



October 15, 2021

Honorable Mae A. D'Agostino
United States District Judge
U.S. District Court, N.D.N.Y.
James T. Foley U.S. Courthouse
445 Broadway, Courtroom 5
Albany, New York 12207

Re: *New Hope Family Services, Inc. v. James*, Case No. 5:21-cv-01031

Dear Judge D'Agostino,

Pursuant to this Court's Individual Rules and Practices, Plaintiff respectfully requests leave to file a motion for preliminary injunction. Counsel for Plaintiff has conferred with counsel for all Defendants, who oppose the injunctive relief that Plaintiff seeks.

This Court, guided by the Second Circuit's decision at 966 F.3d 145 (2020), has held that New Hope has demonstrated a probability of success in establishing that efforts by the State of New York, acting through the Office of Child and Family Services, to require New Hope to change its faith-based policy of placing children entrusted to its care only with couples consisting of a married mother and father (the "Policy"), violate both New Hope's constitutionally protected right of free speech and its constitutionally protected right of free exercise of religion. *New Hope Family Services, Inc. v. Poole*, 493 F. Supp. 3d 44, 61, 63 (N.D.N.Y. 2020).

Now, another agency of the Executive Branch of the State of New York—this time, the Department of Human Rights ("NYDHR")—seeks to investigate New Hope, under threat of fines of up to \$100,000 and even criminal penalties, for alleged "violations" consisting of exactly the same Policy.

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For reasons already weighed by the Second Circuit and this Court, New Hope's Policy, which extensively involves both speech and the exercise of New Hope's faith through its ministry, is constitutionally protected regardless of what specific state law or regulation the State of New York may wish to assert against it. And threats by New York to penalize New Hope for abiding by its faith-based Policy impermissibly put New Hope to the choice of violating its faith convictions and sacrificing its free speech rights, or putting itself at risk of catastrophic fines that would destroy New Hope as surely as a revocation of its license.

Since this Court's ruling in *New Hope v. Poole* in October of 2020, the Supreme Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), has only strengthened New Hope's claim to constitutional protection. There, on similar facts, the Supreme Court held that an anti-discrimination law "lacks general applicability [and is therefore subject to strict scrutiny] if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. New Hope will demonstrate in its motion for preliminary injunction that N. Y. Exec. Law § 296(2)(a) allows exceptions for secular purposes, is thus not "generally applicable," and that strict scrutiny must be applied for this additional reason.

Once strict scrutiny is invoked, the application against New Hope of N. Y. Exec. Law § 296(2)(a) (by NYDHR) or of 18 NYCRR § 421.3(d) (by OCFS) becomes indistinguishable. The purported governmental interest of preventing "discrimination" against unmarried or same-sex couples is identical. But this interest has already been held (at the preliminary injunction stage) not to justify this severe infringement of New Hope's rights of free speech and free exercise of religion.

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After receiving a demand from NYDHR that New Hope respond to a complaint that New Hope's Policy violates N. Y. Exec. Law § 296(2)(a), New Hope called NYDHR's attention to the prior rulings of this Court and the Second Circuit, and to the in-force preliminary injunction, and on September 22, 2021, NYDHR informed New Hope that "the respondent is not being required to submit a response on this date." However, on October 4, in an email from NYDHR Regional Director Julia Day, the State reversed course and informed New Hope that NYDHR "is now proceeding with investigation of the subject case," and demanded that New Hope respond to the allegations by October 18.

Given that senior officials of NYDHR are now clearly aware of both the subject-matter of the investigation being threatened against New Hope, and of the multiple court orders leading to the in-force preliminary injunction previously issued by this Court, the demand by NYDHR that New Hope respond to an allegation that its Policy violates N. Y. Exec. Law § 296(2)(a) appears to be harassment pure and simple, motivated by animus, and disrespectful of the federal courts.

Accordingly, New Hope respectfully requests leave to file a motion for preliminary injunction.

Respectfully Submitted,

s/Mark Lippelmann
Mark Lippelmann
Counsel for Plaintiff

cc (via ECF): Adrienne J. Kerwin
John E. Heisler, Jr.