

19-1715

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

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

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

**OPENING BRIEF OF APPELLANT
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Appellant Requests Oral Argument

CORPORATE DISCLOSURE STATEMENT

New Hope Family Services, Inc., is a nonprofit corporation in New York with no parent corporation and no stockholders.

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Dated: August 15, 2019

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STATEMENT OF JURISDICTION

New Hope Family Services sued in the United States District Court for the Northern District of New York under 42 U.S.C. § 1983 to vindicate its rights under the First and Fourteenth Amendments to the United States Constitution. The district court exercised federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343 and had 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 attorney fees under 42 U.S.C. § 1988.

Sheila J. Poole, in her official capacity as Acting Commissioner for the Office of Children and Family Services (“OCFS”) for the State of New York, moved to dismiss all claims. The district court entered final judgment granting that motion and denying as moot New Hope’s motion for a preliminary injunction on May 16, 2019. New Hope timely filed its notice of appeal on June 10, 2019, within the 30-day time limit allowed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

When ruling on a motion to dismiss for failure to state a claim, a district court may not weigh the evidence or make factual findings. Instead, the court must accept as true every factual allegation in the complaint and draw every reasonable inference in the plaintiff's favor. Here, the district court repeatedly weighed the evidence and resolved factual disputes against New Hope before ultimately dismissing. With that context, this appeal raises three issues:

1. Whether the district court erred in dismissing New Hope's free exercise claim despite New Hope's plausible allegations that the challenged regulation unconstitutionally interferes with New Hope's core religious exercise and that it is not generally applicable or neutral toward religion.
2. Whether the district court erred in dismissing New Hope's compelled speech and expressive association claims, primarily by incorrectly applying the legal standard governing motions to dismiss and by holding in the alternative that a privately funded adoption agency's speech is governmental speech.
3. Whether the district court erred in denying as moot New Hope's motion for a preliminary injunction, and whether this Court should instruct the court to enter one on remand.

STATEMENT OF THE CASE

New Hope appeals the Honorable Mae A. D’Agostino’s decision granting OCFS’s motion to dismiss New Hope’s complaint and denying as moot New Hope’s motion for a preliminary injunction. JA251, JA282. *New Hope Family Servs., Inc. v. Poole*, No. 5:18-CV-1419 (MAD/TWD), 2019 WL 2138355 (N.D.N.Y. May 16, 2019).

Nature of the dispute

New Hope has ministered to and served abandoned infants by placing them in loving homes for half a century, motivated and guided by its faith. New Hope does so without a single dollar of public funds; its operations are funded solely by private donations to help the children of New York. Yet the State now wants to shut New Hope’s ministry down.

The State’s position is remarkable. The State has never contended that New Hope’s practice of placing children with married couples consisting of a mother and a father—a policy driven by New Hope’s religious beliefs about the best environment for children—has ever resulted in a placement that was inconsistent with the best interests of the child. Nor has the State ever claimed that New Hope’s referral policy has ever prevented an unmarried or same-sex couple from successfully adopting. Instead, the State demands New Hope violate its religious beliefs about marriage, family, and the best interests of children, or be shut down for failing to conform to the State’s preferred political orthodoxy. The First Amendment prohibits that ultimatum.

The district court erred when it granted OCFS's motion to dismiss, primarily because the court failed to correctly apply the standard governing that motion. The district court further erred when it denied New Hope's motion for a preliminary injunction as moot. This Court should reverse and remand to the district court with instructions to enter a preliminary injunction allowing New Hope to continue serving children and families while this litigation proceeds.

New Hope's Christian mission of caring for women and children

Since the first century, Christians have embraced the Apostle James's instruction to "look after orphans and widows in their distress." JA9, JA15. In colonial times, Christians brought that ministry to America, founding orphanages for orphaned and abandoned children. JA9. Continuing that tradition, pastor Clinton H. Tasker founded an explicitly Christian ministry in New York to find adoptive homes for children whose birthmothers could not care for them. JA9–11, JA14–15. That ministry became New Hope Family Services. JA9–10, 15–16.

Since its founding in 1958, New Hope has placed over 1,000 children in loving adoptive homes. JA9–10. New Hope also provides temporary foster placements for newborns on short notice. JA31. Finally, New Hope serves hundreds of clients annually as a pregnancy resource center. JA18–19. Because of its dual role as a pregnancy resource center and an adoption provider, New Hope's focus is providing placements for newborns, infants, and toddlers. JA21.

New Hope exists as a Christian ministry devoted to saving the lives of babies God has created. JA18. To guard its religious nature and autonomy, New Hope accepts no government funding. JA17. All New Hope’s staff, counseling volunteers, and board members share its faith and sign its statement of faith. JA17. For adoptive families that choose to work with New Hope, its nature as a religious ministry is integral to the entire adoption process. New Hope prays with prospective parents, discusses Scripture, and explores sensitive adoption-related topics “and how faith in God can help applicants through these issues.” JA25–26. New Hope also collaborates individually with each couple to help them create a personal “parent profile” book—the couple’s voice and message to birthparents choosing adoptive parents for their child. JA27–28.

Before placing a child, New Hope engages in extensive discussions with the child’s birthparents. JA23–24. New Hope then works with birthparents to choose a specific family, presenting them with parent profile books for multiple sets of adoptive couples that New Hope feels it can recommend as good parents for the child. JA24. If birthparents decide not to select a specific family, New Hope selects one based on New Hope’s own assessment of the child’s best interests. JA24.

After a child has been placed in an adoptive family’s home, New Hope supervises the placement until the adoption is finalized—visiting the family to ensure the child’s welfare and to aid the adoptive parents’ adjustment. JA29–30. This process culminates in a series of adoption-

study and field reports that include New Hope’s conclusion and recommendation that placing this child with this family will be in the child’s best interests. JA30.

New Hope’s priorities when finding homes for children

New Hope’s primary concern when placing children is to find a home that best serves the child’s interests, consistent with any preferences—such as religious preferences—expressed by the child’s birthparents. JA10, JA24, JA27. Likewise, New Hope’s own religious convictions inform its judgment about the types of families that best serve the interests of children. JA10. New Hope believes 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.” JA17–18.

Because of these religious beliefs, “New Hope will not recommend or place children with unmarried couples or same-sex couples as adoptive parents.” JA32. If an unmarried or same-sex couple expresses interest in a referral, though, New Hope refers them to one of the many other adoption agencies operating in New York that make such placements. JA32, JA44. All birthparents who have placed a child through New Hope have found an adoptive family they were comfortable placing their child with from the adoptive parent profiles that New Hope provided them. JA24.

New regulation enforced against religious providers

In late 2010, New York amended its law to allow—but not require—private adoption agencies to place children for adoption with unmarried and same-sex couples. JA33–34 (citing N.Y. DOM. REL. LAW § 110). In signing the law, Governor David Paterson emphasized that it was “permissive,” allowing unmarried and same-sex couples to adopt but “without compelling any agency to alter its present policies” and “without in any way treading on the views of any citizen or organization.” JA33–34.

In 2013, though, the New York Office of Child and Family Services (“OCFS”) promulgated a new regulation, § 421.3(d), purporting to prohibit “discrimination” against applicants for adoptions services based on age, race, religion, sex, marital status, and sexual orientation, among other protected characteristics. JA35. During the rulemaking process that led to the change, OCFS derided as “archaic” earlier regulatory language, “which [had] implie[d] that the sexual orientation of gay, lesbian and bisexual prospective adoptive parents . . . is relevant to evaluating their appropriateness as adoptive parents.” JA35.

In early 2018, OCFS began performing on-site reviews of authorized private adoptions agencies—culminating in the removal of several religious adoption agencies from OCFS’s posted list of authorized adoption providers. JA39, JA43. These now-vanished agencies include Catholic providers, a Jewish provider, an LDS

provider, and a Muslim provider. JA43. At least several of them shared New Hope’s beliefs about marriage and the family before they were scrubbed from the State’s website. JA43.

The challenged regulation purports to “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(d). However, and importantly, OCFS recognizes many exceptions to its prohibition on the other forms of discrimination listed in the regulation. JA37–38, JA52. Indeed, as detailed below, *infra* at II-B-1, New York law and OCFS regulations permit and even require discrimination based on the adoptive applicants’ age, race, color, national origin, religion, and certain aspects of their marital status. JA36–38.

But OCFS refuses to allow similar exceptions for agencies who believe—based on religious teachings about marriage, the family, and sexuality—that placing children with a married mother and father is in the best interests of children. JA50–51. Instead, OCFS has vowed to “vigorously enforce” laws and regulations “to protect the rights” of “same sex couples.” JA43. OCFS has declared that in New York, “[t]here is no place for providers” that seek to place children with a married mother and father. JA43. Consistent with its determination to purge from the state those agencies that adhere to time-honored religious

teachings about marriage and the family, OCFS says that it “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.” JA34.

In September 2018, OCFS conducted a review of New Hope’s procedures. JA39. Following that review, OCFS sent New Hope a letter praising it for a number of strengths in its program and identifying no major issues. JA40. A week later, however, OCFS official Suzanne Colligan called and told New Hope’s Executive Director that New Hope’s policy of placing children in homes consistent with its religious beliefs violated § 421.3(d) and was “impermissible,” JA40, and that New Hope would be “choosing to close” unless it changed its policy and violated its beliefs by placing children with unmarried and same-sex couples. JA40. Suggestively, Colligan added that “[s]ome Christian ministries have decided to compromise and stay open.” JA40. OCFS followed up with a letter demanding that New Hope change its policy or else “submit a close-out plan for the adoption program.” JA41–42.

New Hope files suit and moves for preliminary injunction

After receiving OCFS’s ultimatum, New Hope filed this lawsuit seeking declaratory and injunctive relief to prevent OCFS from violating New Hope’s First Amendment right to freely exercise its religion, and to prevent OCFS from compelling New Hope to engage in

speech and expressive association in violation of New Hope's First Amendment free speech rights. JA48–54, JA57.

New Hope moved for a preliminary injunction, attaching uncontested evidence demonstrating (1) that New Hope is a religious ministry with religious convictions that prohibit it from placing children with unmarried or same-sex couples, and (2) that adoptive parents as well as birthparents often choose to work with New Hope precisely because they share or value New Hope's Christian faith and convictions. JA96–97, JA112, JA119, JA121, JA124–25, JA135, JA138, JA151–54.

New Hope's uncontested evidence further demonstrated that its closure would reduce, not increase, the pool of adoptive and foster parents in New York. JA124–25, JA135, JA138, JA151–54. Finally, New Hope's evidence included an affidavit from Interim Executive Director Judith Geyer, indicating that New Hope would lose referrals from other pregnancy centers if it were to violate its beliefs, would lose birthmothers, adoptive families, and foster families who value New Hope's faith convictions, and in sum would lose its ability to most effectively minister to women facing unplanned pregnancies. JA120–21.

The district court dismisses New Hope's claims

OCFS opposed New Hope's preliminary injunction motion and moved to dismiss New Hope's complaint. Dist. Ct. ECF Nos. 32, 32-1, 34, 34-1. On May 16, 2019, the district court granted OCFS's motion to dismiss. JA282. In the same order, the court denied New Hope's preliminary injunction motion as moot. JA251.

First, the court dismissed New Hope's free exercise claim, holding that OCFS's regulation is "neutral and generally applicable' and, therefore, subject to rational basis review." JA262. The court also rejected New Hope's argument that the regulation's many exceptions rendered it non-neutral or not generally applicable, adding that "nothing in the record suggests that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class." JA265.

Applying rational basis review, the court identified two "legitimate" government interests: "(1) ensuring that when OCFS authorizes agencies to provide 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." JA266.

