

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)

**JOINT APPENDIX: VOLUME II OF II
(PAGES JA166–JA286)**

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----- X
NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

-against-

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

Defendants.

X
:
: No.: 5:18-cv-1419 (MAD/TWD)
:
: ECF Case
:
: **DECLARATION OF CAROL
MCCARTHY IN OPPOSITION
TO DEFENDANTS' MOTION
FOR A PRELIMINARY
INJUNCTION**
X

I, Carol McCarthy, declare under the penalties of perjury, pursuant to 28 U.S.C. §1746,
that the following is true and correct:

1. I am an employee of the New York State Office of Children and Family Services
("OCFS"). I am not a party to the above-captioned action. I have first-hand knowledge of the
facts set forth herein and I make this declaration in opposition to Defendant's motion for a
preliminary injunction.

2. I have been employed by OCFS since November 13, 2003. I am currently the
Director of Adoption Services within the Division of Child Welfare and Community Services. I
have been in this position since April 21, 2015.

3. In my role as the Director of Adoption Services, I oversee the Bureau of
Permanency Services. The Bureau of Permanency Services is responsible for, among other
things, reviewing applications and renewals for not-for-profit agencies that operate adoption
programs within the State of New York; promulgating and managing compliance with

regulations related to the provision of adoption services and practices; providing information and referral assistance on adoption, foster care, and family preservation to parents and professionals through the New York Parents Connection Help Line; processing the placement of children from other states into New York State and from New York State into other states through the Interstate Compact on the Placement of Children; providing adoption technical support; and enhancing public awareness to increase opportunities for adoption of New York's waiting children.

4. OCFS's Division of Child Welfare and Community Services is charged with the responsibility to oversee and regulate programs and services involving foster care, adoption and adoption assistance, child protective services, preventive services for children and families, services for pregnant adolescents, and protective programs for vulnerable adults.

5. OCFS is authorized by State law to promulgate regulations that establish standards and criteria for adoption practices, including standards for evaluating prospective adoptive parents.

6. A not-for-profit agency located in the State of New York is authorized to operate an adoption program and to provide adoption services when it has received a certificate of incorporation, or a certificate of amendment for New York corporations, approved by OCFS that gives the agency the authority to place children for adoption, and when the agency's adoption program including, but not limited to, its policies and practices, have been approved by OCFS.

7. OCFS has continuing authority to monitor services provided by approved, or authorized, adoption agencies.

8. The subject regulation, 18 NYCRR §421.3(d), is critically important to the State's adoption policies and practices, and was promulgated to meet important legislative objectives. The regulation serves the legislative objectives of promoting the safety and well-being of

families and children by prohibiting discrimination on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion or disability. This regulation promotes fairness and equality for applicants seeking adoption services by prohibiting authorized adoption agency programs from adopting policies or establishing practices that imply that the sexual orientation of gay, lesbian, and bisexual prospective parents, but not of heterosexual prospective parents, is relevant when evaluating their appropriateness as adoptive parents.

9. The State has a strong interest in preventing discrimination in the provision of adoptive services. Prohibiting discrimination serves the best interests of vulnerable children. Critical to meeting this objective are policies that provide a broad and diverse pool of adoptive parents, and prohibit disqualifying any potential adoptive parents due to their sexual orientation, or any other characteristic that is wholly unrelated to parenting ability. Prohibiting such discrimination maximizes the number of prospective adoptive parents who may be assessed to determine the safety and suitability of placing a child in their home to determine whether the individual can appropriately meet the needs of a child including the child's safety, health, permanency, well-being and mental, emotional and physical development.

10. The subject regulation also seeks to prevent the trauma and social harm caused by discrimination against lesbian, gay, bisexual, transgender, queer or questioning (LGBTQ) people. The State has a strong interest in preventing the harms caused by excluding LGBTQ people from services otherwise available to the public based solely on their sexual orientation. These harms can be particularly acute where, as here, the adoption program engaging in this discrimination is sanctioned by the State. Furthermore, including LGBTQ people in the pool of

potential adoptive families provides support and affirmation to LGBTQ youth awaiting an adoptive placement.

11. Additionally, the State has a strong interest in preventing discrimination in the provision of government services. Since OCFS authorizes and regulates adoption programs operating in New York, allowing agencies with religious objections to refuse to serve all residents equally would undermine the State's ability to provide government services on a nondiscriminatory basis and without favoring particular religious beliefs. The State has a significant interest in providing state services and benefits on an equal basis to all residents.

12. The subject regulations apply uniformly and neutrally to all authorized adoption agencies. OCFS requires all authorized adoption agencies to comply with applicable laws, regulations, and policies, including 18 NYCRR §421.3. All adoption agencies are prohibited from engaging in discriminatory practices or harassment against applicants for adoption services based on sexual orientation.

13. OCFS conducts program reviews of all authorized agencies that operate adoption programs, including those who received their corporate authority to operate in perpetuity, to determine if the agency meets OCFS standards. OCFS does not target specific agencies for program reviews.

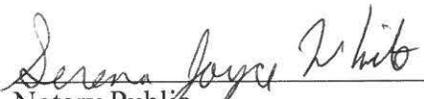
14. New Hope alleges that the families and children served by its program will be potentially impacted if it is not permitted to continue to operate its adoption program and that, in turn, New Hope will suffer irreparable harm. For those children placed with adoptive families who are in the legal custody of New Hope, OCFS has no plans to interfere with those placements and permanency of the children would remain within the authority of the Family Court to determine. Families already approved by New Hope to adopt would retain their status as an

approved adoptive family and would be eligible to receive adoption services and placements from other adoption agencies. OCFS would provide referral services if requested. OCFS would also provide information and referral assistance to any families seeking approval to become adoptive families or to surrender a child. Moreover, New Hope would be permitted to continue to administer any post adoption contact agreements between birthparent families and adoptive families.

Dated: Rensselaer, New York
January 4, 2019


CAROL McCARTHY

Sworn to before me this 4
day of January, 2019.


Notary Public

02W 146267563

Expiration Date: 08/20/2020

Albany County

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

NOTICE OF MOTION

-against-

18-CV-1419

SHEILA J. POOLE,

MAD/TWD

Defendant.

PLEASE TAKE NOTICE that upon the complaint, the accompanying memorandum of law, and all prior proceedings, Defendant Sheila J. Poole, on February 19, 2019 at 11:00 a.m., or as soon thereafter as counsel can be heard, will make a motion at the United States District Court, Northern District of New York, Albany, New York, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint in its entirety with prejudice, together with such other or further relief as may be just.

Pursuant to the January 8, 2019 text order of the court, Plaintiff's response to this motion shall be filed on or before February 4, 2019, and Defendant's reply shall be filed on or before February 8, 2019.

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Dated: Albany, New York
January 14, 2019

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

-against-

18-CV-1419

SHEILA J. POOLE,

MAD/TWD

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
THE COMPLAINT PURSUANT TO FRCP 12(B)(6)**

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Date: January 14, 2019

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PRELIMINARY STATEMENT

The New York State Court of Appeals has long held that “neither marital status nor sexual orientation may alone be determinative in an adoption proceeding.” *In re Jacob*, 86 N.Y.2d 651, 663, 667 (1995). In September 2010, New York State amended its Domestic Relations Law to codify the right to adopt by unmarried adult couples and married adult couples regardless of sexual orientation or gender identity. 2010 S.B. 1523, Ch. 509. N.Y. Dom. Rel. Law §110. Thereafter, in January 2011, the New York State Office of Children Family Services (“OCFS”) informed, *inter alia*, authorized adoption agencies in New York that the amendment brought the Domestic Relations Law into compliance with existing case law, and was “intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home.” OCFS Informational Letter 11-OCFS-INF-01 (Jan. 11, 2011).

In an effort to clarify existing regulations in light of the 2010 amendment, OCFS provided further guidance to authorized adoption agencies. A July 2011 OCFS Information Letter advised that

[i]t is important to recognize that all types of families are potential resources for children awaiting adoption and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, ability to meet the child’s needs, and availability of support systems are the critical assessments in identifying adoptive applicants’ appropriateness for specific children.

OCFS Informational Letter 11-OCFS-INF-05 (July 11, 2011). Toward this end, agencies were advised that, *inter alia*, “discrimination based on sexual orientation in the adoption study assessment process” is prohibited. *Id.* OCFS further stated that

OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent. The capacity of the prospective adoptive parents to meet the needs of children freed for adoption should be the primary consideration when making approval or rejection decisions of an adoptive applicant.

Id. The Informational Letter also reminded authorized agencies that applicants for adoption may only be disapproved if (1) the applicant “is physically incapable for caring for an adopted child;” (2) the applicant “is emotionally incapable of caring for an adopted child;” or (3) the applicant’s approval “would not be in the interests of the children awaiting adoption.” Id.

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

It is this regulation that plaintiff challenges in the instant proceeding. However, contrary to the position of plaintiff, New Hope Family Services, Inc. (“New Hope”), 18 N.Y.C.R.R. §421.3(d) does not create a new obligation for authorized adoption agencies. Such agencies were not permitted to deny the applications of otherwise qualified prospective adoptive parents based on an applicant’s marital status or sexual orientation well before the promulgation of §421.3(d).

This memorandum of law is submitted on behalf of defendant, OCFS Acting Commissioner Sheila Poole, in support of her motion to dismiss the complaint pursuant to FRCP 12(b)(6).

PROCESSING OF ADOPTIVE PARENT APPLICATIONS

Agencies authorized to provide adoption services in New York must comply with all relevant statutory, regulatory and case law. Initially, agencies must receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective adoptive parents. 18 N.Y.C.R.R. §§421.11(a)-(f). After an adoption application is received, an adoption study must be completed, *id.* at §421.13, pursuant to the procedure set forth in 18 N.Y.C.R.R. §421.15. An adoption study must explore the following characteristics of prospective adoptive parents:

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

Id. at §421.16. An application may only be rejected if (1) an applicant does not cooperate with the adoption study; (2) an applicant is “physically incapable of caring for an adoptive child;” (3) an applicant is “emotionally incapable of caring for an adopted child;” or (4) an applicant’s approval “would not be in the best interests of children awaiting adoptions.”¹ *Id.* at §421.15(g).

