UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,
Plaintiff,

vs.

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

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

Memorandum of Law in Opposition to Defendant's Motion to Dismiss

Oral Argument: February 19, 2019

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Preliminary Statement

The memorandum filed by OCFS in support of its motion to dismiss is very largely an exercise in misdirection. As a result, it is necessary to begin by restating what is at issue in this case.

New Hope alleges that OCFS has recently applied New York Codes, Rules and Regulations, Title 18 § 421.3(d) ("the Regulation") to carry out a statewide purge of faith-based adoption agencies, removing not just New Hope, but Catholic, Jewish, Muslim, and Mormon (Latter Day Saints) agencies from its list of approved agencies. (Compl. ¶ 202.) Meanwhile, those agencies that gave in to threats of closure and "compromised" (that is, violated) their faith-based beliefs about human sexuality, marriage, family, and thus the best interests of the child, have been left alone. (Compl. ¶ 192.)

OCFS attempts to justify this sweep as furthering an interest of "finding families for as many children as possible." (OCFS Mem. in Supp. of Mot. to Dismiss (OCFS MTD Mem.) at 9.) On the contrary, shutting adoption agencies can only reduce the number of children successfully adopted in this State each year. In fact, as it admitted in its opposition to New Hope's motion for preliminary injunction (OCFS Opp'n to Pl.'s Mot. for Prelim. Inj. (PI Opp'n) 14; Aff. of Carol McCarthy in Opp'n to Pl.'s Mot. for Prelim. Inj. (McCarthy Aff.) ¶ 10), but omits from its motion to dismiss brief, the Regulation in fact aims at an interest quite separate from the interests of children—that is, what OCFS perceives as "discrimination" against same-sex or unmarried couples—and pursues it at the *expense* of children waiting

for adoption, and at the expense of faith-based ministries that have been faithfully serving such children for decades.

This is a disturbing fact pattern, and one that is quite unlikely to look better under the bright light of discovery. It is no doubt in the hope of avoiding that discovery that OCFS brings this baseless motion to dismiss.

The facts that New Hope has alleged support the claims it has brought. OCFS attempts to solve this problem by changing the topic—attacking claims that New Hope has not brought, and ignoring the facts that New Hope has alleged. OCFS ignores the difference between permission and command. It asserts, falsely and without supporting citation, that private adoption agencies "were not permitted to deny the applications of otherwise qualified prospective adoptive parents based on an applicant's marital status or sexual orientation well before the promulgation of §421.3(d)." (OCFS MTD Mem. 2.) The single case OCFS cites on the topic, *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995), increased the pool of potential adoptive parents by holding that the *state* may not categorically refuse to approve adoptions by unmarried or same-sex couples. That case did not even hint at requiring a faith-based (or any private) adoption agency to devote its resources to assisting with such an adoption.

Likewise, the statute passed in 2010 codified this permission for unmarried or same-sex couples to adopt, and all State agencies, and many private agencies, will assist them in doing so. But the statute, like the judicial holding, did not compel any private actors to assist with such adoptions. As the Governor expressly

noted when signing the bill, that law "would allow for such adoptions without compelling any agency to alter its present policies" and would not "in any way tread[ ] on the views of any citizen or organization." (Compl. ¶ 161; Compl. Ex. 5.)

New Hope is not challenging New York State's policy of allowing unmarried and same-sex couples to adopt, and New Hope is not attempting to get in the way of the legal right of any such couples to adopt. Because of its faith convictions about marriage and family, however, this is simply not a type of adoption that New Hope can devote its efforts to facilitating. Until OCFS issued the Regulation, no law or judicial decision attempted to force New Hope to do so. It is only OCFS's new coercion, embodied in the Regulation, that New Hope challenges. As a result, much of the discussion in OCFS's brief aims where no one is standing.

OCFS's brief is misaimed for another odd reason as well. After asking for and receiving a two-week extension of its time to file this motion, what OCFS has filed is almost literally a verbatim resubmission of its opposition to New Hope's motion for a preliminary injunction, with the addition of a stock recitation of the legal standard governing motions to dismiss (OCFS MTD Mem. 6), a slightly longer response to New Hope's equal protection claim (*id.* 11-13), and a few minor editorial tweaks. Perhaps as a result, there are *only two* citations to New Hope's complaint in the body of OCFS's brief (*id.* 12, 14).

