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)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The Second Circuit recently issued an order (the "Order") reversing this Court's dismissal of New Hope's motion for preliminary injunction and remanded for further proceedings consistent with that opinion. *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 184 (2d Cir. 2020). That Order also allowed the parties to submit a supplemental brief in support of or in opposition to that motion. *Id.* New Hope now files this Supplemental Memorandum together with a Supplemental Affidavit of New Hope Executive Director Kathleen Jerman ("Jerman Aff.").

New Hope's motion for preliminary injunction was briefed more than a year and a half ago, so supplementation is indeed called for. First, the Second Circuit has clarified the law on multiple points relevant to New Hope's motion. Second, on appeal, OCFS changed its position and acknowledged that it *does* seek to control and limit New Hope's speech about the nature of family, marriage, and the best interests of children. Third, in light of the Second Circuit's clarification of controlling law, New Hope offers additional relevant details about its operations and the people it serves through the Supplemental Affidavit of Kathleen Jerman.

Because this brief is supplemental, New Hope continues to rely on its memorandum in support of its motion for preliminary injunction submitted on December 12, 2018 (ECF No. 15-1) ("Pl. MPI"), on its reply memorandum submitted on January 9, 2019 (ECF No. 33) ("Pl. MPI Reply"), on the facts set out in its verified complaint (ECF No. 1), and in the affidavits of Judith Geyer, Charity Loscombe, Ellie Stultz, Elaine Bleuer, Justin Bleuer, and Jeremy Johnston filed in support of its Motion for Preliminary Injunction. ECF Nos. 15-2 – 15-7.

In deciding this motion, this Court "should consider . . . the facts alleged in the verified complaint [("Compl.")], as well as those in sworn affidavits submitted by New Hope." *New Hope*, 966 F.3d at 181. It should also recognize that those facts "are largely unrefuted in OCFS's filings in opposition to injunctive relief." *Id.*

ARGUMENT

I. Title 18 NYCRR § 421.3(d) as applied infringes New Hope's right to free speech in a manner that triggers strict scrutiny.

Section 421.3(d) violates both New Hope's free speech rights and its free exercise rights. We address first the free speech violations.

A. OCFS seeks to censor and compel New Hope's speech to birthmothers, adoptive couples, and the State.

"[T]he 'government may not prohibit the expression of an idea', even one that society finds 'offensive or disagreeable.'" *New Hope*, 966 F.3d at 170 (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). Similarly, "government also cannot tell people that there are things that 'they must say.'" *Id.* (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)); *see* Pl. MPI 21.

In its prior briefs and in the Jerman Supplemental Affidavit, New Hope has detailed the three distinct audiences that its employees address with value-filled messages: "counseling birthmothers," "instructing . . . prospective adoptive parents," and "filing its ultimate reports" with the State. *New Hope*, 966 F.3d at 171; *see* Pl. MPI 6-7, 22-24; Pl. MPI Reply 1-2, 8; Jerman Aff. ¶¶ 8-63. The Second Circuit held that New Hope's adoption services are "laden with speech." *New Hope*, 966 F.3d at 171.

It is undisputed that New Hope holds and seeks to "convey[ ] a system of values about life, marriage, family and sexuality to both birthparents and adoptive parents." Compl. ¶ 270. Specifically, New Hope believes and conveys that the "biblical model for the family"—"one man married to one woman for life for their mutual benefit and the benefit of their children—is the ideal and healthiest family structure for mankind and . . . for the upbringing of children." Compl. ¶ 56; Jerman Aff. ¶ 14.

New Hope speaks and advocates that set of beliefs *to birthmothers* who choose to work with New Hope. When New Hope shows portfolios of potential adoptive couples to a birthmother, it inherently and intentionally represents that New Hope believes that each one of these couples could provide a home and family consistent with the best interests of the child. Jerman Aff. ¶ 10. "If New Hope were forced to work with unmarried or same-sex couples to approve them as adoptive parents, in light of its faith-based beliefs about family and the best interests of children, New Hope would be compelled by conscience—informed by its faith—to advise birthmothers whom it serves that it does not believe that an unmarried or same-sex couple could provide the best home for their child." Jerman Aff. ¶ 11.

New Hope speaks and advocates that same set of beliefs *to potential adoptive couples* who choose to work with New Hope for the application, home study, and adoption process. For example, New Hope's counseling of adoptive parents "includes counseling about building a healthy family environment for the child they will adopt." Jerman Aff. ¶ 13. "If New Hope were required to work with unmarried or

same-sex couples in the counseling and home study process, New Hope would be compelled by conscience—informed by its faith—to advise those couples that New Hope does not believe that an unmarried or same-sex couple can provide the best home for adopted children, because the best home for each infant is a family comprised of a mother and father committed to each other—and thus together to their children—for life in marriage." Jerman Aff. ¶ 14.

New Hope engages in vital speech informed by that set of beliefs *to the State*, when it expresses its conclusions—in records and forms required by the State—as to whether approval of a particular couple is "in the best interests of children awaiting adoptions," and as to whether a specific placement is in the best interests of that particular child. Jerman Aff. ¶ 20; *see id.* ¶¶ 21, 33-48. Since New Hope does not believe that placement with unmarried or same sex couples is consistent with the best interests of children, to require it to approve any such couple, or any such placement, is inevitably to censor New Hope by preventing it from saying what it believes to be true, and to compel speech by requiring New Hope to say what it believes to be false. *See New Hope*, 966 F.3d at 176-77, 182.

And all of this is speech about profound human, religious, and philosophical matters and matters of great public interest, disagreement, and debate. It is not possible to dismiss this speech as unimportant, or merely clerical, implementing some "quantitative checklist." *Id.* at 177.

Intuitively, it was always extremely improbable that OCFS would consider it acceptable for New Hope to agree to work with unmarried or same-sex couples, but

then speak its true beliefs and provide advice consistent with those beliefs to birthmothers or to those couples, or to express its true beliefs about the best interests of children in final conclusions disapproving adoption by such couples. *New Hope*, 966 F.3d at 177. As this Court rightly observed during argument, if New Hope spoke what it believes after being forced into that impossible context, it would probably face a lawsuit "the next day." *Id.* at 176; *see* Tr. of Proceedings Before the Hon. Mae A. D'Agostino at 44, February 19, 2019 (attached as Ex. A to Affidavit of Jacob P. Warner). Nevertheless, based on OCFS's arguments and representations, this Court previously concluded that "nothing is preventing New Hope from continuing to share its religious beliefs throughout the entire process," and that "OCFS is not . . . compelling [New Hope] to change the message it wishes to convey." Mem.-Decision & Order 29-30, ECF No. 38.

On appeal, however, OCFS repudiated that position, stating instead that OCFS does not seek to "restrict New Hope's speech *unrelated to its provision of adoption services*," and that "New Hope is not precluded from espousing its beliefs about marriage and family . . . *outside the contours of its adoption program*." Mem. of Law for Appellee in Opp'n to Mot. for Prelim. Inj. at 20-21, *New Hope*, 966 F.3d 145, ECF No. 101 (attached as Exhibit B to Warner Aff.) (emphasis added). As the Second Circuit recognized, OCFS's assertion that New Hope can say what it likes "unrelated to its provision of adoption services" and "outside the contours of its adoption program" is a "meaningless" concession—or at least irrelevant to New Hope's free speech and free exercise claims. *New Hope*, 966 F.3d at 176.

In plain English, OCFS has now disclosed that it *does* contend that § 421.3(d) empowers it to "prevent[ ] New Hope from continuing to share its religious beliefs [on these topics] throughout the entire [adoption] process." *Id.* at 175. This is censorship plain and simple.

As New Hope has explained, § 421.3(d) as applied equally seeks to compel New Hope to say things it believes to be false. To birthmothers: that unmarried or same-sex couples could provide a "best interests" home for their children. To unmarried or same-sex adoptive couples and to the State: that those couples can provide a "best interests" home for a child.

Both the censorship and the compulsion of speech substantially impair New Hope's free speech rights; both must be enjoined unless OCFS can carry its burden to satisfy strict scrutiny. As we review in Section III below, this it cannot do.

B. New Hope's speech is not governmental speech.

The Second Circuit came close to holding that as a matter of law, censorship or compulsion of New Hope's speech cannot be excused on the grounds that New Hope's speech is governmental speech, *New Hope*, 966 F.3d at 171-75, 182. The Court of Appeals warned of the danger of extending the "government speech" doctrine, *id.* at 171, 173, and concluded that "on the pleadings record, none of the three factors that courts rely on in identifying 'government speech' weighs in favor of identifying any speech by New Hope as such," *id.* at 175. Factual details supplied in the Jerman Affidavit simply strengthen that conclusion.

First, the Second Circuit concluded that "adoption has not historically been treated by government as a means for it to communicate with the public on various

matters. Rather, adoption's singular focus is on identifying a placement that is in the best interests of a child." *New Hope*, 966 F.3d at 174. Reinforcing this, Mrs. Jerman testifies that before the regulation and events at issue, OCFS never made any attempt to control or restrict New Hope's counseling of birthmothers or adoptive parents concerning biblical teachings about the nature of marriage and its relationship to the best interests of children. Jerman Aff. ¶¶ 12, 30.

Second, the Court of Appeals found that "nothing in the pleadings suggests that the public understands New Hope's expressive activities . . . to be the State's own message," noting that New Hope's explicitly religious speech throughout the adoption process could not possibly represent government speech. *New Hope*, 966 F.3d at 174; *see id.* at 182. Mrs. Jerman testifies that while numerous government-run adoption services exist in New York, both birthmothers and potential adoptive parents choose New Hope precisely because of its different—and religious—nature and message. Jerman Aff. ¶¶ 50, 68-70; *see also* Loscombe Aff. ¶¶ 8, 12; Stultz Aff. ¶ 31; E. Bleuer Aff. ¶¶ 7-10; J. Bleuer Aff. ¶¶ 8-17; Johnston Aff. ¶ 14.

Third, the Second Circuit found that while the adoption process is regulated, it is not regulated to that degree of complete control which has at times supported a designation as government speech. "Nothing in the pleadings indicates that OCFS officials ever review, edit, or reject a private authorized agency's best-interests assessment," *New Hope*, 966 F.3d at 175; *see id.* at 182, and OCFS admits that "[t]he statutory . . . scheme bestows significant authority on authorized agencies," *id.* at 177. Again, Mrs. Jerman provides more detail about the wide latitude for

discretion and judgment which is accorded to—and indeed required of—private adoption agencies. Jerman Aff. ¶¶ 19-20, 22, 25-27, 37, 43, 45.

C. Section 421.3(d) also violates New Hope's right to expressive association as applied.

The right to freely associate with like-minded individuals is protected where that association serves the purpose "of engaging in those activities protected by the First Amendment [including] . . . speech . . . and the exercise of religion." *New Hope*, 966 F.3d at 178 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984)).

New Hope has introduced evidence that as an organization it seeks both to practice and communicate the Christian religion, (Jerman Aff. ¶¶ 52-53; Geyer Aff. ¶¶ 30-37, 86, 90, 92-94), and to "convey[] a system of values about life, marriage, family and sexuality to both birthparents and adoptive parents through its comprehensive evaluation, training, and placement programs." *New Hope*, 966 F.3d at 178 (quoting Compl. ¶ 270); *see* Geyer Aff. ¶ 86. All of this is evidentiary. None of it is disputed. OCFS does not deny that New Hope intentionally "conveys a system of values about life, marriage, family, and sexuality." Compl. ¶ 270. Rather, OCFS disagrees with that message, and wants New Hope to *stop* communicating it "[inside] the contours of its . . . adoption services." *New Hope*, 966 F.3d at 176. But this targets the very core of the protected right of expressive association.

1. New Hope together with its employees form a protected expressive association.

New Hope itself, including its employees, is an expressive association that exists not for commercial purposes, and not only to help infants and birthparents and adoptive parents, but with a concurrent mission to spread the Christian faith

and what New Hope believes to be biblical truth about healthy families. Jerman Aff. ¶¶ 59-61; Geyer Aff. ¶¶ 30-37, 90, 92. New Hope and its employees believe that these truths will profoundly help infants and birthparents and adoptive parents. Compl. ¶¶ 52-57; Geyer Aff. ¶¶ 32-37; Jerman Aff. ¶ 54. The people who make up New Hope have associated together in part because they can convey those "shared beliefs and values more effectively" together. *New Hope*, 966 F.3d at 179; *see Rumsfeld v. FAIR*, 547 U.S. 47, 68-69 (2006); Jerman Aff. ¶¶ 57-59; Compl. ¶¶ 52-57. New Hope fears that § 421.3(d) instead requires New Hope to muzzle employees, to prevent them from declaring these beliefs to those to whom New Hope speaks, and even to punish employees who do so. *See New Hope*, 966 F.3d at 179; Jerman Aff. ¶ 55. And in turn, the record establishes that if New Hope is blocked from communicating these messages, and is forced to communicate contrary messages, then multiple employees who associate with New Hope precisely because of its beliefs and mission could no longer in good conscience work for New Hope. Jerman Aff. ¶ 58. Thus, the government's interference in New Hope's speech will "mak[e] association with New Hope 'less attractive' for those who would otherwise combine their voices with the agency's in order to convey their shared beliefs and values more effectively." *New Hope*, 966 F.3d at 179 (quoting *Rumsfeld*, 547 U.S. at 68-69).

2. New Hope together with the adoptive couples it serves form a protected expressive association.

Evidence submitted by New Hope also establishes that New Hope enters into an expressive association with adoptive parents for the purpose of discussing topics including infertility, relationships, adoption, and family dynamics within the faith-

based framework that New Hope very openly professes. Jerman Aff. ¶¶ 50-51; Geyer Aff. ¶¶ 86, 90, 92; *see New Hope*, 966 F.3d at 156-58, 178-180. There is no requirement that adoptive applicants share New Hope's faith, but all who choose to work with New Hope are inevitably very aware of that faith framework before they choose to work with New Hope rather than with one of the many secular adoption services in the state. Geyer Aff. ¶ 86; Jerman Aff. ¶ 51. Indeed, several prospective adoptive parents have testified that if New Hope were blocked from teaching, counseling, and acting based on its religious beliefs about marriage and family, those individuals would not feel comfortable relying on New Hope to guide them through the adoption process. J. Bleuer Aff. ¶ 17; E. Bleuer Aff. ¶ 10; Stultz Aff. ¶ 7. Censorship or compelled speech contrary to New Hope's true beliefs would destroy not only the expression, but the association.

These facts—all undisputed on the present record—establish a violation of New Hope's protected right of expressive association. This is an independent basis for the requested preliminary injunction.

II. Title 18 NYCRR § 421.3(d) as applied impairs New Hope's right to freely exercise its religion in a manner that triggers strict scrutiny.

Religious "traditions, practices, and doctrines . . . need not receive [the Court's] approval or support, but [they] must be tolerated if our freedoms are to be preserved." *Int'l Soc'y For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 447 (2d Cir. 1981). It is undisputed that New Hope's conviction that a family with "one man married to one woman for life . . . is the ideal and healthiest family structure for mankind and specifically for the upbringing of children" is a religious conviction,

Compl. ¶ 56, is part of a coherent view of human nature shared by many religions, and is a belief which the Supreme Court has acknowledged as "based on decent and honorable religious or philosophical premises," and as fully protected by the First Amendment. *See New Hope*, 966 F.3d at 161 (quoting *Obergefell v. Hodges*, 576 U.S. 644 (2015)). OCFS does not dispute that § 421.3(d) as applied "preclude[s] New Hope from pursuing its adoption ministry consistent with its religious beliefs." *New Hope*, 966 F.3d at 160. This Court has not found otherwise.

The remaining question is whether the state may outlaw this historic religious belief and put New Hope to a choice between violating what it believes to be the teachings of God or closing its 50-year-old ministry. It may not.

OCFS argues that it possesses precisely this power, because it is applying a "neutral law of general applicability" within the meaning of *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). OCFS is mistaken, for two separate reasons.

A. Section 421.3(d) must be subjected to strict scrutiny because it intrudes on historic beliefs at the heart of New Hope's "faith and mission."

First, as Plaintiff has previously reviewed, *Smith* has never defined the limits of the right of Free Exercise for all purposes, and specifically does not empower even "neutral and generally applicable" laws to extinguish well-established historical practices that go to the heart of the "faith and mission" of a religious organization. *See* Pl. MPI 11-12.There can be no doubt that, for a Christian ministry devoted to the formation of families and the wellbeing of children, their beliefs about the created nature of man, woman, and family do indeed lie at the heart of their "faith and mission." Thus, strict scrutiny must be applied. As demonstrated in Section III

below, OCFS cannot carry the burden of strict scrutiny so New Hope has demonstrated a likelihood of success on the merits.