The district court also dismissed New Hope’s free speech claims, holding that “OCFS and the regulation simply do not compel speech,” and holding in the alternative that “New Hope’s speech, to the extent any is required . . . constitutes governmental speech.” JA268.

In dismissing New Hope’s expressive association claim, the district court declared, “The slight impairment to New Hope’s expressive activity does not approximate the level of harm that triggered the Supreme Court’s concern in [*Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)].” JA272. The court alternatively held—in a single sentence—that “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.” JA272–73.

Finally, the district court dismissed New Hope’s equal protection claim and its standalone unconstitutional conditions claim as “duplicative.” JA277, JA280.¹

¹ To streamline this appeal, New Hope does not appeal the district court’s dismissal of its Equal Protection claim. And because the unconstitutional conditions analysis factors into New Hope’s free exercise and free speech claims, New Hope also does not appeal the district court’s dismissal of that free-standing claim.

SUMMARY OF THE ARGUMENT

OCFS seeks to force New Hope to violate its religious beliefs, to speak the government's messages, to modify its expression through compelled association, and to place children in homes that New Hope believes will not be best for them. The First Amendment protects organizations like New Hope from this government overreach. But the district court gave OCFS the benefit of every doubt and dismissed New Hope's claims without giving New Hope a chance to prove its case.

OCFS is violating New Hope's First Amendment right to exercise its religion. The First Amendment prohibits government interference with decisions like these affecting the faith and mission of New Hope's ministry, regardless of whether the regulation is neutral or generally applicable. Moreover, the regulation is in fact *not* neutral or generally applicable, as evidenced mainly by OCFS's failure to regulate various forms of discrimination that the regulation purports to prohibit—but in reality does not. Finally, particularly on a motion to dismiss, the State cannot meet its burden to show the regulation satisfies strict scrutiny.

OCFS is also violating New Hope's First Amendment protections against compelled speech and forced expressive association. Private organizations cannot be compelled to express the government's messages, and New Hope does not want to express OCFS's message that placement in certain homes is in the best interests of children. New Hope also does not want to modify its expression by associating with

prospective parents who promote views of marriage and family that contradict the system of values that New Hope conveys. And the Supreme Court has held that the First Amendment offers protection when organizations expressively associate with potential clients.

The district court erred when it dismissed New Hope's First Amendment claims, primarily because the court failed to correctly apply the standard governing motions to dismiss. Specifically, the district court refused to credit New Hope's plausible factual allegations, refused to draw reasonable inferences in New Hope's favor, credited OCFS's contrary factual assertions, weighed the "evidence" in the undeveloped record, and dismissed.

Indeed, in its motion to remove this appeal from this Court's Expedited Appeals Calendar, OCFS flatly admits this foundational error, correctly asserting that the dismissal reflected the district court's decision on the "merits of [New Hope's] constitutional claims . . . rather than a review of whether the allegations of the complaint satisfy pleading standards." 2d Cir. ECF No. 36 at 6–7. OCFS apparently believes "that the issue before the district court was *not* whether the complaint contained sufficient factual allegations to state an established claim." 2d Cir. ECF No. 41 at 2 (emphasis added).

But that was *exactly* the issue before the district court. New Hope was entitled to a decision on OCFS's motion to dismiss based solely on the question of "whether the allegations of the complaint satisfy

pleading standards,” and New Hope deserves the opportunity to develop additional facts through discovery. The district court’s haste to skip over the adequacy of the pleadings to rule on the merits was error. This Court should reverse and remand with instructions to the district court to issue a preliminary injunction while the case proceeds below.

ARGUMENT

I. Standard of Review

This Court “review[s] *de novo* a district court’s dismissal of a complaint pursuant to Rule 12(b)(6).” *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 94 (2d Cir. 2017). “[A] court that rules on a defendant’s motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint,” so on appeal this Court will “describe the facts as alleged in the complaint, drawing all reasonable inferences in the plaintiff’s favor, and construing any ambiguities in the light most favorable to upholding the plaintiff’s claim.” *Sung Cho v. City of New York*, 910 F.3d 639, 642 n.1 (2d Cir. 2018) (cleaned up).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. This standard requires “more than a sheer possibility that a defendant has acted unlawfully,” but it “is not akin to a ‘probability requirement.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). On the contrary, a “well-pleaded complaint may proceed even if it strikes a savvy judge that . . . recovery is very remote and unlikely.” *Nielsen*, 746 F.3d at 62 (quoting *Twombly*, 550 U.S. at 556).

II. The district court erred by dismissing New Hope’s free exercise claim.

A. At the threshold, shutting down New Hope’s long-established, core religious exercise violates the Free Exercise Clause.

“Our commitment to precious First Amendment freedoms is tested when unpopular organizations seek refuge within its scope.” *Int’l Soc’y For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 447 (2d Cir. 1981). “[U]npopular traditions, practices, and doctrines . . . need not receive [the Court’s] approval or support, but [they] must be tolerated if our freedoms are to be preserved.” *Id.* That should be all the more true for individuals and organizations adhering to religious beliefs about “family structure they have long revered,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), beliefs long held “in good faith by reasonable and sincere people here and throughout the world,” *id.* at 2594.

The Supreme Court has stated as a “general proposition that 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.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (describing “the Smith requirements”). But the test first articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990), does not fully delineate the limits on the state’s power to intrude on the rights of its citizens to freely exercise their religion.

As the Supreme Court recently emphasized, it is *not* the case “that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). Instead, the Court has distinguished between cases like “*Smith* [that] involved government regulation of only outward physical acts,” and cases involving government interference with a religious organization’s operations in a manner “affect[ing] the faith and mission of the church itself,” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012), or intruding on activities that play “an important role in transmitting the . . . faith to the next generation,” *id.* at 192.

Thus, the Supreme Court could conclude—without applying *Smith*—that the Free Exercise Clause prohibits using employment antidiscrimination laws to second-guess a religious school’s decision to terminate a teacher responsible for the spiritual instruction of children. *Id.* at 190, 196. Similarly, no *Smith* analysis was needed for the Court to state as obvious that the Free Exercise Clause prohibits even a “neutral law of general applicability” from requiring a ministry to ordain women, *id.* at 190, or members of the clergy to perform same-sex weddings, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). These decisions exemplify “a spirit of freedom for religious organizations, an independence from secular control or manipulation” that is more foundational than *Smith*. *Hosanna-Tabor*, 565 U.S. at 186.

New Hope’s decision to serve orphans and widows by placing children in homes honoring New Hope’s beliefs about God’s plan for marriage and the family is more akin to “an internal church decision that affects the faith and mission of the church itself” than the “individual’s . . . outward physical acts” in *Smith*. See *Hosanna-Tabor*, 565 U.S. at 190. If religious groups “must be free to choose” the men and women “who will preach their beliefs, teach their faith, and carry out their mission,” *id.* at 196—choices that affect the *formation* of the next generation—equally here the State must respect New Hope’s faith-driven choices of the adoptive parents who will *raise* the children

entrusted to New Hope’s care. If religious groups cannot be forced to violate their beliefs by facilitating same-sex weddings (on pain of being denied the right to conduct legally valid marriages at all), *see Masterpiece Cakeshop*, 138 S. Ct. at 1727, they also cannot be forced to violate their beliefs by facilitating unmarried and same-sex adoptions.

The district court acknowledged New Hope’s argument that its referral policy is protected by the Free Exercise Clause even without consulting *Smith*. JA254–55. But the court failed to engage with that argument or with this aspect of Supreme Court precedent. The challenged regulation is not neutral or generally applicable. *See infra* at II-B and II-C. But even without reaching that question, the First Amendment prohibits “government interference” of this sort because it would so severely undermine New Hope’s “faith and mission.” *Hosanna-Tabor*, 565 U.S. at 190. Period.

B. New Hope adequately alleged that the regulation is not generally applicable.

1. OCFS’s regulatory regime is riddled with exceptions that permit other forms of “prohibited” discrimination.

Under *Lukumi*, a regulation like § 421.3(d) is “not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.” *Cent. Rabbinical Cong. of U.S. & Canada v. New York*

City Dep't of Health, 763 F.3d 183, 197 (2d Cir. 2014).² A generally applicable regulation must “prohibit nonreligious conduct that endangers these interests in a similar or greater degree than” the regulated religious conduct. *Lukumi*, 508 U.S. at 543.

Whenever “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.). As Professors Laycock and Collis have summarized, “[t]he constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct.” Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 22–23 (2016).

New York law and OCFS regulations fall far short of this standard: they create a highly tailored regime with a host of exceptions—allowing and sometimes requiring adoption agencies to discriminate based on adoptive applicants’ age, race, color, national origin, religion, and certain aspects of the applicants’ marital status.

² *Accord Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (noting that “the heightened standard of review [applies] where a law fails to similarly regulate secular and religious conduct implicating the same government interests”).

For example, § 421.10 of OCFS’s “Standards of Practice for Adoption Services” requires agencies to focus their recruitment efforts on “communities of populations which have ethnic, racial, religious or cultural characteristics similar to those of the children . . . composing the largest number” of children waiting to be adopted. N.Y. COMP. CODES R. & REGS. tit. 18, § 421.10(a). Similarly, § 421.13 mandates race discrimination, giving “first priority” in the adoption-study process to “Indians seeking to adopt Indian children.” N.Y. COMP. CODES R. & REGS. tit. 18, § 421.13(a)(1). Applicants seeking to adopt children with the “age, race, handicap and other significant characteristics of the largest proportion of waiting children” also get special preference. *Id.*

New York Social Services Law § 373 *requires* religious discrimination, instructing placement of children with individuals and agencies led by people who share the child’s religious faith. N.Y. SOC. SERV. LAW § 373(1) and (2). (Ironically, if OCFS successfully shutteres religious providers like New Hope that adhere to traditional teachings about marriage and family, OCFS will make it *impossible* to obey this statutory mandate.) A corresponding regulation “requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child.” N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(c) (citing N.Y. SOC. SERV. LAW § 373(3)). New York law also requires that, “where practical” and “consistent with the best

interests of the child,” the birthmother’s “religious wishes” be given effect. N.Y. SOC. SERV. LAW § 373(7).

Agencies also are instructed to discriminate in making placement decisions based on an adoptive parent’s “age,” “[r]ace, color or national origin,” N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(d)(1) and (2), when these “relate to the specific needs of an individual child,” *id.*

Indeed, New York law even requires discrimination based on certain aspects of an adoptive applicant’s marital status, preventing certain married persons from adopting individually if they are living apart from their spouse. N.Y. DOM. REL. LAW § 110 (2009). So New York “discriminates” against a class of married individuals in adoption eligibility *because* they are married, while declaring it unacceptable that New Hope “discriminates” *in favor* of married couples.

Finally, counsel for OCFS conceded below that adoption agencies can ask birthparents to describe “the type of family” that they “want[] their baby to go to.” JA231. In other words, birthparents can specify placement with a married mother and father, and agencies can honor those requests. JA231. But OCFS does not allow New Hope to make that same choice based on its own sincerely held religious beliefs.

Despite these many exceptions to § 421.3(d)’s so-called prohibition on discrimination, OCFS insists that religious agencies place children with unmarried and same-sex couples. JA40. Through that double standard, OCFS “regulates religious conduct while failing to regulate

secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.” *Cent. Rabbinical Cong.*, 763 F.3d at 197. Accordingly, the challenged regulation is “substantially underinclusive,” and “not generally applicable,” and therefore subject to strict scrutiny. *Id.*³

The Sixth Circuit’s decision in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), illustrates this. There, graduate student Julea Ward’s faith “prevented her from affirming a client’s same-sex relationships as well as certain heterosexual conduct, such as extra-marital relationships,” and she therefore asked for permission to refer a gay client to another counselor if the counseling session turned to relationship issues. *Id.* at 729. The Sixth Circuit applied *Lukumi* to hold that the Free Exercise Clause prohibited the university from expelling Ward because its supposed “anti-discrimination policy” permitted referrals for various reasons while excluding referrals “for faith-based reasons.” *Id.* at 739. “At some point,” the court held, “an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy” *Id.* at 740.

