

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

NEW HOPE FAMILY SERVICES,
INC.,

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee.

**NEW HOPE'S REPLY IN SUPPORT OF MOTION TO MODIFY
INJUNCTION PENDING APPEAL**

In its response to New Hope's Motion to Modify Injunction Pending Appeal, the State writes as though New Hope's underlying appeal had not been fully briefed and argued. But it has been. Because New Hope has demonstrated a probability of success on the merits of its First Amendment claims, an injunction preventing the State from enforcing the challenged regulation in order to close New Hope's adoption ministry remains appropriate. Because New Hope has demonstrated that further prolonging the bar on New Hope working with new adoptive couples is likely to severely damage New Hope's ministry in the near future, the modification that New Hope requests is reasonable and appropriate.

The State asserts that New Hope “does not even attempt to demonstrate a likelihood of success on the merits.” (Opp’n to Appellant’s Mot. to Modify the Prelim. Inj. (“Opp’n”), ECF No. 199, at 3–4.) Following entry by this Court of the interim injunction on November 4, 2019, all aspects of the merits of New Hope’s appeal were fully briefed and argued. New Hope believes that it has indeed demonstrated a likelihood of success on the merits, both as to its free speech claim,¹ and as to its free exercise claim.² This record is fully before this Court.

The State next asserts that New Hope has not demonstrated that it will suffer “irreparable harm” unless the injunction is modified. (Opp’n at 4–5.) On the contrary, New Hope has documented how the passage of time and attrition has brought it to the verge of being unable to accept new infants for placement in good conscience, because it will not have an adequate pool of candidate adoptive parents to ensure a good placement, particularly for the hard-to-place infants whom New Hope often serves. (Jerman 6/12/20 Decl., ECF No. 195, at 8–10.) Counsel previewed during oral argument that a prolonged period

¹ See Opening Br. of Appellant New Hope Family Services (“NH Merits Br.”), ECF No. 62, at 38–49, 51–58; Reply Br. of Appellant New Hope Family Services (“NH Merits Rep. Br.”), ECF No. 167, at 14–29; 11/13/19 Hearing Tr. 5–7, 18–21. New Hope has had a certified transcript of the oral argument prepared, and provides that transcript as Exhibit A to this Reply Memorandum.

² See NH Merits Br. at 16–37, 51–58, NH Merits Rep. Br. at 2–14, 27–29; 11/13/19 Hearing Tr. 9–13, 22–23.

subject to the “no new adoptive parents” provision would “kill New Hope by strangulation as surely as the effort by OCFS a few weeks ago would have done.” (11/13/19 Hearing Tr. 15.) New Hope Director Kathy Jerman has explained in detail how this will happen, and that it has begun. This is not “reputational harm”; it is the death knell for New Hope’s ability to continue its historic ministry. And it is not necessary to await a death certificate for New Hope to say that this harm is now “likely,” rather than “remote” or “speculative.” *See Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (per curiam). In any case, New Hope has demonstrated a likelihood of success on the merits, and deprivation of First Amendment rights “for even minimal periods” is “irreparable injury” as a matter of law. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996).

Finally, the State claims that the requested modification will inflict harm on the State and on the public interest. (Opp’n at 6–7.) It will not, for multiple reasons.

First, while the Court previously cited New Hope’s agreement to a short-term ban on accepting new adoptive parents as one factor precluding harm to the public interest, the Court also identified an independent and adequate reason why no material threat to the public interest exists: the absence of any record of even a single couple being prevented from adopting as a result of New Hope’s beliefs and practices. (11/4/19 Order at 4–5.)

Second, the merits have now been fully briefed. If New Hope has demonstrated a likelihood of success on the merits with regard to either its free speech or its free exercise claim, then “the Government does not have an interest in the enforcement of an unconstitutional law.” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (cleaned up). It is for this reason that where a preliminary injunction is sought against an alleged violation of First Amendment rights, “the likelihood of success on the merits is the dominant, if not dispositive, factor.” *Id.*

Third, in making its “public interest” argument, the State misdescribes the adoption function as though children are a mere good or commodity to be steered or delivered so as to meet the desires of *adults*, and fabricates facts along the way. The real “public interest” that must be kept front and center in this case is the one this Court identified in its interim order: “the strong public interest pertaining to adoption services, *i.e.*, *the welfare of children.*” (11/4/19 Order at 4 (emphasis added).)

As to the facts, the State claims that “there is an especially high demand for the adoption placement services that New Hope provides because it primarily places newborns.” There is nothing in the record to support the assertion that the children New Hope places are in “high demand.” What *is* in the record is precisely the opposite, in the declaration of New Hope Director Kathy Jerman, who states:

Because of the situations leading to these last-minute referrals, New Hope often places infants considered “hard to place.” This includes infants born with addiction due to the mother’s addiction, infants with physical disabilities or unusual medical needs, infants whose mothers suffer from mental health problems, and infants of a race different than the race shared by most [] parents seeking to adopt. . . . New Hope has been consistently able to find loving homes even for newborn infants with hard-to-place characteristics. (Jerman 6/19/19 Decl. ¶¶ 9–10.)

Given the uncontradicted and verified allegation that (in an exemplary recent year) New York had over 4,000 children waiting to be adopted, with fewer than 1,800 adopted in that year (Verified Compl., ECF No. 1, ¶¶ 32–33), this argument comes from the State with particularly ill grace. Strangling an adoption agency that works to place children without accepting a dime of state money cannot increase the number of children placed into permanent homes in New York. It can only decrease that number, and children will suffer as a result.

Conclusion

For the reasons set forth above, in New Hope’s opening memorandum and supporting affidavit (ECF No. 195), and in New Hope’s briefs on the merits before this Court (ECF Nos. 62, 167), New Hope respectfully requests that the Court grant its Motion to Modify Injunction Pending Appeal to strike, from the injunction presently in force, the prohibition against New Hope “accept[ing] any new prospective adoptive parents for adoption services.”

Dated: July 2, 2020

Respectfully submitted,

s/Roger G. Brooks

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Dated: July 2, 2020

s/ Roger G. Brooks
Attorney for Appellant

Certificate of Service

I hereby certify that on July 2, 2020, a copy of this reply was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ Roger G. Brooks
Attorney for Appellant

EXHIBIT A

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 NEW HOPE FAMILY SERVICES, INC.,)
5 Plaintiff-Appellant,)
6 v.) CASE NO. 19-1715-CV
7 SHEILA J. POOLE, in her)
8 official capacity as Acting) ORAL ARGUMENT
9 Commissioner for the Office of)
10 Children and Family Services)
11 for the State of New York,)
12 Defendant-Appellee.)
13)
14)
15)
16)
17)

12 TRANSCRIPT OF PROCEEDINGS
13 BEFORE THE HONORABLE JOSÉ A. CABRANES, REENA RAGGI, AND
14 EDWARD R. KORMAN

15
16 November 13, 2019
17

18 TRANSCRIBED FROM AUDIO RECORDING
19 (File: 2019.11.13 NHvP Oral Argument 19-1715.mp3.)
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1 BE IT REMEMBERED that Oral Argument was held at
2 the Thurgood Marshall US Courthouse, 40 Foley Square,
3 New York, New York, commencing on the 13th day of
4 November 2019.

5

6 BEFORE: José A. Cabranes
7 Reena Raggi
8 Edward R. Korman

8

9 APPEARANCES:

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11 Inc.:

11

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1 (Commencement of audio recording file labeled
2 2019.11.13 NHvP Oral Argument 19-1715 at 00:00:00.)

3 JUDGE CABRANES: Good afternoon. We have one
4 case for argument today, which is New Hope Family
5 Services Incorporated versus Poole.

6 We'll hear from Counsel.

7 MR. BROOKS: Your Honor, this is Roger Brooks
8 with Alliance Defending Freedom, for New Hope Family
9 Services.

10 There are currently 20,000 children in foster
11 care in the state of New York, of whom 4,000, at any
12 given time, are qualified and waiting for adoption, and
13 less than half of those will, in fact, be adopted within
14 a year. It's an overstretched system.