B. Section 421.3(d) must be subjected to strict scrutiny because it is not "neutral" in either its origin or its enforcement.

Second, even under the test of *Smith*, § 421.3(d) must survive strict scrutiny because it is not "neutral." "[G]overnment hostility to religion can be 'masked, as well as overt,'" and "facial neutrality" is not "determinative." *New Hope*, 966 F.3d at 163 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)); *see also* Pl. MPI 16. New Hope has offered facts sufficient to show a likelihood of success in establishing that § 421.3(d) is not "neutral" in either its origin or its enforcement, but is instead permeated with hostility or animus towards historic religious beliefs about marriage and family such as New Hope holds. This hostility has revealed itself in multiple ways.

As the Second Circuit emphasized, while these clues or "tells" must inevitably be reviewed seriatim, the Court should step back and consider "the totality of the evidence" to decide whether that totality reveals so much as a "slight suspicion of religious animosity," and must be alert for "even . . . 'subtle departures from neutrality.'" *New Hope*, 966 F.3d at 163, 165 (citing *Lukumi*, 508 U.S. at 534, 547).

1. OCFS's promulgation of § 421.3(d) evinced animus against religious beliefs.

First, OCFS's aggressive overreaching in adopting § 421.3(d) without and contrary to statutory authority evinces zealous determination to silence or exclude a disfavored viewpoint. As the Court of Appeals observed, the mandatory language of § 421.3(d) has no basis in the law it purports to implement, N.Y. Dom. Rel. Law

§ 110; *New Hope*, 966 F.3d at 165, and instead is directly contrary to the apparent intent of that statute. The choice of permissive rather than mandatory language in the statute, the Second Circuit found, "appears to have been deliberate, and even intended to allow for accommodation of religious beliefs." *Id.* Confirming this reading, at the time of his signing, the Governor of New York went out of his way to forestall any concern that the law "might be construed to require faith-based adoption agencies 'to facilitate adoption for same-sex [couples] in violation of'" their religious beliefs. *Id.* "He explained that the statutory text was permissive, *i.e.*, it allowed adoptions by more persons than before, but '*without compelling any agency to alter its present policies*.'" *Id.* at 166 (citing Gov. Mem., New York Bill Jacket, 2010 S.B. 1523, ch. 509); Compl. ¶ 7 & Ex. 5. Official statements like this "are routinely relied on in construing the reach of New York statutes." *New Hope*, 966 F.3d at 166 n.18; *see, e.g., People v. Cagle,* 860 N.E.2d 51 (N.Y. 2006); *Greer v. Wing*, 746 N.E.2d 178 (N.Y. 2001). OCFS, however, ignored both the permissive language of the statute and this legislative history in its determination to *prohibit* by regulation exactly what the statute *permits* by its terms. This overreach evinced OCFS's hostility towards the beliefs held by New Hope along with other faith-based adoption agencies. OCFS confirmed its contempt for those beliefs during the rulemaking process that led to the adoption of § 421.3(d), dismissing such beliefs as "archaic." Compl. ¶ 166; *New Hope*, 966 F.3d at 163-64.

Second, counsel for OCFS admitted in argument to the Court of Appeals that OCFS is aware that it is precisely religious organizations that hold the beliefs that

OCFS is attempting to outlaw by means of § 421.3(d). Tr. of Proceedings Before the Hon. José A. Cabranes, Reena Raggi, and Edward R. Korman at 45, November 13, 2019 (attached as Exhibit C to Warner Aff.).

Third, so far as the record shows, OCFS adopted § 421.3(d) not only in disregard of the permissive language of the statutory text and the legislative history, but in the absence of any problem calling for a solution. It is undisputed that no complaint had ever been filed by any applicant against New Hope, (Geyer Aff. ¶ 140), and the State has not contended that any potential adoptive parents had ever been prohibited from adopting as the result of any similar policy of any religious adoption agency. Thus, the adoption of § 421.3(d) was driven by an ideological zeal to quash religious dissenters, not by any neutral goal.

Fourth, "the effect of a law in its real operation" can be "strong evidence of its object," *New Hope*, 966 F.3d at 169 (quoting *Lukumi*, 508 U.S. at 535), and the undisputed evidence is that many other faith-based agencies (of several faiths) that shared New Hope's beliefs concerning family and the best interests of children were removed from OCFS's list of approved agencies following OCFS's adoption of its "comply-or-close method for enforcing § 421.3(d)." *New Hope*, 966 F.3d at 169; *see* Compl. ¶¶ 202-03. While discovery of course remains to be taken, based on the facts presently available, it is reasonable to infer that these closures resulted from OCFS's enforcement of § 421.3(d), and are "evidence of its object."

Fifth, the regulation is not "generally applicable" because the law allows or even requires adoption services to engage in many forms of "discrimination" while

categorically prohibiting only consideration of a factor that OCFS knows is associated predominately with religious faiths and organizations. *See* Pl. MPI 17-19; *New Hope*, 966 F.3d at 163-64.

2. OCFS's enforcement of § 421.3(d) evinced animus against religious beliefs.

Targeting and animus against religious beliefs and organizations continued in OCFS's enforcement of § 421.3(d).

First, OCFS's aggressive reversal of its long-time live-and-let-live approach to New Hope evinced ideological hostility rather than neutral regulatory enforcement in the interest of children. For five years after § 421.3(d) was enacted, "OCFS voiced no objection to" New Hope's child-placement policy, *New Hope*, 966 F.3d at 166; Jerman Aff. ¶ 15. Not one "complaint" was filed during that time, *New Hope*, 966 F.3d at 168; Geyer Aff. ¶ 140, and indeed OCFS consistently praised New Hope's operations and effectiveness right up until the moment it threatened closure, Compl. ¶ 187; *New Hope*, 966 F.3d at 168. This is strong evidence that OCFS's abrupt decision to enforce § 421.3(d) in this manner "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends." *Lukumi*, 508 U.S. at 538.

Second, hostility was evident in OCFS's abrupt leap to the extreme threat of a closure order. As the Second Circuit observed, "It is plainly a serious step to order an authorized adoption agency such as New Hope—operating without complaint for 50 years, taking no government funding, successfully placing approximately 1,000 children, and with adoptions pending or being supervised—to close all its adoption operations." *New Hope*, 966 F.3d at 168. And aggressive hostility is all the more

evident given that OCFS is unable to identify any relevant statutory authority that empowers it to order New Hope to cease its adoption services. *Id.* at 168-69.

Third, when enforcing § 421.3(d) by demanding that New Hope and other religious adoption services comply or close, OCFS representatives made statements to both New Hope and others that "presuppose[d] the illegitimacy" of New Hope's religious beliefs, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018), and demonstrated a determination to coerce New Hope to violate those beliefs. An OCFS representative told New Hope that its choice was to "'compromise'—*i.e.*, abandon" its beliefs, *New Hope*, 966 F.3d at 168, or close. Compl. ¶¶ 188-99; Geyer Aff. ¶¶ 157-62. In response to questions about the closure of another faith-based adoption service, an OCFS spokeswoman baldly declared that there is "no place" in New York for agencies who hold and act on these beliefs. New Hope detailed these statements extensively in its Complaint. Compl. ¶¶ 192, 204. Now, the Court of Appeals has recognized the legal significance of these statements, specifically highlighting them as evincing prohibited hostility against the relevant religious beliefs. *New Hope*, 966 F.3d at 168.

Fourth, as all these actions and statements demonstrate, OCFS threatened New Hope with the regulatory destruction of its ministry while assuming the role of an ideological adversary rather than a "neutral decisionmaker" who gives "full and fair consideration" to its "religious objection[s]." *Masterpiece*, 138 S. Ct. at 1731–32. As the Court of Appeals noted, OCFS apparently gave no consideration at all to strong factors that should have weighed towards providing a religious exemption to

§ 421.3(d) to accommodate those objections—if indeed there was any purpose behind that regulation other than coercing religious organizations. Those factors importantly included the benefit to children consistently provided by New Hope across the years, and the absence of any identifiable harm from providing such an exemption. *New Hope*, 966 F.3d at 166-67, 169.

In short, New Hope has submitted evidence that hostility and non-neutrality pervaded both the promulgation of § 421.3(d) and its enforcement against New Hope. The "totality" of these factors "raise[s] a plausible suspicion that OCFS acted with hostility towards New Hope because of the latter's religious beliefs." *New Hope*, 966 F.3d at 183. Because each of the relevant facts is uncontradicted and in the record, New Hope has shown a strong probability that New Hope will satisfy the *Smith* test, and that strict scrutiny must therefore be applied. *Id.* at 165.

III. Title 18 NYCRR § 421.3(d) cannot satisfy strict scrutiny.

Once New Hope demonstrates—as it has—that § 421.3(d) infringes New Hope's free speech and free exercise, the burden shifts, and the regulation must be enjoined unless the State carries its burden under strict scrutiny—that is, a burden to demonstrate that the application of the regulation *against New Hope specifically* "advance[s] 'interests of the highest order' and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546; *see New Hope*, 966 F.3d at 182 (applying strict scrutiny); *see also* Pl. MPI 19-21. On the record before this Court, OCFS cannot carry that burden, so a preliminary injunction must be granted.

A. OCFS cannot identify any relevant compelling state interest.

In its prior briefing, OCFS has thrown up various supposed "interests." None are supported by record evidence, as would be essential to carry the State's burden.

OCFS has suggested that § 421.3(d) is necessary to avoid "trauma" to LGBTQ children awaiting adoption. McCarthy Decl. ¶ 10; *see New Hope*, 966 F.3d at 183 n.32. This makes no sense for at least two reasons. First, OCFS does not have a policy of placing LGBTQ adolescents with same-sex adoptive couples, any more than it has a policy of placing heterosexual adolescents with heterosexual adoptive parents. Any alleged connection between forcing New Hope to work with same-sex adoptive couples and avoiding trauma to LGBTQ adolescents is purely hypothetical and speculative—which cannot satisfy strict scrutiny. Second, this supposed "interest" is irrelevant to New Hope's work; New Hope places only infants and toddlers, and has not placed any child older than three in at least 20 years. Jerman Aff. ¶ 3. Sexual orientation is not an issue relevant to these very young children.

OCFS has suggested that § 421.3(d) is necessary to maximize the number of families available to adopt. But the only record evidence is that New Hope has never prevented any legally eligible couple from adopting, *New Hope*, 966 F.3d at 158; Geyer Aff. ¶ 140, and that forcing New Hope (and other faith-based adoption agencies with similar convictions) to close their adoption services would *reduce* the resources dedicated to facilitating adoptions in New York, and would actually *reduce* the number of families willing to adopt. *See* Pl. MPI Reply 4; Loscombe Aff. ¶¶ 3-13; J. Bleuer Aff. ¶ 17; E. Bleuer Aff. ¶ 10; Stultz Aff. ¶ 31 The idea that any unmarried or same-sex couple who would otherwise have adopted will decide not to

do so because they are shocked to learn that New Hope—a private and overtly Christian ministry—disapproves of such adoptions is far-fetched speculation unsupported by any shred of record evidence. "[A]necdote and supposition" do not suffice. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822-23 (2000).

In briefing before the Second Circuit, OCFS proposed a governmental interest centered on adults rather than children, asserting (without evidence) that there is an "especially high demand" for the children that New Hope provides because it primarily places newborns, such that each placement by New Hope deprives some other adults of an opportunity to adopt. *See New Hope*, 966 F.3d at 167 n.20. Given the repeated emphasis of the relevant statutes on the "best interests of the child to be adopted," *see id.* at 150-53, and the statutory provisions cited therein, it is not clear that any interest of adults could be a "compelling interest" for OCFS in its role as promulgator and enforcer of implementing regulations. In any case, nothing in the record supports any asserted "shortage" of children available to be adopted in New York State—rather the contrary. *See New Hope*, 966 F.3d at 151. And even so, the record evidence is that the large majority of children placed by New Hope suffer from one or more medical or social disadvantages that place them in recognized "hard to place" categories—in some cases, extreme disadvantages. Jerman Aff. ¶¶ 3-7. Any couple who is willing to adopt such a child will face no shortage of children in desperate need of a home; the only possible effect of ordering New Hope to close its doors will be to leave more "hard to place" children in foster or institutional homes, instead of permanent loving homes. The asserted interest is specious.

Finally, OCFS claims an interest in protecting same-sex or unmarried couples from insult and emotional distress. McCarthy Decl. ¶ 8. Again, it is not apparent that the task of protecting adults from emotional harm has been assigned to OCFS by any statute, and OCFS has articulated no statutory basis on which it could lay claim to this as a legitimate—much less compelling—interest *for OCFS*. OCFS holds no roving commission to right perceived wrongs. More fundamentally, as a matter of law protecting adults from insult and emotional distress is flatly excluded as governmental interest that can justify depredation of First Amendment rights. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) ("the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful"); *Johnson*, 491 U.S. at 414 (the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Pl. MPI Reply 5-6.

B. OCFS cannot show that applying § 421.3(d) to close New Hope actually advances any compelling governmental interest.

A restriction on free speech or free exercise cannot be justified merely by invoking some compelling interest as a protective talisman; to satisfy strict scrutiny, that restriction must actually *"advance"* that interest in these particular circumstances. *See* Pl. MPI 20; *New Hope*, 966 F.3d at 182. OCFS has consistently failed to articulate—and has certainly not tendered any evidence meeting its burden to show—how enforcement of § 421.3(d) to close New Hope (and other faith-based agencies with similar convictions) could "advance" any compelling interest. As

reviewed above, the impact of that closure on children waiting to be adopted will almost certainly be exclusively negative.

The only interest, then, that could actually be "advanced" by shuttering New Hope's adoption ministry is the interest of rebuking and silencing a disapproved message. Indeed, a desire to "rebuke" appears to be very much the spirit behind the OCFS's spokeswoman's public declaration that "[t]here is no place" in New York for agencies that hold to a historic understanding of family and the best interests of children. Compl. ¶ 204. But these are utterly invalid justifications for violating First Amendment rights. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (government may not proscribe speech "because of disapproval of the ideas expressed").

C. OCFS cannot show that applying § 421.3(d) to close New Hope is narrowly tailored to avoid any unnecessary impairment of New Hope's First Amendment rights.

In addition to the fact that OCFS cannot identify a relevant compelling state interest, enforcement of the regulation must be enjoined unless OCFS carries the further burden of "demonstrat[ing] that its challenged actions are *narrowly tailored* to serve that interest without unnecessarily impairing New Hope's Free Exercise of Religion or Free Speech." *New Hope*, 966 F.3d at 182-83 (emphasis added). OCFS has offered no evidence that could meet this burden. As the Second Circuit held, where OCFS has never contended that any placement by New Hope was contrary to the best interests of the child, *id.* at 148-49; where no applicant has ever lodged any complaint against New Hope, *id.* at 168, 183; where New Hope places only very young children and most often "hard to place" children, Jerman Aff. ¶¶ 3-7; *New Hope*, 966 F.3d at 183 n.32; where there is no evidence that New Hope has ever

prevented any applicant from adopting, *New Hope*, 966 F.3d at 158, 183; and given New Hope's policy of providing references upon request to those whom it cannot in good conscience work with itself, *id.* at 183[1]—there can be no showing that any compelling interest could not be served by means that leave in peace New Hope and the birthmothers and adoptive parents who wish to work with New Hope. This is precisely what OCFS did for many years before its 2018 review, without any harm to anyone. *See New Hope*, 966 F.3d at 166; Compl. ¶¶ 165, 188-190.

IV. New Hope is entitled to a preliminary injunction.

New Hope has moved that this Court "preliminar[ily] enjoin Defendant . . . from applying N.Y. Comp. Codes R. & Regs. tit. 18, § 421.3(d) . . . to New Hope, and prevent OCFS from revoking New Hope's perpetual authorization to place children for adoption during the pendency of this litigation." New Hope's Notice of Mot. & Mot. for Prelim. Inj. at 1, ECF No. 15.

To obtain a preliminary injunction, the moving party must ordinarily show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). But where First Amendment rights are at issue (as here), the test reduces essentially to a single prong: "the likelihood of success on the merits is the dominant, if not the dispositive, factor."

[1] It is doubtful that a requirement to cooperate—by providing referrals—in conduct that its religion teaches is wrong can be made a condition of the enjoyment of rights otherwise protected by Free Exercise or Free Speech. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). However, since New Hope has not objected to continuing its practice in this regard, the present case does not present that question.

N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013). This is so because the "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," *New Hope*, 966 F.3d at 181 (quoting *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (1996)); the balance of hardships is entirely one-sided because "the Government does not have an interest in the enforcement of an unconstitutional law," *Walsh*, 733 F.3d at 488; and protection of First Amendment rights is per se "in the public interest," *id.* We expand these points briefly below.