¹ Additionally, an applicant must be at least eighteen years old. 18 N.Y.C.R.R. §421.16(b).

Once an application is approved, the agency must add the applicant to the adoptive parent registry. *Id.* at §§421.15(i); 424.3(a).

MATCHING OF CHILDREN AND ADOPTIVE PARENTS

Whether the adoption of a particular child by a particular prospective adoptive parent should be approved must be made on the “basis of the best interests of the child.” 18 N.Y.C.R.R. §421.18(d). When making placement decisions, the agency should consider (1) the ages of the child and prospective parent(s); (2) the “physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);” (3) the “cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background;” and (4) the ability of a child to be placed in a home with siblings. *Id.* Additionally, agencies must

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

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

STATEMENT OF FACTS

An entity must qualify as an “authorized agency” under the law before it may provide adoption services. N.Y. Soc. Serv. Law §371(10)(a); see also N.Y. Soc. Serv. Law §374(2). New Hope is an “authorized agency” with the authority to “place out or to board out children...,” N.Y. Soc. Serv. Law §371(10)(a); see also N.Y. Soc. Serv. Law §374(2), and “receive children for purposes of adoption.” N.Y. Dom. Rel. Law §109(4). See Dkt. No. 1-4 at p. 2. As an “authorized agency”, New Hope must be “incorporated or organized under the laws of this state

with corporate power or empowered by law to care for, to place out or to board out children . . . and submit and consent to the approval, visitation, inspection and supervision of [OCFS] [emphasis added].” N.Y. Soc. Serv. Law §371(10)(a). Moreover, OCFS must approve an agency’s certificate of incorporation. N.Y. Soc. Serv. Law §460-a.

New Hope is incorporated under New York Not-For-Profit Corporation Law for myriad purposes, including placing out children in New York for adoption. N.Y. Not-For-Profit Corp. Law §404(b)(1). Under prior applicable law, New Hope was granted perpetual *corporate authority*, meaning that it exists as a corporate structure in perpetuity, but not that it is approved by OCFS to provide adoption services as an “authorized agency” in perpetuity. N.Y. Soc. Serv. Law §371(10). In fact, New Hope does not have “perpetual authorization” to provide adoption services. Nor may New Hope provide adoption services without the approval of OCFS. N.Y. Soc. Serv. Law §371(10)(a).

The complaint alleges that New Hope operates several programs including a pregnancy resource center, a temporary foster placement program, and adoptions services. Dkt. No. 1 at ¶50. As an adoption provider, New Hope provides services to birth mothers seeking adoption placements for their infants, Dkt. No. 1. at ¶¶71-102, and single individuals and married opposite-sex couples seeking to adopt. *Id.* at ¶¶103-134.

In 2018, OCFS conducted a review of New Hope’s programs. During that review, OCFS discovered that New Hope’s policies prohibit the placement of children for adoption with unmarried couples or same sex couples. Dkt. Nos. 1 at ¶188. OCFS thereafter informed New Hope that such policies are in violation of 18 N.Y.C.R.R. §421.3(d) and, therefore, New Hope would have to provide adoption services to otherwise qualified unmarried and same sex couples

or cease the operation of its adoption program. Dkt. No. 1-7. New Hope refuses to comply with §421.3(d). Dkt. No. 1 at ¶191.

ARGUMENT

On a motion to dismiss pursuant to FRCP 12(b)(6), the court must “accept[] all factual allegations in the complaint as true and draw[] all reasonable inferences in the plaintiff’s favor.” Concord Assocs., L.P. v. Entm’t Props. Trust, 817 F.3d 46, 52 (2d Cir. 2016). However, the court is not required to assume that legal conclusions within the complaint are true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “In considering a motion to dismiss, a ‘district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.’” CBF Industria DeGusa S/A v. AMCI Holdings, Inc., 2018 U.S. Dist LEXIS 100781, *16 (S.D.N.Y. June 15, 2018) (quoting DiFolco v. MSNBC LLC, 622 F.3d 104, 111 (2d Cir. 2010)).

To withstand a motion to dismiss, a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 50 U.S. 544, 570 (2007). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Matson v. Bd. of Educ., 631 F.3d 326, 329 (2d Cir. 2011).

Based on the facts alleged by the plaintiff, the complaint fails to state a cause of action. First, the complaint fails to allege any facts to support a finding that §421.3(d) was promulgated for the purpose of discriminating against religious beliefs, and therefore it fails to plead a cognizable free exercise claim. Second, the complaint fails to allege that §421.3(d) is not content neutral or that it is unnecessary to fulfill the State’s interests in preventing discrimination and expanding the number of prospective qualified families to adopt children in New York, and

therefore fails to state a freedom of speech or expressive association claim. Third, the complaint fails to allege that the plaintiff is being treated differently from other similarly situated authorized agencies, and therefore fails to allege an equal protection claim. Finally, since the complaint fails to allege the violation of any of plaintiff's constitutional rights, the complaint fails to allege that the defendant is conditioning plaintiff's authorization to provide adoption services on the forfeiture of a constitutional right.

POINT I

THE COMPLAINT FAILS TO STATE A FREE EXERCISE CLAIM

To “state a free exercise claim, a plaintiff generally must establish that ‘the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation,’ or that the law’s ‘purpose...is the suppression of religion or religious conduct.’” Congregation of Rabbinical College of Tartikov, Inc. v. Vill. Of Pomona, 915 F.Supp.2d 574, 619 (S.D.N.Y. 2013) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)). The right of the free exercise of religion does not relieve an individual or entity of the obligation to comply with a “valid and neutral law of general applicability.” Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990). As a result, where an alleged prohibition on the exercise of religion “is not the object ... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” Id. at 878. See also Bloomington Jewish Educ. Ctr. v. Village of Bloomington, 111 F.Supp.3d 459, 484 (S.D.N.Y. 2015) (stating that a “law or regulation that is neutral and of general applicability is constitutional even if it has an incidental effect on religion”). Therefore, a law that only incidentally imposes a burden on the exercise of religion need only be supported by a rational basis. WTC Families for

a Proper Burial, Inc. v. City of New York, 567 F.Supp.2d 529, 539-540 (S.D.N.Y. 2008) (quoting Leebart v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003)).

Religious beliefs are not targeted by 18 N.Y.C.R.R. §421.3(d), and it is plainly not the “object” of the regulation to interfere with plaintiff’s, or anyone’s, exercise of religion. On its face, §421.3(d) is generally applicable:

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

18 N.Y.C.R.R. §421.3(d). The regulation applies to all authorized agencies, regardless of any religious affiliation.

Additionally, 421.3(d) is neutral. The neutrality of a law is determined by the consideration of relevant factors, including: “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in questions, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540 (1993). See also Masterpiece Cakeshop, Ltd. v. Colo. Civil rights Comm’n, ___ U.S. ___, 138 S.Ct. 1719, 1731 (2018) (applying the neutrality factors).

The evolution of adoption law in New York has been discussed by the courts, which have repeatedly held that the goal of the adoption laws is to further “New York’s ‘strong policy of assuring that as many children as possible are adopted into suitable family situations,’” In re Jacob, 86 N.Y.2d at 662, and approve adoptions that are in “the child’s best interests.” Id. at 658. To that end, the expansion of individuals authorized to adopt children in New York State to include unmarried and same sex couples has been identified by the Court of Appeals as in furtherance of the intention of this State’s adoption laws. Id. at 660-664. See also In re Adoption of Carolyn B.,

6 A.D.3d 67, 69-70 (4th Dept 2004) (stating that adoption by unmarried and same sex couples furthers the state's interests in finding families for as many children as possible).

The object of §421.3(d) furthers that state interest, since the object of the relevant language of the regulation is to “[p]rohibit[] discrimination on the basis of sexual orientation, gender identity or expression in essential social services.” N.Y.S. Register, Nov. 6, 2013, p. 3. The rulemaking documents and subsequent OCFS Information Letters, clearly establish this intent of §421.3(d), and no discovery is required. Therefore, when read in connection with the explicit intended purpose of the regulation and the established law relating to adoption, the allegations in the complaint that New Hope's religious beliefs are incidentally affected by the regulation are insufficient to state a First Amendment free exercise claim.² Accordingly, New Hope's first cause of action should be dismissed.

POINT II

THE COMPLAINT FAILS TO ALLEGE A FREE SPEECH OR EXPRESSIVE ASSOCIATION CLAIM³

The First Amendment prohibits the promulgation of a law “abridging the freedom of speech,” U.S. Const. amend. I, and the applicable free speech analysis differs depending on whether the law is “content-based” or “content-neutral.” Universal City Studios v. Corley, 273 F.3d 429, 450-451 (2d Cir. 2001). “The principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the

² It is also noteworthy that §421.3(d) has no effect on the various statutes and regulations requiring the consideration of birth parents, children and prospective adoptive parents in the matching process. Therefore, nothing about §421.3(d) requires New Hope, or any authorized agency, to place a child with a family without considering the relevant religious beliefs of the parties.

³ New Hope's expressive association claim in its second cause of action is duplicative of its free speech claim, Morgan v. Cnty. of Nassau, 2017 U.S. Dist. LEXIS 22992, *46 (E.D.N.Y. Feb. 17, 2017). Therefore, both claims fail for the same reasons discussed herein. Id.

message it conveys...A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). “In other words, ‘[a law] is content-based when the content of the speech determines whether the [law] applies.’” Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona, 138 F.Supp.3d 352, 426 (S.D.N.Y. 2015) (quoting Sugarman v. Vill. of Chester, 192 F.Supp.2d 282, 292 (S.D.N.Y. 2002)).

