

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-1715

Caption [use short title]

Motion for: Emergency Interim Protection Under Fed. R. App. P. 8

Set forth below precise, complete statement of relief sought: Appellant requests that the Court temporarily enjoin OCFS from enforcing its August 8 demand that by August 23, New Hope change the faith-based policies that are at issue in the pending appeal, or else wind down its adoption ministry. This is long before the appeal can be heard and decided, and ignores a prior agreement in principle between the parties.

New Hope Family Servs., Inc. v. Poole

MOVING PARTY: New Hope Family Services, Inc.

OPPOSING PARTY: Sheila Poole

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Roger G. Brooks Alliance Defending Freedom 15100 N. 90th St., Scottsdale, AZ 85260 tel: 207-864-2054; rbrooks@adflegal.org

OPPOSING ATTORNEY: Laura Etlinger New York Office of the Attorney General The Capitol, Albany, NY 12224 tel: 518-776-2028; laura.etlinger@ag.ny.gov

Court- Judge/ Agency appealed from: U.S. District Judge Mae A. D'Agostino, Northern District of New York

Please check appropriate boxes: Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

Opposing counsel's position on motion: Unopposed Opposed Don't Know Does opposing counsel intend to file a response: Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL: Has this request for relief been made below? Yes No Has this relief been previously sought in this court? Yes No Requested return date and explanation of emergency: August 22. OCFS has arbitrarily demanded that by August 23 New Hope comply or agree to close. This will irreparably harm New Hope's ministry and serves no legitimate government interest, as New Hope has already voluntarily stopped accepting new applicant adoptive parents during the litigation, and so cannot be "discriminating" under any view.

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted) Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Roger G. Brooks Date: Aug. 13, 2019 Service by: CM/ECF Other [Attach proof of service]

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

NEW HOPE FAMILY SERVICES,
INC.,

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee.

**APPELLANT’S EMERGENCY MOTION FOR INTERIM
PROTECTION UNDER FED. R. APP. P. 8**

Introduction

New Hope Christian Services is a half-century-old Christian adoption ministry that receives no government funds, and is guided by its religious beliefs about human sexuality and family to place infants entrusted to its care into families consisting of a married mother and father. It cannot, consistent with its religious beliefs, place infants with unmarried or same-sex couples. *Aff. of Judith A. Geyer in Supp. of New Hope Family Servs.’ Mot. for Prelim. Inj. (Geyer Aff.) (Ex. B) at ¶ 137.*

In 2018 the New York Office of Children and Family Services (“OCFS”) declared that New Hope’s faith-based practices violated a recently enacted “antidiscrimination” regulation, and demanded that New Hope violate its beliefs and devote its private energies to placing

children with unmarried or same-sex couples—or have its authorization to act as an adoption service terminated.

On December 6, 2018, New Hope filed this lawsuit to protect its First Amendment rights of free exercise and free speech. Ver. Compl. for Injunctive & Declaratory Relief (Compl.) (Ex. C), *New Hope Family Servs. v. Poole*, No. 5:18-CV-01419-MAD-TWD (N.D.N.Y. Dec. 6, 2018), ECF No. 1. On May 16, 2019, Judge Mae D’Agostino of the Northern District of New York dismissed New Hope’s claims, and denied New Hope’s motion for a preliminary injunction as moot. Memorandum-Decision and Order (Order) (Ex. D) 26, *New Hope*, No. 5:18-CV-1419-MAD-TWD (N.D.N.Y. May 16, 2019). On June 10, 2019, New Hope timely filed a notice of appeal. This Court assigned New Hope’s appeal to its Expedited Appeals Calendar.

New Hope is likely to succeed on its constitutional claims. This case presents serious constitutional questions in light of the Supreme Court’s decisions in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). While New Hope will fully present arguments in support of its claims in its appeal brief, which is due on August 15, New Hope briefly summarizes those arguments here to support its request for interim protection.

From the filing of the verified complaint until August 8, 2019, both parties voluntarily exercised forbearance. That is, since the filing

of its complaint, New Hope has not commenced the adoption process with *any* new applicants, thus mooting any assertion that—during this interim period—New Hope is “discriminating” in its acceptance of applicants. Meanwhile, OCFS did not take action to prevent New Hope from continuing to serve those few adoptive couples with whom it was already working, and from working with birth mothers to place infants with those couples.

That all changed last week. Without warning on August 8, 2019—even while its own motion to *remove* New Hope’s appeal from the Expedited Appeal Calendar was pending (ECF No. 41)—OCFS abruptly launched an action against New Hope calculated to preempt this Court’s consideration of New Hope’s appeal by extinguishing New Hope’s adoption ministry even before that appeal can be heard. OCFS has demanded that New Hope violate its beliefs and change its policies *within 15 days of August 8*, or be shut down.

This threat, if carried out, would destroy or cripple New Hope’s adoption ministry even if this Court later determines that New Hope’s constitutional claims are entitled to further development. Accordingly, New Hope seeks temporary protection only long enough to permit this Court to hear and consider New Hope’s pending appeal. Specifically, as explained below, New Hope requests that this Court order compliance with the terms of a “stand-still” agreement as proposed by counsel for OCFS, and which both parties had previously represented to this Court

was near finalization, before OCFS performed the U-turn that necessitated this emergency motion.

Statement of Jurisdiction

Because the district court denied New Hope's motion for a preliminary injunction according substantially the same relief requested herein, an emergency motion for interim protection to this Court is appropriate. This is especially true in light of the district court's erroneous dismissal of New Hope's constitutional claims before discovery. A motion to the district court would therefore be futile. Making a futile motion to the district court would make it impossible to obtain protection within the deadline that OCFS imposed in its closure letter. This Court has jurisdiction to grant the relief requested for this reason as well. *See* Rule 8(a)(2)(A)(i).

Background

Briefing on New Hope's appeal is scheduled to be completed by October 3, 2019. As an appeal from dismissal, New Hope's appeal was assigned to this Court's Expedited Appeals Calendar. ECF No. 34. OCFS moved to have the case removed from the expedited calendar, and New Hope has opposed that motion. ECF Nos. 36, 38, 41. Because of OCFS's abrupt change of course detailed below and its sudden "death threat" against New Hope, New Hope has moved for leave to submit a surreply explaining those developments and their relevance to OCFS's

motion to “de-expedite” New Hope’s appeal. ECF No. 46. OCFS has opposed this request.

OCFS’s reversal was a surprise. As explained above, throughout the litigation below the parties exercised mutual forbearance, with New Hope continuing to serve its existing couples, but not accepting new applicants. After the filing of the appeal, the parties invested considerable energy in negotiating a formalized “stand-still” agreement along those same lines. Before July 29, 2019, the parties had—in New Hope’s understanding—reached agreement on all substantive points, and were trading emails about precise wording.

On July 29, OCFS rested its motion to remove the case from the Expedited Appeals Calendar—in important part—on its representation that “the parties are currently negotiating a more formal partial stay of OCFS’s enforcement activities, which would allow New Hope to engage in specified adoption activities during the pendency of this appeal.” Decl. of Laura Etlinger at ¶ 14, ECF No. 36. New Hope, similarly, represented that “New Hope . . . believes the parties have reached an agreement in principle.” New Hope’s Opp’n to OCFS’s Mot. To Remove Case from Expedited Appeals Calendar 8, ECF No. 38.

The substance of that agreement was accurately reflected in the last proposal *sent by OCFS to New Hope* on August 2, 2019, which read as follows:

“For the pendency of the appeal:

- a) New Hope will not accept any new prospective adoptive parents.
- b) New Hope can continue the adoption study process for any individuals who completed orientation prior to commencement of the lawsuit (December 2018).
- c) New Hope will provide OCFS with a list naming each applicant to be an adoptive parent and each approved adoptive parent.
- d) New Hope can continue to supervise placements of children in its legal custody.
- e) New Hope can continue to accept surrenders of children and place out children with those adoptive applicants who have been approved.
- f) New Hope will inform OCFS when a child is placed with an approved adoptive parent and when an adoption is finalized.
- g) This agreement will remain in effect during the pendency of Second Circuit Appeal No. 19-1715.
- h) If New Hope desires to terminate the agreement before completion of the appeal, it must provide written notice of its intent to terminate by overnight mail to the Office of the Attorney General at the address below. If New Hope provides such notice, the agreement will terminate 30 days following service of such notice.”

Email Chain Between Etlinger & Brooks (Ex. E) 1-2.

By email dated August 6, 2019, New Hope told OCFS that these terms were acceptable, while proposing that the agreement be extended (if this Court reverses the dismissal) until a substantive ruling on New Hope's motion for preliminary injunction. *Id.* at 1.

However, unbeknownst to New Hope at the time this acceptance was sent, counsel for OCFS had sent an email less than two hours earlier reversing course and declaring that OCFS "may" not be willing to agree to the stand-still terms it proposed in its August 2 email.

On August 8, OCFS informed this court—without explanation—that "it no longer seems likely that the negotiations will result in a stay agreement." ECF No. 41 at 1. That same day, OCFS sent its "enforcement letter" demanding that New Hope abandon its faith-mandated policies or "submit a plan to close [its] adoption program, within 15 calendar days of receipt of this letter." August 8, 2019 Letter Ghartey-Ogundimu to Jerman (Ex. F).

Requested Relief

New Hope requests that this Court enter an order making binding *exactly* the terms last proposed by OCFS, in its August 2 email as quoted above, and thus extending only "during the pendency of Second Circuit Appeal No. 19-1715." When it decides the appeal, this Court will decide what it deems appropriate going forward from that time.

Argument

I. The balance of equities strongly supports entry of the requested relief.

No balance-of-harms analysis is necessary where First Amendment rights are at issue. The loss of First Amendment rights, “for even minimal periods,” is deemed “irreparable injury,” *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 65, 71 (2d Cir. 1996), and the State has no interest in enforcing an unconstitutional law. *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Thus, if a probability of success is shown, an injunction should issue. *Id.* Even so, the balance of harms weighs decisively in favor of New Hope.

By email dated August 12, 2019, OCFS demanded that the “plan to close” include a complete cessation of operations within “90 days” or some “later date approved by OCFS,” but did not offer a “later date.” August 12 Email Etlinger to Brooks (Ex. G). New Hope can neither obtain a ruling on its appeal nor complete serving its existing families within 90 days, while news that it has submitted a “plan to close” would make it difficult or impossible for New Hope to obtain the referrals needed to find infants for its existing adoptive parents. Decl. of Kathy Jerman in Supp. of New Hope Family Servs.’ Emer. Mot. for Interim Protection (Jerman Decl.) (Ex. H) at ¶¶ 41-42.

The harm to New Hope, to adoptive parents who have already invested time and emotional energy in working with New Hope to

obtain a child, and to a birthmother who is currently relying on New Hope to find the right home for her child, will be immediate and severe.

As detailed in New Hope Director Kathy Jerman's declaration, adoptive couples who are already working with New Hope face the loss of the counsel and assistance of New Hope workers they trust through the emotionally difficult home study and adoption process. Many of them face the prospect of starting the process all over again with another agency; all of them must expect to find themselves at the end of another agency's waiting list, postponing their adoption dreams for many months or even years. Jerman Decl. at ¶¶ 10-16. The birthmother, if transferred, will lose the aid and counsel of New Hope workers whom she knows and trusts, at a time of distress and vulnerability. Jerman Decl. at ¶¶ 6-9. New Hope will necessarily lose invaluable staff, will suffer reputational damage that will be hard to repair, and likely will lose contributions that will damage its ability to rebuild. Jerman Decl. at ¶¶ 17-42.

Emergency protection is also necessary to guard this Court's effective jurisdiction. It will nullify this Court's appeal process if OCFS can shutter New Hope before the appeal can be decided. *See Caval Int'l v. Madigan*, 500 F.3d 544, 546 (7th Cir. 2007) (enjoining enforcement pending appeal when such enforcement would jeopardize an entity's continued operation and the injunction would only apply to that "single entity").

By contrast, the State can identify no harm to any State interest that will result from the requested interim protection. Because the stand-still will prevent New Hope from accepting new applicants, there will be no possibility of “discrimination” against any applicants. And stopping New Hope from serving the 19 adoptive couples with whom it was *already* working when the complaint was filed will not further either of the supposed state interests identified by the court below: preventing discrimination against applicants, and ensuring a diverse pool of foster parents. Order 26.

Instead, the only “interest” that can possibly be served by the abrupt closure threatened by OCFS is an “interest” in expressing OCFS’s vehement disapproval of New Hope’s religious convictions about sexuality, marriage, and family, and making an example of New Hope “to encourage the others”¹—that is, to intimidate other ministries that share similar religious convictions into submission. But these were not interests relied on below, and would be illegitimate interests for purposes of a First Amendment “compelling interest” analysis. See *Masterpiece*, 138 S. Ct. at 1729.

Instead, justifications such as these would confirm OCFS’s animus and hostility against New Hope’s religious beliefs. Indeed, OCFS’s

¹ Voltaire, *Candide, ou L’Optimisme* (1759), referring to the English navy’s execution of Admiral John Byng.

abrupt and unexplained abandonment of the parties' stand-still agreement in principle is itself evidence of animus and hostility, confirming that—at least as applied against New Hope—the challenged regulations are far from “neutral,” and must undergo strict scrutiny.

II. New Hope has a likelihood of success on one or more of its underlying constitutional claims, meriting interim protection pending this appeal.

New Hope's brief in support of its appeal is due on August 15. The purpose of the requested interim order is precisely to protect New Hope's ministry from destruction before New Hope's appeal can be briefed and heard. That said, New Hope will here highlight multiple reasons why the district court's dismissal was error and New Hope should get a chance to prove its allegations.

A. New Hope has adequately alleged, and has a likelihood of demonstrating, that OCFS's regulation as enforced against New Hope is neither generally applicable nor neutral towards religion.

The district court applied only “rational basis review” to the regulation because it found (making factual findings rather than crediting New Hope's allegations as the law requires) that the regulation is “generally applicable” and “neutral”. Order 22. This was error. To be generally applicable, a regulation must “prohibit nonreligious conduct that endangers these interests in a similar or greater degree than [the regulated religious conduct] does.” *Lukumi*,

508 U.S. at 543; *see also Cent. Rabbinical Cong. v. N.Y. City Dep't of Health*, 763 F.3d 183, 197 (2d Cir. 2014).

New Hope alleged public record facts raising a reasonable inference that the regulation as applied to New Hope is *not* generally applicable. New York law and regulation in fact create a highly tailored regime that allows many exceptions to a “no discrimination” principle, while rejecting New Hope’s faith-based judgements as illegitimate, including:

- Requiring adoption services when recruiting adoptive parents to discriminate in favor of “Indians seeking to adopt Indian children,” N.Y. Comp. Codes R. & Regs. tit. 18, § 421.13(a)(1), and of parents having “ethnic, racial, religious or cultural characteristics” matching those of the largest numbers of children on waiting lists, N.Y. Comp. Codes R. & Regs. tit. 18, § 421.10(a).
- Requiring courts to discriminate by placing children with individuals and agencies who share the child’s religious faith, N.Y. Soc. Serv. Law § 373(1) and (2), and by giving effect to the birthmother’s “religious wishes” when selecting adoptive parents, N.Y. Soc. Serv. Law § 373(2) and (7).
- Permitting agencies to discriminate based on the adoptive parent’s age, race, or color when the agency deems that to be in the best interests of the child. N.Y. Comp. Codes R. & Regs. tit. 18, § 421.18(d)(1) and (2).
- Discriminating based on specific marital status that the State deems not healthy for children, by excluding

certain classes of married but separated individuals from adopting. N.Y. Dom. Rel. Law § 110 (2009).

The State believes that the discrimination it sanctions is justified, while the faith-guided choice made by New Hope is not. But if “the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.” *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). “This precise evil is what the requirement of general applicability is designed to prevent.” *Lukumi*, 508 U.S. at 545–46. New Hope has submitted uncontradicted evidence that it will not place children with unmarried or same-sex couples not because it “disapproves” of such couples, but because its religious faith teaches that such families are not consistent with the best interests of children. *See* Compl. ¶¶ 4, 101, 121; Geyer Aff. at ¶¶ 82, 103. Indeed, “OCFS does not contend that New Hope is not acting in the best interests of the children when placing these children for adoption.” Order 41.

Because New York allows and requires multiple forms of discrimination against potential adoptive parents based on even “protected classes,” while refusing to allow agencies like New Hope to exercise judgment based on their religious beliefs, the challenged regulation is “substantially underinclusive,” and “not generally applicable,” and therefore subject to strict scrutiny.

New Hope has also alleged facts and introduced uncontradicted evidence that raises a reasonable inference that the challenged regulation—at least as enforced against New Hope—is not “neutral,” but rather “targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices.” Compl. ¶¶ 236. “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *Lukumi*, 508 U.S. at 534. The First Amendment “guarantee[s] that our laws be *applied* in a manner that is neutral toward religion.” *Masterpiece*, 138 S. Ct. at 1730. “[U]pon even *slight suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” *Lukumi*, 508 U.S. at 547.

New Hope alleged that OCFS removed many religious adoption agencies—Catholic providers, a Jewish provider, a Latter Day Saints provider, and a Muslim provider—from OCFS’s list of authorized agencies at the same time it began threatening New Hope with closure. At least several of these agencies shared New Hope’s religious beliefs about marriage and family. Compl. ¶¶ 202-203. “[T]he effect of a law in its real operation is strong evidence of its object.” *Lukumi*, 508 U.S. at 535. A plausible inference from the simultaneous erasure of these religious providers is that OCFS is using its regulation to purge

adoption agencies committed to traditional religious beliefs about marriage and family. Indeed, OCFS has said as much, declaring that in New York, “[t]here is no place for providers” that seek to place children with a married mother and father. Compl. ¶ 204.

The Supreme Court has “made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot . . . act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece*, 138 S. Ct. at 1731.

Religious objectors are entitled to “neutral decisionmaker[s]” who give “full and fair consideration” to their “religious objection[s].” *Id.* at 1732.

New Hope has alleged facts that show that OCFS has been anything but neutral, indeed passing judgment, and presupposing the illegitimacy of New Hope’s religious beliefs. This is demonstrated by the quote above, and also by OCFS’s contemptuous dismissal as “archaic” any belief that families consisting of married mothers and fathers are the healthiest environments for raising children, Compl. ¶ 166; in its proposal that New Hope “compromise” (that is, violate) its beliefs as the price of continued existence, *id.* at ¶ 192; Geyer Aff. at ¶ 160; and in its assertion that OCFS “cannot contemplate any case” in which an

exception to its ban on preferring families consisting of married mothers and fathers would be warranted, Compl. ¶ 164.²

OCFS's present death threat against New Hope—which necessitated this emergency motion—is the crowning evidence of vindictive hostility against New Hope's beliefs, rather than neutrality. OCFS knows that New Hope has accepted *no* new applicants since this case was filed, and that New Hope has placed just two children with adoptive families during that time. Jerman Decl. at ¶ 40. There is no fire. Nothing requires this devastating move against New Hope even while New Hope's appeal seeking preliminary injunctive relief is being briefed. The stand-still agreement referenced by both parties in their briefs on OCFS's motion to "de-expedite" resolved any even arguable interim threat to the interests that OCFS claims to be protecting. OCFS's abrupt move to shutter New Hope before this Court can rule is an act of hostility writ in bold letters, a desire to publicly condemn and punish New Hope for holding its religious beliefs.

By passing "judgment upon" and presupposing the "illegitimacy" of New Hope's "religious beliefs and practices," OCFS has ensured that

² OCFS's remarks resemble statements that the Supreme Court in *Masterpiece* highlighted as evincing animus against religion. 138 S. Ct. at 1729.

the challenged regulation must at least survive strict scrutiny, which it cannot. *Masterpiece*, 138 S. Ct. at 1731.

B. New Hope has adequately alleged, and has a likelihood of demonstrating, that OCFS's regulation as enforced against New Hope impermissibly compels speech.

“The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

The district court dismissed New Hope's compelled speech claim by belittling the extent to which New Hope's adoption ministry involves speech; holding that no speech is compelled; and holding that the speech that is compelled is governmental speech rather than protected private speech. New Hope alleged and introduced uncontradicted evidence that establishes the opposite of each of these propositions.

New Hope's complaint and affidavit detail the extensive, value-laden speech that it engages in throughout its “comprehensive evaluation, training, and placement programs,” including many hours of personal discussion with and counseling of adoptive parents, Compl. ¶ 270; counseling of birth mothers about adoption and selection of specific adoptive parents, *id.* at ¶¶ 87-93; Geyer Aff. at ¶ 67-74; and a final, value-laden affirmation by New Hope that a particular placement

is—in New Hope’s judgment—in the best interests of the child, Compl. ¶¶ 101, 121; Geyer Aff. at ¶¶ 82, 103.

In its interactions with birth parents and adoptive parents, New Hope “conveys a system of values about life, marriage, family and sexuality.” Compl. ¶ 270; Geyer Aff. at ¶¶ 86-87, 95. Specifically, New Hope believes and conveys that the “biblical model for the family as set out in the Bible—one man married to one woman for life for their mutual benefit and the benefit of their children—is the ideal and healthiest family structure for mankind and specifically for the upbringing of children.” Compl. ¶ 56; Geyer Aff. at ¶ 36. In its interactions with birth parents, New Hope “desires to recommend married opposite-sex couples and truly single individuals as adoptive parents.” Compl. ¶ 269; Geyer Aff. at ¶¶ 137-39. This is all speech according to any definition.

The district court held that New Hope’s compelled-speech claim should be dismissed “because OCFS and the regulation simply do not compel speech.” Order 28. New Hope’s allegations and affidavits amply establish prohibited compulsion of speech.

New Hope cannot consistent with integrity and good conscience counsel unmarried or same-sex couples about creating a healthy home for an adoptive child when its faith teaches New Hope that those couples cannot do so. By forcing New Hope to change its *policies* so that it will train, counsel, recommend, and place children with unmarried

and same-sex couples, OCFS would force New Hope’s staff to change their *message* in every one of these contexts as well, to “foster . . . an idea they find morally objectionable.” *Wooley*, 430 U.S. at 715. Compl. ¶¶ 194-99, 266-78. This it may not do. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This Court recently rejected a government effort to compel a not-for-profit to change its policies (as OCFS demands here) as a condition of funding, declaring that this was “viewpoint-based” compelled speech, impermissibly “compel[ling] [the plaintiff] . . . to espouse the government’s position.” *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 230, 239-40 (2d Cir. 2011), *aff’d* 570 U.S. 205 (2013).

Such compulsion is all the more indefensible where the victim is not even receiving government funds. The State “may not directly mandate that [organizations] affirmatively espouse the government’s position on a contested public issue through regulations . . . that threaten . . . to forcibly shut down non-compliant entities.” *Evergreen Ass’n Inc. v. City of New York*, 740 F.3d 233, 250-51 (2d Cir. 2014) (enjoining regulations that required pro-life pregnancy support centers

to post notices regarding referrals for abortions). This is precisely the demand, and the threat, that OCFS is levelling here.

There is more. As the court below recognized, by counseling unmarried or same-sex couples along the road to adoption, and presenting such couples to birthmothers as prospective parents for their infants, New Hope would *at a minimum* communicate a message that the *State* believes that such adoptions can be in the best interests of the child. *See* Order 29. But forcing New Hope to convey even *that* message is unconstitutional. Where the State's "interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717.

Further, being compelled to be a conduit for the State's message will inevitably dilute New Hope's own message. The "choice to speak includes within it the choice of what not to say," and the State cannot "require speakers to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986). To accept the contrary rule "would justify any law compelling speech." *Masterpiece*, 138 S. Ct. at 1745 (Thomas, J., concurring, and collecting citations).

The district court also attempted to dispose of New Hope's compelled speech allegations by labeling *all* of New Hope's speech with adoptive parents and birthparents as "governmental speech." Order 28.

That label was wrong: New Hope is a private Christian ministry; it receives no governmental funds whatsoever; it engages in extensive religious speech with the individuals with whom it works, including prayer and discussion of biblical principles relevant to marriage and family. Compl. ¶ 105; Geyer Aff. at ¶¶ 31, 86, 90, 94.

It is true that New Hope requires authorization from the State in order to carry out what is an ancient Christian ministry to orphans. However, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Supreme Court rejected the argument that the existence of a governmental licensing system “converts [private speech] into government speech.” *Id.* at 1760. “If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.” *Id.* at 1758.

C. New Hope has adequately alleged, and has a likelihood of demonstrating, that OCFS’s regulation as enforced against New Hope violates New Hope’s right to expressive association.

“Freedom of association . . . plainly presupposes a freedom not to associate.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). “The right to associate freely is not mentioned in the text of the First Amendment, but has been derived over time as implicit in and supportive of the rights identified in that amendment.” *Jacoby & Meyers, LLP v. Presiding Justices*, 852 F.3d 178, 185 (2d Cir. 2017). “This right is

crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000).

It follows from the facts reviewed in Section II.B that forcing New Hope to include unmarried and same-sex couples in its group sessions, and requiring New Hope to counsel and recommend such couples as adoptive parents, “would significantly affect [New Hope’s] ability to advocate public or private viewpoints,” *Dale*, 530 U.S. at 650, Compl. ¶¶ 266-78. In any case, courts must “give deference to an association’s view of what would impair its expression.” *Dale*, 530 U.S. at 653.

III. This Court should grant a temporary injunction to prevent the destruction of New Hope’s ministry before this Court can rule.

New Hope’s complaint included allegations that on multiple grounds establish that OCFS’s antidiscrimination regulation, at least as applied to New Hope, must survive strict scrutiny. The court below attempted no strict scrutiny analysis. Once strict scrutiny is triggered, the law is presumptively unconstitutional, and the State must prove that all the requirements of strict scrutiny have been met. *See Lukumi*, 508 U.S. at 546 (confirming that the government bears this burden). Thus, if New Hope’s allegations establish that strict scrutiny applies, then New Hope has *necessarily* demonstrated a “probability of success”

unless and until the State introduces evidence that satisfies that most exacting of tests. This it has not done.

There is inadequate space in an emergency motion for a thorough review of the facts introduced into the record of this case through New Hope's affidavits submitted in connection with its motion for a preliminary injunction, or the contents of OCFS's own very cursory declarations, which contradict almost none of the facts alleged by New Hope. Further, the relevant allegations, evidentiary declarations, and law will necessarily and appropriately all be presented more thoroughly in the parties' briefing of New Hope's appeal.

New Hope submits, however, that the allegations and facts reviewed above adequately establish that this Court should urgently grant the short-term protection that New Hope seeks, because:

- The conduct of OCFS in threatening to destroy New Hope's 50-year-old adoption ministry while New Hope's appeal is being briefed is evidence of prohibited hostility and animus against New Hope's religious beliefs;
- There is a reasonable likelihood that this Court will find, on appeal, that New Hope's complaint adequately alleged deprivations of First Amendment rights that must survive strict scrutiny;
- The State has not demonstrated and cannot demonstrate at this stage of the litigation that the requirements of strict scrutiny are satisfied;

- If so, then New Hope has adequately demonstrated a likelihood of success on the merits, and therefore will be entitled to preliminary injunctive relief as a matter of law;
- The emergency protection sought by New Hope is necessary to prevent the destruction of New Hope's ministry, and is necessary to protect this Court's effective jurisdiction; and
- Issuance of the temporary injunction requested by New Hope will do no harm to any legitimate interest of the State of New York.

Conclusion

For the reasons set forth above, New Hope respectfully requests that the Court grant the requested relief.

Dated: August 13, 2019

Respectfully submitted,

s/Roger G. Brooks

Roger G. Brooks

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Certificate of Compliance

This document complies with the type-volume limit set forth in Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,190 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook type-style.

Dated: August 13, 2019

s/ Roger G. Brooks
Attorney for Appellant

Certificate of Service

I hereby certify that on August 13, 2019, a copy of this response was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

Under Local Rule 27.1(a)(4), Counsel for Appellant will overnight via UPS, FedEx, or USPS three paper copies of the foregoing motion and its attachments as soon as the Court approves their filing.

Dated: August 13, 2019

s/ Roger G. Brooks

Attorney for Appellant

EXHIBIT

A

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

NEW HOPE FAMILY SERVICES,
INC.,

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee.