A. New Hope has shown a probability of success on the merits.

The burden to establish "probability of success on the merits" is of course logically different than the "sufficiency of the pleadings" standard that governs a motion to dismiss. Nevertheless, where the decisive allegations are both verified and undisputed, the practical difference between the two collapses—because the same allegations which have been held to establish a violation if true are evidentiary and are likely to be established as fact since uncontradicted. *See New Hope*, 966 F.3d at 181. As detailed repeatedly above, New Hope's decisive verified allegations and factual submissions about its faith and its speech—while belittled by OCFS in argument—are in fact "largely unrefuted in OCFS's filings in opposition to injunctive relief." *Id.* Instead, OCFS effectively admitted to the Second Circuit its intention to censor and compel New Hope's speech. *Supra* pp. 5-6.

B. New Hope will suffer irreparable injury without a preliminary injunction.

Under our constitutional system, the loss of First Amendment freedoms "for even minimal periods of time" is—as a matter of law—"irreparable injury" that calls

for preliminary injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003). No further factual inquiry is necessary. But New Hope has in fact introduced uncontradicted evidence establishing *additional* impending irreparable harm as well, including: loss of key and difficult-to-replace staff members; loss of reputation and referral relationships that will be difficult to rebuild; and in sum the destruction or severe crippling of a 50-year-old ministry which has placed over 1,000 New York children into loving homes. Jerman Aff. ¶¶ 64-109.

For all these same reasons, the requested preliminary injunction does not and cannot include the "no new adoptive couples" limitation that New Hope voluntarily agreed to strictly on a short-term basis, during the pendency of the now-completed appeal. *See New Hope*, 966 F.3d at 160. As reviewed above, the denial of the ability of these couples and New Hope to voluntarily associate together for the value-laden counseling and home-study process would itself violate First Amendment rights. More radically, the full litigation process almost invariably takes years, and as Mrs. Jerman has testified, a preliminary injunction that "protects" New Hope while simultaneously prohibiting it from taking in new adoptive couples will be illusory, leading to the death "by strangulation" of New Hope's adoption ministry long before a final judgment can be rendered. Jerman Aff. ¶ 96. Slow strangulation will deprive New Hope of its free speech and free exercise rights just as surely as will the summary closure which OCFS has already

attempted. Neither is compatible with the First Amendment; both must be prevented by an appropriate preliminary injunction.

C. The balance of hardships weighs entirely in favor of issuing New Hope's requested preliminary injunction.

As a matter of law, "the Government does not have an interest in the enforcement of an unconstitutional law." *Walsh*, 733 F.3d at 488. As a matter of fact, there is nothing to balance here, because OCFS has not identified a single adult or child who has been harmed by New Hope's consistent practices over many years, while OCFS has amply demonstrated its intent to force New Hope to close its adoption service without awaiting the outcome of this litigation—unless a preliminary injunction is granted. *New Hope*, 966 F.3d at 158-60. OCFS's general desires to "make a statement" and to protect unidentified LGBTQ individuals from hypothetical emotional distress cannot weigh in this balance for the same reasons that they do not constitute "compelling governmental interests."

CONCLUSION

For the reasons set forth above, and in Plaintiff's memoranda in support of its motion for preliminary injunction (ECF Nos. 15-1, 33), and based on the facts in the verified complaint and supporting affidavits, Plaintiff respectfully requests that this Court enter a preliminary injunction prohibiting OCFS from enforcing N.Y. Comp. Codes R. & Regs. tit. 18, § 421.3(d) against New Hope, or on any basis attempting to require New Hope to provide adoption services to unmarried or same-sex couples, until entry of a final judgment in this litigation.

Dated: August 28, 2020

s/Roger G. Brooks

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, I electronically filed the Supplemental Memorandum with the Clerk of the District Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ *Roger G. Brooks*
Attorney for Plaintiff

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)

SUPPLEMENTAL AFFIDAVIT OF KATHLEEN JERMAN IN SUPPORT OF NEW HOPE FAMILY SERVICES' MOTION FOR PRELIMINARY INJUNCTION

I, KATHLEEN JERMAN, hereby declare:

1. I am the Executive Director of New Hope Family Services ("New Hope"). I assumed this position on February 25, 2019.

2. I make this declaration to further explain details of New Hope's operations as an adoption agency, and to further explain the harm that New Hope will suffer if its motion for preliminary injunction is denied.

I. New Hope places only infants and toddlers for adoption, including primarily children who are considered "hard to place."

3. As my predecessor Judith Geyer said in her affidavit dated December 11, 2018, "New Hope's primary focus is providing placements for newborns, infants, and toddlers up to two years of age." Aff. of Judith A. Geyer in Supp. of New Hope Family Services' Mot. for Prelim. Inj. ("Geyer Aff.") ¶ 57, ECF No. 15-2. In fact, New Hope does not place older children. Within the last 20 years, New Hope has not placed any child older than three years of age.

4. New Hope often receives referrals of birthmothers from hospitals, social service agencies, or crisis pregnancy centers, in part because New Hope has a reputation that it will never say "no" to an infant in need of a loving family. New

Hope often receives these referrals within a month or less of the expected birth of the child—or even after the child is born.

5. 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. Among the last 20 infants New Hope has placed, a substantial majority fell into these "hard to place" categories, with many of them bearing multiple disadvantaging characteristics. Yet New Hope found a loving adoptive home comprised of a married mother and father for each of these children.

6. In part because of our own faith-based orientation, and also because of the faith and sense of ministry and mission that many of the couples who come to New Hope as adoptive parents bring with them, New Hope has never to my knowledge turned away any infant that it was asked to place because that infant was "hard to place," and New Hope has in every case found a loving home even for newborn infants with hard-to-place characteristics.

7. For example, about five years ago we successfully placed an infant with Down Syndrome in a loving adoptive home. Three years ago, we did the same for a baby girl who had been born with many of her organs outside her body—an extremely rare condition that required emergency surgery and countless doctors' appointments since. We also regularly place children born with Neonatal Abstinence Syndrome (NAS), which means the child was exposed to drugs in-utero and often requires time in the Neonatal Intensive Care Unit (NICU).

II. New Hope does and must engage in extensive, discretionary, and value-laden speech throughout its provision of adoption-related services.

A. New Hope speaks discretionary and value-laden messages to birthmothers.

8. As Mrs. Geyer has said, "New Hope provides counseling concerning adoption and the adoption process to its prospective birthparents." Geyer Aff. ¶ 67.

9. Often, prospective birthmothers grew up in single parent or severely dysfunctional homes and wish for their child to have a better family and home life experience than they had.

10. When birthmothers are ready to choose adoptive parents for their infant, New Hope offers to them portfolios of up to six adoptive couples. In so doing, New Hope represents to birthmothers that placement with any of the adoptive couples in those portfolios would be in the best interests of their infant. New Hope does not, and could not consistent with its ministry and convictions, present to birthmothers adoptive couples whom New Hope does not believe could provide a family that is consistent with the best interests of the child.

11. If New Hope were forced to work with unmarried or same-sex couples to approve them as adoptive parents, in light of its faith-based beliefs about family and the best interests of children, New Hope would be compelled by conscience—informed by its faith—to advise birthmothers whom it serves that it does not believe that an unmarried or same-sex couple could provide the best home for their child.

12. In my experience and to my knowledge, before the events described in New Hope's complaint in this litigation, OCFS has never tried to compel or censor what New Hope says to the birthmothers it serves about what will be in the best interests of their children.

B. New Hope speaks discretionary and value-laden messages to adoptive parents.

13. New Hope's counseling with adoptive parents includes counseling about building a healthy family environment for the child they will adopt.

14. If New Hope were required to work with unmarried or same-sex couples in the counseling and home study process, New Hope would be compelled by conscience—informed by its faith—to advise those couples that New Hope does not believe that an unmarried or same-sex couple can provide the best home for adopted children, because the best home for each infant is a family comprised of a mother and father committed to each other—and thus together to their children—for life in marriage.

15. Before the events described in New Hope's complaint in this litigation, to my knowledge, OCFS has never tried to compel, censor, or alter New Hope's counselling to adoptive parents about family relationships.

16. When New Hope approves a prospective adoptive couple for adoption generally, New Hope then helps them create a portfolio about themselves to inform birthmothers about who they are, what they believe, why they seek to adopt, and other important background characteristics of themselves and their home. New Hope regularly advises adoptive parents about the content that should go into this portfolio and assists them in its preparation, reviewing drafts, making suggestions, and editing the content before it is finalized. In this process, New Hope seeks to help adoptive couples present themselves and their family in a positive and appealing manner, while at the same time remaining consistent with New Hope's obligation to birthmothers and infants by ensuring that the content of this portfolio is in New Hope's understanding truthful and accurate.

17. I do not believe that New Hope staff could meaningfully and in good faith assist unmarried or same-sex couples in preparing such a portfolio while

remaining true to New Hope's faith-based beliefs about family and the best interests of children, and to New Hope's obligation to seek the best interests of infants entrusted to its care.

18. Before the events described in New Hope's complaint in this litigation, to my knowledge, OCFS has never tried to compel, censor, or alter New Hope's counsel and editorial assistance to adoptive parents about their portfolios.

C. New Hope is required to and does exercise judgment and wide discretion in the course of its evaluation of applicant adoptive parents and specific placements.

19. New Hope's role in working with an applicant adoptive couple, and potentially approving that couple for adoption, and approving a specific adoption for a couple, is very far from a narrowly clerical or administrative role. New Hope's role does not consist of and could not be satisfied by merely "checking the boxes" on a list of criteria provided by the state. Instead, in its role as an adoption agency New Hope is required to and does exercise judgment and wide discretion in the course of its evaluation of applicant adoptive parents, and its evaluation of specific placements.

20. Notably, as part of its evaluation of prospective adoptive parents, New Hope must determine whether the placement of any infant with them is "in the best interests of children awaiting adoptions." 18 NYCRR § 421.15(g)(2)(iii). A great deal of judgment is necessarily involved in making this decision, and that judgment is necessarily guided by one's beliefs about human nature, healthy relationships, and the nature of a healthy family.

21. To illustrate with examples that New Hope has actually encountered, if New Hope concludes that a prospective adoptive parent has a problem with pornography or alcohol use, New Hope believes that these are issues that are likely to interfere with healthy and stable family life and relationships, and that as a

result, placement of an infant with this adoptive parent would not be in the best interests of a child. As a result, New Hope will require that he or she obtain counseling and resolve this problem before moving forward in the adoption process. The State does not specifically mandate this response to these particular personal issues, and New Hope recognizes that other agencies may not require such counseling because they may view these issues, or at least the import of them for healthy family and emotional life, differently than New Hope does.

22. As part of the process to determine whether placement of an infant with a candidate adoptive couple could be in the best interests of a child, the State requires New Hope to complete certain forms, while New Hope uses additional standard forms of its own creation. But these forms cannot and do not eliminate judgment and discretion.

23. For example, OCFS requires New Hope to complete form OCFS-5183F, titled "Household Composition and Relationships Form." I have attached this form as Exhibit A to this affidavit.

24. That form requires New Hope to complete it using "information [about the adoptive couples] gathered from interviews, observations, and other information acquired during the certification/approval process." Ex. A at 1. This form further specifies that New Hope is to make use of its "engagement and assessment skills to explore" topics like the prospective adoptive parent's past and present marriage situation. *Id.* at 4. OCFS allows New Hope wide discretion to conduct this evaluation. The form poses a wide range of questions, such as "How are stressors in your relationship handled?" and "How do you spend a typical weekday?", but OCFS does not specify what answers should be considered positive, and which negative, nor how the answers to the many questions should be weighed by the adoption worker in reaching an overall conclusion. *Id.* at 1-2. After completing the form,

OCFS requires a New Hope adoption worker and his or her "supervisor" to sign it and keep it on file. *Id.* at 1.

25. Similarly, New Hope must exercise its independent judgment and assessment skills to develop an adoptive home study report. This is not a State-provided form. In this report, New Hope evaluates a host of factors about the adoptive family, including the adoptive parents' marriage relationship.

26. If, in New Hope's independent judgment, approval of the prospective adoptive parents is in the best interests of children awaiting adoption, New Hope will express its approval in the home study report. New Hope will also express its approval to the adoptive parents themselves through a letter congratulating them and indicating that New Hope believes approving them for adoption is in the best interests of children awaiting adoption. New Hope will then place the approved couple in its pool of couples waiting to adopt.

27. If, on the other hand, in New Hope's independent judgment, approval of the prospective adoptive parents is not in the best interests of children awaiting adoption, New Hope will first try to counsel that couple into withdrawing their application. This is because if New Hope (or any agency) formally rejects an application submitted by a prospective adoptive couple, that couple must admit in future adoption applications—no matter the agency they choose to work with—that they were rejected before, which is likely to make it more difficult for them to obtain approval to adopt in the future, even if that couple has resolved the issues in their lives or relationship that resulted in a rejection.

28. For this reason, it is not likely to be in the best interests of a potential adoptive couple to work with an adoption agency that has religious beliefs about families and the best interests of children that are at odds with basic beliefs and choices of that couple about these topics.

29. If such a couple rejects New Hope's counsel to withdraw their application, New Hope will be obliged to express in its final determination that approval of those applicants as adoptive parents will not be in the best interests of children awaiting adoption.

30. Before the events described in New Hope's complaint in this litigation, to my knowledge, OCFS has never suggested that it could ever be required—or even acceptable—for New Hope to state in a home study report (or any required report) that it approves an adoptive couple when, in fact, New Hope does not believe that approving them would be in the best interests of children awaiting adoption.

31. After New Hope places a child with approved adoptive parents, it conducts field studies, which culminate in a final "supervisory report." These field studies occur at New Hope and at the adoptive couple's home, where New Hope evaluates how the adoptive child and parents are adjusting to the placement.

32. In these field studies, New Hope asks about the adoptive child's health and development, physical characteristics, eating and sleeping habits, and mental and emotional condition. In addition, New Hope gathers information about how the family is adjusting to the placement. Based on the information it receives in these field studies, New Hope assesses whether finalization of this specific adoption is consistent with the best interests of this specific child.

D. New Hope speaks discretionary and value-laden messages to the State.

33. When New Hope completes the home study, including the Household Composition and Relationships Form, it then uses that information to complete a different State form, OCFS-5183K, titled "Final Assessment and Determination." I have attached this form as Exhibit B to this affidavit. OCFS requires New Hope to complete and retain this form as part of its adoptive-parent evaluation, and to

provide it to OCFS upon request. OCFS may and has required New Hope to produce these forms in agency reviews.

34. According to OCFS, the "purpose" of this form is for adoption agencies "to apply their critical thinking skills to assess all the information they have received." *Administrative Directive*, 18-OCFS-ADM-07 at 7 (OCFS 2018), https://ocfs.ny.gov/main/policies/external/ocfs_2018/ADM/18-OCFS-ADM-07.pdf.

35. Section VI of that form is titled, "Agency Determination." Ex. B at 5. Under that, it asks, "Based on the application, home study, safety review form, medical report(s), references, and background checks, is this applicant(s) ready to parent a child in foster care?" *Id.* Beneath that are three blank boxes, one beside "Yes: Foster/Adoptive," another beside "Yes: Foster Only," and the last beside "No." *Id.* at 6. The form then instructs adoption agencies like New Hope, in the event they disapprove of an applicant, to "Explain the reason(s) for denial." *Id.*

36. This Section VI, according to OCFS, is where New Hope must record its "determination on whether to approve or not approve the application." *Administrative Directive* at 8. That is, agency workers must make "a final decision on whether the home can be certified or approved." *Id.*

37. If, in New Hope's independent judgment, it is in the best interests of children awaiting adoption to approve the adoptive couple, New Hope will express its approval in Section VI of that form. Similarly, if, in New Hope's independent judgment, it is not in the best interests of children awaiting adoption to approve that couple, New Hope will express its disapproval in Section VI (or will counsel that couple to withdraw their application, as I have explained above).

38. Before making this final decision, in Section I of that form, New Hope must certify whether the "current marital status of the applicant(s) affects the ability of the parent(s) to provide adequate care." Ex. B at 1. New Hope must answer "Yes" or "No" and then give its "explanation" for that answer. *Id.*

39. In Section IV of that form, New Hope must analyze the prospective adoptive parents' relationship to one another. In so doing, New Hope must give its view on the couple's "strengths," the "supports" they need, and the "considerations" New Hope applied in performing this relationship analysis. *Id.* at 3.

40. As my predecessor Judy Geyer explained in her declaration, based on its religious beliefs New Hope does believe that the marital status of adoptive parents is an important consideration bearing on the best interests of children who might be entrusted to their care.