As discussed above, §421.3(d) applies to all authorized agencies and, therefore, its applicability is not based on the content of an agency’s speech. Congregation Rabbinical College of Tartikov, 138 F.Supp.3d at 426. Additionally, the regulation was promulgated to ensure that “discrimination on the basis of sexual orientation, gender identity or expression in essential social services,” does not occur, N.Y.S. Register, Nov. 6, 2013, p. 3, when determining if an adoption is in a child’s best interests.⁴ Therefore, it is content-neutral.

A content-neutral law does not violate the free speech guarantee of the First Amendment if it “(1) ‘advances important government interests unrelated to the suppression of speech’ and (2) ‘does not burden substantially more speech than necessary to further those interests.’” Time Warner Cable, Inc. v. FCC, 729 F.3d 137, 160 (2d Cir. 2013) (stating the factors set forth in United States v. O’Brien, 391 U.S. 367, 377 (1968)).

The state interest of expanding the number of people who may adopt children has been judicially determined to be an important government interest. In re Jacob, 86 N.Y.2d at 658, 661.

⁴ Just like the Philadelphia Department of Human Services in Fulton v. City of Philadelphia, OCFS “did not seek to create a forum for private speech nor did [it] seek to promote speech at all” when it authorized a religious organization to provide family services. 320 F.Supp.3d 661, 695-696 (E.D.PA. 2018). Instead, it authorized New Hope to provide services to New York State residents, including the completion of adoption studies. Id. (authorizing plaintiff to provide certification services and home visits for prospective foster parents).

In other words, permanency is vital to the welfare of a child, and is highly valued in determining a child's best interests. Toward that end, 18 N.Y.C.R.R. §421.3(d) goes no further than ensuring that all people entitled to adopt in New York are considered and afforded an equal opportunity as prospective adoptive parents by state authorized adoption agencies. It neither compels, nor prohibits, New Hope from (1) expressing its beliefs, religious or otherwise, or (2) associating with others for the purpose of expressing such beliefs. Therefore, plaintiff's second cause of action should be dismissed.

POINT III

THE COMPLAINT FAILS TO ALLEGE AN EQUAL PROTECTION CLAIM

The equal protection clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. Its command is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). An equal protection claim cannot be maintained unless a plaintiff shows that it is not being treated the same as similarly situated individuals. New York State Club Assoc. v. City of New York, 487 US 1, 17-18 (1988); Tigner v. State of Texas, 310 U.S. 141, 147 (1940) (the Equal Protection Clause "does not require things which are different in fact or opinion to be treated in law as though they were the same.").

It is difficult to decipher if New Hope is attempting to allege a "class of one" or a "selective enforcement" equal protection claim. To allege a class of one equal protection claim, a plaintiff must allege that it has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135, 140 (2d Cir. 2010) (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). A plaintiff "must show an extremely high degree of similarity between [itself] and

[its comparators]” to state such a claim. Ruston v. Town Bd. For the Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010).

A selective enforcement claim requires a plaintiff to allege that it was treated differently than others similarly situated “based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure...” Joglo Realities, Inc. v. Seggos, 229 F.Supp.3d 146, 152-153 (E.D.N.Y. 2017) (quoting LeClair v. Saunders, 627 F.2d 606, 609-610 (2d Cir. 1980)). It is unsettled in the Second Circuit about the level of similarity that must be alleged to state a selective enforcement claim, with some courts applying the same standard as in a class of one claim, and others permitting a slightly more lenient standard requiring that the comparators be similar in “all material respects.” Joglo Realities, Inc., 229 F.Supp.3d at 153. Notwithstanding, the complaint fails to allege a comparator under either standard.

Based on the allegations in the complaint, themselves, §421.3(d) applies to all agencies authorized by OCFS to provide adoption services and, therefore, New Hope has failed to allege a sufficiently similar comparator as required to state an equal protection claim. Vann v. Sudranski, 2017 U.S. Dist. LEXIS 209439, *13 (S.D.N.Y. Dec. 20, 2017). New Hope’s allegations of disparate treatment state that “Section 421.3(d) treats New Hope’s speech and exercise of its religious views differently from persons similarly situated to it because” (1) “faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitting to continue operating” and (2) “parents adopting children are permitted to take into account protected classes and characteristics but in facilitating the adoption New Hope is not.” Dkt. No. 1 at ¶¶282, 283. Neither of these allegations is sufficient to state an equal protection claim.

To allege a sufficient comparator, a plaintiff must allege, at a minimum, that it is similarly situated to such a comparator in **all material respects**. Here, New Hope fails to allege that any other “faith based or secular adoption provider” violated §421.3(d) and was nonetheless permitted to continue operating its adoption program. It has not alleged that other authorized agencies are being permitted to summarily exclude individuals authorized to adopt from the pool of prospective adoptive parents. Additionally, it has not alleged that any other authorized agencies are refusing to apply the relevant statutory and regulatory factors when determining whether approval of a family’s application to adopt would be in children’s best interests. Instead, it alleges only that the general applicability of §421.3(d) incidentally touches on its beliefs. Such allegations are insufficient to allege that New Hope is (1) intentionally being treated differently from other authorized adoption agencies without a rational basis, Analytical Diagnostic Labs, Inc., 626 F.3d at 140, or (2) intentionally being treated differently because of a protected consideration. Joglo Realities, Inc., 229 F.Supp.3d at 152-153.

New Hope’s attempt to allege adoptive parents as a comparator is even more specious. Prospective adoptive parents are not similarly situated to New Hope under the law. New Hope is subject to §421.3(d) because it is an adoption agency authorized by the state to provide adoption services. N.Y. Soc. Serv. Law §371(10)(a). By contrast, prospective adoptive parents are simply members of the public. The state’s determination regarding which criteria authorized adoption agencies may utilize when evaluating prospective adoptive families is far different than a family’s determination of whether it can appropriately nurture a child. Therefore, prospective adoptive parents are not similarly situated to New Hope in all material respects.

As New Hope has failed to allege any sufficiently similar comparator, it has failed to state an equal protection claim. As a result, plaintiff’s third cause of action should be dismissed.

POINT IV

THE COMPLAINT FAILS TO ALLEGE AN
UNCONSTITUTIONAL CONDITIONS CLAIM

Finally, the complaint fails to allege an unconstitutional conditions claim. Under the unconstitutional conditions doctrine, the government may not “condition the acceptance of a public benefit on the curtailment of a constitutional right.” Alliance for Open Soc’y Int’l v. United States Agency for Int’l Dev., 430 F.Supp. 222, 253 (S.D.N.Y. 2006). The application of the doctrine “varies depending on the underlying substantive right at issue.” EklecCo NewCo LLC v. Town of Clarkstown, 2018 U.S. Dist. LEXIS 101591, *20 (S.D.N.Y. June 18, 2018). In the First Amendment context, the unconstitutional conditions doctrine precludes the government from “deny[ing] a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech’ even if he has no entitlement to that benefit.” Bd. Of County Commissioners v. Umbehr, 518 U.S. 668, 674 (1996).

Plaintiff’s fourth cause of action alleges that the defendant “has violated the unconstitutional conditions doctrine by conditioning New Hope’s perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights.” Dkt. No. 1 at 295. This argument necessarily fails because, as discussed above, §421.3(d) does not violate any of New Hope’s First Amendment rights. Additionally, as discussed above, this allegation conflates New Hope’s perpetual authority as a corporate structure with its status as an “authorized agency” subject to the ongoing approval of OCFS. N.Y. Soc. Serv. Law §371(10)(a). Further, authorization by OCFS to provide adoption services is not a “public benefit” under the unconstitutional conditions doctrine. See e.g. Alliance for Open Soc’y Int’l v. United States Agency for Int’l Dev., 2018 U.S. App. LEXIS 35833, **42-43 (2d Cir. Dec. 20, 2018) (discussing public funding as the relevant benefit covered by the doctrine).

Therefore, since New Hope's authorization to provide adoption services is contingent on New Hope's compliance with relevant law, and not on its relinquishment of any First Amendment rights, plaintiff's fourth cause of action should be dismissed.

CONCLUSION

This case does not require the resolution of any issues of fact, because the issues presented are purely legal ones. For the reasons discussed above, defendant's motion to dismiss the complaint pursuant to FRCP 12(b)(6) should be granted in its entirety.

Dated: Albany, New York
January 14, 2018

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,)	
)	
)	
Plaintiff,)	CASE NO. 18-CV-1419
)	
vs.)	
)	
SHEILA J. POOLE,)	
In her official capacity as Acting)	
Commissioner for the Office of)	
Children and Family Services for the)	
State of New York,)	
)	
Defendant.)	
)	

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

FOR THE PLAINTIFF:

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

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

18-CV-1419

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

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

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

11 MR. CORTMAN: David Cortman, Your Honor.

12 MS. HALLOCK: Jeana Hallock.

13 THE COURT: Good morning.

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

16 THE COURT: Good morning to you.

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: No public funds whatsoever?

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

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

20 MR. BROOKS: That is always their goal.

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

22 MR. BROOKS: Yes, it is.

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. BROOKS: It does.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 could go someplace else, correct?

2 MR. BROOKS: That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. BROOKS: To help children.

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: It will never happen.

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

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

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

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1 in adoptive parents who might not otherwise be adopting.

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

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

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

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

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

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

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

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

17 MR. BROOKS: Absolutely.

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

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

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

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

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

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

19 THE COURT: Sexual orientation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Thank you very much.

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

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

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

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

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

3 MS. KERWIN: Funds, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: I understand.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Thank you.

7 MS. KERWIN: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6
7
8 CERTIFICATION OF OFFICIAL REPORTER

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

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

21
22 /s/ JACQUELINE STROFFOLINO

23 JACQUELINE STROFFOLINO, RPR

24 FEDERAL OFFICIAL COURT REPORTER

25
JACQUELINE STROFFOLINO, RPR
UNITED STATES DISTRICT COURT - NDNY JA240

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

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

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

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

Defendant.

