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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,	)	
	)	
	)	
Plaintiff,	)	CASE NO. 18-CV-1419
	)	
vs.	)	
	)	
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.	)	
	)	

**TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HON. MAE A. D'AGOSTINO  
TUESDAY, FEBRUARY 19, 2019  
ALBANY, NEW YORK**

**FOR THE PLAINTIFF:**  
ALLIANCE DEFENDING FREEDOM  
By: ROGER GREENWOOD BROOKS, ESQ., DAVID A. CORTMAN, ESQ.,  
and JEANA HALLOCK, ESQ.  
15100 N 90th Street  
Scottsdale, Arizona 85260

**FOR THE DEFENDANT:**  
OFFICE OF THE ATTORNEY GENERAL  
By: ADRIENNE J. KERWIN, ESQ.  
The Capitol  
Albany, New York 12224

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1 (Open court, 10:53 a.m.)

2 THE CLERK: Today is Tuesday, February 19, 2019. The  
3 time is 10:54 AM. The case is New Hope Family Services,  
4 Incorporated versus Sheila J. Poole in her capacity as acting  
5 commissioner for the Office of Children and Family Services for  
6 the State of New York, case No. 18-CV-1419. We're here today  
7 for oral argument. May we have appearances for the record,  
8 please.

9 MR. BROOKS: Roger Brooks for plaintiff New Hope  
10 Family Services.

11 MR. CORTMAN: David Cortman, Your Honor.

12 MS. HALLOCK: Jeana Hallock.

13 THE COURT: Good morning.

14 MS. KERWIN: Good morning. Adrienne Kerwin for Acting  
15 Commissioner Poole.

16 THE COURT: Good morning to you.

17 I'm going to begin this morning with argument on  
18 behalf of the plaintiff on the motion.

19 MR. BROOKS: Your Honor, thank you. Again Roger  
20 Brooks. And counsel did confer before, and our expectation -- I  
21 hope it's acceptable to the Court -- is that there are two  
22 motions of course with opposite burdens, but we'll argue them  
23 together rather than trying to break that out.

24 THE COURT: I think that's probably the most efficient  
25 way to do it.

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1 MR. BROOKS: And there was also an indication from  
2 your chambers that you were expecting -- and I don't know  
3 whether you're expecting exactly or about half an hour of  
4 argument per side. We just want to make sure.

5 THE COURT: I planned for 30 minutes. If I have  
6 questions that take me beyond 30 minutes, then we'll do that,  
7 but the plan is 30 minutes each side.

8 MR. BROOKS: Then we will make that happen, Your  
9 Honor.

10 Your Honor, at any given time, New York has more than  
11 4,000 children who are in need of adoption and permanent loving  
12 homes, and fewer than 2,000 of those are adopted each year.  
13 Since it was founded more than half a century of ago, New Hope  
14 has found homes for over a thousand newborn and infant children  
15 in this state. That's who it serves. And the people of New  
16 Hope are motivated by their faith, and they view their ministry  
17 through this organization as living out their faith in service  
18 to infants and birth mothers.

19 THE COURT: New Hope sees its mission, if I'm correct,  
20 as a mission to offer orphans and widows assistance in their  
21 time of distress. Would that be correct?

22 MR. BROOKS: Your Honor, I'd say that's a fair  
23 statement of historic context. In the modern world, many of  
24 these women who are unable to care for their children are not  
25 widows, but they are most commonly not married.

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1 THE COURT: What about orphans and what about making  
2 the pool of adoptive parents larger as opposed to smaller by  
3 allowing gay and lesbian adoptions?

4 MR. BROOKS: Well, Your Honor, let me speak for a  
5 moment to the legal history and then address the factual  
6 question, if I may. As Your Honor knows, in 1995 the In Re  
7 Jacob case, the Court of Appeals of this state changed what had  
8 been the law. Before that, a family court couldn't approve an  
9 adoption by an unwed couple or same sex couple.

10 THE COURT: I'm aware of the history.

11 MR. BROOKS: Fine. So Jacobs permitted that and  
12 expands the pool. What New Hope does is devote its mission  
13 energies, all of its work is funded by private contributions and  
14 fees from adoptive parents, nothing from the state.

15 THE COURT: No public funds whatsoever?

16 MR. BROOKS: No public funds whatsoever, exactly.

17 THE COURT: I have even a broader question. When New  
18 Hope is placing a child with a family, you're doing that in the  
19 best interest of the child, correct?

20 MR. BROOKS: That is always their goal.

21 THE COURT: That's the standard, right?

22 MR. BROOKS: Yes, it is.

23 THE COURT: Do you ever ask the birth parents if they  
24 have any objection to a child being placed with a gay and  
25 lesbian couple, or does that never come up?

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1 MR. BROOKS: Well, I believe -- and Your Honor, given  
2 the state of the case, I need to confine myself to what I know  
3 from the complaint and the affidavits. That's largely the limit  
4 of my knowledge. The answer is in every case working with a  
5 birth mother, there's extensive discussion about what that  
6 mother wants for her child in terms of family.

7 THE COURT: And under New York law, if a birth parent  
8 said to you, "My Christian faith is extremely important. I want  
9 my child placed with a Christian family or my ethnicity is very  
10 important. Can you help place the child in a particular group?"  
11 You can legally honor that under existing New York law, correct?

12 MR. BROOKS: Always subject, as I read the law, to the  
13 requirement of the best interest of the child. Yes, Your Honor.

14 THE COURT: So could there be individuals utilizing  
15 New Hope who might not object to their child being placed with a  
16 Christian lesbian or Christian gay couple?

17 MR. BROOKS: Well, obviously, Your Honor, the spectrum  
18 of faith within Christianity or Judaism, there's wide  
19 differences of views within those faiths, as Your Honor I'm sure  
20 is aware. Could such a thing happen? You and I could sit here  
21 and say it could happen, but there's nothing in the record to  
22 suggest such a request has ever been made by a birth mother to  
23 New Hope.

24 THE COURT: I mean if you have a child who is a  
25 hard-to-place child in any way at all -- just for example,

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1 learning disabilities, cognitive problems, physical handicaps --  
2 and there's a willing, able, adoptive family that happens to be  
3 gay or lesbian, is it your position that it's better to keep  
4 that child in a foster home or in some other custody rather than  
5 to place the child with a gay or lesbian couple?

6 MR. BROOKS: Your Honor, our position is that the  
7 factual background of the position is perhaps because of its  
8 outreach into faith communities by recruiting parents, New Hope  
9 has never failed to find multiple families that it was prepared  
10 to offer that it believes were consistent with the best interest  
11 of children. So it does place hard-to-place children. It's  
12 placing infants and newborns up to about two years by the nature  
13 of the pool it works with. So some of the issues that we deal  
14 with older children are probably not detectable at that stage.

15 But there's no allegation that New Hope has ever made  
16 a placement -- there's nothing from the state. You'll see this  
17 in the papers. There's no suggestion that New Hope has ever  
18 made a placement that was not consistent with the best interest  
19 of the child, nor is there any allegation that for reasons such  
20 as you suggest, New Hope hasn't been able to quickly place a  
21 child once it became eligible for adoption.

22 THE COURT: Another question that I have is that  
23 generally speaking in the adoption process, isn't it the  
24 independent home study that determines whether or not anyone is  
25 capable of adopting? You have to have a home study.