But opposing a request for preliminary injunction and supporting a motion to dismiss are two rather different exercises. In particular, a motion to dismiss is entirely about the sufficiency of the complaint. As we review below, once the actual

allegations of New Hope's complaint are considered, it is apparent that New Hope's complaint should not be dismissed.

Because OCFS's memorandum is almost a carbon copy of its memorandum in opposition to New Hope's motion for preliminary injunction, and because these two motions will be argued together, New Hope will not tax the Court's patience by repeating *in toto* its arguments already set out in its briefing of the preliminary injunction motion, but instead will incorporate those discussions by cross-reference where appropriate.

Governing Legal Standards

OCFS correctly recites the legal standard governing motions to dismiss. (OCFS MTD Mem. 6.) It then proceeds to ignore key facts alleged, and to draw inferences in favor of itself. The Court, of course, must do the opposite.

I. THE COMPLAINT STATES A CLAIM FOR VIOLATION OF NEW HOPE'S FREE EXERCISE RIGHTS.

A. New Hope Has Alleged Facts That Establish a Free Exercise Violation Under the Principles of *Hosannah-Tabor* If True.

As New Hope has previously demonstrated, OCFS is mistaken in believing that the pathway marked out by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), is the only test for whether a violation of free exercise has been established. On the contrary, *Hosannah-Tabor Evangelical Lutheran Church & School v. EEOC,* 565 U.S. 171 (2012), and other cases teach that even a genuinely "neutral law of general applicability" cannot be applied when to do so would interfere in historically respected areas of religious

autonomy. Passing on the faith to the next generation has been recognized as one such ancient function; obeying the repeated biblical mandate to aid the poor and the orphan is no less central and time-honored. (*See* New Hope Mem. in Supp. of Mot. for Prelim. Inj. (NH PI Reply) at 3.)

New Hope has alleged in detail the historic nature of its ministry of finding homes for abandoned children, both across the Church's scale of centuries, and across the entire 54 years of New Hope's corporate existence. (Compl. ¶ 2-5, 35-51.) New Hope has alleged that this service *is* a religious ministry, an exercise of the faith of its directors and employees. (Compl. ¶ 52-57, 105-11.) New Hope has alleged that its policies regarding selection of adoptive parents that it works with to provide homes for the infants that it places are based on religious convictions about human nature and marriage that it cannot violate. (Compl. ¶ 56-57, 153-54, 191-93, 208-09, 239-47.)

The State has nowhere asserted—and could not, for purposes of this motion—that New Hope has failed to serve the best interests of the child in *any* of the adoption placements it has made. On the contrary, New Hope has alleged that OCFS praised the quality of the services provided by New Hope and declared that it "look[s] forward to working with you as you continue to provide adoption services" immediately before it launched its threat to shut those services down. (Compl. ¶ 187; Compl. Ex. 6.)

If OCFS disputes any of these allegations, or wishes to contend that this ministry to children is less central to free exercise or less time-honored than the

educational ministry found to be protected against even neutral laws in *Hosannah-Tabor*, then this may indicate factual disputes, and its motion cannot be granted. On the other hand, if OCFS concedes these points, then its motion cannot be granted. OCFS "solves" this dilemma by simply ignoring these authorities, and the constitutional principle for which they stand.

B. New Hope Has Alleged Facts That Establish a Free Exercise Violation Under *Smith* If True.

OCFS asserts that the Regulation is "neutral and generally applicable" (OCFS MTD Mem. 8), and therefore excused from to strict scrutiny. Even if *Smith* governs, this is incorrect, and strict scrutiny must be applied.

As a matter of law and as New Hope has previously detailed, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). OCFS's attempt to hide behind judicial rulings that required the State to *recognize* adoptions by unmarried and same-sex couples (OCFS MTD Mem. 8) are irrelevant; New Hope is not threatened with closure by those rulings and is not challenging them nor alleging that they were not "neutral." (*See supra* 2-3.)

As to the Regulation that *is* at issue, New Hope has alleged that the "regulation was adopted for the purpose of targeting faith-based adoption ministries" (Compl. ¶ 9), that OCFS promulgated the Regulation precisely for the purpose of suppressing faith-based policies such as those of New Hope, which it found objectionable (Compl. ¶¶ 9, 204), and that the Regulation is "*not* neutral or generally applicable as applied" (Compl. ¶248). Further, given that "there are . . .

many ways of demonstrating that the object or purpose of a law is the suppression of . . . religious conduct," *Lukumi*, 508 U.S. at 533, New Hope has made extensive factual allegations that support a reasonable inference of a "targeting" purpose, all of which must be accepted as true for purposes of this motion.