**[PROPOSED] ORDER GRANTING APPELLANT'S EMERGENCY
MOTION FOR INTERIM PROTECTION**

This matter is before the Court on Appellant's Emergency Motion for Interim Protection Under Fed. R. App. P. 8. That motion has been fully briefed, and it is ripe for adjudication. For the reasons stated in Appellant's Emergency Motion for Interim Protection Under Fed. R. App. P. 8, this Court, in its discretion, GRANTS that motion.

The Court therefore ORDERS that until a decision is entered on the currently pending appeal in this matter:

1. New Hope shall not accept any new prospective adoptive parents for adoption services.
2. New Hope may continue providing adoption services for any individuals who completed orientation with New Hope before this lawsuit was filed.

3. New Hope shall provide OCFS with a list naming each applicant to be an adoptive parent and each approved adoptive parent.

4. New Hope may continue to supervise placements of children in its legal custody.

5. New Hope may continue to accept surrenders of children and place children with adoptive applicants who have been approved.

6. New Hope shall inform OCFS when a child is placed with an approved adoptive parent and when an adoption is finalized.

7. Commencing six months after entry of this order, either party may petition this Court to amend this order based on changed circumstances, or for other good cause shown.

ENTERED this ___ day of August, 2019.

EXHIBIT

B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

NEW HOPE FAMILY SERVICES, INC.,

5:18-CV-1419 (MAD/TWD)

Plaintiff,

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,

**AFFIDAVIT OF JUDITH A.
GEYER IN SUPPORT OF NEW
HOPE FAMILY SERVICES'
MOTION FOR PRELIMINARY
INJUNCTION**

Defendant.

1. My name is Judith A. Geyer.
2. I am above the age of 18, of sound mind, and with full authority to make this declaration.
3. I am currently the Interim Executive Director of New Hope Family Services, Inc. (hereafter "New Hope"), located at 3519 James Street, Syracuse, NY 13206.
4. I became an employee of New Hope in 1992.
5. I began my employment with New Hope as an adoptive parent caseworker.
6. I became Executive Director in 1996 and continued in that role until 2013 when I retired.
7. Even after retirement as Executive Director, I continued to work for New Hope Family Services as an adoption caseworker. When the woman who replaced me as Executive Director became ill, I stepped in as Acting Executive Director in August of 2017.

8. After she passed away in April of 2018, I was given the title of Interim Executive Director and I have continued to maintain that position until today.

9. Kathy Jarman, Director of Client Services, for our pregnancy center is anticipated to succeed me as Executive Director on or about April 1, 2019.

10. The care of orphans and infants whose parents cannot care for them has been a Christian mission since the beginning of the faith.

11. St. James instructed the earliest church that “Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress.” James 1:27.

12. New Hope’s adoption ministry is one small part of America’s rich religious heritage of helping birthmothers and children through adoption.

13. In 1958, Clinton H. Tasker, a Christian minister serving in a rescue mission, strongly sensed the call of God to open a Christian adoption ministry in New York that would care for women facing unplanned pregnancies and for their children.

14. He left the Mission and began traveling throughout the state speaking to churches, service organizations, and missionary committees to raise funds.

15. His vision was realized when New Hope Family Services’ incorporation was approved in 1965 by the State Board of Social Welfare under the name Evangelical Family Service, Inc.

16. Its board was composed of ministers and Christian philanthropists.

17. In 1977, New Hope amended its name to Evangelical Adoption and Family Services, Inc. to better reflect all of its services.

18. In 1986, New Hope began operating a pregnancy resource center under its umbrella.

19. In the early 1990s, Evangelical Adoption and Family Services, Inc., amended its name to New Hope Family Services, Inc.

20. Though New Hope's name has changed several times, the mission and Christian character of the organization have remained the same.

21. Like its founding board, the current board of New Hope is composed of devout believers who are actively involved in their Christian churches, including one member who is actively pastoring a church.

22. New Hope's mission is "to be Christ's hands extended to offer hope and help to people with pregnancy, parenting, adoption, or post-abortion needs in the Syracuse area and throughout the State of New York."

23. There are over 440,000 children in foster care in the U.S.

24. Over 120,000 of those children are waiting to be adopted.

25. In federal fiscal year 2017, New York had 27,268 children served in foster care, with 19,213 in foster care on September 30, 2017.

26. Of those, over 4,400 New York children were waiting to be adopted.

27. During fiscal year 2017, throughout the state of New York, a total of only 1,729 children were adopted.

28. Consistent with New Hope's mission, it operates as a pregnancy

resource center and temporary-foster-placement and adoption provider.

29. In order to scrupulously ensure its autonomy to operate in accordance with its religious beliefs, New Hope accepts no government funding.

30. New Hope's Christian faith and religious beliefs motivate and permeate its mission and all of its activities.

31. All of New Hope's paid staff, board members, and counseling volunteers must be in agreement with and sign New Hope's statement of faith, must be in agreement with and supportive of New Hope's religious mission, and must conduct themselves consistent with Christian faith and belief. Paid staff and counseling volunteers must also be willing and able to pray with and present the Gospel to New Hope's clients.

32. New Hope's board members pray at New Hope board meetings.

33. New Hope holds regular times of worship and prayer for its employees and volunteers.

34. All of New Hope's paid staff and counseling volunteers are expected to counsel consistently with biblical truth.

35. New Hope believes that the Bible is the inspired and authoritative word of God and strives to follow its commands.

36. New Hope believes that:

- God is sovereign over and involved in the creation of every human life and every human life is created in the image and likeness of God and is worthy of protection;

- Every person has inherent dignity and self-worth and should be treated with respect and love;
- The biblical model for the family as set out in the Bible—one man married to one woman for life for their mutual benefit and the benefit of their children—is the ideal and healthiest family structure for mankind and specifically for the upbringing of children;
- God created two sexes—male and female. And each sex has a unique role and gifting that is intended to benefit the other and any children in the family;
- An individual’s sex as male or female is determined at the time of conception and cannot be changed;
- Caring for orphans is important to God and God desires believers to do so.

37. Through its adoption program, New Hope strives to save the lives of babies that God has created.

38. New Hope operates as a pregnancy resource center that exists to lovingly serve women facing the fears and concerns of an unplanned pregnancy, and their children.

39. New Hope’s pregnancy resource center serves approximately 700 clients per year.

40. New Hope provides the following services to its pregnancy center clientele: free urine pregnancy tests; free supplies from its care corner that clients

can frequent once per month, including items like car seats, clothes, formula, diapers, and wipes for children ages 0-2 years; referral for free ultrasound if pregnancy test is positive; free unplanned pregnancy options counseling focused on parenting and/or adoption; free childbirth education courses taught by a registered nurse; free counseling on parenting issues/challenges; referrals for medical, community, and social services; free post-abortion counseling; and free counseling following miscarriage or infant loss.

41. All of the services that New Hope provides as a pregnancy resource center are provided without consideration of the recipient's marital status, sexual orientation, gender identity, or religious belief.

42. All of the services that New Hope provides its pregnancy resource center clients are provided free of charge.

43. New Hope provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child by either choosing to parent or to create a loving adoption plan for their child, rather than choosing abortion.

44. As a pregnancy resource center, New Hope regularly serves unmarried couples and those who identify as lesbian, gay, bisexual or transgender.

45. When New Hope has a pregnancy-resource-center client who has a positive pregnancy test and is open to learning about adoption, New Hope provides the mother counseling about the adoption process. New Hope encourages her that adoption is a loving option, enabling the mother to give her baby life and to select

the adoptive family with whom she feels comfortable entrusting her child.

46. New Hope never pressures a birthmother to make an adoption plan over parenting.

47. During the counseling process, New Hope shows the prospective birthmother profiles of some of the families with whom it has recently placed children as examples of the types of loving adoptive families that New Hope may be able to provide for her child.

48. New Hope holds over 1,500 counseling sessions per year as a pregnancy resource center.

49. New Hope's ability to serve its pregnancy-resource-center clients through its adoption program enhances its efficacy in encouraging women to choose life for their babies instead of abortion.

50. In addition, New Hope networks with and acts as a resource to other faith-based pregnancy resource centers throughout the State of New York, none of which are licensed adoption agencies. New Hope offers education sessions to pregnancy resource centers about adoption and the New York adoption process, so that pregnancy resource centers will be familiar with New Hope's services and will be conversant on the subject. New Hope does this so that other pregnancy resource centers will be more effective in their ability to counsel their clients toward adoption over abortion. These centers refer clients to New Hope who are open to learning about adoption.

51. New Hope's ability to serve other pregnancy resource centers and the

pregnant women those centers serve is enhanced by its ability to directly facilitate the creation of adoption plans and adoptive placements.

52. New Hope also operates as a New York voluntary adoption provider and is authorized to place children with New York state residents.

53. New Hope serves individuals from all over the state through its adoption program.

54. New Hope has been placing children in loving homes since 1965 and has placed over 1,000 children.

55. In recent years, New Hope has placed between eight and twelve children in adoptive homes per year.

56. New Hope is unique in New York as an adoption provider because it also operates as a pregnancy resource center.

57. New Hope's primary focus is providing placements for newborns, infants, and toddlers up to two years of age. It is of the greatest urgency that these youngest children be placed into foster or adoptive homes as quickly as possible. OCFS' data indicates that "children less than one year of age are most likely to be involved in a report to the [Statewide Central Register of Abuse and Maltreatment], and the allegations within those reports are most likely to be substantiated."

58. New Hope is a relatively small adoption provider and takes a personal "arm-around-the-shoulder" approach to the services it provides to its adoption clients, walking birthparents through the journey of creating an adoption plan and providing guidance and counsel to prospective adoptive families through each step

of the application, homestudy placement, supervision, and finalization process.

59. Almost all of the adoptions New Hope handles are considered open adoptions, meaning that New Hope facilitates some degree of communication between the adoptive parents and birthparents about the child even after the adoptions are finalized.

60. New Hope allows birthparents and adoptive families to determine the level of openness they desire in the adoption, which includes issues such as (1) meeting the adoptive family before placement, (2) exchanging letters and photos with the adoptive family, (3) sending gifts to the child on holidays or birthdays, and/or (4) having one or two in-person visits per year with the child and adoptive family.

61. The chosen level of openness must be included in a Post Adoption Contact Agreement between the birthparents and adoptive parents, and is facilitated through New Hope until the child turns 18 years of age.

62. Even when birthparents and adoptive parents mutually agree to meet or communicate directly, New Hope remains available as a mediator should they develop a disagreement.

63. New Hope allows birthparents to choose a closed adoption if they prefer. In a closed adoption, there is no information sharing or communication from the adoptive parent to the birthparent regarding the child after the placement.

64. Many of New Hope's prospective birthmothers are referred to New Hope from other pregnancy resource centers throughout the state.

65. Many of New Hope's prospective birthparents contact New Hope directly because they have become aware of New Hope's adoption program and are interested in placing their unborn child for adoption through New Hope.

66. Many of New Hope's prospective birthparents are referred to New Hope by hospital social workers following the child's birth. Many of these clients are seeking immediate foster care placement for their child until an adoption can be arranged. New Hope provides this short-term foster care through its Tender Loving Care program.

67. Regardless of how a prospective birthparent is connected to New Hope, New Hope provides counseling concerning adoption and the adoption process to its prospective birthparents.

68. During the counseling process, New Hope discusses with birthparents their desires for the adoptive family with whom they would place their baby.

69. Consistent with state law and regulations, this includes discussing the birthparents' religious beliefs and whether they desire their baby to be placed in a home that practices those beliefs.

70. Consistent with state law and regulations, New Hope also discusses birthparents' race, ethnicity, and/or color and whether they desire the child to be placed with adoptive parents of similar race, ethnicity, or color.

71. During this process, birthmothers or birthfathers may also make statements to New Hope's birthparent caseworker about the age or sex of individuals with whom they would be willing to place their child.

72. During this process, birthmothers or birthfathers may also make statements about the family structure they would desire for their child's placement, such as a preference or aversion for the child to be placed in a home that already has other biological or adopted children, or a preference for the child to be placed in a home with a married mother and father.

73. During the process, birthmothers and birthfathers may also make statements about the type of community demographics or cultural characteristics they would desire for their child's upbringing.

74. During the process, birthmothers and birthfathers may also make statements about the educational or cultural backgrounds of individuals with whom they would be willing to place their child.

75. Based on the birthparent's desired characteristics for an adoptive family, New Hope reviews its list of prospective adoptive parents.

76. New Hope meets with birthparents, once a birthmother is approximately seven months along in her pregnancy, to show them actual parent profiles created by its current list of prospective adoptive parents.

77. If a birthmother has already given birth to the child, the child's actual characteristics are considered during these discussions.

78. New Hope typically shows five parent profiles to its prospective birthparents and ensures that the profiles match the birthparents' desires as well as the adoptive parents' willingness to adopt a child with the anticipated characteristics of the specific child.

79. New Hope generally has between 14 and 20 prospective adoptive families on its list that it has recommended for adoption.

80. All of the birthparents who have placed a child through New Hope have been able to find a family with whom they were comfortable placing their child for adoption from the profiles that New Hope provided during this process.

81. In some instances, a birthmother does not want to select the adoptive family with whom her child will be placed for personal reasons.

82. In those instances, New Hope considers the prospective adoptive parents on its list in light of the best interest of the child.

83. New Hope has never had a delay in placement because of consideration of these requirements.

84. New Hope receives inquiries about its adoption program from prospective adoptive parents from all over the state of New York.

85. New Hope invites those parents to attend one of its periodic orientation sessions to learn about New Hope, its program, and the adoption process.

86. During the orientation presentation, New Hope makes its nature as a religious ministry clear, opening the meeting with prayer, and providing information about the organization's history and religious mission. New Hope also explains scripture passages and principles about children, including that Jesus loves children, that children are to be valued as gifts from God, and that Christians are told to have faith like a child.

87. During the presentation, New Hope instructs prospective adoptive parents about its vision that adoption is intended to meet the needs of the child by providing a loving home, and that the role of a child should never be to meet the needs of the adoptive parent. New Hope also educates prospective adoptive parents about open adoption, the adoption triad (child, birth parents, adoptive parents), birthparents and their desires to select a good home for their child if they are unable to parent, the home-study process, legal surrenders, and agency fees, among other things.

88. At the orientation meeting, prospective adoptive parents are given New Hope's application packet. Completion of this application puts an applicant on New Hope's waiting list to begin the homestudy process.

89. Usually within six months of receipt of the initial application, the applicant is mailed an invitation to begin the homestudy process and must resubmit an updated application to accept.

90. The first session of the homestudy process—Session One—is an all-day session that begins with prayer. The first portion is a group session with several other applicants. It is followed by individual meetings in the afternoon with an adoptive-parent caseworker.

91. In Session One, applicants receive a homestudy packet with various documents they need in order to complete the homestudy process.

92. At the end of Session One, New Hope provides prospective adoptive families a little booklet entitled "Steps to Peace with God."

93. Session One includes, among other things, an overview of the home-study process, a review of application documents and requirements, a discussion of required reading on interracial adoption, an exploration of applicants' motivations to adopt, including discussion relating to infertility, grief, and loss, and how faith in God can help applicants through these issues. The session also includes education on bonding and attachment, with an emphasis on how different types of child care plans impact bonding and attachment for working parents.

94. Homestudy Session Two takes approximately two and a half hours and takes place on site at the applicant's home and begins with prayer.

95. Session Two includes an in-depth interview by the New Hope caseworker to survey the home for compliance with safety requirements, explore the prospective adoptive parents' experience with children, family support, parenting philosophy, ability to parent a child of a different race or culture, faith and religious practice, and family dynamics, including interviews of any children in the home.

96. Homestudy Session Three is perhaps the most intensive and takes approximately four hours at New Hope's facility.

97. In Session Three, the caseworker further interviews the applicant or applicants. Married applicants are interviewed separately as well as together.

98. The purpose of Session Three is to explore the applicants' strengths and weaknesses in more detail, and to explore the following subjects: family of origin, family dynamics, thoughts on discipline and affection, work responsibilities, marital stability including sensitive topics like pornography use, mental-health

history, financial stability, and parenting philosophy.

99. In the case of a married couple, New Hope is concerned about the importance of ensuring the intimacy and strength of the marriage for the benefit of any child placed with them.

100. New Hope views any discrepancies it discovers through these interviews to potentially be cause for concern regarding the marital relationship.

101. New Hope's primary concern during Session Three is ensuring that the home of the applicant(s) will be a safe, stable environment for the child.

102. After each session, the caseworker makes notes regarding the caseworker's findings and assessments.

103. Following Session Three, the caseworker and I meet to review the entire contents of the casefile. During this meeting the caseworker and I consider all of the documentation submitted and make a determination to approve or disapprove the applicants as prospective adoptive parents. In making this determination, New Hope is always focused on the best interest of any child who may be placed in the home.

104. Only those who are recommended for placement will be invited to participate in Session Four.

105. Homestudy Session Four is a teaching session that is done in a group setting that begins with prayer.

106. During Session Four, New Hope discusses how to talk to your child about adoption and other issues that are common to adopted children and families.

107. During Session Four, New Hope also shows examples of adoptive-parent profiles to prospective adoptive parents and instructs them about how to create their own profile, which will be the picture and message that connects them with the birthparent.

108. After Session Four, adoptive parents are given a month or so to make a profile. They first complete a draft profile, including pictures and wording, which they submit to New Hope for review.

109. New Hope's adoptive-parent caseworker and birthparent caseworker both review this draft, make suggested edits, and provide the adoptive parents with helpful feedback. Upon receiving that feedback, adoptive parents may collaborate further with New Hope on edits to their parent profile before finalizing them in a scrapbook format.

110. Once adoptive parents have finalized their profile, they are placed on the list for consideration by birthparents when a child is in need of an adoptive home.

111. Shortly after adoptive parents have submitted their profile, the New Hope caseworker discusses again in more detail the characteristics and legal risks of a child they are willing to adopt.

112. Consistent with state law and regulation, this discussion will include preferences for a child of a specific sex, race, color, or ethnicity.

113. New Hope will also discuss the adoptive parents' willingness to be involved in an open adoption including meeting the birthparent prior to placement,

exchanging letters and pictures, and meeting with the birthparent in person once or twice per year during a visit supervised by New Hope.

114. Prior to making a placement with adoptive parents, New Hope educates them on sudden infant death syndrome, vaccinations, safe sleep environments for children, caring for premature infants, and the placement, supervision, and finalization process.

115. Information relevant to New Hope's formal homestudy report for its adoptive parents must be assembled prior to making a placement.

116. That report includes the following language:

This report is the culmination of the Homestudy process conducted by New Hope Family Services, Inc. This homestudy process includes training on the following topics: Adoption as a life-changing process, the adoption triangle, the seven core issues of adoption, preparation for the homestudy process from the perspective of both agency and self-assessment, adoptedness as it relates to the developmental esteem in the adopted child, discussion on the uses adopted children usually face, discussion regarding birthparents' resolution of loss, profile preparation instructions and learning to wait. The homestudy process also includes a tour of the home, individual interviews with the husband and wife and joint interviews with the couple.

.....

New Hope Family Services, Inc. is authorized by the New York State Office of Children and Family Services as a child-placement and child care agency. The Agency certifies that it has completed a homestudy on the above mentioned family and that the family has met all the pre-adoption requirements established by the State of New York, including a search of the New York State Central Register on Child Abuse and Maltreatment.

117. The shortest length of time allowed by law for finalization after

placement is three months, but the process usually takes between six months and one year to complete. During that time New Hope maintains legal custody of the child while the adoptive parents have physical guardianship.

118. After a child is placed, New Hope remains in close contact with the adoptive family to ensure that the child is receiving proper medical care and feeding, among other things.

119. New Hope places phone calls to the family and follows up with in-person visits at least two or three times during a period of about six months, and usually once every quarter thereafter if necessary.

120. These supervisory visits are intended to gather information about the child's growth, health, and development as well as to assess the degree of attachment developing between the adoptive parents and the child.

121. New Hope's caseworkers also assess how the level of openness agreed to in the Contact Agreement is playing out in actuality for the adoptive parents and how they are coping with it emotionally.

122. The caseworker's goal is to ensure the child's safety but also to help facilitate the adjustment of the adoptive parents to the child's placement in the home.

123. New Hope caseworkers are required to complete field reports reporting on their supervisory visits for inclusion in the case file and formal supervisory report.

124. In preparation for finalization, the homestudy report—which serves as

New Hope's official recommendation of an adoptive family—must be notarized.

125. Before finalization, the homestudy update and supervisory reports are also prepared and notarized. These reports include information about the child's placement in the home and the child's adjustment to the family. These reports serve as New Hope's official recommendation of the adoptive family for the adoption of the specific child.

126. Following the finalization of an adoption, because of Contact Agreements, New Hope remains involved with the majority of its clients until the child turns 18 years of age.

127. New Hope facilitates letters, photos, and/or gifts being passed back and forth between the adoptive family and birthparents.

128. Depending on the level of openness, New Hope may also supervise and facilitate up to two in-person visits per year.

129. Under certain circumstances, New Hope provides temporary foster placements.

130. New Hope calls its foster-care services Tender Loving Care homes.

131. In general these temporary placements occur when either (1) a birthmother working with New Hope has delivered in a hospital and has not decided between parenting or placement for adoption, or (2) a birthparent is referred to New Hope by a hospital social worker because she has not yet made an adoption plan and desires to do so.

132. New Hope recruits foster families that are willing to take in newborns

on short notice.

133. For the same reasons previously set forth, New Hope typically seeks married husband and wife couples to serve as foster parents.

134. New Hope certifies its foster families for placements in accordance with the state regulatory process.

135. Similar to the adoption homestudy process, that process requires New Hope to interview and collect information on applicants in order to explore applicants' reasons for wanting to foster, their marital stability, family structure, religious affiliation, family background, and life history, among other things.

136. New Hope neither receives nor distributes any government funding in connection with its Tender Loving Care foster program.

137. Because of New Hope's religious beliefs, New Hope will not recommend or place children with unmarried couples or same-sex couples as adoptive parents.

138. New Hope's "Special Circumstances" policy, formalizes this policy and practice and states in part:

If the person inquiring to adopt is single . . . The Executive Director will talk with them to discern if they are truly single or if they are living together without the benefit of marriage. . . because New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage.

If the person inquiring to adopt is in a marriage with a same sex partner . . . (The Executive Director will . . . explain that because New Hope is a Christian Ministry, we do not place children with same sex couples).

139. New Hope has worked with unmarried individuals who are truly single in the past and remains willing to work with such individuals.

140. Because New Hope handles inquiries from unmarried couples and same-sex couples pursuant to the policy and practice described above, New Hope has never denied an unmarried couple or same-sex couple's application. Whenever a same-sex couple or unmarried couple is interested in a referral, New Hope refers them to the appropriate county social services office or another provider. On information and belief, no same-sex couple or unmarried couple who has inquired with New Hope about adoption has ever complained to OCFS about how New Hope handled their inquiry.

141. In January or February of 2018, Suzanne Colligan of OCFS called me. During the call, Ms. Colligan conveyed that, under a new policy implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures.

142. On July 18, Ms. Colligan sent me an email to schedule the adoption program review. That email stated in part:

For your information and in considering a date, below is a general outline of the topics to be covered when we meet. Additionally, I'll need to review adoption records; 1 closed record and if available 3 open pending adoptions. We can talk this through depending on the types of records you have in process.

The on-site review takes anywhere from 4-5 hours to complete, which depends on the record details and the length of discussion needed to cover the topics. Please let me know if you have any questions.

Adoption Model
Agency Goals & Objectives (Fiscal & Program)
Range of Services
Advertisements
Staffing

Waiting List
Maintenance of records

I will need a copy of the following:

Fee Schedule
Board of Directors
Policy and Procedural Manual
Forms
State licenses and/or Contracts
Fiscal Review

143. On July 20, Ms. Colligan confirmed by email that the adoption program review was scheduled for September 6, 2018 at 9:00 a.m.

144. Based on Ms. Colligan's direction that she would need a copy of New Hope's policies and procedure manual, I updated New Hope's formal policies and procedures on adoption into one consolidated manual.

145. On August 28, I received an email from Ms. Colligan, stating in part:

I also thought that it might be helpful for you to see the application we use with agencies requiring reauthorization for corporate authority. Since you are authorized in perpetuity, your agency is not required to complete/submit this form. However, I will be asking many of the program questions on it, so you may find it helpful in preparing for my visit.

146. A few days before the on-site review, Ms. Colligan and I had a call. During the call, Ms. Colligan advised me that she would be providing me with a form that she would be using as a guide for the format of her review. Ms. Colligan stressed that I did not need to complete the form or sign it because of New Hope's perpetual authorization status.

147. On September 6, 2018, Ms. Colligan met with myself and Kathy Decesare, New Hope's Center Director for approximately eight hours.

148. At that meeting, Ms. Colligan provided me with a new regulation that all agencies are required to implement.

149. Ms. Colligan also advised me about how New Hope had handled information that a specific birthparent had died, stating that even in such circumstances the agency could not share the information but could only direct inquiries to the New York State Adoption Registry.

150. Ms. Colligan identified these two topics as opportunities for improvement.

151. During the on-site review, Ms. Colligan never indicated that New Hope's authorization to handle adoption placements was in jeopardy as a result of these opportunities for improvement.

152. Ms. Colligan indicated that OCFS' review would be written up formally within one month, further stating that this timeframe was an OCFS requirement.

153. Ms. Colligan took a copy of New Hope's policy and procedure manual with her when she left.

154. On October 1, 2018, OCFS sent me a letter as an attachment to an email. The letter documented the on-site review and stated in part:

Our office found that your program has a number of strengths in providing adoption services within the community. one of which is the strong emphasis on assisting the birth parents in making an informed decision for their newborn, providing them time to make the decision, along with a supportive and detailed adoptive family selection process. During the site visit there were a few topic areas that warranted a follow up meeting to discuss and verify adjustments have been made to the current agency policies. The topics include:

- Immediate implementation of 18-OCFS-ADM-07: Foster/Adoptive Home Certification Approval Process
- Request for non-identifying information and medical history by adoptive families, adoptee, or birth parent; including usage of the Adoption Information Registry through the Department of Health.
- The agency's role and limitations regarding the exchange of information related to conditions of a surrender.

This program review will be conducted at your agency every three years. Annual onsite visits will be conducted over the next two years. We would like to thank you for the courtesy and cooperation extended to us during the visit and look forward to working with you as you continue to provide adoption services.

155. On October 5, 2018, Ms. Colligan and I scheduled a follow up meeting for October 15, 2018 to address the items mentioned in the October 1 letter.

156. On or about October 9, 2018, I received a call from Ms. Colligan. During the call, Ms. Colligan stated that she had been reading New Hope's policies and procedures manual and that New Hope's policy not to place children with those who are living together without the benefit of marriage or with same-sex couples violated Title 18 NYCRR § 421.3 and was impermissible.

157. Ms. Colligan told me that New Hope would have to comply with § 421.3 by placing children with unmarried couples and same-sex couples.

158. Ms. Colligan said that if New Hope did not comply, New Hope would be "choosing to close."

159. I responded that New Hope would be unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples.

160. During the phone call, Ms. Colligan stated that "[s]ome Christian

ministries have decided to compromise and stay open.”

161. I affirmed again that New Hope would be unwilling to violate its beliefs and stated that “[w]e will never choose to close. You will be forcing us to close.” I also stated that New Hope’s religious freedom was being violated.

162. Ms. Colligan told me that I would be getting a letter from OCFS mandating compliance by a specific date.

163. On October 11, 2018, I sent Ms. Colligan an email stating in part:

I just was thinking about the 18 years of correspondence contracts that our adoptive couples have and the visits—sometimes two per year between adoptive couples and birthparents. If you were to close down our agency, would another agency provide staff to handle all of this casework for the next 18 years?

164. Ms. Colligan replied on October 11, 2018, stating in part:

You will be receiving a letter from our office soon requesting a formal written response regarding your agency’s position. When OCFS receives written notification of an agency’s intention to close a program, OCFS will respond with written instructions to the agency with the steps they must take. These steps include the agency’s responsibility to seek and obtain agreement with another NYS authorized agency to maintain and store their adoption records, of which includes the handling of activities outlined in the legally bound agreements with birth parents.