41. New Hope must reject prospective adoptive parents if, after completing its evaluation process, New Hope believes their "approval would not be in the best interests of children awaiting adoptions." 18 NYCRR § 421.15(g)(2)(iii).

42. OCFS requires a New Hope adoption worker and his or her supervisor to sign this Final Assessment and Determination after completing it.

43. By completing this form, and marking "Yes" in Section VI, New Hope believes it is certifying its judgment and opinion to OCFS and to the adoptive couple that it is in the best interests of children awaiting adoptions to approve for adoption the adoptive couple discussed therein.

44. Before the events described in New Hope's complaint in this litigation, to my knowledge, OCFS has never suggested that it could be required—or even acceptable—for New Hope to state in a Final Assessment and Determination that it approves adoptive parents when, in fact, New Hope does not believe that approving them would be in the best interests of children awaiting adoption.

45. After New Hope places a child with adoptive parents, New Hope works with the adoptive family toward finalization. As my predecessor, Mrs. Geyer has said, in this process New Hope prepares and notarizes "the homestudy report," "the homestudy update" and "supervisory reports." Geyer Aff. ¶¶ 124-25. New Hope exercises its independent judgment in completing these reports.

46. I described the home-study and supervisory reports above. In the home-study update, New Hope evaluates information it gathers on much of the same topics discussed in the home-study report, only this time the evaluation occurs after New Hope places a child with adoptive parents and thus includes an evaluation of how the adoptive family is adjusting to placement. And in this home-study update, New Hope determines whether the placement of a *specific child* with the adoptive parents is in the best interests of *that child*. Again, New Hope is required to and does exercise its independent judgment in making this recommendation.

47. After New Hope completes the home-study report, the home-study update, and supervisory report, a New Hope worker and I must sign them and have them notarized. New Hope then sends these documents, along with others, to its attorney who prepares legal papers necessary for finalization. That attorney will then send two documents for me to sign, the "Adoption and Consent" and "Verified Schedule," both of which are necessary to complete the adoption. New Hope's attorney will then file each of these documents with the court.

48. Without New Hope's expressed approval, no child in New Hope's custody may be placed with, nor finally adopted by, adoptive parents whom New Hope serves.

49. Before the events described in New Hope's complaint in this litigation, to my knowledge, OCFS has never suggested that it could be required—or even acceptable—for New Hope to give its approval and consent to a placement of a child with, or an adoption of a child by, adoptive parents it serves when, in fact, New Hope does not believe that doing so would be in the best interests of that child awaiting adoption.

III. New Hope engages in expressive association throughout the adoption process.

A. New Hope expressively associates with adoptive couples.

50. In my judgment and based on conversations I have had over the years with adoptive parents whom New Hope has served, the majority of adoptive parents choose to work with New Hope initially, and continue working with New Hope, because they value and want to work with an adoption agency that shares their faith, or because they value the faith-based perspective and values that New Hope brings to its work, regardless of their own religious faith.

51. For example, two couples, who have completed our orientation program, are currently waiting to continue the adoption process with New Hope. These couples could choose to work with a different agency and thus expedite their schedule for receiving a child placement. Instead, these couples have told me that they have chosen to delay their adoption in order to work with New Hope specifically, in important part because they value and want to work with an adoption agency that shares their faith.

52. As Mrs. Geyer explained in her Affidavit (Geyer Aff. ¶¶ 86, 90, 94. 105), Christian prayer is a regular part of New Hope's group meetings with potential applicants. This includes prayers for the applicants, for children in need of homes, for birthparents, and for God's blessings on the formation of new families through adoption. Because New Hope and most of the adoptive couples who choose to work with New Hope share or value similar faith-based beliefs about marriage, family, and children, these beliefs underpin and inform New Hope's instruction to and counseling of adoptive couples about the adoption process, both in group meetings at earlier stages of the process, and in meetings with individual couples

later in the process. It is not uncommon for a New Hope adoption worker to pray with an applicant couple, if they wish, at any one of their meetings.

53. Christian evangelism is also a part of New Hope's ministry to birthmothers and adoptive couples, but only to those who *desire* to hear about the Gospel. In these conversations, New Hope team members often discuss Scripture and share about the Christian doctrine of our adoption as children of God. However, New Hope only engages in these conversations with those who wish to have them.

54. New Hope team members believe that Christian truths—about the Gospel and healthy families—will profoundly help infants, birthparents, and adoptive parents. All New Hope team members have associated together in part because they can convey those shared beliefs and values more effectively through their adoption work at New Hope.

55. I am concerned that 18 NYCRR § 421.3(d) may be interpreted by OCFS to require New Hope to correct or discipline employees who, sharing New Hope's religious beliefs, act on, or even express, those beliefs in interacting with birthparents or prospective adoptive parents. I fear that OCFS would treat New Hope's refusal to correct or discipline its team members in this way as a violation of law.

56. In my opinion, it would be difficult for New Hope to maintain the faith-informed nature of its group instruction and discussions, and to teach what it believes to be true about family and the best interests of children, if New Hope were required to include in these group discussions individuals or couples who are strongly hostile to New Hope's faith and to its faith-based convictions on these topics.

B. New Hope expressively associates with its employees.

57. For each New Hope employee, working with New Hope is primarily a calling and a ministry, and only secondarily a job.

58. I have spoken with multiple New Hope employees who have told me that if New Hope began placing children with unmarried or same-sex couples, they could no longer associate with New Hope, because by doing so New Hope would be endorsing and expressing a message that they believe to be wrong and inconsistent with their faith. Indeed, this is true for me.

59. I have spoken with multiple New Hope employees who have told me that they could receive higher pay working somewhere else but choose to work with New Hope because they view their work with and through New Hope primarily as a ministry motivated by their faith, not primarily as a means of earning income.

60. For example, one of New Hope's Adoptive Parent Caseworkers, Amber Doody, has a master's degree in social work. She has told me that she could earn a higher income working somewhere else but chooses to work with New Hope because she views her work with and through New Hope primarily as a ministry motivated by her faith, not primarily as a means of earning income.

61. New Hope team members desire to declare to the world around them, by word and example, God's love for birthmothers and infants, and His good plan for healthy marriage and families. Many team members have told me this. Indeed, I also share this desire and commitment.

62. New Hope's employees meet regularly to pray for the work of New Hope, and to pray for all the people whom New Hope serves—including infants, birthparents, adoptive couples, and the many additional mothers and infants who are served by New Hope's crisis pregnancy ministry.

63. New Hope's employees and board members also work together each year to host a gala dinner which combines fund-raising for New Hope's ministries

with an explicit pro-life, pro-family, and Christian message to the attendees, through speakers and prayer.

IV. New Hope will suffer irreparable injury if this Court does not enter the requested preliminary injunction.

A. The existing injunction.

64. Last August, while this case was on appeal and without warning, OCFS issued a sudden demand that New Hope violate its beliefs and change its policies within 15 days or be shut down.

65. That demand prompted New Hope to file an emergency motion for interim relief, in which New Hope's counsel accurately said, "[t]his threat, if carried out, would destroy or cripple New Hope's adoption ministry even if [the] Court later" reinstates New Hope's complaint. Appellant's Emergency Mot. for Interim Protection at 3, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. Aug. 13, 2019), ECF No. 52-1.

66. I understand that on November 4, 2019, the Second Circuit entered an interim order proposed by New Hope's counsel. This order allowed New Hope, "pending a decision on [ ] appeal," to "continue to accept surrenders of children and to place out children with approved adoptive applicants." However, consistent with a proposal made by New Hope only for the period of that appeal, that interim order prevents New Hope from "accept[ing] any new prospective adoptive parents for adoption services."

67. In its most recent order reinstating New Hope's complaint, I understand that the Second Circuit kept this injunction in place "unless and until vacated or modified by the district court." New Hope has complied with these provisions. However, in my opinion New Hope will suffer irreparable harm if the interim injunction remains in place unchanged much longer, and certainly if New

Hope faces even a temporary shutdown. I explain the bases for these views in the paragraphs that follow.

B. Even temporarily shutting down New Hope's adoption services would severely harm birthmothers who have come to trust New Hope and are relying on New Hope to find homes for their newborns.

68. New Hope presently serves four birthmothers, each of whom expects to place her child within the next three months. These women have depended on New Hope during a time of crisis. They have developed an intense relationship of trust with one of New Hope's counselors; they have asked New Hope to find wonderful families to adopt their children; and they have chosen to rely on New Hope's judgment and experience to find that family.

69. These birthmothers, of course, cannot wait for the district court to hear and decide New Hope's case. If New Hope is forced to turn away these birthmothers, they will be forced to shift, on almost no notice, to working with another placement agency and staff with whom they have not developed a relationship or a trust, and whose values and judgment they do not know and may not share.

70. In my experience, birthmothers who come to New Hope to place their children need and value close relationships and as much stability as possible. An abrupt, unexpected, and forced breaking of this relationship with New Hope would be extremely distressing and stressful for these women, each of whom is already in distressing life circumstances, and already grieved about giving up her baby.

C. Even temporarily shutting down New Hope's adoption services would severely harm adoptive parents who have already invested time working and developing a relationship with New Hope.

71. New Hope is currently working with a total of 18 adoptive couples. Of these, eight are approved and waiting for placement; five are at earlier stages of the

application and home study process; two couples have received placements but have not yet had their adoptions finalized; two couples have been selected by a birthmother and are awaiting adoption placement; and one other couple has received a foster placement and is awaiting adoption placement and finalization. The eight approved couples have persevered through months of applications, counseling, home studies, and reviews. They are now on New Hope's waiting list, expecting a call and a new baby at any time.

72. All of these couples have chosen to go through all this with New Hope because they value its openly faith-based nature and beliefs as well as its highly personal approach. They have come to know New Hope staff as trusted friends, have been open with that staff about personal hopes, fears, and concerns for their families, and are relying on New Hope to walk with them through the entire adoption process.

73. Many of these couples have already endured significant heartbreak, having suffered through infertility, failed treatments, and the emotional fallout from their dashed hopes, dreams, and expectations.

74. If New Hope is suddenly prohibited from providing adoptive services to these couples because of OCFS's shutdown order, the impact on these couples will be severe. First, if the approved couples wish to move ahead with adoption at all, they will have to get on the waiting list of another adoption agency, which could set their hopes back by many months, or even years. The not-yet-approved couples will likely have to re-start the application and home-study process from the beginning with another agency. Second, each of the approved couples—and several of the in-process couples—have invested immense time and emotional energy in developing honest and open relationships with New Hope staff, so that New Hope can fairly portray them to birthmothers, and so that New Hope can help them effectively through all the emotional ups and downs of the adoption process and formation of a

family through adoption. If these couples are forced to change to a new adoption service, they will become just names on a list, instead of known and loved friends—as they currently are with New Hope's ministry. Third, several of these couples have told New Hope staff that they are willing to go down the sometimes scary road of adoption in important part because they know and value New Hope's faith-based nature and its convictions, and trust that New Hope will be guided by that faith and those convictions as it in turn guides them through adoption.

75. For these couples, each of these impacts will be painful. For some, the disruption may be too much emotionally, forcing them to step back from adoption at least at the present time. This will, of course, mean that some children will not be placed, or must wait even longer to be placed, into a permanent loving home.

D. Even temporarily shutting down New Hope's adoption services would severely harm New Hope by forcing it to dismiss critical team members.

76. Shutting down New Hope's adoption services for a period of six months or more would also do long-term damage to New Hope's ministry by forcing it to lay off critical staff, who could not readily be replaced if and when New Hope's constitutional rights are finally vindicated.

77. New Hope has approximately eight team members who work in or oversee its adoptions and foster care ministry. Each of these team members does and must share New Hope's religious convictions.

78. These team members fill various ministry roles, including performing case work for birthparents, adoptive parents, and foster parents, in addition to coordinating correspondence, preparing home studies, and providing administrative support and executive leadership.

79. If New Hope is forced to cease all adoption services for six months, a year, or more, New Hope will be forced to lay off some of its team members. In

particular, New Hope employs five adoption case workers. The ministry would be forced to lay off at least some of these case workers.

80. In my judgment, the degradation of New Hope's team would harm New Hope's reputation as an adoption service provider, and hamper its ability to resume its full ministry quickly and effectively if and when a court affirms that New Hope has a right to do so that is protected by the First Amendment.

81. New Hope's team members by no means perform merely clerical functions. They build trusted relationships with birthmothers and adoptive parents. They love these people in emotionally difficult times. And they do their work with excellence. New Hope's strong reputation as an adoption ministry depends on the skill, love, and reputations of its dedicated and in many cases long-serving and extremely experienced team members.

82. If New Hope is forced to dismiss any of its team members, it is likely that those lost team members would need to secure new jobs and that New Hope would not be able to quickly re-hire them if it were allowed to resume its placement services without limitation. Further, based on my experience in recruiting for New Hope, it will not be easy to find other skilled replacements who share New Hope's religious convictions, and who have the compassionate heart that is essential to New Hope's ministry to both adoptive parents and birthparents.

83. Further, rebuilding New Hope's adoption ministry, once it is closed, would require much more than hiring replacements, difficult as that would be. It would also require rebuilding New Hope's reputation, conducting new rounds of training for new employees, attracting new adoptive couples, and winning back the trust of its sources of referrals of birthmothers.

E. Shutting down New Hope's adoption and foster care services would dismantle or undermine New Hope's ability to provide ongoing correspondence services for birthmothers, children, and adoptive parents that New Hope has served.

84. New Hope provides correspondence services for about 115 families who wish to maintain a relationship between their adoptive child and his or her birth mother, serving as a go-between to enable communications between birthmother and child without disclosing addresses, and also often coordinating annual in-person meetings. New Hope provides these services for each birthmother and adoptive family who requests them until the adopted child reaches 18 years of age. *See* Geyer Aff. ¶¶ 126-28. These services occupy a considerable amount of New Hope staff time each year, yet New Hope does not charge any fees, nor receive any other compensation, for providing this ongoing service to adoptive families, adopted children, and birth-parents. Instead, the cost to New Hope of providing these services is entirely covered by private donations to New Hope.

85. It is unclear to me how OCFS's shutdown order will affect New Hope's ability to provide correspondence services for those families.

86. If the shutdown order affirmatively requires that New Hope abandon its correspondence services for those families, even for a period of months to a year, the ministry would be forced to transfer case files for those families to a different adoption agency—that is, if another agency would *agree* to take them. Assuming that were possible, the transition would likely create significant administrative problems and would disrupt contracted-for correspondence between many adopted children and their birthmothers.

87. On the other hand, if the shutdown order requires that New Hope maintain its correspondence services for those families, the ministry would face a different problem—a services mandate with no funding. New Hope does not receive

compensation for providing these services—often for many years after an adoption occurs—so if New Hope is financially forced to dismiss staff as a result of OCFS's shutdown order, it may simply lack the capacity to provide this service at the level it has done in the past.

88. Either way, New Hope, birthmothers, and adoptive parents will all likely suffer from a shutdown's interference with the ministry's correspondence services.

F. Even temporarily shutting down New Hope's adoption services would severely harm New Hope's future ability to attract referrals of birthmothers, and thus to locate infants in need of placement.

89. Shutting down New Hope's adoption and foster care services would also increase the risk that New Hope will suffer harm to its future ability to attract referrals of birthmothers who desire to place their children for adoption, even if courts ultimately rule in favor of New Hope.

90. I discussed New Hope's referral sources in paragraph 4 above. These referral sources often value New Hope's religious character. Some birth mothers will not choose to entrust the future of their children to an agency unless it has a reputation for placing children promptly and permanently into homes that are not only loving, but meet birthmothers' other desires for their children—which sometimes includes preferences for a specific religious upbringing.

91. Even just the threat of a shutdown has already contributed to a drastic decline in New Hope's child placements since this litigation began. New Hope has placed only three children with adoptive parents since the beginning of 2019, primarily because the number of birthmothers being referred to New Hope has declined and because of this litigation and rumors that New Hope was not able to place children. By contrast, since 2012, and up until the time OCFS threatened to

shut down New Hope's adoption and foster care services in 2018, New Hope placed on average about 8 children per year with adoptive parents. That span includes one year in which New Hope placed 13 children with adoptive parents.

92. Given this decline in referrals based only on rumors or the *possibility* that New Hope would be unable to complete placements, if New Hope is forced to shut down as OCFS is demanding, or to turn away birth mothers who seek its aid, or to turn away birth mothers and adoptive parents with whom New Hope is already working, I anticipate further and serious harm to New Hope's reputation with these referral sources as an adoption service on which they can rely.

