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By Johnnayea Edmond at 11:07 am, Aug 23, 2021

New York State Division of Human Rights
Public Accommodation Discrimination Complaint Form

Although all ages are protected, you must be 18 years or older to file a complaint. A parent, guardian or other person having legal authority to act in the child's interests must file on behalf of a person under the age of 18.

1. Your contact information:

First Name: Michael
Middle Initial/Name: P
Last Name: McWilliams
Street Address/ PO Box: 59 State St
Apt or Floor #: E10
City: Tully
State: NY
Zip Code: 13159

If you are filing on behalf of a person or persons under the age of 18 for whom you have legal authority to act:

I am filing for:
☒ Self & other
☐ Other person(s) only

Name(s):	Relationship(s):	Date(s) of birth:

2. Briefly describe the type of public accommodation you are filing against (e.g. restaurant, store, theatre, bank, medical office, insurance company, etc.):

Adoption Services

3. You are filing a complaint against:

Name: New Hope Family Services and Kathy Jerman
Street Address/ PO Box: 3519 James Street
City: Syracuse
State: NY
Zip Code: 13206

Telephone Number:
315-437-8300 Ext. 113

In what *county or borough* did the violation take place?
Onondaga County

Individual people who discriminated against you:

Name: Kathy Jerman   Title: Executive Director

Name: ______________   Title: ______________

If you need more space, please list them on a separate piece of paper.

4. Date of alleged discrimination *(must be within one year of filing):*

The most recent act of discrimination happened on: Aug (month) 20 (day) 2021 (year)

5. Basis of alleged discrimination:
Check ***ONLY*** the boxes that you believe were the reasons for discrimination, and fill in specifics only for those reasons. Please look at page 2 of "Instructions" for an explanation of each type of discrimination.

☐ **Creed/Religion:** Please specify: ______	☐ **National Origin:** Please specify: ______
☐ **Disability:** Please specify: ______	☐ **Race/Color or Ethnicity:** Please specify: ______
☐ **Gender Identity or Expression, including the Status of Being Transgender**	☐ **Sex:** Please specify: ______
☒ **Marital Status:** ☒ Single ☐ Married ☐ Separated ☐ Divorced ☐ Widowed	☒ **Sexual Orientation:** Please specify: Homosexuals
☐ **Military Status:** ☐ Active Duty ☐ Reserves ☐ Veteran	☐ **Arrest record** (credit and insurance only; see page 2 of instructions for what is covered by the arrest provisions)

☐ **Use of Guide Dog, Hearing Dog, or Service Dog, or a Service Animal meeting the ADA definition**

If you believe you were treated differently because you filed or helped someone file a discrimination complaint, acted as a witness to a discrimination complaint, or reported unlawful discrimination, check below:

☐ **Retaliation:** How you opposed discrimination: ______

If you believe you were discriminated against because of your relationship or association with a member or members of a protected category listed above, indicate the relevant category above, and check below.

☐ **Relationship or association**

6. Acts of alleged discrimination: *What did the person/company you are complaining against do? Check all that apply*

☒ Denied access to public accommodation	☒ Discriminatory advertisement, communication, or notice
☒ Denied equal advantages, facilities and privileges of public accommodation	☐ Sexual harassment
☐ Denied reasonable accommodation for disability	☐ Harassed/intimidated (other than sexual harassment) on any basis indicated above
☐ Denied reasonable accommodation regarding the use of a service animal (dog or miniature horse) in violation of federal standards under the Americans with Disabilities Act	☐ Discriminated against because of use of a professionally trained guide, hearing or service dog

☐ Other: ______

7. Description of alleged discrimination

Please tell us more about each act of discrimination that you experienced. Please include dates, names of people involved, and explain why you think it was discriminatory. PLEASE TYPE OR PRINT CLEARLY. You may also write "see attached" and attach a typed description.

Please see enclosed document.

If you need more space to write, please continue writing on a separate sheet of paper and attach it to the complaint form. ***DO NOT WRITE IN THE MARGINS OR ON THE BACK OF THIS FORM.***

In the Matter of the Complaint of

MICHAEL PAUL MCWILLIAMS,

Complainant-Petitioners,

For Review by the New York State Division of Human Rights ,

- against -

KATHY JERMAN, capacity as Executive Director; and
NEW HOPE ADOPTION FAMILY SERVICES

Defendants-Respondents.

Date: 20th-August-2021

cc: Julia Day,
Regional Director,
NYS Division of Human Rights,
333 E Washington St., Room #543
Syracuse, NY, 13202
Telephone No. (315) 428-4633
eFax: (315) 428-4106
InfoSyracuse@dhr.ny.gov

PRIMA FACIE CASE FOR SEXUAL ORIENTATION AND MARTIAL STATUS DISCRIMINATION:

To support a prima facie case of sexual orientation and marital status discrimination, a Complainant must show: "(1) that [he] is a member of a protected class; (2) that [he] was qualified for [certification] in the position; (3) that [he] suffered an adverse...action; and, in addition, has (4) some minimal evidence suggesting an inference that the [agency] acted with discriminatory motivation."[1] To provide probable cause of the aforementioned: (1) the Complaintant is a single homosexual male. Both *marital status* and *sexual orientation* are considered protected classes; n.b., N.Y. Exec. Law § 296(1-a)(c) and 18 CRR-NY 421.3(d). The Respondent is a place of public accommodation--per N.Y. Exec. Law § 292(9)--and is authorized by the Office of Children and Family Services (hereafter referenced "OCFS") "to provide adoption services" [Exhibit 1, 2, and 3]. Albeit Respondent claims to be a "a private, voluntary, nonprofit corporation", Complainant argues the following: given that the organization is "authorized" by OCFS to provide adoption services, said organization is liable for 18 CRR-NY 421.3(d). This statute, 18 CRR-NY 421.3(d), prohibits "authorized agencies providing adoption services" from discrimination and harassment against applicants for adoption services on the basis of...sexual orientation [and]...marital status". The Respondent is, by Respondent's own admission [Exhibit 1 and 2], an "authorized" agency and thus, subject to OCFS--*public*--laws and regulations including 18 CRR-NY 421.3(d).

Given that the Respondent is subjected to OCFS regulations and statutes--including 18 CRR-NY 421.3(d)--the Respondent is subjected to a NYS Division of Human Rights (hereafter referenced "NYS DHR") investigation as it provides services to the public, i.e., adoption services. Incidentally, given the services the Respondent provides to the public, the Respondent is responsible for compliance with N.Y. Exec. Law § 296(1-a)(c). Said statute states "[t]o discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of ...sexual orientation [and]..marital status" is prohibited and unlawful. Notwithstanding, even if the Respondent was found to be a "religious" and/or "private institution", as denoted N.Y. Exec. Law § 292(9), this may give Respondent license to "apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities", but said license is only to a point. The point ends at the following: "[the organization's] selective criteria do not constitute discriminatory practices under this article or any other provision of law". Thus, the question of the Respondent's religious and/or private status need not matter as it is subjected to both 18 CRR-NY 421.3(d) and N.Y. Exec. Law § 296(1-a)(c); both, of which: prohibit discrimination based on *sexual orientation* and *marital status*.

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[1] Littlejohn v. City of New York, 795 F.3d 297, 307 (2d Cir. 2015).

Consequently, the Respondent cannot be shielded with a claim of religious exemption and/or private agency exemption.

Respondent admits to discriminating in its application process and admissions process when the Respondent states: "New Hope works with adoptive families built around a married husband and wife" [Exhibit 1]. Respondent also acknowledges that Respondent is cognizant of the law when Respondent states: " Others may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area" [Exhibit 1]. When Respondent states the Respondent "works with adoptive families" that are "married", Respondent clearly suggests unmarried couples are not eligible to join Respondent's program. Thus, evidence of *marital status* discrminiation. When the Respondent points out a "married husband and wife", Respondent is suggesting homosexual marriages--and thus, homosexuals--are not accepted either; therefore, evidence of *sexual orientation* discrimination. Coupled with the Respondent's final statement--RE: "[o]thers may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area"--Respondent demonstrates Complainant's fourth need for a prima facie case of discrimination: "minimal evidence suggesting an inference that the [agency] acted with discriminatory motivation". Complainant makes said argument as Respondent was cognizant of the Respondent's language (*marital status discrimination* and *sexual orientation* discrimination) by suggested "[o]thers may be eligible to adopt under New York law", but that said "[o]thers" will not be "eligible to adopt" with Respondent. This proves Respondent's "motivation" to discriminate against specific protected classes of individuals and failure of the Respondent to provide "equal advantages, facilities, and privileges".

Lastly, to support a prima facie case of discrimination, Complainant must prove some "adverse...action" and that Complainant was "qualified for [certification]". Respondent provides evidence of the former; RE: "New Hope can provide contact information about other adoption services in the area". By stating this, Respondent rejects any application and/or equal services to certain protected classes. Said rejection of services is an "adverse...action". Complainant *proves* complainant was "qualified for [certification]" by two mechanisms: (1) Complainant was approved for foster care/adoption by three other agencies [Exhibits 4, 5, and 6]; and (2) the same statues governing the adoption application processes for the Respondent--based on 18 CRR-NY 421.15 [Exhibit 7]--are the application processes that governed the other three aforementioned agencies for which the Complainant was accepted. Coupled, these two aforesaid arguments *prove* the Complainant was eligible to receive Respondent's services; i.e., adoption services.

Signature (Declaration or Oath)

Based on the information contained in this form, I charge the herein named respondent(s) with an unlawful discriminatory practice, in violation of the New York State Human Rights Law.

I have not filed any other civil action, nor do I have an action pending before any administrative agency, under any state or local law, based upon this same unlawful discriminatory practice. (If you have another action pending and still wish to file, please contact our office to discuss.)
PLEASE INITIAL MM

Human Rights Law § 297.1 requires that a complaint filed with the Division of Human Rights must be "under oath or by declaration." **You must complete either the "declaration" or "oath" sections below.** The declaration requires only your signature and does not need to be notarized. The oath requires that you sign it before a notary.

DECLARATION

I affirm this 20 day of Aug (month), 2021 (year) at Groton (city), NY (state), under penalties of perjury, that I am the complainant herein; that I have read (or had read to me) the foregoing complaint and know the content thereof; that the same is true of my own knowledge except as to the matters therein stated on information and belief; and that as to those matters, I believe the same to be true.

[Complainant name]

OATH

STATE OF NEW YORK)
COUNTY OF Tompkins) SS:

Michael McWilliams, being duly sworn, deposes and says: that I am the complainant herein; that I have read (or had read to me) the foregoing complaint and knows the content thereof; that the same is true of my own knowledge except as to the matters therein stated on information and belief; and that as to those matters, I believes the same to be true.

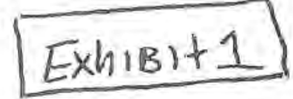
Complainant signature

Subscribed and sworn to
before me this 23rd day
of August , 2021

Colleen R Armstrong
Signature of Notary Public

COLLEEN R. ARMSTRONG
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01AR6027666
QUALIFIED IN TOMPKINS COUNTY
MY COMMISSION EXPIRES 7-12-2025

Please note: Once this form is completed and returned to the New York State Division of Human Rights, it becomes a legal document and an official complaint with the Division.



Michael McWilliams <mpmcwilliams314@gmail.com>

Adoption Services

Kathy Jerman <kjerman@newhopefamilyservices.com> Fri, Aug 20, 2021 at 4:21 PM
To: Michael McWilliams <mpmcwilliams314@gmail.com>

Hi Michael,

Thank you for inquiring about our adoption program. New Hope is a Christian ministry that serves birth mothers, infants, and adoptive parents through the adoption process. New Hope Family Services, Inc., is a private, voluntary, nonprofit corporation that is authorized by the New York State Department of Social Services to provide adoption services. We work with birth moms and adoptive families throughout New York State, with the exception of those who reside in the five boroughs of NYC and Long Island. We have been bringing families together through adoption since 1965.

Because of New Hope's convictions as a Christian adoption service, New Hope works with adoptive families built around a married husband and wife. Others may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area.

New Hope facilitates domestic infant adoptions up to age two. Generally, we work with expectant moms and do adoptions while the child is still an infant. We average about 8 adoptions per year. Our adoptive parent process is as follows:

1. Attend an orientation meeting where you will learn more about New Hope and the adoption process.
2. Fill out our adoption application and submit all other necessary paperwork, such as background checks.
3. Complete a Home Study. Our Home study process lasts for about 3-4 months and is a series of trainings and interviews. We only conduct home studies for 6-7 families at one time.
4. Once you have been approved as an adoptive family, you will create a profile. This is what expectant moms will look at as they decide which family to pick for their child.

In general, our process to become approved can take about 6 months. However, the time spent waiting for a child varies. It could be a few days or a few years.

In terms of fees, it is about $22,000-23,000 total to adopt through New Hope. This is paid out slowly throughout the application process. We also require $4,000 to be deposited in an escrow account at time of approval for legal fees. If this is not completely used for the fees incurred, the remainder will be returned to you.

Another thing to consider is to do a private adoption. The attorney we work with does private adoptions as well. These are cheaper, about $10,000-$15,000. The difference is that you would be working only with the attorney and not going through New Hope. Additionally, it also means that you may have to do some of the "leg work" yourself to find a child to adopt. For people going this route, we suggest letting your family and friends know you are looking to adopt, as they may have a connection to an expectant mom considering adoption. If you would like to learn more about this option, you can call our attorney Kevin Harrigan or his assistant Sherry Kline at 315-478-3138.

Please let me know if you have any further questions.

Warmest Regards,

Kathy Jerman

Executive Director

3519 James Street

Syracuse, NY 13206

315-437-8300 Ext. 113

www.newhopefamilyservices.com

From: Michael McWilliams <mpmcwilliams314@gmail.com>
Sent: Thursday, August 19, 2021 3:30 PM
To: Kathy Jerman <kjerman@newhopefamilyservices.com>
Subject: Adoption Services

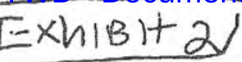
To Whom It May Concern:

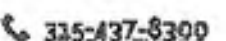
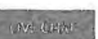
I'm extremely interested in your adoption program!

May you tell me a bit about it?

