ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

October 22, 2021

The Honorable Mae A. D'Agostino
United States District Court
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 509
Albany, New York 12207

Re: *New Hope Family Services, Inc. v. James et al.,* 5:21-cv-1031 (MAD)(TWD)

Your Honor:

Plaintiff does not oppose permission for Defendants to file the motion to dismiss that they describe in their letter of October 18, 2021. However, Plaintiffs do believe that that motion will be without merit, for at least the following reasons.

A. Younger abstention is not relevant to Plaintiff's claim.

Younger abstention is only applicable when the relevant state proceedings are commenced before "proceedings of substance on the merits have taken place in federal court." *Middlesex Cnty Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982). Here, "proceedings of substance" in federal court concerning New Hope's claim of constitutional protection for its faith-based speech and practices have been underway since 2019, when this Court first heard and ruled on cross motions for preliminary injunction and to dismiss in *New Hope Family Services v. Poole*. The State cannot evade this reality through the expedient of attacking the identical policy, and threatening the identical constitutional interests, through a different agency of the executive branch of the New York State government.

Equally fundamentally, no state "proceedings" of a type that can merit *Younger* abstention exist. All that the New York Division of Human Rights (NYDRH) has done thus far is the clerical function of "promptly serv[ing] a copy" of the Complainant's complaint on New Hope, *see* N.Y. Exec. Law § 297(2)(a), thus initiating the very first step of an investigation. Federal courts routinely decline to abstain where a state process is at such an embryonic stage. *See Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 520 (1st Cir. 2009); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1228-29 (4th Cir. 1989); *Schiavone Constr. Co. v. N.Y. City Transit Auth.*, 593 F. Supp. 1257, 1258 n.4 (S.D.N.Y. 1984).

Additionally, *Younger* abstention is not appropriate where, as here, the state action represents harassment. *Spargo v. N.Y. State Comm'n on Jud. Conduct*, 351 F.3d 65, 75 n. 11 (2d Cir. 2003). And federal courts should be less willing to abstain where, as here, a plaintiff is asserting Section 1983 claims, because "the legislative history of § 1983 reflects Congress' aim to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Cecos Intern., Inc. v. Jorling*, 895 F.2d 66, 72 (2d Cir. 1990), *quoting Patsy v. Board of Regents*, 457 U.S. 496, 506 (1982) (cleaned up).

B. Attorney General James is a proper defendant.

Defendant Attorney General James is a proper defendant. James is the head of the Department of Law, which includes the Civil Rights Bureau, *see* N.Y. Exec. Law § 60, and has the duty to enforce the laws of New York throughout the state of

New York, including N.Y. Exec. Law § 296. N.Y. Exec. Law § 63. Defendant James accepts and files notice of complaints alleging violations of New York's laws, and administers, enforces, and prosecutes New York's laws, including the criminal provisions implicated by this lawsuit. *See, e.g.*, N.Y. Exec. Law §§ 63(9), (10), (12), 297(1), 299; N.Y. Civ. Rights Law § 40-d; N.Y. Exec. Law, App. § 465.3(a)(2); *see also* Complaint, Dkt. # 1, ¶ 92. The New York Attorney General's office, and Attorney General James in particular, has exercised her authority under N.Y. Exec. Law § 63(12) to prosecute businesses for violating anti-discrimination laws.

The cases cited by Defendants in which the Attorney General was deemed not a proper party involved claims that contrast sharply with the present case. *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976), involved a challenge to New York's residency requirement for initiation of divorce proceedings, as to which the Attorney General had no enforcement or other role at all. *Chrysafis v. James*, 2021 WL 1405884 (EDNY April 14, 2021), likewise involved a jurisdictional restriction (New York's COVID foreclosure moratorium) as to which the Attorney General had no authority whatsoever. And the *pro se* complaint in *Sabin v. Nelson*, 2014 WL 2945770 at *4 (NDNY June 20, 2014) presented "largely incomprehensible grievances" and identified no authority in, or threat by, the Attorney General to impair the plaintiff's claimed right to "train service animals." Here, by contrast, the Attorney General has, and has previously exercised, relevant enforcement authority.

Respectfully Submitted,

s/*Roger Brooks*
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cc (via ECF): All counsel of record