

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

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NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

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

Defendant.

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No.: 5:18-cv-1419 (MAD/TWD)

**REPLY MEMORANDUM OF LAW  
IN SUPPORT OF NEW HOPE  
FAMILY SERVICES' MOTION  
FOR PRELIMINARY INJUNCTION**

Oral Argument: February 19, 2019

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Plaintiff New Hope Family Services submits this reply memorandum in support of its motion for preliminary injunction.

### Introduction

After a review of the opposition memorandum of Acting Commissioner Poole (hereinafter “OCFS”), two points should be emphasized at the threshold.

*First*, to a striking extent, the facts on which Plaintiff’s motion turns are undisputed. OCFS does not dispute that New Hope’s work of facilitating the adoption of children is an expression and exercise of faith consistent with ancient teaching and tradition (Verified Compl. ¶¶ 34-51; Aff. of Judith A. Geyer (“Geyer Aff.”) ¶¶ 10-22; Br. of New Hope in Supp. of Mot. for Prelim. Inj. (“Br.”) 3-4.)—of a piece with the compassionate care for the “least, the lost, and the lonely” that the Second Circuit found to be a fully protected exercise of religious faith in *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574-76 (2d Cir. 2002). OCFS does not dispute that the belief that healthy marriage and family must be built on the biological reality that every child is the result of a union between man and woman is a sincerely held religious belief—and indeed a belief that the Supreme Court has rightly said “continues to be held in good faith by reasonable and sincere people.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). Nor does OCFS dispute that the conclusion that placement with those in same-sex relationships is therefore not in the best interests of infants is likewise a sincerely held religious belief.

The State does not dispute that New Hope cannot comply with the Regulation without violating the religious beliefs of its board and employees, and so is put to the choice of violating those beliefs, or being forced to shut down its faith-based ministry. (Compl. ¶¶ 188-198, 208; Geyer Aff. ¶¶ 156-166, 169-172; Opp’n to Pl.’s Mot. for Prelim. Inj. (“Opp’n”) 6.) The State does not dispute that New Hope cannot certify same-sex or unmarried couples as adoptive

parents consistent with the best interests of children without saying that which New Hope believes to be false, and so is put to the choice of saying what it believes to be false, or being forced to shut down its ministry. (Compl. ¶¶ 269-273; Geyer Aff. ¶¶ 36, 116, 124-25, 137, 156-166, 169-172.)

While claiming that the Regulation is “neutral,” the State does not contend that any adoption services except those that are faith-based have been threatened with closure due to alleged violation of the Regulation. (*Cf.* Compl. ¶¶ 188-193, 202-205.) And, while the State attempts to dismiss the significance of the harms that will be suffered by New Hope, its employees, and those it serves absent a preliminary injunction, it does not deny that they will occur.<sup>1</sup>

*Second*, the question of whether a preliminary injunction should issue is far simpler than the State’s memorandum suggests. The State accurately quotes the general four-prong test for grant of a preliminary injunction. But where First Amendment rights are at issue, the deprivation of rights itself “for even minimal periods of time, unquestionably constitutes irreparable injury[.]” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); protection of First Amendment rights is per se “in the public interest,” *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); and the balance of hardships is entirely one-sided because “the Government does not have an interest in the enforcement of an unconstitutional law.” *Id.* (internal quotations and citation omitted). Thus, the existence of a First Amendment deprivation is decisive; this Court

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<sup>1</sup> The only arguable exception is Ms. McCarthy’s non-binding statement that “OCFS has no plans to interfere” with a few placements recently made by New Hope but not yet finalized, and that “New Hope would be permitted to continue to administer any post adoption contact agreements.” (McCarthy Aff. ¶ 14.)

will not find a case in which a court has been sustained in denying a preliminary injunction where the plaintiff demonstrated a likelihood of success in proving a First Amendment violation.

As New Hope demonstrates in its opening memorandum and below, the undisputed facts and the proper preliminary injunction analysis dictate issuance of a preliminary injunction to preserve the status quo during this litigation.

I. THE REGULATION VIOLATES NEW HOPE’S FREE EXERCISE RIGHTS.

As we review in Section I.B below, the Regulation would be unconstitutional as applied to New Hope even if it did satisfy the non-exhaustive requirements of *Employment Division v. Smith*, 494 U.S. 872 (1990). However, it does not meet even that test.