165. On October 12, 2018, Ms. Colligan sent me an email stating in part:

We will put Monday’s follow up meeting [to discuss a few minor improvements identified during the visit] on hold for now. The purpose of the follow up meeting would be to work on the necessary changes to your agency policy manual. Based on our recent phone call, the follow up meeting for those purposes does not appear needed at this time.

166. On October 17, 2018, Ms. Colligan indicated in email to me that she

had mailed out a certified letter. That email stated in part:

Once the letter is returned providing us with written notice of your intent, we will send out a letter outlining our expectations around the handling of those that you are currently providing services and the adoption records.

167. I did not receive the certified letter, so I called several times to follow up with Ms. Colligan, but my voicemails were unreturned.

168. On October 26, because I was going to be having a meeting with the Board of New Hope and could not reach Ms. Colligan, I called and spoke to another OCFS staff member.

169. On October 26, 2018, I received an electronic copy of the letter to which Ms. Colligan had referred. The letter stated that New Hope's policy pertaining to "not placing 'children with those who are living together without the benefit of marriage' or 'same-sex couples' violates Title 18 NYCRR § 421.3." The letter further stated:

OCFS hereby requests a formal written response from [New Hope] stating the agency's position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the above-cited regulation.

Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program.

170. New Hope was given until November 30, 2018, to respond to OCFS' ultimatum.

171. Without violating its religious beliefs, New Hope is unable to comply with the OCFS ultimatum to recommend unmarried couples and same-sex couples as foster and adoptive parents, to counsel unmarried and same-sex couples concerning adoptive parenthood and related relational issues, and to place children with unmarried couples and same-sex couples.

172. In fulfillment of its longstanding mission pursued in obedience to the faith of its staff and board, New Hope desires to continue taking on new adoptive parents, birthparents, foster parents, and children for placement in foster care and adoption, but the state now threatens to absolutely prevent New Hope from doing so by terminating New Hope's perpetual license and prohibiting it from serving in all of these ways.

173. At the time of the State's ultimatum, New Hope had approximately thirteen prospective adoptive families on its list that had completed the homestudy process and were waiting for a child to be placed with them.

174. New Hope had a homestudy Session One meeting scheduled for October 29, 2018, to begin the homestudy process with six more prospective adoptive families. Because it had been told that it would have to violate its beliefs or shut down, New Hope was forced to cancel the homestudy Session One meeting. New Hope advised those families of what the state was requiring. Four of the families requested a refund of their application fees.

175. Since receiving the demand from OCFS that New Hope violate its beliefs or cease adoptions, nine additional prospective adoptive families have

contacted New Hope about beginning the adoption process. Because of OCFS' threats, New Hope was obliged to tell them that it may not be able to work with them at this time.

176. New Hope desires to contact these prospective adoptive parents and work with them to place children in need of loving homes.

177. Since receiving the demand from OCFS that New Hope violate its beliefs or cease adoptions, at least five expectant birthmothers contacted New Hope asking for help in placing their children for adoption. But New Hope was obliged to tell them that that it has suspended taking on new birthparents and children to work with towards adoption because of OCFS' threats.

178. New Hope desires to work with these prospective birthparents to help them find loving homes for their children.

179. New Hope has three active foster families that are willing to accept placements, but it has similarly had to advise them that its program is on hold due to the uncertainty caused by the OCFS ultimatum.

180. New Hope had a training session concerning adoption scheduled for October 18, 2018, for center directors from several pregnancy resource centers from around the state. Because of OCFS' threat to terminate New Hope's authorization to provide adoption services, New Hope was forced to cancel the training.

181. If New Hope were to violate its religious beliefs and place children with unmarried couples and same-sex couples, the pregnancy resource centers that it currently serves through trainings and referrals would be less inclined to refer to

New Hope, and may no longer refer to New Hope at all, because they are faith-based organizations that share New Hope's religious beliefs regarding the nature of marriage and family.

182. If New Hope were to violate its beliefs, it would lose some of its clients, including birthmothers, adoptive families, and foster families, who choose to work with New Hope because of their shared Christian faith.

183. If New Hope is unable to place children for adoption or in foster care, its ability to effectively minister to and help women who are facing unplanned pregnancies through its pregnancy resource center will be impaired.

184. New Hope currently retains legal custody of three children that it has placed with three separate adoptive families this year.

185. New Hope continues to actively supervise those placements but has advised those families of what the state is requiring and that it is unsure if it will be able to continue to handle the finalization of their adoptions. If New Hope is unable to do so, finalization of these adoptions will be delayed because of being transferred to another provider.

186. Because the majority of New Hope's adoptions are open adoptions, if New Hope is unable to continue its adoption program, it will have to transfer 117 adoptive families and 117 birthparent families that it has worked with over the past 18 years, to another provider to facilitate those Contact Agreements.

187. If New Hope loses its authorization to place children, it will have to transfer all fifty-three years of its adoptive family and birthparent files to another

EXHIBIT

C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

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.

**VERIFIED COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF**

5:18-cv-1419 (MAD/TWD)

INTRODUCTION

1. This is a federal civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of the New York Office of Children and Family Services' new interpretation and application of New York Codes, Rules, and Regulations, Title 18 § 421.3(d). A copy of the regulation, which became effective on November 6, 2013, is attached as Exhibit 1.

2. In the first century, the Apostle James exhorted Christians that "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress," and across the centuries the church has led the way in caring for orphans and abandoned children. One of the first orphanages in America was founded in pre-revolutionary times by the famous preacher George Whitfield, while shortly after the revolution the first orphanage in New York was financed by churches throughout the city.

3. In 1958, pastor Clinton H. Tasker followed in that long tradition by founding what became New Hope Family Services as an explicitly Christian

ministry to care for and find adoptive homes for children whose birthmothers or parents could not care for them.

4. Since its founding, New Hope has provided loving service to birthparents, infants, and adoptive parents in a manner consistent with its religious convictions about the created nature of women, men, and families, and about the home environment that is best for children.

5. New Hope Family Services has placed over 1,000 children into loving adoptive homes throughout the State of New York.

6. New York law expressly permits birthparents to specify the religion of the adoptive family with which their child will be placed, and many birthmothers and adoptive parents choose to work with New Hope precisely because they share or value its religious nature and convictions.

7. Until recently, it was illegal for adoption providers in New York to place children for adoption with any couple except “an adult husband and his adult wife.” When the legislature first authorized unmarried and same-sex partners to adopt in 2010, the Governor noted in his approval statement that “the statute is permissive” rather than mandatory, and thus “would allow for such adoptions without compelling any agency to alter its present policies.”

8. New York State has never changed its adoption laws to make it mandatory for adoption providers to place children with couples other than “an adult husband and his adult wife.” Instead, unelected bureaucrats in the New York

Office of Children and Family Services have purported to do so through their adoption, interpretation, and enforcement of a new regulation.

9. This regulation was adopted for the purpose of targeting faith-based adoption ministries, and OCFS is now actively demanding that such ministries, including New Hope, violate their religious convictions and say things that they believe to be false—or shut their doors.

10. Following a review of New Hope’s policies and procedures, OCFS wrote a letter to New Hope, stating, “It was found that the agency’s policy pertaining to not placing ‘children with those who are living together without the benefit of marriage’ or ‘same sex couples’ violates Title 18 NYCRR § 421.3, and is discriminatory and impermissible.”

11. The letter provided an ultimatum that New Hope either “revise the present policy and continue the existing adoption program” or “fail to bring the policy into compliance with the regulation,” in which case “OCFS will be unable to approve continuation of [New Hope’s] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program.”

12. Because New Hope’s policy is an exercise of its religious faith, the OCFS ultimatum has placed it in the position of having to choose either to violate its faith or cease exercising its religion by closing its adoption ministry.

13. Because New Hope is on notice that it will be shut down if it does not violate its religious beliefs, New Hope has been unable to accept new birthparent

and adoptive-parent clients and has had to tell its current clients about the risk that it may be unable to serve them through the completion of their adoptions.

14. New Hope has placed three children with adoptive families whose adoptions are not yet finalized. If New Hope is unable to continue its service to these families, these adoptions will likely be delayed and these families may incur additional expense due to the transfer to another agency.

15. Because of its predicament, four of six new families who were scheduled to begin the homestudy program with New Hope have requested that their application fees be refunded.

16. Additionally, of the approximately thirteen families who were recommended to adopt through New Hope but had not yet received placements, three families asked for their money to be refunded. The others have agreed to wait in hopes that New Hope will be able to work with them.

17. And of the four expecting birthmothers who contacted New Hope desiring to place their children in adoptive homes, some have had to be referred elsewhere. But a few of those are anxiously hoping that New Hope will be able to work with them and find loving adoptive homes for their children.

18. The majority of adoptions that New Hope facilitates are open adoptions, meaning that there is a contact agreement in place that New Hope facilitates between the birthparents and the adoptive parents throughout the first eighteen years of the child's life.

19. New Hope has approximately 117 adoptions with active contact agreements that it is responsible for facilitating.

20. Because of the ultimatum, New Hope has been placed in the impossible situation of violating its religious beliefs or losing its ability to fulfill its obligations to the children, birthparents, and adoptive parents involved in open adoptions, with whom it has longstanding relationships of care and trust.

21. OCFS' actions threaten to destroy New Hope's ministry, deny its care to birthparents and adoptive parents who value and desire its services including its religious perspective, disrupt in-process adoptions, and most importantly slow or prevent the placement of infants into adoptive homes.

22. But core First Amendment protections—including New Hope's free exercise and free speech rights—prohibit this attempt by OCFS to either impose its agenda on faith-based adoption providers or shut them down.

23. OCFS' regulation and its actions threaten irreparable injury to New Hope. Accordingly, New Hope brings this lawsuit, seeking both preliminary and permanent injunctive relief.

JURISDICTION AND VENUE

24. This action arises under the Constitution and laws of the United States. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

25. This Court has authority to grant the requested injunctive relief under 28 U.S.C. § 1343; the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202; and costs and attorneys' fees under 42 U.S.C. § 1988.

26. Venue lies in the Federal District Court for the Northern District of New York pursuant to 28 U.S.C. § 1391(b). A substantial part of the actions or omissions giving rise to this case occurred within this District and at least one of the defendants resides within this District.

PARTIES

27. Plaintiff New Hope Family Services, Inc., is a religious not-for-profit corporation duly incorporated under the laws of New York, with its principal place of business at 3519 James Street, Syracuse, NY 13206.

28. Defendant Sheila J. Poole is the Acting Commissioner for OCFS for the State of New York and is sued in her official capacity. Her service address is Capital View Office Park, North Building, 52 Washington Street, Rensselaer, NY 12144.

FACTUAL BACKGROUND

Adoption and foster care crisis

29. There are over 440,000 children in foster care in the U.S.

30. Over 120,000 of those children are waiting to be adopted.

31. In federal fiscal year 2017, New York had 27,268 children served in foster care, with 19,213 in foster care on September 30, 2017.

32. Of those, over 4,400 New York children were waiting to be adopted.

33. During fiscal year 2017, throughout the state of New York, a total of only 1,729 children were adopted.

New Hope's formation and history

34. The care of orphans and infants whose parents cannot care for them has been a Christian mission since the beginning of the faith.

35. St. James instructed the earliest church that “Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress.” James 1:27.

36. Since America’s earliest days, people of Christian faith have carried out the religious mission of caring for orphans and women in distress.

37. One of the very first orphanages in America was founded in pre-revolutionary times by the famous preacher George Whitfield.

38. Shortly after the revolution, the first orphanage in New York was financed by churches throughout the city.

39. New Hope’s adoption ministry is one small part of America’s rich religious heritage of helping birthmothers and children through adoption.

40. In 1958, Clinton H. Tasker, a Christian minister serving in a rescue mission, strongly sensed the call of God to open a Christian adoption ministry in New York that would care for women facing unplanned pregnancies and for their children.

41. His vision was realized when New Hope Family Services’ incorporation was approved in 1965 by the State Board of Social Welfare under the name Evangelical Family Service, Inc. A copy of New Hope’s articles of incorporation as approved is attached as Exhibit 2 and a copy of New Hope’s amendment to perpetual duration is attached as Exhibit 3.

42. Its board was composed of ministers and Christian philanthropists.

43. In 1977, New Hope amended its name to Evangelical Adoption and Family Services, Inc. to better reflect all of its services.

44. In 1986, New Hope began operating a pregnancy resource center under its umbrella.

45. In the early 1990s, Evangelical Adoption and Family Services, Inc., amended its name to New Hope Family Services, Inc.

46. Over the years, OCFS has issued several letters to New Hope affirming that New Hope has the requisite corporate authority to place children for adoption and to perform adoption services. In those letters, OCFS has acknowledged that New Hope's authorization to perform adoption services is perpetual. A copy of one of those letters that was issued in 2008 is attached as Exhibit 4.

47. Though New Hope's name has changed several times, the mission and Christian character of the organization have remained the same.

48. Like its founding board, the current board of New Hope is composed of devout believers who are actively involved in their Christian churches, including one member who is actively pastoring a church.

49. New Hope's mission is "to be Christ's hands extended to offer hope and help to people with pregnancy, parenting, adoption, or post-abortion needs in the Syracuse area and throughout the State of New York."

50. Consistent with New Hope's mission, it operates as a pregnancy resource center and temporary-foster-placement and adoption provider.

51. In order to scrupulously ensure its autonomy to operate in accordance with its religious beliefs, New Hope accepts no government funding.

New Hope's religious character

52. New Hope's Christian faith and religious beliefs motivate and permeate its mission and all of its activities.

53. All of New Hope's paid staff, board members, and counseling volunteers must be in agreement with and sign New Hope's statement of faith, must be in agreement with and supportive of New Hope's religious mission, and must conduct themselves consistent with Christian faith and belief.

54. New Hope's board members pray at New Hope board meetings and all of New Hope's paid staff and counseling volunteers are expected to be willing to pray with any client who requests prayer or with other staff.

55. All of New Hope's paid staff and counseling volunteers are expected to counsel consistently with biblical truth.

56. New Hope believes that:

- God is sovereign over and involved in the creation of every human life and every human life is created in the image and likeness of God and is worthy of protection;
- Every person has inherent dignity and self-worth and should be treated with respect and love;
- The biblical model for the family as set out in the Bible—one man married to one woman for life for their mutual benefit and the benefit

of their children—is the ideal and healthiest family structure for mankind and specifically for the upbringing of children;

- God created two sexes—male and female. And each sex has a unique role and gifting that is intended to benefit the other and any children in the family;
- An individual’s sex as male or female is determined at the time of conception and cannot be changed;
- Caring for orphans is important to God and God desires believers to do so.

57. Through its adoption program, New Hope strives to save the lives of babies that God has created.

New Hope as a pregnancy resource center

58. New Hope operates as a pregnancy resource center that exists to lovingly serve women facing the fears and concerns of an unplanned pregnancy, and their children.

59. New Hope’s pregnancy resource center serves approximately 700 clients per year.

60. All of the services that New Hope provides as a pregnancy resource center are provided without consideration of the recipient’s marital status, sexual orientation, gender identity, or religious belief.

61. All of the services that New Hope provides its pregnancy resource center clients are provided free of charge, including pro-life information; education

and counseling about pregnancy, birth, parenting, and childcare; clothing and supplies for infants; counseling about available social services; referrals to physicians; and more.

62. New Hope provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child by either choosing to parent or to create a loving adoption plan for their child, rather than choosing abortion.

63. As a pregnancy resource center, New Hope regularly serves unmarried couples and those who identify as lesbian, gay, bisexual or transgender.

64. When New Hope has a pregnancy-resource-center client who has a positive pregnancy test and is open to learning about adoption, New Hope provides the mother counseling about the adoption process. New Hope encourages her that adoption is a loving option, enabling the mother to give her baby life and to select the adoptive family with whom she feels comfortable entrusting her child.

65. New Hope never pressures a birthmother to make an adoption plan over parenting.

66. During the counseling process, New Hope shows the prospective birthmother profiles of some of the families with whom it has recently placed children as examples of the types of loving adoptive families that New Hope may be able to locate for her child.

67. New Hope holds over 1,500 counseling sessions per year as a pregnancy resource center.

68. New Hope's ability to serve its pregnancy-resource-center clients through its adoption program enhances its efficacy in encouraging women to choose life for their babies instead of abortion.

69. In addition, New Hope networks with other faith-based pregnancy resource centers throughout the State of New York, none of which are licensed adoption agencies. These centers refer clients to New Hope who are open to learning about adoption.

70. New Hope's ability to serve other pregnancy resource centers and the pregnant women those centers serve is enhanced by its ability to directly facilitate the creation of adoption plans and adoptive placements.

New Hope as adoption provider: birthparent services

71. New Hope operates as a New York voluntary adoption provider and is authorized to place children with New York state residents.

72. New Hope serves individuals from all over the state through its adoption program.

73. New Hope has been placing children in loving homes since 1965 and has placed over 1000 children.

74. In recent years, New Hope has placed between eight and twelve children in adoptive homes per year.

75. New Hope is unique in New York as an adoption provider because it also operates as a pregnancy resource center.

76. New Hope's primary focus is providing placements for newborns, infants, and toddlers up to two years of age. It is of the greatest urgency that these youngest children be placed into foster or adoptive homes as quickly as possible. OCFS' data indicates that "children less than one year of age are most likely to be involved in a report to the [Statewide Central Register of Abuse and Maltreatment], and the allegations within those reports are most likely to be substantiated."

77. New Hope is a relatively small adoption provider and takes a personal "arm-around-the-shoulder" approach to the services it provides to its adoption clients, walking birthparents through the journey of creating an adoption plan and providing guidance and counsel to prospective adoptive families through each step of the application, homestudy, placement, supervision, and finalization process.

78. Almost all of the adoptions New Hope handles are considered open adoptions, meaning that New Hope facilitates some degree of communication between the adoptive parents and birthparents about the child even after the adoptions are finalized.

79. New Hope allows birthparents and adoptive families to determine the level of openness they desire in the adoption, which includes issues such as (1) meeting the adoptive family before placement, (2) exchanging letters and photos with the adoptive family, (3) sending gifts to the child on holidays or birthdays, and/or (4) having one or two in-person visits per year with the child and adoptive family.

80. The chosen level of openness must be included in a Post Adoption Contact Agreement between the birthparents and adoptive parents, and is facilitated through New Hope until the child turns 18 years of age.

81. Even when birthparents and adoptive parents mutually agree to meet or communicate directly, New Hope remains available as a mediator should they develop a disagreement.

82. New Hope allows birthparents to choose a closed adoption if they prefer. In a closed adoption, there is no information sharing or communication from the adoptive parent to the birthparent regarding the child after the placement.

83. Many of New Hope's prospective birthmothers are referred to New Hope from other pregnancy resource centers throughout the state.

84. Many of New Hope's prospective birthparents contact New Hope directly because they have become aware of New Hope's adoption program and are interested in placing their unborn child for adoption through New Hope.

85. Many of New Hope's prospective birthparents are referred to New Hope by hospital social workers following the child's birth. Many of these clients are seeking immediate foster care placement for their child until an adoption can be arranged. New Hope provides this short-term foster care through its Tender Loving Care program.

86. Regardless of how a prospective birthparent is connected to New Hope, New Hope provides counseling concerning adoption and the adoption process to its prospective birthparents.

87. During the counseling process, New Hope discusses with birthparents their desires for the adoptive family with whom they would place their baby.

88. Consistent with state law and regulations, this includes discussing the birthparents' religious beliefs and whether they desire their baby to be placed in a home that practices those beliefs.

89. Consistent with state law and regulations, New Hope also discusses birthparents' race, ethnicity, and/or color and whether they desire the child to be placed with adoptive parents of similar race, ethnicity, or color.

90. During this process, birthmothers or birthfathers may also make statements to New Hope's birthparent caseworker about the age or sex of individuals with whom they would be willing to place their child.

91. During this process, birthmothers or birthfathers may also make statements about the family structure they would desire for their child's placement, such as a preference or aversion for the child to be placed in a home that already has other biological or adopted children, or a preference for the child to be placed in a home with a married mother and father.

92. During the process, birthmothers and birthfathers may also make statements about the type of community demographics or cultural characteristics they would desire for their child's upbringing.

93. During the process, birthmothers and birthfathers may also make statements about the educational or cultural backgrounds of individuals with whom they would be willing to place their child.

94. Based on the birthparent's desired characteristics for an adoptive family, New Hope reviews its list of prospective adoptive parents.

95. New Hope meets with birthparents, once a birthmother is approximately seven months along in her pregnancy, to show them actual parent profiles created by its current list of prospective adoptive parents.

96. If a birthmother has already given birth to the child, the child's actual characteristics are considered during these discussions.

97. New Hope typically shows five parent profiles to its prospective birthparents and ensures that the profiles match the birthparents' desires as well as the adoptive parents' willingness to adopt a child with the anticipated characteristics of the specific child.

98. New Hope generally has between 14 and 20 prospective adoptive families on its list that it has recommended for adoption.

99. All of the birthparents who have placed a child through New Hope have been able to find a family with whom they were comfortable placing their child for adoption from the profiles that New Hope provided during this process.

100. In some instances, a birthmother does not want to select the adoptive family with whom her child will be placed for personal reasons.

101. In those instances, New Hope considers the prospective adoptive parents on its list in light of the best interest of the child.

102. New Hope has never had a delay in placement because of consideration of these requirements.

New Hope as adoption provider: adoptive-family services

103. New Hope receives inquiries about its adoption program from prospective adoptive parents from all over the state of New York.

104. New Hope invites those parents to attend one of its periodic orientation sessions to learn about New Hope, its program, and the adoption process.

105. During the orientation presentation, New Hope makes its nature as a religious ministry clear, opening the meeting with prayer, and providing information about the organization's history and religious mission. New Hope also explains scripture passages and principles about children, including that Jesus loves children, that children are to be valued as gifts from God, and that Christians are told to have faith like a child.

106. New Hope also instructs prospective adoptive parents about its vision that adoption is intended to meet the needs of the child by providing a loving home, and that the role of a child should never be to meet the needs of the adoptive parent.

107. At the orientation meeting, prospective adoptive parents are given New Hope's application packet. Completion of this application puts an applicant on New Hope's waiting list to begin the homestudy process.

108. Usually within six months of receipt of the initial application, the applicant is mailed an invitation to begin the homestudy process and must resubmit an updated application to accept.

109. The first session of the homestudy process—Session One—is an all-day session that begins with prayer. The first portion is a group session with several other applicants. It is followed by individual meetings in the afternoon with an adoptive-parent caseworker.

110. In Session One, applicants receive a homestudy packet with various documents they need in order to complete the homestudy process.

111. At the end of Session One, New Hope provides prospective adoptive families a little booklet entitled “Steps to Peace with God.”

112. Session One includes, among other things, an exploration of applicants’ motivations to adopt, including discussion relating to infertility, grief, and loss, and how faith in God can help applicants through these issues.

113. Homestudy Session Two takes approximately two and a half hours and takes place on site at the applicant’s home.

114. Session Two includes an in-depth interview by the New Hope caseworker to explore the prospective adoptive parents’ experience with children, family support, parenting philosophy, ability to parent a child of a different race or culture, faith and religious practice, and family dynamics, including interviews of any children in the home.

115. Homestudy Session Three is perhaps the most intensive and takes approximately four hours at New Hope’s facility.

116. In Session Three, the caseworker further interviews the applicant or applicants. Married applicants are interviewed separately as well as together.

117. The purpose of Session Three is to explore the applicants' strengths and weaknesses in more detail, and to explore the following subjects: family of origin, family dynamics, thoughts on discipline and affection, work responsibilities, marital stability including sensitive topics like pornography use, mental-health history, financial stability, and parenting philosophy.

118. In the case of a married couple, New Hope is concerned about the importance of ensuring the intimacy and strength of the marriage for the benefit of any child placed with them.

119. New Hope views any discrepancies it discovers through these interviews to potentially be cause for concern regarding the marital relationship.

120. New Hope's primary concern during Session Three is ensuring that the home of the applicant(s) will be a safe, stable environment for the child.

121. Following Session Three, the caseworker and the Executive Director meet to review the entire contents of the case file. During this meeting the Executive Director and the caseworker consider all of the documentation submitted and make a determination to approve or disapprove the applicants as prospective adoptive parents. In making this determination, New Hope is always focused on the best interest of any child who may be placed in the home.

122. Only those who are recommended for placement will be invited to participate in Session Four.

123. Homestudy Session Four is a teaching session that is done in a group setting.

124. During Session Four, New Hope discusses how to talk to your child about adoption and other issues that are common to adopted children and families.

125. During Session Four, New Hope also shows examples of adoptive-parent profiles to prospective adoptive parents and instructs them about how to create their own profile, which will be the picture and message that connects them with the birthparent.

126. After Session Four, adoptive parents are given a month or so to make a profile. They first complete a draft profile, including pictures and wording, which they submit to New Hope for review.

127. New Hope's adoptive-parent caseworker and birthparent caseworker both review this draft, make suggested edits, and provide the adoptive parents with helpful feedback. Upon receiving that feedback, adoptive parents may collaborate further with New Hope on edits to their parent profile before finalizing them in a scrapbook format.

128. Once adoptive parents have finalized their profile, they are placed on the list for consideration by birthparents when a child is in need of an adoptive home.

129. Shortly after adoptive parents have submitted their profile, the New Hope caseworker discusses again in more detail the characteristics and legal risks of a child they are willing to adopt.

130. Consistent with state law and regulation, this discussion will include preferences for a child of a specific sex, race, color, or ethnicity.

131. New Hope will also discuss the adoptive parents' willingness to be involved in an open adoption.

132. Prior to making a placement with adoptive parents, New Hope educates them on sudden infant death syndrome, vaccinations, safe sleep environments for children, caring for premature infants, and the placement, supervision and finalization process.

133. The shortest length of time allowed by law for finalization after placement is three months, but the process usually takes between six months and one year to complete. During that time New Hope maintains legal custody of the child while the adoptive parents have physical guardianship.

134. After a child is placed, New Hope remains in close contact with the adoptive family to ensure that the child is receiving proper medical care and feeding, among other things.

135. New Hope places phone calls to the family and follows up with in-person visits at least two or three times during a period of about six months, and usually once every quarter thereafter if necessary.

136. These supervisory visits are intended to gather information about the child's growth, health, and development as well as to assess the degree of attachment developing between the adoptive parents and the child.

137. New Hope's caseworkers also assess how the level of openness agreed to in the Contact Agreement is playing out in actuality for the adoptive parents and how they are coping with it emotionally.

138. The caseworker's goal is to ensure the child's safety but also to help facilitate the adjustment of the adoptive parents to the child's placement in the home.

139. New Hope caseworkers are required to complete field reports reporting on their supervisory visits for inclusion in the case file and formal supervisory report.

140. In preparation for finalization, the homestudy report—which serves as New Hope's official recommendation of an adoptive family—must be notarized.

141. Before finalization, the homestudy update and supervisory reports are also prepared and notarized. These reports include information about the child's placement in the home and the child's adjustment to the family. These reports serve as New Hope's official recommendation of the adoptive family for the adoption of the specific child.

142. Following the finalization of an adoption, because of Contact Agreements, New Hope remains involved with the majority of its clients until the child turns 18 years of age.

143. New Hope facilitates letters, photos, and/or gifts being passed back and forth between the adoptive family and birthparents.

144. Depending on the level of openness, New Hope may also supervise and facilitate up to two in-person visits per year.

New Hope as foster placement provider: Tender Loving Care

145. Under certain circumstances, New Hope provides temporary foster placements.

146. New Hope calls its foster-care services Tender Loving Care homes.

147. In general these temporary placements occur when either (1) a birthmother working with New Hope has delivered in a hospital and has not decided between parenting or placement for adoption, or (2) a birthparent is referred to New Hope by a hospital social worker because she has not yet made an adoption plan and desires to do so.

148. New Hope recruits foster families that are willing to take in newborns on short notice.

149. For the same reasons previously set forth, New Hope typically seeks married husband and wife couples to serve as foster parents.

150. New Hope certifies its foster families for placements in accordance with the state regulatory process.

151. Similar to the adoption homestudy process, that process requires New Hope to interview and collect information on applicants in order to explore applicants' reasons for wanting to foster, their marital stability, family structure, religious affiliation, family background, and life history, among other things.

152. New Hope neither receives nor distributes any government funding in connection with its Tender Loving Care foster program.