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1 MR. BROOKS: You certainly do have to have a home  
2 study. That's part of the service they do.

3 THE COURT: New Hope does its own home studies,  
4 correct?

5 MR. BROOKS: It does.

6 THE COURT: But what if a gay and/or lesbian couple  
7 came to New Hope? They had had a home study done by an  
8 independent social worker or independent psychologist, and that  
9 home study certified that they could be very appropriate  
10 parents? Is it still free speech if you were to adopt out to  
11 that couple when it wasn't New Hope that said that they would be  
12 appropriate parents? It was an independent home study. Where  
13 is the speech there? Where is the speech in trying to place  
14 children in appropriate, loving homes?

15 MR. BROOKS: Well, let me break that out, Your Honor.  
16 The specific fact situation you suggest where somebody else has  
17 done the home study and the adoption agency in some sense  
18 approves the adoption is not one that I'm familiar with and not  
19 one that arises in any of the facts that are alleged in the  
20 complaint or raised in affidavit by the state. I really can't  
21 speak to that situation.

22 THE COURT: Would New Hope ever endeavor to do a home  
23 study for a gay and/or lesbian couple?

24 MR. BROOKS: I believe the answer to that, Your Honor,  
25 is -- and this is the core of the allegation, that New Hope

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1 feels compelled by its faith to place children in a context that  
2 its faith teaches, given their beliefs about family, about  
3 marriage, about children, is in the best interest of the child.  
4 New Hope doesn't share New York State's belief that those sorts  
5 of families are equally in the best interest in the child.

6 So if somebody approaches New Hope asking for that, a  
7 situation would require New Hope to engage in extensive  
8 counseling-relating speech with the birth mothers about this  
9 potential adopting family. With the adopting family, there's  
10 extensive counseling. These are detailed in the affidavits, and  
11 I could give Your Honor cites. They're in the briefs as well.

12 THE COURT: I know it's hypothetical, but if a home  
13 study was done on a gay and/or lesbian couple and the home  
14 study, which is very exhaustive, as you know, sets forth the  
15 opinion that the gay and/or lesbian couple would provide  
16 excellent parenting to an orphan, what you're saying is that  
17 under no circumstances would you accept that because you're  
18 saying that it goes against your sincerely held religious  
19 belief, correct?

20 MR. BROOKS: Your Honor, New Hope would not perform  
21 that home study because it would be to put them heading towards  
22 a conclusion. It would be wasting the time of the parents.

23 THE COURT: You don't want to get to that conclusion  
24 that the gay or the lesbian parents could be very good parents.  
25 You don't want to risk doing the home study, right?

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1 MR. BROOKS: Your Honor, I too -- it's been a long  
2 time, but I've been through the process myself, and I'm familiar  
3 with how extensive it is. New Hope's faith teaches that the  
4 right environment for children and for infants, newborns, kids  
5 they're placing, what's in the best interest of those children  
6 is the types of families that New Hope succeeds time and again  
7 in recruiting.

8 The thing I would like to emphasize is New Hope's  
9 efforts in this area are all additive. That is, the state does  
10 what it can do. Other private agencies do what they can do, and  
11 all those options are available for anybody who wants to adopt,  
12 for anybody who wants to place their child. New Hope devotes  
13 private efforts, private resources, private contributions to  
14 placing still more children, and there's no contention that any  
15 of those placements have been contrary to the best interest of  
16 the child.

17 THE COURT: I'm not suggesting it has been, and I  
18 accept from reading your papers that New Hope is attempting and  
19 has placed children in homes that you think are appropriate.  
20 But if a gay and/or lesbian couple comes to New Hope and says,  
21 "Will you do a home study on us," which is a precursor to moving  
22 forward the process, your answer would be no. It's against our  
23 sincerely held religious beliefs, correct?

24 MR. BROOKS: That's correct, Your Honor.

25 THE COURT: And that you would counsel them that they

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1 could go someplace else, correct?

2 MR. BROOKS: That is correct.

3 THE COURT: It sounds like separate but equal to me,  
4 and that's very troubling to me. How does it sound to you? You  
5 can't adopt here, but you can go someplace else and adopt.

6 MR. BROOKS: Your Honor, let me give you an analogy.  
7 The Supreme Court in the Obergefell decision -- and this state I  
8 believe reached this conclusion earlier, but in the Obergefell  
9 decision, the Supreme Court opened up the possibility of  
10 marriage between same sex couples. That's legal in every state  
11 of this nation now.

12 What the state is attempting to do here, what the  
13 state is attempting to require of New Hope here would be the  
14 equivalent of saying to the Catholic church or any church that  
15 because it's legal for same sex couples to be married, then any  
16 clergyman who is authorized by the State of New York to perform  
17 legally valid marriages must perform same sex marriages.

18 That's not the law, and the Supreme Court said in  
19 Masterpiece Cakeshop case that that type of order to a religious  
20 organization -- you must perform same sex marriages -- could not  
21 stand in the face of the First Amendment rights of both free  
22 speech and free exercise.

23 So there's a very large difference, Your Honor,  
24 between permission, which is clearly granted here, and many  
25 couples, unmarried couples and same sex couples in this state

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1 are adopting. There's a very large gap between permission and a  
2 command to a religious organization to act in a way and to speak  
3 in a way they believe to be wrong and false.

4 THE COURT: But that Masterpiece Cakeshop Supreme  
5 Court case, which I've read multiple times --

6 MR. BROOKS: I'm sure you have, Your Honor.

7 THE COURT: -- really in many way hinges on the manner  
8 in which Masterpiece Cakeshop was treated by the commission, and  
9 there was language in that decision talking about the palpably  
10 improper comments of the commission and how they, you know,  
11 really disparaged the cake shop.

12 And here, I'm looking at the applicable section of the  
13 law, 421.3(d) I believe of NYCRR, 18 NYCRR. It prohibits  
14 discrimination and harassment against applicants for adoption  
15 services on the basis of race, creed, color, national origin,  
16 sex, age, sexual orientation, gender identity or expression,  
17 marital status, religion, or disability.

18 I don't see any animus toward Christians here. I  
19 don't see things that appeared on the record in the Masterpiece  
20 Cake case. I see this as really a very content neutral  
21 regulation. And so I don't think that the Supreme Court wedding  
22 cake case is really instructive on what I must do here.

23 MR. BROOKS: Your Honor, the holding of the Supreme  
24 Court in the Masterpiece Cake, you've correctly described the  
25 context. It's in a discussion in which the Court has explained

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1 principles of free exercise. They give as an example of  
2 something the state could not do to compel a clergyman to  
3 perform same sex marriages. And it seems to me that the analogy  
4 between compelling a religious entity, a church to perform same  
5 sex marriages and compelling a religious ministry to infants and  
6 birth mothers to facilitate placement in a family environment  
7 they believe is not in the best interest of children is  
8 really -- they're closely analogous.

9 Now, you've said -- if I may, you raise the question  
10 of whether this law is content and viewpoint neutral. I can  
11 address that if you would like.

12 THE COURT: I read your papers. I know you believe it  
13 isn't, but go ahead. Tell me why.

14 MR. BROOKS: I would like to break that out because as  
15 you know, if we're talking from the free speech side, that's  
16 where we kind of engage most directly with that. We believe the  
17 law is invalid under both free speech and free exercise  
18 principles, but let me address this.