³ *Cf. Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 96 (2d Cir. 2003) (“Evidence that the defendants, without legitimate reason, discriminated between discriminators—selectively enforcing Connecticut’s equal protection law only against anti-homosexual discrimination, and not against, for instance, anti-heterosexual discrimination—if adduced, might well be enough to preclude summary judgment for the defendants.”).

Likewise here, OCFS has made a “value judgment in favor of secular motivations, but not religious motivations” as justifying various forms of discrimination. *Fraternal Order of Police*, 170 F.3d at 366 (Alito, J.). “This precise evil is what the requirement of general applicability is designed to prevent.” *Lukumi*, 508 U.S. at 545–46.

2. The district court wrongly concluded that the regulation is generally applicable, mainly by downplaying and disregarding these exceptions.

Despite these exceptions—which OCFS does not deny—the district court held that § 421.3(d) is generally applicable, finding “significant differences” between the permitted forms of discrimination and New Hope’s referral policy because, “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.” JA264. But the relevant question is not whether there are some differences between the unregulated secular conduct and the regulated religious conduct; the question is whether the regulation prohibits “religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.” *Cent. Rabbinical Cong.*, 763 F.3d at 197.

As the district court correctly noted, “OCFS does not contend that New Hope is not acting in the best interests of the children when placing these children for adoption.” JA281. “The issue,” as the court

saw it, concerns the interests of adults, namely New Hope’s “refusal to provide adoption services to unmarried [opposite] sex couples or same sex couples regardless of marital status.” JA281.

Focused on these adults, the district court identified two supposed “government objectives” that it found justified the regulation:

(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.

JA266.

As to the first, the District Court erred at the outset by declaring New Hope’s faith-motivated and privately funded ministry a “governmental service.” It is not. *See infra* at III-A-3. But even leaving that grave error aside, the facts alleged support the reasonable inference that New Hope’s referral policy does not at all undermine the State’s interest in ensuring equal access to adoption and foster care services, because New Hope’s referral policy has never prevented unmarried or same-sex couples from adopting or receiving adoption services, as evidenced by the absence of any complaints from these couples “about how New Hope handled their inquiry.” JA32.

Conversely, the many forms of discrimination that New York allows and even requires are “at least as harmful” to the State’s interest

in ensuring equal access to adoption and foster care services as New Hope’s referral policy. *Cent. Rabbinical Cong.*, 763 F.3d at 197.

Considering the various forms of state-sanctioned discrimination, it can be reasonably inferred that some couples—particularly those whose race or religion distinguish them from the majority of children in need—will have a harder time obtaining adoption and foster care services.

The second asserted interest—creating a “pool of foster parents and resource caregivers” that share the same characteristics as the children in need, JA266—is incoherent. New Hope primarily places newborns, infants, and toddlers up to two years old. JA21. These “youngest children” do not live in sexual relationships, either married or cohabiting. JA21. Nor has it been asserted that they experience sexual attraction at such a young age, or that it would be desirable to place them with adoptive parents with similar sexual attractions.

Further, if the district court’s second “interest” had any coherent validity, a reasonable inference from New Hope’s complaint is that the couples New Hope refers to other agencies have no trouble joining the “pool of foster parents and resource caregivers” through those other agencies. JA266. The same cannot be assumed of couples who, because of state-sanctioned discrimination, face a lengthier and more difficult adoption process regardless of which agency they use.⁴

⁴ If the point instead is that the State believes it will be able to attract *even more* unmarried and same-sex couples if it compels New Hope to

The district court also distinguished New Hope’s referral policy based on the court’s finding that the various forms of state-sanctioned discrimination “are clearly intended to find the best fit for each child.” JA264. But that type of factual finding is wholly inappropriate at the motion-to-dismiss stage. *Sheppard v. Beerman*, 18 F.3d 147, 149 (2d Cir. 1994) (agreeing that the district court had erred by making “certain improper factual findings in ruling on [a] Rule 12(c) motion to dismiss on the pleadings”). The State of New York and OCFS may believe that their approved forms of discrimination are “intended to find the best fit for each child.” JA264. But New Hope equally believes that its referral policy allows it to place children in the “the ideal and healthiest family structure” for each child. JA17–18, JA32. And the State cannot make “a value judgment in favor of secular motivations, but not religious motivations,” without “surviv[ing] heightened scrutiny.” *Fraternal Order of Police*, 170 F.3d at 366 (Alito, J.); *see also Cent. Rabbinical Cong.*, 763 F.3d at 197 (noting that “close scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus”).

Finally, the district court concluded that “nothing in the record suggests that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class.” JA265.

devote its energies and private resources to recruiting and working with these couples, the free exercise violation is even more blatant.

This conclusion makes little sense. First, there was no “record” for the court to consider on a motion to dismiss. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017) (stating that it was “not [the Court’s] task at the motion to dismiss stage to weigh the evidence and evaluate the likelihood that [the plaintiff] would prevail”). Second, even without a record, the court’s assertion is wrong in light of the multiple exceptions recited in the verified complaint and discussed above—exceptions that permit and even require “authorized agenc[ies] to discriminate against members of a protected class,” thereby foreclosing any claim that the challenged regulation is generally applicable. JA265.

C. New Hope also adequately alleged that the regulation is not neutral toward religion.

1. The regulation disproportionately impacts religious providers, and OCFS’s statements and actions demonstrate hostility toward religion.

For many of the same reasons, New Hope plausibly alleged that OCFS has enforced § 421.3(d) in a manner that “targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices.” JA48, JA50–52. “Official action that targets religious conduct for distinctive treatment cannot be shielded by . . . facial neutrality.” *Lukumi*, 508 U.S. at 534. “[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.” *Id.*

at 547 (emphasis added). The First Amendment also “guarantee[s] that our laws be *applied* in a manner that is neutral toward religion.”

Masterpiece Cakeshop, 138 S. Ct. at 1732 (emphasis added).

Through the various exceptions mentioned above, New York law and OCFS allow various forms of discrimination while refusing to allow New Hope to operate consistently with its religious beliefs. “A double standard is not a neutral standard.” *Ward*, 667 F.3d at 740.

The impact of the enforcement bolsters that conclusion. *Lukumi*, 508 U.S. at 535 (“[T]he effect of a law in its real operation is strong evidence of its object.”). New Hope alleged that OCFS removed several religious, private adoption agencies of various faiths from OCFS’s list of authorized agencies around the same time OCFS issued its demands and threats against New Hope. JA39, JA43. At least several of these agencies shared New Hope’s beliefs about marriage and family. JA43. Discovery of course has not occurred. But it is plausible to infer that OCFS gave these now-vanished agencies the same “conform or else” ultimatum. JA40. And this disproportionate shuttering of religious, private adoption agencies is “strong evidence” that the “object” of the regulation is not neutral toward religion. *Lukumi*, 508 U.S. at 535.

Finally, the Supreme Court has “made clear that” the State “cannot . . . act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop*, 138 S. Ct. at 1731. But OCFS has indeed passed judgment,

presupposed the illegitimacy of New Hope’s religious beliefs, and failed to give “full and fair consideration” to its religious objections. *Id.* at 1732. This is evident in OCFS’s public labelling of the belief that married mothers and fathers provide the healthiest environment for raising children as “archaic,” JA35; in OCFS’s proposal that New Hope “compromise” (i.e. violate) its beliefs as the price of its continued existence, JA40; in its public assertion that OCFS “cannot contemplate any case” in which an exception to its ban on preferring married mothers and fathers would be tolerated, JA34; and in its avowed goal of driving providers who will not conform their policies to align with OCFS’s beliefs out of the State of New York, JA43.

By passing “judgment upon” and presupposing the “illegitimacy” of New Hope’s “religious beliefs and practices,” OCFS denied New Hope a “neutral decisionmaker” who gives “full and fair consideration” to its “religious objection[s].” *Masterpiece Cakeshop*, 138 S. Ct. at 1731–32. In *Masterpiece Cakeshop*, such non-neutrality warranted the automatic invalidation of the Commission’s order. 138 S. Ct. at 1732. Thus, New Hope plausibly alleged that it is entitled to the same relief here.

2. The district court wrongly concluded that the regulation is neutral, mainly by failing to correctly apply the governing legal standard.

Taken together, these facts are more than sufficient to “nudge[]” New Hope’s non-neutrality claim “across the line from conceivable to plausible,” which is all that is required to survive a motion to dismiss. *Twombly*, 550 U.S. at 570.⁵ “The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.” *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534).

The district court only managed to find that the regulation is neutral by ignoring the pleading standard. As noted above, OCFS now concedes that the district court did not “review . . . whether the allegations of the complaint satisfy pleading standards.” 2d Cir. ECF No. 36 at 7. Instead, the court ignored or rejected many of New Hope’s factual allegations, resolved factual disputes in OCFS’s favor, and gave the State the benefit of many doubts.

For example, at the motion-to-dismiss stage, it was backwards for the court to ask whether OCFS’s actions could “support a finding of neutrality.” JA263. Instead, the court should have asked whether the facts alleged could support a reasonable inference that the regulation is

⁵ This standard is particularly important here because “[p]roving the motivation behind official action is often a problematic undertaking.” *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). “[D]iscriminatory intent,” in particular, “is rarely susceptible to direct proof.” *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010).

not neutral, or that it has not been neutrally applied. *Iqbal*, 556 U.S. at 678. And the answer is yes, they could.

Likewise, the district court erred by asking whether “[t]he fact that New Hope’s conduct springs from sincerely held and strongly felt religious beliefs” necessarily “impl[ies] that OCFS’s decision to regulate that conduct springs from antipathy to those beliefs.” JA265–66. Instead the court should have asked whether such an inference is “plausible” and “reasonable.” *Iqbal*, 556 U.S. at 678.

Similarly, the court should not have credited OCFS’s claim that “the purpose of [the] regulation . . . was to ‘[p]rohibit[] discrimination on the basis of sexual orientation, gender identity or expression in essential social services.” JA263 (quoting N.Y.S. Register, Nov. 6, 2013, p.3). “[I]t is axiomatic that the district court [should] not consider the defendant[’s] statements of fact in assessing the sufficiency of the complaint.” *MacFarlane v. Grasso*, 696 F.2d 217, 225 (2d Cir. 1982). “By assuming that the [statements] are true where they contradict the allegations in the complaint, the [district court] turn[ed] the Rule 12(b)(6) standard on its head.” *Nielsen*, 746 F.3d at 63 n.4.

Finally, the district court prematurely distinguished *Masterpiece Cakeshop* and *Lukumi*. JA263. OCFS’s public profession that in New York “[t]here is no place for [adoption] providers” whose religious convictions forbid them from placing children with unmarried or same-sex couples, and OCFS’s ultimatum that New Hope “compromise” its

beliefs if it wanted to “stay open,” JA40, JA43, are closely analogous to statements the Supreme Court in *Masterpiece Cakeshop* highlighted as plausible evidence of animus toward religion. 138 S. Ct. at 1729.