A. The Regulation Does Not Survive a *Smith* Analysis.

OCFS misunderstands what *Smith* teaches where it does apply.

1. The Regulation is Not “Neutral” or “Generally Applicable.”

Contrary to the State’s apparent belief, “[f]acial neutrality is not determinative,” but is only the “minimum requirement of neutrality.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993). Here, where the only evidence in the record is that the Regulation has *only* been applied to threaten faith-based adoption agencies with closure (Compl.188-98, 202-05; Geyer Aff. ¶¶ 156-62), this is evidence either that the law targets what is a distinctively religious perspective and practice, or that OCFS’ enforcement of the law is subjectively targeted against faith-based providers. In either case, the evidence supports a reasonable inference that however neutral on its face, the purpose underlying the Regulation is to “stop those religious groups from acting on their outdated views of marriage and family in their ministries.” This is not “neutrality” within the meaning of Supreme Court precedent. As a result, *Smith* would require strict scrutiny of the Regulation.

2. OCFS Makes No Showing that the Regulation “Furthers” a Compelling Interest.

The State’s claim that the Regulation “furthers” a compelling governmental interest depends on muddying the interests properly under consideration.

The “interest” that OCFS is assigned by statute to protect is the best interest of the child. (*See* Opp’n 4, 13.) As to that interest, regardless of one’s beliefs about the healthy family environment for children, it is indisputable that the Court of Appeals’ 1995 ruling—and the 2010 statutory change—*permitting* same-sex and unmarried couples to adopt increased the number of potential adoptive parents. (*See* Opp’n 14, 16.) But contrary to the State’s confused assertion (Opp’n 14), it is equally indisputable that shuttering faith-based adoption service providers does *not* increase the number of potential adoptive or foster parents,<sup>2</sup> and *decreases* the number of adoption services available to work through the complex adoption process with both birthparents and adoptive parents. This decreases, rather than increases, the likelihood of a prompt and happy adoption for infants in the State of New York—thus harming, not furthering, their interests.

The Regulation and OCFS’ arguments actually ignore and indeed frustrate one goal that both the Constitution and the Legislature have found to be in the “best interests of the child” and made mandatory: the requirement to respect the religious preference of birthparents in selecting adoptive parents (N.Y. Soc. Serv. Law § 373(7); *see* Opp’n 4), and the requirement (not mentioned by OCFS) that children in need of adoption shall be committed to “an institution or agency governed by persons . . . of the same religious persuasion as the child.” N.Y. Const. art. VI § 32; *see also* N.Y. Soc. Serv. Law § 373(1). It is no secret that multiple “religious faiths”

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<sup>2</sup> *See, e.g.*, Aff. of Charity Loscombe ¶¶12-13 (values New Hope’s religious beliefs, and would not continue providing foster care through other agencies if New Hope is shuttered); Aff. of Jeremy Johnston ¶14 (may adopt a third child, but values New Hope’s Christian values and would not adopt through a different agency); Aff. of Justin Bleuer ¶16 (values New Hope’s Christian beliefs, and may adopt again, but only through New Hope).

continue in the belief that marriage—and the best environment for children—consists of a permanent, pledged union of man and woman. By promulgating and enforcing the Regulation so as to shut down adoption agencies governed by persons of such faiths, OCFS is making it literally impossible for it to comply with the New York Constitution and N.Y. Soc. Serv. Law § 373(1),<sup>3</sup> and once these faith-based agencies are driven from the field, it is far less likely that N.Y. Soc. Serv. Law § 373(7) will be complied with understandingly and in good faith.<sup>4</sup> An agency-announced goal that is in direct conflict with both the Constitution and state statute cannot reasonably be considered a “compelling state interest.”

Perhaps recognizing the contradictions in its “best interests of the child” arguments, OCFS also asserts the quite different interest of “[p]rohibit[ing] discrimination on the basis of sexual orientation . . . in essential social services[,]” (Opp’n 14) and “prevent[ing] . . . trauma and social harm caused by discrimination against . . . LGBTQ people” (McCarthy Aff. ¶ 10). Notably, while OCFS cites its statutorily assigned mission to respect religious faith only to run roughshod over it, it cites no statute at all that tasks OCFS to protect adults against discrimination “on the basis of sexual orientation.” A regulatory agency should not be heard to assert an “interest” that has not been assigned to its care as a “compelling interest” that can justify what would otherwise be violations of Constitutional rights.