15 Faith-based agencies make an outsized
16 contribution to meeting that crisis and --

17 JUDGE CABRANES: Why is that? Is that because
18 there are not enough agencies or not enough people who
19 want them?

20 MR. BROOKS: Your Honor, I think it's -- I think
21 there are waiting lists to adopt as well, so the answer
22 is -- this is not in the allegations of the complaint.
23 I believe the answer is that it's really the nexus.
24 It's the agencies. It's the resources made available by
25 the State and by private services.

1 And the faith-based agencies are just
2 proportionately helpful because they are -- have the
3 ability to reach into faith communities which have a
4 demonstrated disproportionate willingness to adopt
5 hard-to-adopt children, such as those with disabilities
6 and those with -- born with addiction, which is a very
7 large problem in today's world.

8 JUDGE RAGGI: I don't understand your adversary
9 to be disputing, at least at this time, that your
10 placements are done responsibly. They just want you to
11 expand the pool of applicants that you will consider.

12 So why don't you tell us -- I mean, I think you
13 can assume we know some of what you've been emphasizing
14 now. What is your constitutional claim here that you
15 say survives the Motion to Dismiss?

16 MR. BROOKS: Your Honor, of course, and a Motion
17 to Dismiss is inherently complex. I want to -- I would
18 like to emphasize two things.

19 As to free speech, I would say the mask is off.

20 In briefing to this Court, the State has now
21 made very clear that it intends and expects the
22 regulation to compel and censor New Hope's speech. I
23 think that claim survives, and indeed a Preliminary
24 Injunction should be entered on the basis of the free
25 speech claim.

1 JUDGE RAGGI: Well, I expect they're going to
2 dispute that they're compelling speech. So why don't
3 you tell us why you've got a colorable claim that they
4 are?

5 MR. BROOKS: Yes, Your Honor.

6 In our complaint, we alleged New Hope's beliefs
7 about what's faith teachings about marriage and the best
8 interests of children, and further allege that New Hope
9 does and wants to teach that message to both birth
10 mothers that it works with and adoptive couples that it
11 works with.

12 Now, the District Court found that OCFS and the
13 regulation, quote, simply do not compel speech, and that
14 was failing to accept the allegations. But more
15 dramatically, that finding by the Court has since been
16 repudiated by the State in the briefings to this Court.

17 I would call Your Honor's attention to the
18 State's brief filed in opposition to our Emergency
19 Motion for Interim Relief, which is ECF No. 101. And
20 there they said, The regulation does not, quote,
21 restrict New Hope's speech unrelated to its provision of
22 adoption services. And they said the regulation that
23 New Hope is, quote, not precluded from espousing its
24 beliefs about marriage and family outside the contours
25 of its adoption program.

1 Well, that's fairly plain English. And what
2 they're saying there is what we alleged -- that is that
3 the inescapable effect of the regulation is to constrain
4 and to compel New Hope's speech as it deals with birth
5 mothers, as it deals with adoptive couples.

6 It says, No, you can't speak about or advocate
7 your Christian beliefs about marriage and the best
8 family for children to adoptive parents and birth
9 parents, even though they chose to come to you as a very
10 clearly identified Christian ministry. So there's
11 really no more denial of the intent to change what New
12 Hope can say in the midst of what is its reason for
13 existence.

14 How do they try to excuse that? They also don't
15 really -- the State doesn't really defend the District
16 Court's finding that all of New Hope's speech has been
17 ex-appropriated and is now governmental speech.
18 Instead, they argue that it's -- it's okay to censor and
19 compel, because this is speech merely incidental to
20 conduct, and they rely heavily on the Rumsfeld versus
21 Fair case. I claim that case.

22 JUDGE RAGGI: The Certificate of Authorization,
23 which I understand predates this regulation by many
24 years, nevertheless says that you will function in
25 complete cooperation with all existing social welfare

1 agencies. Once the welfare agency defines the pool of
2 people who are qualified to adopt, what are you claiming
3 is the right you have to not cooperate on that point?

4 MR. BROOKS: Well, of course, Your Honor, a
5 general obligation to cooperate can't be leveraged to
6 accomplish unconstitutional ends.

7 JUDGE RAGGI: Mm-hmm.

8 MR. BROOKS: We're claiming that we can't --
9 we're claiming that my client can't be compelled to
10 bring into the discussion that it has -- it has group
11 meetings, it has prayers -- that it can't be compelled
12 to engage in discussions that seem to approve same-sex
13 or unmarried couples as consistent with the best
14 interests of children. It can't be compelled to present
15 those as recommended parents to birth mothers who come
16 to it and entrust their child to it for placement.

17 JUDGE RAGGI: Even the State policy, though, can
18 you be compelled to refer? I know you say you do refer.
19 But can you be compelled to refer, so that if a gay or
20 unmarried couple comes knocking at your door, rather
21 than closing it, you have to refer them?

22 MR. BROOKS: Your Honor, that may present hard
23 questions, and I haven't thought about it, because my
24 client has been happy to do so. So whether -- whether
25 that might be unconstitutional to require one to

1 refer -- I think there have been cases that have arisen
2 in the abortion context that suggest that requiring one
3 to refer -- and certainly there have been cases that say
4 that requiring one to post referral information is an
5 unconstitutional compulsion. So I think that's out
6 there.

7 JUDGE RAGGI: Let me ask you that apropos this
8 particular case, because if we were to agree with you
9 and to vacate the dismissal, you want us also to grant
10 you a Preliminary Injunction; is that right?

11 MR. BROOKS: That is right, Your Honor.

12 JUDGE RAGGI: Now, that Preliminary Injunction,
13 by contrast to the one we have entered, would allow you
14 to continue to pursue new applicants. Am I right? The
15 injunction you want if -- on remand?

16 MR. BROOKS: The injunction that we want on
17 remand, Your Honor, is exactly as the previous
18 injunction, minus Paragraph 2, which restricts my
19 client's ability to take new applicants. Because
20 otherwise, it will kill them --

21 JUDGE RAGGI: Right. So that's not an
22 insignificant difference.

23 So if we were to agree to that -- and I'm not
24 saying we would -- would you also agree to commit
25 yourselves to referrals of any -- any gay or unmarried

1 couples who sought to adopt with you in the interim?

2 MR. BROOKS: Yes, Your Honor.

3 JUDGE RAGGI: Okay.

4 MR. BROOKS: I would like, in the short time
5 available, to point out one other thing, that is that
6 the State has admitted that facts alleged by New Hope
7 plausibly allege animus. We alleged various facts and
8 statements that I can't recite.

9 I'd like to call the Court's attention to the
10 State's brief at page 43 and 44, when they said of those
11 facts that we alleged, they referred to them as, quote,
12 arguably ambiguous and susceptible of different
13 interpretations.

14 I'll take that. If it's arguably ambiguous,
15 then that means that for purposes of the Motion to
16 Dismiss, it's necessary to draw the inference in favor
17 of my client.

18 And thank you, Your Honor. I have reserved.

19 JUDGE CABRANES: You have indeed. But we can go
20 on with some questions then.

21 MR. BROOKS: Yes.

22 JUDGE CABRANES: You can feel more at ease.

23 Let me just ask a few things, so I understand
24 your argument.

25 Religious organizations, they're not excused

1 from complying with valid and neutral laws; right?

2 MR. BROOKS: Well, Your Honor, we have pointed
3 out that there is precedent that suggests that if even a
4 valid neutral law reaches right into the heart of faith
5 and disrupts that, that perhaps the answer is no. And
6 we've referred to the Hosanna-Tabor case. We've
7 referred to the dictum in, I believe, Masterpiece
8 Cakeshop saying, well, of course, the State couldn't
9 require a faith -- a religious organization, a church to
10 perform a same-sex wedding, even though you can readily
11 imagine a facially neutral law that says everybody who
12 is authorized to perform legally valid weddings must
13 perform all legally permitted weddings.

14 So I think the answer is not necessarily. But
15 we're also happy to -- we would also believe that we've
16 alleged facts and, indeed, put in facts that meet the
17 requirements of Smith.