Best,

Michael



3519 James Street, Syracuse, NY 13208  

HOME PREGNANCY ABORTION ADOPTION SERVICES RESOURCES CONTACT

Adoptive Parents

Services for Adoptive Parents

If you are considering starting the adoption process, we would love to be a part of your adoption journey and help place a child into your loving home. We offer a personal approach in our adoption process and are here for you each step of the way. We would love for you to contact us by email or phone to receive more information!

New Hope Family Services is a New York State certified adoption agency. We work with birth moms and adoptive families throughout New York State, with the exception of those who reside in the five boroughs of NYC and Long Island. We have been bringing families together through adoption since 1965. We would be honored to be a part of your adoption story.

Your Next Steps >>

Contact us to learn more about the adoption process and how to get started. We are happy to provide a free consultation and talk about your next steps.

Get in Touch

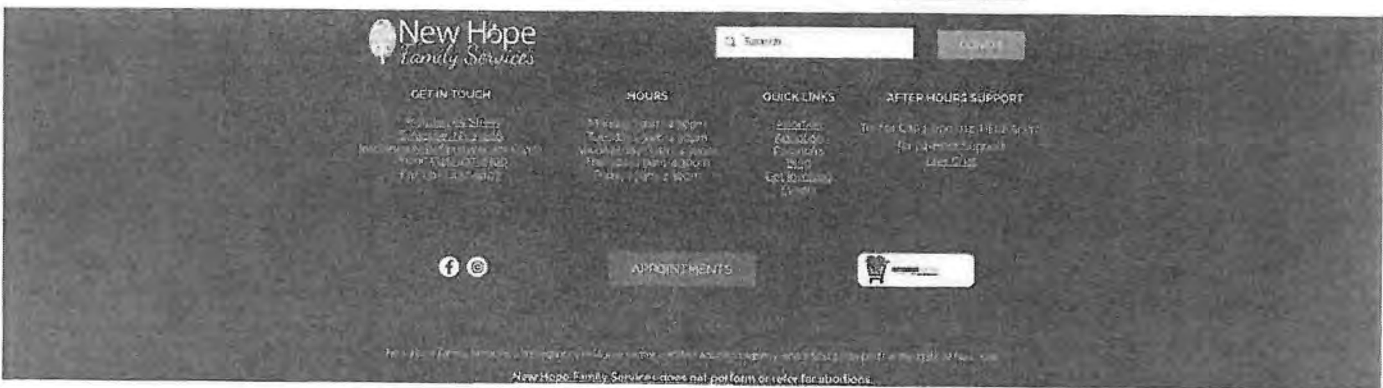


EXHIBIT 3

August 21, 2021 | 2:00 pm
Tropical Storm Henri

Gov. Cuomo declared a State of Emergency as Tropical Storm Henri impacts areas of the State. Monitor your local forecast and take precautions.

DETAILS >

Services News Government COVID-19 Vaccine

Q Search

Office of Children and Family Services

Child Care Child Welfare Prevention Juvenile Justice Youth Development Commission for the Blind Adult Services

Adoption Services

Adoption Home
Adoption Gallery
Adoption Photolisting and Heart Gallery New York
Video Gallery
Before Adopting
Post Adoption
Provide Adoption Services
More Information

Contact Information

NYS Adoption Services
52 Washington Street
Room 332 North
Rensselaer NY 12144
1-800-345-5437
adopt.me@ocfs.ny.gov

Translate this page

home › adoption › agencies › voluntary

Authorized Voluntary Adoption Agencies

This is a comprehensive list of all in state and out of state authorized voluntary adoption agencies with an approved adoption program. Agencies previously listed on the out of state adoption agency list are noted on this list as Article 13 agencies.

Abbott House

100 North Broadway
Irvington, NY 10533

Contact: Jacqueline Joseph, Adoption Supervisor
Phone: 914-591-3200, ext. 3400
Email: jjoseph@abbotthouse.net
Website: abbotthouse.net

Adoption Choices, Inc.

Doing Business in New York As: Adoption Choices of New York
Article 13 - Colorado

1 Marcus Boulevard, Suite 200
Albany, NY 12205

Contact: Laurie Coreno Reynolds, LMHC, MA, Social Services Director
Phone: 518-478-8420
Fax: 518-935-9988
Email: lauriecorenoreynolds@gmail.com

Contact: Kathleen Copps DiPaola, Esq.
Phone: 518-436-4170
Email: kdipaola@thecdslawfirm.com

Website: adoptionchoicesofnewyork.org

Adoption S.T.A.R., Inc.

131 John Muir Drive
Amherst, NY 14228

Contact: Michele Fried, Founder and CEO
Phone: 716-639-3900
Fax: 716-639-3700

Website: www.adoptionstar.com

Adoption Services, Inc.

Doing Business in New York As: Adoption Services International
Article 13 – Pennsylvania

7 Orchard Street
Nyack, NY 10960

28 Central Boulevard
Camp Hill, PA 17011

Contact: Vincent F. Berger, Ph.D., ABPP, ABFP, Executive Director
Phone: 800-943-0400

Website: adoptionservices.org

Adoptions From The Heart, Inc.

Article 13 – Pennsylvania

661 Decker Road
Wallkill, NY 12589

30-31 Hampstead Circle
Wynnewood, PA 19096

Contact: Maxine Chalker, Executive Director
Phone: 610-432-2384
Email: Adoption@afth.org

Website: afth.org

Association of Black Social Workers Child Adoption Counseling and Referral Services, Inc.

1969 Madison Avenue
New York, NY 10035

Contact: Leora Neal, Director
Phone: 212-831-5181
Fax: 212-831-5350
Email: abswnyc@aol.com

Baker Hall

Doing Business As: **OLV Human Services**

780 Ridge Road
Lackawanna, NY 14218

Contact: Virginia Goodremote, Director of Foster Care
Phone: 716-828-9777

Contact: Hafi Lavner, Director OCFS Residential and Foster Care Programs
Phone: 716-826-9497
Fax: 716-828-7845

Website: www.olvhumanservices.org

Berkshire Farm Center & Services for Youth

427 New Karner Road, 1st Floor
Albany, NY 12205

Contact: Alicia Kreiner, Vice President of Foster Care
Phone: 518-925-6926
Fax: 518-456-8686
Email: [illegible]@berkshirefarm.org

Website:
www.berkshirefarm.org

Bethany Christian Services of New Jersey

Article 13 · Michigan

410 Troy Schenectady Road, Suite 202
Latham, NY 12110

Phone: 518-782-7800
Website: bethany.org/albany

321 East Ave.
Rochester, NY 14604

Phone: 585-288-6760
Website: bethany.org/rochester

Contact: Yesenia Fermin, Executive Director of New York, New Jersey & Connecticut
Phone: 201-703-4371

901 Eastern Avenue NE
Grand Rapids, MI 49501

Website: bethany.org

* *Intercountry Adoption Accredited*

Buffalo Urban League, Inc.

15 Genesee Street
Buffalo, NY 14203

Contact: Brenda McDuffie, President/CEO
Phone: 716-250-2400

Website: buffalourbanleague.org

Foster Care & Adoption Programs

15 Pine Street
Buffalo, NY 14204

Contact: Tafadzwa I. Chiera, Coordinator
Phone: 716-882-8852
Fax: 716-854-2171

Cardinal McCloskey School and Home for Children

115 East Stevens Avenue, Suite LL5
Valhalla, NY 10595

529 Courtlandt Avenue, 3rd Floor
Bronx, NY 10451

Contact: Elizabeth Rende-Bakshi, Director of Foster Care Programs
Phone: 718-993-7700 ext. 831
Email: [illegible]

Website: [illegible]

Catholic Charities of the Diocese of Albany

Doing Business As: **Community Maternity Services**

27 North Main Avenue
Albany, NY 12203

Contact: Peg Elled, LCSW-R, Associate Executive Director for Community Based Services
Phone: 518-482-8836
Email: [illegible]

Website: [illegible]

Catholic Charities of the Diocese of Rochester

Doing Business As: **Catholic Family Center**

87 North Clinton Avenue
Rochester, NY 14604

Contact: Jennifer [illegible], LCSW, Director of Children and Family Services
Phone: 585-546-7220 ext. 4650
Email: [illegible]

Website: [illegible]

* *Intercountry Adoption Accredited*

Catholic Guardian Services

1011 First Avenue, 10th Floor
New York, NY 10022

Contact: Cynthia Blake, Director of Family Foster Care Support Services
Phone: 718-228-1510, ext. 102
Email: CBlake@catholicguardian.org

Website: catholicguardian.org

Cayuga Home for Children

Doing Business As: Cayuga Centers

1916 Park Avenue, Suite 100
New York, NY 10037

Contact: Troy Brathwaite, Chief Operations Officer, New York City Programs
Phone: 646-760-9100, ext. 1978
Email: troy.brathwaite@cayugacenters.org

Website: cayugacenters.org

Child & Family Services of Erie County

824½ Delaware Avenue
Buffalo, NY 14209-2008

Contact: Stacy Wilson, Program Manager for Foster Care & Adoption
Phone: 716-335-7215
Email: SWilson@cfsbny.org

Website: cfsbny.org

Children At Heart Adoption Services, Inc.

44 North Main Street
Mechanicville, NY 12118

Contact: Janice Bergeron, Director
Phone: 518-664-5988
910-431-3372
Fax: 910-763-4415
Email: cahadoptions@aol.com

Website: childrenatheart.com

Children Awaiting Parents, Inc.

Doing Business As: Donald J. Corbett Adoption Agency

274 North Goodman Street
Rochester, NY 14607

Contact: Lauri McKnight, Executive Director
Phone: 585-232-5110, ext. 234
Fax: 585-232-2634
Cell: 585-978-4268
Email: info@capbook.org

Website: childrenawaitingparents.org

Children's Home of Wyoming Conference

1182 Chenango Street
Binghamton, NY 13901

Contact: Aliscia Gaucher, Director of Homefinding & Adoption
Phone: 607-772-6904, ext. 2285
Email: agaucher@chowc.org

Website: chowc.org

Coalition for Hispanic Family Services

315 Wyckoff Avenue, 4th Floor
Brooklyn, NY 11237

Contact: Denise Rosario, Executive Director
Phone: 718-497-6090
Fax: 718-497-9495

Website: hispanicfamilyservicesny.org

Downey Side, Inc.

Grace Episcopal Church
33 Church Street
White Plains, NY 10601

Contact: Kimberly Frink, Communication Manager
Phone: 212-714-2200
Fax: 914-931-0585
Email: kfrink@downeyside.org

Website: downeyside.org

Family & Children's Agency, Inc.

Article 13 - Connecticut

600 Mamaroneck Avenue, Suite 400-20
Harrison, NY 10528

Phone: 914-834-5806

9 Mott Avenue
Norwalk, CT 06850

Contact: Mary Kate Locke, LCSW, Director of Child & Family Development
Phone: 203-855-8765
Email: adoption@fcagency.org

Website: www.familyandchildrensagency.org

** Intercountry Adoption Accredited*

Family Connections, Inc.

156 Port Watson Street
PO Box 5555
Cortland, NY 13045

Contact: Daniel Stevens, Executive Director

Phone 607-756-6574
Email [illegible]
Website [illegible]

Intercountry Adoption Accredited

Family Focus Adoption Services

54-40 Little Neck Parkway, Suite #5
Little Neck NY 11362

Contact Jack Brennan, Executive Director
Phone 718-224-1919

Website [illegible]

Inter-country Adoption Accredited

Family Services of Westchester, Inc.

Adoption & Children's Services Division
78 Main Street
Hastings-on-Hudson NY 10706

Contact Mia Diamond Padwa Director
Phone 914 274-8334 ext 232
Email [illegible]

Website [illegible]

Forestdale, Inc.

67-35 112th Street
Forest Hills, NY 11375

Contact Alexandra Dorkeani, Permanency Supervisor
Phone 718 263-0740 ext. 290

Website forestdaleinc.org

Forever Families Through Adoption, Inc.

62 Bowman Avenue
Rye Brook, NY 10573

Contact Joy S. Goldstein, LCSW ACSW Executive Director
Phone 914-939-1180
Email [illegible]

Website [illegible]

Intercountry Adoption Accredited

Friends in Adoption, Inc.

Article 13 - Vermont

125 High Rock Avenue
Saratoga Springs NY 12866

Contact Tara Salsa Executive Director
Email [illegible]
Phone 800-844-3630

212 Main Street
Poultney VT 05764

Email [illegible]

Website [illegible]

Gateway-Longview, Inc.

10 Symphony Circle
Buffalo NY 14201

Contact Michelle Federowicz Cope Vice President of Foster Care & Residential Services
Phone 716 783-3187
Email [illegible]

Contact Matthew Meazie Director of Foster Care & Permanency Services
Phone 716-783-3202
Email [illegible]

Website [illegible]

Good Shepherd Services

7 West Burnside Avenue
Bronx, NY 10453

Contact Karen Callender, Division Director
Phone 718-561-4340
Email [illegible]

Corporate Office

305 7th Avenue 9th Floor
New York, NY 10001

Contact Sr Paulette LoMonaco, Executive Director
Phone 212-243-7070
Email [illegible]

Website goodshepherds.org

Graham Windham

1946 Webster Avenue
Bronx NY 10457

Contact Fridesvinda Sanchez Supervisor
Phone 718-294-1715 ext. 4303
Email [illegible]

Contact Richie Nixon Director
Phone 718-294-1715 ext. 4333
Email [illegible]

Website: graham-windham.org

Heart to Heart Adoptions, Inc.

Article 13 – Utah

40 Beaver Street
Albany, NY 12207

9660 South 700
East Sandy, UT 84070

Contact: Donna Pope, Executive Director
Phone: 801-563-1000
Email: donnap@hearttoheartadopt.com

Website: hearttoheartadopt.com

Heartshare Human Services of New York / St. Vincent's Services

66 Boerum Place
Brooklyn, NY 11201-4306

Contact: John Olufemi, Permanency Unit Supervisor
Phone: 718-522-3700

Website: www.hsvsnyc.org

Hillside Children's Center

215 Wyoming Street
Syracuse, NY 13204

1 Mustard Street
Rochester, NY 14609

Contact: Barbara Borick, Permanency Specialist
Phone: 585-355-9113
Fax: 315-703-8750

Website: hillside.com

Holt International Children's Services, Inc.