19 You know that it's a requirement that we're going to  
20 have to get this law through strict scrutiny unless it's content  
21 neutral. You've pointed to the text of the law and said, well,  
22 it looks neutral to me.

23 THE COURT: It seems to apply to everybody equally. I  
24 don't see anything in there that says that we believe  
25 Christianity is not an appropriate faith and therefore we're

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1 going to go after you. I mean I don't see anything -- I  
2 simplified it, but I don't see anything like that.

3 MR. BROOKS: Let me stick with the speech principle  
4 first, Your Honor. The fact that a law applies its requirements  
5 to everyone does not make it content neutral within the meaning  
6 of the law. We pointed that out. If that were the case, Your  
7 Honor, then a law that says everyone must salute the flag would  
8 be neutral. It wouldn't inquire into anybody's beliefs. It  
9 wouldn't focus on the fact that there are conscientious  
10 objecting denominations that don't want to salute the flag.

11 It would on its face be neutral, yet in the midst of  
12 World War II, the Supreme Court said no. You can't pass a law  
13 of general applicability that requires people to speak something  
14 they believe that is contrary to conscience, they don't want to  
15 say. That's the Barnette case. You know it well. So the fact  
16 that you look at the law on its face, it looks content neutral  
17 that applies equally to everybody, doesn't answer the question.

18 It's also the case that the state here has said this  
19 is content neutral because it has a neutral goal of fighting  
20 discrimination, of ending discrimination.

21 THE COURT: And that's a good goal, isn't it? Isn't  
22 that an important societal goal to prevent and to outlaw  
23 discrimination?

24 MR. BROOKS: Well, those are two different questions,  
25 Your Honor.

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1 THE COURT: Maybe you can answer both of them.

2 MR. BROOKS: I'm going to try to do that. One is: Is  
3 it a legitimate and appropriate goal for the state to combat  
4 discrimination? And of course, at different times and different  
5 people have different views of what's appropriate judgment  
6 distinction and what's discrimination, but broadly speaking, the  
7 answer to your question is yes, and the state is free to take  
8 all sorts of actions to teach against, to act against  
9 discrimination.

10 Now, is it appropriate to outlaw discrimination?  
11 Well, the answer to that is when it runs into First Amendment  
12 principles, often the answer to that is not. And I would call  
13 your attention particularly to the Supreme Court's case in  
14 *Hurley*, which again is surprisingly closely analogous. There,  
15 the state Massachusetts asserted that the goal of their public  
16 accommodation law was "to ensure that discrimination does not  
17 occur." And the Supreme Court there said the speech clause has  
18 no more certain antithesis than the concept of censoring or  
19 compelling speech "to produce a society free of biases." And  
20 they struck it, and they said no. You can't require that parade  
21 organizers to let in a group that's representing a position that  
22 the parade organizers don't want to sponsor.

23 And so what may be a legitimate policy goal for the  
24 state to advocate in other ways, when it intersects First  
25 Amendment principles, the Supreme Court said in *Hurley* that this

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1 goal which is otherwise meritorious perhaps of combatting  
2 discrimination "was a decidedly fatal objection." Just the  
3 opposite of a compelling objection, a decidedly fatal objection.

4 So the difference between what the state can  
5 legitimately pursue and what the state can outlaw, what the  
6 state can compel, what the state can compel speech that a  
7 religious organization or anybody of conscience disagrees with  
8 are two very different questions, and our First Amendment law  
9 both with regard to speech and with regard to free exercise is  
10 all about frankly letting people say things that are generally  
11 disapproved and letting people do things that broader society  
12 doesn't approve of because if that's not the situation, you  
13 don't find yourself in court.

14 THE COURT: Why don't you move on to your equal  
15 protection argument for me.

16 MR. BROOKS: Well, Your Honor, we did not make a  
17 preliminary injunction request based on equal protection  
18 argument.

19 THE COURT: Right.

20 MR. BROOKS: In the motion to dismiss, I will tick  
21 through some of the allegations we believe are sufficient to  
22 defeat the motion to dismiss. That is, the state says in their  
23 final papers that we admitted that we were not making a class of  
24 one claim. And I guess that's true because we never suggested  
25 that we were.

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1           What we suggested is that we've made a kind of classic  
2 protected class claim. The OCFS has taken action that we  
3 believe and we've alleged has the particular effect of shutting  
4 down agencies who hold what could be called traditional  
5 faith-based beliefs concerning marriage, family, and the best  
6 interest of children. And the state seems to be of the view  
7 that as long as you shut down everybody who holds those beliefs,  
8 then there's no equal protection problem because you're applying  
9 it equally. Your Honor, that, we believe is not what equal  
10 protection requires. You've forgotten the relevant variable,  
11 that is similarly, equivalently placed except for the point of  
12 controversy.

13           And it's undisputed. The allegations are clear that  
14 New Hope has only been commended for the quality of its service  
15 except in this one respect, and yet it -- and we believe and  
16 have alleged based on information and belief other similarly  
17 situated organizations are being shut down solely because they  
18 won't toe the state's line on this one point of speech and  
19 belief.

20           So we've cited the American Atheist case from the  
21 Second Circuit just a few years ago which highlights  
22 discrimination based on the protected class of a religious  
23 belief defining the protected class.

24           We've alleged arbitrary enforcement amounting to  
25 discrimination against that protected class when you have a

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1 structure that says, look, we're against discrimination, but you  
2 can consider race and you can consider religion subject to the  
3 best interest of the parent or as part of the best interest of  
4 the parent. The only thing we say you may not under any  
5 consideration consider is this one thing that is probably in New  
6 York today distinctive only of a limited number of faith-based  
7 organizations.

8 It's a rather unique thing, Your Honor. You can parse  
9 through the statute and regulatory structure, and you will see  
10 guarded permissions to consider race, to consider ethnicity, to  
11 consider religion as part of the best interest. And then you  
12 hit this one thing where the state says, but you may not  
13 consider. We deem it irrelevant. So many things about the  
14 family structure are relevant. We deem it irrelevant whether  
15 the family is married, whether the parents are married. You may  
16 not consider it.

17 We believe that we've sufficiently alleged -- we  
18 believe the discovery will show more that that has been  
19 promulgated in that form precisely because OCFS detects that  
20 there are religious organizations that hold to what I've called  
21 traditional views of the importance of marriage and family with  
22 a mother and father and it has described those beliefs as  
23 "archaic," that it's hostile to them, and it's trying to shut  
24 them down for that reason. We think that states an equal  
25 protection violation.

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1 THE COURT: All right. Is there anything else that  
2 you want to bring to my attention before you conclude?

3 MR. BROOKS: Your Honor, there is. I would like to if  
4 I may speak of the question that arises in the free exercise  
5 realm. If we've identified -- we need to identify a compelling  
6 interest and demonstrate that not only is it a noble interest, a  
7 commendable interest, but it's actually furthered by the  
8 statute. And in it, as applied challenge, which we've made here  
9 as applied to New Hope, the Gonzalez versus O Centro Espirita --  
10 it goes on -- case says the state actually has a burden to  
11 demonstrate that making an exception for this party in this case  
12 would harm the interest.

13 Well, the state advances an interest of fighting  
14 discrimination, and I've talked about that, but I think always  
15 what it really comes back to, the right interest here, the  
16 interest that OCFS is commissioned with, the highest interest  
17 that we need to be thinking about when there is an adoption  
18 situation going on is the interest of the children of the state  
19 who need homes.