18 JUDGE RAGGI: Is that -- is there a distinction,
19 though, between something such as the marriage ceremony,
20 which is viewed as a sacrament by the faith, and
21 adoption, which is certainly a charitable function that
22 you tie back historically to faith organizations, but is
23 not a required sacrament or ritual of the faith? Is
24 there a difference there?

25 MR. BROOKS: Well, I certainly don't think that

1 the law can turn on what one church or another or faith
2 or another calls a sacrament. The Catholics consider
3 marriage a sacrament; Protestants don't.

4 JUDGE RAGGI: No, no. But I mean, you
5 understand my point here. You're not suggesting that
6 New -- New Hope views this as a religious ritual that is
7 part of its -- part of its expression of faith. Or do I
8 misunderstand?

9 MR. BROOKS: I would say that it is the view --
10 New Hope views it as more important than a religious
11 ritual: That is that the forming of a family, that the
12 placing of a child into the family, the formation of the
13 next generation is frankly central to any major faith
14 system. It is at the very core. And you can kind of go
15 through them and think through the ones that you've
16 encountered. It's at the center.

17 So the marriage ritual is considered a
18 sacrament, not because it's a religious ritual, but
19 because it's forming a family. And by placing children
20 into a family, New Hope does believe that it's engaging
21 something of the utmost human and religious importance.

22 JUDGE RAGGI: But it can only be done pursuant
23 to the laws of the State. As the New York Court of
24 Appeals explained, it didn't even exist at common law.
25 So it's only a matter of State law. That suggests it

1 operates separate and distinct from the religion that
2 seeks to foster it.

3 MR. BROOKS: Well, adoption as -- adoption as a
4 legal thing and adoption as a human thing, I suppose,
5 are not the same. Adoption has existed since time
6 ancient. And faith-based organizations have been taking
7 in families and placing them in homes since time
8 ancient. And I expect to put in expert testimony about
9 that very issue at trial.

10 But the bottom line, I would say, is that when
11 you look at Hosanna-Tabor and when you look at the
12 discussion about performing marriages, what those have
13 in common and what other similar cases have in common is
14 they're about this thing at the heart of human
15 existence, which is family and the formation of the next
16 generation. And that is sacred and protected, we
17 believe, is kind of what the Court is groping at. I do
18 not claim that that is a well-developed area of law or
19 crisply defined.

20 JUDGE CABRANES: Mr. Brooks, let me ask you a
21 question or two. Is there any indication in a time that
22 the regulation was adopted, the OCFS had any specific
23 hostility toward religion?

24 MR. BROOKS: I think the contemporaneous
25 evidence, Your Honor -- and these things unfold fairly

1 quickly -- was I think we've cited a public statement in
2 which they've said, There's no place in New York for any
3 agency that doesn't comply. We've cited them referring
4 to this type of belief as archaic --

5 JUDGE RAGGI: They referred to the regulations
6 as archaic.

7 MR. BROOKS: The regulations are archaic because
8 they embody exactly this belief, which, as you well
9 know, was the legal requirement until not so long ago.
10 So I think that.

11 And then followed up in fairly rapid succession
12 by the statement of the enforcing officer who says other
13 Christian organizations have decided to compromise and
14 stay open.

15 Well, what does that tell you? It tells you
16 somebody is keeping track. They know who this is
17 affecting, they know what the results are keeping, and
18 they know what they're trying to achieve.

19 JUDGE CABRANES: Let me ask you, Mr. Brooks,
20 perhaps if you can recapitulate for us the timeline of
21 proceedings in the District Court. Because I'd like to
22 know how much you've done in the District Court; and
23 also, ultimately what I'd like to ask you to do is focus
24 on the applicable legal standards for preliminary
25 injunctive relief. So why don't you tell me exactly

1 what took place in the District Court.

2 MR. BROOKS: What took place in the District
3 Court, Your Honor, was submission of the complaint,
4 submission of a Preliminary Injunction Motion with
5 attached affidavits; responsive affidavits, which I
6 think as we've pointed out in the brief, say what they
7 say, but don't, in fact, contradict key facts. So the
8 facts are as alleged for that purpose. And then an oral
9 argument -- that is there was no evidentiary hearing;
10 there were no witnesses on the stand.

11 JUDGE CABRANES: Was there a request for an
12 evidentiary hearing?

13 MR. BROOKS: There was not a request for an
14 evidentiary hearing, Your Honor, so --

15 JUDGE CABRANES: That's what -- that's what you
16 seek in any kind of decretal language that we may issue.
17 What is it that you want? Let's look at it that way.

18 MR. BROOKS: What do we want?

19 JUDGE CABRANES: Right.

20 MR. BROOKS: What we would -- what we want is
21 remands to proceed into discovery. I think many of
22 these issues would benefit --

23 JUDGE RAGGI: Vacate the dismissal.

24 MR. BROOKS: Vacate dismissal, grant a
25 preliminary -- instruct the Court to enter a preliminary

1 injunction while we proceed with full-scale litigation,
2 is what we want.

3 And on your point, I should emphasize that what
4 New Hope could -- was happy to agree to as an interim
5 measure, just pending this appeal, that is we will moot
6 the issue of discrimination with applicants by taking no
7 applicants. If that's left in place throughout a
8 discovery and trial period, it will kill New Hope by
9 strangulation as surely as the effort by OCFS a few
10 weeks ago would have done.

11 JUDGE CABRANES: What would you be looking for
12 in discovery?

13 MR. BROOKS: What would we -- we would be
14 probing exactly the question of who has this been
15 enforced in? Or is -- we have limited visibility, and
16 we see that in -- right in this time period that New
17 Hope's being threatened that a number of faith-based
18 organizations disappear off the list of approved
19 organizations.

20 Well, needless to say, we'd like to see internal
21 documentation that goes both to actually the formation
22 of this. What's the proximate cause? Why did they feel
23 the need for this? I think I know the answer, but I
24 haven't had discovery. And then is enforcement
25 targeted? Are they out there doing what they did to New

1 Hope, to faith-based agencies, saying, you know what,
2 everything's good here, and it's all in good order, but
3 we need to see your policies. And that's what happens
4 in New Hope.

5 So we would be looking for evidence of targeting
6 both in its origin and in its enforcement. I think also
7 in the allegation that this policy is furthering, is
8 actually furthering any compelling interest, something
9 that would need to be showed under strict scrutiny is
10 going to be very difficult for the government to prove,
11 and we intend so establish facts that will disprove
12 furthering.

13 JUDGE CABRANES: We'll turn to the standards
14 of -- for injunctive relief. There may be agreement.
15 And we'll ask the government or the State to comment on
16 this, the first prong is irreparable harm. In your
17 view, that's been settled?

18 MR. BROOKS: In our -- in my view, that's
19 settled as a matter of law. That is, if it's likely
20 that there's a violation of first amendment rights, that
21 just is irreparable harm. And frankly, I think the
22 uncontradicted facts, the fact of closure of New Hope,
23 seeing that as irreparable harm is not difficult, but
24 it's also not necessary, because the law is so clear
25 that any deprivation of first amendment rights, even on

1 a temporary basis, is irreparable harm.

2 JUDGE CABRANES: Well, what else do you need to
3 show us here or the District Court on remand in order to
4 secure Preliminary Injunctive relief?

5 MR. BROOKS: The answer, Your Honor, is simply
6 likelihood of success on any one of the claims, any one
7 of the first amendment claims, period.

8 JUDGE CABRANES: That standard is particularly
9 difficult to meet when a party is seeking an injunction
10 against a government.

11 MR. BROOKS: Well, Your Honor, I think that
12 kicks in at -- that rule kicks in when you're talking of
13 balancing of harms. But in the first amendment area, I
14 believe it doesn't. I think the law is clear that if I
15 can show -- if I can convince you that we have a
16 probability of success, then it follows necessarily that
17 there's irreparable harm as a matter of law, and we're
18 done with the Preliminary Injunction analysis.

19 JUDGE RAGGI: The difference between your
20 demonstration of premature dismissal and -- and
21 likelihood of success, though, seems to be something we
22 have to consider. I mean, you've argued that there's
23 ambiguity as to why they passed the regulation and that
24 that should entitle you to discovery. Even if we were
25 persuaded of that, ambiguity doesn't necessarily get you

1 to likelihood of success. How do you satisfy the
2 likelihood of success?