93. The loss of referral relationships will make it difficult or impossible for New Hope to find infants for any adoptive couples with whom it is permitted to work during any interim period. The loss of referral relationships will also make it that much more difficult and time-consuming to restore New Hope's adoption ministry to its historic levels once New Hope's right to continue that ministry consistently with its faith has been protected by the courts.

G. Even with the existing injunction in place, New Hope's adoption ministry is suffering irreparable harm and will continue to do so because of its dwindling pool of adoptive couples and reduced number of placements.

94. Before this litigation, New Hope typically averaged between 14 and 20 couples on our list of couples approved to adopt. Geyer Aff.¶ 79. New Hope also had been averaging between 8 and 12 placements of children in adoptive homes per year in recent years. *Id.* ¶ 55.

95. Under the Second Circuit's interim November 4, 2019 order, consistent with a proposal made by New Hope solely for the period of the appeal, New Hope

has only been allowed to work with prospective adoptive couples "who completed New Hope's orientation prior to the commencement of this lawsuit."

96. At the oral argument held on November 13, 2019, New Hope counsel Roger Brooks explained that the restriction on accepting new prospective adoptive parents, if continued for an extended period, "will kill New Hope by strangulation as surely as the effort by OCFS a few weeks ago would have done."

97. This statement was accurate. In order to accept referrals of new birthmothers in good faith, New Hope must have a sufficiently large group of approved, waiting adoptive couples so that New Hope can be confident that it can find a loving home for that mother's baby. This is particularly true given New Hope's pattern of serving "hard-to-place" infants. As New Hope's waiting list of approved couples dwindles—whether because couples receive a child, or because they withdraw their names for some other reason—New Hope will become unable to serve birthmothers and infants.

98. New Hope is currently working with a total of 18 adoptive couples. Of these, eight are approved and waiting for placement; five are at earlier stages of the application and home study process; two couples have received placements but have not yet had their adoptions finalized; two couples have been selected by a birthmother and are awaiting adoption placement; and one other couple has received a foster placement and is awaiting adoption placement and finalization.

99. We filed our lawsuit on December 6, 2018. For some period between when OCFS threatened to close our adoption ministry and when we filed our lawsuit, many of our traditional referral sources believed that we had already lost our authorization to handle adoptions. As a result, referrals reduced to a trickle, and New Hope did not place any infants *for the next 14 months.*

100. In May of this year, New Hope received a very short-notice referral from a local hospital of a child whose birthmother had mental health issues. Within

two days, we were able to place the child with one of the couples that the Court has allowed us to continue working with during our appeal. This was our first placement in 14 months, after previously averaging between 8 to 12 placements per year. This also, of course, reduced our pool of approved adoptive couples by one.

101. Meanwhile, since we filed this suit, several couples have withdrawn, or placed a hold on, their applications for various personal and family reasons, as inevitably happens over time among any group of couples who apply to adopt.

102. As a result of placements and couples' choices to withdraw or place their applications on hold, New Hope currently only has eight couples who stand ready to consider adopting a child if called.

103. I am deeply concerned that with this small number of adoptive couples waiting, a very few more placements will leave New Hope with an inadequate pool of adoptive couples to assure us that we will be able to find a home for each child entrusted to our care, including infants with hard-to-place characteristics.

104. Should this occur, New Hope will not be able in good conscience to accept referrals of birthmothers who want to place their newborns through New Hope. This, in my opinion, would be gravely harmful to the infants involved, to birthmothers, and to New Hope's reputation among service providers who would otherwise refer birthmothers to New Hope.

105. Unfortunately, once our pool of approved adoptive parents becomes depleted, that problem cannot be fixed quickly. From the time a prospective adoptive couple first contacts us, it can take between six months to a year to help them through the application, orientation, home-study, and approval processes.

106. Our dwindling pool of prospective adoptive couples is especially troubling because, through active outreach efforts that have included calls, in-person conversations, and a new brochure, New Hope has recently succeeded in informing organizations that we have worked with previously that we remain open

and able to accept referrals and place infants. As a result of these efforts, a large faith-based pregnancy support ministry in New York recently told me they want to use New Hope as their primary adoption service that they refer birthmothers to—mainly because of our shared beliefs about marriage and family and the best interests of children.

107. Having to turn referrals away based on our dwindling pool of couples will harm New Hope's reputation as an adoption provider that has been able to place every child entrusted to our care. In my opinion, that harm will have a lasting negative effect on our ability to attract referrals of birthmothers from social-service providers, and also our ability to attract new prospective adoptive parents once we are allowed to do so.

108. Since we filed our lawsuit in December of 2018, we have received calls from *more than 100 couples* who are interested in adopting a child through New Hope. We have had to turn away all of these couples, explaining that we are not presently able to accept any new applications.

109. If the Court allows us to do so, we will begin accepting new applications right away, while referring to other agencies any unmarried or same-sex couples who wish for such a referral.

I, Kathleen Jerman, a citizen of the United States and a resident of the State of New York, hereby declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 28 day of August, 2020, at Syracuse, New York.

Kathleen Jerman

Kathleen Jerman

EXHIBIT A

OCFS-5183F (Rev. 07/2019)

NAME OF APPLICANT(S):
NEW YORK STATE

OFFICE OF CHILDREN AND FAMILY SERVICES

HOUSEHOLD COMPOSITION AND RELATIONSHIPS FORM

Instructions:

Home finders: This form must be completed with information gathered from interviews, observations, and other information acquired during the certification/approval process. The form must be signed by a supervisor when it is completed.

NAME OF APPLICANT(S):	
MARITAL STATUS - to be completed by the home finder individually with each applicant	
Are you married?	☐ No ☐ Yes
Do you have any previous marriages/long term relationships? a. If yes, when and why did they end?	☐ No ☐ Yes
IF MARRIED:	
1. What date were you married?	/ /
2. How long have you been together?	
3. How would you describe your relationship?	
IF NOT MARRIED:	
1. Do you have a partner or significant other?	☐ No ☐ Yes If yes, name:
2. How often do they reside with you?	☐ N/A
3. How long have you been together?	
4. How would you describe your relationship?	
I. RELATIONSHIP – to be completed by the home finder individually with each applicant in a marriage/partner relationship	
1. What makes you happy regarding your partner?	
2. What kind of things make you angry regarding your partner?	
3. What are the strengths of your relationship?	
4. What are the areas of disagreement in your relationship?	
5. How are disagreements handled?	
6. How do you react to your partner when there are disagreements?	
7. How are decisions made?	
8. What stressors exist in your relationship?	
9. How are stressors in your relationship handled?	
10. Who manages the money in your relationship?	
11. How are financial decisions made?	
12. How would you describe your partner's strengths and needs?	
13. How would your partner describe your strengths and needs?	

NAME OF APPLICANT(S):

II. FAMILY – to be completed by the home finder individually with each household member	
SCHEDULE	
1. How do you spend a typical weekday? a. Typical weekend?	
2. How do you spend leisure time as a family? a. Individually?	
3. What community resources/activities are you (and your family) involved in?	
RELATIONSHIPS	
1. What extended family do you have? a. Where do they live? b. How frequently do you interact? c. What kind of relationship do you have?	
2. Where are your friends located? a. How long have you been friends? b. Under what circumstances and how frequently do you interact?	
3. What support systems do you have available?	
4. If considering adopting, who would be the backup resource if you were no longer able to care for the child?	
HOUSEHOLDS WITH CHILDREN (IF APPLICABLE)	
1. How do the children in the household get along with each other and, if applicable, with your children who reside outside of the home?	
2. What rules exist in the house, and what are the consequences if broken?	
3. How are rules adjusted based on age, capacity, etc. of each child?	
4. How is discipline handled?	
FOSTER CARE/ADOPTION	
1. What is each household member's feeling about becoming a foster/adoptive family?	
2. What is each household member's level of readiness?	
3. How do your extended family and friends feel about you foster parenting/adopting?	
III. PARENTING – to be completed by the home finder individually with each applicant	
1. What experience have you had parenting?	

NAME OF APPLICANT(S):

2. What is your parenting style? a. What is your partner's parenting style?	☐ N/A
3. What do you find to be the most effective form of discipline?	
4. Describe your relationship with each of the children in the household and outside the household, if applicable.	
5. What, if any, parenting training have you had? a. What parenting training/supports do you think you will need?	
6. What do you think would make you a good foster parent? a. What strengths would you bring to fostering?	
7. What child caring experiences have you had?	
8. How do you support your children academically, at home and in school?	☐ N/A
9. Are any of your children homeschooled?	☐ N/A
PARENTING A CHILD IN FOSTER CARE	
1. What are the reasons you think a child would be in foster care?	
2. What is your motivation for pursuing fostering/adoption at this time?	
3. What is your understanding of your role as a foster parent?	
4. What is your understanding of your role as an adoptive parent?	☐ N/A
5. What experience have you had with foster care and/or adoption?	
6. How would you support a child in foster care academically, at home and in school? a. What are your expectations of a child's academic progress?	
7. How would you help a child in foster care maintain family, cultural, religious, and community connections?	
8. What role do you think the biological family will have with your child in foster care? a. What role will you have with the biological family?	
SUPPORTS – to be completed by the home finder individually with each applicant(s)	
1. Do any household members have special needs or challenges? a. If yes, describe.	☐ No ☐ Yes
2. If applicable, describe your children's history of substance abuse, mental health issues, behavioral issues, if any, as well as treatment.	☐ N/A

NAME OF APPLICANT(S):

IV. PSYCHOSOCIAL INTERVIEW – to be completed by the home finder with each applicant individually

The purpose of the psychosocial interview is to explore the applicant's history and current psychological/social factors and their impact on the capacity, willingness, and readiness to safely care for a child in foster care; and to develop support plans where applicable.

In this section, questions are provided as guidance only. Home finders will need to use their engagement and assessment skills to explore these areas, using the questions and guidance below as relevant and applicable. Applicant's responses should be provided in narrative format in the space provided below.

PERSONAL HISTORY

Areas for consideration:

- Familial history and relationships with all household members and extended family (Genogram)
- Family relationship
- Childhood experiences and defining moments
- How were you disciplined as a child?
- Traditions and religion/spirituality
- Marriage/Dating history
- Has the foster/adoption plan added any stress to you and/or your family?

COPING SKILLS AND STRESS MANAGEMENT

Areas for consideration:

- Life experiences of loss and/or trauma
- Infertility (if applicable)
- Coping strategies and stress management
- Impact of life experiences on current functioning
- Realistic expectations of childhood

Sample Questions:

- Many of the most successful foster/adoptive parents have experienced loss and trauma in their lives that has helped them become the people they are today. Has this occurred in your life?
  - What impact has it had on you then and now?
  - What challenges has it posed for you?
- When experiencing challenging times, what resources do you use to cope? Who helps you?
- How do you know when you are getting stressed out? What cues do you notice physically, socially, and/or cognitively?
- What are situations that are likely to generate stress for you or trigger a crisis?
- What strategies for self-care are effective for you?

BEHAVIORAL HEALTH FOR ALL HOUSEHOLD MEMBERS

Areas for consideration:

- Alcohol and/or substance abuse
- Mental health
- Family/partner violence
- Is anyone in the household currently or was in the past under treatment for substance abuse (drugs/alcohol) or mental health issues?

Sample Questions:

- Describe any history of alcohol/substance use in your family growing up and today.
- Does anyone in your family currently receive or have a history of receiving substance abuse/alcohol abuse treatment?
- Have you or anyone in your family experienced emotional difficulties or significant health challenges including physical, mental, or emotional difficulties?
- Has your self-care included seeking the benefits of a counselor or therapist?
- Can you describe any time you or another family member threatened/hurt/scared another family member or felt threatened/hurt/scared by another family member?

HOME FINDER NOTES

NAME OF APPLICANT(S):

Dates of visits/interviews:	
Notes:	
Date of Completion:	/ /

SIGNATURE/DATE:

HOME FINDER'S SIGNATURE: **X**	DATE: / /
SUPERVISOR'S SIGNATURE: **X**	DATE: / /
AGENCY'S NAME:	

V. CHILD INTERVIEW – The home finder will complete a separate form for each household member under 18 years of age, depending on the child's developmental stage. The family, home finder, and home finder's supervisor will determine whether the child will participate and whether the applicant(s) should be present. (Please note that this form can also be used for adult children of the applicant[s].)

CHILD'S NAME:	**DATE OF BIRTH:**
Child's relationship to the applicant(s):	
If a decision was made for a child not to participate, explain why:	

YOU	
1. Are you in school? a. If yes, what grade are you in?	☐ No ☐ Yes
2. What are your feelings about school?	
3. What are your hobbies and interests?	
4. What five words best describe you?	
5. Who are you able to talk to if you need help?	
YOUR PARENT(S)	
1. What is your relationship like with each of the applicants/parents? a. Siblings?	
2. Describe your parents'/applicants' relationship.	
HOUSEHOLD	
1. How often do you visit friends? a. How often do friends visit your house?	
2. Can you describe any rules in your house? a. What happens when you don't follow these rules?	
3. Do you have house rules? a. What house rules are difficult to follow?	
FOSTER CARE/ADOPTION	
1. What do you know about foster care/adoption?	
2. What are your feelings about sharing your home with another child?	

NAME OF APPLICANT(S):

3. Explain how you think a child will fit in with your family.	
4. What concerns do you have about your parent's/applicant's fostering and/or adopting a child?	
5. How do you imagine the decision to foster and/or adopt will impact you?	
6. What will you do if the child disagrees with you or your parents/applicants?	
7. What would be your wish for any child who joins your family? For example: age, gender, interests?	
8. Have you ever wanted another sibling?	☐ No ☐ Yes ☐ I don't know/Never thought about it

HOME FINDER NOTES

Dates of visits/interviews:	
Notes:	
Date of Completion:	/ /

SIGNATURE/DATE:

HOME FINDER'S SIGNATURE: **X**	DATE: / /
SUPERVISOR'S SIGNATURE: **X**	DATE: / /
AGENCY'S NAME:	

EXHIBIT B

OCFS-5183K (Rev. 07/2019)

NAME OF APPLICANT(S):

☐ **NEW APPLICATION** ☐ **CHANGES (Interim Home St d)**

NEW YORK STATE
OFFICE OF CHILDREN AND FAMILY SERVICES

FINAL ASSESSMENT AND DETERMINATION

This form is a written analysis and summary of the entire certification/approval process. Home finder completes this form for each new application and reviews with supervisor. For changes (Interim Home Study), update sections IV-VI. Determinations must be shared with applicant(s) for review.

I. DEMOGRAPHICS

APPLICANT 1:

APPLICANT 2:

ADDRESS:

HOUSEHOLD MEMBERS:

Name	**DOB**	**Name**	**DOB**
Name	**DOB**	**Name**	**DOB**
Name	**DOB**	**Name**	**DOB**

II. REGULATORY RE UIREMENTS

Compliance with regulations 18 NYCRR 443 and/or 18 NYCRR 420 and 18 NYCRR 421

1. Each foster parent is over the age of 21.

   ☐ No ☐ Yes
   Foster parent 1 DOB:
   Foster parent 2 DOB:

   Document(s) used to verify:
   As verified by:

2. Each member of the household is in good physical and mental health, and free from communicable diseases, infection, or illness, or any physical condition that might affect the proper care of a foster child.

   ☐ No ☐ Yes
   Explain:

   Document(s) used to verify:
   As verified by:

3. There is a suitable plan for the care and supervision of the child in foster care at all times.

   ☐ No ☐ Yes
   Explain:

4. The current marital status of the applicant(s) affects the ability of the parent(s) to provide adequate care.

   ☐ No ☐ Yes
   Explain:

   The applicant(s) current marital status is:
   Document(s) used to verify:
   As verified by:

5. Three personal references were submitted attesting to each of the applicants' moral character, mature judgement, ability to manage financial resources, and capacity to develop a meaningful relationship with children.

NAME OF APPLICANTS:

☐ No ☐ Yes
Explain:

Date(s) of most current references: / /

6. Employment references were:

a. Provided? ☐ No ☐ Yes ☐ NA
b. Checked? ☐ No ☐ Yes
c. Acceptable? ☐ No ☐ Yes
Explain:

Date of most current reference: / /

7. Applicant(s) understand(s) role of a foster parent and demonstrates the ability, motivation, and psychological readiness.