APPEARANCES:

ALLIANCE DEFENDING FREEDOM

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ADRIENNE J. KERWIN, AAG

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

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

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

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

II. BACKGROUND

A. Regulatory Scheme

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

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

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

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

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

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

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

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

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

B. New Hope Family Services

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

C. The Complaint

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

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

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

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

Id. at ¶ 154.

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

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

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

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

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

Dkt. No. 1 at ¶ 167. New Hope claims that OCFS promulgated these new regulations "purporting to require adoption providers to place children with unmarried and same-sex couples in complete disregard for the law, the scope of OCFS' authority, and the rights of adoption providers." *Id.* at ¶ 168.

In January or February of 2018, Suzanne Colligan of OCFS called New Hope's then Acting Executive Director, Judith A. Geyer. *See id.* at ¶ 182. During the call, Ms. Colligan conveyed that, under a new policy implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures. *See id.* On July 18, Ms. Colligan sent an email to Ms. Geyer to schedule the adoption program review and included a list of things she needed to review, including New Hope's policies and procedures. *See id.* at ¶ 183. Based on Ms. Colligan's direction that she would need a copy of New Hope's policies and procedure manual, Ms. Geyer updated New Hope's formal policies and procedures on adoption into one consolidated manual. *See id.* at ¶ 184.

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

I also thought that it might be helpful for you to see the application we use with agencies requiring reauthorization for corporate authority. Since you are authorized in perpetuity, your agency is not required to complete/submit this form. However, I will be

asking many of the program questions on it, so you may find it helpful in preparing for my visit.

Dkt. No. 1 at ¶ 185.

On September 6, 2018, Ms. Colligan met with Ms. Geyer and Kathy Decesare, New Hope's Center Director, and took a copy of New Hope's policy and procedure manual with her when she left. *See id.* at ¶ 186. On October 1, 2018, OCFS sent a letter to Ms. Geyer that praised a number of strengths in New Hope's program, thanked New Hope for its professionalism during the meeting, and suggested a follow-up meeting to discuss a few opportunities for improvement. *See id.* at ¶ 187. On or about October 9, 2018, Ms. Geyer received a call from Ms. Colligan. During the call, Ms. Colligan stated that she had been reading New Hope's policies and procedures manual and that New Hope's policy not to place children with those who are living together without the benefit of marriage or with same-sex couples violated 18 N.Y.C.R.R. § 421.3. *See id.* at ¶ 188. New Hope claims that Ms. Colligan told Ms. Geyer that New Hope would have to comply with § 421.3 by placing children with unmarried couples and same-sex couples. *See id.* at ¶ 189. Further, Ms. Colligan stated that if New Hope did not comply, New Hope would be "choosing to close." *Id.* at ¶ 190. Ms. Geyer responded that New Hope would be unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples. *See id.* at ¶ 191. Ms. Colligan responded by stating that "[s]ome Christian ministries have decided to compromise and stay open." *Id.* at ¶ 192. Ms. Colligan informed Ms. Geyer that she would be getting a letter from OCFS mandating compliance by a specific date. *See id.* at ¶ 194.

On October 11, 2018, Ms. Colligan emailed Ms. Geyer, stating in part as follows:

You will be receiving a letter from our office soon requesting a formal written response regarding your agency's position. When OCFS receives written notification of an agency's intention to close a program, OCFS will respond with written instructions to the agency with the steps they must take. These steps include the

agency's responsibility to seek and obtain agreement with another NYS authorized agency to maintain and store their adoption records, of which includes the handling of activities outlined in the legally bound agreements with birth parents.

Id. at ¶ 195.

On October 12, 2018, Ms. Colligan sent an email to Ms. Geyer stating that "[w]e will put Monday's follow up meeting [to discuss a few minor improvements identified during the visit] on hold for now. The purpose of the follow up meeting would be to work on the necessary changes to your agency policy manual. Based on our recent phone call, the follow up meeting for those purposes does not appear needed at this time." *Id.* at ¶ 196. On October 17, 2018, Ms. Colligan indicated in an email to Ms. Geyer that she had mailed out a certified letter. That email stated that "[o]nce the letter is returned providing us with written notice of your intent, we will send out a letter outlining our expectations around the handling of those that you are currently providing services and the adoption records." *Id.* at ¶ 197.

On October 26, 2018, Ms. Geyer received an electronic copy of the letter to which Ms. Colligan had referred. The letter stated that New Hope's policy pertaining to "not placing 'children with those who are living together without the benefit of marriage' or 'same-sex couples' violates Title 18 NYCRR § 421.3." Dkt. No. 1 at ¶ 198. The letter further stated:

OCFS hereby requests a formal written response from [New Hope] stating the agency's position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the above-cited regulation. Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program.

Id. (quoting Dkt. No. 1-7). New Hope was given until November 30, 2018 to respond to OCFS' letter. *See id.* at ¶ 199.

D. Procedural History

On December 6, 2018, filed its complaint alleging that OCFS has violated various constitutional rights protected by the First and Fourteenth Amendments. *See* Dkt. No. 1. In its first cause of action, New Hope contends that OCFS' interpretation and enforcement of 18 N.Y.C.R.R. § 421.3(d) "targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices" in violation of the First Amendment's Free Exercise Clause. *See id.* at ¶¶ 230-263. In its second cause of action, New Hope argues that applying "section 421.3(d) to New Hope requires New Hope to engage in speech and expression that it does not wish to convey – speech and expression that violates its core religious beliefs – by compelling it to recommend same-sex couples or unmarried couples as adoptive parents" in violation of the First amendment. *See id.* at ¶¶ 264-278. In its third cause of action, New Hope contends that section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it in violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at ¶¶ 279-290. Finally, in its fourth cause of action, New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." *Id.* at ¶¶ 291-95.

On December 12, 2018, New Hope filed a motion for a preliminary injunction. *See* Dkt. No. 15. On January 14, 2019, OCFS moved to dismiss the complaint in its entirety. *See* Dkt. No. 34. On February 19, 2019, after the motions were fully briefed, the Court held oral arguments on

both pending motions. For the reasons set forth below, the Court grants OCFS's motion to dismiss the complaint and denies New Hope's motion for a preliminary injunction as moot.

III. DISCUSSION

A. Standard of Review

1. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *see id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability

requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief.'" *Id.* (quoting [*Twombly*, 550 U.S.] at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[] complaint must be dismissed[,]" *id.* at 570.

2. Preliminary Injunction

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005) (citation omitted). "A decision to grant or deny a preliminary injunction is committed to the discretion of the district court." *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 78 (2d Cir. 1994) (citation omitted).

A party seeking a preliminary injunction must establish "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Allied Office Supplies, Inc. v. Lewandowski*, 261 F. Supp. 2d 107, 108 (D. Conn. 2005) (quoting *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003)). Moreover, in certain circumstances, an even higher standard applies. "The moving party must make a 'clear' or 'substantial' showing of a likelihood of success where (1) the injunction sought 'will alter, rather than maintain, the status quo' – *i.e.*, is properly characterized as a 'mandatory' rather than 'prohibitory' injunction; or (2) the injunction sought 'will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the

defendant prevails at a trial on the merits." *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (quoting *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995)).¹ "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999) (internal quotations omitted).

The Supreme Court has observed that the decision of whether to award preliminary injunctive relief is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Consonant with this view, the Second Circuit has held that a district court may consider hearsay evidence when deciding whether to grant preliminary injunctive relief. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010). Therefore, the strict standards for affidavits under the Federal Rules of Evidence and in support of summary judgment under Rule 56(c)(4) of the Federal Rules of Civil Procedure requiring that an affidavit be made on personal knowledge are not expressly applicable to affidavits in support of preliminary injunctions. *See Mullins v. City of New York*, 634 F. Supp. 2d 373, 384 (S.D.N.Y. 2009) (citations omitted). Nevertheless, courts have wide discretion to assess the affidavit's credibility and generally consider affidavits made on information and belief to be insufficient for a preliminary injunction. *See* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2949 (2d ed. 1995); *Mullins*, 634 F. Supp. 2d at 373, 385, 390 n.115 (declining to fully credit the "defendants' hearsay affidavit" and noting that while the court "may consider hearsay evidence in a preliminary injunction hearing . . . , a court

¹ As the Second Circuit has noted, "[t]he distinction between mandatory and prohibitory injunctions is not without ambiguities or critics,' . . . and that in a close case an injunction can be framed in mandatory or prohibitory terms[.]" *Jolly*, 76 F.3d at 473-74 (internal quotations and citation omitted).

may weigh evidence based on whether such evidence would be admissible under the Federal Rules of Evidence").

In the Second Circuit "there is no hard and fast rule . . . that oral testimony must be taken on a motion for a preliminary injunction or that the court can in no circumstances dispose of the motion on the papers before it." *Maryland Cas. Co. v. Realty Advisory Bd. of Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997) (quoting *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 259 (2d Cir. 1989)). "Generally, the district court is not required to conduct an evidentiary hearing on a motion for a preliminary injunction when essential facts are not in dispute." *Id.*

Even if the plaintiff demonstrates irreparable harm and a likelihood of success on the merits, however, the remedy of preliminary injunctive relief may still be withheld if equity so requires. "An award of an injunction is not something a plaintiff is entitled to as a matter of right, but rather it is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999) (citation omitted).