3 MR. BROOKS: Let me tell you what I think are
4 the two strongest points on that. One, in light of the
5 facts alleged, and now frankly admitted by the State
6 with regard to speech -- compulsion of speech in these
7 interactions, I think that you should find a likelihood
8 of success. They say the result of this regulation is
9 we're free to say whatever we want outside the scope of
10 the ministry. That's a major issue.

11 JUDGE CABRANES: And I want to understand your
12 freedom of speech argument. You know at the outset of a
13 process, when a couple appears, whether they're married
14 and heterosexual. What -- what else do you do? I mean,
15 you don't conduct your traditional evaluation because it
16 would be a waste of time given what your bottom-line
17 policy is. So what -- what speech are you -- are they
18 preventing you from engaging in? I just want to
19 understand that.

20 MR. BROOKS: The -- I think the point is if New
21 Hope was required to bring those people into the
22 counseling conference room, then New Hope would be
23 compelled to have any sort of good faith counseling of
24 them to be prepared to be adoptive parents. When New
25 Hope believes that they can't be best interests of the

1 child adoptive parents, it puts New Hope in an
2 impossible situation, which is why the State's exactly
3 right that if this is compelled, then New Hope is left
4 free to say what it really thinks only outside the scope
5 of its adoption service. And if New Hope is compelled
6 to do home studies for these folks, and evaluate them
7 and as OCFS clearly intends, to recommend these couples
8 to their -- to the birth mothers who come to them and
9 say, help me select a home for my child, then that
10 recommendation is contrary to what New Hope believes to
11 be true. According to the teachings of its faith, it
12 believes it cannot be in the best interests of the
13 child.

14 So that's -- and that's -- it's really the
15 compelled speech. Because obviously, if you bring
16 somebody into your group discussion with other parents,
17 who violently disagrees with your faith principles, that
18 puts a damper on the conversation. That kind of brings
19 us into some of these associative communication cases
20 and concerns about changing my message.

21 But when it comes to the birth mothers and
22 counseling a specific couple, it really requires New
23 Hope to say things that they believe that their faith
24 teaches them is false and ought not to be said.

25 JUDGE RAGGI: In the end, doesn't the regulation

1 really require you to be open to the idea that you would
2 say that it is in the best interests of a child to be
3 adopted by an unmarried couple, by a gay couple, and
4 that that is what you absolutely cannot say, according
5 to your brief, consistent with your faith; is that
6 right?

7 MR. BROOKS: Your Honor, that is exactly right.

8 JUDGE RAGGI: So it's -- you're arguing that it
9 starts with the first counseling session. But to be in
10 good faith compliance with this regulation, you have to,
11 in the end, be prepared to say that it's in the best
12 interests of child to be adopted by an unmarried or by a
13 gay couple.

14 MR. BROOKS: New Hope -- correct. New Hope
15 speaks in three directions in this relation: One is to
16 the would-be adoptive parents; another is to the birth
17 mother -- and each of these generally pick New Hope
18 because it's a faith-based ministry, one of a few out of
19 many secular and state agencies; and third, it speaks to
20 the state in a final report in which it must -- it can
21 only certify if it believes that this placement is in
22 the best interests of the child.

23 And again, it's obviously intended that New Hope
24 not discriminate in that, even though it's faith teaches
25 it that in no case is that in the best interests of the

1 child. So that's -- they're not stopping -- they will
2 refer. They're not -- there's no allegation that
3 anybody has been prevented or even discouraged from
4 adopting, but they say we can't devote our resources.

5 And they're all private resources. Not a dime
6 of State money involved in this, that we can't devote
7 our energies and our resources to placements and all
8 those relationships of speech that we believe are wrong.

9 JUDGE KORMAN: And the State would preclude you,
10 in your view, from asking a parent who says they prefer
11 a child with the Catholic -- Catholic parents be placed
12 with a Catholic family. Would you be permitted to ask
13 the birth mother whether she would want a placement with
14 a married, heterosexual couple? Forget about
15 persuading, just --

16 MR. BROOKS: The regulation doesn't say anything
17 about that, Your Honor, so I don't know the answer to
18 that.

19 JUDGE KORMAN: But the regulation does talk
20 about deference to the wishes of the --

21 MR. BROOKS: Well, it --

22 JUDGE KORMAN: -- religious wishes.

23 MR. BROOKS: It does with the religious wishes.
24 And indeed, the State -- this takes me to the second
25 point where I -- to answer both your questions at once,

1 I hope.

2 Yours is on what grounds do I think my client's
3 entitled to Preliminary Injunction. And yours takes us
4 into the area of general applicability and what
5 exceptions are permitted and not permitted. And this is
6 an area where I think also -- and it's so fact-intensive
7 in detail that I can't begin to recite it all in
8 argument, and it's better done in writing anyway, and
9 you have that.

10 What I would say is that the different treatment
11 of my client's beliefs here is exactly highlights the
12 problem. That is, we begin with the regulation that
13 purports to outlaw discrimination on the basis of a
14 whole long list of protected characteristics, and more
15 besides. And then you start shooting holes in it with
16 exceptions, and there are many exceptions.

17 There are exceptions permitted or required when
18 it comes to going out and recruiting parents. Who gets
19 to the front of the line, who gets to the back? There
20 are exceptions allowed, even on the basis of race, the
21 most troubling category in our nation's history and our
22 constitutional law -- there are exceptions for that.
23 There are exceptions for ethnicity for religion.

24 You're required to take the religion of the
25 child into account. You're required to place the

1 authority, it can't be used for an unconstitutional end.
2 I think that possibly one could construct an ultra vires
3 argument under state law. We've come to the federal
4 courts to defend the federal constitutional rights of my
5 client.

6 If I may, one last thing on the Preliminary
7 Injunction, because I know I'm substantially over time.
8 I want to call -- and this is on the issue of exceptions
9 and general applicability, and are we making exemptions
10 for secular reasons and refusing them for beliefs held
11 for religious reasons?

12 I would call the Court's attention to the
13 Central Rabbinical Congress case, 2014, 2d Cir.,
14 page 197. And there the 2d Circuit said that when a law
15 burdens free exercise, the burden is on the State to
16 demonstrate that the law is generally applicable if it
17 wants dismissal.

18 And I would encourage the Court to go look at
19 that because that's what it says in rather plain English
20 in that case of just a few years ago. So -- and I think
21 it's not necessarily intuitive to start with. But that
22 was a dismissal case, and the Court says, We're not
23 convinced by the State that this is generally
24 applicable, so dismissal reversed.

25 JUDGE CABRANES: Before you sit down, if we

1 ruled for you on First Amendment grounds, as you're
2 asking us to do, what would prevent there -- a racist
3 adoption agency from denying service to black families?

4 MR. BROOKS: Well, let me come at that from two
5 ways, Your Honor.

6 JUDGE CABRANES: Please.

7 MR. BROOKS: Not a surprising question.

8 First of all, race is -- just has a distinctive
9 place unfortunately in our history and fortunately in
10 our constitutional jurisprudence and in the constitution
11 itself.

12 So -- and if you think about what the Supreme
13 Court said in, let's say, the Bob Jones case about
14 racism or the Rodriguez -- Peña-Rodriguez case about
15 reaching -- breaking into the jury inviolability; and
16 you compare that to what the Supreme Court said about
17 exactly the type of beliefs that my client holds in the
18 Obergefell case itself and in the Masterpiece Cakeshop
19 case, I think you will see that they're conceived of as
20 such very different things that you don't need to worry
21 about the -- about the bleed over. That's something
22 that can be handled if it comes up.

23 And has it ever historically come up? Yes. Has
24 that problem come up in recent decades in the courts? I
25 think the answer is no. If it does, then strict

1 E-T-L-I-N-G-E-R?

2 MS. ETLINGER: That's correct.

3 JUDGE CABRANES: Thank you.

4 MS. ETLINGER: Good afternoon, Your Honors,
5 Laura Etlinger for Commissioner Poole.

6 I'd like to start with just two points before we
7 get into the actual constitutional claims. And one is
8 that New Hope essentially asked to be let alone to
9 perform its adoption services as it sees fit. But it's
10 only allowed to engage in these adoption services
11 because it's authorized by law to do so and agrees to
12 operate pursuant to strict statutory standards.