New Hope's practices with respect to married and unmarried prospective adoptive parents

153. Because of New Hope's religious beliefs detailed above, New Hope will not recommend or place children with unmarried couples or same-sex couples as adoptive parents.

154. New Hope's "Special Circumstances" policy, formalizes this policy and practice and states in part:

If the person inquiring to adopt is single . . . The Executive Director will talk with them to discern if they are truly single or if they are living together without the benefit of marriage. . . . because New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage.

If the person inquiring to adopt is in a marriage with a same sex partner . . . (The Executive Director will . . . explain that because New Hope is a Christian Ministry, we do not place children with same sex couples).

155. New Hope has worked with unmarried individuals who are truly single in the past and remains willing to work with such individuals.

156. Because New Hope handles inquiries from unmarried couples and same-sex couples pursuant to the policy and practice described above, New Hope has never denied an unmarried couple or same-sex couple's application. Whenever a same-sex couple or unmarried couple is interested in a referral, New Hope refers them to the appropriate county social services office or another provider. On information and belief, no same-sex couple or unmarried couple who has inquired with New Hope about adoption has ever complained to OCFS about how New Hope handled their inquiry.

New York law concerning selection of adoptive parents and OCFS' lawless regulatory changes

157. Until recently, New York adoption law required that authorized agencies could *only* place children for adoption with “an adult unmarried person or an adult husband and his adult wife.” NY Dom. Rel. Law § 110 (2009).

158. In September 2010, New York amended its law to allow authorized agencies to place children for adoption with “an adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together.” NY Dom. Rel. Law § 110 (2011).

159. The Sponsor of the bill that amended the law, used permissive language throughout the Introducer’s Memorandum in Support, and throughout the memo, including in the purpose, summary, and justification sections the words “permit,” “may adopt” and “allow” were used to explain the need for the law. New York Bill Jacket, 2010 S.B. 1523, Ch. 509.

160. OCFS provided a letter in support of S.1523-A, in which it explained that “The bill . . . clarif[ies] that two unmarried adult intimate partners may adopt a child together even where neither person is the child’s biological parent.” The letter further stressed that “[t]his legislation permits . . . adoptions” by “two single persons . . . together where neither person is the biological parent of the child.” New York Bill Jacket, 2010 S.B. 1523, Ch. 509.

161. In signing the bill into law, the New York Governor emphasized the permissive nature of the law—“since the statute is permissive, it would allow for such adoptions without compelling any agency to alter its present policies.”

Approval Memorandum No. 25, Chapter 509. The Governor further stated the law “expands the rights of New Yorkers, without in any way treading on the views of any citizen or organization.” *Id.* A copy of the Governor’s Approval Memorandum is attached as Exhibit 5.

162. Shortly after this change, OCFS issued an informational letter explaining the new law in which it emphasized that the amendment “does not change or alter the standards currently in place for the approval of an individual as an adoptive parent or the eligibility requirements for adoption subsidies.” Office of Children & Family Services, Informational Letter, 11-OCFS-INF-01 (January 11, 2011).

163. New York has *never* amended its law to *require* authorized agencies to place children for adoption with “an adult unmarried person,” a same-sex “adult married couple together,” or “two unmarried adult intimate partners together.”

164. But OCFS is attempting to use regulations to require exactly that: on July 11, 2011, OFCS issued a second letter that purported to clarify, but in fact materially changed, the adoption regulations then found in 18 NYCRR 421.16 and subpart (h). In that letter, OCFS declared that “the intent of” subpart (h) “is to prohibit discrimination based on sexual orientation in the adoption study assessment process. In addition, OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent.” Office of Children & Family Services, Informational Letter, 11-OCFS-INF-05 (July 11, 2011).

165. In 2013, OCFS amended the adoption regulations, declaring that authorized agencies,

providing adoption services shall ... (d) prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability....

N.Y. Comp. Codes R. & Regs. tit. 18, § 421.3 (2018).

166. During the rulemaking process that led to this change, OCFS issued various statements and comments on the rule change, including that, “[t]he proposed regulation is needed to allow OCFS to fully implement LGBTQ best practices in child welfare . . .” OCFS asserted that the amendments were needed to “eliminate *archaic* regulatory language, which implies that the sexual orientation of gay, lesbian and bisexual prospective adoptive parents . . . is relevant to evaluating their appropriateness as adoptive parents.” (emphasis added).

167. Following these 2013 changes, OCFS issued another informational letter in 2016 which stated:

[T]his policy directive requires the formalization of any existing nondiscrimination and harassment policies and procedures, and possibly the revision of such policies and procedures, by requiring that . . . [voluntary agencies] . . . not engage in or condone discrimination . . . on the basis of race, creed, color, national origin, sex, religion, sexual orientation, gender identity or expression, marital status or disability against . . . applicants for adoption services, . . . prospective foster parents, foster parents, or children in foster care.

168. OCFS promulgated these new regulations purporting to require adoption providers to place children with unmarried and same-sex couples in

complete disregard for the law, the scope of OCFS' authority, and the rights of adoption providers.

169. New York has never enacted any law requiring any adoption provider to facilitate or participate in any adoption by unmarried or same-sex couples, or indeed to participate in any adoption that the agency believes is not in the best interests of the child. Instead, New York law leaves all such matters to the judgment and beliefs of individual adoption providers.

170. New York Social Services Law § 373 required children to be placed “when practicable” with “an authorized agency under the control of persons of the same religious faith as that of the child.” Through its new regulations, OCFS is directly frustrating, rather than complying with, this statutory law. By shuttering religious adoption ministries that adhere to biblically based beliefs about marriage and family, OCFS is making it *impossible* to place children of birthparents who share this faith “with an authorized agency under the control of persons of the same faith as that of the child.”

171. New York adoption regulations repeatedly recognize the extensive, intimate, and important speech of the adoption provider that is involved in the adoption-placement process. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 421.1 (“counseling”), N.Y. Comp. Codes R. & Regs. tit. 18, § 421.4 (“discussion”), N.Y. Comp. Codes R. & Regs. tit. 18, § 421.8 (“parent training”, “interviews”, “counseling”), N.Y. Comp. Codes R. & Regs. tit. 18, § 421.17 (“communication . . . agreement”).

172. New York regulations require authorized agencies to recruit based on “ethnic, racial, religious or cultural characteristics similar to those of the children identified annually by the department as composing the largest number of waiting children.” N.Y. Comp. Codes R. & Regs. tit. 18, § 421.10.

173. New York regulations require authorized agencies to use an application form “to elicit the following information from adoptive applicants: . . . (2) age, race, and religion of members of the household; . . . (4) characteristics of the child(ren) sought to be adopted.” N.Y. Comp. Codes R. & Regs. tit. 18, § 421.12.

174. New York regulations require authorized agencies to give priority processing to “applicants seeking children having” the “characteristics” of the “largest proportion of waiting children” including consideration of the children’s “age, race, handicap and other significant characteristics.” N.Y. Comp. Codes R. & Regs. tit. 18, § 421.13.

175. New York regulations permit authorized agencies to “consider[] . . . the age of the child and of the adoptive parent(s); . . . the cultural, ethnic, or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such background as one of a number of factors used to determine best interests. Race, color or national origin of the child or the adoptive parent may be considered only where it can be demonstrated to relate to the specific needs of an individual child.” N.Y. Comp. Codes R. & Regs. tit. 18, § 421.18.

176. New York regulations state that “a preference to adopt a child of a particular gender, where found necessary and appropriate, shall be carried out

openly.” N.Y. Comp. Codes R. & Regs. tit. 18, § 421.16.

177. New York Social Services Law § 373 requires courts to “when practicable . . . give custody through adoption, only to a person or persons of the same religious faith as that of the child.” It further dictates that those requirements “so far as consistent with the best interests of the child, and where practicable, be applied so as to give effect to the religious wishes of the birth mother and of the birth father . . .”

178. That section defines religious wishes as follows:

Religious wishes of a parent shall include wishes that the child be placed in the same religion as the birth parent or in a different religion from the birth parent or with indifference to religion or with religion a subordinate consideration. Expressed religious wishes of a birth parent shall mean those which have been set forth in a writing signed by the birth parent, except that, in a non-agency adoption, such writing shall be an affidavit of the birth parent. In the absence of expressed religious wishes, as defined in this subdivision, determination of the religious wishes, if any, of the birth parent, shall be made upon the other facts of the particular case, and, if there is no evidence to the contrary, it shall be presumed that the birth parent wishes the child to be reared in the religion of the birth parent.

N.Y. Soc. Serv. Law § 373 (McKinney).

179. New York state regulations require adoption agencies to “[m]ake an effort to place each child in a home as similar to and compatible with his or her religious background as possible . . .” N.Y. Comp. Codes R. & Regs. tit. 18 § 441.11.

180. New York regulations require that adoption agencies perform a rigorous assessment of prospective adoptive parents before placing children in their care.

181. Many individuals who may want to adopt may not be able to meet New York's requirements.

The Office of Children and Family Services targets New Hope and other faith-based adoption providers for threats and closure

182. In January or February of 2018, Suzanne Colligan of OCFS called New Hope's then Acting Executive Director, Judith A. Geyer. During the call, Ms. Colligan conveyed that, under a new policy implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures.

183. On July 18, Ms. Colligan sent an email to Ms. Geyer to schedule the adoption program review and included a list of things she needed to review, including New Hope's policies and procedures.

184. Based on Ms. Colligan's direction that she would need a copy of New Hope's policies and procedure manual, Ms. Geyer updated New Hope's formal policies and procedures on adoption into one consolidated manual.

185. On August 28, Ms. Geyer received an email from Ms. Colligan, stating in part:

I also thought that it might be helpful for you to see the application we use with agencies requiring reauthorization for corporate authority. Since you are authorized in perpetuity, your agency is **not** required to complete/submit this form. However, I will be asking many of the program questions on it, so you may find it helpful in preparing for my visit.

186. On September 6, 2018, Ms. Colligan met with Ms. Geyer and Kathy Decesare, New Hope's Center Director, and took a copy of New Hope's policy and procedure manual with her when she left.

187. On October 1, 2018, OCFS sent a letter to Ms. Geyer as an attachment to an email. The email and October 1, 2018 letter are attached as Exhibit 6. The letter praised a number of strengths in New Hope's program, thanked New Hope for its professionalism during the meeting, and suggested a follow-up meeting to discuss a few minor opportunities for improvement.

188. On or about October 9, 2018, Ms. Geyer received a call from Ms. Colligan. During the call, Ms. Colligan stated that she had been reading New Hope's policies and procedures manual and that New Hope's policy not to place children with those who are living together without the benefit of marriage or with same-sex couples violated Title 18 NYCCR § 421.3 and was impermissible.

189. Ms. Colligan told Ms. Geyer that New Hope would have to comply with § 421.3 by placing children with unmarried couples and same-sex couples.

190. Ms. Colligan said that if New Hope did not comply, New Hope would be "choosing to close."

191. Ms. Geyer responded that New Hope would be unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples.

192. During the phone call, Ms. Colligan stated that "[s]ome Christian ministries have decided to compromise and stay open."

193. Ms. Geyer affirmed again that New Hope would be unwilling to violate its beliefs and stated that "[w]e will never choose to close. You will be forcing us to close." Ms. Geyer also stated that New Hope's religious freedom was being violated.

194. Ms. Colligan told Ms. Geyer that she would be getting a letter from OCFS mandating compliance by a specific date.

195. Ms. Colligan emailed Ms. Geyer on October 11, 2018, stating in part:

You will be receiving a letter from our office soon requesting a formal written response regarding your agency's position. When OCFS receives written notification of an agency's intention to close a program, OCFS will respond with written instructions to the agency with the steps they must take. These steps include the agency's responsibility to seek and obtain agreement with another NYS authorized agency to maintain and store their adoption records, of which includes the handling of activities outlined in the legally bound agreements with birth parents.

196. On October 12, 2018, Ms. Colligan sent an email to Ms. Geyer stating in part:

We will put Monday's follow up meeting [to discuss a few minor improvements identified during the visit] on hold for now. The purpose of the follow up meeting would be to work on the necessary changes to your agency policy manual. Based on our recent phone call, the follow up meeting for those purposes does not appear needed at this time.

197. On October 17, 2018, Ms. Colligan indicated in email to Ms. Geyer that she had mailed out a certified letter. That email stated in part:

Once the letter is returned providing us with written notice of your intent, we will send out a letter outlining our expectations around the handling of those that you are currently providing services and the adoption records.

198. On October 26, 2018, Ms. Geyer received an electronic copy of the letter to which Ms. Colligan had referred. The letter stated that New Hope's policy pertaining to "not placing 'children with those who are living together without the

benefit of marriage’ or ‘same-sex couples’ violates Title 18 NYCRR § 421.3.” The letter further stated:

OCFS hereby requests a formal written response from [New Hope] stating the agency’s position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the above-cited regulation.

Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope’s] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program.

A copy of the letter is attached as Exhibit 7.

199. New Hope was given until November 30, 2018, to respond to OCFS’ ultimatum.

200. OCFS’ threat to prohibit New Hope from continuing to provide adoption services is not only entirely unjustified, it is lawless. New Hope was granted a perpetual authorization by the State of New York to act as an adoption agency. The New York Social Services Law section 388 preserves the authority of authorized agencies that is given in their charters. The New York Social Services Law section 385 permits OCFS to issue an order barring an authorized agency from providing adoption services only in enumerated circumstances—specifically, when “any disposition of a child under this title has been made for purposes of gain, or without due inquiry as to the character and reputation of the person with whom such child is placed, or in such manner that such child is subjected to cruel or

improper treatment or neglect or immoral surroundings, or in such manner that the religious faith of the child is not preserved and protected as provided by this title.”

201. OCFS has made no finding—and could not make a finding—that New Hope has engaged in any one of these prohibited practices.

202. On information and belief, several voluntary faith-based authorized agencies that were listed on OCFS’ website in January of 2018 as authorized to make adoption placements, including several Catholic providers, a Jewish provider, an LDS provider, and a Muslim provider, have been removed by OCFS from that posted list of authorized agencies as of the date of this Complaint.

203. On information and belief, several of those faith-based providers share similar beliefs to New Hope concerning life, marriage, the family, and human sexuality.

204. OCFS spokeswoman Monica Mahaffey was quoted in The Buffalo News as saying “New York State law is clear . . . Discrimination of any kind is illegal and in this case OCFS will vigorously enforce the laws designed to protect the rights of children and same sex couples. In New York State, we welcome all families who are ready to provide loving and nurturing homes to foster or adoptive children. There is no place for providers that choose not to follow the law.”

205. On information and belief, one of those religious adoption agencies that is no longer authorized by New York, had begun referring clients to New Hope before New Hope received the ultimatum from OCFS.

206. According to OCFS' website "In New York State, there are more than 130 adoption agencies. Each of New York's 58 social services districts has an adoption unit, and more than 70 authorized voluntary agencies statewide work with adopting families." The Adoption Process, N.Y. Office of Children & Family Servs., <https://ocfs.ny.gov/adopt/process.asp>.

207. The vast majority of New York's adoption agencies will place with unmarried and same-sex couples.

Irreparable injury suffered by New Hope and its clients

208. Without violating its religious beliefs, New Hope is unable to comply with the OCFS ultimatum to recommend unmarried couples and same-sex couples as foster and adoptive parents, to counsel unmarried and same-sex couples concerning adoptive parenthood and related relational issues, and to place children with unmarried couples and same-sex couples.

209. In fulfillment of its longstanding mission pursued in obedience to the faith of its staff and board, New Hope desires to continue taking on new adoptive parents, birthparents, foster parents, and children for placement in foster care and adoption, but the state now threatens to absolutely prevent New Hope from doing so by terminating New Hope's perpetual license and prohibiting it from serving in all of these ways.

210. At the time of the State's ultimatum, New Hope had approximately thirteen prospective adoptive families on its list that had completed the homestudy process and were waiting for a child to be placed with them.

211. New Hope had a homestudy Session One meeting scheduled for October 29, 2018, to begin the homestudy process with six more prospective adoptive families. Because it had been told that it would have to violate its beliefs or shut down, New Hope was forced to cancel the homestudy Session One meeting. New Hope advised those families of what the state was requiring. Four of the families requested a refund of their application fees.

212. Since receiving the demand from OCFS that New Hope violate its beliefs or cease adoptions, four additional prospective adoptive families have contacted New Hope about beginning the adoption process. Because of OCFS' threats, New Hope was obliged to tell them that it may not be able to complete an adoption plan for their child and has had to refer some elsewhere.

213. New Hope desires to contact these prospective adoptive parents and work with them to place children in need of loving homes.

214. Since receiving the demand from OCFS that New Hope violate its beliefs or cease adoptions, four expectant birthmothers contacted New Hope asking for help in placing their children for adoption. But New Hope was obliged to tell them that that it has suspended taking on new birthparents and children to work with towards adoption because of OCFS' threats.

215. New Hope desires to work with these prospective birthparents to help them find loving homes for their children.

216. New Hope has three active foster families that are willing to accept placements, but it has similarly had to advise them that its program is on hold due

to the uncertainty caused by the OCFS ultimatum.

217. New Hope had a training session concerning adoption scheduled for October 18, 2018, for center directors from several pregnancy resource centers from around the state. Because of OCFS' threat to terminate New Hope's authorization to provide adoption services, New Hope was forced to cancel the training.

218. If New Hope were to violate its religious beliefs and place children with unmarried couples and same-sex couples, the pregnancy resource centers that it currently serves through trainings and referrals would be less inclined to refer to New Hope, and may no longer refer to New Hope at all, because they are faith-based organizations that share New Hope's religious beliefs regarding the nature of marriage and family.

219. On information and belief, if New Hope were to violate its beliefs, it would lose some of its clients, including birthmothers, adoptive families, and foster families, who choose to work with New Hope because of their shared Christian faith.

220. If New Hope is unable to place children for adoption or in foster care, its ability to effectively minister to and help women who are facing unplanned pregnancies through its pregnancy resource center will be impaired.

221. New Hope currently retains legal custody of three children that it has placed with three separate adoptive families this year.

222. New Hope continues to actively supervise those placements but has advised those families of what the state is requiring and that it is unsure if it will

be able to continue to handle the finalization of their adoptions. If New Hope is unable to do so, finalization of these adoptions will be delayed because of being transferred to another provider.

223. Because the majority of New Hope's adoptions are open adoptions, if New Hope is unable to continue its adoption program, it will have to transfer 117 adoptive families and 117 birthparent families that it has worked with over the past 18 years, to another provider to facilitate those Contact Agreements.

224. If New Hope loses its authorization to place children, it will have to transfer all fifty-three years of its adoptive family and birthparent files to another provider.

225. If New Hope loses its authorization to place children in adoptive homes or foster care, it will likely have to terminate the employment of five of its employees.

226. At all times relevant to this Complaint, each and all of the acts alleged here are attributable to Defendant, who acted under color of a statute, regulation, custom, or usage of the State of New York.

227. New Hope currently suffers imminent and irreparable harm because of Defendant's regulation and ultimatum applying that regulation, which violate New Hope's constitutional rights.

228. New Hope has no adequate or speedy remedy at law for the loss of its constitutional rights.

229. Unless Defendant's conduct is enjoined, New Hope will continue to suffer irreparable injury.

FIRST CAUSE OF ACTION

First Amendment: Free Exercise of Religion

230. New Hope repeats and re-alleges each allegation contained in paragraphs 1–229 of this Complaint as if fully set forth here.

231. New Hope is a religious organization that can and does exercise religion in its provision of information and services, and in the way in which it chooses to speak and not speak during its provision of information and services.

232. The First Amendment to the United States Constitution protects New Hope's rights to speak about, publish, and freely exercise its religious beliefs.

233. The First Amendment prevents the government from excluding New Hope from a public benefit based solely on its religious beliefs.

234. The First Amendment prevents the government from interfering with New Hope's faith and mission.

235. The First Amendment protects New Hope from government hostility, targeting, and discrimination because of its religious beliefs and practices.

236. Defendant's interpretation and enforcement of § 421.3(d) targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices.

237. The First Amendment requires Defendant to act in a neutral and generally applicable manner toward New Hope and its religious beliefs and practices and bars even subtle departures from neutrality on matters of religion.

This First Amendment protection applies upon even slight suspicion that state actions stem from animosity to religion or distrust of its practices.

238. The First Amendment prevents the government from burdening religion with a law that is neither neutral nor generally applicable.

239. New Hope has sincerely held religious beliefs that motivate and require it to operate its ministry in accordance with biblical teachings.

240. New Hope has sincerely held religious beliefs that motivate and require it to care for orphans and other children whose parents cannot care for them.

241. New Hope has sincerely held religious beliefs that motivate and require it to care for women facing unplanned pregnancies and their unborn children.

242. OCFS has conditioned New Hope's perpetual authorization to perform adoption services on New Hope's willingness to renounce or violate its religious beliefs pertaining to marriage and family.

243. New Hope's existence as a religious organization is dependent on and inseparable from its ability to perform adoption services—that is the reason and purpose for which it was created.

244. Application of section 421.3(d) to New Hope interferes with New Hope's ability as a religious non-profit to carry out its religious doctrine, faith and mission.

245. Application of section 421.3(d) to New Hope imposes a substantial burden on New Hope's religious exercise and coerces it to change or violate its religious beliefs.

246. Forcing New Hope to revise its policies and place children with unmarried couples and/or same-sex couples substantially burdens New Hope's exercise of its religious beliefs as it is forced to choose between violating its beliefs and losing its perpetual authorization to perform adoption services.

247. Forcing New Hope to revise its policies and place children with unmarried couples and/or same-sex couples also substantially burdens New Hope's exercise of its religious beliefs because it undermines its religious message and its ability to save the lives of babies whose mothers are contemplating abortion.

248. Section 421.3(d) is not neutral or generally applicable as applied because it targets New Hope's disfavored religious beliefs for punishment, it imposes special disabilities on the basis of stating or exercising disfavored religious views, and the statutory and regulatory scheme provides exemptions for secular, nonreligious purposes.

249. Because state statutes and regulations allow adoption providers to consider protected characteristics when making placements consistent with the best interests of the child, and allows parents to consider such characteristics for any reason, the law also involves a system of individualized assessments.

250. In adopting section 421.3(d) OCFS removed section 421.16 (h)(2) which allowed consideration of sexual orientation as it related to the best interests of

adoptive children. The removal of that provision created an absolute bar against consideration of sexual orientation in the homestudy process. This categorically different treatment of this class as compared to the others without justification demonstrates OCFS' hostility toward New Hope's religious beliefs about marriage and the best family environment for children.

251. OCFS' adoption of section 421.3(d) contrary to law demonstrates OCFS' hostility towards New Hope's religious beliefs about marriage and the best family environment for children.

252. OCFS' enforcement of section 421.3(d) through threatening revocation of New Hope's authorization—something that OCFS is not empowered by law to do under the circumstances—demonstrates OCFS' hostility towards New Hope's religious beliefs about marriage and the best family environment for children.

253. The First Amendment prohibits the government from punishing the profession of a religious belief or imposing special disabilities on the basis of stating disfavored religious views.

254. Defendant issued the ultimatum because of New Hope's expression of its religious belief in its internal policy and procedures manual.

255. Defendant's ultimatum was targeted to exclude New Hope from participating as an adoption provider in the State of New York so long as New Hope maintained its disfavored religious views and expression.

256. Defendant's ultimatum and regulation impose special disabilities on New Hope due to New Hope's religious beliefs about marriage.

257. Defendant's ultimatum and regulation has chilled and continues to chill New Hope's religious exercise.

258. Applying section 421.3(d) to New Hope also violates the hybrid-rights doctrine by implicating free exercise rights in conjunction with other constitutional protections like the rights to free speech and equal protection.

259. Applying section 421.3(d) to New Hope does not serve any compelling, significant, legitimate, or even valid interest.

260. Forcing New Hope to place children with same-sex couples or unmarried couples, in violation of its religious beliefs, does not serve any interest in a narrowly tailored way.

261. Defendant has alternative, less restrictive means to achieve any legitimate interests rather than forcing New Hope to abandon its First Amendment rights.

262. Section 421.3(d) also is underinclusive because there are numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation and marital status discrimination.

263. Accordingly, as applied to New Hope, Section 421.3(d) violates the First Amendment right to free exercise of religion.

SECOND CAUSE OF ACTION

First Amendment: Free Speech and Expressive Association

264. New Hope repeats and re-alleges each allegation contained in paragraphs 1–229 of this Complaint as if fully set forth here.

265. The First Amendment prevents the government from compelling

people to express, support, or promote a message not of their own choosing or to speak when they would rather remain silent.

266. The First Amendment protects the right of persons to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

267. The First Amendment bars the government from compelling persons to expressively associate with others in the process of creating and disseminating speech.

268. The First Amendment protects New Hope's right to speak, to freely associate, to be free not to speak, and to not associate.

269. New Hope desires to recommend married opposite-sex couples and truly single individuals as adoptive parents.

270. New Hope conveys a system of values about life, marriage, family and sexuality to both birthparents and adoptive parents through its comprehensive evaluation, training, and placement programs.

271. Applying section 421.3(d) to New Hope requires New Hope to engage in speech and expression that it does not wish to convey—speech and expression that violates its core religious beliefs—by compelling it to recommend same-sex couples or unmarried couples as adoptive parents.

272. Applying section 421.3(d) to New Hope harms New Hope's ability to promote its beliefs and values about religion, marriage, sexuality, and family by

requiring it to associate with prospective-adoptive parents who promote a view of marriage and family that contradicts its own.

273. Including unmarried or same-sex couples in New Hope's comprehensive evaluation, training, and placement programs and adoptive-parent profiles would change New Hope's message and counseling to adoptive families and birthparents.

274. Applying section 421.3(d) to New Hope does not serve any compelling, significant, legitimate, or even valid interest.

275. Forcing New Hope to recommend and facilitate placement with same-sex couples or unmarried couples, in violation of its religious beliefs, does not serve any interest in a narrowly tailored way.

276. Defendant has alternative, less restrictive means to achieve any legitimate interests rather than forcing New Hope to abandon its First Amendment rights.

277. Section 421.3(d) also is underinclusive because there are numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation and marital status discrimination.

278. Accordingly, as applied to New Hope, Section 421.3(d) violates the First Amendment right to free speech.

THIRD CAUSE OF ACTION

Fourteenth Amendment: Equal Protection

279. New Hope repeats and re-alleges each allegation contained in paragraphs 1–229 of this Complaint as if fully set forth here.

280. The Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws.

281. Under the Equal Protection Clause, the government may not treat New Hope differently than similarly situated persons and organizations.

282. Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating.

283. Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because parents adopting children are permitted to take into account protected classes and characteristics but in facilitating the adoption New Hope is not.

284. Section 421.3(d) violates New Hope's fundamental rights, including its free exercise, free speech, and expressive-associational rights.

285. Applying section 421.3(d) to New Hope does not serve any compelling, significant, legitimate, or even valid interest.

286. Forcing New Hope to recommend and facilitate placement with same-sex couples or unmarried couples, in violation of its religious beliefs, does not serve any interest in a narrowly tailored way.

287. Defendant has alternative, less restrictive means to achieve any legitimate interests rather than forcing New Hope to abandon its First Amendment rights.

288. Section 421.3(d) also is underinclusive because there are numerous exemptions to several forms of prohibited discrimination, including the bar on sexual orientation and marital status discrimination.

289. In addition, there is no rational basis for requiring New Hope to violate its religious beliefs in order to continue performing adoption services.

290. Accordingly, as applied to New Hope, Section 421.3(d) violates its Fourteenth Amendment right to equal protection of the laws.

FOURTH CAUSE OF ACTION

Unconstitutional Conditions

291. New Hope repeats and re-alleges each allegation contained in paragraphs 1–229 of this Complaint as if fully set forth here.

292. The unconstitutional conditions doctrine prohibits the government from conditioning the receipt of a government benefit on the relinquishment of a constitutional right.

293. The government violates this unconstitutional conditions doctrine when it pressures a person to give up constitutional rights in order to obtain a public benefit.

294. The government also violates this doctrine when it denies a person a benefit because that person exercised his or her constitutional rights.