20 THE COURT: That's true, and statistically right now,  
21 I may be -- I don't know if these are the most up to date  
22 numbers, but I think that 8 to 10 million children are being  
23 raised by, you know, gay and lesbian couples, and your position  
24 is that that's wrong. It's against our religious beliefs, and I  
25 keep coming back to the fact that it's usually an independent

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1 home study that decides whether or not somebody could be  
2 suitable. Your litmus test is if it's not a marriage between a  
3 man and a woman, and if you're not truly -- I take it you would  
4 adopt out, New Hope, to a single gay person or a single lesbian  
5 person if they were truly single; is that correct?

6 MR. BROOKS: Your Honor, there is nothing about that  
7 in the record, but my understanding is the faith convictions at  
8 issue here have to do with family structure, not with anybody's  
9 identity.

10 THE COURT: I know, but if you would be willing to  
11 place a child with a truly single gay person or a truly single  
12 lesbian person, but not gays or lesbians in a marriage, it seems  
13 contradictory.

14 MR. BROOKS: Your Honor, different people's faith  
15 beliefs often seem nonsensical to others. That's the nature of  
16 faith. That's why we have the First Amendment.

17 THE COURT: I'm not criticizing your faith beliefs.  
18 I'm getting back to your mission, which is to take care of  
19 orphans.

20 MR. BROOKS: To help children.

21 THE COURT: Orphans and children and infants and  
22 toddlers and everybody else that is placed for adoption. And I  
23 can't help -- but I take a look at the regulation, which is a  
24 regulation that New York adopted in order to prohibit  
25 discrimination. And I keep coming back to the fact that New

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1 Hope has a litmus test, and that litmus test is we are not going  
2 to place children with gay and lesbian couples because it's  
3 against I believe your sincerely held religious beliefs that  
4 marriage is between one man and one woman. And yet you will  
5 adopt out to a single gay person or a single lesbian person.  
6 And by your conduct, you're excluding a significant number of  
7 people who would be available to adopt.

8 MR. BROOKS: Frankly, Your Honor, probably the larger  
9 number of people who New Hope's beliefs about family prevented  
10 from assisting towards adoption are unmarried couples. This  
11 isn't really about -- this is about their belief, faith taught  
12 belief about the proper structure of relationships for children,  
13 and they are what they are.

14 One of the things the Court is very clear on is in a  
15 free exercise case, you don't parse the reasonableness. You can  
16 in some cases ask about the sincerity. I don't think there's  
17 any dispute about sincerity here, but let me cut to the chase  
18 because you said a few moments ago the key thing is getting  
19 children into good homes. For purposes of the preliminary  
20 injunction, for purposes of this lawsuit, let me emphasize two  
21 things.

22 First, shutting down New Hope, which is what the state  
23 wants to do right away, will not increase the adoption  
24 possibilities for any child. It cannot increase the adoption  
25 possibilities for any would-be parents.

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1 THE COURT: Do you know how many families are  
2 currently beyond the home study and awaiting placement of an  
3 infant with New Hope right now?

4 MR. BROOKS: I don't think a definitive number is in  
5 the record. I think the answer is less than ten fully completed  
6 families. And part of the reason we need a preliminary  
7 injunction is that's always the pipe line.

8 One of the things, one point I would like to make is  
9 shutting down New Hope doesn't increase any child or any  
10 potential adoptive parent's options and access to adoption.  
11 Keeping them open doesn't deprive anybody of any options they  
12 have otherwise. There's no argument to the contrary.

13 THE COURT: The state would say we don't want to shut  
14 you down. We just want to make sure you're not discriminating.  
15 You know what I mean?

16 If you can consider religion and you can consider  
17 ethnicity, why is it that you can't continue to operate and say  
18 to a birth mother or a birth mother or birth mother and father,  
19 "We have a home study from a gay couple. The social worker  
20 indicates that they have everything that you could ask in terms  
21 of being great parents." And why couldn't you ask them and have  
22 them say either, "Okay. They seem great. We'll do it," or,  
23 "No. No. We're not going that way. We want a heterosexual.  
24 We want a one man and a one woman." I mean what are you afraid  
25 of?

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1 MR. BROOKS: Your Honor, New Hope always does its own  
2 studies. That's just how they operate and have operated for  
3 decades as far as I understand. So the scenario you suggest --

4 THE COURT: It will never happen.

5 MR. BROOKS: What they do do and commonly as I think  
6 you also understand, one of their frequent, by no means only  
7 sources of infants is their pregnancy resource center. They're  
8 helping women who are in unplanned pregnancies, and it's a whole  
9 counseling relationship about what that woman wants for her  
10 child, and New Hope has convictions about what's going to be  
11 good for that child. They can't lie about those convictions.  
12 They can't say, "We don't think it's important that your child  
13 be raised in a family with a father and mother," because they do  
14 think it's important.

15 They -- and I'm an attorney, Your Honor. I'm trying  
16 my best to characterize their beliefs, and I hope I'm getting it  
17 accurately. They believe that that God-ordered structure is  
18 best for children.

19 So the other thing I want to emphasize that's in the  
20 pleadings and it's in the affidavit we've submitted in support  
21 of the preliminary injunction, speaking broadly, having  
22 faith-based adoption agencies in this state, whether it's Jewish  
23 ones reaching into the Jewish community, whether it's  
24 evangelicals reaching into the evangelical community, whether  
25 it's Catholics reaching into the Catholic community, it brings

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1 in adoptive parents who might not otherwise be adopting.

2 We have declarations from two parents, both of whom  
3 have adopted, say they would consider adopting again, that  
4 they've adopted with New Hope in the past. They would consider  
5 adopting again, but not if they couldn't find an agency that  
6 shared their faith beliefs about family.

7 THE COURT: I've read those, but the truth of the  
8 matter is that when parents are -- when people are looking to  
9 adopt, I think that there is a lot more than faith that enters  
10 into it. You know, many people are looking at wanting to get  
11 infants. Many people have a cutoff age after which they do not  
12 want to adopt. I read those affidavits, and I understand that.

13 But I just get back to the fact that no gay and/or  
14 lesbian couple would ever have a shot with New Hope because you  
15 would just say, no, I'm not going to do the home study. Many  
16 gays and lesbians have had -- married couples have had home  
17 studies by other agencies. They've been determined to be  
18 excellent candidates for parenthood, and they've gone on to  
19 adopt, but with your agency, it's just a nonstarter.

20 MR. BROOKS: Your Honor, as you well know, there are  
21 many agencies that will serve those people. What the state said  
22 in its final papers, on page 7, New York State permits  
23 faith-based groups to provide adoption services in an effort to  
24 provide as many service options as possible to families  
25 surrendering children for adoption and those seeking to adopt,

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1 as many service options as possible. That's the commendable  
2 spirit. That's the right spirit. It's the opposite of what the  
3 state is trying to do here.

4 THE COURT: I think it's the opposite of what you're  
5 trying to do.

6 MR. BROOKS: Well, New Hope has faith convictions. It  
7 finds families for children time and again without exception  
8 that have never been criticized. All that is additive. We  
9 believe that we're finding parents who become willing to adopt  
10 because they're engaged with people who share their faith and  
11 they value that. I can't prove that standing here, but we have  
12 affidavits saying it for the purpose.