"[T]he effect of a law in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535. New Hope has alleged facts that support a reasonable inference that the Regulation has been used to remove multiple faith-based agencies from the rolls of approved adoption agencies (Compl. ¶¶ 202-03), while leaving the many state agencies and voluntary agencies that do not adhere to traditional religious convictions about marriage and family untouched. This supports a reasonable inference of "gerrymander[ing]" for the purpose of eliminating a disapproved religious viewpoint and practice. *See id.* at 535-36 ("almost the only conduct subject to [the ordinance] is the religious exercise").

Similarly, New Hope has alleged that OCFS's hostility to New Hope's faith-based policy may be inferred from OCFS's adoption of the Regulation even though—by shutting down faith-based agencies that adhere to what they deem biblical beliefs concerning marriage and family—the Regulation will, in the case of infants of mothers who share New Hope's Christian faith, directly *frustrate* the statutory mandate to OCFS and courts to entrust infants to "an authorized agency *under the control of persons of the same faith as that of the child*." (Compl.¶¶ 170, 251 (emphasis adde).)

New Hope has alleged that the Regulation is not neutral or "generally applicable" because it exists within a framework that makes numerous exceptions to OCFS's supposed antidiscrimination policy, permitting and even requiring "discrimination" in many contexts based on many factors including secular, religious, and racial, as well as based on the very wide individualized discretion of the evaluating agency concerning the fitness of the would-be adoptive parents, all in service of the foundational goal of the best interests of the child. (Compl. ¶¶ 172-81, 248-49, 262); *see* NH PI Mem. 16-19; *Lukumi*, 508 U.S. at 543–44; *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."). Indeed, New Hope has alleged that never before has New York adopted any law or regulation "requiring any adoption provider to facilitate or participate in any adoption . . . that the [provider] believes is not in the best interests of the child." (Compl. ¶ 169.) The categorical overruling by the Regulation of the discretion and judgment of adoption providers concerning the best interests of the child, in aid of a goal of protecting adults from discrimination, is unique and hence targeted and not neutral.

New Hope has also alleged that the *enforcement* of the Regulation has been decidedly non-neutral, "target[ing] and show[ing] hostility towards . . . New Hope because of its religious beliefs and practices" (Compl. ¶ 236), demanding that New Hope "compromise" its beliefs as a condition of staying open (Compl. ¶ 192), and

revoking approval of multiple faith-based agencies because of their faith-based policies concerning the families with whom they will place children (Compl. ¶¶ 202-03.)

New Hope has alleged that OCFS's targeting of and hostility towards New Hope because of its faith-based policy is further demonstrated by OCFS's threat to revoke New Hope's license even though this threat is contrary to law—which authorizes OCFS to order a licensed agency to cease providing services *only* in the event that it makes findings of abuse which OCFS has not made—and could not make—with respect to New Hope. (Compl. ¶¶ 200, 251.)

If all these alleged facts and reasonable inferences are accepted as true, then OCFS's assertion that the Regulation is "neutral" and "generally applicable" must be rejected at least for purposes of the present motion, and the Regulation must be subjected to strict scrutiny. (NH PI Mem. 16-19.)

Further, the Supreme Court has held that an improper purpose of suppressing religious conduct may be demonstrated by "the specific series of events leading to the enactment or official policy in question." *Lukumi*, 508 U.S. at 540. But fuller information about the adoption of the Regulation, beyond the extensive allegations of non-neutrality cited above, can only become available through discovery.

C. New Hope Has Alleged Facts That Establish a Violation Under a Strict Scrutiny Analysis.

Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997), and a law that is subject to strict

scrutiny is "presumptively unconstitutional," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). To survive strict scrutiny, the government must overcome the presumption of unconstitutionality by demonstrating that the Regulation "furthers a compelling interest and is narrowly tailored." *Reed*, 135 S. Ct. at 2231. The government bears the burden of establishing this. *Ashcroft v. ACLU*, 542 U.S. 656, 660-61, 666 (2004). Nevertheless, New Hope has gone much further, and has alleged facts that, if accepted as true, decisively establish that the Regulation cannot survive strict scrutiny.