Article 13 – Oregon

108 W. 39th Street, Suite 805
New York, NY 10018

Contact: Sama Alghali, Branch Director
Phone: 212-645-1451
609-882-4972
Email: samaa@holtinternational.org

250 Country Club Road
Eugene, OR 97401

Email: info@holtinternational.org
Website: holtinternational.org

* *Intercountry Adoption Accredited*

Hopscotch Adoptions, Inc.

c/o Michael Gerabedian, Esq.
Egan & Golden, LLP
96 South Ocean Avenue
Patchogue, NY 11772

Contact: Robin Sizemore, Executive Director
Phone: 336-899-0068
336-899-0062
Fax: 888-837-3824

Website: hopscotchadoptions.org

* *Intercountry Adoption Accredited*

Hudson Valley Adoption Services, Inc.

PO Box 280
Woodstock, NY 12498

Contact: Laurie Slavin, Executive Director
Phone: 305-775-8340
Email: info@hudsonvalleyadoptionservices.org

Website: hudsonvalleyadoptionservices.org

Jewish Child Care Association of New York

555 Bergen Avenue, 4th Floor
Bronx, NY 10455

Contact: Antoinette Bryce, Program Director for Adoption
Phone: 718-742-8503
Email: brycea@jccany.org

Website: jccany.org

Jewish Family and Children's Service of Greater Philadelphia

Article 13 - Pennsylvania

1190 6th Avenue, 8th Floor
New York, NY 11036

Contacts: Stefani Moon, Program Manager
Meredith Rose, Director
Phone: 888-OPENARMS
888-673-6276
Email: info@openarmsadoption.net

Website: openarmsadoption.net

Little Flower Children and Family Services of New York

630 Flushing Avenue, 3rd Floor
Brooklyn, NY 11206

Contact: Patricia Lott-Alston, Adoption Analyst
Phone: 718-526-9150

Website: [illegible]

Lutheran Social Services of Metropolitan New York, Inc.

75 West 125th Street, 3rd Floor
New York, NY 10027

Contact: Antonnette Taylor, Executive Director for Children's Services
Phone: 646-790-0500

Website: lssny.org

MercyFirst

241 37th Street, Suite 6A, Unit 10
Brooklyn, NY 11232-2417

Contact: Rebecca Marcone, Vice President
Phone: 718-232-1500 ext. 7210
Email: [illegible]@mercyfirst.org

Website: mercyfirst.org

New Alternatives for Children, Inc.

37 West 26th Street
New York, NY 10010

Contact: Christine Carroll, Permanency Facilitator
Phone: 212-696-1550 ext. 470
Email: ccarroll@NACKidsCan.org

Website: nackidscan.org

New Beginnings Family and Children's Services, Inc.

87 Mineola Boulevard
Mineola, NY 11501

Contact: Timothy Sutfin, Executive Director
Phone: 516-747-2207
Email: [illegible]

Website: new-beginnings.org

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New Directions Youth and Family Services, Inc.

4511 Harlem Road
Amherst, NY 14226

Contact: Lynn Siradas, Director of Foster Care & Organizational and Staff Development
Phone: 716-529-1142
Email: lsiradas@nydfs.org

Website: FosteringGood.org

New Hope Family Services, Inc.

3519 James Street
Syracuse, NY 13206

Contact: Kathy Jerman, Executive Director
Phone: 315-437-8300
800-272-3171
Email: [illegible]@newhopefamilyservices.com

Website: newhopefamilyservices.com

OHEL Children's Home & Family Services, Inc.

1268 East 14th Street
Brooklyn, NY 11230

Contact: Shelley Berger, Program Director
Phone: 718-351-6200

Website: ohelfamily.org

Parsons Child and Family Center

60 Academy Road
Albany, NY 12208

Contact: Damarise Alexander-Mann, Director of Foster Care and Adoption Programs
Phone: 518-426-2620

Website: [illegible]

Rising Ground, Inc.

151 Lawrence Street, 5th floor
Brooklyn, NY 11201

Contact: Tamara Chalvire, Director of Home Finding
Phone: 212-437-3557
Email: [illegible]@risingground.org

Contact: Moji Obadeyi, Adoption Expeditor
Phone: 212-437-3541
Email: [illegible]@risingground.org

Contact: Gerald Brumskine, Adoption Expeditor
Phone: 212-437-3506
Email: [illegible]@risingground.org

Website: risingground.org

Saint Dominic's Family Services

853 Longwood Avenue, Suite 202
Bronx, NY 10454

Contact: Tameka Williams, Vice President of Family Foster Care
Phone: 917-645-9100, ext. 8103
Email: twilliams@sdfs.org

Website: www.sdfs.org

SCO Family of Services

1 Alexander Place
Glen Cove, NY 11542

Contact: Michele Aguirre Jones, Director of AIMS (Agency Information Management System)
Phone: 516-671-1253, ext. 1814
Email: majones@sco.org

Website: sco.org

Seamen's Society for Children & Families

50 Bay Street
Staten Island, NY 10301

Contact: Denisa Suloilan, Adoption Specialist
Phone: 718-447-7740, ext. 3054
Email: DSuloilan@seamenssociety.org

Contact: Dan Barckhaus, Vice President, Foster Care and Adoption Services
Phone: 718-447-7740, ext. 3053
Email: DBarckhaus@seamenssociety.org

Website: seamenssociety.org

Sheltering Arms Children and Family Services, Inc.

25 Broadway, 18th Floor
New York, NY 10004

Contact: Theresa R. Maddicks, Adoption Supervisor
Phone: 718-401-5145

Email: info@shelteringarmsny.org
Website: shelteringarmsny.org

Spence-Chapin, Services to Families and Children

410 East 92nd Street, 3rd Floor
New York, NY 10128

Contact: Yekaterina Trambitskaya, Chief Executive Officer
Phone: 212-369-0300

Website: spence-chapin.org

Intercountry Adoption Accredited

The Adoption Alliance

Article 13 – Texas

2530 Oak Street
Bellmore, NY 11710

7303 Blanco Road
San Antonio, TX 78216

Contact: Justin Johnson, Executive Director
Phone: 210-349-3991
Website: adoption-alliance.com

The Alliance for Children, Inc.

Article 13 - Massachusetts

58 West 58th Street, Suite 7B
New York, NY 10019

Contact: Ruth A. Rich, Executive Director
Phone: 212-751-4095
781-444-7148
Fax: 781-444-7879
Email: information@allforchildren.org

Website: allforchildrenadoption.org

Intercountry Adoption Accredited

The Children's Aid Society

1522 Southern Boulevard
Bronx, NY 10460

Contact: Maritza Batista, LMSW, Administrative Supervisor for Adoption & Kinship Guardianship
Phone: 718-764-7406, ext. 5206
Email: Maritzab@childrensaidnyc.org

Website: childrensaidsociety.org

The Children's Village

2130 Adam Clayton Powell Jr. Boulevard
New York, NY 10027

Contact: Daniela Pogue, Director of Adoption and Foster Care
Phone: 212-932-9009, ext. 7224
Email: dpogue@childrensvillage.org

Website: childrensvillage.org

The Gladney Center for Adoption

Article 13 – Texas

430 East 92nd Street, 3rd floor
New York, NY 10128

Contact: Wendy Stanley
Phone: 347-387-0889
Fax: 212-868-4566
Email: wendy.stanley@gladney.org

6300 John Ryan Drive
Fort Worth, TX 76132

Contact: Ashley Whiteside, Manager of Domestic Adoption
Phone: 817 922 5957
Email: ashley.whiteside@gladney.org

Website: adoptionsbygladney.com

Intercountry Adoption Accredited

The Lutheran Service Society of New York

6680 Main Street
P.O. Box 1962
Williamsville, NY 14221

Contact: Susan Lichtenthal, Executive Director
Phone: 716-631-9212
Email: info@lssofny.org

Website: lssofny.org

The New York Foundling

590 Avenue of the Americas
New York, NY 10011

Contact: Liyan Bao, VP Specialized Services and Permanency Support
Phone: 212-886-4082
Cell: 917-783-6154
Email: Liyan.Bao@NYfoundling.org

Website: nyfoundling.org

Wide Horizons For Children, Inc.

Article 13 - Massachusetts

71 West Main Street
Oyster Bay, NY 11771

Contact: Charlene Tordi, Senior Social Worker
Phone: 516-922-0751
Fax: 516-922-6944
Email: ctordi@whfc.org

375 Totten Pond Road, Suite 100
Waltham, MA 02451

Contact: Maryanne Ludwig, Director of Family Services
Phone: 781-894-5330
Fax: 781-899-2769
Email: mludwig@whfc.org

Website: whfc.org

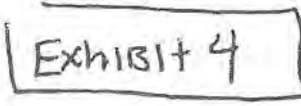
**Intercountry Adoption Accredited*

You Gotta Believe! The Older Child Adoption & Permanency Movement, Inc.

3114 Mermaid Avenue
Brooklyn, NY 11224

Contact: Jennifer Pinder, Executive Director
Phone: 718-372-3003

Website: yougottabelieve.org



Michael Colon <mpcolon@buffalo.edu>

Hey!

Katarina Dercole <kdercole@chjc.org>
To: Michael Colon <mpcolon@buffalo.edu>

Fri, Aug 28, 2020 at 11:16 AM

Excellent. No, you do not. I will bring the official document for you to sign at our next homevisit.

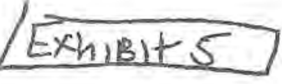
You are now officially open! Congratulations, and we look forward to placing with you in the near future!

[Quoted text hidden]

[Quoted text hidden]

PO Box 6550
Watertown, NY 13601
Ph. (315) 777-9620
Fax (315) 785-5637
kdercole@chjc.org

[Quoted text hidden]



Michael Colon <mpcolon@buffalo.edu>

Fwd: YAYYY
1 message

Michael McWilliams <mmcwilliams@hcsk12.org> Sat, May 16, 2020 at 6:57 AM
To: mpcolon@buffalo.edu

---------- Forwarded message ---------
From: **Chelsea Martin** <chelseam@hgs-utica.com>
Date: Mon, Mar 16, 2020 at 11:43 AM
Subject: YAYYY
To: Michael McWilliams <mmcwilliams@hcsk12.org>

You are officially opened!!!! CONGRATULATIONS!!!!!!

Chelsea Martin
Assistant Director of Foster Care
315-782-8064 x 4032

ChangingChildrensLives.com

The House of the Good Shepherd and HIPAA prohibit the disclosure of confidential health-related data to unauthorized individuals. Please notify helpticket@hgs-utica.com immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system.

Exhibit 6

156 Port Watson Street
P.O. Box 5555
Cortland, NY 13045

607-756-6574
800-535-5556
Fax 607-756-0373

E-Mail:
info@adoptfamilyconnections.org
Web Site:
www.adoptfamilyconnections.org

"Where Families Are Born"

ADOPTION HOME STUDY INVESTIGATION & REPORT

For Michael McWilliams
Regarding the adoption of
One child or a sibling pair of children, preferably male unless in a sibling group, between the ages of eight (8) and seventeen (17) as defined in the adoption plan from the United States.

DATE OF HOME STUDY APPROVAL: 09/02/2020

ADOPTIVE PARENTS IDENTIFYING INFORMATION

Name: Michael Paul McWilliams
Alias: Michael Paul Colon
Date of Birth: [redacted], 1987
Social Security #: [redacted]
Employer: Groton Central School District
Position: Secondary Science Teacher
Date of Marriage: N/A
Address: 939B Emjay Way, Carthage, New York, 13619
Phone Number(s): (914) [redacted]
Email(s): mpmcwilliams314@gmail.com

OTHER MEMBERS OF THE HOUSEHOLD:

None.

ASSESSMENT OF ADOPTIVE FAMILY BY SOCIAL WORKER

Date & Location of Face-to-Face Visits, Significant Emails and Phone Conversations	Topics Discussed	Person(s) Present
Agency Office on August 23, 2020	Orientation to Adoption	Michael McWilliams
August 19, 2020 Face-to Face virtual visit via Google Meet (HIPAA Compliant)	Individual interview social history, marriage history, motivation for adoption, adoption plan, duty of candor & disclosure.	Michael McWilliams
At Family home on August 27, 2020	Home Safety Inspection, preparation for adoption, duty of candor and disclosure	Michael McWilliams

Home Study Agency: Family Connections
156 Port Watson St.
P.O. Box 5555
Cortland, NY 13045-5555
(607) 756-6574

INTRODUCTION

Michael McWilliams wishes to adopt one child or a sibling pair of children, preferably male unless in a sibling group, between the ages of eight (8) and seventeen (17) as defined in the adoption plan from the United States. Michael requested Family Connections Inc., a New York State authorized child-placing agency, to conduct a home study to facilitate the adoption.

SOCIAL HISTORY – ADOPTIVE FATHER

Michael Paul McWilliams is a 33-year-old Caucasian man. He was born on [redacted], 1987 to Cristina Ann Colon in the Bronx in New York City, New York (verified by birth certificate). Michael is 5 feet, 3 inches tall and weighs 200 pounds. He has brown hair and hazel eyes. He is of Irish heritage. He speaks English.

Michael's mother, Cristina, is unmarried and works in the real estate business. She is fifty years old and reportedly in fine health. Michael reports that his relationship with his mother has been complex in its history. Michael explained that his mother got pregnant when she was sixteen so life as a young single mother was complicated. Growing up Michael was told that his mother did not know who is father was. Michael's mother eventually (married) Derek O'Farrell. During his mother's relationship, when Michael was younger, Derek had substance addictions that caused him to be abusive to Michael. Derek was verbally and physically abusive. At age fifteen, Michael left his mother's home to go and live with his grandmother in the Bronx. Michael has reconciled with his mother and step-father. He has built a stronger relationship with both of them. Michael describes his mother as being "funny, laid back, responsible, a hard worker, a strong feminist, liberal, and very Catholic." Michael reports that he speaks with his mother a couple of times each week and they see each other once or twice a month. Michael described his step-father as "living in the moment, laid back, and care free." Michael's step-dad is a building superintendent in Bronxville, New York. Michael's father is not identified on his birth certificate however Michael was able to locate his birth father when he was thirty-three through Ancestry and 23 and Me. When he reconnected with his birth father, Michael learned that his birth father knew of the birth and made it clear he wanted nothing to do with Michael. They do not have a relationship at this time. Michael's mother and step-father are aware of Michael's adoption plan and support him in his efforts.