13 THE COURT: I mean I'll be asking Ms. Kerwin, but you  
14 can still even with the existing law, you can still ask birth  
15 parents if they prefer that their child be placed with a certain  
16 faith, correct?

17 MR. BROOKS: Absolutely.

18 THE COURT: So you will always have that ability. The  
19 regulation does not vitiate that ability to counsel birth  
20 parents and to find out what they wish, what they want. You can  
21 as an agency still take that into consideration.

22 MR. BROOKS: Your Honor, if the situation was created  
23 in which New Hope was saying to birth mothers, "The state  
24 requires us to let you know about unmarried couples who want to  
25 adopt." Take that example. "But we want to tell you we think

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1 that's not right for your child." And they have to counsel  
2 applicants about how to form an adoptive family, but their true  
3 beliefs are you're not in a position right now the way your life  
4 is structured to form the ideal adoptive family. That's not a  
5 situation that's good for anyone. That's not a situation New  
6 Hope is willing to put itself and those people in.

7 Their faith teaches them that their efforts should and  
8 must be devoted to placing children in families of what they  
9 view as biblically mandated family structure and is purely  
10 additive, Your Honor. Again coming back to the fact that  
11 closing New Hope increases nobody's options. Leaving New Hope  
12 open takes nobody's options away. You said, well, the state,  
13 they don't want to close them. They just want to change what  
14 they do. Well, again, Your Honor --

15 THE COURT: They want you not to discriminate on the  
16 basis of gender, marriage.

17 MR. BROOKS: The proposition that we don't want to  
18 close you.

19 THE COURT: Sexual orientation.

20 MR. BROOKS: We just want you to act according to our  
21 beliefs instead of your beliefs is just -- that's what the First  
22 Amendment forbids when it comes to free exercise. I would  
23 direct Your Honor again, and I'll sit down, to the thought  
24 experiment that the Supreme Court engaged in. You can look at  
25 the discussion in Masterpiece. It said yes. We the Supreme

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1 Court have said states must allow same sex couples to marry, but  
2 no, state. You can't say and therefore anybody we authorize to  
3 do legally valid marriages, clergymen, clergywomen throughout  
4 the state, if you're going to do legally valid marriages, then  
5 you must perform same sex marriage. That not the law.

6 The First Amendment says no, and we live in a society  
7 that says, you know what? There's room for these different  
8 types of beliefs about these most personal things about  
9 humanity, about how people should live and what makes for a good  
10 life. We live in a society in which there's room for different  
11 groups to do it different ways as they implement what the  
12 Supreme Court itself in Obergefell referred to, and let me --

13 Your Honor has seen the language, but Justice Kennedy  
14 in the majority opinion said even as they were mandating that  
15 all states recognize same sex marriages, Justice Kennedy took  
16 pains to say on page 2607 of that opinion, "the First Amendment  
17 ensures that religious organizations and persons are given  
18 proper protection as they seek to continue the family structure  
19 they have long revered."

20 It is New Hope's belief in the family structure that  
21 they have and so many faiths have so long revered that is  
22 precisely and the only reason that OCFS wants now to revoke its  
23 license, and we believe that that revocation cannot stand up to  
24 the requirements of the First Amendment.

25 THE COURT: I still think you could preserve that just

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1 by asking your clients whether or not they would consider having  
2 their child adopted by a gay and lesbian couple, but you never  
3 get there with your clients because of what you say are your  
4 sincerely held religious beliefs.

5 MR. BROOKS: What I say are their sincerely held  
6 religious beliefs. Your Honor, the last thing I would say --  
7 and I apologize. This is the second last thing I said I would  
8 say -- is on the issue of preliminary injunction, obviously  
9 these are deep constitutional waters. There are both emotional  
10 and legal complexities and strongly held convictions on these  
11 points. But if New Hope is shut down, not only does the Supreme  
12 Court say again and again even a temporary deprivation of First  
13 Amendment rights is irreparable injury, but in a very practical  
14 way, we've talked about the pipe line, reaching out into  
15 communities, finding and cultivating adoptive parents. They do  
16 that. They're not just people knocking on their doors. Finding  
17 mothers, birth mothers before their children are born and  
18 working with them. These are a pipe line.

19 If the lights are turned off at New Hope, they cannot  
20 be quickly turned on again. This is a Humpty Dumpty situation.  
21 Once the shell is broken, very hard to put together again. So I  
22 urge Your Honor after it's over that you think not only about  
23 the underlying merits, but the situation that cries out for a  
24 preliminary injunction while we take the time to litigate both  
25 the facts and the law on that thoroughly. Thank you.

**JACQUELINE STROFFOLINO, RPR**  
**UNITED STATES DISTRICT COURT - NDNY**

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1 THE COURT: Every time you place an adoption, it's an  
2 exercise of free speech. One adoption accomplished. We were  
3 able to have our free speech and our free expression. Another  
4 adoption. You know, before I got these papers, I never  
5 considered private adoptions as exercises of free speech. Okay.  
6 We've successfully placed a child, and we've now freely  
7 expressed our convictions. I look at that as something  
8 different.

9 MR. BROOKS: New Hope is not trying to send a message  
10 to the world. New Hope, it's not that the placement is speech.  
11 The placement is certainly an act that might be subject to free  
12 exercise issues, but the speech aspect, I think we've tried to  
13 make clear both in our pleadings and our briefs that -- and  
14 you've been -- as I say, I've been through some of this process,  
15 not all of this process. It's an almost all speech ministry.

16 Before this case came in front of Your Honor, you may  
17 not have been aware of the history of faith-based work to place  
18 orphans, historically something really kind of originated by the  
19 church in Western culture.

20 THE COURT: Well, I read that in your underlying  
21 papers, and that's where I began, that your mission as pointed  
22 out in the history that you gave me in your papers was to take  
23 care of orphans and mothers in their time of distress. And what  
24 you're saying is that every time New Hope consummates an  
25 adoption, you've at the same time exercised your free speech,

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1 and it's an odd way to look at adoption.

2 MR. BROOKS: And Your Honor, that's not how I  
3 articulated the speech claim. The speech claim is that the  
4 ministry itself on an ongoing basis is almost an entirely  
5 all-talk ministry. That is, it's talking in a deep, personal  
6 level and counseling about kind of the most important things in  
7 life with birth mothers. That's all talk, and it's core talk of  
8 the type that's clearly protected by free speech. There's no  
9 way to categorize that as conduct or purely noncontroversial  
10 information, various carve-outs the Supreme Court has made.  
11 That's speech that we seek to protect.

12 The speech to adoptive, potential adoptive parents as  
13 you counsel them about forming an adoptive family, that's core  
14 protected speech.

15 And then finally, the summation of which, the  
16 organization must state its view that this adoption will be in  
17 the interest, the best interest of the child, that is clearly  
18 substantive core protected speech. And in those situations, New  
19 Hope believes that to place these children, these infants, these  
20 newborns in an unmarried couple, same sex couple would not be.

21 And what the state says, it's no problem. All you  
22 have to do is say yes when you think no and we'll be fine here.  
23 Your Honor, that's the speech that's at issue, and it's hard to  
24 articulate a more clear compulsion of speech contrary to  
25 conscience.