1. New Hope has alleged facts that establish that the Regulation does not further the governmental interest in the best interests of the child.

To demonstrate that a law furthers a compelling government interest, mere intent to further is not enough; the government must establish that the law is actually "effective" towards that end. *Ashcroft v. ACLU*, 542 U.S. at 665-66.[1] Further, in an as-applied challenge the government must demonstrate that the compelling interests would be adversely affected if an exception were granted to the challenger. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-32 (2006) (apply the compelling interest test in the context of RFRA); (*see also* NH PI Mem. 20-21). Otherwise, application of the law against the challenger cannot further the interest.

[1] *See also Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (2012) (failure to demonstrate empirical effectiveness of regulation towards asserted interest undermines claim that regulation serves claimed interest); *Buckley v. Valeo*, 424 U.S. 1, 45-46 (1976) (same).

New Hope has alleged that the application of the Regulation to revoke New Hope's license as an adoption agency does not and cannot further OCFS's proper interest in the best interests of children in need of adoption. More specifically, New Hope has alleged that because its services are all additive over those provided by the State, at no cost to the State (Compl. ¶ 51), terminating New Hope's license to provide adoption services can only *reduce* the total amount of adoption services and adoption possibilities available for birthmothers and children in need of adoption in New York state, harming their interests. (Compl. ¶¶ 189-93, 208-17.)

The State's contrary assertion that shutting adoption agencies that only place with married male/female couples will improve availability of adoption for children (OCFS MTD Mem. 10) is irrelevant for purposes of a motion to dismiss, and is nonsense, on the order of maintaining that shutting down all Catholic schools in New York would increase educational options and opportunities for children. OCFS's determination to close New Hope's adoption services is about some agenda very different than the best interests of infants in need of adoption.

New Hope has also alleged that enforcement of the Regulation against New Hope and other faith-based adoption providers that share similar beliefs must frustrate rather than further the interest—expressly declared by statute—of placing children in the custody of adoption agencies, and then with parents, that share the "same religious faith as that of the child" [i.e, of the birthmother or birthparents]. (Compl. ¶¶ 170, 177; *see* NH PI Reply 5.)

2. New Hope has alleged facts that establish that the Regulation does not further any other cognizable interest.

In its opposition to New Hope's request for preliminary injunction, OCFS attempted to rely on an interest in preventing "discrimination" resulting in "trauma and social harm" to *adults* who approach New Hope seeking to adopt. (OCFS PI Opp'n 14; McCarthy Aff. ¶ 10.) As a matter of law, as New Hope has detailed in its reply memorandum in support of its request for preliminary injunction, this is not a cognizable interest that could justify deprivation of New Hope's free exercise and free speech rights. (NH PI Reply 5-6.) As a matter of fact, New Hope has alleged that even this inadequate interest is not "furthered" by application of the Regulation to close New Hope's adoption services, given that no one has ever registered a complaint against New Hope on these grounds, and, more importantly, given New Hope's policy of providing polite referrals to applicants it is not able to approve due to its religious convictions. (Compl. ¶ 156; NH PI Reply 6.) Perhaps significantly, OCFS makes no mention of or claim to such an interest at all in its Motion to Dismiss.

3. New Hope has alleged facts that establish that the Regulation is not narrowly tailored to the interest it purports to serve.

A prohibition that makes exceptions for secular reasons, but not to accommodate conduct motivated by religious belief, cannot be said to be "narrowly

tailored" because it is underinclusive. *See Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. at 543; *Fraternal Order of Police*, 170 F.3d at 366.[2]

New Hope has alleged that the Regulation is not "narrowly tailored" (Compl. ¶ 275), and as noted above, New Hope has made specific allegations that the Regulation and broader statutory regime permit or require adoption agencies to make numerous exceptions to a supposed rule against "discrimination" in the selection of adoptive parents. (*Supra* at 8; Compl. ¶¶ 87-94, 172-81, 248-49, 262, 277, 283.)[3] If OCFS wishes to demonstrate that New Hope's faith-based decision that it must not assist with placements to same-sex or unmarried couples in some way "create[s] any greater difficulties" than all of these many permitted exceptions, *Fraternal Order of Police*, 170 F.3d at 366, this is a topic for discovery and cross-examination, not for decision on a motion to dismiss.