In that case, one commissioner declared that the Christian baker could believe “what he wants to believe,” but that he could not act on those beliefs “if he decides to do business in the state,” and that any “businessman who wants to do business in the state . . . needs to look at being able to compromise” his “personal belief system.” *Id.* While conceding that “these statements are susceptible of different interpretations,” the Supreme Court recognized that “they might be seen as inappropriate and dismissive comments showing lack of due consideration for [the baker’s] free exercise rights and the dilemma he faced.” *Id.* The facts and statements alleged here support the same *plausible* inference, and therefore adequately pleaded non-neutrality.

At the motion-to-dismiss stage, that should have been enough. But it was not enough for the district court, which concluded that “New Hope may *assert* that OCFS’s actions were not driven by a sincere commitment to equality, but rather by antireligious bias,” but that “the *current record* does not show religious persecution or bias.” JA282 (emphasis added). This conclusion highlights the extent to which the district court lost track of the task before it, a failing that even OCFS has been forced to acknowledge. 2d Cir. ECF No. 36 at 7.

D. Particularly at the motion-to-dismiss stage, OCFS cannot meet its burden to establish that the regulation survives strict scrutiny.

Because New Hope plausibly alleged that the regulation is not generally applicable or neutral toward religion, the State had the burden of proving that it satisfies strict scrutiny. *Lukumi*, 508 U.S. at 546 (holding that the challenged ordinances failed strict scrutiny because *the City* had “not demonstrated” that its “governmental interests are compelling”).⁶ Burdens of this type are “rarely carried at the pleadings stage.” *Finch v. Peterson*, 622 F.3d 725, 728 (7th Cir. 2010). And even on a complete evidentiary record, “[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Lukumi*, 508 U.S. at 546.

Importantly, in cases where, as here, First Amendment claims come up for review after being dismissed at the motion-to-dismiss stage, the reviewing court’s “ability to assess whether [the State’s] asserted interests are compelling is constrained by the fact that, at this stage of litigation,” the reviewing court has before it “only the allegations in the complaint, orders issued in the action, and other matters of public

⁶ *Cf. Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004) (“When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”).

record.” *Wilmoth v. Sec’y of New Jersey*, 731 F. App’x 97, 104 (3d Cir. 2018) (cleaned up).⁷ “[B]ecause the District Court granted [the State’s] motion to dismiss prior to discovery taking place, the parties were not afforded an opportunity to develop an evidentiary record, and thus [the reviewing court has] no basis upon which to gauge the validity of the competing interests at stake.” *Id.* at 104.

“Similarly, [the reviewing court] also [has] no basis upon which to determine whether the [challenged law] is narrowly tailored to protect the State’s interests.” *Id.* Answering that “question is particularly difficult [when] reviewing a motion to dismiss” on appeal given the absence of an evidentiary record. *Free Speech Coal., Inc. v. Attorney Gen. of U.S.*, 677 F.3d 519, 536 (3d Cir. 2012).⁸

⁷ *Accord Agran v. City of New York*, No. 95 Civ. 2170 (JFK), 1997 WL 354705, at *4 (S.D.N.Y. June 25, 1997) (denying motion to dismiss because, “[a]t this early stage of the proceedings, the Court [could not] state beyond doubt that [the defendant’s] instruction would pass constitutional muster if tested under the strict scrutiny standard”); *Perez v. Pers. Bd. of City of Chicago*, 690 F. Supp. 670, 677 n.6 (N.D. Ill. 1988) (denying motion to dismiss because it was “not the appropriate avenue for defendants to set forth [their] defense” that the challenged requirement satisfied strict scrutiny—it was enough that the plaintiff had “set forth sufficient facts to establish that strict scrutiny [was] warranted”).

⁸ *Accord Gebin v. Mineta*, 231 F. Supp. 2d 971, 976 (C.D. Cal. 2002) (denying defendants’ motion to dismiss because the district court could not “conclude, at this pleading stage,” that the statute was “the least restrictive means to further [the compelling] governmental interest”).

Once plaintiffs have plausibly alleged facts triggering strict scrutiny, it is difficult to identify a situation in which dismissal prior to discovery could be appropriate. It was not appropriate here.⁹ For the reasons set out below, *see infra* at IV-C, New Hope is likely to succeed on its claim that the regulation does not satisfy strict scrutiny. But even if the Court declines to instruct the district court to enter a preliminary injunction on remand, the Court should at a minimum remand the case to the district court to allow New Hope and OCFS to develop a record to determine whether § 421.13(d) is justified by a compelling government interest and narrowly tailored to further that interest. *Free Speech Coal.*, 677 F.3d at 536; *Wilmoth*, 731 F. App'x at 105.

E. The district court's holding that the regulation satisfies rational basis review is irrelevant and incorrect.

Rather than recognize the limits of its authority at the motion-to-dismiss stage, the district court essentially borrowed factual findings from the Third Circuit's decision in *Fulton* and relied on those findings to conclude that "OCFS's enforcement of [the regulation] is rationally related to a number of legitimate government objectives." JA266. That was error for multiple reasons.

⁹ *Accord Free Speech Coalition*, 677 F.3d at 536 (remanding to give the plaintiffs "the opportunity to conduct discovery and develop the record regarding whether the Statutes are narrowly tailored").

First, New Hope has alleged facts that require application of strict scrutiny. *Fulton* involved a different regulation in a different state promulgated by a different agency under different circumstances. The Third Circuit’s rational basis review of that regulation says nothing about whether the regulation here can survive strict scrutiny.

Second, the *Fulton* court was considering a motion for a preliminary injunction, not a motion to dismiss. *Fulton v. City of Philadelphia*, 922 F.3d 140, 146–47 (2019). Thus, the burden was on the plaintiff, and the question was whether the plaintiff had “established a reasonable likelihood of success on the merits.” *Id.* at 152. The question whether that plaintiff had met that burden on the particular facts in that record says nothing about the adequacy of New Hope’s complaint.

Third, the issues presented in *Fulton* differed in significant ways. That case concerned whether the City of Philadelphia may terminate a contract under which a Catholic adoption service *received payments from the city*. *Id.* at 147–48. By contrast, New Hope alleges that it does not have or seek a contract with the State and that New Hope “accepts no government funding” of any type. JA17.

For all these reasons, the district court’s heavy reliance on *Fulton* was misplaced. New Hope’s complaint states claims requiring strict scrutiny, and that analysis cannot be performed in the absence of an evidentiary record. This Court should reverse and remand the case to the district court for discovery and further proceedings.

III. The district court erred by dismissing New Hope’s compelled speech and expressive association claims.

A. The district court erred by dismissing New Hope’s compelled speech claim.

“The First Amendment protects the right of individuals to hold a point of view different from the majority and 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; by holding that no speech is compelled; by holding that the compelled speech is governmental speech; and by holding that if private speech is compelled, the State has a compelling interest in overriding New Hope’s right not to speak messages it does not believe. Each conclusion was error.

1. New Hope’s uncontradicted allegations establish that its adoption ministry involves extensive, value-laden speech.

The district court misconstrued the nature of New Hope’s compelled speech claim, describing it as “not entirely clear” what speech was involved, suggesting an “expressive activity” claim that New Hope has nowhere advanced, and concluding vaguely that “the ‘ministry’ that New Hope engages in” is the speech at issue. JA269. New Hope’s complaint very clearly detailed the extensive, value-laden, plain-language speech that it engages in throughout its “comprehensive

evaluation, training, and placement programs,” including many hours of highly personal discussions with and counseling of adoptive parents, JA26, JA36, JA53–54; counseling of birth mothers about adoption and selection of specific adoptive parents, JA24; 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 particular child, JA30.

In these interactions, New Hope “conveys a system of values about life, marriage, family and sexuality to both birthparents and adoptive parents.” JA53. 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.” JA17–18. As a result, New Hope cannot counsel unmarried and same-sex couples about making their homes healthy homes for adoptive children. In its interactions with birthparents, New Hope “desires to recommend married opposite-sex couples and truly single individuals as adoptive parents.” JA53. New Hope would be lying if it told birthparents or the State that it believed placing an infant with an unmarried or same-sex couple could be in the best interests of that child. JA32, JA40. And New Hope does not wish to speak a lie about something so important. JA40, JA53–54.

2. New Hope’s uncontradicted allegations establish that the regulation compels New Hope to speak.

The district court held that New Hope’s compelled speech claim should be dismissed “because OCFS and the regulation simply do not compel speech.” JA268. Specifically, the district court held that New Hope is not being compelled to express that it accepts cohabiting and same-sex relationships “as appropriate” or that it “believes that adoption by such couples can be in the best interests of the child.” JA269. This conclusion was error for several reasons.

First, this factual conclusion is inconsistent with New Hope’s allegations that it cannot counsel unmarried or same-sex couples as potential adoptive parents, or recommend unmarried or same-sex couples to birthmothers as adoptive parents, or affirm to the State a belief that such an adoption would be in the best interests of a child, without making statements or endorsing views that New Hope believes to be false. JA32, JA40, JA53–54.

Second, by forcing New Hope to change its *policies* to train, counsel, recommend, and place children with unmarried and same-sex couples, OCFS is forcing New Hope’s staff to change their *messages* to “foster . . . an idea they find morally objectionable.” *Wooley*, 430 U.S. at 715. JA41–42, JA53–54. This the State 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.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command” *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018).

In *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, this Court enjoined a requirement that non-governmental organizations adopt an anti-prostitution policy as a condition of receiving federal grants, holding that it “likely violate[d] the First Amendment by impermissibly compelling [the organizations] to espouse the government’s viewpoint on prostitution.” 651 F.3d 218, 230, 239-40 (2d Cir. 2011), *aff’d sub nom. Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013). Likewise, OCFS’s demand that New Hope change its policies and practices is “viewpoint-based,” and it is equally impermissible because it “compels [New Hope], as a condition of [authorization], to espouse the government’s position.” *Id.* at 234.

That no government funding is involved here simply “underscores the First Amendment violation.” *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014). 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.” *Id.* at 250–51.

Third, the court’s assertion that New Hope could still express its own views without restriction is illusory, JA269–70, as even the district court acknowledged at the hearing, JA237. In response New Hope hypothetically presenting a same-sex couple’s file to a birthmother while explaining, “[T]he state requires us to show you this couple, but let us tell you all the reasons why [our faith tells us that] they would not be the right choice for your child,” the court volunteered that New Hope would likely “be sued in federal court the next day.” JA237.

Fourth, even if it were true that “the only message that would be conveyed” if New Hope bowed to OCFS’s demands is that *the State* believes that adoptions by unmarried and same-sex couples can be in the best interests of the child, *see* JA269, compelling even that message would be constitutionally impermissible. New Hope does not wish to devote its private resources to promulgating the State’s views on these issues. The government may devote its own resources to advocating any views it chooses, but it may not force private citizens to be conduits for those views, or even to be conduits to inform others what the State’s views are. 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 717.¹⁰

¹⁰ *See also Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring) (rejecting lower court’s reasoning “that an outside observer

Fifth and finally, even if the State were to authorize New Hope to express its own beliefs about sexuality, marriage, and family while still being forced to serve as a conduit to express the State’s contrary views, that compelled speech will inevitably—and impermissibly—alter and undermine the message that New Hope wants to express. The “choice to speak includes within it the choice of what not to say,” and the First Amendment’s protection of these choices “would be empty” if the State could “require speakers to affirm in one breath that which they deny in the next.” *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of California*, 475 U.S. 1, 16 (1986).

“Forcing free and independent individuals to endorse ideas they find objectionable is *always* demeaning” *Janus*, 138 S. Ct. at 2464 (emphasis added). And the notion that the State can force a speaker to express certain messages if the speaker remains free to express contrary messages “would justify any law compelling speech.” *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring). For that reason, the Supreme Court has repeatedly rejected that notion. *Id.* (Thomas, J., concurring) (collecting examples).

would think that [the baker] was merely complying with Colorado’s public-accommodations law, not expressing a message”); *Evergreen*, 740 F.3d at 250 (“[A] law that requires a speaker to advertise on behalf of the government offends the Constitution even if it is clear that the government is the speaker.”); *Alliance*, 651 F.3d at 234 (noting that where “the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns”).