295. Defendant has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights.

PRAYER FOR RELIEF

New Hope respectfully requests that this Court enter judgment against Defendant and provide New Hope with the following relief:

- (A) Preliminary and permanent injunctive relief to stop Defendant and any person acting in concert with her from enforcing section 421.3(d) as applied to bar New Hope from engaging in its constitutionally protected practices;
- (B) A declaration that section 421.3(d) as applied to New Hope violates the First and Fourteenth Amendments to the United States Constitution and the unconstitutional conditions doctrine;
- (C) That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter in controversy here so that these declarations shall have the force and effect of a final judgment;
- (D) That this Court retain jurisdiction of this matter for the purpose of enforcing its orders;
- (E) That this Court award New Hope costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988;
- (F) That this Court issue the requested injunctive relief without a condition of bond or other security being required of New Hope; and
- (G) That this Court grant any other relief that it deems equitable and just in the circumstances.

Respectfully submitted this 6th day of December, 2018.

s/Jon Scruggs

Robert Genant, Bar No. 105257
3306 Main Street, Ste. B
Mexico, NY 13114
(315) 963-7296
(315) 963-8274 (Fax)
bgenant@genantlaw.com
Local Counsel

Erik Stanley, AZ Bar No. 030931*
estanley@ADFlegal.org
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jgalus@ADFlegal.org
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jhallock@ADFlegal.org
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (Fax)
**Pro Hac Vice application forthcoming*

David Cortman, Bar No. 502661
dcortman@ADFlegal.org
Alliance Defending Freedom
1000 Hurricane Shoals Road, N.E.
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (Fax)

Attorneys for Plaintiff

5:18-cv-1419 (MAD/TWD)

EXHIBIT

1

18 CRR-NY 421.3

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 18. DEPARTMENT OF SOCIAL SERVICES

CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES

SUBCHAPTER C. SOCIAL SERVICES

ARTICLE 2. FAMILY AND CHILDREN'S SERVICES

PART 421. STANDARDS OF PRACTICE FOR ADOPTION SERVICES

Current through August 15, 2018

421.3 General requirements.

Authorized agencies providing adoption services shall:

(a) have written policies and procedures governing adoption services to:

- (1) biological parents and legal guardians;
- (2) children who are free for adoption, or who are not free but in need of adoptive planning;
- (3) prospective adoptive parents, adoptive applicants and adoptive parents; and
- (4) persons who have been adopted;

(b) make provisions for such written policies to be available to any interested party, and to be provided to biological parents, adoptive applicants, legal guardians and foster parents; and

(c) maintain appropriate records demonstrating compliance with agency policies and applicable department regulations; maintain a written record for each child and adoptive applicant containing information which documents decisions and plans of action;

(d) prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, *gender identity or expression* shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. *Gender identity* refers to a person's internal sense of self as male, female, no gender, or another gender, and *gender expression* refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, and other means.

HISTORICAL NOTE

Sec. added by renum. 455.3, filed April 26, 1978; repealed, new filed Sept. 30, 1981; amd. filed Oct. 22, 2013 eff. Nov. 6, 2013. Added (d).

18 CRR-NY 421.3

End of Document

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5:18-cv-1419 (MAD/TWD)

EXHIBIT

2

STATE OF NEW YORK
DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the Department of State, at the City of Albany, on February 14, 2018.

A handwritten signature in black ink, appearing to read "B. Fitzgerald", written over a horizontal line.

Brendan Fitzgerald
Executive Deputy Secretary of State

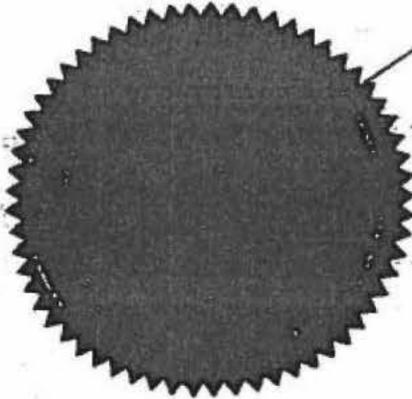


State Board of Social Welfare

Albany

Know all Men by These Presents:

At a meeting of the State Board of Social Welfare, held on the sixteenth day of February, 1965, due inquiry and investigation having been made, the Board approved the proposed Certificate of Incorporation of EVANGELICAL FAMILY SERVICE, INC. pursuant to the Membership Corporation Law of the State of New York.



In witness whereof, the State Board of Social Welfare has caused these presents to be signed in accordance with the provisions of the statutes and its by-laws, and the official seal of the Board and of the Department to be hereunto affixed, this seventeenth day of February, in the year one thousand nine hundred and sixty-five.

John J. [Signature]

Secretary.

-----x
CERTIFICATE OF INCORPORATION
OF
EVANGELICAL FAMILY SERVICE, INC.
pursuant to the
MEMBERSHIP CORPORATION LAW
-----x

494171

We, the undersigned, for the purpose of forming a membership corporation pursuant to the Membership Corporation Law of the State of New York do hereby certify:

1. The name of the proposed corporation shall be Evangelical Family Service, Inc.
2. The purposes for which it is to be formed are to provide family counseling; to have authority to accept legal custody and guardianship of children; to provide protective service for children; to provide foster care service to child and unwed mother; to place children for adoption; and function in complete cooperation with all existing social welfare agencies.
3. The duration of the corporation shall be two years from the date of filing this certificate with the Secretary of State.
4. The territory in which its operations are to be principally conducted is the State of New York.
5. The city and county in which its office is to be located is Syracuse, Onondago County, New York.
6. The number of its directors shall be not less than twelve (12) nor more than thirty-six (36).
7. The names and residences of the directors until the first annual meeting are:
Burton B. Butman, M. D., 25 Woodgreen Lane, Roslyn Heights, N. Y.
Benjamin J. Fisher, Jr., Glen Crest Village, New Hartford, N. Y.

2

John W. Helfrich, Salem Drive, Stony Brook, New York
Adolph H. Huttar, 284 Reed Avenue, Syracuse, New York 13207
Rev. Gerald Jack, Frawley Drive, Baldwinsville, N. Y. 13027
Emily D. Markham, M. D., 175 Nob Hill, Rochester, N. Y. 14617
Ford S. Mason, Mason Manor, 11705 Main Rd., Akron, N.Y. 14001
Dr. Herbert S. Mekeel, 115 Union St., Schenectady, N. Y. 12305
Dr. Clyde W. Meredith, 315 W. 70th St., Apt. 18F, New York, N. Y.
Rev. Leon L. Miles, 154 W. Kennedy St., Syracuse, N. Y. 13205
Parker E. Olney, 302 Catherine St., North Syracuse, N. Y. 13212
Anthony J. Pagano, 25 Gifford Drive, Syracuse, N. Y. 13219
Miss Mildred Sheldon, 329 W. Seneca Street, Ithaca, N. Y. 14850
Mr. Donald Shetland, W. Lake Road, Oswego, New York
Charles K. Smith, D.O., 237 Church St., Breesport, N. Y. 14816
Rev. Carlton Spencer, Elim Bible College, Lima, N. Y. 14485
Rev. G. Thomas Spiker, 244 Belle Ave., Syracuse, N. Y. 13205
Oliver J. Steiner, M.D., 32 Treehaven Rd., Buffalo, New York 14215
Hollis Stevenson, D.D.S., 66A, Broad St., Plattsburg, N. Y. 12901
Clinton H. Tasker, Hillmount Apts. Apt. 507, 505 Cherry St. S.E.
Grand Rapids, Michigan
Rev. A. S. Taylor, 412 Rural Avenue, Williamsport, Penna.
Dr. Ellwood A. Voller, North Chili, N. Y. 14514
Charles D. Wallace, 118 Cole Rd., Orchard Park, N. Y.
Rev. Arnold T. Williamson, 11 Edmund St., Lynbrook, N. Y. 11563
Robert M. Easley, Box 905, Orleans, Massachusetts
Albert J. Page, 4424A Myrtlewood Drive, Huntsville, Alabama

8. All of the subscribers to the certificate are of full age, at least two-thirds of them are citizens of the United States, at least one of them is a resident of the State of New York and that of the persons named as directors, at least one is a citizen of the United States and a resident of the State of New York.

-X-
3

IN WITNESS WHEREOF, we have made, signed, and acknowledged
this certificate this 26th day of March, 1965.

Clyde W. Meredith
CLYDE W. MEREDITH

John W. Helfrich
JOHN W. HELFRICH

Adolph H. Huttar
ADOLPH H. HUTTAR

Leon L. Miles
LEON L. MILES

Oliver J. Steiner
OLIVER J. STEINER

Read
Huttar
JSC

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

On this 2 day of April, 1965, before me came
Clyde W. Meredith, to me known and known to me to be the
individual described in, and who executed the foregoing
instrument, and acknowledged that he executed the same.

JAMES C. FAUST
NOTARY PUBLIC, State of New York
No. 52-1173725
Qualified in Suffolk County
Commission expires March 30, 1969

James C. Faust
NOTARY PUBLIC

STATE OF NEW YORK)
COUNTY OF NASSAU) ss

On this 26th day of March, 1965, before me came John W. Helfrich,
to me known and known to me to be the individual described in,
and who executed the foregoing instrument, and acknowledged that
he executed the same.

HARRY D. LOUISA
NOTARY PUBLIC, State of New York
No. 30-0332500
Qualified in Nassau County
Term Expires March 30, 1968

Harry D. Louisa
NOTARY PUBLIC

STATE OF NEW YORK)
COUNTY OF Montgomery) ss

On this 30th day of May, 1965, before me came Adolph H. Huttar,
to me known and known to me to be the individual described in,
and who executed the foregoing instrument, and acknowledged that
he executed the same.

Raymond J. deSena
NOTARY PUBLIC

RAYMOND J. DESENA
NOTARY PUBLIC, State of New York
Qualified in Montgomery County
No. 34-931556
My Commission Expires March 30, 1966

-X-
4

STATE OF NEW YORK)
COUNTY OF ~~Orange~~) ss

On this 30th day of ~~Mar.~~ March, 1965, before me came Leon L. Miles, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and acknowledged that he executed the same.

Raymond J. DeSilva, Jr.
NOTARY PUBLIC
Raymond J. DeSilva, Jr.
Notary Public in the State of N. Y.
Qualified in Onondaga Co. No. 34-083155
My Commission expires March 30, 1966

STATE OF NEW YORK)
COUNTY OF ERIE) ss

On this 2nd day of March, 1965, before me came Oliver J. Steiner, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and acknowledged that he executed the same.

William H. ...
NOTARY PUBLIC
My Comm. expires
March 30, 1967

*Read
with
J.S.C.*

I hereby approve of the foregoing Certificate of Incorporation of the Evangelical Family Service, Inc., and of the filing thereof.

*Signed at Albany
April 23, 1965*

George W. ...
Justice of the Supreme Court
of the State of New York

NOTICE WAIVED. NO OBJECTION
(This is not to be deemed an approval on behalf of any other State Department or agency, nor an authorization of activities otherwise limited by law.)

4/14/65
LOUIS J. LEFKOWITZ
Attorney General of
the State of New York

BY: *[Signature]*
Assistant Attorney General

-A-

5

54/26

CERTIFICATE OF INCORPORATION
494171 OF *L*
EVANGELICAL FAMILY SERVICE, INC.
pursuant to the
MEMBERSHIP CORPORATION LAW

STATE OF NEW YORK
DEPARTMENT OF STATE
FILED APR 26 1965

TAX \$ *none*
FILING FEE \$ *5.00*

John P. Lomax
Secretary of State
BY *J. Bell*

7
JOHN W. Helfrich
Attorney-at-law
330 FRONT STREET
HEMPSTEAD, NY
(516) 491-2929

5:18-cv-1419 (MAD/TWD)

EXHIBIT

3

CERTIFICATE OF EVIDENCE OF EXISTENCE
OF

EVANGELICAL FAMILY SERVICE INC.

pursuant to Section 49 of the General
Corporation Law.

We, ADOLPH H. HOWAR and JOHN W. HELFRICH, being the
President and Secretary of EVANGELICAL FAMILY SERVICE INC. last
elected to such offices of the corporation, do certify:

1. The name of this corporation is EVANGELICAL FAMILY
SERVICE INC.
2. The certificate of incorporation of this corporation
was filed in the office of the Secretary of State of the State of
New York on the 25th day of April, 1965.
3. The date on which the term of existence specified in
the certificate of incorporation of this corporation expired is
the 25th day of April, 1967.
4. The existence of this corporation is so being
revived and the duration of this corporation shall be perpetual.

WE HEREBY WARRANT WE HAVE EXAMINED THIS CERTIFICATE

and on _____ day of _____, 1967.

ADOLPH H. HOWAR

JOHN W. HELFRICH

STATE OF NEW YORK)
) ss:
COUNTY OF ORONDAGA)

On this _____ day of _____, 1957, before me personally appeared ADOLPH N. NUTTALL, to me personally known, and known to me to be the person described in and who executed the above instrument, and he fully acknowledged to me that he executed the same.

Joseph H. Smith
Notary Public



STATE OF NEW YORK)
) ss:
COUNTY OF MASSACHUSETTS)

On this _____ day of _____, 1957, before me personally appeared JOHN A. HARRINGTON, to me personally known, and known to me to be the person described in and who executed the above instrument, and he fully acknowledged to me that he executed the same.

John A. Harrington
Notary Public

CERTIFICATE OF INCORPORATION)
STATE OF MICHIGAN) SS:

LEONARD B. HERRMAN AND JOHN W. HERRMANN, being severally and duly sworn, deposes and says, and each for himself deposes and says, that he, LEONARD B. HERRMAN is the president of ENVIRONMENTAL FAMILY SERVICES INC., and that he, JOHN W. HERRMANN, is the secretary thereof, mentioned in the foregoing certificate; that they were and are the persons last elected to such office in such corporation and they now hold such office; that they were duly authorized to execute and file the foregoing certificate by the consent of the members of said corporation; that such consent was given after notice to all members entitled to vote at a meeting called for that purpose and held upon notice, given in the manner required for a meeting of the members of said corporation, which meeting was held at the City-Center Postgraduate Building, Inc., at the Syracuse Airport, Syracuse, New York, at eleven o'clock in the morning on the 22nd day of April, 1967.

That the certificate of incorporation does not require the consent of more than a majority of the members of the corporation to modify it and does not require the consent of more than a majority of the members to amend the corporate existence.

John W. Herrmann
Secretary

Subscribed and sworn to before me
this _____ day of _____, 1967.



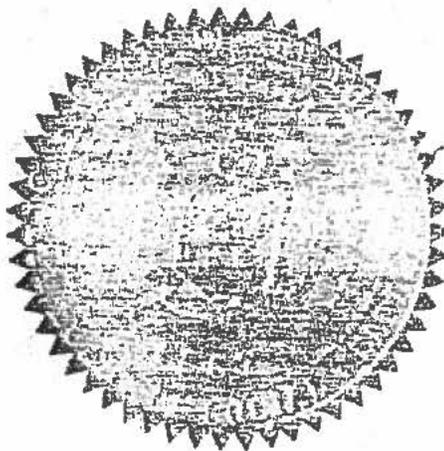
State of New York — Department of Social Services

State Board of Social Welfare

Albany

Know all Men by These Presents:

At a meeting of the State Board of Social Welfare, held on the nineteenth day of September, 1967, due inquiry and investigation having been made, the Board approved the proposed Certificate of Revival of Existence of EVANGELICAL FAMILY SERVICE, INC., pursuant to Section 35 of the Social Services Law of the State of New York.



In Witness Whereof, the State Board of Social Welfare has caused these presents to be signed in accordance with the provisions of the statutes and its by-laws, and the official seal of the Board and of the Department to be hereunto affixed, this twentieth day of September, in the year one thousand nine hundred and sixty-seven.

George R. Wynn
Commissioner

5:18-cv-1419 (MAD/TWD)

EXHIBIT

4



**New York State
Office of
Children &
Family
Services**
www.ocfs.state.ny.us

Eliot Spitzer
Governor

Gladys Carrión, Esq.
Commissioner

The Atrium
100 S. Salina St.
Syracuse, NY 13202



Equal Opportunity Employer

January 17, 2008

3519 James Street
Syracuse, New York 13206

Re: New Hope Family Services, Inc.

To Whom It May Concern:

This letter is to confirm that New Hope Family Services, Inc. is an authorized adoption agency in the State of New York. The State of New York does not issue "licenses" to corporations engaged in adoptions. A corporation obtains the authority to act as an adoption agency by filing with the New York State Department of State, upon the approval of this Office, of a certificate of incorporation or amendment to the certificate of incorporation or application for authority to do business in New York containing the appropriate corporate powers and authority. New Hope Family Services, Inc. is authorized to place out children in New York for adoption.

In the State of New York home studies (referred to as adoption studies in New York) must be conducted in conformity with New York State law. The adoption study must include but is not limited to criminal history background checks, sworn statements by the applicants whether they have ever been convicted of a crime and a clearance through the Statewide Central Register of Child Abuse and Maltreatment. Such an adoption summary must be prepared by an authorized adoption agency. In addition, the corporation has the authority to conduct post placement visits and reports.

According to the Office's records, on April 26, 1965, New Hope Family Services, Inc. filed with the Department of State a certificate of incorporation, under the name of Evangelical Family Service, Inc., which included as corporate powers the authority to accept legal custody and guardianship of children and to place children for adoption. On September 26, 1967, the corporation filed with the Department of State a certificate of amendment of the certificate of incorporation to extend the duration of the existence of the corporation from an initial duration of two years to a perpetual duration. On December 16, 1988, the corporation filed with the Department of State another certificate of amendment of the certificate of incorporation to change the name of the corporation from Evangelical Family Service, Inc. to Evangelical Adoption and Family Services, Inc. On March 26, 1993, the corporation filed with the Department of State another certificate of amendment of the certificate of incorporation to change the name of the corporation from Evangelical Adoption and Family Service, Inc. to New Hope Family Services, Inc. The written approval of the State Board of

Social Welfare was obtained for the filing of the initial certificate of incorporation and the first certificate of amendment. The written approval of the State Department of Social Services was obtained for the filing of the second and third certificates of amendment. (The State Board of Social Welfare and the State Department of Social Services were the predecessor agencies to the State Office of Children and Family Services. Those agencies previously had the authority to approve certificates of incorporation and amendment of proposed adoption agencies that are currently the responsibility of this Office.) Therefore, New Hope Family Services, Inc. currently has the requisite corporate authority to place children for adoption and to perform other adoption services, including home studies. The agency's authority to conduct such activities in New York is perpetual.

You may provide this letter or copies thereof to demonstrate the current authority of the agency to place out children for adoption in New York.

Please call me at 315-423-3942 if you have any questions.

Very truly yours,



Suzanne M. Colligan
Adoption Specialist
Syracuse Regional Office

JACQUELINE A. HOUDE
Notary Public, State of New York
Reg. No. 01HO6144941
Qualified in Onondaga County
My Commission Expires May 1, 2012

Sworn to before me this
17th day of January, 2008



Notary Public

cc: Brenda Rivera

5:18-cv-1419 (MAD/TWD)

EXHIBIT

5



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

APPROVAL # 25
CHAPTER # 509

SEP 17 2010

MEMORANDUM filed with Senate Bill Number 1523-A, entitled:

“AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child”

A P P R O V E D

This bill would amend Domestic Relations Law § 110 to add to the delineated list of those who may adopt a child, an unmarried couple comprised of adult “intimate partners.” In adding this language, the bill would make absolutely clear a principle that has already been established by the courts, *see In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (4th Dep’t 2004) and that ensures fairness and equal treatment to families that are ready, willing and able to provide a child with a loving home. This includes same-sex couples, regardless of whether they are married. Moreover, since the statute is permissive, it would allow for such adoptions without compelling any agency to alter its present policies. It is a wise, just and compassionate measure that expands the rights of New Yorkers, without in any way treading on the views of any citizen or organization.

There are two aspects of this legislation that I believe warrant my comment, so as to make clear my understanding of this bill as I sign it into law. First, the term “intimate partners,” although at the heart of the bill, is not defined in it. That should not, however, create any confusion. The term is defined elsewhere in New York law, *see* CPL § 530.11(e), and I believe such definitions contained in other titles provide adequate specificity as to the term’s meaning, and would be looked to by agencies and courts in determining the appropriate construction of this law.

Second, I note that this amendment at least clarifies, and at most expands, existing law. It does not in any way limit or restrict it. Therefore, to the extent the law prior to this bill has been, or may be, read to permit any particular individual or individuals to adopt, including individuals who are neither married nor “intimate partners,” there is nothing in this bill that would disturb such a reading.

In sum, this bill will enhance the rights of New Yorkers longing to be parents. As such, it is a welcome addition to New York law.

The bill is approved.

000005

5:18-cv-1419 (MAD/TWD)

EXHIBIT

6

From: **Colligan, Suzanne (OCFS)** <Suzanne.Colligan@ocfs.ny.gov>
Date: Mon, Oct 1, 2018 at 1:14 PM
Subject: Program Review 2018
To: Judy Geyer <jgeyer.newhope@gmail.com>

Judy – Please find attached our letter regarding your agency’s program review. I will be sending another email providing dates for a follow up meeting, as well as the template identifying the practice areas that need improvement at this point. Thank you

Suzanne M. Colligan

Permanency Specialist, Child Welfare and Community Services

NYS Office of Children and Family Services

100 South Salina Street – Suite 350

Syracuse, NY 13202

Phone: 315-423-3943 Fax: 315-423-3960 Email: Suzanne.Colligan@ocfs.ny.gov



Office of Children
and Family Services

ANDREW M. CUOMO
Governor

SHEILA POOLE
Acting Commissioner

October 1, 2018

Judy Geyer, Interim Executive Director
New Hope Family Services, Inc.
3519 James Street
Syracuse, NY 13206

Dear Ms. Geyer:

On September 6, 2018 the New York State Office of Children and Family Services, Syracuse Regional Office, conducted a review of your agency's adoption program. The review included meeting with staff to discuss and review the current provision of adoption services, program structure, policies, and record storage. Additionally, we reviewed several adoptive applicant and free foster home records.

Our office found that your program has a number of strengths in providing adoption services within the community. One of which is the strong emphasis on assisting the birth parents in making an informed decision for their newborn, providing them time to make the decision, along with a supportive and detailed adoptive family selection process. During the site visit there were a few topic areas that warranted a follow up meeting to discuss and verify adjustments have been made to the current agency policies. The topics included:

- Immediate implementation of 18-OCFS-ADM-07: Foster/Adoptive Home Certification Approval Process
- Request for non-identifying information and medical history by adoptive families, adoptee, or birth parent; including usage of the Adoption Information Registry through the Department of Health.
- The agency's role and limitations regarding the exchange of information related to conditions of a surrender.

This program review will be conducted at your agency every three years. Annual onsite visits will be conducted over the next two years. We would like to thank you for the courtesy and cooperation extended to us during the visit and look forward to working with you as you continue to provide adoption services. We will be contacting you shortly to schedule a follow up meeting. If you have any questions about this letter, please contact Suzanne Colligan at 315-423-3943.

Sincerely,

A handwritten signature in cursive script that reads "Sara J. Simon".

Sara J. Simon, Director

Child Welfare and Community Services, Syracuse Regional Office

5:18-cv-1419 (MAD/TWD)

EXHIBIT

7



Judy Geyer <jgeyer.newhope@gmail.com>

Letter for New Home Family Services

1 message

White, Catherine (OCFS) <Catherine.White@ocfs.ny.gov>

Fri, Oct 26, 2018 at 11:32 AM

To: "jgeyer.newhope@gmail.com" <jgeyer.newhope@gmail.com>

Cc: "Colligan, Suzanne (OCFS)" <Suzanne.Colligan@ocfs.ny.gov>, "Staley, Debra (OCFS)" <Debra.Staley@ocfs.ny.gov>, "McCarthy, Carol (OCFS)" <Carol.McCarthy@ocfs.ny.gov>, "Korona-Wilson, Alicia (OCFS)" <Alicia.Korona-Wilson@ocfs.ny.gov>, "Simon, Sara (OCFS)" <Sara.Simon@ocfs.ny.gov>, "Meyer, Sonia K (OCFS)" <Sonia.Meyer@ocfs.ny.gov>

Good mid-day Ms. Geyer;

Here is an electronic copy of the original certified letter mailed out to you all on Tuesday, October 26, 2018. I am resending another certified letter out to you today. When you receive it can you **acknowledge receipt of the letter and/or have an email receipt** that shows that it was delivered. Thanks again for your patience in this important matter.

Have a great day,

Catherine

*Catherine M. White**Secretary 1**Bureau Of Permanency Services**52 Washington Street North Bldg. Rm 332**Rensselaer, NY 12144**518-408-3628*

 New Hope Family Services.pdf
110K



Office of Children and Family Services

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Acting Commissioner

October 16, 2018

SENT VIA CERTIFIED MAIL

Judy Geyer
Interim Executive Director
New Hope Family Services
3519 James Street
Syracuse, NY 13206

Dear Ms. Geyer,

The New York State Office of Children and Family Services (OCFS) is seeking clarification on the New Hope Family Services' (NHFS) position relating to the attached policy. On September 6, 2018, Suzanne Colligan, Permanency Specialist from the OCFS Syracuse Regional Office, met with you to conduct a site visit and program review of the agency's current adoption program. As part of the program review, Ms. Colligan was provided a copy of your agency's policy manual. It was found that the agency's policy pertaining to not placing "children with those who are living together without the benefit of marriage" or "same sex couples" violates Title 18 NYCRR §421.3, and is discriminatory and impermissible.

OCFS hereby requests a formal written response from NHFS stating the agency's position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether NHFS intends to revise the present policy and continue the existing adoption program, or that NHFS will not revise the policy so as to comply with the above-cited regulation.

Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of NHFS's current adoption program and NHFS will be required to submit a close-out plan for the adoption program.

Please return your response to the attention of Carol McCarthy, Director, Bureau of Permanency Services at:

NYS Office of Children and Family Services
Room 332N
52 Washington St.
Rensselaer, NY 12144

Thank you,

A handwritten signature in cursive script that reads "Laura M. Velez".

Laura M. Velez
Deputy Commissioner
Child Welfare and Community Services

Attachment

cc: Sara Simon, Director of Syracuse Regional Office

ADOPTION INQUIRIES: SPECIAL CIRCUMSTANCES

Because New Hope is a Christian Ministry, and we stand on the authority of the Word of God, there are special circumstances which would require a call from the Executive Director. These are:

If the person inquiring to adopt is single, please get all of their information and tell them that the Executive Director will call them within the next 5 business days. (The Executive Director will talk with them to discern if they are truly single or if they are living together without the benefit of marriage. (New Hope will place children with those who are truly single, but because New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage).

If the person inquiring to adopt is in a marriage with a same sex partner, please get all of their information and tell them that the Executive Director will call them within the next 5 business days. (The Executive Director will talk to them and explain that because New Hope is a Christian ministry, we do not place children with same sex couples).

In the above situations, please give the Executive Director the Purple Service Request. She will return the Purple Service Request to the Receptionist once the call has been made.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

NEW HOPE FAMILY SERVICES, INC.

(b) County of Residence of First Listed Plaintiff Onondaga (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Jon Scruggs Alliance Defending Freedom 15100 N. 90th St. Scottsdale, AZ 85260 (480) 444-0020

DEFENDANTS

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

County of Residence of First Listed Defendant Rensselaer (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. 1983. Brief description of cause: Violation of constitutional rights under the First and Fourteenth Amendments.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/06/2018 SIGNATURE OF ATTORNEY OF RECORD s/ Jon Scruggs

FOR OFFICE USE ONLY

RECEIPT # ANYNDC-4585142 AMOUNT \$400.00 APPLYING IFP JUDGE MAD MAG JUDGE TWD

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

EXHIBIT

D

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

**5:18-CV-1419
(MAD/TWD)**

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.

APPEARANCES:

ALLIANCE DEFENDING FREEDOM

1000 Hurricane Shoals Road, NE
Suite D1100
Lawrenceville, Georgia 30078
Attorneys for Plaintiff

OFFICE OF ROBERT E. GENANT

3306 Main Street, Suite B
P.O. Box 480
Mexico, New York 13114
Attorneys for Plaintiff

**OFFICE OF THE NEW YORK
STATE ATTORNEY GENERAL**

The Capitol
Albany, New York 12224
Attorneys for Defendant

OF COUNSEL:

**DAVID A. CORTMAN, ESQ.
JONATHAN A. SCRUGGS, ESQ.
JEANA HALLOCK, ESQ.
ERIK W. STANLEY, ESQ.
JEREMIAH GALUS, ESQ.**

ROBERT E. GENANT, ESQ.