Michael has a half-sister, Devin. Devin is 21 years old, is not married and has no children. She currently lives in the New York City area. Michael is not very close with his sister as they are nine years apart. They see each other a couple of times each year.

Michael describes his childhood as being "tumultuous, difficult and challenging." As described above Michael left home at age fifteen and went to live with his grandmother. From the age of

fifteen until he graduated high school he commuted to New Rochelle High School by train alone to attend school. He was often assaulted on his commute in the Bronx. He reflects on his past and believes that it taught him resiliency and pushed him to strive to accomplish more with his life. He had fond memories of his childhood being with his grandmother, spending time with cousins, cooking, and spending time outside. He has fond memories of vacations in the Poconos, Pennsylvania and going camping. Michael has always been an avid learner. He went to Hebrew School despite being a Catholic. As a kid he could often be found reading and educating himself on topics that interested him. Growing up his grandmother instilled the values of "working hard, helping the community, self-responsibility, humility, and helping others helps yourself." When Michael was younger his grandmother would use guilt as a way to discipline if needed. Michael reports that he did not get in trouble often. He mostly got in trouble for how he spoke with his mother.

Michael graduated from New Rochelle High School in 2006. He earned his bachelors in Biology in 2009 from Long Island University. He continued his higher education at Georgetown, earning a Masters in Biochemistry in 2010, and an Master/PHD in Biology from State University of New York at Buffalo in 2015. He was studying for his Doctorate in Medicine at Dartmouth and was in residency.

Michael was a Research Associate from 2009 until 2015. He then left research to work in education by becoming a teacher to children with behavioral needs in secondary education at a private Catholic School. He also worked for two years as a professor in biology.

Michael currently works in the Groton Central School District as a Secondary Science Teacher. He has worked there for one year.

Michael enjoys reading, being in nature, going to Maine, traveling, learning new things, history, politics, and is trying to write a book. Michael does not have a professional organization. He is involved with Harrisville community organizations and is involved in the Catholic church. Michael presents as an educated, well spoken, and well-adjusted man who is looking to provide a home a for a child(ren) who has had difficult circumstances in their past. References describe him as "passionate about older kids in the foster care system", he "makes decisions more holistically", and "determined."

SOCIAL HISTORY of ADULT HOUSEHOLD MEMBERS: None

MARRIAGE

Michael McWilliams has never been married. He is currently single. He has had a number of relationships in his past but various circumstances forced the couples apart. Michael is not opposed to finding a spouse but is choosing to focus on adoption at this point.

PARENTING BELIEFS & EXPERIENCE WITH CHILDREN

Michael McWilliams is not currently parenting but is looking forward to this adoption with great anticipation.

Michael has had a number of experiences interacting with children. He has worked with children with behavior problems at a program called Ocean Tides in Rhode Island, he has been a college professor for two years and is currently teaching secondary biology at Groton High School. He has been involved with a number of teenagers who were finishing high school. Michael helped these men graduate from high school, enter college, and even start a career by helping an 18-year-old foster care child start a business. Michael is an approved foster home in New York State.

Michael is looking forward to nurturing a child and supporting their development. Michael believes that parenting should be dynamic and should also be fluid in response. Michael believes that communication is important as well as appropriate boundaries. He believes that a parent should grow with a child and that healing comes from relational parenting. Michael believes that discipline should be age appropriate and child specific. He does not believe in physical punishment and will not use physical punishment. He believes that communication is very important in discipline. Michael hopes to raise a child(ren) to value humility, empathy for others, working hard, and that "perfection doesn't exist."

Michael has a large support network of family and friends who he can rely on. His grandmother is a strong support as well as his mother and step-father. Michael also views the professionals he has gathered in his adoption plan are also supports in his journey. He plans to rely on professionals and those in his support network for guidance in areas where he does not have experience.

Michael is preparing himself to support his child(ren) through the myriad of life-long adoption issues including attachment, loss of birth parents, cultural identity formation, and self-concept development. He understands the importance of openness, listening and empathy. As stated Michael has put a lot of time and effort into preparing himself for this process. He has read many books and scholarly articles about trauma, trauma informed parenting, and the needs of children in the foster care system. Michael has experience with children from the foster care system who have educational delays, emotional regulation problems, and complex or unknown trauma. He is ready, willing and able to adopt a child with those special needs.

MOTIVATION TO ADOPT

Michael has a passion for helping children who are aging out of the foster care system. He has made helping these children a passion and mission. He is an advocate for foster care children and continually advocates for more men to be involved in impacting young men in the system. Michael is able to reflect on his past and sees many correlations between his experiences and what others have experienced and feels like he can relate to kids in foster care. Michael is aware of the impact his grandmother had to reshaping his path.

Michael has the capacity to accept and parent children not born to him. He has great respect for birth parents and expresses gratitude for the birth parent(s)' choice of adoption. He also understands the reasons children come into care of the government social service agency. He has an understanding of the dynamics of separation and loss and the effects of these experiences on children. He has an understanding of the life-long journey of adoption and has appropriate expectations for an adopted child.

ADOPTION PLAN

Michael McWilliams would like to adopt one child or a sibling pair of children, preferably male unless in a sibling group, between the ages of eight (8) and seventeen (17) as from the United States who is as healthy as possible with a history of abuse and neglect, developmental delays, institutional delays, prenatal exposure to drugs and alcohol, low birth weight and premature birth, emotional delays, emotional dysregulation, and other effects of trauma.

Michael McWilliams is open to embracing their child(ren)'s individuality and ethnic background and are prepared to support their child(ren)'s racial identity development. Michael McWilliams understands the importance of respecting the child's ethnic background and maintaining the child's native heritage and culture. If his child(ren) have a different ethnic background than himself, he plans to keep his child(ren) connected to their racial background by participating in local cultural events, socializing with persons from the child(ren)'s ethnic group, and networking with other families who have adopted children of the same ethnic background. Michael is committed to growing as a family with any child that is placed in his home to include creating a multi-cultural family not just a multi-cultural adoption. Michael is open to openness in his adoption plan if connection to siblings or other family is beneficial for his child(ren).

He has an understanding of the dynamics of separation and loss and the effects of these experiences on children. He has an understanding for the life-long journey of adoption and has appropriate expectations for an adopted child.

FAMILY LEAVE AND CHILD CARE PLAN

Depending on timing, Michael has different plans for family leave. If a child is placed in the summer, Michael has the summer off from school. If a child is placed during the school year, he has thirteen paid days off as well as paid family leave if needed. Michael hopes to help a child adjust by getting into a daily routine as quickly as possible which includes getting the child into the local school program.

ADOPTION TRAINING

Michael is preparing himself to support his child(ren) through the myriad of life-long adoption issues including attachment, loss of birth parents, cultural identity formation, and self-concept development. He understands the importance of openness, listening, and empathy. During the initial inquiry and throughout the home visit, this case worker discussed transitioning a child into his home, the need to locate and research support services, counseling services, and recommending that he have a pediatrician who is adoption competent. It was also recommended that he begin building resources and supportive systems who can support the child and parent through a myriad of different ways. This agency will be a support to the family throughout the adoption process and beyond. New York State has a vigorous program to deal with post-adoption issues as the children grow. This case worker recommended the book *The Connected Child* by Karen Purvis and referred them to the agency's online resource page and blog. Family Connections has provided the family access to training and education regarding a multitude of topics related to the adoption process.

Michael has completed twelve hours of pre-adoptive training as required by Family Connections Inc. The training was presented by Creating a Family, certificates of completion are on file with this agency. The training covered the following topics:

- Should You Consider Adopting a Child of a Different Race or Ethnicity for 1 hour, completed on 08/27/2020
- Raising a Child with ADHD to a Successful and Healthy Adulthood for 1 hour, completed on 08/27/2020
- Becoming a Foster Parent: What You Really Need to Know 1 hour, completed on 08/272020
- Adoption Tax Credit for 1 hour, completed on 08/27/2020
- Helping Adopted Children Heal From Past Trauma and Loss for 1 hour, completed on 08/27/2020
- Transitioning From Foster Care to Adoption for 1 hour, completed on 08/27/2020
- Introduction to Foster Care for 1 hour, completed on 08/27/2020
- Trauma-Informed Parenting: Practical Applications of TBRI for 1 hour, completed on 08/27/2020
- Introduction to Prenatal Exposure for Those Considering Adoption for 1 hour, completed on 08/27/2020
- Talking With Kids About Adoption at Different Ages for 1 hour, completed on 08/27/2020
- Surviving the Home Study for 1 hour completed on 08/27/2020
- Open Adoption: Handling Difficult Birth Parent Situation for 1 hour, completed on 08/27/2020
- Adopting a Teen or Tween: Things to Consider for 1 hour, completed 08/28/2020

UNDERSTANDING OF DOMESTIC ADOPTION

Family Connections informs its families interested in domestic adoption about the risks and unknowns in domestic adoption. Information is provided through discussion, referral to adoption literature, networking with community support groups, and information on adoption websites. Through this information Michael McWilliams is aware of the placement risks inherent in domestic adoption.

Michael understands that with any domestic adoptive placement there is inherent and unknown health and social risks associated with the placement of the child. The child's birth parents' medical and social history and the child's prenatal history may be incomplete, inaccurate, or unavailable. The child may arrive with or develop medical, physical, emotional, and/or developmental problems. Family Connections, Inc. has advised him to consult with a pediatrician who is familiar with adoption issues regarding the physical, mental and social history of the child prior to agreeing to the placement of a child. Michael understands these potential risks and is accepting of the risks.

GUARDIANSHIP

In the event that Michael McWilliams is unable to care for their child, Cristina Colon and Derek O'Farrell have agreed to become the guardians for the child. Cristina Colon and Derek O'Farrell are Michael's mother and step-father. Cristina is in real estate and Derek is a building superintendent. They are reportedly healthy and both are 50 years old. They have one child together, Devin who is 21 and doesn't live in the home. They currently live in Bronxville, New York, are financially stable and their annual income is [redacted]. Combined with the financial resources of Michael's estate Cristina and Derek have the financial capacity to care for additional children. Cristina and Derek will be in the lives of any children placed in Michaels care as grandparents.

HOME

Michael McWilliams is currently renting his home. His apartment is a duplex structure that has 4 bedrooms and two bathrooms. The home has approximately 1400 square feet. The first floor has a living room, entry way, utility/laundry room, bathroom, dining room, kitchen and one bedroom. Michael has been living in the home since June of 2020. Upstairs has three large bedrooms. Two of the bedrooms are currently empty and will be furnished accordingly when a placement is made. There is also a smaller office space upstairs. The office room is not large enough to be considered a bedroom. There is also a full bathroom upstairs. Both potential children's rooms are 64 to 100 square feet approximately and have ample space for a twin bed, desk, dresser as needed. There are windows to let in plenty of light. There are no firearms in the home and no other household dangers. The back door of the apartment opens into a common grass area where children could play. There are smoke detectors and carbon monoxide detectors on each floor. The home is well maintained both inside and outside and provides a safe environment for a child(ren).

The housing development is comprised of many young families. The community is diverse and many of the residents are affiliated with the local army base, Fort Drum. It is a quiet neighborhood where neighbors look out for each other and hold each other accountable for safe driving practices. Outside of the small housing development the community is less diverse in Carthage. There are plenty of parks and recreational activities in the area. The local hospital is a two-minute drive with more advanced hospitals fifteen minutes and 1.5 hours from the home. There are many educational activities in the area such as science centers, cultural enrichment such as rural museums.

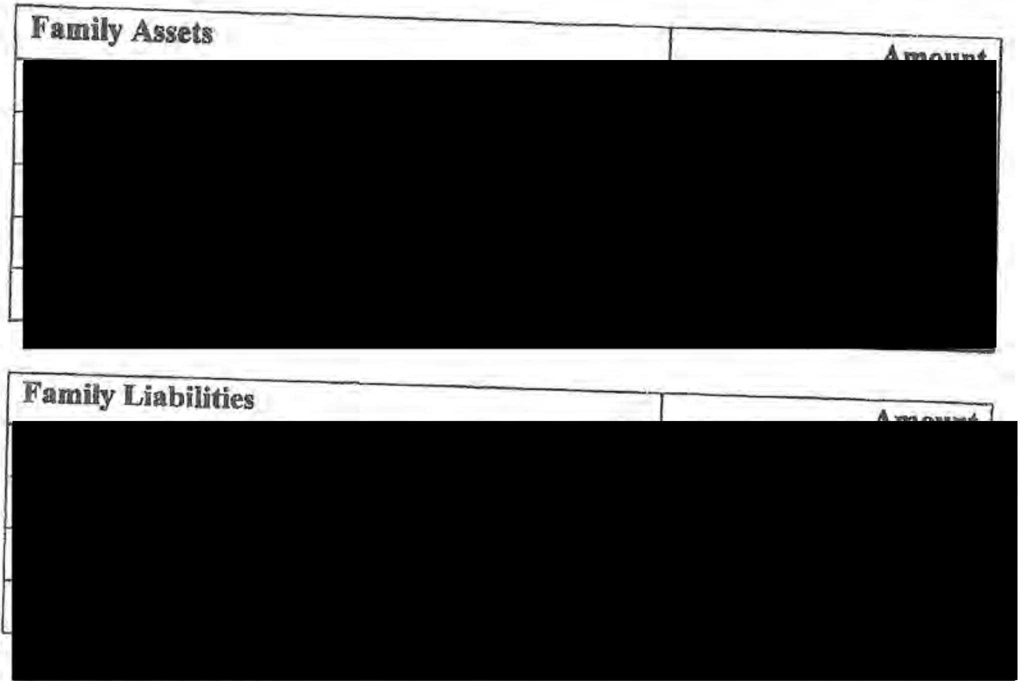
FINANCES

Michael McWilliams has the financial capacity to parent additional child(ren). Michael has an adjusted gross annual income of [redacted] (verified by 2019 1040 tax return). Michael reports that he has an annual gross salary of $[redacted]0 plus he receives [redacted] in income from his rental property. The family's income covers monthly liabilities and there are sufficient finances to cover the addition of a child(ren) to the family. Michael McWilliams' monthly net income is [redacted] and has monthly liabilities of [redacted] leaving [redacted] remaining in uncommitted funds.

