Hope’s ability to communicate its values. New Hope Br. 47.

In opposing New Hope’s expressive association claim, OCFS skates past both the facts and the law. As to the facts, OCFS contends that New Hope and its clients are not “engaged in expressive association,” OCFS Br. 58, or engage in only “a mere kernel of expression,” OCFS Br. 56, and that New Hope’s “mission is not to engage in protected speech or to inculcate values.” OCFS Br. 58. But to say that requires willful blindness to New Hope’s actual allegations. And as to the law, there is no requirement that an organization must have been “formed for the purpose” or “organized” *ab initio* “for expressive purpose” to enjoy expressive association rights. OCFS Br. 57 n. 18, 59. On the contrary, “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

In a footnote, OCFS tries to cabin this language in *Dale* by claiming that the Court “was not contradicting its earlier statement that a group has a protected expressive-association right only if it is *formed for the purpose of* and engages in protected expression.” OCFS Br. 57 n.18 (emphasis added). But OCFS does not provide a citation for

this alleged “earlier statement.” Nor can it because no such statement exists. Moreover, the very next line in the Court’s opinion contradicts OCFS’s manufactured “purpose” requirement: “An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Dale*, 530 U.S. at 655.

It is likely true that New Hope’s biblically based views about human nature, sexuality, and the best home for children have gone from mainstream to minority. “But this is scarcely an argument for denying First Amendment protection to those who refuse to accept [this shift in] views.” *Dale*, 530 U.S. at 660. “[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.” *Id.*

Like the Boy Scouts, New Hope seeks to “inculcate [those with whom it works] with [its] values—both expressly and by example,” and *Dale* teaches that both forms of “expressive activity” are protected. *Dale*, 530 U.S. at 649–50. The forced inclusion of same-sex and unmarried couples in New Hope’s individual and group counseling sessions, in the portfolios of adoptive parents that New Hope shows to birthparents, and among the families that New Hope works with post-placement would severely undercut New Hope’s ability to communicate, expressly and by example, its beliefs and ideals concerning the God-formed nature of marriage and family. The district court’s finding that this would not

impair New Hope’s expressive association in a direct or substantial way, JA272, was not only factually wrong but also improper on a motion to dismiss, New Hope Br. 47–49.

Contrary to OCFS’s implication, no case limits expressive association rights to formal membership organizations. OCFS Br. 58–59. In fact, the Supreme Court recognizes that “freedom of expressive association protects more than just a group’s membership decisions.” *Rumsfeld*, 547 U.S. at 69. New Hope’s relationships with adoptive parents and birthparents—which are far more intense, intimate, and communicative than the relationships among members of some ideological and political advocacy organizations—are at least as deserving of protection as membership decisions. Certainly, New Hope’s relationships are utterly unlike the “transactional association” between a dance hall and its patrons. OCFS Br. 60.

Nor is New Hope’s expressive association any less protected because its communications are about moral and religious values and beliefs rather than “political expression.” OCFS Br. 61. OCFS tries to distinguish *NAACP v. Button*, 371 U.S. 415, 428–29, 437 (1963), and *In re Primus*, 436 U.S. 412, 431 (1978), on the theory that those cases “involved political speech” and “political association.” OCFS Br. 60–61. But those cases did not create a special category for “political speech” that would distinguish it from “religious speech” for constitutional purposes. On the contrary, what matters is that the challenged

“speech—as part of associational activity—was expression intended to advance beliefs and ideas.” *Primus*, 436 U.S. at 438 n.32. New Hope’s expressive association qualifies for constitutional protection under this standard, and the district court erred by dismissing its expressive association claim.

**III. OCFS does not dispute that it cannot satisfy its burden under strict scrutiny at this preliminary stage of the litigation.**

If strict scrutiny applies, then OCFS bears the burden of proving that the regulation’s application to New Hope satisfies that “most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). *See also Lukumi*, 508 U.S. at 546 (holding that challenged ordinances failed strict scrutiny because *the City* had “not demonstrated” that its interests were “compelling”). It is effectively impossible for the state to satisfy that burden at the motion-to-dismiss stage given that evidentiary submissions from the defendant may not be considered and inferences may not be drawn in favor of the defendant when deciding a motion to dismiss. New Hope Br. 34–36. In its brief, OCFS does not contend otherwise.