13 This is not a case where the State is intruding
14 on private religious practice. This is a robust
15 regulatory scheme that they have chosen to get involved
16 in.

17 If New Hope wanted to make sure that it was only
18 involved in any adoptions that had to do -- that where
19 the family was a married, heterosexual couple or a truly
20 single parent, it could counsel birth parents that that
21 is what they should choose. And if they were able to
22 locate a specific family that the birth parent wanted to
23 adopt to, they could facilitate a private placement
24 adoption.

25 JUDGE CABRANES: Help me with the --

1 understanding the record.

2 You seem to suggest that the agency has
3 insinuated themselves into this regulatory scheme. Were
4 they in existence before the regulatory scheme came into
5 existence?

6 MS. ETLINGER: Since they've been in operation,
7 there has been a regulatory scheme for adoption services
8 under New York law.

9 JUDGE CABRANES: Right. And has that regulatory
10 scheme been -- is it the same as it is now?

11 MS. ETLINGER: It is essentially the same in
12 term --

13 JUDGE CABRANES: Well, no. I didn't say
14 essentially. Did it include this particular issue?

15 MS. ETLINGER: No. This regulation was adopted
16 in 2013, after they had already been providing services.

17 JUDGE CABRANES: And after they had been
18 licensed by the State; is that right?

19 MS. ETLINGER: Yeah. They're not exactly
20 licensed. But after their corporate --

21 JUDGE CABRANES: They're permitted to --

22 MS. ETLINGER: -- will have been --

23 JUDGE CABRANES: -- they're permitted to exist.

24 MS. ETLINGER: But OCFS has ongoing authority to
25 make sure that an agency is operating pursuant to state

1 law.

2 JUDGE CABRANES: No. I understand that.

3 JUDGE KORMAN: Which state law are you talking
4 about?

5 MS. ETLINGER: I'm sorry.

6 JUDGE KORMAN: We're making the law. There's no
7 New York State statute that --

8 MS. ETLINGER: No. This is a nondiscrimination
9 regulation that's entirely consistent with state law.

10 JUDGE RAGGI: Well, the state law, when it was
11 enacted, prompted statement by the governor -- and this
12 is in the bill jacket.

13 MS. ETLINGER: Yes.

14 JUDGE RAGGI: It wasn't going to require any
15 policy differences, that the legislation was permissive,
16 not mandatory.

17 MS. ETLINGER: And the agency at another time
18 felt that that was not consistent with the law, that the
19 law allows --

20 JUDGE RAGGI: Which law?

21 MS. ETLINGER: The --

22 JUDGE RAGGI: It's not consistent with which
23 law?

24 MS. ETLINGER: Domestic Relations Law,
25 Section 110, was amended to specifically allow unmarried

1 and same-sex couples to adopt.

2 JUDGE RAGGI: Right. But when he signs that
3 statement, the governor --

4 MS. ETLINGER: Yes.

5 JUDGE RAGGI: -- says it's permissive. It would
6 not compel any agency to alter its present policies.

7 MS. ETLINGER: Yes. And the --

8 JUDGE RAGGI: And so to that extent -- I mean,
9 if this were ever to go down the road to less
10 restrictive alternatives, why wouldn't this law be
11 satisfied by a requirement that agencies that have
12 religious objections refer to the State?

13 MS. ETLINGER: Well, I'd like to address that,
14 because a referral doesn't eliminate the harm that the
15 statute -- that the nondiscrimination regulation seeks
16 to prevent. When new --

17 JUDGE RAGGI: Let's stay focused.

18 You've just told us that this regulation is
19 entirely consistent with the statute, and my question
20 suggests to you that the regulation goes beyond the
21 statute. Do you not agree with that?

22 MS. ETLINGER: The statute doesn't speak to what
23 adoption agencies may or may not do. So in that sense,
24 the regulation regulates something that's outside the
25 scope of the statute.

1 JUDGE RAGGI: Right. And before we get to that,
2 explain to me what it means to have a permanent or
3 Perpetual Certificate of Incorporation for an adoption
4 agency in New York, which is what I understand New Hope
5 had before this regulation went into effect.

6 MS. ETLINGER: Yes. That means that their
7 corporate existence is perpetual. But that is separate
8 from --

9 JUDGE RAGGI: For purposes of conducting
10 adoptions.

11 MS. ETLINGER: It's their corporate purpose
12 is -- their corporate existence is perpetual. But their
13 authority to engage in adoption services is always
14 subject to OCFS's ongoing approval under --

15 JUDGE RAGGI: What's law or statute explains
16 that to them?

17 MS. ETLINGER: Under Social Services Law,
18 Section 34, which says that OCFS can make sure that
19 authorized agencies are performing pursuant to state
20 laws and regulations; and also 371, Subdivision 10,
21 which indicates that an authorized agency consents to
22 approval, visitation, inspection, and supervision, and
23 that must necessarily mean ongoing supervision and
24 inspection and approval.

25 JUDGE RAGGI: And they were indeed inspected

1 shortly before you sent -- you all sent -- when I say
2 you --

3 MS. ETLINGER: Yes.

4 JUDGE RAGGI: -- [indiscernible] sent the letter
5 that told them that they were in violation --

6 MS. ETLINGER: Right.

7 JUDGE RAGGI: -- of the regulation, in a letter
8 that actually commended them for some of their
9 practices.

10 MS. ETLINGER: Yes.

11 JUDGE RAGGI: But let me ask you, Social Service
12 Law 385 specifies when the Commissioner can order that
13 an agency not place out children anymore. And I don't
14 see any of the reasons for which such an order can be
15 entered to apply in this circumstance.

16 MS. ETLINGER: Yes.

17 JUDGE RAGGI: What is your authority to shut
18 them down?

19 MS. ETLINGER: Well, 385 is a -- is specific
20 authority under the title having to do with safety of
21 children.

22 JUDGE RAGGI: Right. Which we would assume --

23 MS. ETLINGER: So --

24 JUDGE RAGGI: We would assume would be the
25 primary concern of the [indiscernible].

1 MS. ETLINGER: That is a primary concern. But
2 in addition to that authority, the State has authority
3 under Social Services Law, Section 34, and Social
4 Services Law, Section 371-10, where the agency commits
5 itself to approval, inspection, and supervision. If
6 there were not -- and 34 says that the agency has
7 authority to make sure there's compliance with laws and
8 regulations.

9 JUDGE RAGGI: Right. But why is it that if you
10 find that they're not, why is it that you don't have to
11 go to a court? Because presumably, what you're doing is
12 invalidating their Certificate of Incorporation.

13 MS. ETLINGER: Well, we're not invalidating
14 their Certificate of Incorporation which allowed them to
15 do a number of different activities. We're saying that
16 right now they're not in compliance with the legal --

17 JUDGE RAGGI: Why don't you have to go to
18 court --

19 MS. ETLINGER: Because this is a --

20 JUDGE RAGGI: -- to alter a -- to basically
21 narrow a Perpetual Certificate of Incorporation?

22 MS. ETLINGER: Well, I don't think the action
23 affects their Certificate of Incorporation. It affects
24 their ability to engage in adoption services in the way
25 that they wish to. And this is an administrative

1 process. They would be subject to administrative
2 process. If they didn't like the administrative
3 process, they could go to court in a New York State
4 Article 78 proceeding.

5 JUDGE RAGGI: Your letter -- your client's
6 letter --

7 MS. ETLINGER: Yes.

8 JUDGE RAGGI: -- to them gave them two choices.
9 Either, come -- become -- come in compliance with the
10 regulation or start to close down.

11 MS. ETLINGER: Yes.

12 JUDGE RAGGI: And I am not sure I understand how
13 you can tell an agency that it has to close down without
14 a court order.

15 MS. ETLINGER: Well, and I would also point out
16 that they're not raising that claim here, but I
17 understand that Your Honor is interested in it.