More fundamentally, OCFS does not assert (much less provide evidence) that any potential applicant was prevented from pursuing adoption as a result of New Hope’s faith-based policy. And our law is strong that protecting one citizen from mere offense or “social harm”

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<sup>3</sup> See Aff. of Ellie Stultz ¶31 (“As a birthmother, considering placing my child with New Hope, New Hope's Christian faith was important to me.”).

<sup>4</sup> Thus, OCFS’ assertion that “[the Regulation] has no effect on the various statutes and regulations requiring the consideration of the religious beliefs of birth parents, children, and prospective parents . . .” (Opp’n 14 n. 5) is not correct.

inflicted by another (McCarthy Aff. ¶ 10) is not a governmental interest that can justify restricting First Amendment freedoms. *See Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (overturning state ban on flag-burning: “Our precedents . . . recognize that a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it . . . stirs people to anger.”); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) (overturning state “public accommodation” law imposing liability for exclusion of LGB group from privately organized parade) (“[T]he point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”); *Obergefell*, 135 S.Ct. at 2607 (anticipating continuing “searching debate” concerning the nature of marriage and family and the morality of same-sex marriage).

Finally, even if “preventing offense” *could* provide a compelling interest, given that not a single complaint has ever been filed against New Hope by anyone claiming to be offended by its policies and graceful referrals to other agencies (Compl. ¶ 156; Geyer Aff. ¶ 140), OCFS cannot possibly make the required showing that allowing New Hope and similarly situated faith-based adoption agencies to continue serving families would materially undermine that interest. (*See Br. 20.*) Punishing or making an example of New Hope is not itself a legitimate state interest.

### 3. The Regulation is Not Narrowly Tailored.

OCFS has no response to the point that the Regulation is not narrowly tailored to the harm (discrimination against would-be adoptive parents) that it purports to address. As set out in New Hope’s opening memorandum, a law that is underinclusive is not “narrowly tailored.” (*Br. 18-19.*) The Regulation is severely underinclusive because it prohibits “discrimination” only on the basis of one favored criterion (issues relating to sexuality), in a statutory and regulatory framework that permits or even requires discrimination based on multiple criteria, including religion, race and ethnicity, cultural background, emotional stability, age, mental and emotional

health, ability to care for a child (which may implicate otherwise protected disabilities), and indeed the subjective judgment of the evaluating agency. (Br. 17-18; Opp’n 3-4.)

B. The Regulation Unconstitutionally Violates New Hope’s Free Exercise Rights Regardless of a *Smith* Analysis.

It is also true that *Smith* does not define the limits of protected free exercise. As reviewed in New Hope’s opening memorandum, other and more recent Supreme Court precedent establishes that historic religious missions and ministry are protected by free exercise even against “neutral law[s] of general applicability”—including neutral laws that pursue strong social goals of non-discrimination. (Br. 11-13.) In short, the state may not use “neutral and generally applicable” laws as a means to do a hostile takeover of a long-established faith ministry (whether performing marriages (*see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1727 (2018)), educating the next generation (*Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 190, 192 (2012)), providing compassionate care to the poor (*Fifth Avenue Presbyterian*, 293 F.3d at 575-76), or taking care of abandoned children), and force religious organizations and individuals to conform to the State’s preferred beliefs or exit the field.<sup>5</sup> This is exactly what OCFS is attempting here. Given that OCFS has not disputed the historic faith-based nature of New Hope’s service to infants whose birthparents cannot care for them, nor the sincere nature of New Hope’s religious convictions concerning human nature, marriage, and the best interests of children, the Regulation is unconstitutional as applied to New Hope without regard to a *Smith* analysis. (Br. 11-15.)

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<sup>5</sup> *See also Wisconsin v. Yoder*, 406 U.S. 205, 216, 219 (1972) (rejecting neutral, generally applicable state requirement of education until age 16 where applied in a manner that classed with central religious practices of the Amish).