B. Free Exercise Claim

OCFS contends that the Court must dismiss New Hope's free exercise claim because 18 N.Y.C.R.R. § 421.3(d) is a neutral law of general applicability that only incidentally imposes a burden on the exercise of religion. *See* Dkt. No. 34-1 at 12-14. Therefore, OCFS alleges that the law only needs to be supported by a rational basis, which is easily met in this case. *See id.* New Hope, however, responds that "cases teach that even a genuinely 'neutral law of general applicability' cannot be applied when to do so would interfere in historically respected areas of

religious autonomy." Dkt. No. 36 at 9-10 (quoting *Hosannah-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012)). Additionally, New Hope argues that even assuming that the test in *Employment Division, Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) applies, it is still likely to succeed on this claim because it is alleged that the "regulation was adopted for the purpose of targeting faith-based adoption ministries." *Id.* at 11 (quoting Dkt. No. 1 at ¶ 9). Therefore, New Hope argues that the regulation is not neutral or generally applicable as applied. *See id.* (citing Dkt. No. 1 at ¶ 248). "Further, given that 'there are ... many ways of demonstrating that the object or purpose of a law is the suppression of ... religious conduct,' *Lukumi*, 508 U.S. at 533, New Hope has made extensive factual allegations that support a reasonable inference of a 'targeting' purpose, all of which must be accepted as true for purposes of this motion." *Id.* at 11-12.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210 (2d Cir. 2012) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). "Nonetheless, 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* (quoting *Lukumi*, 508 U.S. at 533, 113 S. Ct. 2217) (internal citation omitted).

"However, 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'" *Id.* (quoting *Lukumi*, 508 U.S. at 531, 113 S. Ct. 2217).

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 877.

Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (internal citations and question marks omitted) (emphasis in original). Likewise, it forbids government acts specifically designed to suppress religiously motivated practices or conduct. *See id.* at 877-78. The Court concluded that the Free Exercise Clause does not, however, "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quotation omitted).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the City of Hialeah, Florida had adopted an ordinance prohibiting the slaughtering of animals except in certain recognized circumstances. The history of the law's adoption made plain, however, that this was no earnest piece of animal welfare legislation, but rather an attempt to suppress the practice of Santeria, a religion that incorporates animal sacrifice in many of its rituals. *See Lukumi*, 508 U.S. at 524. The Supreme Court noted that the emergency sessions that led to the ordinance, held immediately after a Santeria church first tried to open in town, were rife with unrestrained hostility. Council members referred to supposed Biblical prohibitions on animal

sacrifice except for consumption and asked "What can we do to prevent the Church from opening?" *Id.* at 541. Further, the audience cheered these remarks and taunted the president of the Church, and the chaplain of the city police department called Santeria "an abomination to the Lord." *Id.* at 541-42.

Additionally, the Supreme Court found that, although the ordinance itself was ostensibly concerned with animal welfare, it clearly reflected the hostility demonstrated during the emergency sessions. Its restriction on animal killing was limited to "sacrifice," and was further limited to the context of "a public or private ritual or ceremony." *Id.* at 527. Although it did not apply if the killing was "for the primary purpose of food consumption," or if the animals were "specifically raised for food purposes," the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as would often happen in Santeria rituals. *Id.* at 527-28. As the Supreme Court noted, the "net result" of these definitions was that "few if any killings of animals are proscribed other than Santeria sacrifice. ... Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. This "gerrymander" of the ordinance, *id.*, along with the striking hostility at the public meetings, left the Court with only "one conclusion: The ordinances had as their object the suppression of religion." *Id.* at 542.

In *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018), the plaintiff, Catholic Social Services ("CSS"), and the defendant, the Philadelphia Department of Human Services ("DHS"), entered into a contract for CSS to provide foster care services to the city in exchange for public funding, such services to include screening, training, and certifying resource caregivers (foster parents) to "provide certified resource homes." *Fulton*, 320 F. Supp. 3d at 670. The contract included some limited reasons that CSS might refuse to provide services, along with

the following provision: "Provider is in compliance with the laws, ordinances, regulations and executive orders" including the Fair Practices Ordinance ("FPO"), which states that "[provider shall not] discriminate or permit discrimination against individuals in ... public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of ... sex, sexual orientation, gender identity, marital status, familiar [sic] status." *Id.* at 671. Breach of this covenant would permit DHS to suspend the contract. *Id.*

In March 2018, DHS became aware that CSS was refusing to provide services to same-sex couples. James Amato from CSS acknowledged "that CSS would not provide these services on religious grounds" and that under CSS policy they "(1) would not certify same-sex couples as prospective foster parents even if [they] were otherwise eligible ... and (2) would not provide a same-sex couple with a home study as part of [their] application for adoption." *Id.* DHS suspended CSS's intake of new referrals. CSS filed suit alleging, among other things, that DHS' suspension of referrals of new children to CSS' care violated its free speech rights. *See id.* at 669.

In denying the motion for preliminary injunctive relief, the district court first found that the Fair Practices Ordinance that was incorporated into the services contract was, on its face, a neutral law of general applicability under *Smith* and, therefore, rational basis review applied to determine its constitutionality. *See id.* at 682-83. Initially, the court concluded that the Services Contract and the Fair Practices Ordinance were neutral with respect to religion because there was no evidence that either were drafted or enacted with the object "to infringe upon or restrict practices because of their religious motivation." *Id.* at 683 (quoting *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275) (emphasis in original). The court found that both demonstrated neutrality in that no reference to religion was made other than that they both

prohibited discrimination on the basis of religion. *See id.* Further, the court looked to the legislative history of the Fair Practices Ordinance in finding that it was a neutral law. *See id.*

In finding that the Services Contract and Fair Practices Ordinance were generally applicable, the court noted that they do not "'proscribe particular conduct only or primarily when religiously motivated;' they proscribe only CSS's ability to turn away qualified Philadelphians on the basis of particular character traits without regard to secular or religious reasons." *Id.* (quoting *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275) (other citation omitted). "As applied in this case, the Services Contract and Fair Practices Ordinance were, in fact, implemented in a general manner. Not only has DHS confirmed that it would not permit any foster agency under contract, faith-based or not, to turn away potential foster parents for the foster parents' characteristics under the Services Contract and Fair Practices Ordinance, DHS also closed intake of new referrals by CSS and Bethany Christian Services for the same reason. This evidence supports the conclusion that DHS and Philadelphia are not applying the Services Contract or the Fair Practices Ordinance to target particular religious denominations for any religious reason." *Id.* at 684.

Having concluded that the Services Contract and Fair Practices Ordinance were facially neutral and generally applicable, and that they were applied in a neutral and generally applicable manner, the court in *Fulton* found that they were rationally related to a number of legitimate government objectives. *See id.* These objectives included the following: (1) ensuring that when contractors agree to terms in a government contract, the contractors adhere to those terms; (2) ensuring that when its contractors voluntarily agree to be bound by local laws, those laws are enforced; (3) ensuring that when DHS and Philadelphia employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the

services; (4) ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers; (5) ensuring that individuals who pay taxes to fund government contractors are not denied access to those services; and (6) avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples. *See id.* at 684-85. As such, the court found that the Services Contract and Fair Practices Ordinance survived rational basis review and denied the application for preliminary injunctive relief. *See id.*

After the district court denied the motion for injunctive relief, CSS appealed. On April 22, 2019, the Third Circuit upheld the district court's decision. *See Fulton v. City of Philadelphia*, ___ F.3d ___, 2019 WL 1758355 (3d Cir. 2019). In affirming the district court, the Third Circuit rejected CSS's claims that the application of the anti-discrimination clause is impermissible under *Smith* and its progeny. *See id.* at *7-*9. In those cases, the courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct. *See id.* at *7 (citing *Masterpiece Cakeshop*, 138 S. Ct. 1719); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). The Third Circuit found that these cases "clarify *Smith* by reaffirming that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application." *Id.* Therefore, a challenger under the Free Exercise Clause must show that it was treated differently because of its religion. *See id.* "Put another way, it must show that it was treated more harshly than the

government would have treated someone who engaged in the same conduct but held different religious views." *Id.*

Summarizing the issue to be decided and its ultimate conclusion, the Third Circuit held as follows:

The question in our case, then, is whether CSS was treated differently because of its religious beliefs. Put another way, was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, that question has a clear answer: no. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

Id. at *10.

As the cases above make clear, evolving First Amendment jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion.

"Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719, 1731 (2018) (internal quotation marks and citation omitted); *see id.* at 1729-31 (citing hostile comments from members of the Colorado Civil Rights Commission and the commission's inconsistent treatment of religious discrimination and sexual-orientation discrimination to conclude that the commission's treatment of a cake shop owner "violated the [s]tate's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *Trump v. Hawaii*, ___ U.S. ___, 138 S. Ct. 2392,

2417 (2018) (considering extrinsic evidence of anti-Muslim animus when determining the constitutionality of a presidential proclamation).

In the present matter, contrary to New Hope's assertions in its motion for preliminary injunctive relief and response to the motion to dismiss, 18 N.Y.C.R.R. § 421.3(d) is, on its face, "neutral and generally applicable" and, therefore, subject to rational basis review. In its complaint, New Hope alleges that the "regulation was adopted for the purpose of targeting faith-based adoption ministries," that OCFS promulgated the regulation for the purpose of suppressing faith-based policies such as those of New Hope, which it found objectionable, and that the regulation is "not neutral or generally applicable as applied." Dkt. No. 1 at ¶¶ 9, 204, 248.

On its face, 18 N.Y.C.R.R. § 421.3(d) is generally applicable and it is plainly not the object of the regulation to interfere with New Hope's, or any other agency's, exercise of religion. The regulation states that "[a]uthorized agencies providing adoption services shall ... prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." 18 N.Y.C.R.R. § 421.3(d). The regulation applies to all authorized agencies, regardless of any religious affiliation.

Moreover, section 421.3(d) is neutral. In determining the neutrality of a law or regulation, a court may consider, among other things, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members

of the decisionmaking body." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993) (citation omitted). "These objective factors bear on the question of discriminatory object." *Id.* (citation omitted).

Nothing before the Court supports the conclusion that section 421.3(d) was drafted or enacted with the object "to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. The plain language of the regulation demonstrates its neutrality, which makes no reference to religion, other than to prohibit religious discrimination. Further, as discussed in more detail above, the actions of OCFS leading up to the promulgation of section 421.3(d) further support a finding of neutrality. After New York codified the right to adopt by unmarried adult couples and married adult couples regardless of sexual orientation or gender identity, the communications from OCFS indicate that it could not "contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent." Moreover, in discussing the purpose of the regulation, OCFS stated that it was to "[p]rohibit[] discrimination on the basis of sexual orientation, gender identity or expression in essential social services." N.Y.S. Register, Nov. 6, 2013, p.3.