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1           THE COURT: I come back to the fact that because New  
2 Hope clearly does not interview gay and lesbian prospective  
3 adoptive parents, that you're making those decisions only on the  
4 tenets of your Christianity. I wonder what would happen if you  
5 ever brought a gay and/or lesbian couple in and sat down with  
6 them and talked to them about what their goals were, what their  
7 aspirations, what they wanted for a child, but you don't -- New  
8 Hope doesn't get to that point because your sincerely held  
9 religious belief that it's wrong. We can only adopt out to a  
10 marriage of one man and one woman. And your position is if a  
11 wonderful gay and lesbian couple wants to adopt, there are  
12 plenty of other places that will service them.

13           MR. BROOKS: Your Honor, again it's comparable to the  
14 position of not just the Catholic church but many churches. If  
15 a gay and lesbian couple wants to get married, then that's  
16 simply not consistent with the teaching of that religious  
17 organization. That organization can't do it, though of course  
18 the state will through civil marriages. Perhaps some other  
19 religious organizations will.

20           And here likewise, this faith-based organization  
21 consistent with its convictions, which I'm not here to try to  
22 change them and not here to argue with. Consistent with their  
23 convictions says we can't devote our efforts consistent with  
24 conscience and faith to putting a child in that situation, but  
25 the state thinks it's right and the state does it. The state

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1 does it all the time. Many private organizations are willing to  
2 do it. They do it.

3 All we're saying here is that New Hope should be  
4 permitted to continue its ministry consistent with its faith,  
5 which is only adding to the number of adoptive parents and is  
6 only adding to the number of adoptions completed in the State of  
7 New York each year. And Your Honor, it is that that's the key  
8 issue, and when we start seeing this case as primarily about the  
9 rights of adults --

10 THE COURT: I'm sorry, but I think you're detracting  
11 from the pool because you're excluding a pool of potentially --  
12 I'm not saying that every gay and lesbian married couple would  
13 be great parents. That depends on what the independent home  
14 study says, but you say you're adding to it. I'm thinking  
15 you're excluding from it.

16 MR. BROOKS: Your Honor, there's no allegation and I  
17 don't think there could be frankly that New Hope's faith-based  
18 position stops any couple from adopting any more than the  
19 Catholic church's faith-based position of performing same sex  
20 marriages stops same sex couples from getting married in the  
21 State of New York. It just doesn't.

22 So the reason I say it's additive is the privately  
23 funded effort of this ministry, and you know that the home study  
24 process is labor intensive. It's time intensive. The state  
25 gets fewer than 2,000 done every year because it's really hard

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1 to do. They are voluntarily as a ministry for half a century  
2 doing it. They're doing it over and above whatever would  
3 otherwise get done. If they're shut down, it's pure  
4 subtraction, and subtraction doesn't add, Your Honor.  
5 Subtraction doesn't add, and addition can't subtract.

6 THE COURT: Thank you very much.

7 Ms. Kerwin, before you can even get a word out, I need  
8 to ask. If I were to find in favor of your client, would you be  
9 immediately shutting down New Hope? Would there be no period of  
10 winding down?

11 MS. KERWIN: I think it's important to note that OCFS  
12 isn't trying to shut down New Hope at all. All its directive  
13 was, was that if you can't comply with this regulation and  
14 change this policy, you will no longer be able to provide  
15 adoption services. So the one sliver of New Hope's ministry or  
16 provision of services would have to end. It wouldn't be shut  
17 down.

18 But I think more directly to answer your question,  
19 there is and I think it was even in one of the attachments to  
20 the complaint. There will be a close-down program or policy  
21 developed with New Hope and OCFS to properly deal with anything  
22 that is still pending in that sliver of its provision of  
23 services.

24 THE COURT: One of the things that concerns me about  
25 your position and the Office of Children and Family Services is

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1 that am I correct that it's a given that New Hope operates  
2 completely independently of any state funds?

3 MS. KERWIN: Funds, yes.

4 THE COURT: The way you said that, what else do you  
5 give them other than funds?

6 MS. KERWIN: By becoming an authorized agency, they  
7 have agreed to, or as a matter of law, the supervision of OCFS.  
8 So the only reason that New Hope can even exist as an adoption  
9 provider is because New York State has allowed it to. And  
10 subject to that authorization is the requirement that New Hope  
11 stay under the supervision of OCFS and its regulations. So no,  
12 there's no money in and out, but New Hope is acting as a  
13 provider of essential social services with the authorization of  
14 the state. It can't do so otherwise.

15 THE COURT: Have any other faith-based adoption  
16 agencies to date challenged the law that we're arguing today?

17 MS. KERWIN: It's not my understanding, no.

18 THE COURT: Now, in preparing for oral argument, I  
19 looked at Section 385 of the Social Services Law. And it  
20 basically says that if the commissioner were to find that an  
21 agency was willfully violating a multitude of violations, but  
22 the violations did not relate to the prohibitions found in  
23 Section 385 -- let me rephrase that.

24 Is the commissioner in any way relying on Social  
25 Services Law Section 385 in this proceeding?

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1 MS. KERWIN: No. 385 deals with findings that  
2 adoption providers have committed some kind of misconduct.  
3 That's not what we're doing here. OCFS was merely auditing the  
4 program to make sure there was compliance with all OCFS  
5 regulations and found noncompliance. It's not saying that it  
6 placed a child in an abusive place or was refusing to consider  
7 things that are supposed to be required. It was simply saying  
8 there's a policy here not in compliance. We'd like you to stay  
9 in business and continue to provide these adoption services, but  
10 this one piece -- and there are actually other pieces in the  
11 audit that were found to have been things that needed to be  
12 fixed.

13 THE COURT: Under 385, if you found multiple  
14 violations and if they were flagrantly doing things wrong, you  
15 could revoke their certification?

16 MS. KERWIN: Right. 385 would apply in certain  
17 circumstances as described, egregious misconduct, which is not  
18 what we're talking about here.

19 THE COURT: You know, another question that I have is  
20 we have an adoption agency that's been practicing in New York  
21 for a long time. If you're not using Section 385, what is it  
22 that empowers the commissioner to now say to New Hope, "It's our  
23 way or the highway"? Basically even though you believe that you  
24 should only have to adopt out to married, heterosexual couples,  
25 what gives the commissioner the authority at this stage to say

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1 that if it's not 385 of the Social Services Law?

2 MS. KERWIN: Social Services Law 372-b(3) empowers  
3 OCFS to promulgate regulations establishing the standards and  
4 criteria for providing adoption services, and Social Services  
5 Law 34 allows OCFS to enforce those regulations.

6 Now, I think as we all understand here, since New Hope  
7 came into being, the law has changed. Society has changed. The  
8 policy of the state has changed. The laws have changed, and New  
9 Hope has to abide by the law. To say otherwise would be to say  
10 that it only has to abide by the laws that existed way back when  
11 it was founded, and I don't think anybody here would say that  
12 that makes any sense.

13 THE COURT: Isn't your law forcing New Hope to do  
14 something to place children potentially in gay and lesbian  
15 marriages that they really truly believe goes against their  
16 sincerely held religious convictions?

17 MS. KERWIN: One thing just before I answer that  
18 question directly is that this regulation doesn't just affect  
19 gay or lesbian couples. They also will not accept an  
20 application from a male and female couple that isn't married.

21 THE COURT: I understand.

22 MS. KERWIN: So the pool is restricted even much  
23 further than just the consideration of same sex couples.  
24 However, no. With this regulation, to answer your question,  
25 this regulation doesn't force them to do anything other than

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1 obey the law. So all that the law says is people come in. They  
2 are interested in adopting. You have to give them an  
3 application.