II. THE REGULATION VIOLATES NEW HOPE’S FREE SPEECH RIGHTS BY COMPELLING SPEECH.

OCFS does not dispute that its application of the Regulation to New Hope would compel New Hope to say something it believes to be false (in reporting same-sex or unmarried couple candidates as “in the best interests of the child”), and forces New Hope into an intimate expressive association with these candidates (the home study process) in which it must speak contrary to conscience. (*See* Br. 21-24.) Remarkably, OCFS fails to distinguish or discuss a single one of the cases that New Hope cited concerning compelled speech and expressive association. Those cases establish that the Regulation violates New Hope’s free speech rights.

OCFS’ assertion that the Regulation is not content-based, and is therefore subject only to intermediate scrutiny is wrong. The core of what OCFS is demanding is that New Hope state a very specific message in reports that it submits to OCFS: that adoption by candidate same-sex and unmarried couples would be “in the best interests of the child.” It is hard to imagine more specifically content-based compelled speech. This contrasts sharply with the carriage obligations at issue in *Time Warner Cable v. FCC*, 729 F.3d 137 (2d Cir. 2013), which were entirely content-neutral. Likewise, in compelling New Hope to provide home-study services to same-sex and unmarried couples, what OCFS is requiring is precisely (intimate and extensive) speech; the speech is not “incidental” to any “conduct.” Strict scrutiny must be applied.

The few other cases cited by OCFS are simply irrelevant to New Hope’s compelled speech claim.<sup>6</sup> In particular, *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018), addressed the very different question of what conditions the city could impose by contract on a Catholic-affiliated service provider paid many millions of dollars of “public funds” to

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<sup>6</sup> *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (noise limits on outdoor amplification in city-owned venue); *United States v. O’Brien*, 391 U.S. 367 (1968) (prohibition on *conduct* (draft card burning) that incidentally burdens expression).

“perform . . . public service function under [a] Service Contract”. *Id.* at 671, 696. New Hope has no contract with the State of New York and receives no public funds. (Compl. ¶ 51, Geyer Aff. ¶ 29.) It is not “provid[ing] government services” (*see* McCarthy Aff. ¶ 11), nor speaking on behalf of the State.<sup>7</sup> If the State wishes to provide adoption services to same-sex or unmarried couples, it is free to do so—as it in fact does through state-operated agencies in nearly every county.

In addition, for the reasons already explained, the Regulation as applied to New Hope could not survive even the “more lenient [intermediate scrutiny] test articulated in *O’Brien*,” *Masterpiece*, 138 S. Ct. at 1746 (Thomas, concurring), because it does not actually further any relevant government interest “unrelated to the suppression of [speech,]” *id.* n.4. (*Supra* 4-6.)

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OCFS does not deny that the license necessary for New Hope to continue its historic ministry—whether “perpetual” or not—is a “benefit” subject to the unconstitutional conditions doctrine.

If the Court concludes that a “balance of harms” or “equities” analysis is necessary for any purpose, then it will find an absolute *imbalance*. OCFS can identify no “harm” at all that will result from preserving the status quo by permitting New Hope to operate consistently with its faith during the pendency of this litigation. (*Supra* 6-7; Br. 25.) By contrast, if a preliminary injunction is denied, the disruption of operations and loss of reputation that New Hope would suffer (and indeed is already suffering, *see* Geyer Aff. ¶¶ 174-180), and the denial of its ability to

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<sup>7</sup> *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (“If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.”). If OCFS disagrees with New Hope’s messages concerning marriage, family, and the best interests of children, the solution is for OCFS to speak, not to compel speech by New Hope. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018).

serve pregnant birthmothers who value a faith-based adoption service with New Hope's beliefs and who cannot "wait for later" (*see* Loscombe Aff. ¶¶ 6-8) is undeniable, and all in addition to the legally sufficient harm of even temporary loss of New Hope's constitutional freedoms to continue its ministry and speak as it chooses.

Conclusion

For the reasons set forth above and in New Hope's opening memorandum, this Court should grant a preliminary injunction preventing OCFS from enforcing the Regulation against New Hope during the pendency of this litigation.

Dated: January 9, 2019

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