☐ No ☐ Yes
Explain:

8. Does at least one applicant in the home have functional literacy (in their primary language)?

☐ No ☐ Yes
Explain:

9. Other family members understand foster care and the foster child's role in the family.

☐ No ☐ Yes
Explain:

10. List the dates received and results of all applicant's and applicable household member's background checks:

a. Staff Exclusion List (SEL)
Dates and Results:

b. Statewide Central Register (SCR)
Dates and Results:

c. Out-of-State Child Abuse Register ☐ N/A
Dates and Results:

d. NYS Division of Criminal Justice (DCJS)
Dates and Results:

e. Federal Bureau of Investigation (FBI)
Dates and Results:

11. Applicant's/Applicants' history as foster and/or adoptive parent(s) has been:

a. Verified? ☐ No ☐ Yes ☐ N/A
b. Is acceptable? ☐ No ☐ Yes
Explain:

Document(s) and/or methods used to verify:

NAME OF APPLICANTS:

12. Were the applicant(s) approved for an exception by a supervisor?
☐ No ☐ Yes
If yes, provide date of approval and approver's name:

Explain the exception:

13. FOR LETTERS OF APPROVAL ONLY
Were the applicant(s) approved for a waiver by the LDSS?
☐ No ☐ Yes ☐ NA
If yes, provide date of approval and approver's name:
Explain the waiver:

III. CERTIFIED OR APPROVED EMERGENCY FOSTER HOME

Are the applicant(s) certified or approved emergency foster parent(s)? ☐ No ☐ Yes

FIRST NAME OF CHILD List all children in foster care currently placed in the home.	**AGE**	**DATES OF PLACEMENT IN THE HOME** To and from	**CHILD INTERVIEW DATE** If still in home	**FOSTER CARE WORKER AND CONTACT DATE**
		/ / - / /	/ /	/ /
		/ / - / /	/ /	/ /
		/ / - / /	/ /	/ /

Based on the analysis of information gathered during the interview and observation of the child(ren), describe how the child(ren)'s physical, emotional, developmental, and educational needs are being met by the emergency certified or approved foster parent(s) since being placed in this home:

Summari e the emergency certified or approved foster parent(s) overall ability to work with the birth family, school/service providers, and partner with the LDSS/agency since the child(ren) have been placed in the home:

IV. ASSESSMENT OF HOME STUDY COMPONENTS

PARTNER RELATIONSHIPS

Based on the information provided by the family and your analysis of the applicant(s), summari e each area below as it impacts the ability to foster and/or adopt.

STRENGTHS:

CONSIDERATIONS:

SUPPORTS NEEDED:

NAME OF APPLICANTS:

PARENTING

Based on the information provided by the family and your analysis of the applicant(s), summari e each area below as it impacts the ability to foster and/or adopt.

STRENGTHS:

CONSIDERATIONS:

SUPPORTS NEEDED:

FAMILY RELATIONSHIPS

Based on the information provided by the family and your analysis of the applicant(s), summari e each area below as it impacts the ability to foster and/or adopt.

STRENGTHS:

CONSIDERATIONS:

SUPPORTS NEEDED:

CHILD INTERVIEWS, IF APPLICABLE

Based on the analysis of information gathered during the interview(s) and the observation(s) of the child(ren), describe how the child(ren)'s physical, emotional, and developmental needs are being met in this home.

STRENGTHS:

CONSIDERATIONS:

SUPPORTS NEEDED:

PSYCHOSOCIAL

Based on the information provided by the family and your analysis of the applicant(s), summari e each area below as it impacts the ability to foster and/or adopt.

STRENGTHS:

CONSIDERATIONS:

SUPPORTS NEEDED:

V. CHANGES (INTERIM HOME STUDY ONLY)

The following changes have occurred prior to the reauthori ation period:

NAME OF APPLICANTS:

AGENCY TRANSFER:

Effective date: / /
Explain:

HOME ADDRESS (form, OCFS-5183E required)**:**

Effective date: / /
Explain:

HOUSEHOLD COMPOSITION (Fingerprinting is required when new adult enters household or turns 18.)**:**

Effective date: / /
Explain:

CRIMINAL RECORDS RESULT:

Effective date: / /
Explain:

MARITAL STATUS (New application required if adult spouse of foster parent enters home)**:**

Effective date: / /
Explain:

AGE RANGE OR GENDER:

Effective date: / /
Explain:

CAPACITY:

Effective date: / /
Explain:

PROGRAM TYPES:

Effective date: / /
Explain:

LEVEL OF CARE:

Effective date: / /
Explain:

REOPEN A HOME:

Effective date: / /
Explain:

If any of the above changes are made, summari e the effect on the children in foster care:

CHILD(REN)'S NAME(S):
Explain:

VI. AGENCY DETERMINATION

Home finder should not submit the Final Assessment and Determination in CONNECTIONS until it has been reviewed with the supervisor, the determination is shared with the applicant(s), and applicant's comments are received and entered in CONNECTIONS.

Based on the application, home study, safety review form, medical report(s), references, and background checks, is this applicant(s) ready to parent a child in foster care?

NAME OF APPLICANTS:

Issue Certificate or Letter of Approval/Approved Changes (Interim Home Study)

☐ Yes: Foster/Adoptive

Placement considerations, if applicable:

OR

☐ Yes: Foster Only

Placement considerations, if applicable:

OR

☐ No

Explain the reason(s) for denial:

HOME FINDER'S SIGNATURE: DATE:

X / /

SUPERVISOR'S SIGNATURE: DATE:

X / /

VII. APPLICANT'S COMMENTS

Enter applicant's comments here:

APPLICANT'S SIGNATURE: DATE:

X / /

APPLICANT'S SIGNATURE: DATE:

X / /

HOME FINDER'S SIGNATURE: DATE:

X / /

SUPERVISOR'S SIGNATURE: DATE:

X / /

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)

AFFIDAVIT OF JACOB P. WARNER IN SUPPORT OF NEW HOPE FAMILY SERVICES' MOTION FOR PRELIMINARY INJUNCTION

I, JACOB P. WARNER, hereby declare:

1. I am one of the attorneys for New Hope Family Services ("New Hope").

2. Attached as Exhibit A is a true and accurate copy of the Transcript of Proceedings held on February 19, 2019, before the Hon. Mae A. D'Agostino. This is a transcript of the oral argument before this Court concerning New Hope's motion for preliminary injunction and Defendant's motion to dismiss.

3. Attached as Exhibit B is a true and accurate copy of Defendant's "Memorandum of Law for Appellee in Opposition to Motion for a Preliminary Injunction" dated August 23, 2019 and filed with the Second Circuit in connection with New Hope's prior appeal in this case.

4. Attached as Exhibit C is a true and accurate copy of the Transcript of Proceedings held on November 13, 2019 before the Hon. José A. Cabranes, Reena Raggi, and Edward R. Korman. This is a transcript of the oral argument before the Second Circuit concerning New Hope's appeal from this Court's dismissal of its complaint and denial of its motion for preliminary injunction as moot.

I, Jacob P. Warner, a citizen of the United States and a resident of the State of Arizona, hereby declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 28th day of August, 2020, at Scottsdale, Arizona.

Jacob P. Warner

EXHIBIT A

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.

CASE NO. 18-CV-1419

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

FOR THE PLAINTIFF:
ALLIANCE DEFENDING FREEDOM
By: ROGER GREENWOOD BROOKS, ESQ., DAVID A. CORTMAN, ESQ., and JEANA HALLOCK, ESQ.
15100 N 90th Street
Scottsdale, Arizona 85260

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

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

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

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

MR. CORTMAN: David Cortman, Your Honor.

MS. HALLOCK: Jeana Hallock.

THE COURT: Good morning.

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

THE COURT: Good morning to you.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I'm aware of the history.

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

THE COURT: No public funds whatsoever?

MR. BROOKS: No public funds whatsoever, exactly.

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

MR. BROOKS: That is always their goal.

THE COURT: That's the standard, right?

MR. BROOKS: Yes, it is.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BROOKS: It does.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: And that you would counsel them that they

could go someplace else, correct?

MR. BROOKS: That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Maybe you can answer both of them.

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

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

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

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

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

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BROOKS: To help children.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: It will never happen.

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

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

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

in adoptive parents who might not otherwise be adopting.

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

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

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

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

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

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

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

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

MR. BROOKS: Absolutely.

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

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

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

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

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

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

THE COURT: Sexual orientation.

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

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

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

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

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

THE COURT: I still think you could preserve that just

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you very much.

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

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

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

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

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

MS. KERWIN: Funds, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I understand.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: But doesn't it substantially burden free

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

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

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

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

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

MS. KERWIN: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CERTIFICATION OF OFFICIAL REPORTER

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

Dated this 28th day of June, 2019.

/s/ JACQUELINE STROFFOLINO

JACQUELINE STROFFOLINO, RPR

FEDERAL OFFICIAL COURT REPORTER

EXHIBIT B

UNITED STATES COURT OF APPEALS
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

MEMORANDUM OF LAW FOR APPELLEE IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

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Dated: August 23, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES (Cont'd)

CASES (CONT'D) **PAGE(S)**

TABLE OF AUTHORITIES (Cont'd)

PAGE(S)

TABLE OF AUTHORITIES (Cont'd)

NEW YORK STATE STATUTES (CONT'D) **PAGE(S)**

STATE REGULATIONS

MISCELLANEOUS AUTHORITIES

PRELIMINARY STATEMENT

New Hope Family Services ("New Hope") is a faith-based agency that operates, among other things, an adoption program in New York. It refuses to place children for adoption with unmarried cohabitating couples and same-sex couples. It thereby operates in violation of a regulation of the New York State Office of Children and Family Services ("OCFS") that prohibits adoption agencies (public and private) from discriminating against applicants for adoption services on the basis of, among other things, sex, sexual orientation, gender identity or expression, and marital status.

In this action under 42 U.S.C. § 1983, New Hope challenges the regulation as applied, arguing that it violates its rights of religion, speech and association under the First Amendment, and also its right to equal protection. After its complaint was dismissed for failure to state a claim, it appealed. And solely on the basis of its First Amendment claims, New

Hope now seeks a preliminary injunction pending appeal that would enjoin OCFS from enforcing its nondiscrimination regulation against it.[1]

The Court should deny the motion because New Hope cannot show a likelihood of success on appeal on any of its First Amendment claims.

BACKGROUND

A. Factual Background

New Hope operates an authorized adoption program that primarily places infants and toddlers up to age two. (Complaint ¶ 76.[2]) It also operates a pregnancy resource center that encourages pregnant women to choose parenting or adoption over abortion. (Complaint ¶¶ 58-62). Some of the birth mothers whose infants New Hope places for adoption come to New Hope through its pregnancy resource center. (Complaint ¶¶ 68, 75.)

In September 2018, OCFS learned that New Hope refuses to provide adoption services to unmarried and same-sex couples, in

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[1] Indeed, in its recently filed merits brief, New Hope has abandoned its equal protection claim.

[2] All of the record documents cited herein are attached as exhibits to New Hope's motion or to the accompanying declaration of Laura Etlinger, where so indicated.

violation of its regulation prohibiting such discrimination. *See* N.Y. Code Rules & Reg., tit. 18, ("18 N.Y.C.R.R.") § 421.3(d). OCFS thus notified New Hope that its practice violated state regulation and was impermissible. (Complaint ¶ 10.) The notice also directed New Hope to file a formal written response identifying whether it intended to come into compliance or to submit a close-out plan for its adoption program. *Id.*

Instead of responding, New Hope commenced this litigation, arguing that the regulation as applied violated its First Amendment rights and its right to equal protection. New Hope also promptly moved for preliminary injunctive relief. OCFS thereupon moved to dismiss the complaint for failure to state a claim and opposed the request for injunctive relief.

On May 16, 2019, the U.S. District Court for the Northern District of New York (D'Agostino, J.), rejected New Hope's constitutional claims, granted OCFS's motion to dismiss, and dismissed the motion for a preliminary injunction as moot. (Decision and Order, at 42.)

New Hope appealed and thereafter sought an agreement from OCFS that would allow it to continue specified adoption activities at least

as long as the appeal remained pending. *See* Etlinger Dec. Ex. A. While OCFS initially considered such an agreement and even proposed specified terms, it ultimately determined that it could not countenance continued discrimination by New Hope, even pending appeal.[3] Accordingly, on August 9, 2019, OCFS sent New Hope a second notice of noncompliance directing New Hope within fifteen days either to confirm that it would come into compliance with the nondiscrimination regulation or to submit a plan to close out its adoption program. (Etlinger Dec. Ex. B.) As New Hope recognizes, OCFS thereafter clarified that a close-out plan would not result in immediate closure of New Hope's program; rather, New Hope was to submit a proposal specifying the steps it intended to take to cease operation of its adoption program within a reasonable time period (typically 90 days or as extended). (Motion Ex. G.)

[3] Contrary to New Hope's claim (Motion at 6), OCFS's motion to remove the appeal from the expedited appeals calendar did not rest on the status of those negotiations. OCFS only referenced those negotiations in connection with its alternative request for an extension to file its brief. *See* Etlinger Dec. Ex. C, ¶ 14.

This emergency motion for a preliminary injunction seeking to enjoin OCFS from enforcing its nondiscrimination regulation pending appeal followed.

B. Statutory and Regulatory Framework

The State has a vital interest in ensuring that prospective adoptive parents provide safe and appropriate homes for adopted children, and that adoptive placements serve each child's best interests. N.Y. Domestic Relations Law ("DRL") § 114(1); *see also* 18 N.Y.C.R.R. 421.2(a). In furtherance of these interests, the State stringently regulates those who provide authorized adoption services while implementing standards and criteria pursuant to which adoption services are provided and placement decisions are made.

Only a public or private "authorized agency" may provide adoption services. N.Y. Soc. Sec. Law ("SSL") § 374(2). An "authorized agency" is an agency organized under New York law with corporate authority to care for children, place out children for adoption, or board out children for foster care. SSL § 371(10). Authorized agencies thus exercise significant authority under New York law in administering adoption services. They accept applications from prospective adoptive parents,

conduct adoption studies regarding applicants' suitability to serve as adoptive parents based on specified factors, *see* 18 N.Y.C.R.R. §§ 421.13, 421.15, 421.16, and applying regulatory standards, approve or disapprove applicants for adoption, *id.* § 421.15(g). The decisions of authorized agencies disapproving applicants are subject to fair-hearing review before OCFS. *See* SSL § 372-e(4). State law also vests authorized agencies with authority to accept surrender of a child from its parents, and thereby transfer legal custody and guardianship of a child to the authorized agency. SSL § 384; 18 N.Y.C.R.R. § 421.6. An authorized agency chooses a prospective adoptive home for the child, making a decision on the basis of the "best interests" of the child, taking into consideration the factors specified in 18 N.Y.C.R.R. § 421.18(d). Guardianship and legal custody of the child remain with the authorized agency during any period of supervised pre-adoptive placement. DRL § 113(1); SSL § 383(2). And critically, the adoption agency's consent is required to complete an adoption for a child the agency has placed. DRL § 113. The district court thus rightly characterized New Hope's adoption activities as involving the "administ[ration] of public services." (Decision and Order, at 42.)

An authorized agency's adoption activities are also subject to significant government oversight. A private adoption agency's certificate of incorporation is subject to OCFS approval, SSL § 460-a(1), and all of its adoption activities are subject to approval, visitation, inspection and supervision by OCFS, DRL § 109; SSL § 371(10).

Thus, under the statutory scheme, an authorized agency wields significant authority and occupies a special status in approving applicants, exercising guardianship and custody of a child, and choosing a safe and appropriate adoptive home.

C. OCFS's Nondiscrimination Regulation

In 2013, OCFS promulgated a series of regulatory amendments designed to eliminate discrimination on the basis of sexual orientation and gender identity in "essential social services." N.Y. State Register (Nov. 6, 2013), at 3.[4] One of these amendments enacted the regulatory provision at issue here prohibiting authorized adoption agencies from "discrimination and harassment against applicants for adoption services

[4] Available at https://docs.dos.ny.gov/info/register/2013/nov6/pdf/rulemaking.pdf.

on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d); *see also* N.Y. Human Rights Law § 296(2)(a) (prohibiting discrimination in the provision of public accommodations on the same bases as OCFS's regulation).

And with respect to the specific protected characteristics that New Hope's discriminatory policy targets—marital status, sex and sexual orientation—New York law has long recognized that none of these characteristics "may alone be determinative in an adoption proceeding." *In re Jacob*, 86 N.Y.2d 651, 663, 667 (1995). Indeed, state law was amended in 2010 to confirm the ability of unmarried and same sex-couples to adopt. *See* N.Y. Laws 2010, c. 509 (*codified at* DRL § 110).

ARGUMENT

THE COURT SHOULD DENY THE MOTION FOR A PRELIMINARY INJUNCTION FOR FAILURE TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Generally, a party seeking a preliminary injunction must show (1) irreparable harm, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking the injunctive

relief. *Covino v. Patrissi,* 967 F.2d 73, 76-77 (2d Cir. 1992). Here, however, because New Hope seeks to stay "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," it may not obtain an injunction by meeting that second less rigorous "serious questions" standard. *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) (internal quotation omitted). As the Court has explained, "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). And New Hope has not demonstrated the requisite likelihood of success on any of its First Amendment claims.