4 THE COURT: What about the analogy that I got from  
5 Mr. Brooks where New York State says that there can be same sex  
6 marriage, but a Catholic priest when asked to conduct a same sex  
7 marriage can say no?

8 MS. KERWIN: New Hope isn't a church. New Hope is a  
9 provider of essential social services for New York State.

10 THE COURT: They're a faith-based organization though,  
11 right?

12 MS. KERWIN: Right. They have a faith-based ministry,  
13 which they are more than capable of continuing. I mean I think  
14 it's important. The complaint itself shows great things that  
15 New Hope has done. It provides a lot of important services to  
16 pregnant women for family planning purposes, so foster care  
17 services, all things not involved here. What this regulation  
18 does is allows -- it forces them to provide services to people  
19 who want them.

20 THE COURT: I know, and that's what I'm being told is  
21 a problem because there could be an employee at New Hope, if the  
22 Court ordered that they service married gay and lesbian couples  
23 and unmarried gays and lesbians, let's take the person who has a  
24 sincerely held religious belief. I'm trying to picture the  
25 conference room discussion, you know, to prepare a home study

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1 because on the one hand, I may have an employee of New Hope who  
2 believes to his or her core that this is religiously wrong, and  
3 you want me to put that person at a conference table with a gay  
4 and/or lesbian married couple, and you want that employee of New  
5 Hope with the sincerely held religious beliefs to have to start  
6 inquiring as to whether these would be appropriate parents. I  
7 mean they could be choking on their words because they have a  
8 religious conviction that this couple in front of them according  
9 to the Bible or their historical source cannot be parents. I  
10 mean that's a little troubling.

11 MS. KERWIN: I agree. It's got to be an uncomfortable  
12 conversation to have. However, as a provider of adoption  
13 services, New Hope just like any other adoption provider has to  
14 conduct the adoption study pursuant to specific criteria.

15 THE COURT: Aren't there a bunch of other agencies in  
16 the state of New York and in the United States that would allow  
17 a gay or lesbian couple to come forward and to begin the home  
18 study process and the adoption process?

19 MS. KERWIN: Of course there are, but that doesn't  
20 mean that a provider of adoption services in New York State can  
21 tell them to go someplace else because of something that has  
22 nothing to do with their ability to parent. That's all that  
23 this is about is making sure that providers of adoption services  
24 in this state consider only characteristics that go to an  
25 adoptive applicant's ability to parent, and we never even get

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1 there at New Hope. They ask for applications at the door.  
2 They're turned away. So all this is doing is saying consider  
3 whether I'd be a good parent based on characteristics that have  
4 to do with the ability to parent.

5 THE COURT: With the regulation that's in issue in  
6 this case, 18 NYCRR 421.3(d), I think it is, can New Hope still  
7 ask possible birth parents about whether they would feel  
8 comfortable adopting out to a gay or lesbian couple? Could they  
9 ask is there a particular Christian denomination that you would  
10 like the child to go to? Is that permissible under 421.3(d)?

11 MS. KERWIN: Not only is it permissible under that  
12 regulation, but it's required under Social Services Law and  
13 other regulations that the birth parent's wish, religious wishes  
14 are honored to the extent that they could do so and be in the  
15 best interest of the child. That doesn't change. The religious  
16 background of the child is very important in New York State  
17 adoption policy, as is the wishes of the birth parent.

18 Here, we're talking about the religious wishes of an  
19 adoption provider, and that is not something that the  
20 Constitution, that the Constitution in this kind of case has to  
21 consider over the wishes of the birth parent of the child.

22 And to the other part of your question, no. I don't  
23 think there's anything about 421.3(d) that prohibits the inquiry  
24 of a birth parent about the type of family that she or he wants  
25 their baby to go to.

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1 THE COURT: What about the Masterpiece Cake case as it  
2 relates or does not relate to this case? What's your position  
3 on that?

4 MS. KERWIN: I think that the -- I think that the  
5 reasoning does apply here because Masterpiece Cakeshop was very  
6 specific in its decision to say our holding here applies to the  
7 particular facts of this case in which the adjudicating  
8 administrative body made express discriminatory statements to  
9 the baker. But it also made a good point to say had that not  
10 happened, had that hearing not happened and those statements not  
11 be made, it's very likely that the decision might have been  
12 different because it's important to look, is it generally  
13 applicable? Is it content neutral? And here it is, and that  
14 case was very different for that reason.

15 THE COURT: When we talk about content neutral in this  
16 case, one prong of that is that the law advances an important  
17 governmental interest unrelated to the suppression of free  
18 speech. Is that what you think you have here?

19 MS. KERWIN: Absolutely. I mean the important  
20 government interests are expanding the number of people who can  
21 adopt and ensuring that the primary consideration in evaluating  
22 applications is the capacity of prospective parents to meet the  
23 needs of the children. Those are certainly important state  
24 interests.

25 THE COURT: But doesn't it substantially burden free

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1 speech in this case, again getting back to that awkward  
2 conference room scenario where someone who believes to his or  
3 her core that marriage can only be between one man and one  
4 woman, for somebody like that to be compelled by the state to be  
5 sitting down with a gay and/or lesbian couple? Doesn't that  
6 substantially burden speech?

7 MS. KERWIN: It doesn't because it neither compels nor  
8 prohibits New Hope from expressing its beliefs or associating  
9 with others for the purpose of expressing those beliefs, no  
10 matter how uncomfortable that conference room conversation might  
11 be. There's no narrow way to assure that social services are  
12 being provided in this state in a nondiscriminatory manner.  
13 Permitting exemptions to certain religious groups would be an  
14 impermissible favoring of particular religious beliefs.

15 The overwhelming state interest here is that New York  
16 State wants to provide, have services that it authorizes be  
17 provided in the state be done in a nondiscriminatory manner. If  
18 it gives exemptions for some organizations to discriminate based  
19 on characteristics that have nothing to do with the ability to  
20 parent, it would completely undermine the interests.

21 THE COURT: If a birth mom were presented with three  
22 potential adoptive families, two being marriages of one man and  
23 one woman and the other being of two men, and the adoption  
24 agency sits down and says, "We have the home studies here of  
25 three couples. Here you go. Our sincerely held religious

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1 belief is that only these two heterosexual couples will provide  
2 appropriate parenting for your child, but you decide." Would  
3 that be a violation of the regulation?

4 MS. KERWIN: That's an interesting question because  
5 this case is about whether they have to accept them into the  
6 organization at all.

7 THE COURT: Right.

8 MS. KERWIN: We haven't got to the matching piece.

9 THE COURT: I'm looking at the breadth of your law.  
10 I'm just wondering if they did bring three potential families to  
11 a birth parent and say, "Here you go. We're a faith-based  
12 organization and we don't really condone this, but here. Here's  
13 what we know about these two heterosexual couples. Here's what  
14 we know about this marriage between these two men, and you  
15 decide." Just wondering would they be able to do that under  
16 your statute?

17 MS. KERWIN: Standing here on my feet, what I think is  
18 that as long as New Hope said these three couples have gone  
19 through the adoption process, they've been deemed to be  
20 appropriate prospective adoptive parents according to the  
21 regulations that exist and are in effect right now and have an  
22 opinion. New Hope has an opinion based on marital status or,  
23 you know, people live on the beach. I think they can give their  
24 opinion about that as long as they don't mischaracterize the  
25 findings of an adoption study.