The family's net worth (assets minus liabilities) is [redacted] He has assets totaling [redacted] and liabilities totaling [redacted] as detailed below:

Family Assets | **Amount**

Family Liabilities | **Amount**



In addition, Michael has health insurance coverage through Excellus and dental care coverage through DEHA. He will be able to add their adopted child(ren) to his policies upon placement.

Michael's assets and liabilities were verified by this agency through the following sources:

Student Loan Statements
Kelley Blue Book
Employment letters
Mortgage Statement
Vehicle Loan Statement
Stock/Bond Statement
Bank Statement
Tax Return
Rental Lease Agreement on home in Buffalo

RELIGION

Michael McWilliams is Roman Catholic in his faith. He intends to expose any child placed in his home in any faith they take interest in allowing the child to practice accordingly.

HEALTH

ASSESSMENT OF CAPABILITIES (8 CFR 204.3(e)(2)(i))

Based on the assessment of this home study preparer and the analysis of the submitted home study investigation documentation, it is Family Connections, Inc.'s opinion that Michael has the physical, mental, and emotional capability to assume the responsibilities of parenting and properly care for an adopted child(ren). Family Connections, Inc. did not require Michael to have further physical, mental or emotional evaluations.

CHILD ABUSE CLEARANCE

Family Connections, Inc. obtains child abuse and maltreatment history reviews for all prospective adoptive parents and all adult members of their household from each State in which the prospective adoptive parents and adult household members have resided since their eighteenth birthday. Michael McWilliams has only resided in New York, Wisconsin, Rhode Island, Virginia, Vermont, and Maryland. Michael reportedly has not resided in any other state. This agency has reviewed the child abuse and maltreatment history reviews for Michael McWilliams.

Name	State/Country	Clearance Date	Results
Michael McWilliams	New York	August 4, 2020	No Record
Michael McWilliams	Wisconsin	August 5, 2020	No Record
Michael McWilliams	Rhode Island	August 6, 2020	No Record
Michael McWilliams	Virginia	August 6, 2020	No Record
Michael McWilliams	Vermont	August 6, 2020	No Record
Michael McWilliams	Maryland	June 29, 2020	No Record

CLEARANCE THROUGH THE VULNERABLE PERSONS' CENTRAL REGISTER

Family Connections, Inc. is required to screen each prospective adoptive parent and all adult household members through the New York Justice Center's Vulnerable Persons' Central Register in accordance with the provisions of Section 424-a and 495 of the Social Services Law and the Protection of People with Special Needs Act. This Register lists all individuals who have been or are currently found responsible for serious or repeated acts of abuse and neglect against an individual with special needs. The Agency received correspondence from the New York State Justice Center dated July 31, 2020 that stated the results of the screening resulted in "No Match" for Michael McWilliams

CRIMINAL CLEARANCE/HISTORY OF ABUSE AND VIOLENCE

Michael McWilliams under penalty of perjury was asked and responded "NO" to the following questions:

- if he had ever been arrested or convicted for any incidence of sexual abuse, child abuse/neglect/molestation, domestic violence, alcohol abuse, drug abuse, assaultive behavior, pilfering or any other criminal record or activity whether in the United States or abroad.
- If he had any history of an arrest in the United States or abroad, even if such an arrest did not result in a conviction or was sealed, pardoned or expunged
- If he had any history as an offender of any physical, sexual, emotional, child, alcohol or substance abuse, or domestic violence even if such history did not result in an arrest or conviction
- If he has ever transferred or received permanent custody of a child outside of the state/local authorities or outside of the state/local process

In addition, Michael McWilliams signed, with notarization dated July 28, 2020, under penalty of perjury, a sworn statement of criminal history that stated "I, Michael Paul McWilliams, to the best of my knowledge, have never been arrested, charged, or convicted of a crime in New York State or any other jurisdiction".

Pursuant to section 378-A (2) of the Social Services Law, Family Connections, Inc., requested a state and national criminal history check from the Office of Children & Family Services (OCFS) for Michael McWilliams. The New York State Department of Criminal Justice Services (DCJS) retains the fingerprint record until the adoption is finalized. The OCFS is notified by DCJS if there are any subsequent arrests and a summary of such information in the event of any such occurrences is provided to Family Connections. In letters dated August 6, 2020 for Michael McWilliams, the OCFS reported on the findings of the New York State Division of Criminal Justice Services (DCJS) and the Federal Bureau of Investigations (FBI). The letters stated that Michael McWilliams has no state criminal record, and that there is no information that would cause our agency to disapprove Michael based on criminal record.

HOME STUDY HISTORY

Michael McWilliams was asked and responded "No" to the following questions

- if he had ever been rejected as a prospective adoptive parent for a domestic or international adoption due to an unfavorable home study or for any other reason
- If he has ever began a home study process in relation to an adoption or to any form of foster or other custodial care of a child that was not completed, and/or was terminated prior to completion,

Michael McWilliams was asked and responded "Yes" to the following questions

- If he has ever had a previous adoptive home study completed. Michael McWilliams has been approved as a foster parent with two separate agencies, Children's Home of Jefferson

County and House of Good Shepherd. Both agencies approved Michael and his home. Michael approached Family Connections for an additional private agency home study to facilitate his adoption plan of an out of state foster care adoption.

POST ADOPTION

Michael McWilliams understands that post-placement reports will be required in all domestic placement. He understands the importance of the post-adoption placement supervision and support. He has agreed to cooperate with Family Connections Inc., and the court (if applicable) to complete post-adoption placement visits and reports. Family Connections agrees to conduct the post-adoption placement visits and reports.

REFERENCES

Five references for Michael McWilliams were provided to this agency by friends and coworkers who have known Michael for a number of years. All reference providers were highly supportive of Michael's application to adopt a child(ren) from the United States.

References all commented on his work ethic, his morals, and his commitment. One reference stated that "Kids has been one of his most important aspects of his life" also stating "He also continues to show committed love and compassion towards kids in his immediate family". One reference explained that Michael was a "profound influence on me" explaining how Michael encouraged him as an older teenager to pursue college and "ways to go about getting my dreams." The same reference explained that Michael became a mentor and listened to him when he felt like others did not. This reference conveyed his sincere gratitude for the dedication that Michael provided. Other references commented on Michaels zest for learning and planning. The same reference identified Michael as an advocate for children. All references gave support for Michael as an adoptive parent.

DOCUMENTS REVIEWED FOR THIS HOME STUDY

Verification of Income
Adoptive Parent Questionnaires
Birth Certificates
Child Abuse Clearances GA
Criminal Clearances
References
Autobiographies
Child Abuse Clearances
Tax Return
Information Form
Medical Forms

CONCLUSION AND RECOMMENDATION

Michael McWilliams is a well-spoken, articulate, and educated man who is passionate about his interest. He presented as compassionate, understanding and cooperative. Michael is hoping to adopt one child or a sibling pair of children, preferably male unless in a sibling group, between the ages of eight (8) and seventeen (17) as defined in the adoption plan, from the United States. Michael McWilliams is ready and prepared to adopt a child(ren) as described and has committed himself to being a present and understanding parent that incorporates trauma informed parenting and relational parenting. Michael understands that children who have experienced trauma view

and process the world differently thus they need to be parented differently. Michael is committed to any and everything that he does and strives to do things well yet understands that children need room to grow and also space to try their best. Michael does not expect perfection but only expects an effort. Michael is open to embracing a child of a different race or ethnicity than his own as part of his nature for education and growth for himself personally.

Michael McWilliams meets all the requirements as a prospective adoptive parent set forth by the State of New York. As an authorized New York State child placing agency, Family Connections, Inc. recommends and approves Michael McWilliams to adopt one child or a sibling pair of children, preferably male unless in a sibling group, between the ages of eight (8) and seventeen (17) from the United States who is as healthy as possible with a history of abuse and neglect, developmental delays, institutional delays, prenatal exposure to drugs and alcohol, low birth weight and premature birth, emotional delays, emotional dysregulation, and other effects of trauma. This agency has provided all necessary pre-adoption counseling and is available to provide required post-placement supervision and supportive counseling as needed.

VERIFICATIONS

I declare, under penalty of perjury under United States law, that:

Family Connections Inc. is a duly authorized adoption agency with the authority to complete home studies, and is authorized through the New York State Office of Children and Family Services.

I declare that the factual statements in the home study are true and correct to the best of my knowledge, information, and belief.

I declare that with the professional diligence reasonably necessary to protect the best interests of any child(ren) whom the applicant might adopt, conducted the home study, including personal interview(s), home visits, and all other aspects of the investigation needed to prepare the home study.

I declare that I have informed the adoptive applicants and any adult members of the household of their duty to disclose all information, and the consequences should they fail to disclose any information for questions asked. Further, this worker has advised the applicants of their duty of candor and ongoing duty of disclosure."

The home study preparer has informed the applicants that they may file a complaint about how the home study investigation was conducted with the New York State Office of Children and Family Services, Special Hearings Bureau, 52 Washington Street, Rensselaer, New York 12144, 1-800-345-5437.

Respectfully Submitted,

Daniel Stevens, LMSW
NY Social Worker License 102082-01
Executive Director

September 2, 2020
Date

Sworn before me this 2nd day of September 2020.

Notary Public

ANITA F. STEVENS
Notary Public, State of New York
No. 4964957
Qualified in Cortland County
Commission Expires April 16, 2022

The University of the State of New York
Education Department
Office of the Professions
REGISTRATION CERTIFICATE
Do not accept a copy of this certificate

License Number: 102082-01 Certificate Number: 1045667

STEVENS DANIEL FLETCHER
192 WEST DRYDEN RD
FREEVILLE NY 13068-0000

is registered to practice in New York State through 02/28/2023 as a(n)
LICENSED MASTER SOCIAL WORKER

LICENSEE/REGISTRANT

INTERIM COMMISSIONER OF EDUCATION

EXECUTIVE SECRETARY

DEPUTY COMMISSIONER
FOR THE PROFESSIONS

This document is valid only if it has not expired, name and address are correct, it has not been tampered with and is an original - not a copy. To verify that this registration certificate is valid or for more information please visit www.op.nysed.gov.

Office of Children and Family Services

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Commissioner

September 10, 2019

Family Connections, Inc.
156 Port Watson Street
PO Box 5555
Cortland, NY 13045
Attention: Anita F. Stevens, Executive Director

Re: Family Connections, Inc. as authorized adoption agency.

This letter is to confirm that Family Connections, Inc. is an authorized adoption agency in the State of New York. The State of New York does not issue "licenses" to corporations engaged in adoptions. A corporation obtains the authority to act as an adoption agency by filing with the New York State Department of State, upon the approval of the New York State Office of Children and Family Services (OCFS), a certificate of incorporation or amendment to the certificate of incorporation or application for authority to do business in New York containing the appropriate corporate powers and authority. Family Connections, Inc. is authorized to place out children in New York for adoption.

According to records in the files of OCFS, Family Connections, Inc. filed a certificate of amendment to its Certificate of Incorporation on August 6, 2019 with the New York State Department of State that gave the agency the authority to place out children and operate an adoption agency in New York for a period terminating on July 1, 2022.

You may provide this letter or copies thereof to demonstrate the current authority of the agency to place out children for adoption in New York.

Please call me at (518) 474-3333 if you have any questions.

Very truly yours,

Debra Staley
Senior Attorney
Bureau of Child Welfare Services

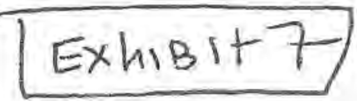
Sworn to before me this 10 day of September, 2019.

Notary Public

Sonia L. Meyer
Notary Public, State of New York
No. 02KR605476
Qualified in Columbia County
Commission Expires
February 12, 20 22

cc: Alicia Korona-Wilson

THOMSON REUTERS
WESTLAW New York Codes, Rules and Regulations



18 CRR-NY 421.15
NY-CRR
OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 18. DEPARTMENT OF SOCIAL SERVICES
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES
SUBCHAPTER C. SOCIAL SERVICES
ARTICLE 2. FAMILY AND CHILDREN'S SERVICES
PART 421. STANDARDS OF PRACTICE FOR ADOPTION SERVICES

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421.15 Adoption study process.

Authorized agencies operating an adoption program shall:

(a) Conduct an adoption study process in groups, individually, or in any combination thereof. Such adoption study shall include at least one visit to the applicant's home.

(b) In at least one session in any study process containing two or more group sessions, include the participation of parents who have adopted a child.

(c) Inform applicants at the first appointment or meeting that the following will be required prior to the conclusion of the adoption study:

(1) report from a physician about the health of each member of the household;

(2) references from at least three persons, only one of which may be related to the applicant(s) who can attest to the character, habits, reputation and personal qualifications of the applicant(s) and their suitability for caring for a child;

(3) if married, proof of marriage;

(4) if married and living separate and apart from their spouse:

(i) proof that the separation is based upon a legally recognizable separation agreement or decree of separation; or

(ii) an affidavit executed by the prospective adoptive parent attesting that he or she has been or will be living separate and apart from his or her spouse for a period of three years or more prior to the commencement of the adoption proceeding;

(5) if previously married, proof of dissolution of marriage by death or divorce;

(6) evidence of employment and salary, such as W-2 form or pay stub for each employed applicant;

(7)

(i) a response to an agency inquiry to the Statewide Central Register of Child Abuse and Maltreatment indicating whether the applicant(s) and/or any other person over the age of 18 who resides in the home of the applicant(s) are the subject(s) of an indicated child abuse or maltreatment report and, if the applicant(s) or any other person over the age of 18 who resides in the home of the applicant(s) resided in another state at any time during the five years preceding the application for approval as adoptive parent(s) made in accordance with this Part, the response from the child abuse and maltreatment registry of the applicable child welfare agency in each such state of previous residence; and

(ii) a response to an agency inquiry to the Justice Center for the Protection of People with Special Needs whether the applicant(s) and/or any other person over the age of 18 who resides in the home of the applicant(s) are listed on the register of substantiated category one cases of abuse or neglect maintained by the Justice Center for the Protection of People with Special Needs.