18 JUDGE RAGGI: Well, it goes to the likelihood of
19 success. I mean, all of this is -- it comes into
20 whether or not you really are acting pursuant to
21 appropriate authority.

22 MS. ETLINGER: Yes. But they're not claiming
23 that we lacked authority to close them down. But the
24 authority is that there's ongoing approval. There is
25 necessarily ongoing approval under 371, Subdivision 10,

1 because there would be no other way we could tell
2 whether they were in compliance with New York law. We
3 have the right to inspect them on an ongoing basis and
4 to supervise them.

5 JUDGE RAGGI: I must not be making myself clear.

6 Even assuming all of that, when you find them
7 deficient in some way, I don't see where the law gives
8 you the authority to order them to close down.

9 MS. ETLINGER: I think it's just general
10 principles of New York State Administrative Law. When
11 they're not in compliance with the law, we're
12 withholding our approval, and they need the approval to
13 operate.

14 JUDGE RAGGI: But they never need approval
15 again, once they have perpetual authority. They --
16 you're right. You get to inspect; you get to do that.
17 But they don't need you to sign off the way they needed
18 you to sign off after their second year
19 of incorporation.

20 MS. ETLINGER: Well, we -- OCFS disagrees. OCFS
21 takes the position that they do need ongoing approval to
22 conduct adoption services.

23 JUDGE RAGGI: Well, what the heck is the point
24 of a perpetual authorization? This is my -- I'm
25 perplexed by this particular --

1 MS. ETLINGER: It's just their corporate status,
2 not their ability to engage in the conduct.

3 JUDGE RAGGI: It's their corporate status that
4 is the legal authority for them to operate an adoption
5 agency.

6 MS. ETLINGER: Well, they need both. They need
7 both a corporate authority that gives them the authority
8 to be an authorized agency, and they need OCFS approval,
9 ongoing approval, to make sure that their program is
10 being conducted pursuant to state law.

11 JUDGE RAGGI: Right. As I understand the last
12 supervision report, there is no question that every
13 adoption they have placed has been to parents who were
14 qualified. Right?

15 MS. ETLINGER: Yes.

16 JUDGE RAGGI: Okay. So this isn't a case where
17 they are just slipshod about their interviews or not
18 really placing children in appropriate settings.

19 This is a case about whether the pool of
20 applicants they're willing to consider for adoptive
21 parents is what the State requires. And they're saying
22 they can't consider some of those folks without
23 violating their religion.

24 Now, I -- explain to us why we shouldn't view
25 that as an infringement of their religious rights.

1 MS. ETLINGER: Their religious rights are not
2 infringed because the Smith Test applies here. Contrary
3 to their argument that there is a -- an exception to the
4 Smith Test that's applicable here for state intrusion on
5 internal church operations -- that's simply not what's
6 going on here.

7 These are regulated adoption services. And as
8 regulated adoption services, they're bringing together
9 people outside their organization.

10 JUDGE RAGGI: Right. But they take no money.
11 They don't have a contract with you. This isn't Fulton.

12 And so their argument is that basically you
13 can't use your licensing authority, your authorization
14 authority, to infringe their speech. And Smith does say
15 when you infringe on religious exercise, and there's
16 another right at stake, then you may have to satisfy
17 strict scrutiny. But what --

18 MS. ETLINGER: With respect to --

19 JUDGE RAGGI: Why don't -- why shouldn't we will
20 receptive to that?

21 MS. ETLINGER: Because on the free speech claim,
22 the Supreme Court has long ruled that nondiscrimination
23 rules regulate conduct, not speech. And their conduct
24 is what is being enforced against here.

25 They must serve adoption applicants on a

1 nondiscriminatory basis. When they evaluate applicants,
2 that activity must be done in a nondiscriminatory way.

3 JUDGE RAGGI: The ultimate thing that you're
4 requiring them to do is be willing to say, after they've
5 done all their evaluation, that a -- that an unmarried
6 or a gay couple -- it would be in the best interests of
7 a child to be placed with such a family. And they're
8 saying they can never say that.

9 MS. ETLINGER: We're requiring them to make a
10 determination that placement with a family -- that type
11 of family may be in the child's best interest.

12 The much more difficult question -- and OCFS is
13 very sensitive to this question -- is whether, if an
14 agency was willing to conform its conduct to the
15 regulation, if they were willing to bring in applicants
16 of all different sexual orientations, if they were
17 willing to do nondiscriminatory home studies to all of
18 these applicants, if they were willing to place children
19 with any of these applicants, could they still profess
20 their belief with their speech? That's a very different
21 question, and a much more sense -- a question that OCFS
22 is very sensitive to, and it hasn't been presented with
23 that question. New Hope has never --

24 JUDGE CABRANES: And what's the answer to that
25 question?

1 MS. ETLINGER: Well, the -- truly the answer is
2 OCFS has not developed a policy with respect to that,
3 because it's never been faced with that situation.

4 But if you look at the regulation, the
5 regulation regulates conduct. So it may well be that
6 they could engage in speech of their choice -- this is
7 what the District Court found -- as long as they're
8 conduct conformed to the regulation.

9 JUDGE RAGGI: But it's hard for me to view this
10 only as conduct when what they are ultimately required
11 to do is make a recommendation.

12 MS. ETLINGER: Well --

13 JUDGE RAGGI: And recommendation seems to me to
14 imply speech.

15 MS. ETLINGER: They're not making a
16 recommendation. They're actually making a placement.
17 So they're choosing the placement and placing the child
18 with that family, which is an action. They're not
19 making a recommendation to an outside agency that does
20 the placement. Their ultimate -- the ultimate conduct
21 that they were found to be in violation of is that they
22 refuse --

23 JUDGE RAGGI: Don't they have to write a report
24 that basically says it's in the best interests of the
25 child to be placed with this couple?

1 MS. ETLINGER: No. They have to -- they have to
2 conduct a home study, evaluating the family, make a
3 placement. And then after they've made that placement,
4 there are some submissions to the family court. But
5 their -- but their -- their conduct --

6 JUDGE CABRANES: Sorry. It's then filed with
7 the family court?

8 MS. ETLINGER: There is a report that they file
9 with the family court.

10 But it's their -- it's their conduct that's
11 being regulated here. They've never indicated that they
12 would engage in the -- conform their conduct to the
13 rule, but want to profess their belief in their
14 counseling sessions. That's a much more difficult
15 question and one that we don't have the actual answer to
16 because OCFS has never been presented with that. But --

17 JUDGE CABRANES: Can I take you back to this
18 perpetual existence --

19 MS. ETLINGER: Yes.

20 JUDGE CABRANES: -- business? What agency
21 authorizes perpetual existence? Is that the OCFS?

22 MS. ETLINGER: It was a predecessor agency at
23 the time. And these --

24 JUDGE CABRANES: But you said that it was --
25 that that was a reference to corporate existence.

1 MS. ETLINGER: Yes. It's filed with the
2 Secretary of State.

3 JUDGE CABRANES: That's where I was heading.

4 MS. ETLINGER: That's exactly what it is.

5 JUDGE CABRANES: Yeah.

6 MS. ETLINGER: It's their corporate existence.
7 So they're a corporation.

8 JUDGE CABRANES: So what does the OCFS have to
9 do with the functions of the Department of State of
10 New York, which is responsible for corporate existence?

11 MS. ETLINGER: When an agency wants to engage in
12 adoption or foster care services, state law requires
13 that the Certificate of Incorporation also be approved
14 by OCFS.

15 JUDGE CABRANES: It's an additional requirement?

16 MS. ETLINGER: It's an additional requirement.

17 JUDGE CABRANES: Let me ask you about these
18 regulations. Do they permit agencies to consider, when
19 making placement decisions, an adoptive parents' age; is
20 that right?

21 MS. ETLINGER: Yes. That's a valid -- I'm glad
22 you brought that up, because that's a very interesting
23 one, in particular to this case. Because OCFS places
24 exclusively infants, newborns, and toddlers. And one --
25 and age, the statute says that age can be -- the age of

1 the child and the age of the prospective adoptive
2 parents can be considered.

3 So one might think that in this situation, older
4 parents would not very often or perhaps never at all,
5 one might think, be appropriate placements in the best
6 interests of a newborn. Because obviously, the State
7 would like the parents to be around for at least
8 18 years or more.