4. New Hope has alleged facts that establish that the Regulation is not the least restrictive means to accomplish the interest it purports to serve.

To satisfy strict scrutiny, the final requirement is that the law be the least restrictive means available to further the compelling governmental interest. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Since OCFS has not coherently suggested how applying the Regulation to close adoption services could possibly further its supposed interest of increasing the number of children who find

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[2] Such exceptions also suggest an impermissible value judgment that secular reasons are more important than religious ones, negating *Smith's* threshold requirement of neutrality. *See Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. at 543.

[3] *See also* N.Y. Dom. Rel. Law § 110 (placing restrictions on adoptions by adult married persons who are "living separate and apart from his or her spouse pursuant to a decree of judgment of separation . . .").

permanent adoptive homes, it is difficult even to begin this analysis. However, if the facts that New Hope has alleged are accepted as true, a less restrictive (and more effective) means of maximizing the placement of as many children as possible in loving homes would be to construe the Regulation so as to permit New Hope and other faith-based agencies that share similar convictions to continue their work consistent with their beliefs. Accordingly, New Hope has alleged that the Regulation is not the least restrictive means to achieve any legitimate governmental interest. (Compl. ¶ 276.) Certainly, OCFS has not begun to meet its burden (*supra* 9-10) to show that the Regulation as applied to revoke New Hope's license is the least restrictive means of furthering any legitimate interest. For this reason, also, OCFS's motion to dismiss cannot be granted.

II. THE COMPLAINT STATES A CLAIM FOR VIOLATION OF THE FREE SPEECH RIGHTS OF NEW HOPE.

A. New Hope Has Alleged Facts That State a Claim for Denial of Free Speech Through Compelled Speech.

A law that forces a speaker to change the content of his message violates the free speech protections of the First Amendment. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (government may not "compel [an individual] to utter what is not in his mind"); (*see also* NH PI Mem. 21-22). New Hope has amply alleged such a violation of its free speech rights.

New Hope has extensively alleged that its mission and function as an adoption services provider involves—indeed, largely consists of—value-laden speech. This includes counseling birthmothers and recommending candidate

adoptive parents to them (Compl. ¶¶ 62-66, 77, 86-89, 94-97, 270); explaining New Hope's faith-based beliefs concerning children and adoption to potential adoptive parents (*id.* ¶¶ 104-109, 270); counseling potential adoptive parents about the adoption process, their own readiness for adoption, and their presentation of themselves in parent profiles (*id.* ¶¶ 104-06, 112, 114, 116-120, 123-127, 132), and New Hope's final certification (or not) of its own conclusion that adoption by specific proposed adoptive parents is in the best interests of the child (*id.* ¶¶ 140-141).[4]

New Hope has alleged that its beliefs lead it to "recommend married opposite-sex couples and truly single individuals as adoptive parents" (Compl. ¶269), and that because of those same beliefs it cannot endorse "unmarried couples or same-sex couples as adoptive parents" (Compl. ¶153).

The Regulation, as OCFS seeks to apply it against New Hope, would compel New Hope to radically alter the content of its speech, forcing New Hope to say to both the State and to birthmothers, "We do believe that adoption by this unmarried or same-sex couple would be in the best interests of this child," when in fact New Hope believes it would not be. (Compl. ¶¶ 153, 269-273.) This is not "requiring the dissemination of purely factual and uncontroversial information." *Hurley v. Irish-Am. Gay, Lesbian &Bisexual Grp. of Bos.*, 515 U.S. 55, 573 (1995). This is changing no to yes, white to black.

[4] *See also* N.Y. Comp. Codes R. & Regs. tit. 18, § 421.15 (requiring an authorized adoption agency to submit either a report indicating approval of an applicant, or a report that states the agency's conclusion that "approval would not be in the best interests of children awaiting adoption.").

B. New Hope Has Alleged Facts That State a Claim for Denial of Free Speech Through Violation of Its Freedom of Expressive Association.

The right to free speech carries with it a right to associate with others to express desired views or beliefs, and a concomitant right *not* to include in that association others where to do so would "affect[ ] in a significant way the group's ability to advocate" its desired viewpoints. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48). If a group indeed engages in "expressive association"—including any attempt to "transmit . . . a system of values," *id.* at 650,—then a law that infringes on that freedom of association must satisfy strict scrutiny. *Id.* at 648.