OCFS also does not explain how *closing* faith-based adoption agencies that receive no government funding and are entirely supported by private donations and fees could *further* the State’s interest in increasing the number of adoptive parents in New York. Neither does

OCFS explain how closing agencies that respectfully refer unmarried or same-sex couples to other agencies could somehow increase the opportunity for any legally qualified adult to adopt a child. *See* New Hope Br. 25–26. Nor does the State make any argument that New Hope’s placements have ever been inconsistent with the State’s interest in “ensuring that prospective adoptive parents provide safe and appropriate homes” for children that are in “each child’s best interests.” OCFS Br. 3. Even the district court recognized that the State had not leveled any such accusation against New Hope. JA281.

And finally, OCFS does not attempt to explain how shuttering a privately funded agency that has placed more than 1,000 children for adoption could do anything but *harm* what should be the State’s primary interest: placing as many children as possible in loving homes.

**IV. This Court should issue or direct the district court to issue a preliminary injunction to block the announced intent of OCFS to shutter New Hope’s adoption service at the earliest possible moment.**

In the district court, New Hope offered sufficient evidentiary support through affidavits and its verified complaint to demonstrate that it will likely succeed on one or more of its constitutional claims. *See* New Hope Br. 51–54. Nowhere in its brief on appeal or in its pleadings below has OCFS tried to dispute any of New Hope’s proffered evidence by offering or citing to any evidentiary submissions of its own. OCFS does not argue that the challenged regulation can survive strict

scrutiny. Nor does OCFS dispute that the deprivation of New Hope’s First Amendment rights and termination of New Hope’s license to act as an adoption agency—even if subsequently overruled and revoked—would cause New Hope irreparable injury. *See* New Hope Br. 55.

Instead, if this Court concludes that any one of New Hope’s claims should have survived the motion to dismiss, OCFS’s *only* grounds for objecting to this Court ordering a preliminary injunction on remand is a technical argument that this Court should not exercise its discretion to order an injunction because the district court dismissed New Hope’s request as moot without reaching the merits. OCFS Br. 62–64. This is remarkably cynical, given that in the midst of this appeal OCFS revoked a proposed stand-still agreement that both parties represented to this Court had been agreed to in principle and has taken aggressive action to close New Hope’s adoption ministry. *See* 2d. Cir. ECF No. 56-1 at 3–4, 5–7. OCFS continues to threaten to do so at the earliest opportunity, long before any further proceeding could occur before the district court. *See* 2d. Cir. ECF No. 110 at 1–2, 11.

New Hope needs immediate relief, and this Court has authority to “direct the district court to issue [an] injunction” on remand. *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986). The Court has exercised that authority before,<sup>10</sup> including in a similar case where the district court’s

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<sup>10</sup> *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 489 (2d Cir. 2013); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

ruling on the plaintiffs' preliminary injunction motion "resemble[d] more closely a grant of summary judgment to the defendants." *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 852, 853 n.5, 873 (2d Cir. 1996). Equity, orderly adjudication, and the exceptionally strong protections accorded to First Amendment rights all merit this Court directing entry of a preliminary injunction on remand.

## CONCLUSION

For the reasons set forth above, New Hope respectfully submits that this Court should reverse the district court's order dismissing New Hope's free exercise and free speech claims and its order dismissing New Hope's motion for a preliminary injunction as moot, should remand for further proceedings consistent with this Court's order, and should direct the district court to enter a preliminary injunction on remand on the terms requested in New Hope's prayer for relief in its opening brief.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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## CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, this brief was filed electronically with the Clerk of the Second Circuit Court of Appeals through the Court's electronic filing system, which will accomplish service on the following counsel:

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