The rule making documents and subsequent OCFS Information Letters clearly set forth the intent of section 421.3(d). When read in connection with the explicit intended purpose of the regulation and the established law relating to adoption, the allegations that New Hope's religious beliefs are incidentally affected by the regulation are insufficient for the Court to find that New Hope has pled a plausible First Amendment free exercise claim. Absent from the complaint and submissions in support of the motion for a preliminary injunction are any allegations of type of hostility or bias demonstrated in *Masterpiece Cakeshop* or *Lukumi*. Rather, the facts before the

Court more closely align with *Fulton*, where the Third Circuit found that the plaintiff was unlikely to succeed on its claim because the record demonstrated that the defendant respected the plaintiff's sincerely held beliefs while enforcing the anti-discrimination provision at issue.

New Hope further argues that "the Regulation is not neutral or 'generally applicable' because it exists within a framework that makes numerous exceptions to OCFS's supposed antidiscrimination policy, permitting and even requiring 'discrimination' in many contexts based on many factors including secular, religious, and racial, as well as based on the very wide individualized discretion of the evaluating agency concerning the fitness of the would-be adoptive parents, all in service of the foundational goal of the best interests of the child." Dkt. No. 36 at 13 (citing Dkt. No. 1 at ¶¶ 172-81, 248-49, 262). Contrary to New Hope's suggestion, these "exceptions" to the anti-discrimination policy do not render the regulation non-neutral or generally applicable. New Hope cites to provisions in the regulations that require authorized agencies to consider things such as the "age of the child and of the adoptive parent(s); ... the cultural, ethnic, or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such background as one of a number of factors used to determine best interests." 18 N.Y.C.R.R. § 421.18. However, as the Third Circuit found in *Fulton*, there are significant differences between New Hope's refusal to recommend or place children with unmarried couples or same sex couples as adoptive parents and the requirement for authorized agencies to consider such things as the race of the child and prospective adoptive parents in determining the best interests of the child. *See Fulton*, 2019 WL 1758355, at *11. Most significantly, unlike New Hope's practice, the cited provisions do not permit authorized agencies to refuse to work with individuals because of their membership in a protected class. Instead, the cited provisions are clearly intended to find the best fit for each child, "taking the whole of that

child's life and circumstances into account." *Id.* Further, nothing in the record suggests that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class.

New Hope also contends that "the *enforcement* of the Regulation has been decidedly non-neutral, 'target[ing] and show[ing] hostility towards ... New Hope because of its religious beliefs and practices,' ... demanding that New Hope 'compromise' its beliefs as a condition of staying open, ... and revoking approval of multiple faith-based agencies because of their faith-based policies concerning the families with whom they place children." Dkt. No. 36 at 13-14 (quoting Dkt. No. 1 at ¶¶ 236, 192, 202-03). Further, New Hope contends that "OCFS's targeting of and hostility towards New Hope because of its faith-based policy is further demonstrated by OCFS's threat to revoke New Hope's license even though this threat is contrary to law – which authorizes OCFS to order a licensed agency to cease providing services *only* in the event that it makes findings of abuse which OCFS has not made – and could not make – with respect to New Hope." *Id.* at 14 (citing Dkt. No. 1 at ¶¶ 200, 251).

This is a common theme present throughout New Hope's submissions. Basically, New Hope's argument can be broken down as follows: OCFS is targeting New Hope because it discriminates against same-sex couples and unmarried opposite-gender couples; New Hope is discriminating against same-sex couples and unmarried opposite-gender couples because of its religious beliefs; therefore, OCFS is targeting New Hope for its religious beliefs. This syllogism, however, runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from neutral, generally applied legal requirements. The fact that New Hope's conduct springs from sincerely held and strongly felt religious beliefs does not imply that OCFS's decision to regulate that

conduct springs from antipathy to those beliefs. "If all comment and action on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well." *Fulton*, 2019 WL 1758355, at *12.

Having concluded that section 421.3(d) is facially neutral and generally applicable, and that it has been neutrally and generally applied in this case, the Court concludes that OCFS's enforcement of it is rationally related to a number of legitimate government objectives. These legitimate government interests include the following: (1) ensuring that when OCFS authorizes agencies to provide important governmental services, those services are accessible to all New York State citizens who are otherwise qualified for those services; and (2) in the context of foster care and adoption, ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. *See Fulton*, 320 F. Supp. 3d at 684-85.

In sum, New Hope has failed to plausibly allege a free exercise claim. 18 N.Y.C.R.R. § 421.3(d) has not been "gerrymandered" as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or the kind of animosity against religion found in *Masterpiece Cakeshop*. As such, OCFS's motion to dismiss is granted as to New Hope's free exercise claim and New Hope's motion for preliminary injunctive relief is denied as moot.

C. Free Speech

Although far from clear, in its complaint, New Hope appears to assert violations of its rights to be free from compelled speech and expressive association. *See* Dkt. No. 1 at ¶¶ 264-78. The Court will address each claim in turn.

1. Compelled Speech

In support of its First Amendment claim, New Hope contends that 18 N.Y.C.R.R. § 421.3(d) is unconstitutional as applied to it insofar as it forces New Hope to change the content of its message. *See* Dkt. No. 36 at 19 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943)). New Hope alleges that its beliefs lead it to "recommend married opposite-sex couples and truly single individuals as adoptive parents, *see* Dkt. No. 1 at ¶ 269, and that because of those same beliefs it cannot endorse "unmarried couples or same-sex couples as adoptive parents." *Id.* at ¶ 153. "The Regulation, as OCFS seeks to apply it against New Hope, would compel New Hope to radically alter the content of its speech, forcing New Hope to say to both the State and to birthmothers, 'We do believe that adoption by this unmarried or same-sex couple would be in the best interests of this child,' when in fact New Hope believes it would not be." Dkt. No. 36 at 20 (quoting Dkt. No. 1 at ¶¶ 153, 269-273).

The Supreme Court has advised that courts must examine the purpose of a government program when analyzing whether a government condition to participate in the program is constitutional under the First Amendment. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Where the purpose of the program is to facilitate private speech, rather than to promote a government message, the restriction violates the First Amendment if speech is a prerequisite of participation in the program. *See id.* at 542-43.

In *Velazquez*, a group of lawyers employed by the New York City Legal Services Corporation, sought a declaration that Congress's imposition of a funding condition on legal services under the Legal Services Corporation Act was an unconstitutional restriction of their freedom of speech. *See Velazquez*, 531 U.S. at 536. Congress' funding condition prohibited legal services corporations' use of federal funds to "amend or otherwise challenge existing welfare law." *Id.* In ruling that the funding condition of the Legal Services Corporation Act was

unconstitutional, the Supreme Court focused on the purpose of the law. The law was "designed to facilitate private speech, not promote a governmental message." *Id.* at 542. Indeed, advice from legal services corporation attorneys to their clients, the Supreme Court concluded, "cannot be classified as governmental speech even under a generous understanding of the concept." *Id.* at 543.

In the present matter, OCFS's purpose in authorizing agencies to provide adoption and foster care services is for such agencies to provide adoption and foster care services. The process of authorizing such agencies here, in contrast to *Velazquez*, is not intended to create a forum for private speech or to facilitate private speech. Adoption agencies like New Hope were authorized to perform governmental functions for OCFS. That New Hope's work as an authorized agency is governmental in nature is further supported by the fact that OCFS provides regular oversight of its authorized agencies and, in fact, provides the same services through state operated adoption agencies. As the court found in *Fulton*, New Hope's work as an authorized agency is an extension of OCFS's own work and New Hope's speech, to the extent any is required when performing its services as an authorized agency, constitutes governmental speech under *Velazquez*. *See Fulton*, 320 F. Supp. 3d at 697; *see also Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 840 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2007). Therefore, OCFS is permitted to "take legitimate and appropriate steps to ensure that its message," that adoption and foster care services are provided to all New Yorkers consistent with anti-discrimination policy set forth in 18 N.Y.C.R.R. § 421.3(d), was and is "neither garbled nor distorted by" New Hope.

Further, the Court finds that, even assuming *Velazquez* does not apply to the present matter, New Hope's compelled speech claim must still be dismissed because OCFS and the regulation simply do not compel speech. New Hope argues that "requiring New Hope to work

with, counsel, and recommend unmarried and same-sex couples 'would, at the very least, force [New Hope] to send a message, both to [other adoptive parents, to birthparents] and to the world, that [New Hope] accepts' such relationships as appropriate and believes that adoption by such couples can be in the best interests of the child." Dkt. No. 36 at 24 (quoting *Dale*, 530 U.S. at 653). Contrary to New Hope's contention, no such message is being compelled. Rather, application of section 421.3(d) to New Hope simply prohibits discrimination against potential adoptive parents on the basis of marital status and sexual orientation. In approving an unmarried or same sex couple for adoption, the only message that would be conveyed is that, applying the regulatory criteria set forth above, placement with such a couple would be in the child's best interest.

Although not entirely clear from the face of the complaint, at oral argument, New Hope's counsel clarified that the free speech claim that they are attempting to raise is not that the adoption itself is the expressive activity, but rather the "ministry" that New Hope engages in on an ongoing basis. *See* Transcript of Oral Argument dated Feb. 19, 2019 ("Tr.") at 27. However, as the complaint and other evidence before the Court makes clear, OCFS is not prohibiting New Hope's ongoing ministry in any way or compelling it to change the message it wishes to convey. New Hope is not being forced to state that it approves of non-married or same sex couples. Rather, the only statement being made by approving such couples as adoptive parents is that they satisfy the criteria set forth by the state, without regard to any views as to the marital status or sexual orientation of the couple.