ADRIENNE J. KERWIN, AAG

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff New Hope Family Services, Inc. ("New Hope") commenced this civil rights action on December 6, 2018 challenging the constitutionality of the New York Office of Children

and Family Services ("OCFS") interpretation and application of 18 N.Y.C.R.R. § 421.3(d). *See* Dkt. No. 1. Currently before the Court are Plaintiff's motion for a preliminary injunction and Defendant's motion to dismiss. *See* Dkt. Nos. 15 & 34.

II. BACKGROUND

A. Regulatory Scheme

In September 2010, New York State amended its Domestic Relations Law to codify the right to adopt by unmarried adult couples and married couples regardless of sexual orientation or gender identity. *See* 2010 S.B. 1523, Ch. 509; N.Y. Dom. Rel. Law § 110. In January 2011, the OCFS informed authorized adoption agencies in New York that the amendment brought the Domestic Relations Law into compliance with existing case law and was "intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home." After providing further guidance, adoption agencies were advised that, among other things, "discrimination based on sexual orientation in the adoption study assessment process is prohibited."

In November 2013, OCFS promulgated 18 N.Y.C.R.R. § 421.3(d) which, in accordance with existing law, prohibits "discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability" and requires that agencies authorized by New York to provide adoption services "shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." 18 N.Y.C.R.R. § 421.3(d).

Agencies authorized to provide adoption services in New York must receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective parents. *See* 18 N.Y.C.R.R. § 421.15. After an adoption application is received, an adoption study must be completed. *See id.* at § 421.13. An adoption study must explore the following characteristics of prospective parents:

- (1) capacity to give and receive affection;
- (2) ability to provide for a child's physical and emotional needs;
- (3) ability to accept the intrinsic worth of a child, to respect and share his past, to understand the meaning of separation he has experienced, and to have realistic expectations and goals;
- (4) flexibility and ability to change;
- (5) ability to cope with problems, stress and frustration;
- (6) feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and
- (7) ability to use community resources to strengthen and enrich family functioning.

Id. at § 421.16(a). An application may only be rejected if (1) an applicant does not cooperate with the adoption study; (2) an applicant is "physically incapable of caring for an adoptive child;" (3) an applicant is "emotionally incapable of caring for an adopted child;" or (4) an applicant's approval "would not be in the best interests of children awaiting adoptions." *Id.* at § 421.15(g). Once an application is approved, the agency must add the applicant to the adoptive parent registry. *See id.* at §§ 421.15(i), 424.3(a).

Whether the adoption of a particular child by a particular prospective adoptive parent should be approved must be made "on the basis of the best interests of the child." 18 N.Y.C.R.R. § 421.18(d). In making placement decisions, the agency must consider, among other things, (1)

the ages of the child and prospective parent(s); (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);" (3) "the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background;" and (4) the ability of a child to be placed in a home with siblings and half-siblings. *See id.* Additionally, agencies must

[m]ake an effort to place each child in a home as similar to and compatible with his or her religious background as possible with particular recognition that section 373(3) of the Social Services Law requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child.

Id. at § 421.18(c). Further, the Social Services Law provides that, "so far as consistent with the best interests of the child, and where practicable," the religious wishes of the birth parents should be honored. *See* N.Y. Soc. Serv. Law § 373(7).

B. New Hope Family Services

When an entity seeks to facilitate adoptions in New York, it must qualify as an "authorized agency" under the law before it may provide those services. *See* N.Y. Soc. Serv. Law § 371(10)(a); N.Y. Soc. Serv. Law § 374(2). New Hope is an "authorized agency" with the authority to "place out or to board out children..." N.Y. Soc. Serv. Law § 371(10)(a), and "receive children for purposes of adoption." N.Y. Dom. Rel. Law § 109(4). As an "authorized agency," New Hope must be "incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children ... [and] shall submit and consent to the approval, visitation, inspection and supervision of such office as to any and all acts in relation to the welfare of children performed or to be performed under this title." N.Y. Soc. Serv. Law § 371(10)(a). Additionally, OCFS must approve an agency's certificate of incorporation. *See id.* at § 460-a.

C. The Complaint

In 1958, Pastor Clinton H. Tasker founded what became New Hope Family Services as a Christian ministry to care for and find adoptive homes for children whose birth parents could not care for them. *See* Dkt. No. 1 at ¶ 3. New Hope dedicates a considerable portion of the complaint setting forth its religious beliefs, which the Court will not fully recount here. The Court fully accepts that New Hope and its employees have these sincerely held religious beliefs.

It is because of these religious beliefs that "New Hope will not recommend or place children with unmarried couples or same sex couples as adoptive parents." *Id.* at ¶ 153. New Hope's "Special Circumstances" policy states in part as follows:

If the person inquiring to adopt is single . . . [t]he Executive Director will talk with them to discern if they are truly single or if they are living together without the benefit of marriage . . . because New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage.

If the person inquiring to adopt is in a marriage with a same sex partner . . . ([t]he Executive Director will . . . explain that because New Hope is a Christian Ministry, we do not place children with same sex couples).

Id. at ¶ 154.

New Hope claims that it has worked with unmarried individuals who are truly single in the past and remains willing to work with such individuals. *See id.* at ¶ 155. Further, New Hope claims that because it "handles inquiries from unmarried couples and same-sex couples pursuant to the policy and practice described above, New Hope has never denied an unmarried couple or same-sex couple's application." *Id.* at ¶ 156. "Whenever a same-sex couple or unmarried couple is interested in a referral, New Hope refers them to the appropriate county social services office or another provider." *Id.*

Until recently, New York adoption law required that authorized agencies could only place children for adoption with "an adult unmarried person or an adult husband and his adult wife." N.Y. Dom. Rel. Law § 110 (2009). As mentioned above, in September 2010, New York amended its law to allow authorized agencies to place children for adoption with "an adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together." N.Y. Dom. Rel. Law § 110 (2010). New Hope notes that permissive language is used throughout the amended law and claims that "New York has *never* amended its law to *require* authorized agencies to place children for adoption with 'an adult unmarried person,' a same-sex 'adult married couple together,' or 'two unmarried adult intimate partners together.'" Dkt. No. 1 at ¶ 163 (emphasis in original). New Hope contends that "OCFS is attempting to use regulations to require exactly that: on July 11, 2011, OCFS issued a second letter that purported to clarify, but in fact materially changed, the adoption regulations then found in 18 NYCRR 421.16 and subpart (h). In that letter, OCFS declared that 'the intent of' subpart (h) 'is to prohibit discrimination based on sexual orientation in the adoption study assessment process. In addition, OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent.'" *Id.* at ¶ 164 (quoting Office of Children & Family Services, Informational Letter, 11-OCFS-INF-05 (July 11, 2011)).

In 2013, OCFS amended the adoption regulations, declaring that authorized agencies, "providing adoption services shall ... (d) prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability...." 18

N.Y.C.R.R. § 421.3 (2018). Following the 2013 changes, OCFS issued another informational letter in 2016 which stated as follows:

[T]his policy directive requires the formalization of any existing nondiscrimination and harassment policies and procedures, and possibly the revision of such policies and procedures, by requiring that . . . [voluntary agencies] . . . not engage in or condone discrimination . . . on the basis of race, creed, color, national origin, sex, religion, sexual orientation, gender identity or expression, marital status or disability against . . . applicants for adoption services, . . . prospective foster parents, foster parents, or children in foster care.

Dkt. No. 1 at ¶ 167. New Hope claims that OCFS promulgated these new regulations "purporting to require adoption providers to place children with unmarried and same-sex couples in complete disregard for the law, the scope of OCFS' authority, and the rights of adoption providers." *Id.* at ¶ 168.

In January or February of 2018, Suzanne Colligan of OCFS called New Hope's then Acting Executive Director, Judith A. Geyer. *See id.* at ¶ 182. During the call, Ms. Colligan conveyed that, under a new policy implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures. *See id.* On July 18, Ms. Colligan sent an email to Ms. Geyer to schedule the adoption program review and included a list of things she needed to review, including New Hope's policies and procedures. *See id.* at ¶ 183. Based on Ms. Colligan's direction that she would need a copy of New Hope's policies and procedure manual, Ms. Geyer updated New Hope's formal policies and procedures on adoption into one consolidated manual. *See id.* at ¶ 184.

On August 28, Ms. Geyer received an email from Ms. Colligan, stating in part:

I also thought that it might be helpful for you to see the application we use with agencies requiring reauthorization for corporate authority. Since you are authorized in perpetuity, your agency is not required to complete/submit this form. However, I will be

asking many of the program questions on it, so you may find it helpful in preparing for my visit.

Dkt. No. 1 at ¶ 185.

On September 6, 2018, Ms. Colligan met with Ms. Geyer and Kathy Decesare, New Hope's Center Director, and took a copy of New Hope's policy and procedure manual with her when she left. *See id.* at ¶ 186. On October 1, 2018, OCFS sent a letter to Ms. Geyer that praised a number of strengths in New Hope's program, thanked New Hope for its professionalism during the meeting, and suggested a follow-up meeting to discuss a few opportunities for improvement. *See id.* at ¶ 187. On or about October 9, 2018, Ms. Geyer received a call from Ms. Colligan. During the call, Ms. Colligan stated that she had been reading New Hope's policies and procedures manual and that New Hope's policy not to place children with those who are living together without the benefit of marriage or with same-sex couples violated 18 N.Y.C.R.R. § 421.3. *See id.* at ¶ 188. New Hope claims that Ms. Colligan told Ms. Geyer that New Hope would have to comply with § 421.3 by placing children with unmarried couples and same-sex couples. *See id.* at ¶ 189. Further, Ms. Colligan stated that if New Hope did not comply, New Hope would be "choosing to close." *Id.* at ¶ 190. Ms. Geyer responded that New Hope would be unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples. *See id.* at ¶ 191. Ms. Colligan responded by stating that "[s]ome Christian ministries have decided to compromise and stay open." *Id.* at ¶ 192. Ms. Colligan informed Ms. Geyer that she would be getting a letter from OCFS mandating compliance by a specific date. *See id.* at ¶ 194.

On October 11, 2018, Ms. Colligan emailed Ms. Geyer, stating in part as follows:

You will be receiving a letter from our office soon requesting a formal written response regarding your agency's position. When OCFS receives written notification of an agency's intention to close a program, OCFS will respond with written instructions to the agency with the steps they must take. These steps include the

agency's responsibility to seek and obtain agreement with another NYS authorized agency to maintain and store their adoption records, of which includes the handling of activities outlined in the legally bound agreements with birth parents.

Id. at ¶ 195.

On October 12, 2018, Ms. Colligan sent an email to Ms. Geyer stating that "[w]e will put Monday's follow up meeting [to discuss a few minor improvements identified during the visit] on hold for now. The purpose of the follow up meeting would be to work on the necessary changes to your agency policy manual. Based on our recent phone call, the follow up meeting for those purposes does not appear needed at this time." *Id.* at ¶ 196. On October 17, 2018, Ms. Colligan indicated in an email to Ms. Geyer that she had mailed out a certified letter. That email stated that "[o]nce the letter is returned providing us with written notice of your intent, we will send out a letter outlining our expectations around the handling of those that you are currently providing services and the adoption records." *Id.* at ¶ 197.

On October 26, 2018, Ms. Geyer received an electronic copy of the letter to which Ms. Colligan had referred. The letter stated that New Hope's policy pertaining to "not placing 'children with those who are living together without the benefit of marriage' or 'same-sex couples' violates Title 18 NYCRR § 421.3." Dkt. No. 1 at ¶ 198. The letter further stated:

OCFS hereby requests a formal written response from [New Hope] stating the agency's position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the above-cited regulation. Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program.

Id. (quoting Dkt. No. 1-7). New Hope was given until November 30, 2018 to respond to OCFS' letter. *See id.* at ¶ 199.

D. Procedural History

On December 6, 2018, filed its complaint alleging that OCFS has violated various constitutional rights protected by the First and Fourteenth Amendments. *See* Dkt. No. 1. In its first cause of action, New Hope contends that OCFS' interpretation and enforcement of 18 N.Y.C.R.R. § 421.3(d) "targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices" in violation of the First Amendment's Free Exercise Clause. *See id.* at ¶¶ 230-263. In its second cause of action, New Hope argues that applying "section 421.3(d) to New Hope requires New Hope to engage in speech and expression that it does not wish to convey – speech and expression that violates its core religious beliefs – by compelling it to recommend same-sex couples or unmarried couples as adoptive parents" in violation of the First amendment. *See id.* at ¶¶ 264-278. In its third cause of action, New Hope contends that section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it in violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at ¶¶ 279-290. Finally, in its fourth cause of action, New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." *Id.* at ¶¶ 291-95.

On December 12, 2018, New Hope filed a motion for a preliminary injunction. *See* Dkt. No. 15. On January 14, 2019, OCFS moved to dismiss the complaint in its entirety. *See* Dkt. No. 34. On February 19, 2019, after the motions were fully briefed, the Court held oral arguments on

both pending motions. For the reasons set forth below, the Court grants OCFS's motion to dismiss the complaint and denies New Hope's motion for a preliminary injunction as moot.

III. DISCUSSION

A. Standard of Review

1. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *see id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability

requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief.'" *Id.* (quoting [*Twombly*, 550 U.S.] at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[] complaint must be dismissed[,]" *id.* at 570.

2. Preliminary Injunction

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005) (citation omitted). "A decision to grant or deny a preliminary injunction is committed to the discretion of the district court." *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 78 (2d Cir. 1994) (citation omitted).

A party seeking a preliminary injunction must establish "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Allied Office Supplies, Inc. v. Lewandowski*, 261 F. Supp. 2d 107, 108 (D. Conn. 2005) (quoting *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003)). Moreover, in certain circumstances, an even higher standard applies. "The moving party must make a 'clear' or 'substantial' showing of a likelihood of success where (1) the injunction sought 'will alter, rather than maintain, the status quo' – *i.e.*, is properly characterized as a 'mandatory' rather than 'prohibitory' injunction; or (2) the injunction sought 'will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the

defendant prevails at a trial on the merits." *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (quoting *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995)).¹ "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999) (internal quotations omitted).

The Supreme Court has observed that the decision of whether to award preliminary injunctive relief is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Consonant with this view, the Second Circuit has held that a district court may consider hearsay evidence when deciding whether to grant preliminary injunctive relief. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010). Therefore, the strict standards for affidavits under the Federal Rules of Evidence and in support of summary judgment under Rule 56(c)(4) of the Federal Rules of Civil Procedure requiring that an affidavit be made on personal knowledge are not expressly applicable to affidavits in support of preliminary injunctions. *See Mullins v. City of New York*, 634 F. Supp. 2d 373, 384 (S.D.N.Y. 2009) (citations omitted). Nevertheless, courts have wide discretion to assess the affidavit's credibility and generally consider affidavits made on information and belief to be insufficient for a preliminary injunction. *See* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2949 (2d ed. 1995); *Mullins*, 634 F. Supp. 2d at 373, 385, 390 n.115 (declining to fully credit the "defendants' hearsay affidavit" and noting that while the court "may consider hearsay evidence in a preliminary injunction hearing . . . , a court

¹ As the Second Circuit has noted, "[t]he distinction between mandatory and prohibitory injunctions is not without ambiguities or critics, . . . and that in a close case an injunction can be framed in mandatory or prohibitory terms[.]" *Jolly*, 76 F.3d at 473-74 (internal quotations and citation omitted).

may weigh evidence based on whether such evidence would be admissible under the Federal Rules of Evidence").

In the Second Circuit "there is no hard and fast rule . . . that oral testimony must be taken on a motion for a preliminary injunction or that the court can in no circumstances dispose of the motion on the papers before it." *Maryland Cas. Co. v. Realty Advisory Bd. of Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997) (quoting *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 259 (2d Cir. 1989)). "Generally, the district court is not required to conduct an evidentiary hearing on a motion for a preliminary injunction when essential facts are not in dispute." *Id.*

Even if the plaintiff demonstrates irreparable harm and a likelihood of success on the merits, however, the remedy of preliminary injunctive relief may still be withheld if equity so requires. "An award of an injunction is not something a plaintiff is entitled to as a matter of right, but rather it is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999) (citation omitted).

B. Free Exercise Claim

OCFS contends that the Court must dismiss New Hope's free exercise claim because 18 N.Y.C.R.R. § 421.3(d) is a neutral law of general applicability that only incidentally imposes a burden on the exercise of religion. *See* Dkt. No. 34-1 at 12-14. Therefore, OCFS alleges that the law only needs to be supported by a rational basis, which is easily met in this case. *See id.* New Hope, however, responds that "cases teach that even a genuinely 'neutral law of general applicability' cannot be applied when to do so would interfere in historically respected areas of

religious autonomy." Dkt. No. 36 at 9-10 (quoting *Hosannah-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012)). Additionally, New Hope argues that even assuming that the test in *Employment Division, Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) applies, it is still likely to succeed on this claim because it is alleged that the "regulation was adopted for the purpose of targeting faith-based adoption ministries." *Id.* at 11 (quoting Dkt. No. 1 at ¶ 9). Therefore, New Hope argues that the regulation is not neutral or generally applicable as applied. *See id.* (citing Dkt. No. 1 at ¶ 248). "Further, given that 'there are ... many ways of demonstrating that the object or purpose of a law is the suppression of ... religious conduct,' *Lukumi*, 508 U.S. at 533, New Hope has made extensive factual allegations that support a reasonable inference of a 'targeting' purpose, all of which must be accepted as true for purposes of this motion." *Id.* at 11-12.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210 (2d Cir. 2012) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). "Nonetheless, 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* (quoting *Lukumi*, 508 U.S. at 533, 113 S. Ct. 2217) (internal citation omitted).

"However, 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'" *Id.* (quoting *Lukumi*, 508 U.S. at 531, 113 S. Ct. 2217).

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 877.

Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (internal citations and question marks omitted) (emphasis in original). Likewise, it forbids government acts specifically designed to suppress religiously motivated practices or conduct. *See id.* at 877-78. The Court concluded that the Free Exercise Clause does not, however, "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quotation omitted).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the City of Hialeah, Florida had adopted an ordinance prohibiting the slaughtering of animals except in certain recognized circumstances. The history of the law's adoption made plain, however, that this was no earnest piece of animal welfare legislation, but rather an attempt to suppress the practice of Santeria, a religion that incorporates animal sacrifice in many of its rituals. *See Lukumi*, 508 U.S. at 524. The Supreme Court noted that the emergency sessions that led to the ordinance, held immediately after a Santeria church first tried to open in town, were rife with unrestrained hostility. Council members referred to supposed Biblical prohibitions on animal

sacrifice except for consumption and asked "What can we do to prevent the Church from opening?" *Id.* at 541. Further, the audience cheered these remarks and taunted the president of the Church, and the chaplain of the city police department called Santeria "an abomination to the Lord." *Id.* at 541-42.

Additionally, the Supreme Court found that, although the ordinance itself was ostensibly concerned with animal welfare, it clearly reflected the hostility demonstrated during the emergency sessions. Its restriction on animal killing was limited to "sacrifice," and was further limited to the context of "a public or private ritual or ceremony." *Id.* at 527. Although it did not apply if the killing was "for the primary purpose of food consumption," or if the animals were "specifically raised for food purposes," the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as would often happen in Santeria rituals. *Id.* at 527-28. As the Supreme Court noted, the "net result" of these definitions was that "few if any killings of animals are proscribed other than Santeria sacrifice. ... Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. This "gerrymander" of the ordinance, *id.*, along with the striking hostility at the public meetings, left the Court with only "one conclusion: The ordinances had as their object the suppression of religion." *Id.* at 542.

In *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018), the plaintiff, Catholic Social Services ("CSS"), and the defendant, the Philadelphia Department of Human Services ("DHS"), entered into a contract for CSS to provide foster care services to the city in exchange for public funding, such services to include screening, training, and certifying resource caregivers (foster parents) to "provide certified resource homes." *Fulton*, 320 F. Supp. 3d at 670. The contract included some limited reasons that CSS might refuse to provide services, along with

the following provision: "Provider is in compliance with the laws, ordinances, regulations and executive orders" including the Fair Practices Ordinance ("FPO"), which states that "[provider shall not] discriminate or permit discrimination against individuals in ... public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of ... sex, sexual orientation, gender identity, marital status, familiar [sic] status." *Id.* at 671. Breach of this covenant would permit DHS to suspend the contract. *Id.*

In March 2018, DHS became aware that CSS was refusing to provide services to same-sex couples. James Amato from CSS acknowledged "that CSS would not provide these services on religious grounds" and that under CSS policy they "(1) would not certify same-sex couples as prospective foster parents even if [they] were otherwise eligible ... and (2) would not provide a same-sex couple with a home study as part of [their] application for adoption." *Id.* DHS suspended CSS's intake of new referrals. CSS filed suit alleging, among other things, that DHS' suspension of referrals of new children to CSS' care violated its free speech rights. *See id.* at 669.

In denying the motion for preliminary injunctive relief, the district court first found that the Fair Practices Ordinance that was incorporated into the services contract was, on its face, a neutral law of general applicability under *Smith* and, therefore, rational basis review applied to determine its constitutionality. *See id.* at 682-83. Initially, the court concluded that the Services Contract and the Fair Practices Ordinance were neutral with respect to religion because there was no evidence that either were drafted or enacted with the object "to infringe upon or restrict practices because of their religious motivation." *Id.* at 683 (quoting *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275) (emphasis in original). The court found that both demonstrated neutrality in that no reference to religion was made other than that they both

prohibited discrimination on the basis of religion. *See id.* Further, the court looked to the legislative history of the Fair Practices Ordinance in finding that it was a neutral law. *See id.*

In finding that the Services Contract and Fair Practices Ordinance were generally applicable, the court noted that they do not "'proscribe particular conduct only or primarily when religiously motivated;' they proscribe only CSS's ability to turn away qualified Philadelphians on the basis of particular character traits without regard to secular or religious reasons." *Id.* (quoting *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275) (other citation omitted). "As applied in this case, the Services Contract and Fair Practices Ordinance were, in fact, implemented in a general manner. Not only has DHS confirmed that it would not permit any foster agency under contract, faith-based or not, to turn away potential foster parents for the foster parents' characteristics under the Services Contract and Fair Practices Ordinance, DHS also closed intake of new referrals by CSS and Bethany Christian Services for the same reason. This evidence supports the conclusion that DHS and Philadelphia are not applying the Services Contract or the Fair Practices Ordinance to target particular religious denominations for any religious reason." *Id.* at 684.

Having concluded that the Services Contract and Fair Practices Ordinance were facially neutral and generally applicable, and that they were applied in a neutral and generally applicable manner, the court in *Fulton* found that they were rationally related to a number of legitimate government objectives. *See id.* These objectives included the following: (1) ensuring that when contractors agree to terms in a government contract, the contractors adhere to those terms; (2) ensuring that when its contractors voluntarily agree to be bound by local laws, those laws are enforced; (3) ensuring that when DHS and Philadelphia employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the

services; (4) ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers; (5) ensuring that individuals who pay taxes to fund government contractors are not denied access to those services; and (6) avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples. *See id.* at 684-85. As such, the court found that the Services Contract and Fair Practices Ordinance survived rational basis review and denied the application for preliminary injunctive relief. *See id.*

After the district court denied the motion for injunctive relief, CSS appealed. On April 22, 2019, the Third Circuit upheld the district court's decision. *See Fulton v. City of Philadelphia*, ___ F.3d ___, 2019 WL 1758355 (3d Cir. 2019). In affirming the district court, the Third Circuit rejected CSS's claims that the application of the anti-discrimination clause is impermissible under *Smith* and its progeny. *See id.* at *7-*9. In those cases, the courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct. *See id.* at *7 (citing *Masterpiece Cakeshop*, 138 S. Ct. 1719); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). The Third Circuit found that these cases "clarify *Smith* by reaffirming that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application." *Id.* Therefore, a challenger under the Free Exercise Clause must show that it was treated differently because of its religion. *See id.* "Put another way, it must show that it was treated more harshly than the

government would have treated someone who engaged in the same conduct but held different religious views." *Id.*

Summarizing the issue to be decided and its ultimate conclusion, the Third Circuit held as follows:

The question in our case, then, is whether CSS was treated differently because of its religious beliefs. Put another way, was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, that question has a clear answer: no. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

Id. at *10.

As the cases above make clear, evolving First Amendment jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion.

"Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719, 1731 (2018) (internal quotation marks and citation omitted); *see id.* at 1729-31 (citing hostile comments from members of the Colorado Civil Rights Commission and the commission's inconsistent treatment of religious discrimination and sexual-orientation discrimination to conclude that the commission's treatment of a cake shop owner "violated the [s]tate's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *Trump v. Hawaii*, ___ U.S. ___, 138 S. Ct. 2392,

2417 (2018) (considering extrinsic evidence of anti-Muslim animus when determining the constitutionality of a presidential proclamation).

In the present matter, contrary to New Hope's assertions in its motion for preliminary injunctive relief and response to the motion to dismiss, 18 N.Y.C.R.R. § 421.3(d) is, on its face, "neutral and generally applicable" and, therefore, subject to rational basis review. In its complaint, New Hope alleges that the "regulation was adopted for the purpose of targeting faith-based adoption ministries," that OCFS promulgated the regulation for the purpose of suppressing faith-based policies such as those of New Hope, which it found objectionable, and that the regulation is "not neutral or generally applicable as applied." Dkt. No. 1 at ¶¶ 9, 204, 248.

On its face, 18 N.Y.C.R.R. § 421.3(d) is generally applicable and it is plainly not the object of the regulation to interfere with New Hope's, or any other agency's, exercise of religion. The regulation states that "[a]uthorized agencies providing adoption services shall ... prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." 18 N.Y.C.R.R. § 421.3(d). The regulation applies to all authorized agencies, regardless of any religious affiliation.

Moreover, section 421.3(d) is neutral. In determining the neutrality of a law or regulation, a court may consider, among other things, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members

of the decisionmaking body." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993) (citation omitted). "These objective factors bear on the question of discriminatory object." *Id.* (citation omitted).

Nothing before the Court supports the conclusion that section 421.3(d) was drafted or enacted with the object "to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. The plain language of the regulation demonstrates its neutrality, which makes no reference to religion, other than to prohibit religious discrimination. Further, as discussed in more detail above, the actions of OCFS leading up to the promulgation of section 421.3(d) further support a finding of neutrality. After New York codified the right to adopt by unmarried adult couples and married adult couples regardless of sexual orientation or gender identity, the communications from OCFS indicate that it could not "contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent." Moreover, in discussing the purpose of the regulation, OCFS stated that it was to "[p]rohibit[] discrimination on the basis of sexual orientation, gender identity or expression in essential social services." N.Y.S. Register, Nov. 6, 2013, p.3.

The rule making documents and subsequent OCFS Information Letters clearly set forth the intent of section 421.3(d). When read in connection with the explicit intended purpose of the regulation and the established law relating to adoption, the allegations that New Hope's religious beliefs are incidentally affected by the regulation are insufficient for the Court to find that New Hope has pled a plausible First Amendment free exercise claim. Absent from the complaint and submissions in support of the motion for a preliminary injunction are any allegations of type of hostility or bias demonstrated in *Masterpiece Cakeshop* or *Lukumi*. Rather, the facts before the

Court more closely align with *Fulton*, where the Third Circuit found that the plaintiff was unlikely to succeed on its claim because the record demonstrated that the defendant respected the plaintiff's sincerely held beliefs while enforcing the anti-discrimination provision at issue.