A. New Hope Cannot Demonstrate a Likelihood of Success on its Free-Exercise Claim.

New Hope's religious beliefs do not excuse it from complying with a neutral, generally-applicable regulation, even if the regulation prescribes conduct that its religion proscribes. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990). As the Supreme

Court recently explained, while religious and philosophical objections to specified conduct are protected, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018). New Hope acknowledges as much by arguing only that OCFS's regulation is not generally applicable and that its enforcement is motivated by religious animosity. (Motion, at 11-17.) As the district court properly found, New Hope's allegations do not support that claim.

First, the regulation is by its terms general in application. *All* private and public adoption agencies must "prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d). And contrary to New Hope's argument (Motion, at 12), the statutory and regulatory scheme for adoption contains no exception to OCFS's nondiscrimination regulation. The scheme thus does not "in a selective manner impose burdens only on conduct motivated by religious

belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 543 (1993) (considering targeted nature of prohibition together with secular exception to prohibition as evidence of religious gerrymandering).

The provisions on which New Hope relies (and that it mischaracterizes in any event) create no exceptions to the nondiscrimination regulation. Rather, they allow an agency making a placement determination to consider various factors (including religion) to further the interest in obtaining for each child the most appropriate placement from the pool of approved applicants. For example, state law favors placing a child with adoptive parents of the same faith "when practicable" and honoring a religious preference of the birth mother "when practicable" and in the child's best interest. SSL § 373(2) and (7) (derived from N.Y. Const. art. VI, § 32). In like manner, 18 N.Y.C.R.R. § 421.18(d) allows consideration of "the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet

the needs of the child with such a background" as part of an agency's best-interest placement decision.[5]

As the Third Circuit recently explained in rejecting a challenge similar to New Hope's, there are significant differences between prohibiting agencies from refusing to serve unmarried and same-sex applicants and allowing agencies to consider protected characteristics in placement decisions in order "to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Fulton v. Philadelphia,* 922 F.3d 140, 158 (3d Cir. 2019).

The district court correctly applied the same reasoning here. (Decision and Order, at 24-25).

Moreover, New Hope does not plausibly allege that OCFS's nondiscrimination regulation was motivated by religious hostility. As the

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[5] The two additional provisions New Hope cites simply allow for priorities in recruiting from certain communities or processing applications based on applicants' matching various characteristics of the majority of children available for adoption. *See* 18 N.Y.C.R.R. §§ 431.10(a), 421.18(a)(1). Finally, New Hope cites to the prior version of DRL § 110 for the proposition that state law limits adoption on the basis of marital status. But not only did the Court of Appeals interpret that statute more broadly in *In re Jacob,* 86 N.Y.2d 651, the statute was amended in 2010 to expressly remove references to any such limitation. *See* N.Y. Laws 2010, c. 509.

Court has explained, a litigant challenging the neutrality of a generally applicable and rational law must demonstrate the absence of a neutral, secular basis for the lines the government has drawn. *See Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (2d Cir. 2012). As explained, *supra* at 9, OCFS adopted the challenged regulation as part of a regulatory package that had the neutral and rational purpose of eliminating discrimination on the basis of sexual orientation and gender identity in essential social services, a quintessentially valid public purpose. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

Nor do New Hope's remaining allegations give rise to an inference that OCFS applied its regulation in a manner hostile toward religion. New Hope primarily relies on the allegations that (1) OCFS by December 2018 removed from its website the names of several voluntary faith-based agencies authorized at the start of year to make adoption placements, some of which may share New Hope's views on cohabitating and same-sex couples, and (2) OCFS officials made four statements indicating they would not tolerate discriminatory policies.

As to the first allegation, any alleged disparate impact of the regulation on religiously-affiliated agencies flows not from any hostility to religion, but rather from the fact that social services agencies with similarly discriminatory policies often have religious affiliations. After all, there is a long history of social service by religious institutions, as well as a history of opposition by certain religious groups to cohabitation outside of marriage and same-sex marriage. *See, e.g.,* Human Rights Campaign, Religion and Faith: Faith Positions, *available at* https://www.hrc.org/resources/faith-positions. Critically, New Hope has not alleged that OCFS allows agencies to discriminate against unmarried or same-sex couples for secular reasons. As the Third Circuit explained in *Fulton,* "a challenger under the Free Exercise Clause must show that it was treated differently *because of* its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Fulton*, 922 F.3d at 154. And like the plaintiff agencies in *Fulton*, New Hope has failed to allege that discrimination against unmarried or same-sex couples is tolerated when based on secular grounds. As in that case, then, the fact that "[New Hope's] conduct

springs from sincerely held and strongly felt religious beliefs does not imply that [OCFS's] desire to regulate that conduct springs from antipathy to those beliefs." *Id.* at 159.

As to the allegations involving statements by OCFS officials, which New Hope quotes in its complaint but misleadingly describes in its motion papers, they establish only that OCFS does not tolerate discrimination, whatever its source. New Hope alleges four statements for this purpose: (1) a statement by an OCFS spokesperson that "[t]here is no place for providers that choose not to follow the law" (Complaint ¶ 204); (2) a statement that the regulatory amendments that included the nondiscrimination regulation at issue were intended to "eliminate archaic regulatory language" (Complaint ¶ 166); (3) a statement in a policy directive that "OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent" (Complaint ¶ 164); and (4) a staff member's reference to the fact that "[s]ome Christian ministries have decided to compromise and stay open." (Complaint ¶ 192). Contrary to New Hope's argument (Motion, at 16 n.2), these statements do not resemble the statements of the adjudicatory

administrators that the Supreme Court found problematic in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1729. Unlike those problematic statements, which evinced an "animosity to religion or distrust of its practices," *id.* at 1731, the statements at issue here are neutral toward religion and indicate only that OCFS will not tolerate discriminatory action in contravention of its regulation.

New Hope thus cannot show a likelihood of success on its free-exercise claim.

B. New Hope Cannot Demonstrate a Likelihood of Success on its Free-Speech Claim.

New Hope cannot demonstrate a likelihood of success on its free-speech claim for either of two reasons: First, the regulation does not, as New Hope insists, compel speech, but rather regulates New Hope's conduct—the provision of nondiscriminatory services. Indeed, New Hope has not alleged, and the record does not show, that OCFS will enforce the regulation to restrict any aspect of New Hope's speech, even in connection with its provision of services. Second, even if it the regulation restricted New Hope's speech, it would do so only within the contours of the

provision of regulated public services, and thus would not run afoul of New Hope's free-speech rights.

The Supreme Court has made clear that an equal-access requirement "regulates conduct, not speech." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) ("*FAIR*") (upholding a law requiring that law schools grant military recruiters equal access to their campuses). Like the law upheld in *FAIR*, the nondiscrimination regulation "affects what [adoption agencies] must *do*—afford equal access to [applicants protected by the law]—not what they may or may not *say*." *Id.* (emphasis in original). Its only function is to ensure that providers of adoption services—like appellant—not exclude qualified prospective adoptive parents from its services.

The Supreme Court has also explained that such equal-access laws do not regulate speech: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62. Similarly here, New Hope cannot through its discriminatory policy in effect

proclaim, "Single and Married Heterosexual Applicants Only." By prohibiting New Hope from discriminating in its provision of services, OCFS regulates conduct, not speech.

The effect of OCFS's nondiscrimination regulation further confirms that the regulation addresses conduct, not speech. It requires New Hope to exercise its statutory powers in a manner that is neutral toward marital status and sexual orientation. It thus regulates New Hope's *conduct* in approving adoption applicants and making placement decisions; it does not compel New Hope "to disseminate an ideology" with which it disagrees. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713-14 (1977) (individual may not be forced to disseminate state's ideological message on his license plate). The other cases New Hope cites are distinguishable because they similarly involve government-mandated speech. *E.g., Pac. Gas & Elec. Co. v. Pub. Util. Com.*, 475 U.S. 1, 18 (1986) (requiring access to content-based message); *Evergreen Ass'n Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (requiring posting of specified information).

To the extent New Hope argues that complying with the regulation would dilute its message, its claim fares no better because any such effect on New Hope's speech is incidental to the regulation of New Hope's

conduct. And "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Natl. Inst. of Family & Life Advocates v Becerra*, 138 S. Ct. 2361, 2373 (2018) (internal quotation omitted); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (rejecting First Amendment challenge to requirement of specific informed-consent language because it regulated speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State").

Indeed, New Hope does not allege that OCFS has ever sought to enforce its regulation by restricting New Hope's speech, as opposed to its conduct. Rather, OCFS's enforcement actions have thus far been directed only at New Hope's conduct—its refusal to place children with unmarried and same-sex couples. New Hope alleges no facts—let alone submits with its motion evidence to support any such allegations—suggesting that OCFS intends to regulate New Hope's speech in the absence of discriminatory conduct. Indeed, the district court thought it likely that the regulation did not address such speech. (Decision and Order, at 29-30.) New Hope thus cannot obtain an injunction on the ground that the regulation impermissibly restricts its speech.

Second, and in any event, OCFS's regulation does not in fact purport to restrict New Hope's speech unrelated to its provision of adoption services, and any restriction on New Hope's speech in connection with its delivery of adoption services would flow from the fact that New Hope has "chosen to partner with the government to help provide what is essentially a public service." *Fulton,* 922 F.3d at 161.

Adoption services are provided only by operation of an adoption agency's special status as an authorized agency imbued with statutory authority to wield significant influence over the creation of familial relationships, one of the most powerful legal structures in people's lives. Thus, notwithstanding that New Hope operates as a privately-funded agency, the rule regarding speech restrictions in government programs is instructive. In that context, the Supreme Court has distinguished situations in which the government defines the contours of a government program, which is permissible, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), from those in which the government requires a program participant to espouse the government's message on its "own dime and time," which runs afoul of the free speech clause, *Agency for Intl. Dev. v. Alliance for Open Socy. Intl., Inc.*, 570 U.S. 205, 218-19 (2013). Here, OCFS has

merely defined the contours of the regulated services—applicants may not be rejected and placement decisions may not be made on the basis of protected characteristics. New Hope is not precluded from espousing its beliefs about marriage and family, including by advocating for adoptions by married heterosexual couples, outside the contours of its adoption program. The nondiscrimination regulation thus does not impermissibly regulate New Hope's speech.

C. New Hope Cannot Demonstrate a Likelihood of Success on its First Amendment Association Claim.

New Hope cannot demonstrate a likelihood of success on its claim that the nondiscrimination regulation violates its expressive association rights by requiring it to include unmarried and same-sex couples in its group sessions and recommend such couples as adoptive parents.

In support of its claim, New Hope relies primarily on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). That reliance is misplaced. *Dale* involved the associational rights of the Boy Scouts, whose primary mission is "to instill values in young people." *Id.* at 649. The *Dale* Court held that because the Boy Scouts' members came together specifically for "expressive association," application of a state nondiscrimination law so

as to require the reinstatement of a homosexual scoutmaster violated the Boy Scouts' association rights. *Id.* at 648. In contrast here, New Hope is not open to membership and it was not organized for the purpose of engaging in expressive activities. Its primary mission is to provide adoption services under state law. (*See* Complaint Ex. 2 (certificate of incorporation).) "To the extent that the [nondiscrimination regulation] restricts the activities of charitable or religious groups, it places limits on the non-expressive *conduct* in which they may engage, rather than on their right to associate for the purpose of expressing their views." *United States v. Thompson*, 896 F.3d 155, 165 (2d Cir. 2018).

To be sure, requiring New Hope to provide equal access to its services without regard to marital status or sexual orientation will compel it to associate with unmarried and same-sex couples in the sense of interacting with them for purpose of assisting them to become adoptive parents. But just as the right of association was not infringed by a rule requiring law schools to interact with military recruiters by allowing them on campus and providing the same incidental services provided to other recruiters, *see FAIR*, 126 S. Ct. 1297, New Hope's right of association is not infringed here. That right is infringed only when an

organization is forced to alter its selection of members or constituents, interfering with the critical means by which a group "express[es] those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. "Mere incidental burdens on the right to associate do not violate the First Amendment; rather, to be cognizable, the interference with plaintiffs' associational rights must be direct and substantial or significant." *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (internal quotation and alteration from original omitted). Here, they are neither.

Although New Hope proclaims a viewpoint about the marital status and sexual orientation of adoptive parents, it does not accept those individuals as members of its organization merely by providing services to them as required by state law. Such transactional association does not directly or substantially interfere with New Hope's associational rights.

Finally, OCFS is not enforcing its nondiscrimination regulation for the very purpose of altering New Hope's expression. OCFS's enforcement merely "assur[es] its citizens equal access to publicly available goods and services"—a goal "which is unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624 (rejecting challenge to application of equal-

access law that required Jaycees to include women as full voting members). Thus, even if the nondiscrimination regulation impacts New Hope's right to expressive association in some way, enforcement of the regulation would not unconstitutionally violate that right.

D. The Balance of Hardships Favor OCFS's Enforcement of the Nondiscrimination Regulation.

Because New Hope cannot establish a likelihood of success on the merits, the Court should deny New Hope's motion on that ground alone. But New Hope is not entitled to a preliminary injunction for the additional reason that the balance of the hardships weighs against it. Although New Hope has proposed interim relief under which it would not accept any new potential parents for adoption services pending appeal, all of the unmarried and same-sex couples who were previously excluded from New Hope's services, as well as those couples who refrained even from seeking services from New Hope on account of its discriminatory policy, would continue to be excluded from the opportunity to adopt any of the children New Hope is in a position to place. The hardship from precluding full enforcement of the nondiscrimination policy is thus not illusory. And the strong public interests that weigh in favor of equal-

access to public services balances the hardships in favor of enforcement. Accordingly, even under the traditional test, the injunction should be denied.

CONCLUSION

The motion seeking a preliminary injunction should be denied.

Dated: Albany, New York
August 23, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Laura Etlinger, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4600 words exclusive of cover and tables and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Laura Etlinger

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

DECLARATION OF LAURA ETLINGER IN OPPOSITION TO APPELLENT'S MOTION FOR A PRELIMINARY INJUNCTION

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family ("appellee" or "OCFS").[1]

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[1] At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She was subsequently appointed to serve as Commissioner of the agency.

2. I submit this declaration in opposition to New Hope's motion for a preliminary injunction, seeking to enjoin OCFS from enforcing its nondiscrimination regulation as to New Hope's regulated adoption program. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. I submit the following documents, consisting of copies of correspondence between the parties and their counsel and filed documents, in support of OCFS's opposition to appellant's motion.

a. Exhibit A: Letter from R. Brooks to A. Kerwin, dated July 3, 2019;
b. Exhibit B: Letter from L. Ghartey Ogundimu to K. Jerman, dated August 9, 2019;
c. Exhibit C: OCFS Motion to Remove Appeal from Expedited Appeal Calendar.

Dated: Albany, New York
August 22, 2019

/s/ Laura Etlinger
LAURA ETLINGER
Assistant Solicitor General

Exhibit A

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

July 3, 2019

Via Email & First Class Mail

Adrienne Kerwin, Assistant Attorney General
99 Washington Ave., 2nd Floor
Albany, New York, 12210

Re: *New Hope Family Services, Inc. v. Poole*; NDNY Case No. 5:18-cv-04519

Dear Ms. Kerwin,

Now that we have filed our notice of appeal, I wanted to follow up on our earlier conversation. When we last spoke, you indicated you believed we had a prior "agreement" that New Hope would not take on new clients and that the State would not act to revoke New Hope's authorization to provide adoption and fostering-related services while we litigate the PI motion. Based on my recollection, though, and after looking back at our correspondence, I don't believe we have directly addressed this question before. In your opposition brief dated January 4, 2019, the State represented that "OCFS has no plans to interfere with New Hope's current legal custody of three children, or the placement of those children." (Opp'n Mem. at 11 n. 11.) But the State has not given any assurances regarding New Hope's work with its adoptive families, nor with respect to birthmothers who specifically request New Hope's assistance while the PI litigation is pending.

As New Hope detailed in its preliminary injunction papers, if it is unable to respond to these requests and commitments, New Hope and the individuals it serves will suffer harm that will be difficult or impossible to remedy. Obviously, the district court dismissed New Hope's claim and therefore did not consider New Hope's request for a preliminary injunction on the merits. We believe the district court erred and that this error stands a reasonable chance of being reversed on appeal. If we prevail on appeal, New Hope's request for a preliminary injunction will be renewed.