In short, accepting New Hope’s well-pleaded allegations as true, the district court’s holding that the regulation does not impermissibly compel speech was legal error.

3. The district court wrongly concluded that New Hope’s speech is government speech.

In a fallback irreconcilable with its assertion that “nothing is preventing New Hope from continuing to share its religious beliefs throughout the entire process,” JA269–70, the district court held that all of New Hope’s speech in connection with its adoption ministry is “governmental speech,” and hence freely subject to the State’s control. JA268. “Therefore,” the court concluded, “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 its anti-discrimination policy,” “was and is ‘neither garbled nor distorted by’ New Hope.” JA268.

But the Supreme Court rebuffed just this sort of regulatory takeover of private speech in *Matal v. Tam*, 137 S. Ct. 1744 (2017). There, the court rejected the claim “that the registration of a trademark converts the mark into government speech.” *Id.* at 1760. To accept that contention would inflict “a huge and dangerous extension of the government-speech doctrine.” *Id.*

It is true that the State now requires private adoption agencies like New Hope to obtain authorization from the State before they can

carry out their ancient Christian ministry to find homes for orphans. In *Matal*, though, the Supreme Court rejected the notion that a state 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. OCFS tries to do exactly that, flexing its authorization power to “silence or muffle” New Hope’s faith-based voice in the adoption context. *Id.*

The district court’s reliance on *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), does not warrant a different result; indeed it was premised on only a partial quotation from *Velazquez* that omitted the holding’s foundation. Quoting its decision in *Rosenberger*, the Supreme Court in *Velazquez* reasoned that, “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” 531 U.S. at 541 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)) (emphasis added). The State has not disbursed *any* public funds to New Hope. JA17. So *Velazquez* has no bearing on the outcome.¹¹

¹¹ As noted above, even if the State *had* disbursed funds to New Hope, this Court’s decision in *Alliance* demonstrates that the State still could not compel New Hope “to voice the government’s viewpoint and to do so as if it were their own.” 651 F.3d at 237. But this case does not present that complicating question.

B. The district court erred by dismissing New Hope’s expressive association claim.

1. New Hope plausibly alleged that OCFS is violating its expressive association rights by forcing it to accept, approve, counsel, and recommend unmarried and same-sex couples.

“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.” *Dale*, 530 U.S. at 647–48.

“To determine whether a group is protected by the First Amendment’s expressive associational right, [this Court] must determine whether the group engages in ‘expressive association.’” *Dale*, 530 U.S. at 648. In its complaint, New Hope alleged that it “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.” JA53. New Hope described this system of values in detail earlier in its complaint. JA17–18. As with the Boy Scouts in *Dale*, it should “seem[] indisputable that

an association that seeks to transmit such a system of values engages in expressive activity.” 530 U.S. at 650.

As New Hope plausibly alleged, forcing it to include unmarried and same-sex couples in its group sessions, and requiring it to counsel and recommend such couples as adoptive parents, “would significantly affect [New Hope’s] ability to advocate public or private viewpoints.” *Id.* And courts must “give deference to [New Hope’s] view of what would impair its expression.” *Id.* at 653.

2. The district court wrongly disregarded New Hope’s allegations and improperly found that any burden was slight.

Rather than “give deference to [New Hope’s] view of what would impair its expression,” *Dale*, 530 U.S. at 653, the district court held that any “impairment to New Hope’s expressive activity” resulting from forced compliance with the regulation would be “slight,” JA272. The court premised that conclusion on two points: 1) “New Hope is not being required to hire employees that do not share their same religious values,” and 2) New Hope is “not prohibited in any way from continuing to voice their religious ideals.” JA272. Neither of these points justifies discrediting New Hope’s plausible allegations.

First, as noted above, the district court’s holding that New Hope’s speech throughout the adoption process is “governmental speech,” JA268, conflicts with the court’s assurance that the regulation will not

prevent New Hope “in any way from continuing to voice their religious ideals.” JA272. And forcing New Hope to devote its time and efforts to working with unmarried and same-sex couples, to include them with other couples in group sessions, and to present them to birth mothers as prospective adoptive parents, would certainly “garble and distort” the messages about marriage and family that *New Hope* wishes to convey, and that burden is not “slight.” *See supra* at III-A-1.

Second, the district court’s observation that the regulation does not force New Hope to hire staff who disagree with its views does not end the “freedom of association” inquiry. In *NAACP v. Button*, the Supreme Court held that freedom of association extended to the NAACP’s recruitment of clients with whom it would work—not merely to its staff selection. 371 U.S. 415, 428–29, 437 (1963).¹² New Hope is a religious ministry motivated by strong religious beliefs about marriage and family—beliefs that it advocates and promotes throughout the adoption process. JA17–18, JA53. New Hope’s decisions about whom it helps to *form* families to raise children are integral to the messages New Hope means to convey and to New Hope’s success in conveying those messages. New Hope engages in “modes of expression and association protected by the First [Amendment]” when it associates

¹² *Accord In re Primus*, 436 U.S. 412, 431 (1978) (ACLU attorney’s solicitation letter to potential client fell “within the generous zone of First Amendment protection reserved for associational freedoms”).

with birthparents and prospective adoptive parents as clients, and then as it walks—and talks—these same clients through the adoption process. *Button*, 371 U.S. at 428. New Hope plausibly alleged that OCFS is disrupting and violating New Hope’s right to engage in those value-laden expressive associations free from interference by the government, and the district court erred by dismissing that claim.

IV. The district court erred by denying as moot New Hope’s motion for a preliminary injunction, and this Court should instruct the district court to enter one on remand.

A. Standard of Review

This Court “review[s] the denial of a preliminary injunction for abuse of discretion.” *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009). “A district court abuses its discretion when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” *Vincenty v. Bloomberg*, 476 F.3d 74, 83 (2d Cir. 2007) (cleaned up).

“Where, as here, the moving parties seek to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, they must establish (1) a likelihood of success on the merits, and (2) irreparable harm in the absence of an injunction.” *Alliance*, 651 F.3d at 230 (cleaned up). Deprivation of First Amendment rights “for

even minimal periods” is “irreparable injury” as a matter of law. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996); accord *Paulsen v. Cty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (holding that “[s]ince prohibitions on leafletting and dissemination of religious views contravene core First Amendment values,” irreparable injury had been established). So, “in the First Amendment context, . . . the likelihood of success on the merits is the dominant, if not the dispositive, factor.” *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

“Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a finding of merit in plaintiff’s case, can in the alternative direct the district court to issue the injunction.” *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986). This Court has directed district courts to enter preliminary injunction orders in a wide variety of cases.¹³

¹³ *E.g.*, *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 489 (2d Cir. 2013) (reversing order denying preliminary injunction and ordering the district court to “enter a preliminary injunction enjoining the application and enforcement of” the challenged statutes); *Amestoy*, 92 F.3d at 74 (“Because appellants have demonstrated both irreparable harm and a likelihood of success on the merits, the judgment of the district court is reversed, and the case is remanded for entry of an appropriate injunction.”); *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 873 (2d Cir. 1996) (remanding “for the issuance of an injunction and additional proceedings”).

B. New Hope is likely to succeed on its free exercise and free speech claims because New Hope proffered uncontradicted evidence to support those claims.

Because the district court granted OCFS's motion to dismiss New Hope's claims, the court denied New Hope's motion for a preliminary injunction as moot, not on the merits. JA251, JA282. That ruling was error because New Hope's First Amendment claims should have survived OCFS's motion to dismiss. And this Court should instruct the district court to issue a preliminary injunction on remand considering the uncontradicted evidence supporting New Hope's claims for relief.

New Hope's complaint was verified, and thus its factual allegations may be treated as evidence. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) (rejecting the defendants' argument that the plaintiff's "more detailed factual allegations" in his complaint were "irrelevant to" their summary judgment motion where the plaintiff had "verified his complaint . . . under penalty of perjury").¹⁴

In addition, when New Hope filed its preliminary injunction motion in the district court, it attached an affidavit from Judith Geyer providing evidentiary support for most of the factual assertions supporting New Hope's First Amendment claims contained in New Hope's complaint. JA93–122.

¹⁴ *Accord Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd.*, 74 F.R.D. 621, 624 n.1 (S.D.N.Y. 1977) (noting that a "verified complaint or affidavits standing undenied may be presumed true," and thus "a court may grant a preliminary injunction on the basis of pleadings and affidavits").

For example, Geyer averred that

- “New Hope’s Christian faith and religious beliefs motivate and permeate its mission and all of its activities,” JA96;
- “New Hope accepts no government funding,” JA96;
- “New Hope believes that . . . [t]he biblical model for the family as set out in the Bible . . . is the ideal and healthiest family structure for mankind and specifically for the upbringing of children,” JA96–97;
- “New Hope has been placing children in loving homes since 1965 and has placed over 1,000 children,” JA100;
- “New Hope’s primary focus is providing placements for newborns, infants, and toddlers up to two years of age,” JA100;
- New Hope “discuss[es] the birthparents’ religious beliefs and whether they desire their baby to be placed in a home that practices those beliefs,” JA102;
- “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,” JA102;
- “During this process,” birthparents also may make statements about the “age or sex of individuals with whom they would be willing to place their child” and about “the family structure they would desire for their child’s placement,” including whether they have “a preference for the child to be placed in a home with a married mother and father, JA102–03;

- “All of the birthparents who have placed a child through New Hope have [found] a family with whom they were comfortable placing their child,” JA104;
- After an intensive adoption study process, Geyer and a caseworker “make a determination to approve or disapprove the applicants as prospective adoptive parents” based on New Hope’s beliefs about “the best interest of any child who may be placed in the home,” JA107;
- “Before finalization,” New Hope prepares various reports about a prospective adoptive family that “serve as New Hope’s official recommendation of the adoptive family for the adoption of the specific child,” JA111;
- “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,” JA112;
- “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,” JA113;
- “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,” JA113;
- “On or about October 9, 2018,” OCFS informed Geyer “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 [§ 421.3] and was impermissible,” and “New Hope would have to comply” or it would be “choosing to close,” JA116;

- OCFS told Geyer that “[s]ome Christian ministries have decided to compromise and stay open,” JA116–17;
- OCFS later sent New Hope a letter informing it that if New Hope “fail[ed] to bring [its referral] 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,” JA118;
- “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 [these] couples concerning adoptive parenthood and related relational issues, and to place children with [these] couples,” JA119; and
- “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,” and New Hope “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,” JA120–21.

In response, OCFS proffered a declaration by an OCFS employee. JA166–70. But none of the proffered facts in that declaration contradict any of the proffered facts in Geyer’s affidavit listed above. Nor does OCFS’s declaration contest the exception-riddled nature of the statutory and regulatory regime. Based on these uncontested facts, New Hope has demonstrated that it is likely to succeed on its free exercise and free

speech claims because the challenged regulation is not generally applicable or neutral toward religion, OCFS is compelling New Hope to express messages that it does not want to express, and OCFS is violating New Hope's right not to expressively associate with individuals who do not share New Hope's beliefs about marriage and the family. *See supra* at II-B, II-C, III-A, and III-B.

Deprivation of these First Amendment rights “for even minimal periods” is “irreparable injury” as a matter of law. *Int'l Dairy Foods*, 92 F.3d at 71. Moreover, OCFS's recent retraction of a proposed voluntary stand-still agreement and its attempt to shutter New Hope's adoption ministry even before this Court can decide New Hope's appeal only exacerbates that irreparable harm. 2d Cir. ECF No. 56. Accordingly, this Court should reverse and “direct the district court to issue [an] injunction” on remand. *Patton*, 806 F.2d at 31.