New Hope has alleged that type of expressive association, and has alleged that the Regulation will materially impair its ability to associate with others to advocate its preferred viewpoints. Specifically, New Hope has alleged that it engages in extensive expression as an adoption provider, including "convey[ing] a system of values about life, marriage, family and sexuality to both birthparents and adoptive parents . . ." (Compl. ¶¶ 64, 66, 77, 86-89, 95-96, 104-06, 112, 114, 116-120, 123-27, 140-141, 270.) New Hope has alleged that it engages in association for this purpose with others who share its beliefs. (Compl. ¶¶ 53-56, 69, 84, 217-19.) New Hope has alleged that the state is requiring it to include individuals that it does not currently include in its adoption program, but rather refers to other providers. (Compl. ¶153-54, 156, 168, 188-90, 198). New Hope has alleged that "[i]ncluding unmarried or same-sex couples in New Hope's comprehensive evaluation, training, and placement programs and adoptive-parent profiles would change New Hope's message and counseling to adoptive families and birthparents." (Compl. ¶273.) And

New Hope has alleged that requiring it to include same-sex or unmarried couples would impede its ability to associate with others who share or are open to its beliefs, both potential adoptive parents and birthmothers. (Compl. ¶¶ 218-20.)

These allegations state a claim under the principles of *Boy Scouts of America v. Dale*, and require that the Regulation be subjected to strict scrutiny.

C. OCFS's Arguments Against New Hope's Free Speech Claims Are Without Merit.

The extensive factual allegations summarized above state claims for impermissible compelled speech and compelled expressive association far beyond the possibility of dismissal under Federal Rule of Civil Procedure 12(b)(6). OCFS responds by simply ignoring these factual allegations, and ignoring the leading precedents that define the law relating to compelled speech and freedom of expressive association, instead offering several cursory and meritless justifications.

OCFS's assertion that because the Regulation "applies to all authorized agencies" it is not "based on . . . content" (OCFS MTD Mem. 10), and is therefore not subject to strict scrutiny, is nonsense. By this logic, a law that requires *everyone* to salute the flag is not content-based, and would not be subject to strict scrutiny. The law is the opposite. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Instead, laws "adopted by the government 'because of disagreement with the message [the speech] conveys,' . . . like those that are content-based on their face, must also satisfy strict scrutiny" because they are considered "content-based regulations of speech." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

New Hope has extensively alleged that the Regulation was enacted, and is being applied against New Hope, because of just such disagreement. (*Supra* 6-9.)

OCFS's further assertion that the Regulation should be considered "content-neutral" because its aim is to ensure that "discrimination . . . does not occur" (OCFS MTD Mem. 10) is a non-sequitur. On the contrary, the Supreme Court has emphasized that "[t]he Speech Clause has no more certain antithesis" than the concept of censoring or compelling speech "to produce a society free of . . . biases," and that far from justifying compelled speech, this "is a decidedly fatal objective." *Hurley*, 515 U.S. at 579.

OCFS also invokes *Time Warner Cable v. FCC*, 729 F.3d 137 (2d Cir. 2013), to suggest that the Regulation need not satisfy strict scrutiny. But that case—like the Supreme Court's decision in *Turner Broadcasting* on which it relied—concerned the distinctive context of cable operators whom courts have concluded are mere "conduits" that are not attempting to communicate a message. *Time Warner*, 729 F.3d at 144; *Turner Broadcasting*, 512 U.S. 622, 629 (1994); *compare Hurley*, 515 U.S. at 575 (rejecting contention that parade could be described as a mere "conduit"). There can be no argument—and OCFS does not argue—that New Hope is a mere conduit for the messages of others, and these cases are therefore irrelevant.

Finally, OCFS simply asserts that the Regulation does not "compel[ ] . . . New Hope from [sic] . . . associating with others for the purpose of expressing [its] beliefs." (OCFS MTD Mem. 11.) On the contrary, the facts alleged and reviewed

above establish that the Regulation as OCFS is applying it against New Hope would compel New Hope to associate *extensively* with potential adoptive parents who disagree strongly with New Hope's beliefs about marriage, family, and the best interests of children, for discussions about precisely those topics, and in a manner that would severely compromise New Hope's ability to advocate and visibly stand for the positions that it believes to be true. Parallel to the situation that confronted the Supreme Court in *Dale*, requiring New Hope to work with, counsel, and recommend unmarried and same-sex couples "would, at the very least, force [New Hope] to send a message, both to [other adoptive parents, to birthparents] and to the world, that [New Hope] accepts" such relationships as appropriate and believes that adoption by such couples can be in the best interests of the child. *See Dale*, 530 U.S. at 653. But New Hope does not believe these things.