All that will proceed in an orderly manner. In the meantime, as I suggested when we spoke, if possible, we would like to avoid needlessly burdening your office, our office and the courts with briefing and deciding emergency motions for temporary protection pending appeal of the recent ruling. If the State will agree not to revoke New Hope's authorization until either the dismissal is affirmed *or* a substantive ruling on New Hope's preliminary injunction motion has been entered,

there will be no need for collateral litigation over maintaining the status quo during these appellate proceedings.

Please let me know your thoughts. In the meantime, I hope you enjoy a pleasant Fourth of July holiday.

Best Regards,

s/ Roger G. Brooks
Roger Brooks
Attorney for Plaintiff

Exhibit B

9171 9690 0935 0054 4740 21

NEW YORK STATE | Office of Children and Family Services

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Commissioner

August 9, 2019

Kathy Jerman
Executive Director
New Hope Family Services
3519 James Street
Syracuse, NY 13206

Dear Ms. Jerman:

The New York State Office of Children and Family Services (OCFS) is writing in furtherance of its letter, dated October 16, 2018, which informed New Hope Family Services (New Hope) of its determination that New Hope's policy precluding the placement of children with same sex couples or unmarried cohabitating couples was discriminatory and impermissible. That letter directed New Hope to submit a formal written response identifying whether it was going to revise its policy and practices to come into compliance with 18 NYCRR 421.3, or if it intended to submit a close-out plan for its adoption program.

By decision dated May 16, 2019, United States District Court Judge Mae D'Agostino determined that "OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services" and found that New Hope had failed to plausibly state a claim alleging an infringement of its right to free exercise of religion. As stated previously, OCFS cannot continue to approve New Hope's adoption program if it does not bring its policy and practices into compliance with the above-cited regulation.

Accordingly, please submit confirmation that New Hope will come into compliance with the regulation, or a plan to close New Hope's adoption program, within 15 calendar days of receipt of this letter. If New Hope chooses to close its adoption program, OCFS will provide all necessary guidance and assistance to ensure minimal disruption to children and families receiving adoption services.

Sincerely yours,

Lisa Ghartey Ogundimu
Deputy Commissioner
Child Welfare and Community Services

cc: Roger G. Brooks, Esq.

Exhibit C

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

DECLARATION OF LAURA ETLINGER IN SUPPORT OF MOTION TO REMOVE THE APPEAL FROM THE EXPEDITED APPEAL CALENDAR

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family ("appellee" or "OCFS").[1]

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[1] At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She

2. I submit this declaration in support of appellee's motion pursuant to Local Rule 31.2(b)(2) to remove the appeal from the Expediated Appeal Calendar ("XAC") or, in the alternative, to extend the time for the filing of appellee's brief in this matter. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. As explained below, this appeal is not well-suited to expedited review for two reasons: (1) the appeal involves constitutional issues that implicate important public policies and merit sufficient time for briefing, argument, and decision, and (2) the District Court dismissed the complaint following a full substantive review of the merits of appellant's constitutional claims, which is not the type of dismissal for which the XAC was developed.

4. Appellant New Hope Family Services ("New Hope") is a faith-based not-for-profit agency that operates, among other things, an adoption program in New York State. New Hope commenced this action pursuant to 42 U.S.C. § 1983 to challenge an OCFS regulation that

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was subsequently appointed to serve as Commissioner of the agency.

prohibits public and private adoption agencies from discriminating against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. *See* N.Y. Code Rules & Reg., tit. 18, ("18 N.Y.C.R.R.") § 421.3(d). Dist. Ct. No. 18-cv-01419, ECF No. 1.[2] New Hope maintains a policy of not placing children with adoptive couples who are unmarried or of the same sex. Dist. Ct. No. 18-cv-01419, ECF No. 1, at 24. Upon learning of this policy during an on-site review, OCFS advised New Hope that if it failed to bring its policies into compliance with the non-discrimination regulation, OCFS would be unable to approve continuation of New Hope's adoption program. Dist. Ct. No. 18-cv-01419, ECF No. 1-7, at 3. New Hope then commenced this action, seeking a permanent injunction prohibiting enforcement of the non-discrimination regulation to its adoption program, claiming the regulation violates its free exercise, free speech, and equal protection rights and constitutes an unconstitutional condition. Dist. Ct. No. 18-cv-

[2] Citations to the record are to documents filed with the District Court in Docket No. 18-cv-01419 or with this Court in Docket No. 19-1715. Documents are referred to by document number and page in the courts' electronic court filing ("ECF") systems.

01419, ECF No. 1, at 24, 40, 44, 46, 48.

5. Immediately after commencing this action, New Hope filed a motion for a preliminary injunction. Dist. Ct. No. 18-cv-01419, ECF No.15. Shortly thereafter, OCFS moved to dismiss the complaint for failure to state a claim on the ground that the neutral, generally-applicable non-discrimination regulation could be constitutionally applied to New Hope's adoption program as a matter of law. Dist. Ct. No. 18-cv-01419, ECF Nos. 34, 34-1. In a thorough, 42-page decision, the District Court for the Northern District of New York (D'Agostino, J.) rejected all New Hope's constitutional claims on the merits, holding that the OCFS non-discrimination regulation could be constitutionally applied to New Hope's adoption program. The court accordingly denied the motion for a preliminary injunction and dismissed the complaint. Dist. Ct. No. 18-cv-01419, ECF No.38.

6. New Hope filed its notice of appeal on June 10, 2019. Dist. Ct. No. 18-cv-01419, ECF No. 40. On July 11, 2019, this Court issued a Notice of Expedited Appeal, placing the appeal on the Court's XAC, and directing that New Hope's opening brief be due by August 15, 2019 and appellee OCFS's brief be due by September 19, 2019. Second Cir. No.

19-1715, ECF No. 34.

7. There is good cause to remove this appeal from the XAC. First, the constitutional issue presented—whether a non-discrimination regulation may be constitutionally applied to a not-for-profit agency engaged in the regulated, public service of facilitating adoptions—involves important matters of public policy. The importance of this issue is demonstrated by the fact that fifteen amici briefs were filed in connection with a recent Third Circuit appeal involving an analogous issue—whether a similar non-discrimination policy may be constitutionally applied to a foster-care program operated by a faith-based not-for-profit agency. *See Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019). In addition, the plaintiff not-for-profit agency in that case has recently filed a petition for certiorari seeking review in the U.S. Supreme Court of the Third Circuit's decision rejecting its constitutional challenges to application of the non-discrimination policy. *See Fulton v. City of Philadelphia*, Supreme Court Docket No. 19-123 (pet. for cert. filed July 22, 2019).

8. Although plaintiff's appeal is from a judgment dismissing the complaint for failure to state a claim, that dismissal was based on a

full review of the merits of appellant's constitutional claims and application of substantive law, rather than a review of whether the allegations of the complaint satisfy pleading standards. Thus, the appeal does not involve the type of dismissal for which the XAC was designed. *See* Hon. Jon O. Newman, *Report: The Second Circuit's Expedited Appeals* 80 Brook. L. Rev. 429, 429-30 (2015) (stating that the Court's XAC was instituted in the aftermath of Supreme Court decisions requiring a more rigorous pleading standard so that cases in which the new pleading standards were deemed to have been improperly applied could be returned more quickly to the district court).

9. For these reasons, OCFS respectfully submits that there is good cause to remove this appeal from the XAC in order to allow sufficient time for the important constitutional issues presented by this appeal to be briefed, argued, and decided.

10. In the alternative, if the appeal is not removed from the XAC, appellee OCFS respectfully requests that it be granted a 30-day extension of the deadline for its brief, to October 21, 2019.

11. An extension is needed because it would be extremely difficult for my office to adequately research the issues and prepare a

brief within the timeframe contemplated under the current briefing schedule.

12. My own schedule is especially busy from now through mid-September, when among other work I will be preparing four other appellate briefs and presenting oral arguments in three appeals, including one in this Circuit and one in the New York Court of Appeals. Moreover, reassigning this matter to someone else is not feasible, as my office is currently short three attorneys due to extended family leaves and a recent departure.

13. In addition, the brief in this matter will require review by both a deputy solicitor general and the New York Solicitor General. The current expedited briefing schedule does not allow sufficient time for the necessary review process to take place.

14. Finally, New Hope has been able to continue to engage in some adoption service activities, even though its motion for a preliminary injunction was denied. Indeed, during the pendency of the litigation in District Court, OCFS permitted New Hope to continue to engage in certain of its adoption program services. *See* Dist. Ct. No. 18-cv-01419, ECF No. 32, at 4. And the parties are currently negotiating a

more formal partial stay of OCFS's enforcement activities, which would allow New Hope to engage in specified adoption activities during the pendency of this appeal.

15. Accordingly, for all of these reasons, OCFS respectfully requests that the Court remove this appeal from the XAC or, in the alternative, that the Court grant OCFS a 30-day extension to file its brief, to October 21, 2019.

Dated: Albany, New York
July 29, 2019

/s/ Laura Etlinger
LAURA ETLINGER
Assistant Solicitor General

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC., Plaintiff-Appellant, v. SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York, Defendant-Appellee.	)	CASE NO. 19-1715-CV ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOSÉ A. CABRANES, REENA RAGGI, AND EDWARD R. KORMAN

November 13, 2019

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BE IT REMEMBERED that Oral Argument was held at the Thurgood Marshall US Courthouse, 40 Foley Square, New York, New York, commencing on the 13th day of November 2019.

BEFORE: José A. Cabranes
Reena Raggi
Edward R. Korman

APPEARANCES:

For the Plaintiff-Appellant New Hope Family Services, Inc.:

ALLIANCE DEFENDING FREEDOM
BY: Roger G. Brooks, Esq.
15100 North 90th Street
Scottsdale, Arizona 85260

For the Defendant-Appellee Sheila J. Poole:

SOLICITOR GENERAL, STATE OF NEW YORK
BY: Laura Etlinger, Esq.
The Capitol
Albany, New York 12224

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

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

We'll hear from Counsel.

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

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

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

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

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

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

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

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

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

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

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

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

MR. BROOKS: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

JUDGE RAGGI: Mm-hmm.

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

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

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

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

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

MR. BROOKS: That is right, Your Honor.

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

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

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

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

couples who sought to adopt with you in the interim?

MR. BROOKS: Yes, Your Honor.

JUDGE RAGGI: Okay.

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

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

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

And thank you, Your Honor. I have reserved.

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

MR. BROOKS: Yes.

JUDGE CABRANES: You can feel more at ease.

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

Religious organizations, they're not excused

from complying with valid and neutral laws; right?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE RAGGI: They referred to the regulations as archaic.

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

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

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

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

what took place in the District Court.

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

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

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

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

MR. BROOKS: What do we want?

JUDGE CABRANES: Right.

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

JUDGE RAGGI: Vacate the dismissal.

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

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

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

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

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

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

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

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

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

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

a temporary basis, is irreparable harm.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BROOKS: Well, it --

JUDGE KORMAN: -- religious wishes.

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

I hope.

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

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

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

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

child -- the religion of the child's origin into account. You're required to place the child with a family of the same religion, so long as that's not inconsistent with the best interests of the child. All these substantial exceptions to things that in other contexts, we would consider to be unacceptable discrimination based on those categories.

The only category that OCFS says that we could never consider, we could never contemplate, I think was their word, an exception on that basis is the one belief which OCFS knows and has said is primarily in today's world and this state associated with religious faith -- and that is the belief in what many people would describe as old fashioned, and they would describe as a traditional and biblical view of marriage and the form of family and the best interest of the child.

JUDGE RAGGI: Okay.

JUDGE CABRANES: Now -- go ahead.

JUDGE RAGGI: Do you in any way challenge before this Court the authority of the agency to shut you down, or to have promulgated this particular regulation given the language of the statute that was enacted by the New York legislature?

MR. BROOKS: Well, Your Honor, we have chosen to focus the claim on the fact that whatever their

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

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

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

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

JUDGE CABRANES: Before you sit down, if we

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

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

JUDGE CABRANES: Please.

MR. BROOKS: Not a surprising question.

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

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

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

scrutiny is out there, and strict scrutiny is strict, but it's not -- it's not contrary to a couple of things that have been said. It's not always fatal. It's still there to protect us.

The other thing I would say is that it's kind of -- of course, we all ask that question of ourselves when we think about a case like this, but it's ironic because then we have this situation where, in the adoption context -- because the overriding -- in general, in our law, race discrimination is an overriding concern.

But when it comes to adoption, the overriding concern is the best interest of the child. And so we see the law and we see the regulation as not just permitting, but requiring selection based on race. Again, that takes us back -- and I won't repeat the point that there's exceptions for every type of belief and secular beliefs about what's in the best interests of the child, no exception allowed for my client's belief based on their faith teachings.

JUDGE CABRANES: Thank you very much.

MR. BROOKS: Thank you, Your Honors.

JUDGE CABRANES: Counsel, you're just -- I have a simple clerical question. And we may have your name incorrect on the form that I have it. Your surname is

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

MS. ETLINGER: That's correct.

JUDGE CABRANES: Thank you.

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

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

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

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

JUDGE CABRANES: Help me with the --

understanding the record.

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

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

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

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

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

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

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

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

JUDGE CABRANES: They're permitted to --

MS. ETLINGER: -- will have been --

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

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

law.

JUDGE CABRANES: No. I understand that.

JUDGE KORMAN: Which state law are you talking about?

MS. ETLINGER: I'm sorry.

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

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

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

MS. ETLINGER: Yes.

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

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

JUDGE RAGGI: Which law?

MS. ETLINGER: The --

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

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

and same-sex couples to adopt.

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

MS. ETLINGER: Yes.

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

MS. ETLINGER: Yes. And the --

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

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

JUDGE RAGGI: Let's stay focused.

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

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

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

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

JUDGE RAGGI: For purposes of conducting adoptions.

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

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

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

JUDGE RAGGI: And they were indeed inspected

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

MS. ETLINGER: Yes.

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

MS. ETLINGER: Right.

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

MS. ETLINGER: Yes.

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

MS. ETLINGER: Yes.

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

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

JUDGE RAGGI: Right. Which we would assume --

MS. ETLINGER: So --

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

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

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

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

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

MS. ETLINGER: Because this is a --

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

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

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

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

MS. ETLINGER: Yes.

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

MS. ETLINGER: Yes.

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

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

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

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

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

JUDGE RAGGI: I must not be making myself clear.

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

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

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

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

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

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

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

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

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

MS. ETLINGER: Yes.

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

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

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

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

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

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

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

MS. ETLINGER: With respect to --

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

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

They must serve adoption applicants on a

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

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

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

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

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

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

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

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

MS. ETLINGER: Well --

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

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

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

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

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

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

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

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

MS. ETLINGER: Yes.

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

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

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

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

JUDGE CABRANES: That's where I was heading.

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

JUDGE CABRANES: Yeah.

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

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

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

JUDGE CABRANES: It's an additional requirement?

MS. ETLINGER: It's an additional requirement.

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

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

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

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

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

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

JUDGE CABRANES: Well, what about race?

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

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

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

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

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

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

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

MR. BROOKS: The label of the faith.

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

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

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

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

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

MS. ETLINGER: No. Because the --

And this Court has said in the St. Bartholomew's Church case that we cited in our brief, that the fact that there may be a disparate impact on religious organizations because of factual matters, they are the ones more likely to be affected is not evidence of discrimination.

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

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

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

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

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

MS. ETLINGER: Well --

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

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

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

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

MS. ETLINGER: Discovery --

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

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

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

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

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

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

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

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

JUDGE RAGGI: I understand that.

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

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

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

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

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

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

MS. ETLINGER: And the statements --

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

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

JUDGE RAGGI: I understand that.

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

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

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

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

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

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

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

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

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

MS. ETLINGER: That is incorrect.

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

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

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

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

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

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

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

JUDGE RAGGI: With the alternative being to shut down?

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

JUDGE RAGGI: Right.

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

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

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

JUDGE RAGGI: I think they tried to draw an

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

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

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

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

MS. ETLINGER: Yes. This regulation.

JUDGE RAGGI: This regulation.

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

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

these two provisions.

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

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

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

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

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

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

MS. ETLINGER: Right.

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

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

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

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

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

JUDGE CABRANES: Thank you, very much. Ms. Etlinger.

MS. ETLINGER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

And Your Honors, I will stop. Thank you.

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

We reserved decision. And we're adjourned.

(Conclusion of audio recording file labeled 2019.11.13 NHvP Oral Argument 19-1715 at 01:01:16.)

C E R T I F I C A T E

I, Katherine McNally, Certified Transcriptionist, do hereby certify that the foregoing pages 1 to 56 constitute a full, true, and accurate transcript, from electronic recording, of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

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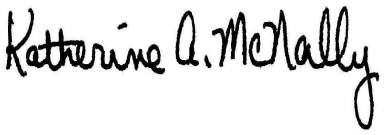

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