C. OCFS is not likely to meet its burden to demonstrate that the regulation satisfies strict scrutiny.

“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. It “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Id.* at 531–32. And the same applies for laws that compel speech or unwanted expressive association. *See Dale*, 530 U.S. at 658–59; *Evergreen*, 740 F.3d at 244. “[N]o showing merely of a rational

relationship to some colorable state interest [will] suffice.” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The State bears the burden of demonstrating that the challenged law can survive strict scrutiny. *Lukumi*, 508 U.S. at 546; *Ashcroft*, 542 U.S. at 665. And for the following reasons, OCFS is not likely to carry its burden here.

1. OCFS likely cannot establish a “compelling interest.”

As detailed above, OCFS has never asserted that any of New Hope’s placements were inconsistent with the best interests of the child placed, the “interest” identified by the district court in “ensuring that the pool of foster parents . . . is as diverse and broad as the children in need of foster parents” is incoherent, *supra* at 26, and the only other “interest” identified by the district court rests on the fatally flawed premise that New Hope’s privately funded ministry is a “governmental service,” *supra* at III-A-3.

Any claim that the regulation aims at a compelling interest is further undercut by the under-inclusiveness of the regulation with respect to the declared interest. “[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 547 (cleaned up).¹⁵ And the supposed “anti-discrimination”

¹⁵ *See also Ward*, 667 F.3d at 740 (holding that the “multiple types of referrals tolerated by the counseling profession severely undermine the university’s interest in expelling Ward for the referral she requested”);

principle being enforced against New Hope is riddled with statutory and regulatory exceptions—exceptions at least as harmful to the State’s alleged interests as New Hope’s referral policy. *See supra* at II-B.

2. OCFS likely cannot establish that the regulation as applied to New Hope is “narrowly tailored.”

To survive strict scrutiny, a law must also be “narrowly tailored” to serve the State’s compelling interest, meaning that it cannot be either “overbroad or underinclusive in substantial respects.” *Lukumi*, 508 U.S. at 546. And it “must use the least restrictive means to achieve its ends.” *Evergreen*, 740 F.3d at 246.

Here, a workable and narrower tailoring consistent with the State’s ends is obvious—indeed it represents the status quo up until 2018. That is, the State can allow New Hope to devote its private resources to serving birthparents and married adoptive parents while continuing to refer couples whom it cannot serve to the state and private agencies who will gladly serve them. Like the referral policy in *Ward*, New Hope’s referral policy serves everyone’s interests, allowing New Hope to “counsel [couples they are] better able to assist,” while allowing the couples New Hope refers to “receive [services] from [agencies] better suited” to meet their needs. 667 F.3d at 740.

Fraternal Order of Police, 170 F.3d at 367 (Alito, J.) (“We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.”)

3. OCFS likely cannot establish that the regulation actually furthers its asserted interests.

Finally, OCFS likely will not be able to carry its burden to show that the regulation not merely aims at, but demonstrably advances the interests it purports to serve. The district court appeared to speculate that unmarried and same-sex couples whom New Hope refers to other agencies might somehow fall through the cracks, thereby undermining the State's interests in equal access and a diverse pool. JA266. But that speculation is contrary to New Hope's uncontradicted assertion that no applicant has ever complained to OCFS about New Hope's adoption process, and mere speculation is not enough to satisfy strict scrutiny. *See Sherbert*, 374 U.S. at 407 (noting that the appellees had suggested "no more than a possibility" of abuses that might result from granting the requested exemption, and further noting that there was "no proof whatever to warrant [the] fears" advanced).¹⁶

Finally, "even if the possibility" of a breakdown in the referral process "did threaten to" deny some couples equal access while diluting the diversity of the prospective parent pool, "it would plainly be incumbent upon the [State] to demonstrate that no alternative forms of regulation would combat such [a breakdown] without infringing First

¹⁶ *Accord Ward*, 667 F.3d at 740 ("Neither does the unsubstantiated possibility that the counseling program could lose its accreditation provide a compelling interest.").

Amendment rights.” *Sherbert*, 374 U.S. at 407. The State likely cannot make that showing here, nor has it even tried.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court’s order dismissing New Hope’s free exercise and free speech claims as well as its order dismissing New Hope’s motion for a preliminary injunction as moot; should remand for further proceedings consistent with this Court’s order; and should direct the district court to enter a preliminary injunction prohibiting OCFS from enforcing § 421.3(d) against New Hope and from taking any adverse action against New Hope as a result of New Hope’s policies concerning the individuals with whom it works as adoptive parents, until a ruling has been entered on the merits.

Respectfully submitted,

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Appellant

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rule 32.1(a)(4)(A) because, excluding the portions exempted by Fed. R. App. R. 32(f)

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2019, this brief and the accompanying joint appendix were filed electronically with the Clerk of the Second Circuit Court of Appeals through the Court's electronic filing system, which will accomplish service on the following counsel:

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ADDENDUM

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U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

N.Y. DOM. REL. LAW § 110

Who may adopt; effect of article

An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor married couple together may adopt a child of either of them born in or out of wedlock and an adult or minor spouse may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

An adult married person who has executed a legally enforceable separation agreement or is a party to a marriage in which a valid decree of separation has been entered or has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding and who becomes or has been the custodian of a child placed in their care as a result of court ordered foster care may apply to such authorized agency for placement of said child with them for the purpose of adoption. Final determination of the propriety of said adoption of such foster child, however, shall be within the sole discretion of the court, as otherwise provided herein.

Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person.

A proceeding conducted in pursuance of this article shall constitute a judicial proceeding. An order of adoption or abrogation made therein by a surrogate or by a judge shall have the force and effect of and shall be entitled to all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action.

No adoption heretofore lawfully made shall be abrogated by the enactment of this article. All such adoptions shall have the effect of lawful adoptions hereunder.

Nothing in this article in regard to a minor adopted pursuant hereto inheriting from the adoptive parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred seventy-three, nor alters, changes or interferes with such will, devise or trust. As to any such will, devise or trust a minor adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created. Nothing in this article in regard to an adult adopted pursuant hereto inheriting from the adoptive parent applies to any will, devise or trust made or created before April twenty-second, nineteen hundred fifteen, nor alters, changes or interferes with such will, devise or trust. As to any such will, devise or trust an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created. It shall be unlawful to preclude a prospective adoptive parent or parents solely on the basis that the adoptor or adopters has had, or has cancer, or any other disease. Nothing herein shall prevent the rejection of a prospective applicant based upon his or her poor health or limited life expectancy.

N.Y. SOC. SERV. LAW § 373

Religious faith

1. Whenever a child is committed to any agency, association, corporation, institution or society, other than an institution supported and controlled by the state or a subdivision thereof, such commitment shall be made, when practicable, to an authorized agency under the control of persons of the same religious faith as that of the child.
2. Whenever any child is surrendered, released, placed out, or boarded out, in a family, a home or an institution, or in an agency boarding home, or in a group home, or to an authorized agency, or in the custody of any person other than that of a relative within the second degree, such surrender, release, placement or boarding out shall when practicable, be to, with or in the custody of a person or persons of the same religious faith as that of the child or to an authorized agency under the control of persons of the same religious faith as that of the child.
3. In appointing guardians of children, and in granting orders of adoption of children, the court shall, when practicable, appoint as such guardians, and give custody through adoption, only to a person or persons of the same religious faith as that of the child.
4. The provisions of subdivision one, two and three of this section shall be so interpreted as to assure that in the care, protection, adoption, guardianship, discipline and control of any child, its religious faith shall be preserved and protected.
5. Whenever a child is placed out or boarded out in the custody, or under the supervision or control, of a person or of persons of a religious faith different from that of the child, or if a guardian of a child is appointed whose religious faith is different from that of the child, or if letters of adoption of a child are granted to a person or persons whose religious faith is different from that of the child or if a child is committed to an agency, association, corporation, society or institution, which is under the control of persons of a religious faith

different from that of the child, the court, public board, commission or official shall state or recite the facts which impelled such disposition to be made contrary to the religious faith of the child or to any person whose religious faith is different from that of the child and such statement shall be a part of the minutes of the proceeding, and subject to inspection by the department or an authorized agency. This subdivision shall not apply to institutions supported and controlled by the state or a subdivision thereof.

6. The provisions of this section in relation to the protection of the religious faith of children shall also apply to minors between sixteen and eighteen years of age.
7. The provisions of subdivisions one, two, three, four, five and six of this section shall, 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 whose consent would be required for the child's adoption pursuant to section one hundred eleven of the domestic relations law, if the child is born out-of-wedlock, or if born in-wedlock, the religious wishes of the birth parents of the child, or if only one of the birth parents of an in-wedlock child is then living, the religious wishes of the birth parent then living. 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. COMP. CODES R. & REGS. tit. 18, § 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, selfimage, 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.

N.Y. COMP. CODES R. & REGS. tit. 18, § 421.10

Community relations and recruiting

Authorized agencies operating an adoption program shall:

- (a) carry out recruiting efforts specifically directed at communities of populations which have 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 pursuant to section 421.13 of this Part;
- (b) keep the community informed about the development and progress of the program and the needs of the children who require adoption;
- (c) offer information about the program, the need for adoptive homes and the availability of adoption subsidy, to organizations, agencies, media representatives and other persons who may be a referral source in the community; and
- (d) seek to recruit persons with the ability and motivation to serve children in need of permanent substitute family life.

N.Y. COMP. CODES R. & REGS. tit. 18, § 421.13

Application acceptance

- (a) Authorized agencies operating an adoption program shall accept for adoption study, all persons who have completed applications on a priority basis, as follows:
 - (1) On or about April 1st of each year the department will determine the age, race, handicap and other significant characteristics of the largest proportion of waiting children. Applicants seeking children having these characteristics, foster parents seeking to adopt a child who has resided in their home 12 continuous months and Indians seeking to adopt Indian children shall receive first priority for adoption studies.
 - (2) Second priority shall be given other applicants seeking to adopt photo-listed children who do not have the characteristics of the

largest proportion of waiting children as determined by the department, or children currently available for adoption in the care of the agency to which application was made for whom there is not a waiting list of approved families.

- (3) Third priority shall be given all other applicants, i.e., those expressing an interest in adopting children such as healthy young children who are not photo-listed, if such children are not immediately available for adoption in the care of the agency where the application was made.
- (b) Authorized agencies shall acknowledge in writing, within 10 working days of receipt, each completed application. Each applicant shall be informed that his/her application will be acted upon as follows:
- (1) acceptance of first priority applications for immediate study, including a date for first appointment to be not more than 30 days from receipt of completed application and the name and telephone number of an agency staff person he can contact during the interval;
 - (2) acceptance of second priority applications for action in accordance with paragraph (a)(2) of this section, giving an estimate of when a study may start and the name and telephone number of an agency staff person he can contact during the interval; and
 - (3) remaining applications for action in accordance with paragraph (a)(3) of this section, and stating whether there is any likelihood of an adoption study being granted.
- (c) Third priority applicants shall be rejected on the basis of “no need” unless the agency is able to initiate the study promptly so that it will be able to complete it within six months of receipt of a completed application. Any such rejection shall be accompanied by:
- (1) a statement of the fair hearing rights which are set forth in sections 22 and 372-e of the Social Services Law; and
 - (2) a statement that the applicant has the option of remaining on a waiting list with a description of the procedures for exercising this option.
- (d) Authorized agencies may refer an adoption applicant to another agency prior to the initiation of the adoption study when:

- (1) the applicant has expressed interest in a specific photo-listed child determined to be in the care of that agency; and
- (2) the applicant has indicated willingness to be so referred.