Given the extensive religious ministry and information provided to potential adoptive parents, there is no doubt that New Hope's general disapproval of cohabiting unmarried couples and same sex couples will continue to be made clear. Indeed, nothing is preventing New Hope

from continuing to share its religious beliefs throughout the entire process. All that is forbidden is discrimination against prospective adoptive parents on the basis of their marital status and/or sexual orientation. *See Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090, 1119 (D. Minn. 2017) ("The simple ability to disclaim support for same-sex marriage sets this case apart from *Hurley*, where there was not a practicable way to disclaim support of participants' messages in the context of a moving parade") (citing *Hurley*, 515 U.S. at 576-77, 115 S. Ct. 2338).

Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's compelled speech claim.

2. Expressive Association

Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—the freedom to associate. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("F.A.I.R."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Healy v. James*, 408 U.S. 169 (1972). The freedom to associate assures that the majority (or a powerful or vocal minority) cannot force its views on groups that choose to express unpopular ideas. *See Dale*, 530 U.S. at 647-48. Government action may impermissibly burden the freedom to associate in a variety of ways; two of them are "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group." *Roberts*, 468 U.S. at 623.

The Supreme Court has held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* Freedom to associate "plainly presupposes a freedom not to associate." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623, 104 S. Ct. 3244). When the

government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person "affects in a significant way the group's ability to advocate" its viewpoint, the government has infringed on the group's freedom of expressive association. *Dale*, 530 U.S. at 648. However, "the freedom of expressive association, like many freedoms, is not absolute." *Id.*; *see also Roberts*, 468 U.S. at 623. Infringements on expressive association are subject to strict scrutiny; the right of expressive association "may be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623, 104 S. Ct. 3244).

In *Dale*, the Boy Scouts revoked the membership of an "adult scout" who was openly gay, and the scout sued under New Jersey's Law Against Discrimination ("LAD"), which prohibits discrimination based on sexual orientation in places of public accommodation. *See Dale*, 530 U.S. at 645. The Boy Scouts argued that the LAD violated its First Amendment right to associate for expressive purposes. *Id.* at 643. Applying a three-step analysis, the Supreme Court held that the First Amendment protected the Boy Scouts' right to control its membership. First, it determined that the Boy Scouts was an expressive association because its purpose was to "instill values in young people." *Id.* at 649-50. Next, the Court evaluated "whether the forced inclusion of [the expelled scout] would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 650. It determined that the Boy Scouts' official position was that homosexuality was immoral and that requiring the Boy Scouts to admit the expelled scout would "interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs." *Id.* at 655-56. Finally, the Court analyzed whether the LAD was narrowly tailored to a compelling interest. *See id.* at 656-57. Although the Supreme Court noted that eliminating discrimination

can be a compelling state interest, it concluded that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scout's freedom of expressive association." *Id.* at 654.

Similarly, in *Hurley*, the Court held that Massachusetts' public accommodations law could not be constitutionally applied to force a Boston St. Patrick's Day parade organization to accept a parade unit marching under the banner of an Irish gay and lesbian group. The Court held that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with a message of their own." *Hurley*, 515 U.S. at 578. This, the Court said, "is a decidedly fatal objective." *Id.* at 579.

In the present matter, the Court finds that New Hope's reliance on *Dale* is misplaced. The slight impairment to New Hope's expressive activity does not approximate the level of harm that triggered the Supreme Court's concern in *Dale*. Whereas, according to the Court, requiring admission of homosexuals to the Boys Scouts would be tantamount to promoting homosexual conduct, a clear violation of that organization's values, New Hope has not alleged facts demonstrating a similar harm that providing adoption services to unmarried or same sex couples would cause to their organization. New Hope is not being required to hire employees that do not share their same religious values. They are not prohibited in any way from continuing to voice their religious ideals. Rather, as in *Roberts* and *Bd. of Dirs. of Rotary Int'l.*, "the enforcement of [the regulation] would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657.

In any case, even if the application of the regulation worked a significant impairment on New Hope's association rights, the state's compelling interest in prohibiting the discrimination at

issue here far exceeds any harm to New Hope's expressive association. As such, the Court grants OCFS's motion to dismiss as to New Hope's expressive association claim.

D. Equal Protection²

1. Selective Enforcement

"To state a selective enforcement claim, plaintiffs must plead facts that allow the court to reasonably infer 'that (1) ... compared with others similarly situated, [they were] selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Joglo Realties, Inc. v. Seggos*, 229 F. Supp. 3d 146, 152-53 (E.D.N.Y. 2017) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980)). "[T]he precise standard for determining whether comparators are similarly situated for' purposes of a selective enforcement claim is an unsettled question in this circuit." *Id.* at 153 (quoting *Mosdos Chofetz Chaim, Inc. v. Vill of Wesley Hills*, 815 F. Supp. 2d 679, 693 (S.D.N.Y. 2011)).

Some district courts have held that the standard in selective enforcement cases is the same as that in "class of one' cases," which, as explained in more detail below, require plaintiffs to "show an extremely high degree of similarity between themselves and [their comparators]." *Ruston v. Town Bd. for Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (quoting *Clubsides, Inc. v.*

² In its complaint, the language used makes clear that New Hope's equal protection claim was being brought as either a selective enforcement or class-of-one claim. *See* Dkt. No. 1 at ¶¶ 280-87. In its response to OCFS's motion to dismiss, New Hope has conceded that it is not alleging a class-of-one equal protection claim. *See* Dkt. No. 36 at 28. New Hope then proceeds to present a convoluted theory of an equal protection violation that is entirely inapplicable to the present matter. As OCFS correctly notes, the complaint is properly construed as alleging a selective enforcement claim. Nevertheless, the Court will also address the claim that New Hope has presented in its response.

Valentin, 468 F.3d 144, 159 (2d Cir. 2006)); *see also Kamholtz v. Yates Cty.*, No. 08-CV-6210, 2008 WL 5114964, *5 (W.D.N.Y. Dec. 3, 2008).

"Other courts have applied a slightly more lenient standard, asking whether plaintiffs are similarly situated to comparators 'in all material respects.'" *Joglo Realties, Inc.*, 229 F. Supp. 3d at 153 (quotation and other citation omitted). To satisfy this standard, "plaintiffs 'must identify comparators whom a prudent person would think were roughly equivalent, but plaintiffs need not show an exact correlation between themselves and the comparators.'" *Id.* (quotation omitted). In other words, "[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.... Exact correlation is neither likely nor necessary, but the cases must be fair congeners.... [A]pples should be compared to apples." *Id.* (quoting *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F. Supp. 2d 455, 463 (E.D.N.Y. 2002)) (other citation omitted).

In the present matter, even applying the more lenient standard, New Hope has failed to plausibly allege a selective enforcement claim. Based on the allegations in the complaint, section 421.3(d) applies to all agencies authorized by OCFS to provide adoption services and, therefore, New Hope has failed to allege a sufficiently similar comparator as required to state an equal protection claim. *See King v. N.Y.S. Div. of Parole*, 260 Fed. Appx. 375, 380 (2d Cir. 2008) (affirming dismissal of claim because the plaintiff "failed to identify a single individual with whom he can be compared for Equal Protection purposes"). New Hope's allegations of disparate treatment state that "Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because" (1) "faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating" and (2) "parents adopting children are permitted to take into account

protected classes and characteristics but in facilitating the adoption New Hope is not." Dkt. No. 1 at ¶¶ 282-83. Neither of these allegations support a selective enforcement claim.

To allege a sufficient comparator, a plaintiff must allege, at a minimum, that it is similarly situated to such a comparator in all material respects. Here, New Hope fails to allege that any other "faith based or secular adoption provider" violated section 421.3(d) and was nonetheless permitted to continue operating its adoption program. It has not alleged that other authorized agencies are being permitted to summarily exclude individuals authorized to adopt from the pool of prospective adoptive parents. Additionally, it has not alleged that any other authorized agencies are refusing to apply the relevant statutory and regulatory factors when determining whether approval of a family's application to adopt would be in a child's best interest. Instead, New Hope alleges only that the general applicability of section 421.3(d) incidentally touches on its beliefs. Such allegations are insufficient to support the inference that New Hope is (1) intentionally being treated differently from other authorized adoption agencies without a rational basis, *see Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 140 (2d Cir. 2010), or (2) intentionally being treated differently because of a protected consideration, *See Joglo Realities, Inc.*, 229 F. Supp. 3d at 152-53.

Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's selective enforcement claim.

2. Intentional Discrimination

"The Equal Protection Clause prohibits the government from subjecting individuals to 'selective treatment ... based on impermissible considerations such as ... religion.'" *American Atheists, Inc. v. Port Auth. of N.Y. and N.J.*, 936 F. Supp. 2d 321, 338 (S.D.N.Y. 2013) (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 166 (2d Cir. 2001)) (other citation omitted).

"To prove an equal protection violation, claimants must prove purposeful' or intentional 'discrimination by a government actor directed at a suspect class, such as' a religious group." *Id.* (quoting *Congregation Rabbinical Coll. of Tartikov, Inc.*, 915 F. Supp. 2d 574, 615 (S.D.N.Y. 2013)) (other citations omitted); *see also Thomas v. City of New York*, 143 F.3d 31, 37 (2d Cir. 1998). This intentional discrimination may be demonstrated in one of three ways: "by pointing to [1] a law that expressly classifies on the basis of [religion], [2] a facially neutral law or policy that has been applied in an unlawfully discriminatory manner, or [3] a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus." *Pyke v. Cuomo*, 567 F.3d 74, 76 (2d Cir. 2009) (quotation omitted).

If claimants can demonstrate such intentional discrimination on the basis of religion, the government action is "subject to strict judicial scrutiny." *Id.* at 77. Absent evidence of intentional discrimination, the government action is subject to rational basis review. *See Abascal v. Jarkos*, 357 Fed. Appx. 388, 391 (2d Cir. 2009); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 237 (S.D.N.Y. 2005). Rational basis also applies to classifications that do not involve fundamental rights. *See Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) ("A classification must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (applying rational basis to "a statute [that] is neutral on its face ... and passes the *Lemon* test"); *Red Earth LLC v. United States*, 657 F.3d 138, 147 (2d Cir. 2011). And, absent allegations of "'adverse treatment of individuals compared with other similarly situated individuals' based on religion," an Equal Protection claim fails. *Incantalupo v. Lawrence Union Free Sch. Dist.*, 380 Fed. Appx. 59, 62 (2d Cir. 2010) (quoting *Miner v. Clinton County*, 541 F.3d 464, 474 (2d Cir. 2008)).