New Hope further argues that "the Regulation is not neutral or 'generally applicable' because it exists within a framework that makes numerous exceptions to OCFS's supposed antidiscrimination policy, permitting and even requiring 'discrimination' in many contexts based on many factors including secular, religious, and racial, as well as based on the very wide individualized discretion of the evaluating agency concerning the fitness of the would-be adoptive parents, all in service of the foundational goal of the best interests of the child." Dkt. No. 36 at 13 (citing Dkt. No. 1 at ¶¶ 172-81, 248-49, 262). Contrary to New Hope's suggestion, these "exceptions" to the anti-discrimination policy do not render the regulation non-neutral or generally applicable. New Hope cites to provisions in the regulations that require authorized agencies to consider things such as the "age of the child and of the adoptive parent(s); ... the cultural, ethnic, or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such background as one of a number of factors used to determine best interests." 18 N.Y.C.R.R. § 421.18. However, as the Third Circuit found in *Fulton*, there are significant differences between New Hope's refusal to recommend or place children with unmarried couples or same sex couples as adoptive parents and the requirement for authorized agencies to consider such things as the race of the child and prospective adoptive parents in determining the best interests of the child. *See Fulton*, 2019 WL 1758355, at *11. Most significantly, unlike New Hope's practice, the cited provisions do not permit authorized agencies to refuse to work with individuals because of their membership in a protected class. Instead, the cited provisions are clearly intended to find the best fit for each child, "taking the whole of that

child's life and circumstances into account." *Id.* Further, nothing in the record suggests that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class.

New Hope also contends that "the *enforcement* of the Regulation has been decidedly non-neutral, 'target[ing] and show[ing] hostility towards ... New Hope because of its religious beliefs and practices,' ... demanding that New Hope 'compromise' its beliefs as a condition of staying open, ... and revoking approval of multiple faith-based agencies because of their faith-based policies concerning the families with whom they place children." Dkt. No. 36 at 13-14 (quoting Dkt. No. 1 at ¶¶ 236, 192, 202-03). Further, New Hope contends that "OCFS's targeting of and hostility towards New Hope because of its faith-based policy is further demonstrated by OCFS's threat to revoke New Hope's license even though this threat is contrary to law – which authorizes OCFS to order a licensed agency to cease providing services *only* in the event that it makes findings of abuse which OCFS has not made – and could not make – with respect to New Hope." *Id.* at 14 (citing Dkt. No. 1 at ¶¶ 200, 251).

This is a common theme present throughout New Hope's submissions. Basically, New Hope's argument can be broken down as follows: OCFS is targeting New Hope because it discriminates against same-sex couples and unmarried opposite-gender couples; New Hope is discriminating against same-sex couples and unmarried opposite-gender couples because of its religious beliefs; therefore, OCFS is targeting New Hope for its religious beliefs. This syllogism, however, runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from neutral, generally applied legal requirements. The fact that New Hope's conduct springs from sincerely held and strongly felt religious beliefs does not imply that OCFS's decision to regulate that

conduct springs from antipathy to those beliefs. "If all comment and action on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well." *Fulton*, 2019 WL 1758355, at *12.

Having concluded that section 421.3(d) is facially neutral and generally applicable, and that it has been neutrally and generally applied in this case, the Court concludes that OCFS's enforcement of it is rationally related to a number of legitimate government objectives. These legitimate government interests include the following: (1) ensuring that when OCFS authorizes agencies to provide important governmental services, those services are accessible to all New York State citizens who are otherwise qualified for those services; and (2) in the context of foster care and adoption, ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. *See Fulton*, 320 F. Supp. 3d at 684-85.

In sum, New Hope has failed to plausibly allege a free exercise claim. 18 N.Y.C.R.R. § 421.3(d) has not been "gerrymandered" as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or the kind of animosity against religion found in *Masterpiece Cakeshop*. As such, OCFS's motion to dismiss is granted as to New Hope's free exercise claim and New Hope's motion for preliminary injunctive relief is denied as moot.

C. Free Speech

Although far from clear, in its complaint, New Hope appears to assert violations of its rights to be free from compelled speech and expressive association. *See* Dkt. No. 1 at ¶¶ 264-78. The Court will address each claim in turn.

1. Compelled Speech

In support of its First Amendment claim, New Hope contends that 18 N.Y.C.R.R. § 421.3(d) is unconstitutional as applied to it insofar as it forces New Hope to change the content of its message. *See* Dkt. No. 36 at 19 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943)). New Hope alleges that its beliefs lead it to "recommend married opposite-sex couples and truly single individuals as adoptive parents, *see* Dkt. No. 1 at ¶ 269, and that because of those same beliefs it cannot endorse "unmarried couples or same-sex couples as adoptive parents." *Id.* at ¶ 153. "The Regulation, as OCFS seeks to apply it against New Hope, would compel New Hope to radically alter the content of its speech, forcing New Hope to say to both the State and to birthmothers, 'We do believe that adoption by this unmarried or same-sex couple would be in the best interests of this child,' when in fact New Hope believes it would not be." Dkt. No. 36 at 20 (quoting Dkt. No. 1 at ¶¶ 153, 269-273).

The Supreme Court has advised that courts must examine the purpose of a government program when analyzing whether a government condition to participate in the program is constitutional under the First Amendment. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Where the purpose of the program is to facilitate private speech, rather than to promote a government message, the restriction violates the First Amendment if speech is a prerequisite of participation in the program. *See id.* at 542-43.

In *Velazquez*, a group of lawyers employed by the New York City Legal Services Corporation, sought a declaration that Congress's imposition of a funding condition on legal services under the Legal Services Corporation Act was an unconstitutional restriction of their freedom of speech. *See Velazquez*, 531 U.S. at 536. Congress' funding condition prohibited legal services corporations' use of federal funds to "amend or otherwise challenge existing welfare law." *Id.* In ruling that the funding condition of the Legal Services Corporation Act was

unconstitutional, the Supreme Court focused on the purpose of the law. The law was "designed to facilitate private speech, not promote a governmental message." *Id.* at 542. Indeed, advice from legal services corporation attorneys to their clients, the Supreme Court concluded, "cannot be classified as governmental speech even under a generous understanding of the concept." *Id.* at 543.

In the present matter, OCFS's purpose in authorizing agencies to provide adoption and foster care services is for such agencies to provide adoption and foster care services. The process of authorizing such agencies here, in contrast to *Velazquez*, is not intended to create a forum for private speech or to facilitate private speech. Adoption agencies like New Hope were authorized to perform governmental functions for OCFS. That New Hope's work as an authorized agency is governmental in nature is further supported by the fact that OCFS provides regular oversight of its authorized agencies and, in fact, provides the same services through state operated adoption agencies. As the court found in *Fulton*, New Hope's work as an authorized agency is an extension of OCFS's own work and New Hope's speech, to the extent any is required when performing its services as an authorized agency, constitutes governmental speech under *Velazquez*. *See Fulton*, 320 F. Supp. 3d at 697; *see also Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 840 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2007). Therefore, OCFS is permitted to "take legitimate and appropriate steps to ensure that its message," that adoption and foster care services are provided to all New Yorkers consistent with anti-discrimination policy set forth in 18 N.Y.C.R.R. § 421.3(d), was and is "neither garbled nor distorted by" New Hope.

Further, the Court finds that, even assuming *Velazquez* does not apply to the present matter, New Hope's compelled speech claim must still be dismissed because OCFS and the regulation simply do not compel speech. New Hope argues that "requiring New Hope to work

with, counsel, and recommend unmarried and same-sex couples 'would, at the very least, force [New Hope] to send a message, both to [other adoptive parents, to birthparents] and to the world, that [New Hope] accepts' such relationships as appropriate and believes that adoption by such couples can be in the best interests of the child." Dkt. No. 36 at 24 (quoting *Dale*, 530 U.S. at 653). Contrary to New Hope's contention, no such message is being compelled. Rather, application of section 421.3(d) to New Hope simply prohibits discrimination against potential adoptive parents on the basis of marital status and sexual orientation. In approving an unmarried or same sex couple for adoption, the only message that would be conveyed is that, applying the regulatory criteria set forth above, placement with such a couple would be in the child's best interest.

Although not entirely clear from the face of the complaint, at oral argument, New Hope's counsel clarified that the free speech claim that they are attempting to raise is not that the adoption itself is the expressive activity, but rather the "ministry" that New Hope engages in on an ongoing basis. *See* Transcript of Oral Argument dated Feb. 19, 2019 ("Tr.") at 27. However, as the complaint and other evidence before the Court makes clear, OCFS is not prohibiting New Hope's ongoing ministry in any way or compelling it to change the message it wishes to convey. New Hope is not being forced to state that it approves of non-married or same sex couples. Rather, the only statement being made by approving such couples as adoptive parents is that they satisfy the criteria set forth by the state, without regard to any views as to the marital status or sexual orientation of the couple.

Given the extensive religious ministry and information provided to potential adoptive parents, there is no doubt that New Hope's general disapproval of cohabiting unmarried couples and same sex couples will continue to be made clear. Indeed, nothing is preventing New Hope

from continuing to share its religious beliefs throughout the entire process. All that is forbidden is discrimination against prospective adoptive parents on the basis of their marital status and/or sexual orientation. *See Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090, 1119 (D. Minn. 2017) ("The simple ability to disclaim support for same-sex marriage sets this case apart from *Hurley*, where there was not a practicable way to disclaim support of participants' messages in the context of a moving parade") (citing *Hurley*, 515 U.S. at 576-77, 115 S. Ct. 2338).

Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's compelled speech claim.

2. Expressive Association

Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—the freedom to associate. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("F.A.I.R."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Healy v. James*, 408 U.S. 169 (1972). The freedom to associate assures that the majority (or a powerful or vocal minority) cannot force its views on groups that choose to express unpopular ideas. *See Dale*, 530 U.S. at 647-48. Government action may impermissibly burden the freedom to associate in a variety of ways; two of them are "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group." *Roberts*, 468 U.S. at 623.

The Supreme Court has held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* Freedom to associate "plainly presupposes a freedom not to associate." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623, 104 S. Ct. 3244). When the

government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person "affects in a significant way the group's ability to advocate" its viewpoint, the government has infringed on the group's freedom of expressive association. *Dale*, 530 U.S. at 648. However, "the freedom of expressive association, like many freedoms, is not absolute." *Id.*; *see also Roberts*, 468 U.S. at 623. Infringements on expressive association are subject to strict scrutiny; the right of expressive association "may be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623, 104 S. Ct. 3244).

In *Dale*, the Boy Scouts revoked the membership of an "adult scout" who was openly gay, and the scout sued under New Jersey's Law Against Discrimination ("LAD"), which prohibits discrimination based on sexual orientation in places of public accommodation. *See Dale*, 530 U.S. at 645. The Boy Scouts argued that the LAD violated its First Amendment right to associate for expressive purposes. *Id.* at 643. Applying a three-step analysis, the Supreme Court held that the First Amendment protected the Boy Scouts' right to control its membership. First, it determined that the Boy Scouts was an expressive association because its purpose was to "instill values in young people." *Id.* at 649-50. Next, the Court evaluated "whether the forced inclusion of [the expelled scout] would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 650. It determined that the Boy Scouts' official position was that homosexuality was immoral and that requiring the Boy Scouts to admit the expelled scout would "interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs." *Id.* at 655-56. Finally, the Court analyzed whether the LAD was narrowly tailored to a compelling interest. *See id.* at 656-57. Although the Supreme Court noted that eliminating discrimination

can be a compelling state interest, it concluded that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scout's freedom of expressive association." *Id.* at 654.

Similarly, in *Hurley*, the Court held that Massachusetts' public accommodations law could not be constitutionally applied to force a Boston St. Patrick's Day parade organization to accept a parade unit marching under the banner of an Irish gay and lesbian group. The Court held that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with a message of their own." *Hurley*, 515 U.S. at 578. This, the Court said, "is a decidedly fatal objective." *Id.* at 579.

In the present matter, the Court finds that New Hope's reliance on *Dale* is misplaced. The slight impairment to New Hope's expressive activity does not approximate the level of harm that triggered the Supreme Court's concern in *Dale*. Whereas, according to the Court, requiring admission of homosexuals to the Boys Scouts would be tantamount to promoting homosexual conduct, a clear violation of that organization's values, New Hope has not alleged facts demonstrating a similar harm that providing adoption services to unmarried or same sex couples would cause to their organization. New Hope is not being required to hire employees that do not share their same religious values. They are not prohibited in any way from continuing to voice their religious ideals. Rather, as in *Roberts* and *Bd. of Dirs. of Rotary Int'l.*, "the enforcement of [the regulation] would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657.

In any case, even if the application of the regulation worked a significant impairment on New Hope's association rights, the state's compelling interest in prohibiting the discrimination at

issue here far exceeds any harm to New Hope's expressive association. As such, the Court grants OCFS's motion to dismiss as to New Hope's expressive association claim.

D. Equal Protection²

1. Selective Enforcement

"To state a selective enforcement claim, plaintiffs must plead facts that allow the court to reasonably infer 'that (1) ... compared with others similarly situated, [they were] selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Joglo Realties, Inc. v. Seggos*, 229 F. Supp. 3d 146, 152-53 (E.D.N.Y. 2017) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980)). "[T]he precise standard for determining whether comparators are similarly situated for' purposes of a selective enforcement claim is an unsettled question in this circuit." *Id.* at 153 (quoting *Mosdos Chofetz Chaim, Inc. v. Vill of Wesley Hills*, 815 F. Supp. 2d 679, 693 (S.D.N.Y. 2011)).

Some district courts have held that the standard in selective enforcement cases is the same as that in "class of one' cases," which, as explained in more detail below, require plaintiffs to "show an extremely high degree of similarity between themselves and [their comparators]." *Ruston v. Town Bd. for Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (quoting *Clubside, Inc. v.*

² In its complaint, the language used makes clear that New Hope's equal protection claim was being brought as either a selective enforcement or class-of-one claim. *See* Dkt. No. 1 at ¶¶ 280-87. In its response to OCFS's motion to dismiss, New Hope has conceded that it is not alleging a class-of-one equal protection claim. *See* Dkt. No. 36 at 28. New Hope then proceeds to present a convoluted theory of an equal protection violation that is entirely inapplicable to the present matter. As OCFS correctly notes, the complaint is properly construed as alleging a selective enforcement claim. Nevertheless, the Court will also address the claim that New Hope has presented in its response.

Valentin, 468 F.3d 144, 159 (2d Cir. 2006)); *see also Kamholtz v. Yates Cty.*, No. 08-CV-6210, 2008 WL 5114964, *5 (W.D.N.Y. Dec. 3, 2008).

"Other courts have applied a slightly more lenient standard, asking whether plaintiffs are similarly situated to comparators 'in all material respects.'" *Joglo Realties, Inc.*, 229 F. Supp. 3d at 153 (quotation and other citation omitted). To satisfy this standard, "plaintiffs 'must identify comparators whom a prudent person would think were roughly equivalent, but plaintiffs need not show an exact correlation between themselves and the comparators.'" *Id.* (quotation omitted). In other words, "[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.... Exact correlation is neither likely nor necessary, but the cases must be fair congeners.... [A]pples should be compared to apples." *Id.* (quoting *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F. Supp. 2d 455, 463 (E.D.N.Y. 2002)) (other citation omitted).

In the present matter, even applying the more lenient standard, New Hope has failed to plausibly allege a selective enforcement claim. Based on the allegations in the complaint, section 421.3(d) applies to all agencies authorized by OCFS to provide adoption services and, therefore, New Hope has failed to allege a sufficiently similar comparator as required to state an equal protection claim. *See King v. N.Y.S. Div. of Parole*, 260 Fed. Appx. 375, 380 (2d Cir. 2008) (affirming dismissal of claim because the plaintiff "failed to identify a single individual with whom he can be compared for Equal Protection purposes"). New Hope's allegations of disparate treatment state that "Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because" (1) "faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating" and (2) "parents adopting children are permitted to take into account

protected classes and characteristics but in facilitating the adoption New Hope is not." Dkt. No. 1 at ¶¶ 282-83. Neither of these allegations support a selective enforcement claim.

To allege a sufficient comparator, a plaintiff must allege, at a minimum, that it is similarly situated to such a comparator in all material respects. Here, New Hope fails to allege that any other "faith based or secular adoption provider" violated section 421.3(d) and was nonetheless permitted to continue operating its adoption program. It has not alleged that other authorized agencies are being permitted to summarily exclude individuals authorized to adopt from the pool of prospective adoptive parents. Additionally, it has not alleged that any other authorized agencies are refusing to apply the relevant statutory and regulatory factors when determining whether approval of a family's application to adopt would be in a child's best interest. Instead, New Hope alleges only that the general applicability of section 421.3(d) incidentally touches on its beliefs. Such allegations are insufficient to support the inference that New Hope is (1) intentionally being treated differently from other authorized adoption agencies without a rational basis, *see Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 140 (2d Cir. 2010), or (2) intentionally being treated differently because of a protected consideration, *See Joglo Realities, Inc.*, 229 F. Supp. 3d at 152-53.

Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's selective enforcement claim.

2. Intentional Discrimination

"The Equal Protection Clause prohibits the government from subjecting individuals to 'selective treatment ... based on impermissible considerations such as ... religion.'" *American Atheists, Inc. v. Port Auth. of N.Y. and N.J.*, 936 F. Supp. 2d 321, 338 (S.D.N.Y. 2013) (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 166 (2d Cir. 2001)) (other citation omitted).

"To prove an equal protection violation, claimants must prove purposeful' or intentional 'discrimination by a government actor directed at a suspect class, such as' a religious group." *Id.* (quoting *Congregation Rabbinical Coll. of Tartikov, Inc.*, 915 F. Supp. 2d 574, 615 (S.D.N.Y. 2013)) (other citations omitted); *see also Thomas v. City of New York*, 143 F.3d 31, 37 (2d Cir. 1998). This intentional discrimination may be demonstrated in one of three ways: "by pointing to [1] a law that expressly classifies on the basis of [religion], [2] a facially neutral law or policy that has been applied in an unlawfully discriminatory manner, or [3] a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus." *Pyke v. Cuomo*, 567 F.3d 74, 76 (2d Cir. 2009) (quotation omitted).

If claimants can demonstrate such intentional discrimination on the basis of religion, the government action is "subject to strict judicial scrutiny." *Id.* at 77. Absent evidence of intentional discrimination, the government action is subject to rational basis review. *See Abascal v. Jarkos*, 357 Fed. Appx. 388, 391 (2d Cir. 2009); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 237 (S.D.N.Y. 2005). Rational basis also applies to classifications that do not involve fundamental rights. *See Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) ("A classification must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (applying rational basis to "a statute [that] is neutral on its face ... and passes the *Lemon* test"); *Red Earth LLC v. United States*, 657 F.3d 138, 147 (2d Cir. 2011). And, absent allegations of "adverse treatment of individuals compared with other similarly situated individuals' based on religion," an Equal Protection claim fails. *Incantalupo v. Lawrence Union Free Sch. Dist.*, 380 Fed. Appx. 59, 62 (2d Cir. 2010) (quoting *Miner v. Clinton County*, 541 F.3d 464, 474 (2d Cir. 2008)).

In the present matter, the Court first notes that the facts upon which New Hope relies in support of its equal protection claim are the same as those alleged in support of its First Amendment claims. As such, New Hope's equal protection claim is subject to dismissal as duplicative of its First Amendment claims. *See Barnes v. Fedele*, 760 F. Supp. 2d 296, 302 (W.D.N.Y. 2011) (dismissing the plaintiff's equal protection claim as duplicative of his First Amendment free-exercise claim) (citations omitted); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (dismissing equal protection and Eighth Amendment claims based on same circumstances as a free exercise claim because the free exercise claim "gains nothing by attracting additional constitutional labels"); *Frisenda v. Incorporated Vill. of Malverne*, 775 F. Supp. 2d 486, 518 (E.D.N.Y. 2011) ("Similarly, to the extent that plaintiff also may be attempting to assert an equal protection claim based upon retaliation for First Amendment activity (rather than under a class-of-one theory), such a claim is completely duplicative of the First Amendment retaliation claim and, therefore, should not go forward") (citations omitted); *Whitehead v. City of New York*, 953 F. Supp. 2d 367, 377 (E.D.N.Y. 2012) (same); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that courts should analyze similar claims under the most "explicit source[s] of constitutional protection"). Indeed, the allegations in New Hope's equal protection claim rely almost exclusively on the fact that OCFS's conduct and application of section 421.3(d) violate its various First Amendment rights. *See* Dkt. No. 1 at ¶ 282 ("Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating"); *id.* at ¶ 283 ("Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because parents adopting children are permitted to take into account protected classes and

characteristics but in facilitating the adoption New Hope is not"); *id.* at ¶ 284 ("Section 421.3(d) violates New Hope's fundamental rights, including its free exercise, free speech, and expressive-associational rights"); *id.* at ¶ 286 ("Forcing New Hope to recommend and facilitate placement with same-sex couples or unmarried couples, in violation of its religious beliefs, does not serve any interest in a narrowly tailored way"); *id.* at ¶ 287 ("Defendant has alternative, less restrictive means to achieve any legitimate interests rather than forcing New Hope to abandon its First Amendment rights"); *id.* at ¶ 289 ("In addition, there is no rational basis for requiring New Hope to violate its religious beliefs in order to continue performing adoption services"). Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's equal protection claim.

Even assuming that this aspect of New Hope's equal protection claim was not duplicative of its First Amendment claims, it is nevertheless still subject to dismissal because New Hope has failed to allege any facts plausibly suggesting that section 421.3(d) or OCFS expressly classifies on the basis of religion, that section 421.3(d), which is a facially neutral law, has been applied in an unlawfully discriminatory manner, or that a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus. *See Pyke*, 567 F.3d at 76.

"Discriminatory purpose implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999) (internal quotation marks and emphasis omitted). Though the desire to discriminate need not be the sole motivating factor, *see Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), it must be "a significant reason for a public body's actions," *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 786 (2d Cir. 2007).

Here, rather than allege a discriminatory purpose because of New Hope's religious beliefs, the complaint makes clear that OCFS's actions were in spite of them. After reviewing New Hope's adoption program, OCFS praised many aspect of the program and expressed a desire to resolve the issues identified in a way in which New Hope is able to continue providing adoption services. Such facts clearly fail to demonstrate a discriminatory purpose.

In establishing discriminatory effect, a plaintiff is not "obligated to show a better treated, similarly situated group of individuals." *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) (holding that a plaintiff who alleges "that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus ... is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection"). Indeed, the courts "recognize[] that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose." *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 546 (S.D.N.Y. 2006).

Again, for all the reasons set forth above, nothing in the complaint plausibly alleges that OCFS was motivated by a discriminatory animus. The complaint make clear that the only purpose behind OCFS's actions was to prevent unlawful discrimination on the basis of marital status and sexual orientation. The complaint further alleges that OCFS enforced or was in the process of enforcing section 421.3(d) against other faith-based providers, including "several Catholic providers, a Jewish provider, an LDS [(Latter Day Saints)], and a Muslim provider" who shared New Hope's beliefs "concerning life, marriage, the family, and human sexuality." Dkt. No. 1 at ¶¶ 202-03. Such consistent enforcement of this neutral regulation against other authorized agencies engaging in the same discriminatory conduct as alleged here renders New Hope's allegation of discriminatory animus implausible.

Since New Hope has failed to allege intentional discrimination, rational basis review applies. As set forth above, OCFS has several legitimate governmental interests in enforcing section 421.3(d) and, therefore, New Hope's equal protection claim is subject to dismissal on this alternative ground.

E. Unconstitutional Conditions

"Pursuant to this 'unconstitutional conditions' doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Alliance for Open Society Intern., Inc. v. U.S. Agency for Intern. Dev.*, 651 F.3d 218, 231 (2d Cir. 2011) (citation omitted); *see also Perry v. Sindermann*, 408 U.S. 593 (1972). "As the Supreme Court recently reiterated, 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" *Id.* (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)).

New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." Dkt. No. 1 at ¶ 295. The Court views New Hope's unconstitutional conditions claim as a mere repackaging of its various First Amendment claims and, therefore, the Court similarly repackages its resolution of those claims. Having already found that New Hope has failed to plausibly allege any violation of its constitutional rights, the Court grants OCFS's motion to dismiss as to New Hope's unconstitutional conditions claim. *See Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 95 (D. Me. 2004).

IV. CONCLUSION

Undoubtedly, New Hope and all authorized adoption agencies perform essential services that greatly impact the lives of thousands of children who, without such organizations, would grow up without a home. As New Hope notes in its complaint, there are over 440,000 children in foster care in the United States, with over 120,000 of those children waiting to be adopted. *See* Dkt. No. 1 at ¶¶ 29-30. In federal fiscal year 2017, New York had 27,268 children served in foster care, with 19,213 in foster care as of September 30, 2017. *See id.* at ¶ 31. Of those, over 4,400 New York children were waiting to be adopted. *See id.* at ¶ 32. Further, during fiscal year 2017, throughout New York, a total of only 1,729 children were adopted. *See id.* at ¶ 33.

It is clear from the materials before the Court that OCFS does not contend that New Hope is not acting in the best interests of the children when placing these children for adoption. In fact, after OCFS conducted its review on September 6, 2018, Director Sara Simon sent New Hope a letter in which she praised New Hope's strengths in certain areas, including its "strong emphasis on assisting the birth parents in making an informed decision for their newborn, providing them time to make the decision, along with a supportive and detailed adoptive family selection process." Dkt. No. 1-6 at 3. The issue which led to the present matter is the refusal to provide adoption services to unmarried same sex couples or same sex couples regardless of marital status.

The gratitude owed to all those working to better the lives of New York's most vulnerable children is too great to convey in words. While such gratitude is ultimately ineffable, the Court still concludes this Memorandum-Decision and Order by recognizing the parties in this case for their many years of sacrifice and labor.

Until recent events, the parties have had a fruitful relationship; a relationship that has benefitted New York's children in immeasurable ways. For this reason, the Court would prefer that the parties seek out some compromise to their current dispute without further judicial

intervention. As the district court noted in *Fulton*, "[c]reative problem solving through concerted and thoughtful discourse without court intervention is often the best method to avoid what may appear to the parties, or to other persons in the public, to be harsh legal results." *Fulton*, 320 F. Supp. 3d at 668.

Ultimately, OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services. Under *Smith*, the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while New Hope may assert that OCFS's actions were not driven by a sincere commitment to equality, but rather by antireligious bias, the current record does not show religious persecution or bias.

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, the Court hereby

ORDERS that OCFS's motion to dismiss (Dkt. No. 34) is **GRANTED**; and the Court further

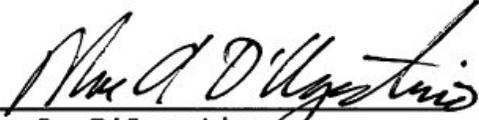
ORDERS that New Hope's motion for a preliminary injunction is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in OCFS's favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: May 16, 2019
Albany, New York


Mae A. D'Agostino
U.S. District Judge

EXHIBIT

E

From: [Roger Brooks](#)
To: [Etlinger, Laura](#)
Subject: RE: Revised agreement language - New Hope Family Services, Inc. v. Poole
Date: Tuesday, August 6, 2019 8:31:00 PM
Attachments: [image001.png](#)

Laura, your terms a-f are acceptable to New Hope, as you have them phrased.

A moment on the duration:

You write, "For the pendency of the appeal:" My original proposal to Ms. Kerwin was, in substance, "until the first to occur of the 2nd Cir. affirming the dismissal, or a ruling by any court on the merits on New Hope's motion for a preliminary injunction." I think this temporal frame makes sense. If the 2nd cir. remands, then we will more or less be back where we started, and I'll suggest that the State should agree that precipitous action while a PI motion is pending would be inappropriate.

Please let me know your thoughts.

Regards,

Roger G. Brooks
Senior Counsel
Alliance Defending Freedom
(207) 864-2054

From: Etlinger, Laura [mailto:Laura.Etlinger@ag.ny.gov]
Sent: Friday, August 2, 2019 11:33 AM
To: Roger Brooks <rbrooks@adflegal.org>
Subject: RE: Revised agreement language - New Hope Family Services, Inc. v. Poole

Roger,

OCFS wanted to add one additional request for information. See below in red.

For the pendency of the appeal:

- a) New Hope will not accept any new prospective adoptive parents.
- b) New Hope can continue the adoption study process for any individuals who completed orientation prior to commencement of the lawsuit (December 2018).
- c) New Hope will provide OCFS with a list naming each applicant to be an adoptive parent and each approved adoptive parent.
- d) New Hope can continue to supervise placements of children in its legal custody.
- e) New Hope can continue to accept surrenders of children and place out children with those adoptive applicants who have been approved.
- f) New Hope will inform OCFS when a child is placed with an approved adoptive parent and when an adoption is finalized.