There is no end-run. The Regulation must satisfy strict scrutiny.

As set out above, a law or regulation subject to strict scrutiny is presumptively invalid, and the state bears the burden of proving otherwise. To carry that burden, the state must demonstrate that the law "furthers a compelling interest and is narrowly tailored," *Reed*, 135 S. Ct. at 2231, including that its application against the specific challenger rather than providing an exception, *Gonzales v. O Centro Espirita*, 546 U.S. at 430-32, is the "least restrictive means" of accomplishing that interest, *Roberts v. U. S. Jaycees*, 468 U.S. at 623. *See supra* 9-14. These are factual burdens of proof that simply cannot be met by a defendant on a motion to dismiss. In any case, as detailed above, the allegations of the Complaint,

accepted as true, negate these necessary findings at every point. New Hope's allegations state violations of free speech—in the forms of compelled speech and compelled association—that cannot be dismissed.

III. THE COMPLAINT STATES A CLAIM FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS BY IMPOSITION OF UNCONSTITUTIONAL CONDITIONS.

Not a great deal needs to be said separately about New Hope's unconstitutional conditions claim. New Hope has alleged that New York has conditioned its license to continue the ministry that is New Hope's historic reason for existence on an agreement to "compromise" (read, violate) its religious convictions and speak what it believes to be false, in all the ways reviewed above. (Compl. ¶¶ 192, 291-295.) This states a claim for deprivation of constitutional rights under the unconstitutional conditions doctrine. *See Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2024-25 (2017); (NH PI Mem. 13-15). OCFS asserts that authorization to continue New Hope's adoption ministry is "not a public benefit" (OCFS MTD Mem. 14), but with no support other than citation to a case in which the benefit in question was public funding. But the facts of that case do not constrain either the logic or the law of the doctrine. The state-required license is the most valuable government benefit possible for this ministry—indeed, it is essential to its existence and fulfilment of its ministry.[5] OCFS does not dispute that—apart

[5] While the "perpetual" nature of the license granted to New Hope is in no way essential to New Hope's claim (refusal to renew an annual license could be equally wrongful), OCFS's attempt to portray the "perpetual" aspect as relating merely to "corporate structure," (OCFS MTD Mem. 14), is inconsistent with the facts alleged in the Complaint, and in particular with a 2018 email from OCFS which stated that

from New Hope's refusal to support and endorse adoption by same-sex or unmarried couples as demanded by OCFS—New Hope is "fully qualified" to continue to serve as an adoption agency. *See Trinity Lutheran*, 137 S. Ct. at 2024.

IV. THE COMPLAINT STATES A CLAIM FOR VIOLATION OF EQUAL PROTECTION.

OCFS appears to be under the impression that so long as it adopts and enforces a policy that shuts down *all* faith-based adoption providers who hold what OCFS considers "*archaic*" beliefs about marriage and family, (Compl. ¶ 166), then there is no Equal Protection problem: "similarly situated" entities are treated similarly. *See* OCFS MTD Mem. 11-13. OCFS is mistaken.

"[T]he Equal Protection Clause is most commonly used to bring claims alleging discrimination based on membership in a protected class" – a concept that the cases it cites discuss, but Defendant ignores. *Vann v. Sudranski*, No. 16 CV 7367 (VB), 2017 WL 6515612, at *5 (S.D.N.Y. Dec. 20, 2017). Plaintiff has alleged membership in a class that receives strict scrutiny under the Equal Protection Clause—specifically, those discriminated against on the basis of religious belief. *See, e.g., Am. Atheists, Inc. v. Port Auth. of NY & NJ*, 936 F. Supp. 2d 321, 338 (S.D.N.Y. 2013), *aff'd* 760 F.3d 227 (2d Cir. 2014) ("The Equal Protection Clause prohibits the government from subjecting individuals to 'selective treatment ... based on impermissible considerations such as ... religion.' "). Specifically, New

since New Hope is "authorized in perpetuity," it would not be obligated to complete an otherwise required questionnaire containing "many" questions about its "program"—hardly topics of "corporate structure." (Compl. ¶ 185.)