(8) a response from the Office of Children and Family Services to the Federal and State criminal history record checks of the applicant and any other person over the age of 18 currently residing in the home of such applicant in accordance with section 421.27 of this Part. If a prospective adoptive parent is approved or if the approval of an approved adoptive parent is not revoked, notwithstanding that the agency is notified by the Office of Children and Family Services that the prospective or approved adoptive parent or any other person over the age of 18 who is currently residing in the home of the prospective or approved adoptive parent has a criminal history record of a discretionary disqualifying crime, a record of the reasons why the prospective or

approved adoptive parent was determined to be appropriate and acceptable to be approved as an adoptive parent provided, however, the agency may not grant or continue approval where the prospective or approved adoptive parent has been convicted of a mandatory disqualifying crime or where an authorized agency, as defined in section 371(10)(a) or (c) of the Social Services Law, has been directed by the Office of Children and Family Services to deny such application or to hold such application in abeyance because of the results of the Federal Bureau of Investigation criminal history record check conducted in accordance with section 421.27 of this Part; and

(9) a sworn statement from each applicant, indicating whether to the best of such applicant's knowledge, such applicant or any person over the age of 18 currently residing in the home has ever been convicted of a crime in New York State or any other jurisdiction. If an applicant discloses in the sworn statement furnished in accordance with this paragraph that he/she or any other person over the age of 18 currently residing in the home has been convicted of a crime, the agency must determine, in accordance with guidelines developed and disseminated by the Office of Children and Family Services to the extent consistent with section 421.27 of this Part, whether to approve the applicant to be an adoptive parent. If the agency determines it will approve the applicant, the agency must maintain a written record, as part of the application file or home study, of the reason(s) why the applicant was determined to be appropriate and acceptable to receive an adoptive placement.

(d) Determine compliance with all of the criteria set forth in section 421.16 of this Part, explore each applicant's ability to be an adoptive parent, and discuss the following topics:

(1) characteristics and needs of children available for adoption;

(2) the principles and requirements for adopting a child who is a member of a sibling group in accordance with sections 421.2(e) and 421.18(b) of this Part;

(3) principles related to the development of children;

(4) reasons a person seeks to become an adoptive parent;

(5) the understanding of the adoptive parent role;

(6) the person's concerns and questions about adoption;

(7) the person's psychological readiness to assume responsibility for a child;

(8) the attitudes that each person in the applicant's home has about adoption and their concept of an adopted child's role in the family;

(9) the awareness of the impact that adoptive responsibilities have upon family life, relationships and current life style;

(10) a person's self-assessment of his/her capacity to provide a child with a stable and meaningful relationship; and

(11) the role of the agency in supervising and supporting the adoptive placement.

(e) When an adoption study has been completed and an authorized agency intends to approve an applicant, it shall:

(1) prepare a written summary of the study findings and activities, including significant characteristics of their family members, the family interaction, the family's relationship to other persons and the community, the family's child rearing practices and experiences, and any other material needed to describe the family for adoption purposes, to be submitted to workers in the agency or other agencies responsible for making placement decisions about children;

(2) arrange for the applicant(s) to review this written summary with the exception of any comments by references which have sought confidentiality;

(3) encourage the applicant(s) to express their views on the substance of any significant aspect of the written summary;

(4) give applicant(s) the opportunity to enter their reaction as an addendum to the written summary;

(5) arrange for the applicant(s) and the caseworker to sign the summary after it has been reviewed and any addendum has been attached; and

(6) provide a dated written notice of approval to applicant.

(f) Discontinue a study process and by mutual consent:

(1) the applicant's record shall reflect the discussion leading to such mutual agreement to discontinue; and

(2) the applicant shall be informed in writing of the discontinuation of the adoption study.

(g) Reject an applicant:

(1) during a study if his lack of cooperation does not permit the study to be carried out; or

(2) if it is determined after a thorough adoption study based on casework principles that he is:

(i) physically incapable of caring for an adopted child;

(ii) emotionally incapable of caring for an adopted child; or

(iii) that his approval would not be in the best interests of children awaiting adoptions.

(3) A decision to reject an applicant shall be made by at least two staff members in conference, one of whom shall be at a supervisory level.

(4) The record shall reflect the names of the participants in the decision and the reason for the decision.

(5) The agency must inform the applicant in writing that he has not been accepted, stating its reason(s) for rejection. If the rejection is based in whole or in part on the existence of an indicated report of child abuse or maltreatment, that fact and the reasons therefor must be included in the notice.

(6) The notification shall offer the applicant the opportunity to discuss this decision in person with the worker's supervisor.

(7) The notification must inform the applicant that he may apply for a hearing before the department pursuant to section 372-e of the Social Services Law regarding the rejection of the application and must state the procedure to be used for this purpose.

(8) If the reason for the rejection is based in whole or in part on the existence of an indicated report of child abuse or maltreatment, the agency must comply with the provisions of section 421.16(o) of this Part pertaining to notice of right to a hearing pursuant to section 424-a of the Social Services Law.

(h) Conclude an adoption study process in either discontinuation, rejection, or approval within four months of initiation:

(1) except where illness or geographic absence of the applicant makes him/her unavailable for a substantial part of said four-month period. In such a case, the record shall clearly show such unavailability and what efforts were made to contact the applicant; or

(2) provided, however, where an adoption study has been interrupted by unavailability of agency staff, the period of four months may be extended, but to not more than six months, if the applicant agrees to such extension in writing. If the applicant agrees to delay in order to avoid caseworker change, the record must show when this agreement was obtained. If the applicant does not accept such delay, the study must be concluded within the four months through the utilization of substitute staff or purchase of service.

(i) At the conclusion of the adoption study process, the registering agency shall update the adoptive parent registry required by section 424.3(a) of this Title, either by noting that an applicant has had the study approved or, in the case of a study resulting in either discontinuation or rejection, removing the applicant from the registry.

18 CRR-NY 421.15
Current through September 30, 2020

END OF DOCUMENT

October 18, 2021

Julia B. Day, Regional Director
NYS Division of Human Rights
333 E. Washington Street, Room 543
Syracuse, New York 13202

Dear Ms. Day,

Respondents New Hope Family Services, Inc., and Kathy Jerman, in her official capacity as Executive Director (collectively, "New Hope"), submit their response to Complainant's verified complaint. New Hope denies that the Division of Human Rights has jurisdiction over it. Without waiving its jurisdictional and other defenses, New Hope submits this response solely to prevent the Division from seeking to unlawfully enforce the penalties of imprisonment and fines threatened in its August 23, 2021 letter to New Hope. The Respondent Information Sheet is attached as Exhibit 1.

Complainant charges New Hope "with an unlawful discriminatory practice relating to public accommodation in violation of Article 15 of the Executive Law of the State of New York (Human Rights Law) because of marital status [and] sexual orientation." V. Compl. at 1. The Division should stay any investigation and dismiss the verified complaint for three reasons. *First*, two federal courts have already condemned—and an in-force injunction currently prohibits—the State's efforts to force New Hope to change its faith-based choice to work with adoptive families built around a mother and father committed to each other in marriage. *Second*, New Hope is not a public accommodation. *Third*, Complainant lacks standing because he was not denied any service or benefit.

FACTUAL BACKGROUND

New Hope is a religious not-for-profit corporation duly incorporated under the laws of New York. For more than 56 years, New Hope has worked with birthmothers and adoptive parents to place more than 1,000 children into permanent homes. New Hope's Christian faith and religious beliefs motivate and permeate all of its activities.

New Hope believes that God created marriage to consist of the union of one man and one woman for life, that a family built around this type of marriage is designed by God as the ideal and healthiest family structure for the upbringing of

children, and that placement with a family consisting of a mother and father committed to each other for life in marriage is therefore in the best interests of each child that is entrusted to New Hope for placement.

As a result of this priority and its beliefs, New Hope does not devote its private resources to placing children with unmarried couples or same-sex couples. At the same time, New Hope does not "reject" unmarried or same-sex applicants, as a formal rejection could complicate those applicants' ability to later obtain approval through any agency. Instead, New Hope respectfully informs them that, because of its beliefs as a Christian ministry, New Hope cannot be the agency to serve them, and New Hope is willing to provide referrals to numerous other agencies that can.

In order to scrupulously ensure its autonomy to operate in accordance with its religious beliefs, New Hope accepts no government funding. Its operations are entirely funded by private contributions and by fees paid by couples with which New Hope works to perform home studies and complete adoptions. New Hope does not provide adoption services to the general public. Rather, it does so only for a modest number of couples each year—a group that results from selection by both New Hope and the couples themselves. On New Hope's side, that selection occurs during a lengthy screening process that includes background checks, medical exams, and an intensive and deeply personal home study process.

In 2018, the New York Office of Child and Family Services ("OCFS") demanded that New Hope begin working with unmarried and same-sex couples or else lose its authorization to act as an adoption agency under 18 CRR-NY § 421.3(d). On December 6, 2018, New Hope filed suit in federal court contending that the State's demand violated New Hope's rights of Free Speech and Free Exercise of Religion. On July 21, 2020, the U.S. Court of Appeals for the Second Circuit held that the State's demand likely violated New Hope's constitutional rights. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020), attached as Exhibit 2.

On October 5, 2020, guided by the Second Circuit's decision, the District Court for the Northern District of New York held that New Hope was likely to prevail on both its Free Speech and its Free Exercise claims, and preliminarily enjoined OCFS from requiring New Hope to work with unmarried or same-sex couples, or penalizing it for declining to do so by revoking its authorization to act as an adoption agency. *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44 (N.D.N.Y. 2020), attached as Exhibit 3. That injunction remains in force.

On August 19, 2021, Complainant sent an email to New Hope that read "I'm extremely interested in your adoption program! May you tell me a bit about it?"

Compl. Form, Ex. 1 at 2. The next day, on Friday, August 20, New Hope director Kathy Jerman responded with her standard email containing basic information, including the fact that (as permitted and protected by a federal injunction), "Because of New Hope's convictions as a Christian adoption service, New Hope works with adoptive families built around a married husband and wife. Others may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area." Compl. Form, Ex. 1 at 1. Less than one hour later, Complainant replied, mentioning New Hope's regular outside counsel *by name* and asserting that New Hope's practices violate New York law. Complainant's Reply Email Dated Aug. 20, 2021, attached as Exhibit 4.

RESPONSE TO COMPLAINT

I. The Division should stay this investigation pending resolution of a related federal lawsuit with an in-force injunction.

In a pending lawsuit regarding the very same conduct challenged here, two federal courts have already held that the State of New York likely violates New Hope's constitutional rights by forcing it to violate its faith-based conviction that infants should be placed into families built around a mother and father committed to each other in marriage. *See New Hope*, 966 F.3d at 145; *New Hope*, 493 F. Supp. 3d at 63. Indeed, the State is presently *enjoined* from using one of its executive agencies (OCFS) to penalize New Hope's faith-based choice by enforcing Section 421.3(d), a regulation that Complainant repeatedly cites in his complaint. *New Hope*, 493 F. Supp. 3d at 63 (enjoining application of Section 421.3(d) against New Hope); Compl. Form at 5 (alleging that New Hope is subject to—and violates—Section 421.3(d)). These legal protections were only bolstered by the Supreme Court's unanimous decision in *Fulton v. City of Philadelphia*, which held that a nondiscrimination law may violate a religious adoption agency's Free Exercise rights by putting the agency to the choice of curtailing its mission or affirming relationships that violate its religious convictions. 141 S. Ct. 1868, 1876 (2021), attached as Exhibit 5.

Here, Complainant asks the Division to find that New Hope is subject to Section 421.3(d) and that its choice to work with families built around a married husband and wife violates N.Y. Exec. Law § 296, the State's human rights law prohibiting discrimination in public accommodations. But courts have already held that Section 421.3(d) is likely unconstitutional as applied to New Hope, and the conduct that Complainant challenges under Section 296 is the same conduct that federal courts have already found protected by the First Amendment. So at a

minimum, the Division should stay this investigation pending resolution of the related federal lawsuit regarding New Hope's constitutional rights.

Finally, on information and belief, Complainant's purported query to New Hope was not made as part of a good faith effort to obtain adoption services, but rather was made with awareness of the widely publicized pending litigation and preliminary injunctions protecting New Hope's right to conduct adoption services in a manner consistent with its faith, and for the sole purpose of harassing New Hope. Indeed, the face of the complaint reveals that Complainant has already been approved for foster care or adoption by three other agencies. Compl. Form, Exs. 4, 5, 6. And less than one hour after sending his purported inquiry, Complainant was ready with a reply that alleged legal violations and identified New Hope's regular counsel by name. And the very next business day, Complainant was ready to file a detailed complaint with over 30 pages of exhibits.

II. The complaint should be dismissed because New Hope is not a public accommodation.

The possibility of any violation—and the jurisdiction of the Division—depends upon New Hope being a "public accommodation." But the Supreme Court rejected the contention that a similarly situated faith-based adoption agency is a public accommodation. *Fulton*, 141 S. Ct. at 1868, 1881. Like the adoption agency in *Fulton*, New Hope does not offer adoption services to the general public, but only for a modest number of couples selected during a lengthy screening process that includes background checks, medical exams, and an intensive and deeply personal home study process. *See id.* Indeed, the Second Circuit Court of Appeals disparaged as "surprising" and strained any contention that New Hope might be a public accommodation under New York law. *New Hope*, 966 F.3d at 166. Because New Hope is not a public accommodation as a matter of law, the Division should dismiss the complaint.

III. The complaint should be dismissed for lack of standing and ripeness.

The Division should dismiss the complaint for lack of standing and ripeness. Complainant alleges that New Hope violated New York's human rights law, which makes it unlawful for a public accommodation "to refuse, withhold from or deny" services or benefits. N.Y. Exec. Law § 296(2)(a). But as explained above, New Hope is not a public accommodation, and the face of the complaint negates any allegation that Complainant requested adoption services or that New Hope refused, withheld, or denied such services to Complainant. Indeed, Complainant's only request was for New Hope to "tell me a bit about" its adoption program. Compl. Form, Ex. 1 at 2.

And New Hope's response did not deny any request for adoption services, but merely provided the general information that Complainant requested, including an accurate description of New Hope's beliefs and practices as protected by the in-force injunction. *Id.* at 1. Because Complainant did not request—and New Hope did not deny—adoption services, Complainant lacks standing to assert a violation of Section 296 and the complaint is not ripe.