- g) This agreement will remain in effect during the pendency of Second Circuit Appeal No. 19-1715.
- h) If New Hope desires to terminate the agreement before completion of the appeal, it must provide written notice of its intent to terminate by overnight mail to the Office of the Attorney General at the address below. If New Hope provides such notice, the agreement will terminate 30 days following service of such notice.

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Etlinger, Laura
Sent: Thursday, August 1, 2019 6:14 PM
To: Roger Brooks <rbrooks@adflegal.org>
Subject: Revised agreement language - New Hope Family Services, Inc. v. Poole
Importance: High

Dear Roger,

Below please find revised language for the stay agreement. In lieu of allowing New Hope to provide notice of intent to accept new prospective parents, the agreement would allow New Hope to terminate the agreement on 30 day's notice. Also, instead of the numbers on prospective parents and children we requested the other day, OCFS has included in the agreement information it would like to receive during the pendency of the agreement. The request for information should not be objectionable, as it is information OCFS could obtain through an inspection.

We have also determined not to withdraw our motion to remove the appeal from the expedited calendar. As set forth in our motion, we do not believe this appeal is appropriate for expedited review. We understand that you may feel you need to oppose the motion to expedite, but we hope that you will nonetheless indicate to the Court that you do not oppose the alternative relief of a 30-day extension, should the appeal remain on the expedited calendar.

I look forward to hearing your response to the proposed agreement.

"The following agreement governs OCFS's response to New Hope's stated policy of not accepting prospective adoptive couples who are unmarried or the same sex, which OCFS maintains violates the non-discrimination policy promulgated at 18 NYCRR § 421.3(d). This agreement does not preclude OCFS from taking action with respect to any other potential violations of state law, regulation, or policy by New Hope, should such violations occur.

For the pendency of the appeal:

- a) New Hope will not accept any new prospective adoptive parents.
- b) New Hope can continue the adoption study process for any individuals who completed orientation prior to commencement of the lawsuit (December 2018).
- c) New Hope will provide OCFS with a list naming each applicant to be an adoptive parent and each approved adoptive parent.
- d) New Hope can continue to supervise placements of children in its legal custody.
- e) New Hope can continue to accept surrenders of children and place out children with those adoptive applicants who have been approved.
- f) New Hope will inform OCFS when a child is placed with an approved adoptive parent.
- g) This agreement will remain in effect during the pendency of Second Circuit Appeal No. 19-1715.
- h) If New Hope desires to terminate the agreement before completion of the appeal, it must provide written notice of its intent to terminate by overnight mail to the Office of the Attorney General at the address below. If New Hope provides such notice, the agreement will terminate 30 days following service of such notice.

Such notice will be provided to:
Laura Etlinger
Assistant Solicitor General
New York State Office of the Attorney General
Albany, New York 12224

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Etlinger, Laura
Sent: Thursday, August 1, 2019 11:17 AM
To: Roger Brooks <rbrooks@adfilegal.org>
Subject: RE: New Hope Family Services, Inc. v. Poole--Agreement and schedule

Roger,

Just touching base with an update. We are working on getting approval for proposed alternative language and are also awaiting your response to the inquiry below.

Laura

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol

Albany, New York 12224
(518) 776-2028

From: Etlinger, Laura
Sent: Tuesday, July 30, 2019 11:25 AM
To: Roger Brooks <rbrooks@adlegal.org>
Subject: RE: New Hope Family Services, Inc. v. Poole--Agreement and schedule

Great. We're working on some language here. Also, OCFS will want status information about New Hope's prospective parents and current children placed in its legal custody. This information relates to the questions we had posed last week, as updated to reflect the proposed agreement.

1. Please indicate the number of prospective parents who had completed the introduction and orientation process as of December 2018, and the total number of prospective adoptive parents in New Hope's parent registry.
2. Please indicate the number of children currently in New Hope's legal custody and the status of the three children that were placed in New Hope's custody at the time of the complaint.

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Roger Brooks <rbrooks@adlegal.org>
Sent: Tuesday, July 30, 2019 11:06 AM
To: Etlinger, Laura <Laura.Etlinger@ag.ny.gov>
Subject: RE: New Hope Family Services, Inc. v. Poole--Agreement and schedule

That's not my intent, so I'm sure we can solve it with careful drafting.

Roger G. Brooks
Senior Counsel
Alliance Defending Freedom
(207) 864-2054

From: Etlinger, Laura [<mailto:Laura.Etlinger@ag.ny.gov>]

Sent: Tuesday, July 30, 2019 10:56 AM

To: Roger Brooks <rbrooks@adflegal.org>

Subject: RE: New Hope Family Services, Inc. v. Poole--Agreement and schedule

Dear Roger,

Your proposed language change is problematic because it indicates OCFS agrees to allow New Hope to accept new parent applications if notice is provided. I do not believe that was our understanding and it does not reflect OCFS's intent. We'll work on proposed language on our end, but would be happy to consider alternative language you propose.

We will consider your additional questions as well.

Regards,

Laura

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Roger Brooks <rbrooks@adflegal.org>

Sent: Tuesday, July 30, 2019 7:52 AM

To: Etlinger, Laura <Laura.Etlinger@ag.ny.gov>

Cc: Jeana Hallock <jhallock@adflegal.org>; Jake Warner <jwarner@adflegal.org>

Subject: RE: New Hope Family Services, Inc. v. Poole--Agreement and schedule

Dear Laura:

Your more precise statement of the agreement is acceptable to my client, with the clarification that your first bullet is subject to the last. That is, with edits in red to show my additions.

"For the pendency of the appeal:

- a) New Hope will not accept any new prospective adoptive parents **unless after the prior notice specified in (e) below.**
- b) New Hope can continue the adoption study process for any individuals who completed orientation prior to commencement of the lawsuit (December 2018).
- c) New Hope can continue to supervise placements of children in its legal custody.
- d) New Hope can continue to accept surrenders of children and place out children with those adoptive applicants who have been approved.
- e) OCFS will receive 30-days **written** notice from New Hope (form of notification to be

decided) if New Hope intends to begin accepting new adoptive parent applicants.”

As to the form of notification, should that occur, for convenience I'll propose notice in writing, directed to your attention.

As to your motion, as I told you it is not our goal to make your life difficult, and with the above agreement in place we will certainly agree to a 30 day extension for OCFS to file its opposition to our appeal brief. With that extension agreed, will you consider withdrawing your motion to remove New Hope's appeal from the Second Circuit's expedited calendar?

Best regards,

Roger G. Brooks
Senior Counsel
Alliance Defending Freedom
(207) 864-2054



Roger Brooks
Sr. Counsel
+1 480 444 0020 (Office)
+1 480 388 8211 (Direct Dial)
+1 917 843 4251 (Mobile)
rbrooks@adflegal.org
ADFlegal.org

From: Etlinger, Laura [<mailto:Laura.Etlinger@ag.ny.gov>]

Sent: Monday, July 29, 2019 3:32 PM

To: Roger Brooks <rbrooks@adflegal.org>; Jeana Hallock <jhallock@adflegal.org>

Subject: RE: New Hope Family Services, Inc. v. Poole

Dear Roger,

OCFS has reviewed your proposal regarding an agreement to allow New Hope Family Services to continue certain adoption service activities pending resolution of this appeal. OCFS can agree in principle to your proposal as follows:

For the pendency of the appeal:

- a) New Hope will not accept any new prospective adoptive parents **unless after the prior notice specified in (e) below.**
- b) New Hope can continue the adoption study process for any individuals who completed orientation prior to commencement of the lawsuit (December 2018).

- c) New Hope can continue to supervise placements of children in its legal custody.
- d) New Hope can continue to accept surrenders of children and place out children with those adoptive applicants who have been approved.
- e) OCFS will receive 30-days **written** notice from New Hope (form of notification to be decided) if New Hope intends to begin accepting new adoptive parent applicants.

Please note that I will be filing my motion shortly. If you cannot agree that the appeal should be removed from the expedited appeal calendar, I hope you will consider advising the Court that you consent to the alternative relief sought of a 30-day extension for OCFS's brief. If so, I would not object to a reasonable extension for New Hope's reply brief.

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Etlinger, Laura
Sent: Thursday, July 25, 2019 7:30 PM
To: rbrooks@adflegal.org; Jeana Hallock <jhallock@adflegal.org>
Subject: RE: New Hope Family Services, Inc. v. Poole

Dear Mr. Brooks,

OCFS is currently reviewing your proposal regarding a limited stay of enforcement action and has some questions and requests for additional information to facilitate a response. I am happy to discuss this matter on the phone but thought it might be helpful to send this email in advance of a phone call.

I am also writing to advise that we have decided to make a motion to remove the appeal from the Expedited Appeals Calendar pursuant to Second Circuit Rule 31.2(b)(2) or for a thirty-day extension for appellee's brief pursuant to Second Circuit Rule 27.1. The current deadline of September 19 is not possible in light of my current workload, which includes three oral arguments in late August/early September, including an argument in the New York Court of Appeals; and three additional briefs during this time period. Further, our office is currently down three attorneys (due to recent leaves and departures) and it was therefore not possible to reassign this appeal to another attorney. Because this motion must be made "promptly" after a case is placed on the Expedited Appeals Calendar, I do not anticipate that we will have reached a final stay agreement before I file my motion (on Monday), but perhaps we can reach a short-term interim assurance as you suggested.

Regarding your proposal, I first need to clarify that during litigation in District Court, New Hope identified three children who were currently in New Hope's legal custody pending finalization of

adoption. Doc. 1, at 4 (complaint). OCFS agreed that New Hope could continue to supervise these placements through to finalization of the adoptions. OCFS also agreed that parents approved to adopt would retain their status as an approved adoptive family. Finally, OCFS agreed that New Hope could continue to administer any post-adoption contact agreements. Doc. 32, at 4 (McCarthy Declar.)

Thus, according to your proposal, New Hope has been engaging in some activities that were not subject to the agreement described above. Nonetheless, OCFS is currently considering your proposal to stay discontinuance of its approval in part, and allow New Hope to engage in these additional activities during the pendency of the appeal, with reconsideration of the proposal during further litigation if dismissal of the complaint is reversed. In connection with OCFS's consideration of your proposal, please provide the additional information indicated below.

1. Request to continue to work with parents who have already applied and gone through New Hope's introduction and orientation process:
 - Please confirm that this request pertains only to parents who had completed the introduction and orientation process as of December 2018.
2. Request to continue to work with birth mothers.
 - Please explain what services are being provided. Please confirm whether New Hope has obtained legal custody of any additional children since the filing of the complaint. In addition, what is the status of the three children that were placed in New Hope's custody at the time of the complaint?
3. New Hope will provide OCFS notice before accepting new adoptive parents.
 - Please explain what you believe the purpose of the notice to OCFS serves.

I look forward to discussing these matters and will call you tomorrow.

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Etlinger, Laura
Sent: Thursday, July 18, 2019 12:24 PM
To: rbrooks@adflegal.org; Jeana Hallock <jhallock@adflegal.org>
Subject: RE: New Hope Family Services, Inc. v. Poole

Dear Counsel,

In light of the fact that we did not receive a response to my inquiry below, sent in response to Mr. Brooks' letter of July 3, 2018, I am writing for a status update.

Please advise:

- (1) The number of children that remain in placement pending final adoption;
- (2) The number of prospective adoptive parents you have approved since the commencement of this litigation;
- (3) The number of birth parents you have agreed to serve since the commencement of this litigation.

Thank you,
Laura

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Etlinger, Laura
Sent: Monday, July 8, 2019 3:36 PM
To: rbrooks@adflegal.org
Subject: RE: New Hope Family Services, Inc. v. Poole

Dear Mr. Brooks,

As Adrienne Kerwin mentioned, I will be handling the appeal on behalf of the State appellee. Adrienne has forwarded me your letter regarding a potential agreement regarding New Hope Family Services' activities during the pendency of the appeal. It is not clear to us from your letter exactly what activities New Hope Family Services is seeking to engage in during the pendency of the appeal. Please respond in writing by letter or email indicating exactly what activities New Hope seeks to engage in pending the appeal and I will discuss your request with my client.

Thank you,

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Stacie Harris <sharris@adflegal.org>
Sent: Wednesday, July 3, 2019 5:07 PM
To: Kerwin, Adrienne <Adrienne.Kerwin@ag.ny.gov>
Cc: Roger Brooks <rbrooks@adflegal.org>; Jeana Hallock <jhallock@adflegal.org>
Subject: New Hope Family Services, Inc. v. Poole

Dear Ms. Kerwin,

Please find attached a letter from Mr. Brooks on behalf of New Hope Family Services regarding the above-referenced case.

Best regards,

Stacie Harris



Stacie Harris
Legal Secretary
+1 480 444 0020 (Office)
+1-480-388-8114 (Direct Dial)
SHarris@ADFlegal.org
ADFlegal.org

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EXHIBIT

F



**Office of Children
and Family Services**

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Commissioner

August 8, 2019

Kathy Jerman
Executive Director
New Hope Family Services
3519 James Street
Syracuse, NY 13206

Dear Ms. Jerman:

The New York State Office of Children and Family Services (OCFS) is writing in furtherance of its letter, dated October 16, 2018, which informed New Hope Family Services (New Hope) of its determination that New Hope's policy precluding the placement of children with same sex couples or unmarried cohabitating couples was discriminatory and impermissible. That letter directed New Hope to submit a formal written response identifying whether it was going to revise its policy and practices to come into compliance with 18 NYCRR 421.3, or if it intended to submit a close-out plan for its adoption program.

By decision dated May 16, 2019, United States District Court Judge Mae D'Agostino determined that "OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services" and found that New Hope had failed to plausibly state a claim alleging an infringement of its right to free exercise of religion. As stated previously, OCFS cannot continue to approve New Hope's adoption program if it does not bring its policy and practices into compliance with the above-cited regulation.

Accordingly, please submit confirmation that New Hope will come into compliance with the regulation, or a plan to close New Hope's adoption program, within 15 calendar days of receipt of this letter. If New Hope chooses to close its adoption program, OCFS will provide all necessary guidance and assistance to ensure minimal disruption to children and families receiving adoption services.

Sincerely yours,

Lisa Gartey-Ogundimu
Deputy Commissioner, Division of Child Welfare and Community Services

cc: Roger G. Brooks, Esq.

EXHIBIT

G

From: [Etlinger, Laura](#)
To: [Roger Brooks](#)
Subject: Clarification regarding Aug. 9 letter from OCFS - RE: Notice of emergency motion
Date: Monday, August 12, 2019 5:58:25 PM

Roger,

After reviewing the language in your papers in support of New Hope's motion to file a surreply, OCFS believes New Hope may be misinterpreting the reference in the August 9 letter to Ms. Jerman to submission of a "plan to close New Hope's adoption program." For purposes of expediency and in light of the ongoing motion practice, OCFS has asked that I send you the clarification below regarding that language. OCFS also advises that it will be sending Ms. Jerman a letter/guide regarding the plan, which will also include this clarification.

OCFS requests New Hope submit a close-out plan by the specified deadline. A close-out plan is a proposal that specifies the steps New Hope will take to cease operation of its adoption program within a reasonable period, typically 90 days or on a later date approved by OCFS. The proposal should specify how New Hope intends to transition children and families currently receiving services. The adoption program will be terminated upon completion of the steps outlined in the approved close-out plan.

We trust that this clarification is helpful.

Regards,
Laura

Laura Etlinger
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2028

From: Roger Brooks <rbrooks@adflegal.org>
Sent: Monday, August 12, 2019 3:15 PM
To: Etlinger, Laura <Laura.Etlinger@ag.ny.gov>
Cc: Chris Schandavel <CSchandavel@adflegal.org>; Jake Warner <jwarner@adflegal.org>
Subject: RE: Notice of emergency motion

Laura, thank you for your prompt response.

Roger G. Brooks
Senior Counsel
Alliance Defending Freedom

EXHIBIT H

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

NEW HOPE FAMILY SERVICES,
INC.,

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee.

**DECLARATION OF KATHY JERMAN IN SUPPORT OF NEW
HOPE FAMILY SERVICES' EMERGENCY MOTION FOR
INTERIM PROTECTION**

I KATHY JERMAN, hereby declare:

1. I am the Executive Director of New Hope Family Services (“New Hope”). I assumed this position on February 25, 2019.
2. New Hope is a half-century old Christian adoption and foster care ministry, which has across the decades placed more than 1,000 children into permanent, loving, adoptive homes.
3. I make this declaration to explain the harm that New Hope and individuals whom it serves will suffer if New Hope is forced to cease its provision of adoption services while its appeal to the Second Circuit

is heard and decided by the Court of Appeals, even if New Hope's constitutional rights are finally recognized and New Hope is later permitted to resume its operations.

4. I am advised that we must expect it to be between six months and a year, or even longer, before the Court of Appeals renders a decision on New Hope's appeal.

5. A shutdown that lasts this long would substantially harm third parties who are currently using New Hope's services; it would impair the ministry's fundraising ability; it would jeopardize New Hope's ability to keep its team of competent professionals in place; and it would further imperil the viability of New Hope's adoption and foster care ministry.

A. Even temporarily shutting down New Hope's adoption services would severely harm birth mothers who have come to trust New Hope and are relying on New Hope to find homes for their newborns.

6. New Hope presently serves one birth mother, who expects her child to be born within the next month. This woman has depended on New Hope during a time of crisis. She has developed an intense relationship of trust with one of New Hope's counselors, she has asked

New Hope to find a wonderful family to adopt her child, and she has chosen to rely on New Hope's judgment and experience to find that family.

7. If New Hope is forced to turn away this birth mother because of the impending shutdown order from OCFS, this mother of course cannot wait for the appeals court to hear and decide New Hope's appeal.

8. Instead, she will be forced to shift, on almost no notice, to working with another placement agency and staff with whom she has not developed a relationship of trust, and whose values and judgment she does not know.

9. In my experience, women who come to New Hope to place their children need and greatly value close relationships and as much stability as possible. An abrupt, unexpected, and forced breaking of this important relationship with New Hope will be extremely distressing and stressful for this woman, who is already in distressing circumstances in life, and already grieved at the thought of giving up her baby.

B. Even temporarily shutting down New Hope's adoption services would severely harm adoptive parents who have already invested time working and developing a relationship with New Hope.

10. New Hope has six sets of adoptive parents who have been approved to adopt and are waiting for placements. These adoptive parents have persevered through months of applications, counseling, home studies, and reviews. They are currently on New Hope's waiting list, expecting a call and a new baby at any time.

11. These couples have chosen to go through all this with New Hope because they value its highly personal approach as well as its openly faith-based nature. They have come to know New Hope staff as trusted friends, have been open with that staff about personal hopes, fears, and concerns for their families, and are relying on New Hope to walk with them through the entire adoption process.

12. Many of those adoptive parents waiting for children have already experienced significant heartbreak, having suffered through infertility, failed treatments, and the emotional fallout from their dashed hopes, dreams, and expectations.

13. If New Hope is suddenly prohibited from providing adoptive

services to these six couples because of OCFS's shutdown order, the impact on those couples will be severe. First, if they wish to move ahead with adoption at all, they will have to get on the waiting list of another adoption service, which could set their hopes back by many months, or even years. Second, each of these six couples has invested immense time and emotional energy in developing honest and open relationships with New Hope staff, so that New Hope can fairly portray them to birthmothers, and so that New Hope can help them effectively through all the emotional ups and downs of the adoption process and formation of a family through adoption. If they are forced to change to a new adoption service, they will become just names on a list, instead of known and loved friends—as they currently are with New Hope's ministry. Third, several of these couples have told New Hope staff that they are willing to go down the sometimes scary road of adoption in important part because they know and value New Hope's faith-based nature and its convictions, and trust that New Hope will be guided by that faith and those convictions as it in turn guides them through adoption.

14. For these six couples, each of these impacts will be extremely

painful. For some, the disruption may be too much emotionally, forcing them to step back from adoption at least at the present time. This will, of course, mean that some children will not be placed, or must wait even longer to be placed, into a permanent loving home.

15. New Hope also has 13 other couples who have completed New Hope's orientation process, and are now at various earlier stages of the home study process. These couples in many cases have devoted a great deal of effort to researching multiple adoption services, and have chosen New Hope for the same reasons I have described above. Some of them have begun the time-consuming and emotionally taxing home study process. All of them have begun the process of building open and trusting relationships with New Hope.

16. If New Hope is forced to turn away those adoptive parents because of the impending shutdown order, those couples will be forced to start all over with other adoption services. They will be at the end of the line with those new agencies, again putting off their adoption dreams by many months, at least. As with the couples who have completed their home studies, if OCFS forces New Hope to close its adoption ministry and these couples are forced to start again with other

services, this will be emotionally very painful, and may cause some of them to give up and decide not to adopt, at least at present.

C. Even temporarily shutting down New Hope's adoption services would harm New Hope's fund-raising efforts and thus all its ministries.

17. New Hope depends solely on private donations to fund its adoption and foster care ministry. It does not accept any money from federal, state, or local government programs.

18. New Hope operates this way to preserve its independence and its freedom to operate consistently with the dictates of its faith.

19. News about this litigation and OCFS's threat to shut down New Hope's adoption and foster care ministry has already raised many questions from donors who support the ministry. These donors are supportive of New Hope's ministry and its policies, but want to know that their donations can and will be well-used to aid birth mothers looking for loving homes for their infants, and to aid couples who want to adopt.

20. If New Hope is forced to completely cease providing adoption services now and for the months until its appeal is decided, in my judgment this will discourage donors from financially supporting New

Hope.

21. This likelihood is especially grave because New Hope's annual fundraiser occurs in October. At this fundraiser, New Hope on average receives donations that support about 20% of its annual budget—a budget that covers its pregnancy support services ministry as well as its adoption ministry. If this banquet occurs in a context in which New Hope has been forced to turn away couples and mothers with whom it was already working, this is likely to be severely discouraging to donors. Thus, funding for all of New Hope's ministries, not just its adoption and foster care services, is threatened by OCFS's sudden closure demand.

22. New Hope also receives funding from private grants. If New Hope must report on its grant proposals that OCFS has shut down New Hope's adoption and foster care services, that fact would likely decrease New Hope's chances of receiving grants to support its ministry.

23. Finally, if OCFS's shutdown order stands, New Hope will be forced to refund approximately \$60,000 dollars in adoption fees to the couples from whom it has already received fees. Much of this amount has been spent to pay for the time of staff and other expenses that have

already been incurred in working with these couples, so this would be real loss to New Hope, and would be a severe financial strain.

D. Even temporarily shutting down New Hope's adoption services would severely harm New Hope by forcing it to dismiss critical team members.

24. Shutting down New Hope's adoption and foster care services for a period of six months or more would also do long-term damage to New Hope's ministry by forcing it to lay off critical staff, who could not readily be replaced if and when New Hope's constitutional rights are finally vindicated.

25. New Hope has approximately eight team members who work in or oversee its adoptions and foster care ministry. Each of these team members does and must share New Hope's religious convictions.

26. These team members fill various ministry roles, including performing case work for birth parents, adoptive parents, and foster parents, in addition to coordinating correspondence, preparing home studies, and providing administrative support and executive leadership.

27. If New Hope is forced to cease all adoption services for six months, a year, or more, New Hope will be forced to lay off some of its team members. In particular, New Hope employs five adoption case

workers who would have little to no work to do if OCFS shuts down New Hope's adoption services. The ministry would be forced to lay off at least some of these case workers.

28. In my judgment, the degradation of New Hope's team—should that occur—will harm New Hope's reputation as an adoption and foster care service provider, as well as its ability to resume its full ministry quickly and effectively if and when a court affirms that New Hope has a right to do so that is protected by the First Amendment.

29. New Hope's team members by no means perform merely clerical functions. They build trusted relationships with birth mothers and adoptive parents. They love these people in emotionally difficult times. And they do their work with excellence. New Hope's strong reputation as an adoption and foster care ministry depends on the skill, love, and reputations of its dedicated and in many cases long-serving and extremely experienced team members.

30. If New Hope is forced to dismiss any of its team members, it is likely that those lost team members would need to secure new jobs and that New Hope would not be able to quickly re-hire them if it were allowed to resume its placement services without limitation. Further,

based on my experience in recruiting for New Hope, it will not be easy to find other skilled replacements who share New Hope's religious convictions, and who have the compassionate heart that is essential to New Hope's ministry to both adoptive parents and birthparents.

31. Further, rebuilding New Hope's adoption ministry, once it is closed, would require much more than hiring replacements, difficult as that would be. Instead, rebuilding the ministry would also require rebuilding New Hope's reputation, conducting new rounds of training for new employees, attracting new adoptive couples, and winning back the trust of its sources of referrals of birthmothers.

E. Shutting down New Hope's adoption and foster care services would dismantle or undermine New Hope's ability to provide correspondence services for birth mothers, children, and adoptive parents that New Hope has served in the past.

32. New Hope provides correspondence services for approximately 115 families who wish to maintain a relationship between their adoptive child and his or her birth mother, serving as a go-between to enable communications between birth mother and child without disclosing addresses, and also often coordinating annual in-person meetings. New Hope provides these services for each birth

mother and adoptive family who requests them until the adopted child reaches 18 years of age.

33. It is unclear to me how OCFS's shutdown order will affect New Hope's ability to provide correspondence services for those families.

34. If the shutdown order affirmatively requires that New Hope abandon its correspondence services for those families, even for a period of months to a year, the ministry would be forced to transfer case files for those families to a different adoption agency—that is, if another agency would *agree* to take them. Assuming that were possible, the transition would likely create significant administrative problems and would disrupt contracted-for correspondence between many adopted children and their birth mothers.

35. If the shutdown order requires that New Hope maintain its correspondence services for those families, the ministry would face a different problem—a services mandate with no funding. New Hope does not receive compensation for providing these services—often for many years after an adoption occurs—so if New Hope is financially forced to

dismiss staff as a result of OCFS's shutdown order, it may simply lack the capacity to provide this service at the level it has done in the past.

36. Either way, New Hope, birth mothers, and adoptive parents will all likely suffer from a shutdown's interference with the ministry's correspondence services—whatever interference that may be.

F. Even temporarily shutting down New Hope's adoption services would severely harm New Hope's future ability to attract referrals of birth mothers, and thus to locate infants in need of placement.

37. Shutting down New Hope's adoption and foster care services would also increase the risk that New Hope will suffer harm to its future ability to attract referrals of birth mothers who desire to place their children for adoption, even if courts ultimately rule in favor of New Hope and permit it to continue its ministry unhindered.

38. New Hope receives most of its referrals for adoption placement services from pregnant birth mothers, pregnancy care centers, or social workers.

39. These referral sources often value New Hope's religious character. Some birth mothers will not choose to entrust the future of their children to an agency unless it has a reputation for placing

children promptly and permanently into homes that are not only loving, but meet birth mothers' other desires for their children—which sometimes includes preferences for a specific religious upbringing.

40. Even just the threat of a shutdown has already contributed to a drastic decline in New Hope's child placements since this litigation began. New Hope has placed only two children with adoptive parents so far in 2019, primarily because the number of birth mothers being referred to New Hope has declined, because of this litigation and rumors that New Hope was not able to place children. By contrast, since 2012, and up until the time OCFS threatened to shut down New Hope's adoption and foster care services in 2018, New Hope placed on average about 8 children per year with adoptive parents. That span includes one year in which New Hope placed up to 13 children with adoptive parents.

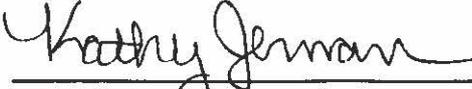
41. Given this decline in referrals based only on rumors or the *possibility* that New Hope would be unable to complete placements, if New Hope in fact is forced to submit a "close-out plan" as OCFS is demanding, or to turn away birth mothers who seek its aid, or to turn away birth mothers and adoptive parents with whom New Hope is already working, I anticipate further and serious harm to New Hope's

reputation with these referral sources as an adoption service on which they can rely with confidence.

42. The loss of referral relationships will make it difficult or impossible for New Hope to find infants for any adoptive couples with whom it is permitted to work during any interim period. The loss of referral relationships will also make it that much more difficult and time-consuming to restore New Hope's adoption ministry to its historic levels once New Hope's right to continue that ministry consistently with its faith has been protected by the courts.

I, Kathy Jerman, a citizen of the United States and a resident of the State of New York, hereby declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 13 day of August, 2019, at Syracuse,
New York.



Kathy Jerman