Hope has alleged its Christian faith and beliefs regarding marriage, family, and the best interest of children—and those of other faith-based providers who share its beliefs—have caused it and others to be threatened with closure. (*See* Compl. ¶¶ 40-42, 47-57, 105, 153-156, 188-193, 198, 202-205.) Whether construed as a class of religious adherents or as those exercising and facing infringement of fundamental rights protected by the Constitution, a similar level of review under Equal Protection applies. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

And New Hope has alleged that the Regulation and its enforcement has been both "applied in an unlawfully discriminatory manner" and that it "has an adverse effect" on faith-based providers who share its beliefs on marriage and the family and that the policy and its enforcement "was motivated by discriminatory animus." *Am. Atheists, Inc. v. Port Auth. of NY & NJ*, 936 F. Supp. 2d at 338 (citing *Pyke v. Cuomo,* 567 F.3d 74, 76 (2d Cir.2009)); (Compl. ¶¶ 87-94, 100-01, 129-30, 172-81, 187, 249-52, 282-83 (documenting consideration of protected characteristics permitted throughout system, except for complete bar in regards to consideration of sexual orientation); (Compl. ¶¶ 188-93, 202-05 (documenting adverse effect on faith-based providers who share New Hope's beliefs); (Compl. ¶¶ 163-170, 200-05, 250-52, 255 (alleging facts that demonstrate discriminatory animus)).

Further, "the equal protection clause . . . secure[s] . . . against . . . arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*,

528 U.S. 562, 564 (2000); *see also Bush v. Gore*, 531 U.S. 98, 104–06 (2000) (focusing on the "arbitrary and disparate treatment" of voters and the need to ensure "equal application."). New Hope has not alleged a class-of-one equal protection claim; it has alleged that the Regulation's prohibition on discrimination, which nominally covers several protected classes, taken together with OCFS's enforcement of that prohibition, is arbitrary because OCFS permits New Hope, all other approved agencies, and all parents involved in the adoption process to "discriminate" on the basis of protected characteristics in multiple contexts, but categorically bans consideration of sexual orientation even for best-interest analysis concerning a particular child. (Compl. ¶¶ 87-94, 100-01, 129-30, 172-81, 187, 249-52, 282-83; *see also* Compl. Ex. 6.)

This is the kind of arbitrary enforcement that the Equal Protection Clause forbids. It is also a fact-intensive allegation as to which dismissal prior to discovery is not feasible. *Raza v. City of New York*, 998 F. Supp. 2d 70, 80–81 n.6 (E.D.N.Y. 2013) (permitting discovery "regarding any NYPD policy or program involving the investigation of [a religious group] based, in whole or part, on their religion. Without this discovery, Plaintiffs would be preemptively and irreparably prohibited from proving that Defendants' alleged discriminatory intent was a motivating factor" and noting the Rule of *United States v. Armstrong*, 517 U.S. 456 (1996),

which is specific to claims involving selective prosecution, "has no application to their claim.").[6]

Because New Hope has alleged membership in a suspect class, the exercise of several infringed fundamental rights, and arbitrary discrimination through selective enforcement, New Hope has alleged violations of Equal Protection that would entitle it to strict scrutiny, a burden the State cannot meet. *See* supra 9-14.

Conclusion

For the reasons set forth herein, OCFS's motion to dismiss should be denied.

[6] We will note that OCFS has cited a rather uninformative set of cases in its discussion of New Hope's equal protection claim. Several concern motions after discovery or even trial—a very different standard than that which governs a motion to dismiss. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 7 (1988); *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 143 (2d Cir. 2010); *LeClair v. Saunders*, 627 F.2d 606, 607, 611 (2d Cir. 1980). Two others concern the rather distinctive topic of property development and the standard governing "class of one" equal protection claims—a type of claim that New Hope has not alleged. *Ruston v. Town Bd. for the Town of Skaneateles*, 610 F.3d 55 (2d Cir. 2010); *Joglo Realities, Inc. v. Seggos*, 229 F. Supp. 3d 146 (E.D.N.Y. 2017).

Respectfully submitted this 4th day of February, 2019.

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Certificate of Service

I hereby certify that on February 4, 2019, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

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