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1 THE COURT: Okay. Is there anything else that you  
2 want to bring to my attention?

3 MS. KERWIN: No, Your Honor. I just think this case  
4 is a lot simpler than it seems to have come out this morning.

5 THE COURT: It doesn't seem simple to me. I will tell  
6 you that.

7 MS. KERWIN: But what it comes down to is New Hope  
8 provides adoption services with the authorization of New York  
9 State. Whether it likes it or not, it has to abide by New York  
10 State laws and regulations with respect to the provision of  
11 those services, and it doesn't want to. It wants to use, like  
12 Your Honor said, a litmus test before it even allows a  
13 prospective adoptive family in the door, and it has nothing to  
14 do with the ability to parent, and there can certainly be  
15 nothing -- I don't think anybody here could disagree that a  
16 person's ability to parent and take care of the needs of a  
17 prospective adoptive child is what's important here.

18 THE COURT: But they do believe that your regulation  
19 is not content neutral, in fairness to them, and they indicate  
20 that it requires strict scrutiny and that it should not survive  
21 strict scrutiny.

22 MS. KERWIN: I know that's what they say, but it's a  
23 fact any law can incidentally affect someone's religious  
24 beliefs. There has to be a line, and this regulation could not  
25 be more on its face neutral. Do not discriminate on these

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1 things that have nothing to do with an ability to parent at the  
2 outset. Then do a study, determine, think about all sorts of  
3 things, but don't shut them down at the door and not give them a  
4 chance based on something that has nothing to do with ability to  
5 parent.

6 THE COURT: Thank you.

7 MS. KERWIN: Thank you.

8 THE COURT: Mr. Brooks, if you want to take another  
9 five minutes to respond, you can.

10 MR. BROOKS: I'll try to tick rapidly through several  
11 things.

12 Counsel ended as their briefs ended on the principle  
13 of, look. All we're saying here is that New Hope needs to abide  
14 by the law, but that describes the situation of every free  
15 exercise case. That just isn't advancing the ball. What the  
16 First Amendment says and free exercise says is no. In certain  
17 circumstances -- and we have the whole body of law. I won't  
18 rehash it -- a law that violates faith does not need to be  
19 complied with. I just want to flag that.

20 She made the argument that to grant New Hope an  
21 exemption, let's leave aside whether it would increase the  
22 number of adoptions or not. She said it would be an  
23 impermissible favoring, again when you go through the free  
24 exercise, because it would create an exemption for a special  
25 religious group. When you go through the Sherbert versus Verner

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1 case, unemployment compensation, Hosanna-Tabor, employment law,  
2 there's just a variety of issues. Again our free exercise law  
3 is built around situations where the Court says, our courts say,  
4 sorry. The First Amendment says you must make an exemption for  
5 a religious group.

6 You asked an important question about speech to birth  
7 mothers. Would it be okay -- let me just in context, New Hope  
8 believes that the right way to do its business, and frankly I  
9 don't know how much of this is required, but the right way to do  
10 its business is to show birth mothers only parents and  
11 portfolios, several parent options, each of which New Hope  
12 believes could be consistent with the best interest of the  
13 child.

14 So asking New Hope to slip into that one that they  
15 would then need to say, "Oh, by the way, the state requires us  
16 to show you this couple, but let us tell you all the reasons why  
17 we think they would not be the right choice for your child."  
18 The notion that the state would let that go forward without  
19 coming down on New Hope like a ton of bricks --

20 THE COURT: You'd probably be sued in federal court  
21 the next day.

22 MR. BROOKS: -- is scarcely credible. Exactly. So  
23 it's not just the initial conference room. It's scene after  
24 scene in this, including follow-up studies and reports back to  
25 the birth parents about the situation. As I think Your Honor

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1 knows from the papers, New Hope is almost always doing somewhat  
2 open adoption and plays an ongoing intermediary role and has  
3 ongoing speech related obligations between.

4 So the complexities of forcing a faith-based  
5 organization to in any way facilitate something that it believes  
6 to be not right for the children and either saying that, which  
7 creates kind of almost incomprehensible situations, or being  
8 muzzled and censored from saying what they believe to be true,  
9 either one of those cannot be the right answer, Your Honor.

10 The counsel also indicated that at the beginning of  
11 her remarks, look. The only reason New Hope can be in this  
12 business is because the state authorizes it. The state grants  
13 them a license, and absent that, it couldn't provide this  
14 essential social service.

15 I talked about the Masterpiece case. In many ways,  
16 Your Honor, the NIFLA case from last term has at least equally  
17 and perhaps more important things to say about this case. One  
18 of the things that the NIFLA case says, and we've discussed this  
19 in our papers, is that by granting, by making something a  
20 licensed activity, the state doesn't gain increased power to  
21 violate First Amendment rights. I will refer Your Honor to  
22 papers on that. So again just as all we want you to do is obey  
23 the law is not an answer to a free exercise or free speech  
24 claim, neither is, look. If you didn't have a license, you  
25 wouldn't be allowed to do business. That also is not an answer.

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1           She said also referring to -- I frankly forget what  
2 triggered it. She said, look. New Hope is not a church. It's  
3 a provider of essential social services. Well, again, our First  
4 Amendment law, relatively few of the cases are about churches.  
5 This is a right that pertains to the religious faith of  
6 citizens, not to churches qua churches. Now, citizens gather  
7 into churches, but citizens gather into faith-based  
8 organizations of all sorts. The Boy Scouts are not a church.  
9 You can go down the list of the leading cases in our  
10 constitutional history of free exercise, and they're generally  
11 not about a church. These rights pertain to us as citizens.

12           Your Honor asked about a wind-down period, whether  
13 there's going to be kind of immediate cessation. You may not  
14 talk to people. We have a nonbinding statement in a footnote  
15 that the state would not prevent such a wind-down, but that's  
16 really kind of irrelevant to my Humpty Dumpty breakage analogy  
17 here because it's the pipe line that's critical. If you're  
18 winding down, then you are reducing staff. You're losing that  
19 capacity. You're not able to go out and tell birth mothers, let  
20 us work with you. We would love to work with you. You're not  
21 able to go out and recruit new parents. Very difficult, not  
22 necessarily impossible, but very difficult to turn the lights  
23 back on. And as you know, being deprived of First Amendment  
24 rights for any length of time is conclusively held to be  
25 irreparable injury under the law.

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1                   And with that, Your Honor, I will stop. Thank you for  
2 your attention.

3                   THE COURT: Thank you. I thank both sides. I will  
4 get a written decision out as soon as possible. Thank you.

5                                   (The matter concluded at 12:03 p.m.)

6  
7  
8                                   CERTIFICATION OF OFFICIAL REPORTER

9  
10  
11                   I, JACQUELINE STROFFOLINO, RPR, Official Court Reporter,  
12 in and for the United States District Court for the Northern  
13 District of New York, do hereby certify that pursuant to Section  
14 753, Title 28, United States Code, that the foregoing is a true  
15 and correct transcript of the stenographically reported  
16 proceedings held in the above-entitled matter and that the  
17 transcript page format is in conformance with the regulations of  
18 the Judicial Conference of the United States.

19  
20                                   Dated this 28th day of June, 2019.

21  
22                                   **/s/ JACQUELINE STROFFOLINO**

23                                   JACQUELINE STROFFOLINO, RPR

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