If such referral is not accepted by the applicant, completion of the adoption study shall not be delayed beyond the periods required under section 421.14 of this Part.

N.Y. COMP. CODES R. & REGS. tit. 18, § 421.15

Adoption study process

Authorized agencies operating an adoption program shall:

- (a) Conduct an adoption study process in groups, individually, or in any combination thereof. Such adoption study shall include at least one visit to the applicant's home.
- (b) In at least one session in any study process containing two or more group sessions, include the participation of parents who have adopted a child.
- (c) Inform applicants at the first appointment or meeting that the following will be required prior to the conclusion of the adoption study:
 - (1) report from a physician about the health of each member of the household;
 - (2) references from at least three persons, only one of which may be related to the applicant(s) who can attest to the character, habits, reputation and personal qualifications of the applicant(s) and their suitability for caring for a child;
 - (3) if married, proof of marriage;
 - (4) if married and living separate and apart from their spouse:
 - (i) proof that the separation is based upon a legally recognizable separation agreement or decree of separation; or
 - (ii) an affidavit executed by the prospective adoptive parent attesting that he or she has been or will be living separate and apart from his or her spouse for

- a period of three years or more prior to the commencement of the adoption proceeding;
- (5) if previously married, proof of dissolution of marriage by death or divorce;
 - (6) evidence of employment and salary, such as W-2 form or pay stub for each employed applicant;
 - (7)
 - (i) a response to an agency inquiry to the Statewide Central Register of Child Abuse and Maltreatment indicating whether the applicant(s) and/or any other person over the age of 18 who resides in the home of the applicant(s) are the subject(s) of an indicated child abuse or maltreatment report and, if the applicant(s) or any other person over the age of 18 who resides in the home of the applicant(s) resided in another state at any time during the five years preceding the application for approval as adoptive parent(s) made in accordance with this Part, the response from the child abuse and maltreatment registry of the applicable child welfare agency in each such state of previous residence; and
 - (ii) a response to an agency inquiry to the Justice Center for the Protection of People with Special Needs whether the applicant(s) and/or any other person over the age of 18 who resides in the home of the applicant(s) are listed on the register of substantiated category one cases of abuse or neglect maintained by the Justice Center for the Protection of People with Special Needs.
 - (8) a response from the Office of Children and Family Services to the Federal and State criminal history record checks of the applicant and any other person over the age of 18 currently residing in the home of such applicant in accordance with section 421.27 of this Part. If a prospective adoptive parent is approved or if the approval of an approved adoptive parent is not revoked, notwithstanding that the agency is notified by the Office of Children and Family Services that the prospective or

approved adoptive parent or any other person over the age of 18 who is currently residing in the home of the prospective or approved adoptive parent has a criminal history record of a discretionary disqualifying crime, a record of the reasons why the prospective or approved adoptive parent was determined to be appropriate and acceptable to be approved as an adoptive parent, provided, however, the agency may not grant or continue approval where the prospective or approved adoptive parent has been convicted of a mandatory disqualifying crime or where an authorized agency, as defined in section 371(10)(a) or (c) of the Social Services Law, has been directed by the Office of Children and Family Services to deny such application or to hold such application in abeyance because of the results of the Federal Bureau of Investigation criminal history record check conducted in accordance with section 421.27 of this Part; and

- (9) a sworn statement from each applicant, indicating whether to the best of such applicant's knowledge, such applicant or any person over the age of 18 currently residing in the home has ever been convicted of a crime in New York State or any other jurisdiction. If an applicant discloses in the sworn statement furnished in accordance with this paragraph that he/she or any other person over the age of 18 currently residing in the home has been convicted of a crime, the agency must determine, in accordance with guidelines developed and disseminated by the Office of Children and Family Services to the extent consistent with section 421.27 of this Part, whether to approve the applicant to be an adoptive parent. If the agency determines it will approve the applicant, the agency must maintain a written record, as part of the application file or home study, of the reason(s) why the applicant was determined to be appropriate and acceptable to receive an adoptive placement.

- (d) Determine compliance with all of the criteria set forth in section 421.16 of this Part, explore each applicant's ability to be an adoptive parent, and discuss the following topics:
 - (1) characteristics and needs of children available for adoption;
 - (2) the principles and requirements for adopting a child who is a member of a sibling group in accordance with sections 421.2(e) and 421.18(b) of this Part;
 - (3) principles related to the development of children;
 - (4) reasons a person seeks to become an adoptive parent;
 - (5) the understanding of the adoptive parent role;
 - (6) the person's concerns and questions about adoption;
 - (7) the person's psychological readiness to assume responsibility for a child;
 - (8) the attitudes that each person in the applicant's home has about adoption and their concept of an adopted child's role in the family;
 - (9) the awareness of the impact that adoptive responsibilities have upon family life, relationships and current life style;
 - (10) a person's self-assessment of his/her capacity to provide a child with a stable and meaningful relationship; and
 - (11) the role of the agency in supervising and supporting the adoptive placement.
- (e) When an adoption study has been completed and an authorized agency intends to approve an applicant, it shall:
 - (1) prepare a written summary of the study findings and activities, including significant characteristics of their family members, the family interaction, the family's relationship to other persons and the community, the family's child rearing practices and experiences, and any other material needed to describe the family for adoption purposes, to be submitted to workers in the agency or other agencies responsible for making placement decisions about children;
 - (2) arrange for the applicant(s) to review this written summary with the exception of any comments by references which have sought confidentiality;

- (3) encourage the applicant(s) to express their views on the substance of any significant aspect of the written summary;
 - (4) give applicant(s) the opportunity to enter their reaction as an addendum to the written summary;
 - (5) arrange for the applicant(s) and the caseworker to sign the summary after it has been reviewed and any addendum has been attached; and
 - (6) provide a dated written notice of approval to applicant.
- (f) Discontinue a study process and by mutual consent:
- (1) the applicant's record shall reflect the discussion leading to such mutual agreement to discontinue; and
 - (2) the applicant shall be informed in writing of the discontinuation of the adoption study.
- (g) Reject an applicant:
- (1) during a study if his lack of cooperation does not permit the study to be carried out; or
 - (2) if it is determined after a thorough adoption study based on casework principles that he is:
 - (i) physically incapable of caring for an adopted child;
 - (ii) emotionally incapable of caring for an adopted child; or
 - (iii) that his approval would not be in the best interests of children awaiting adoptions.
 - (3) A decision to reject an applicant shall be made by at least two staff members in conference, one of whom shall be at a supervisory level.
 - (4) The record shall reflect the names of the participants in the decision and the reason for the decision.
 - (5) The agency must inform the applicant in writing that he has not been accepted, stating its reason(s) for rejection. If the rejection is based in whole or in part on the existence of an indicated report of child abuse or maltreatment, that fact and the reasons therefor must be included in the notice.
 - (6) The notification shall offer the applicant the opportunity to discuss this decision in person with the worker's supervisor.

- (7) The notification must inform the applicant that he may apply for a hearing before the department pursuant to section 372-e of the Social Services Law regarding the rejection of the application and must state the procedure to be used for this purpose.
- (8) If the reason for the rejection is based in whole or in part on the existence of an indicated report of child abuse or maltreatment, the agency must comply with the provisions of section 421.16(o) of this Part pertaining to notice of right to a hearing pursuant to section 424-a of the Social Services Law.
- (h) Conclude an adoption study process in either discontinuation, rejection, or approval within four months of initiation:
 - (1) except where illness or geographic absence of the applicant makes him/her unavailable for a substantial part of said four-month period. In such a case, the record shall clearly show such unavailability and what efforts were made to contact the applicant; or
 - (2) provided, however, where an adoption study has been interrupted by unavailability of agency staff, the period of four months may be extended, but to not more than six months, if the applicant agrees to such extension in writing. If the applicant agrees to delay in order to avoid caseworker change, the record must show when this agreement was obtained. If the applicant does not accept such delay, the study must be concluded within the four months through the utilization of substitute staff or purchase of service.
- (i) At the conclusion of the adoption study process, the registering agency shall update the adoptive parent registry required by section 424.3(a) of this Title, either by noting that an applicant has had the study approved or, in the case of a study resulting in either discontinuation or rejection, removing the applicant from the registry.

N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16

Adoption study criteria

- (a) An adoption study shall explore the following characteristics of applicants:
 - (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.
- (b) Age. Applicants accepted for adoption study shall be at least 18 years old. The agency shall not establish any other minimum or maximum age for study or acceptance.
- (c) Health.
 - (1) An approved applicant shall be in such physical condition that it is reasonable to expect him/her to live to the child's majority and to have the energy and other abilities needed to fulfill the parental responsibilities.
 - (2) A report of a physical examination conducted not more than one year preceding the date of the adoption application and a written statement from a physician, physician assistant, nurse practitioner or other licensed and qualified health care practitioner as appropriate, regarding the family's general health, the absence of communicable disease, infection, or illness or any physical condition(s) which might affect the proper care of an adopted child, must be filed with the agency. This examination must include a tuberculosis screening and additional related tests as deemed necessary within the last 12 months; an additional report of chest X-rays is required where a physician determines that such X-rays are necessary to rule

out the presence of current diseases. If the adoptive applicant is or has been a foster parent, and the agency which certified, licensed or approved the foster parent has a completed medical report on the foster family in its records, the foster family medical report will satisfy this requirement, if the medical report was completed within the past year.

- (3) Upon a finding of physical condition(s) which are likely to have negative effects upon an applicant's ability to carry out the parental role, an adoption study may be discontinued with the agreement of the applicant. If the applicant does not agree about the likelihood of such negative effects, he shall be given the opportunity to seek another medical opinion, and file another medical report, before a final decision is made.
 - (4) The record of a study discontinued or resulting in rejection because of present or expected effects of a medical condition, must identify the condition found and effects found or expected.
- (d) Marital status. Agencies must not consider marital status in their acceptance or rejection of applicants. However, one married partner may not adopt without the other unless one partner is living separate and apart from his or her spouse pursuant to a legally recognizable separation agreement or decree of separation, or one partner has been or will be living separate and apart from his or her spouse for a period of three years or more prior to the commencement of the adoption proceeding. Agencies must not establish policies which place single or divorced applicants, applicants who are separated from their spouses pursuant to a legally recognizable separation agreement or decree of separation, applicants who have been or will be living separate and apart from their spouses for a period of three or more years, or widowed applicants, at a disadvantage.
- (e) Fertility. An adoptive applicant may not be rejected for adoption because of his, her or their fertility (capacity to have biological children). The significance of fertility and/or infertility as it relates to the desire to adopt shall always be explored in the adoption process, but applicants shall not be required to provide proof of infertility.
- (f) Family composition.

- (1) The agency may study family size as it relates to the ability of a family to care for another child and the quality of life which will be offered to an adoptive child. Policies shall not be established which require rejection of an applicant based on family composition without determining its effect on the ability to care for a child and the quality of life which will be offered.
 - (2) Presence or absence of children in applicant's home regardless of their age and sex shall not be a basis for rejecting applicants.
 - (3) Adoptive placement which will result in there being more than two infants under the age of two in the home at the same time shall be made only after a study specifically focusing on the family's ability to care successfully for such a number of infants.
 - (4) If any children in an approved home are there as foster children, placement of an adoptive child shall be delayed if it would result in a family composition which violates section 378.4 of the Social Services Law.
 - (5) An adoptive placement shall not be made where a child previously placed for adoption has not yet been adopted, except:
 - (i) where the child to be placed is a sibling of one already in the home;
 - (ii) where the delay in adoption is due primarily to court delays; or
 - (iii) where the child to be placed is unusually hard to place and other placement resources are not available.
 - (6) Any exceptions pursuant to paragraph (5) of this subdivision shall be fully documented in the records.
- (g) Sex preference and matching.
- (1) Single applicants shall not be rejected because they seek children of only the same sex (or only the opposite sex).
 - (2) Exploration of a preference to adopt a child of a particular gender, where found necessary and appropriate, shall be carried out openly with a clear explanation to the applicant of the basis for, and relevance of, the inquiry.
- (h) Employment and education of parents. Employment, education, or volunteer activities of applicants may not be a basis for rejection.