9 But the consideration of age is not an
10 exclusionary factor. There could, in fact, be instances
11 where older parents are just the right placement for a
12 newborn. If you had a newborn with special needs that
13 needed a lot of special care, a retired couple might be
14 exactly the right one.

15 So it doesn't -- none of the statutes and
16 regulations that New Hope cites, that they claim permit
17 discrimination, operate as an exclusionary rule.

18 JUDGE CABRANES: Well, what about race?

19 MS. ETLINGER: Race can be considered in a -- in
20 a way that if the race of the child -- all of these
21 other provisions want consideration --

22 JUDGE CABRANES: There's no question that they
23 are permitted to consider race; right?

24 MS. ETLINGER: Well, it's -- the way it's
25 actually worded is that the race or cultural identity of

1 the child, the parents' ability to consider the child's
2 race and cultural identity is appropriate. It's not
3 actually a matching of race.

4 And again, what you're starting with in those
5 cases is the needs of the child. What does this child
6 need for a placement?

7 JUDGE CABRANES: No. I -- no, we understand
8 that. But you're permitted to consider also the
9 religion of the parents; isn't that right?

10 MS. ETLINGER: Yes. And the religion means the
11 label of the faith. OCFS does not --

12 MR. BROOKS: The label of the faith.

13 MS. ETLINGER: The label of the faith, not --
14 not the particular practices. So that if the --

15 And again, it's a best interest consideration.
16 It's not a question of a Jewish family coming to the
17 agency and being turned away because they're Jewish.
18 That's never permitted. In fact, that's not permitted
19 by the very same nondiscrimination regulation at issue
20 here. So the consideration of religion in the best
21 placement decision is not a discriminatory rule.

22 JUDGE CABRANES: But there's no question that
23 you're preventing consideration of whether the adoptive
24 parents are a same-sex couple as a result of the
25 religious views of the agency?

1 MS. ETLINGER: Yes. Because the State has
2 determined what factors are relevant to the best
3 interest determination. And sexual orientation of the
4 parents, the State has decided, is not a relevant factor
5 to the well-being of the child.

6 JUDGE CABRANES: You don't think that there's a
7 suggestion here that the regulation is targeting
8 religious groups?

9 MS. ETLINGER: No. Because the --
10 And this Court has said in the St. Bartholomew's
11 Church case that we cited in our brief, that the fact
12 that there may be a disparate impact on religious
13 organizations because of factual matters, they are the
14 ones more likely to be affected is not evidence of
15 discrimination.

16 JUDGE RAGGI: That was where the majority of
17 people affected or the majority of entities affected
18 were, in fact, not religious.

19 The plaintiffs submit that discovery would
20 reveal that the vast majority, if not all, of the
21 agencies that have had to go out of existence since this
22 regulation was promulgated are religious organizations.
23 Do you dispute that?

24 MS. ETLINGER: Well, in -- it's not in the
25 record.

1 JUDGE CABRANES: [Indiscernible] you want
2 discovery [indiscernible].

3 JUDGE RAGGI: Well, one can compare the web --
4 your web site's a matter of public record, and one can
5 compare --

6 MS. ETLINGER: Well --

7 JUDGE RAGGI: -- what it -- how it existed at
8 the start of 2018 and how it exists now.

9 MS. ETLINGER: Well, I can tell you that the --
10 those agencies that went out of existence did not do so
11 because of the enforcement of this regulation. That's
12 not in the record, but my client so advises me.

13 But to the extent there is an impact, because
14 religious organizations are the ones that have a view
15 about placement with same-sex couples does not mean that
16 the agency was targeting those --

17 JUDGE RAGGI: Well, isn't that what discovery
18 might reveal?

19 MS. ETLINGER: Discovery --

20 JUDGE RAGGI: Because I mean, the question here
21 is whether there was any problem requiring this
22 regulation with respect to any agencies other than those
23 with religious views?

24 MS. ETLINGER: The law had developed to a place
25 where same-sex couples were given equal rights to adopt.

1 And OCFS felt that to be consistent with that statute,
2 it should revise its regulatory language because there
3 had been regulations on the books that indicated that
4 length of marriage and homosexuality were relevant to a
5 best interest determination. So OCFS revised those
6 regulations, and in doing so, also made it a rule that
7 you can't discriminate on the basis of all of these
8 characteristics: Race, religion, sex, sexual
9 orientation, and marital status in the two adoption
10 applicants.

11 JUDGE RAGGI: So with respect to religion, it --
12 you would have us conclude that it's just coincidental
13 that Catholic Charities no longer does adoptions in
14 Boston, Philadelphia, Chicago, Los Angeles, New Orleans,
15 and most of New York?

16 MS. ETLINGER: No. It's because those are the
17 organizations that have the belief that is inconsistent
18 with the nondiscrimination rule.

19 JUDGE RAGGI: And the suggestion that I was
20 making to you is that the plaintiff submits that in
21 discovery, we would learn that the agencies that were
22 operating in 2018 before the regulation and then
23 after -- had to go out of business after the regulation
24 are faith-based organizations.

25 MS. ETLINGER: But even if there's a disparate

1 impact on faith-based organizations, that doesn't mean
2 that the agencies were targeted.

3 JUDGE RAGGI: I understand that.

4 But then we also get to the question of why your
5 agency, confronted with a law that's permissive, decided
6 to promulgate a regulation that was proscriptive -- who
7 they were aiming it at. I mean, what problem there was
8 that you felt needed to be addressed.

9 Now, it may be that discovery would reveal no --
10 no religious animus. But I thought in your briefs you
11 conceded that the statements being made, at least that
12 are in the record so far, are ambiguous.

13 MS. ETLINGER: Well, two things, discovery is
14 not needed because the purpose of the regulation was
15 made clear by the regulatory history. And we've cited
16 all of this in our brief. There were --

17 JUDGE RAGGI: I thought you were acknowledging
18 that it was ambiguous.

19 MS. ETLINGER: Well, to -- the -- I'm talking
20 about separately, first, the history of the regulation.
21 The history of the regulation shows that there were
22 informational letters sent to the agencies explaining
23 that we were bringing -- OCFS was bringing the function
24 of the -- the regulations into compliance with changes
25 in the law. And --

1 JUDGE RAGGI: And I mean, the problem is you
2 went beyond the law.

3 MS. ETLINGER: And the statements --

4 JUDGE RAGGI: And so to the extent you write to
5 the agencies, we're only bringing the regulation
6 up-to-date with the applicable law, there's at least an
7 argument for the plaintiffs to make that you went beyond
8 that and that your purpose was -- it indicates some
9 religious hostility.

10 MS. ETLINGER: These statements that they rely
11 on -- two of the statements are somewhat similar to two
12 of the statements in Masterpiece Cakeshop. This is what
13 we explain in our brief. And those statements, the
14 Court in Masterpiece Cakeshop found were ambiguous and
15 could either be seen as simply a statement of
16 nondiscrimination requirement or perhaps as dismissive
17 of a religious confrontation. But the Masterpiece
18 Cakeshop court was not concerned about those statements
19 in the absence of the clearly hostile statements that
20 followed.

21 JUDGE RAGGI: I understand that.

22 But you're not focusing on what I asked you
23 about, which is that your regulation goes beyond the law
24 in a way that raises concern, because the -- when the
25 law was enacted, the governor said it wasn't going to

1 require anybody to change their policies. Everybody
2 knew what he was talking about.

3 You went beyond and required them to change
4 their policies. And they say they're entitled to
5 discovery as to why you did that, and the reason they
6 says there's a good faith basis to think it was
7 discriminatory or your ambiguous statements and the
8 ultimate consequences which is to effectively drive
9 religious adoption agencies out of the New York market,
10 they claim.

11 MS. ETLINGER: We think the history of the
12 regulation, as set forth in our brief, including all of
13 the informational letters that were issued one after the
14 other in response to the changes in the law, explain
15 where the agency was going and why it was going there.
16 It felt that this was consistent -- even if it went
17 beyond, that it was consistent with the law and with
18 New York State law that prevents discrimination on the
19 basis of sexual orientation, as a matter of civil rights
20 under the Civil Rights Law, and in a -- in public
21 accommodations under the Executive Law.