IV. New Hope's responses to each of Complainant's factual allegations

Much of the complaint consists of Complainant's citation and quotation of statutes and regulations, which do not call for any response. In response to the factual and legal allegations stated in the complaint, New Hope states as follows:

- New Hope lacks information sufficient to admit or deny that Complainant is a single homosexual male.

- New Hope denies that it is a public accommodation. As explained above, authority from the Supreme Court and the Second Circuit Court of Appeals confirms that New Hope is *not* a public accommodation.

- New Hope admits that it is authorized by OCFS to provide adoption services. However, New Hope denies Complainant's suggestion that its authorization by OCFS renders New Hope a public accommodation.

- New Hope denies that it is "liable for 18 CRR-NY 421.3(d)." As explained above, after two federal courts held that the State's application of Section 421.3(d) to New Hope likely violates its constitutional rights, a federal court issued an in-force injunction prohibiting the State (through OCFS) from enforcing Section 421.3(d) against New Hope.

- New Hope denies that it is subject to N.Y. Exec. Law § 296 or to a Division of Human Rights investigation because "it provides services to the public, i.e. adoption services." As explained above, New Hope is not a public accommodation as a matter of law.

- New Hope denies that its "religious and/or private status need not matter as it is subjected to both 18 CRR-NY § 421.3(d) and N.Y. Exec. Law § 296." Neither Section 421.3(d) nor N.Y. Exec. Law § 296 can lessen New Hope's constitutional rights or preclude New Hope from relying on its status as a private religious institution to continue speaking and practicing its religious convictions. As explained above, the Supreme Court, the Second

Circuit Court of Appeals, and the U.S. District Court for the Northern District of New York have confirmed that New Hope's constitutional rights preclude application of nondiscrimination laws that infringe their rights. Indeed, an in-force injunction currently prevents the State from applying Section 421.3(d) against New Hope. Further, Section 296 itself contains an express religious exception which would exempt New Hope and its policies from the coverage of Section 296 even if New Hope were a "public accommodation." *See* N.Y. Exec. Law §296(11).

- New Hope denies that it "admits to discriminating in its application process and admissions process" by stating that it works with adoptive families built around a married husband and wife. As explained above, New Hope's constitutional rights protect its right to speak and act in a manner consistent with its convictions, and New Hope does not "reject" single or same-sex applicants, but respectfully offers to refer them to other agencies.

- New Hope denies that it showed discriminatory motivation by stating that, "others [beyond a married husband and wife] may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area." As explained above, New Hope's constitutional rights protect its right to speak and act in a manner consistent with its convictions, and New Hope's offer of referral assistance negates any allegation that it seeks to prevent single or homosexual individuals from pursuing adoption services.

- New Hope denies that Complainant suffered an adverse action or a denial of any request for adoption services. Complainant did not request adoption services, but instead, merely asked New Hope to "tell me a bit about" its adoption program. In response to Complainant's email, New Hope provided the information requested, and its response email did not deny any request for adoption services. Further, as explained above, New Hope does not "reject" single or same-sex applicants, but respectfully offers to refer them to other agencies.

- New Hope lacks information sufficient to admit or deny that Complainant is qualified and eligible to receive adoption services from New Hope or any other agency.

CONCLUSION

For the foregoing reasons, New Hope respectfully requests that the Division dismiss the complaint. In the alternative, and at a minimum, New Hope respectfully requests that the Division stay all proceedings in this matter pending resolution of a related federal lawsuit regarding the same conduct that Complainant challenges here.

Respectfully Submitted,

Mark A. Lippelmann
Counsel for Respondents

Enclosure(s)

Exhibit 1: Respondent Information Sheet
Exhibit 2: *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020)
Exhibit 3: *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44 (N.D.N.Y. 2020)
Exhibit 4: Complainant's Reply Email Dated Aug. 20, 2021
Exhibit 5: *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021)

EXHIBIT 1

Respondent Contact Information

Return to:
NYS Division of Human Rights
Rochester Regional Office
259 Monroe Avenue, Suite 308
Rochester, New York 14607

Re: Michael P. McWilliams v. New Hope Family Services
SDHR NO: 10213155

Correct legal name of Respondent: New Hope Family Services, Inc.; Kathy Jerman, in her official capacity as Executive Director of New Hope Family Services, Inc.

Federal Employer Identification Number (FEIN): 23-7103133

Contact person for this complaint:

Name: Mark A. Lippelmann Title: Attorney for Respondents

Street Address: 15100 N. 90th Street

City/State/Zip: Scottsdale, AZ 85260 Telephone No: (480) 444-0200

E-mail address: mlippelmann@adflegal.org

The Division uses email, whenever possible, to communicate with the parties to complaints. This avoids delays and lost mail, and increases the efficiency of Division case processing. **Therefore, you are required to provide an email address, if you have one**, and to keep us advised of any change of your email address. The Division will not use your email address for any non-case related matters.

Is the firm a publicly traded corporation, privately owned, or a d/b/a? If yes, please indicate:

____ Publicly traded corporation X Privately owned corporation ____ d/b/a

If privately owned or d/b/a, list names and addresses of all individuals who have an ownership interest in the Respondent (attach additional sheets if necessary)

None.

Do you have an attorney for this matter: Yes X No____ If yes:

Attorney Name: Mark A. Lippelmann

Firm: Alliance Defending Freedom

Street Address: 15100 N. 90th Street

City/State/Zip: Scottsdale, AZ 85260 Telephone No: (480) 444-0200

Will you participate in settlement/conciliation? Yes___ No X If yes, for this purpose please contact:

Name: ______________________ Telephone No: (_____)____________

(Settlement discussions will not delay the investigation and participation in settlement does not provide good cause for an extension of time to respond to the complaint.)

[signature]
Signature

October 18, 2021
Date

EXHIBIT 2

966 F.3d 145
United States Court of Appeals, 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.

No. 19-1715-cv
|
August Term 2019
|
Argued: November 13, 2019
|
Decided: July 21, 2020

Synopsis
Background: Christian adoption agency brought action alleging that New York Office of Children and Family Services (OCFS) regulation prohibiting adoption agencies from discriminating on basis of sexual orientation and marital status violated its rights under Free Exercise, Free Speech, and Equal Protection Clauses. The United States District Court for the Northern District of New York, Mae A. D'Agostino, J., 387 F.Supp.3d 194, dismissed complaint, and denied agency's motion for preliminary injunction. Agency appealed.

Holdings: The Court of Appeals, Raggi, Senior Circuit Judge, held that:

agency stated plausible claim under Free Exercise Clause;

agency stated plausible claim under Free Speech Clause;

fact that agency was authorized by state did not transform its speech into government speech; and

agency stated plausible claim for violation of its First Amendment right to expressive association.

Reversed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion for Preliminary Injunction.

West Codenotes

Validity Called into Doubt
N.Y. Comp. Codes R. & Regs. tit. 18, § 421.3(d)

***147** On Appeal from the United States District Court for the Northern District of New York

Attorneys and Law Firms

Roger G. Brooks (Jeana J. Hallock, Alliance Defending Freedom, Scottsdale, Arizona, John J. Bursch, Alliance Defending Freedom, Washington, District of Columbia, Christopher P. Schandevel, Alliance Defending Freedom, Ashburn, Virginia,

Robert E. Genant, Genant Law Office, Mexico, New York, on the brief), Alliance Defending Freedom, Scottsdale, Arizona, for Plaintiff-Appellant.

Laura Etlinger, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, on the brief) for Letitia James, Attorney General of the State of New York, Albany, New York, for Defendant-Appellee.

Lori H. Windham, Nicholas R. Reaves, for Amicus Curiae The Becket Fund for Religious Liberty, Washington, District of Columbia.

Gregory Dolin, University of Baltimore School of Law, Baltimore, Maryland, for Amici Curiae The Jewish Coalition for Religious Liberty, Agudath Israel of America, The Rabbinical Alliance of America, and The Coalition for Jewish Values.

Geoffrey T. Blackwell, American Atheists, Inc., Washington, District of Columbia, Monica L. Miller, American Humanist Association, Washington, District of Columbia, Nicholas J. Little, Center for Inquiry, Washington, District of Columbia, Rebecca Markert, Freedom From Religion Foundation, Madison, Wisconsin, for Amici Curiae American Atheists, Inc., American Humanist Association, Center for Inquiry, and Freedom From Religion Foundation.

Cathren Cohen, Lambda Legal Defense and Education Fund, Inc., Los Angeles, California, Currey Cook, Karen L. Loewy, Lambda Legal Defense and Education Fund, Inc., New York, New York, Richard B. Katskee, Kenneth D. Upton, Jr., Carmen N. Green, Patrick Grubel, Americans United for Separation of Church and State, Washington, District of Columbia, for Amici Curiae Civil Rights Organizations.

Before: Cabranes, Raggi, Circuit Judges, Korman, District Judge. [*]

Opinion

Reena Raggi, Circuit Judge:

***148** An important question of law animates this case: What is the proper relationship between the First Amendment —specifically, its guarantees of free exercise of religion and free speech—and laws protecting against various forms of discrimination? The question has arisen most recently when religious organizations, like Plaintiff here, seek some exemption from laws prohibiting discrimination on the basis of sexual orientation, arguing that such laws compel them to speak and behave contrary to the dictates of their consciences. The answer to this question—whether, in particular circumstances, anti-discrimination laws violate First Amendment rights—may profoundly affect our system of ordered liberty. [1]

But at this early stage in the case, we need not answer that ultimate question. Instead, we need decide only whether Plaintiff has stated a plausible claim for the violation of its First Amendment rights, affirming the district court if we conclude that Plaintiff has not stated a plausible claim, or reversing if we conclude that Plaintiff has.

Plaintiff, New Hope Family Services, Inc. ("New Hope"), is a voluntary, privately funded Christian ministry located in Syracuse, New York. Its avowed mission is to assist women with unplanned pregnancies and to provide temporary foster care and adoptive homes for children whose birth parents cannot care for them. In its more than 50 years of operation, New Hope has placed approximately 1,000 children with adoptive parents. There appears ***149** to be no question that each of these placements has been in the best interests of the adopted child. While New Hope operates under a certificate of incorporation authorizing it to provide adoption services in New York State, it has no contract with any government entity, and it does not receive any public funding.

At issue on this appeal is whether New Hope will be permitted to continue its adoption ministry in New York State. That comes into question because New Hope's ministry is informed by its religious belief in the biblical model of marriage as one man married for life to one woman. New Hope asserts that, consistent with this belief, it cannot recommend adoption by unmarried or same-sex couples because it does not think such placements are in the best interests of a child. Accordingly, it does not itself

work with such couples but, rather, refers them to other adoption agencies. In 2018, officials of the New York State Office of Children and Family Services ("OCFS") informed New Hope that such a policy violates a 2013 state regulation prohibiting discrimination 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 ...." N.Y. Comp. Codes R. & Regs. tit. 18 ("18 NYCRR"), § 421.3(d) (emphases added). OCFS officials told New Hope that it either had to change its policy to conform to the regulation or close its adoption operation.

Unwilling to do either, New Hope initiated this action in the United States District Court for the Northern District of New York (Mae A. D'Agostino, *Judge*). Pursuant to 42 U.S.C. § 1983, New Hope charged OCFS's Acting Commissioner Sheila J. Poole with violating its rights under the Constitution's Free Exercise of Religion, Free Speech, and Equal Protection Clauses, *see* U.S. CONST. amends. I, XIV, and requested declaratory and injunctive relief.[2] On cross-motions by New Hope for a preliminary injunction and by OCFS for dismissal, the district court granted dismissal pursuant to Fed. R. Civ. P. 12(b)(6), concluding that New Hope failed to plead any plausible constitutional claims. Consequently, the court denied New Hope's preliminary injunction motion as moot. *See New Hope Family Servs. Inc. v. Poole*, 387 F. Supp. 3d 194 (N.D.N.Y. 2019). New Hope appeals from so much of the district court judgment, entered on May 16, 2019, as dismissed its Free Exercise and Free Speech claims and rejected its preliminary injunction motion.

For the reasons stated in this opinion, we reverse the challenged dismissal judgment, vacate the denial of New Hope's motion for a preliminary injunction, and remand the case to the district court for further proceedings consistent with this opinion, including consideration of whether to grant a preliminary injunction.

I. Background

In recounting the background to this case, we follow the standard applicable to the review of motions to dismiss, *i.e.*, we accept all factual allegations pleaded by New Hope in its complaint as true, and we draw all reasonable inferences in its favor. *See, e.g.*, *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110–11 (2d Cir. 2010).

A. New York Adoption Law

Private charities—many of them religiously affiliated—have long played an important role in caring for orphans and ***150** abandoned children in New York.[3] Adoption in New York, however, is now "solely the creature of ... statute," *Matter of Jacob*, 86 N.Y.2d 651, 657, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995) (internal quotation marks omitted), and requires "a judicial proceeding" for a person (or couple) to "take[ ] another person into the relation of child and thereby acquire[ ] the rights and incur[ ] the responsibilities of parent in respect of such other person," N.Y. Dom. Rel. Law § 110.

Since first enacted in 1873, New York's adoption law has had as its primary purpose ensuring the "best interest[s]" of the child to be adopted. *Matter of Jacob*, 86 N.Y.2d at 658–59, 636 N.Y.S.2d 716, 660 N.E.2d 397. But if that objective has remained constant, not so the factors informing it. Over a century and a half, New York's adoption law has been amended "innumerable times," such that its many requirements and prohibitions—both those established by statute and those propounded by regulation —have aptly been described as "a complex and not entirely reconcilable patchwork." *Id.* at 659, 636 N.Y.S.2d 716, 660 N.E.2d 397. Nevertheless, because some understanding of that law is necessary to discuss New Hope's claims, we begin by discussing relevant statutory and regulatory provisions, starting with those pertaining to authorized adoption agencies.

1. Authorized Agencies

Adoption services in New York can only be provided by "authorized agencies," *i.e.*, entities incorporated or organized under New York law with corporate or legal authority "to care for, to place out or to board out children." N.Y. Soc. Serv. Law §§ 371(10)(a), 374(2).[4] More than 130 authorized agencies presently operate in New York. Fifty-eight such agencies are public,

each operating as a unit of one of the State's social services districts. More than 70 authorized agencies are private, non-profit organizations that voluntarily provide adoption services. Some do so pursuant to contracts with local social services districts and with government funding; ***151** others, such as New Hope, operate independently.