- (i) Religion and race. Race, ethnic group, and religion shall not be a basis for rejecting an adoption applicant.
- (j) Income. No applicant shall be rejected on the basis of low income, or because of receipt of income maintenance payments. The adoption study process shall evaluate an applicant's ability to budget his resources in such a way that a child placed with him can be reasonably assured of minimum standards of nutrition, health, shelter, clothing and other essentials. An applicant whose budgeting and money management skills appear deficient to assure such minimum standards shall be referred to any available resources which might help improve these skills.
- (k) Employment and geographical stability. Changes in employment and residences may be examined to determine the significance of such changes for the functioning and well-being of the family and any child to be placed in the home. Frequent changes in employment and residences shall not be a basis for rejection unless it is determined that such changes reflect an inability to provide for the well-being of any child to be placed in the home.
- (l) Child care experience. An adoption study shall inquire into an applicant's experience with children and offer him and/or her, if feasible, the opportunity to increase his/her experience, knowledge and skills in this area. However, no applicant should be rejected solely on the basis of a lack of such experience.
- (m) Socialization and community support. The adoption study process shall include inquiry into the applicant's ability to locate and take advantage of human and organizational resources to strengthen their own capacity as parents. There shall not be any requirement for particular levels of educational achievement or kinds of organizational involvement or community recognition.
- (n) Inquiry of State Central Register of Child Abuse and Maltreatment. An adoption study must include an inquiry of the department regarding whether the applicant is the subject of an indicated child abuse and maltreatment report on file with the State Central Register of Child Abuse and Maltreatment.
 - (1) If the applicant is the subject of such a report, the agency must determine on the basis of the information it has available and in accordance with guidelines developed and disseminated by the department whether to approve the application, except

- that any agency operated by a local social services district which had guidelines for the review of persons who are the subjects of indicated reports of child abuse or maltreatment in use prior to January 1, 1986 may continue to use such agency guidelines in making the required determination.
- (2) If the application is approved, the agency must indicate in writing in the adoption study record the specific reason(s) why the person who is the subject of an indicated report was determined to be appropriate to receive an adoption placement.
 - (3) If the agency rejects the applicant, giving the indicated report as a reason, the applicant must be informed in writing of the reasons for such decision and that:
 - (i) he/she has a right to a hearing under section 424-a of the Social Services Law, regarding the record maintained in the State Central Register of Child Abuse and Maltreatment;
 - (ii) a request for such a hearing must be made within 90 days of the receipt of the written notice of rejection which indicates that the rejection is based in whole or in part on the existence of the indicated report; and
 - (iii) the sole issue at any such hearing will be whether the applicant has been shown by a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report.
 - (4) If in a hearing under section 424-a of the Social Services Law the department fails to show by a preponderance of the evidence that the applicant committed the act or acts upon which the indicated report is based, the department will notify the agency which made the inquiry that, pursuant to the hearing decision, any decision to deny the applicant based on the indicated report should be reconsidered, upon receiving such notification from the department, the agency should reopen the adoption study and review its decision without considering the indicated report.
 - (5) Notwithstanding any other provision of this Part, the requirements of this section relating to an inquiry to the Statewide Central Register of Child Abuse and Maltreatment

apply to a person applying to be an approved adoptive parent to an authorized agency as defined by section 371(10)(a), (b) or (c) of the Social Services Law or an agency approved by the Office of Children and Family Services to place out children for the purpose of adoption in accordance with article 13 of the Not-for-Profit Corporation Law.

- (o) Inquiry of Out-of-State Child Abuse and Maltreatment Registry.
 - (1) This subdivision applies where an applicant or other person over the age of 18 who resides in the home of the applicant resided in another state at any time during the five years preceding the application for approval as an adoptive parent made in accordance with this Part.
 - (2) If the applicant or other person who resides in the home of the applicant has a history of child abuse or maltreatment in another state, the agency must determine on the basis of the information provided by the applicable child welfare agency in the other state and by the applicant and the guidelines developed by the Office of Children and Family Services, as referenced in subdivision (o) of this section, whether to approve or deny the application.
 - (3) If the application is approved, the agency must indicate in the adoption study record the specific reason(s) why the application was approved where an applicant or other person who resides in the home of the applicant has a history of child abuse or maltreatment.
 - (4) The agency must safeguard the confidentiality of the information received from the applicable child welfare agency in the other state to prevent unauthorized disclosure and such agency is prohibited from using such information for any purpose other than conducting background checks pursuant to this Part.
- (p) Additional factors.
 - (1) Current abuse of alcohol or other drugs requires the rejection of an application. The record must clearly show how the finding of such abuse was made.
 - (2) An applicant may not be rejected for past drug or alcohol abuse, or past psychiatric illness or treatment, unless the

record shows how these factors would contribute to the applicant's inability to care for an adopted child.

(q) Inquiry of Vulnerable Persons' Central Register. An adoption study must include inquiry of the Justice Center for the Protection of People with Special Needs regarding whether the applicant or other person over the age of 18 who resides in the home of the applicant is listed on the Vulnerable Persons' Central Register.

(1) If the applicant or other person over the age of 18 who resides in the home of the applicant is listed on the Vulnerable Persons' Central Register, the agency must determine on the basis of the information it has available and in accordance with guidelines developed and disseminated by the Office of Children and Family Services whether to approve the application.

(2) If the application is approved, the agency must indicate in writing in the adoption study record the specific reason(s) why the person who was listed in the above referenced Register was determined to be appropriate to receive an adoption placement.

(r) Inquiry of Vulnerable Persons' Central Register. An adoption study must include inquiry of the Justice Center for the Protection of People with Special Needs regarding whether the applicant or other person over the age of 18 who resides in the home of the applicant is listed on the Vulnerable Person's Central Register.

(1) If the applicant or other person over the age of 18 who resides in the home of the applicant is listed on the register of substantiated category one cases of abuse or neglect maintained by the Justice Center for the Protection of People with Special Needs, the agency must determine on the basis of the information it has available and in accordance with guidelines developed and disseminated by the Office of Children and Family Services whether to approve the application.

(2) If the application is approved, the agency must indicate in writing in the adoption study record the specific reason(s) why the person who was listed in the above referenced register was determined to be appropriate to receive an adoption placement.

N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18

Special provisions for adoptive placement

Each authorized agency shall:

- (a) Prior to placement of a child for adoption, inform prospective adoptive parents of the procedures necessary for finalizing an adoption in accordance with section 421.19(i)(5) of this Part.
- (b)
 - (1) At the time prospective adoptive parents indicate a desire to adopt a particular child, inform such parents if the child has minor siblings or half-siblings, and, if so, whether the minor siblings or half-siblings are free for adoption. Such parents must be asked if they would also be willing to adopt the child's minor siblings or half-siblings who are free for adoption.
 - (2) Discuss with the adoptive parents their willingness to facilitate contact between the adopted child and any siblings or half-siblings of such child, and inform the adoptive parents of the availability of services, if any, to assist in establishing and maintaining sibling contact.
- (c) Make 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.
- (d) Make placement decisions on the basis of the best interests of the child, including but not limited to:
 - (1) consideration of the appropriateness of placement in terms of the age of the child and of the adoptive parent(s);
 - (2) consideration of the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s).
When making placement decisions, an authorized agency may consider 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 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; and

- (3) the requirement of authorized agencies to place minor siblings or half-siblings together in accordance with section 421.2(e) of this Part, unless the social services district, or the voluntary authorized agency with the guardianship and custody, has determined such placement to be detrimental to the best interests of one or more of the children. Such determination must establish that the placement would be contrary to the health, safety or welfare of one or more of the children. The determination must be made after consultation with, or an evaluation by, other professional staff, such as a licensed psychologist, psychiatrist, other physician, or certified social worker. Factors to be considered in making a determination of whether siblings or half-siblings may be placed separately must include, but are not limited to:

- (i) the age differences among the siblings;
- (ii) the health and developmental differences among the siblings;
- (iii) the emotional relationship of the siblings to each other;
- (iv) the individual service needs of the siblings; and
- (v) the attachment of the individual siblings to separate families/locations.

The factors used by the social services district to determine whether siblings or half-siblings are to be placed separately must be documented in the children's uniform case records in accordance with section 428.6 of this Title. In the case of a child in the guardianship and custody of a voluntary authorized agency, the factors used to determine whether the child and the child's siblings or half-siblings are to be placed separately must be documented in the children's case records.

- (e) Prior to the initial visit, ensure that the potential adoptive parent(s) have the opportunity to discuss and be fully informed

- about the child and that information specified in subdivision (b) of this section is provided.
- (f) Arrange the initial visit of the child with the prospective adoptive parent(s) at a time and place convenient for all.
 - (g) Insure that placement occurs when child and parents are ready.
 - (h) At the time a child is placed in a prospective adoptive home, notify the prospective adoptive parent(s) in writing of his or her right to a fair hearing when a social services official fails to provide adoption services or assistance on behalf of a child freed for adoption when such services or assistance are authorized to be provided pursuant to section 372-b of the Social Services Law or the State Consolidated Services Plan.
 - (i) Arrange for contact between the adoptive parents and the caseworker within five working days after placement.
 - (j) Offer a personal interview to a family who has refused a child in order to identify their reasons for refusal and to clarify their adoption plans.
 - (k) At the time of placement require the adoptive parents and a duly appointed agency representative to sign an adoptive placement agreement that shall contain a statement of rights and responsibilities of the parents and the agency.
 - (l) At the time of placement, enter the following information about the placement in a bound book in accordance with subdivision 5 of section 384 of the Social Services Law:
 - (1) the date of placement;
 - (2) the date of the placement agreement;
 - (3) the name and address of the adoptive parents; and
 - (4) the first name of the child.
 - (m) To the extent available, provide to prospective adoptive parent(s) the psychological and medical histories, as described in section 373-a of the Social Services Law, of a child legally freed for adoption as well as that of his or her biological parents. In the case of finalized adoptions, such information shall be provided, upon request, to the child's adoptive parents. In all cases, information identifying biological parents shall be eliminated from all such psychological and medical histories. Agencies shall provide assistance to

prospective adoptive parent(s) and adoptive parent(s) to understand the psychological and medical reports and the implications of such reports for the child's health.

(n)

(1) Where the person whose application to become an adoptive parent has been approved, but whose request to adopt a particular child who is eligible for adoption has been denied or not acted upon within 60 days of the request, and where such person is a foster parent seeking to adopt a child in his or her care or where a person seeking to adopt a child who is related within the second degree to the applicant or where the denial or delay is based in whole or in part upon the location of such person outside of the social services district or State of the authorized agency with custody of the particular child, inform such person that he or she has a right to a hearing to review such denial or failure to act if the request is made within 60 days of the denial or failure to act. Such hearing shall be conducted in accordance with section 372-e(4) of the Social Services Law.

(2) For purposes of this subdivision, a child who is related within the second degree to the applicant shall be the applicant's grandchild, nephew, niece, sibling, half-brother or half-sister.

(o) Where a person has been approved as the adoptive parent for a child in residential care, comply with the requirements of section 421.19(i) of this Part.