In the present matter, the Court first notes that the facts upon which New Hope relies in support of its equal protection claim are the same as those alleged in support of its First Amendment claims. As such, New Hope's equal protection claim is subject to dismissal as duplicative of its First Amendment claims. *See Barnes v. Fedele*, 760 F. Supp. 2d 296, 302 (W.D.N.Y. 2011) (dismissing the plaintiff's equal protection claim as duplicative of his First Amendment free-exercise claim) (citations omitted); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (dismissing equal protection and Eighth Amendment claims based on same circumstances as a free exercise claim because the free exercise claim "gains nothing by attracting additional constitutional labels"); *Frisenda v. Incorporated Vill. of Malverne*, 775 F. Supp. 2d 486, 518 (E.D.N.Y. 2011) ("Similarly, to the extent that plaintiff also may be attempting to assert an equal protection claim based upon retaliation for First Amendment activity (rather than under a class-of-one theory), such a claim is completely duplicative of the First Amendment retaliation claim and, therefore, should not go forward") (citations omitted); *Whitehead v. City of New York*, 953 F. Supp. 2d 367, 377 (E.D.N.Y. 2012) (same); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that courts should analyze similar claims under the most "explicit source[s] of constitutional protection"). Indeed, the allegations in New Hope's equal protection claim rely almost exclusively on the fact that OCFS's conduct and application of section 421.3(d) violate its various First Amendment rights. *See* Dkt. No. 1 at ¶ 282 ("Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating"); *id.* at ¶ 283 ("Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because parents adopting children are permitted to take into account protected classes and

characteristics but in facilitating the adoption New Hope is not"); *id.* at ¶ 284 ("Section 421.3(d) violates New Hope's fundamental rights, including its free exercise, free speech, and expressive-associational rights"); *id.* at ¶ 286 ("Forcing New Hope to recommend and facilitate placement with same-sex couples or unmarried couples, in violation of its religious beliefs, does not serve any interest in a narrowly tailored way"); *id.* at ¶ 287 ("Defendant has alternative, less restrictive means to achieve any legitimate interests rather than forcing New Hope to abandon its First Amendment rights"); *id.* at ¶ 289 ("In addition, there is no rational basis for requiring New Hope to violate its religious beliefs in order to continue performing adoption services"). Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's equal protection claim.

Even assuming that this aspect of New Hope's equal protection claim was not duplicative of its First Amendment claims, it is nevertheless still subject to dismissal because New Hope has failed to allege any facts plausibly suggesting that section 421.3(d) or OCFS expressly classifies on the basis of religion, that section 421.3(d), which is a facially neutral law, has been applied in an unlawfully discriminatory manner, or that a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus. *See Pyke*, 567 F.3d at 76.

"Discriminatory purpose implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999) (internal quotation marks and emphasis omitted). Though the desire to discriminate need not be the sole motivating factor, *see Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), it must be "a significant reason for a public body's actions," *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 786 (2d Cir. 2007).

Here, rather than allege a discriminatory purpose because of New Hope's religious beliefs, the complaint makes clear that OCFS's actions were in spite of them. After reviewing New Hope's adoption program, OCFS praised many aspect of the program and expressed a desire to resolve the issues identified in a way in which New Hope is able to continue providing adoption services. Such facts clearly fail to demonstrate a discriminatory purpose.

In establishing discriminatory effect, a plaintiff is not "obligated to show a better treated, similarly situated group of individuals." *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) (holding that a plaintiff who alleges "that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus ... is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection"). Indeed, the courts "recognize[] that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose." *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 546 (S.D.N.Y. 2006).

Again, for all the reasons set forth above, nothing in the complaint plausibly alleges that OCFS was motivated by a discriminatory animus. The complaint make clear that the only purpose behind OCFS's actions was to prevent unlawful discrimination on the basis of marital status and sexual orientation. The complaint further alleges that OCFS enforced or was in the process of enforcing section 421.3(d) against other faith-based providers, including "several Catholic providers, a Jewish provider, an LDS [(Latter Day Saints)], and a Muslim provider" who shared New Hope's beliefs "concerning life, marriage, the family, and human sexuality." Dkt. No. 1 at ¶¶ 202-03. Such consistent enforcement of this neutral regulation against other authorized agencies engaging in the same discriminatory conduct as alleged here renders New Hope's allegation of discriminatory animus implausible.

Since New Hope has failed to allege intentional discrimination, rational basis review applies. As set forth above, OCFS has several legitimate governmental interests in enforcing section 421.3(d) and, therefore, New Hope's equal protection claim is subject to dismissal on this alternative ground.

E. Unconstitutional Conditions

"Pursuant to this 'unconstitutional conditions' doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Alliance for Open Society Intern., Inc. v. U.S. Agency for Intern. Dev.*, 651 F.3d 218, 231 (2d Cir. 2011) (citation omitted); *see also Perry v. Sindermann*, 408 U.S. 593 (1972). "As the Supreme Court recently reiterated, 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" *Id.* (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)).

New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." Dkt. No. 1 at ¶ 295. The Court views New Hope's unconstitutional conditions claim as a mere repackaging of its various First Amendment claims and, therefore, the Court similarly repackages its resolution of those claims. Having already found that New Hope has failed to plausibly allege any violation of its constitutional rights, the Court grants OCFS's motion to dismiss as to New Hope's unconstitutional conditions claim. *See Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 95 (D. Me. 2004).

IV. CONCLUSION

Undoubtedly, New Hope and all authorized adoption agencies perform essential services that greatly impact the lives of thousands of children who, without such organizations, would grow up without a home. As New Hope notes in its complaint, there are over 440,000 children in foster care in the United States, with over 120,000 of those children waiting to be adopted. *See* Dkt. No. 1 at ¶¶ 29-30. In federal fiscal year 2017, New York had 27,268 children served in foster care, with 19,213 in foster care as of September 30, 2017. *See id.* at ¶ 31. Of those, over 4,400 New York children were waiting to be adopted. *See id.* at ¶ 32. Further, during fiscal year 2017, throughout New York, a total of only 1,729 children were adopted. *See id.* at ¶ 33.

It is clear from the materials before the Court that OCFS does not contend that New Hope is not acting in the best interests of the children when placing these children for adoption. In fact, after OCFS conducted its review on September 6, 2018, Director Sara Simon sent New Hope a letter in which she praised New Hope's strengths in certain areas, including its "strong emphasis on assisting the birth parents in making an informed decision for their newborn, providing them time to make the decision, along with a supportive and detailed adoptive family selection process." Dkt. No. 1-6 at 3. The issue which led to the present matter is the refusal to provide adoption services to unmarried same sex couples or same sex couples regardless of marital status.

The gratitude owed to all those working to better the lives of New York's most vulnerable children is too great to convey in words. While such gratitude is ultimately ineffable, the Court still concludes this Memorandum-Decision and Order by recognizing the parties in this case for their many years of sacrifice and labor.

Until recent events, the parties have had a fruitful relationship; a relationship that has benefitted New York's children in immeasurable ways. For this reason, the Court would prefer that the parties seek out some compromise to their current dispute without further judicial

intervention. As the district court noted in *Fulton*, "[c]reative problem solving through concerted and thoughtful discourse without court intervention is often the best method to avoid what may appear to the parties, or to other persons in the public, to be harsh legal results." *Fulton*, 320 F. Supp. 3d at 668.

Ultimately, OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services. Under *Smith*, the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while New Hope may assert that OCFS's actions were not driven by a sincere commitment to equality, but rather by antireligious bias, the current record does not show religious persecution or bias.

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, the Court hereby

ORDERS that OCFS's motion to dismiss (Dkt. No. 34) is **GRANTED**; and the Court further

ORDERS that New Hope's motion for a preliminary injunction is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in OCFS's favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: May 16, 2019
Albany, New York


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

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

JUDGMENT IN A CIVIL CASE

**NEW HOPE FAMILY SERVICES, INC.,
Plaintiff,**

vs.

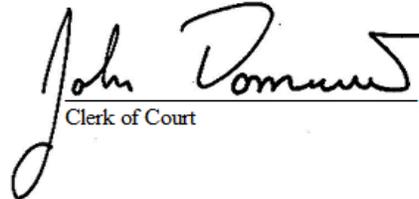
**5:18-CV-1419
(MAD/TWD)**

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

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that OCFS's motion to dismiss (Dkt. No. 34) is **GRANTED**; and the Court further **ORDERS** that New Hope's motion for a preliminary injunction is **DENIED**; and the Court further **ORDERS** that the Clerk of the Court shall enter judgment in OCFS's favor and close this case, all of the above pursuant to the Memorandum-Decision and Order of the Honorable Judge Mae A. D'Agostino, dated the 16th day of May, 2019.

DATED: May 16, 2019


Clerk of Court

s/Britney Norton

Britney Norton
Deputy Clerk

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

NEW HOPE FAMILY SERVICES, INC.,

No.: 5:18-cv-1419-MAD-TWD

Plaintiff,

vs.

NOTICE OF APPEAL

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.

Notice is hereby given that New Hope Family Services, Inc., Plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment and decision of this Court entered on May 16, 2019, granting the Defendant's motion to dismiss and denying Plaintiff's motion for preliminary injunction (Dkt. Nos. 38 & 39).

Dated: June 10, 2019.

Respectfully submitted,

s/Roger G. Brooks

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*Admitted *Pro Hac Vice*

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

Adrienne.Kerwin@ag.ny.gov

s/ Roger G. Brooks
Attorney for Plaintiff