22 So they felt that this was entirely consistent
23 with all of New York State law. The history of the
24 regulation sets that forth, and we don't think discovery
25 would produce anything beyond that. And the statements

1 speak for themselves. And the two statements that could
2 be taken one way or the other were not found to be
3 enough in Masterpiece Cakeshop. There are no other
4 statements here. There are no statements that raise
5 hostility toward religion.

6 JUDGE CABRANES: Let me ask you about that.
7 Your client agency referred to New Hope's practices as,
8 quote, archaic, unquote.

9 MS. ETLINGER: Well, the agency referred to the
10 prior regulations, which permitted --

11 JUDGE CABRANES: Okay. I have a relatively
12 simple question. Is it not correct that OCFS referred
13 to New Hope's practice as archaic?

14 MS. ETLINGER: That is incorrect.

15 JUDGE CABRANES: That's incorrect. It never --
16 it never did that?

17 MS. ETLINGER: No. It referred to its prior
18 regulations as archaic.

19 JUDGE CABRANES: I see. And did OCFS ask New
20 Hope to, quote, compromise its beliefs?

21 MS. ETLINGER: No. OCFS pointed out that other
22 agencies who had told the agency that they did have a
23 problem with their beliefs and these placements had
24 decided themselves to compromise.

25 JUDGE CABRANES: But you're -- yes, but that

1 means that were you not saying explicitly or implicitly
2 that New Hope had to compromise its beliefs?

3 MS. ETLINGER: We -- I think what we were saying
4 was they had the choice to do so if they chose.

5 JUDGE RAGGI: With the alternative being to shut
6 down?

7 MS. ETLINGER: With the alternative to be shut
8 down because --

9 JUDGE RAGGI: Right.

10 MS. ETLINGER: -- they were not in compliance
11 with New York law.

12 JUDGE RAGGI: So [indiscernible] understand that
13 on a Motion to Dismiss, we have [indiscernible] all of
14 these pleadings in the light most favorable to the
15 plaintiff. The -- in doing that, we would have to
16 conclude that they were being told to either compromise
17 or shut down.

18 MS. ETLINGER: But even the Supreme Court found
19 that those statements were not enough to suggest
20 hostility. It was only because the Commissioner went on
21 to say that the plaintiffs' beliefs in Masterpiece
22 Cakeshop were a despicable piece of rhetoric. That was
23 the evidence that the Court was concerned about, not
24 these somewhat ambiguous statements.

25 JUDGE RAGGI: I think they tried to draw an

1 analogy to that to the statement that there is no place
2 in New York for any agency that -- I'm not -- I don't
3 have the quote in front of me -- that basically does not
4 view homosexual and unmarried couples as fit parents for
5 adoption. And so they're suggesting that, less
6 colorfully perhaps, you have expressed the same
7 hostility.

8 In any event, at the dismissal stage, why isn't
9 that enough?

10 MS. ETLINGER: Well, first of all, the statement
11 was there's no place in New York for providers that
12 choose not to follow the law. So it wasn't a specific
13 statement about their belief.

14 JUDGE RAGGI: This regulation was what they were
15 talking about.

16 MS. ETLINGER: Yes. This regulation.

17 JUDGE RAGGI: This regulation.

18 MS. ETLINGER: Because in -- because those
19 statements are not enough to raise an inference about
20 hostility. At most, they show there could be some
21 ambiguity, but there is no evidence of hostility in
22 those statements.

23 JUDGE RAGGI: Well, what's ambiguous is whether
24 he had anything in mind other than faith-based agencies
25 whose religious beliefs do not permit them to agree to

1 these two provisions.

2 MS. ETLINGER: The regulation prohibits
3 discrimination on a wide variety of things.

4 JUDGE RAGGI: Right. But there was no reason to
5 think that that was the concern he was addressing when
6 he spoke; right? I mean, what was the context of the
7 remark?

8 MS. ETLINGER: No. The context of the remark
9 was agencies that refused to place with same-sex or
10 unmarried couples.

11 JUDGE RAGGI: Right. So that -- that was what
12 there was no place for.

13 MS. ETLINGER: Because the law didn't allow for
14 it.

15 JUDGE RAGGI: Well, now the question is whether
16 the law is -- violates the Constitution.

17 MS. ETLINGER: Right.

18 JUDGE RAGGI: But the question now is whether
19 that reflects a hostility to a religious view, contrary
20 to what was put into the regulation. Isn't that what --
21 where we are at?

22 MS. ETLINGER: Yes. And we don't believe that
23 that expresses a hostile view, and we don't believe
24 discovery will produce any evidence of anything else,
25 because the history of the regulation is very clear that

1 it was enacted in response to the changes in the law.

2 JUDGE CABRANES: You think those comments can be
3 construed as neutral?

4 MS. ETLINGER: Yes. Absolutely, because they
5 are just saying that we feel strongly about this
6 nondiscrimination rule, and the law has changed, and
7 this is the rule that's consistent with the law now.

8 JUDGE CABRANES: Thank you, very much.

9 Ms. Etlinger.

10 MS. ETLINGER: Thank you.

11 JUDGE CABRANES: I've given you as much time as
12 your adversary, but he's reserved a couple of minutes.

13 MR. BROOKS: The Court has been generous, and
14 I'll be short.

15 Counsel claims that the regulation regulates
16 conduct, not speech. In their briefing, they're really
17 focused on an incidental conduct argument citing Fair.
18 And I would just really like to contrast what was going
19 on in the Fair case.

20 In Fair, the conduct at issue was requiring the
21 law school to hand a key to an empty classroom to a JAG
22 recruiter. And the incidental speech at issue was
23 requiring the law school to let the students know what
24 classroom that was. And that's the conduct; that's the
25 speech.

1 The situation here could not be more different.
2 OCFS wants to force New Hope into the conference room
3 with the birth mothers, with the adoptive parents, and
4 control what it says.

5 It's much more analogous to if Donald Rumsfeld
6 was trying to require the law school dean to stand up in
7 front of the student body and advocate a JAG Corps
8 career as a great choice for Yale graduates.

9 That would have been a different case. And I
10 think, in fact, when you parse the Fair case, you don't
11 have the parse it too closely. It says exactly that
12 that would be prohibited and that it held the way it did
13 in that case because it's fundamentally a fight about an
14 empty conference room.

15 JUDGE RAGGI: What do you think are your legal
16 obligations, though, given that you have an
17 authorization pursuant to the laws of New York?

18 I mean, I don't understand you to be arguing
19 that you're not obligated to follow every other rule and
20 regulation that they've promulgated and that you, in
21 fact, do. So I mean, obviously you think you're bound
22 to comply with the rules and regulations of New York
23 [indiscernible].

24 MR. BROOKS: Your Honor, I think that -- I think
25 that when we have a lot of law that governs what happens

1 when free speech -- and I frankly think that's simpler
2 in this case -- and free exercise run up against neutral
3 regulation.

4 And that law, I think once you've determined, as
5 we think we will determine that this law was not
6 neutrally motivated and certainly not neutrally
7 enforced, and we saw that before our very eyes in the
8 attempt to shut down New Hope in the midst of the
9 appeal -- if you get past that, well, then that clash is
10 controlled by strict scrutiny. And we have precedent
11 that guides us through that.

12 And may heartfelt religious beliefs sometimes
13 have to give way to the State's necessity? Yes,
14 according to -- applying the compelling state interest
15 test of strict scrutiny. So it's hard -- there's no
16 general answer. Strict scrutiny is a very case -- is a
17 fact-specific inquiry. But how you resolve those
18 issues, I think, is well established.

19 And Your Honors, I will stop. Thank you.

20 JUDGE CABRANES: Thank you, both of you, for
21 excellent arguments. We're grateful to you both. Thank
22 you.

23 We reserved decision. And we're adjourned.

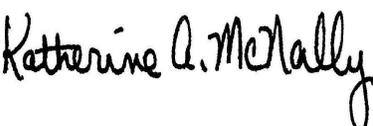
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