The need for adoption services in New York, whether public or private, is undeniably great. In fiscal year 2017, more than 27,000 children in the State were in foster care. Some 4,400 were awaiting adoption. Nevertheless, only 1,729 were actually adopted that year.

To facilitate adoptions, state law empowers authorized agencies to receive legal custody of children whose parents cannot care for them. *Id.* § 384; 18 NYCRR § 421.6. Authorized agencies can then board such children in foster homes or place them in prospective adoptive homes based on the agencies' assessment of the children's "best interests." Most relevant here, authorized agency approval, or consent, is required to finalize the adoption of any child placed by that agency. *See* N.Y. Dom. Rel. Law §§ 111(1)(f), 113(1).

A thicket of regulations applies to an authorized agency's placement of a child for adoption. These regulations detail numerous areas for agency consideration, but they comprise no mere quantitative checklist. Rather, most regulations, by their nature, entrust authorized agencies with considerable discretion in determining the best interests of a child. For example, agencies are instructed that in "[m]ak[ing] placement decisions," a consideration of the child's "best interests" shall "includ[e], but [is] not limited to" three factors. 18 NYCRR § 421.18(d). First is "the appropriateness of placement in terms of the age of the child and of the adoptive parent(s)." *Id.* § 421.18(d)(1). "Appropriateness" is hardly a matter of mathematical calculation; rather, it calls for the exercise of judgment. That same conclusion obtains for the second factor: "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s)." *Id.* § 421.18(d)(2). Judgment is also called for by the third factor, which requires placing sibling children together absent documented findings, made by the agency in consultation with identified professionals, that such placement would inure to the detriment of one or more of the children. *See id.* § 421.18(d)(3).

Judgment and discretion also necessarily inform the "adoption study process" that must precede any placement. *Id.* § 421.15. This is evident from the litany of topics that an authorized agency is expected to discuss in "explor[ing] each applicant's ability to be an adoptive parent." *Id.* § 421.15(d). Among these are the "characteristics and needs of children available for adoption"; principles of child development; the applicant's "reasons" for wishing to adopt; "understanding of the adoptive parent role"; "psychological readiness to assume responsibility for a child"; and "self-assessment" of "capacity to provide a child with a stable and meaningful relationship." *Id.* The agency is further expected to explore other household members' "attitudes ... about adoption," and "the[ir] awareness of the impact that adoptive responsibilities have upon family life." *Id.* Again, none of these matters is quantifiable; rather, they call for qualitative assessments by authorized agencies.

Agency judgment will also have to inform the required assessment of a prospective adoptive parent's,

(1) capacity to give and receive affection;

(2) ability to provide for a child's physical and emotional needs;

(3) ability to accept the intrinsic worth of a child, to respect and share his past, to understand the meaning of separation he has experienced, and to have realistic expectations and goals;

(4) flexibility and ability to change;

***152** (5) ability to cope with problems, stress and frustration;

(6) feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and

(7) ability to use community resources to strengthen and enrich family functioning.

Id. § 421.16(a).

While this sampling of applicable regulations indicates a largely holistic approach to identifying the best interests of an adopted child, regulations single out certain factors that should not be considered or, at least, not be determinative. For example, a prospective adoptive parent cannot "be rejected on the basis of low income, or because of receipt of income maintenance payments." *Id.* § 421.16(j). Nor can rejection be based on marital status, subject to certain caveats. *Id.* § 421.16(d). [5] "Race, ethnic group, and religion" also cannot be a basis for rejection, *id.* § 421.16(i), though here too other statutory and regulatory provisions appear to qualify the prohibition. [6]

At the same time, regulations instruct an agency to reject adoption applicants who fail to cooperate in the study process. *See id.* § 421.15(g)(1). Rejection is also warranted if the agency finds an applicant "physically" or "emotionally" "incapable of caring for an adopted child," *id.* § 421.15(g)(2)(i)–(ii), or if the agency concludes that "approval would not be in the best interests of children awaiting adoptions," *id.* § 421.15(g)(2)(iii)—both matters requiring an exercise of judgment. Rejection, however, triggers certain procedural safeguards, including the opportunity for a hearing before OCFS. *See id.* § 421.15(g)(3)–(8).

On the other hand, if, after completion of the required study, an authorized agency decides to approve adoption by a particular applicant or applicants—thereby concluding that adoption by that applicant or applicants is "in the best interests of children awaiting adoptions," *id.* § 421.15(g)(2)(iii)—the agency creates "a written summary of the study findings and activities, including significant characteristics of ... family members, the family interaction, the family's relationship to other persons and the community, the family's child rearing practices and experiences, and any other material needed to describe the family for adoption purposes," and provides that summary "to workers in the agency ... responsible for making placement ***153** decisions about children," *id.* § 421.15(e)(1). The agency works with the approved prospective parents to identify an adoptive child to be placed with them, "[m]ak[ing] placement decisions on the basis of the best interests of th[at] child." *Id.* § 421.18(d). The agency and prospective parents then submit to a court a verified petition for adoption and an adoptive placement agreement, *see* N.Y. Dom. Rel. Law § 112(2)–(3), (5), and the court decides whether to accept the agency's approval and to order adoption, *id.* §§ 113, 114. Generally, "no order of adoption shall be made until [the adoptive] child has resided with the adoptive parents for at least three months." *Id.* § 112(6).

New York law authorizes the Commissioner of OCFS to enforce laws and rules pertaining to adoption. *See* N.Y. Soc. Serv. Law § 34(3)(e). [7] By law, OCFS is authorized to visit, inspect, and supervise authorized adoption agencies. *See id.* § 371(10). Where OCFS determines that an agency has placed or boarded a child (1) "for purposes of gain," (2) "without due inquiry as to the character and reputation of the person with whom such child is placed," (3) "in such manner that such child is subjected to cruel or improper treatment or neglect or immoral surroundings," or (4) "in such manner that the religious faith of the child is not preserved and protected as provided [by law]," OCFS is specifically authorized, upon notice and an opportunity to be heard, to "issue an order prohibiting such an authorized agency ... from thereafter placing out or boarding out any child." *Id.* § 385(1).

2. 18 NYCRR § 421.3(d)

We now turn to the regulation at issue in this case, 18 NYCRR § 421.3(d), beginning with some background to its pronouncement.

As the New York Court of Appeals has observed, the "pattern of amendments" to New York adoption law over the last 75 years "evidences a successive expansion of the categories of persons entitled to adopt." *Matter of Jacob*, 86 N.Y.2d at 660–61, 636 N.Y.S.2d 716, 660 N.E.2d 397. Consistent with a general purpose to assure that "as many children as possible are adopted into suitable family situations," certain of these amendments reflect "fundamental changes that have taken place in the makeup of the family." *Id.* at 661, 636 N.Y.S.2d 716, 660 N.E.2d 397 (internal quotation marks omitted).

As relevant here, until 2010, New York's Domestic Relations Law permitted only "[a]n adult unmarried person or an adult husband and his adult wife together" to adopt a child. N.Y. Dom. Rel. Law § 110 (2009). This law did not prohibit a homosexual person from adopting as a single "adult unmarried person." *See Matter of Jacob,* 86 N.Y.2d at 662, 636 N.Y.S.2d 716, 660 N.E.2d 397 (stating that "New York does not prohibit adoption by homosexuals," and observing that administrative regulation forbids denial of agency adoption on basis of homosexuality [8]). But it ***154** was understood not to permit an unmarried couple, whatever their sexual orientation, jointly to adopt a child.

That conclusion was eroded, however, by court rulings beginning with the 1995 decision in *Matter of Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397. In that case, the New York Court of Appeals construed § 110's "adult unmarried person" phrase to allow the same-sex partner of a child's biological mother to adopt the child without the mother surrendering her rights, thereby effectively allowing a same-sex couple to become the child's parents. *See id.* at 660–62, 665–68, 636 N.Y.S.2d 716, 660 N.E.2d 397. A decade later, the Fourth Department construed *Jacob*'s reasoning to compel the conclusion that an unmarried, same-sex couple—neither member of which was the child's biological parent—could jointly petition for adoption of a child rather than being required to file separately. *See In re Adoption of Carolyn B.*, 6 A.D.3d 67, 68–70, 774 N.Y.S.2d 227 (4th Dep't 2004).

Mindful of these decisions, the New York State legislature, in 2010, amended § 110 to state that "[an] adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person." N.Y. Dom. Rel. Law § 110. In a signing statement accompanying his approval of the bill, then-Governor David Paterson observed that the amendment expanded qualified adoption applicants to include same-sex couples, "mak[ing] absolutely clear a principle that has already been established by the courts, and that ensures fairness and equal treatment to families that are ready, willing and able to provide a child with a loving home ... includ[ing] same-sex couples, regardless of whether they are married." Gov. Mem., New York Bill Jacket, 2010 S.B. 1523, ch. 509 (internal citation omitted). At the same time, however, the Governor stated that "since the statute is permissive, it would allow for such adoptions without compelling any agency to alter its present policies." *Id.* In sum, he characterized amended § 110 as "a wise, just and compassionate measure that expands the rights of New Yorkers, without in any way treading on the views of any citizen or organization." *Id.*

The new law went into effect on September 17, 2010, and prompted OCFS to issue two "informational letters" to authorized agencies. The first letter, dated January 11, 2011, and entitled "Adoption by Two Unmarried Adult Intimate Partners," stated that amended § 110 "codifies ... court decisions that authorize unmarried persons to adopt a child together," but "does not change or alter the standards currently in place for the approval of an individual as an adoptive parent." OCFS Informational Ltr., 11-OCFS-INF-01. A copy of the Governor's quoted signing statement was attached to this letter.

The second letter, dated July 11, 2011, and entitled "Clarification of Adoption Study Criteria Related to Length of Marriage and Sexual Orientation," addressed the effect of amended § 110 on two existing OCFS regulations: 18 NYCRR § 421.16(e) (prohibiting rejection of applicants for adoption study on basis of "length of time they have been married, provided that time is at least one year") and 18 NYCRR § 421.16(h)(2) (prohibiting rejection of applicants "solely on the basis of homosexuality"). As to the first regulation, OCFS instructed authorized agencies that the amended statute no longer permitted ***155** rejecting an adoption applicant "solely on the basis that the length of marriage is less than one year." OCFS Informational Ltr., 11-OCFS-INF-05. As to the second regulation, OCFS stated that its purpose "is to prohibit discrimination based on sexual orientation in the adoption study assessment process," and 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." *Id.*

Two years later, in November 2013, OCFS replaced both regulations with the provision here at issue: 18 NYCRR § 421.3(d). *See* 35 N.Y. Reg. 3 (Nov. 6, 2013). [9] It requires authorized adoption agencies,

> [to] 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, and[ ] [to] take reasonable steps to prevent such discrimination or harassment by

staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur.

18 NYCRR § 421.3(d).

In promulgating this provision, OCFS stated that the regulation would "promote fairness and equality in the child welfare adoption program by eliminating archaic regulatory language that implies the sexual orientation of gay, lesbian and bisexual prospective adoptive parents—but not of heterosexual prospective adoptive parents—is relevant to evaluating their appropriateness as adoptive parents." 35 N.Y. Reg. 4 (Aug. 7, 2013) (proposed rulemaking). [10]

B. New Hope's Adoption Services

New Hope's Christian ministry was conceived by clergyman Clinton H. Tasker who, in 1958, sensed a "call of God" to care for women facing unplanned pregnancies and for their children. [11] Compl. ¶ 40. Tasker's idea was realized in 1965, when Evangelical Family Service, Inc.—New Hope's predecessor agency—sought and obtained from New York's Board of Social Welfare a two-year certificate of incorporation authorizing it "to accept legal custody and guardianship of children; to provide protective service for children; to provide foster care service to child[ren] and unwed mother[s]; to place children for adoption; ***156** and [to] function in complete cooperation with all existing social welfare agencies." J. App'x at 66; *see* N.Y. Soc. Serv. Law § 371(10)(a). Two years later, in 1967, New York made the certificate "perpetual." J. App'x at 73–76. [12] Thus, when in a 2008 letter, OCFS—as successor to the Board of Social Welfare—traced New Hope's authorization history, it confirmed that New Hope's "authority to place children for adoption and to perform other adoption services, including home studies ... in New York is perpetual." *Id.* at 79, 774 N.Y.S.2d 227.

New Hope maintains that its "Christian faith and religious beliefs motivate and permeate its mission and all of its activities." Compl. ¶ 52. In defending dismissal, OCFS does not contend otherwise, nor does it challenge the sincerity of New Hope's religious beliefs.

Consistent with its religious identity, New Hope requires all board members, staff, and volunteers to "be in agreement with and sign New Hope's statement of faith, ... be in agreement with and supportive of [its] religious mission, and ... conduct themselves consistent with Christian faith and belief." *Id.* ¶ 53. Moreover, "to scrupulously ensure its autonomy to operate in accordance with its religious beliefs, New Hope accepts no government funding." *Id.* ¶ 51.

New Hope asserts that its religious beliefs prompt it to conduct its adoption ministry in such a way as to convey a "system of values about life, marriage, family and sexuality to both birthparents and adoptive parents." *Id.* ¶ 270. Thus, when prospective parents attend an initial orientation session, "New Hope ... open[s] the meeting with prayer, ... provid[es] information about the organization's history and religious mission," and uses "scripture passages" to explain that "children are to be valued as gifts from God." *Id.* ¶ 105.

New Hope also uses prayer and religious literature in conducting the second, "home study," step of the adoption process. *See id.* ¶¶ 109, 111–112. During this study, a New Hope caseworker "explore[s] the prospective adoptive parents' experience with children, family support, parenting philosophy, ability to parent a child of a different race or culture, faith and religious practice, and family dynamics, including interviews of any children in the home." *Id.* ¶ 114.

At the third step of the process, a New Hope caseworker explores in still more detail the prospective parents' "strengths and weaknesses," their "family dynamics, thoughts on discipline and affection, work responsibilities, marital stability ..., mental-health history, financial stability, and parenting philosophy." *Id.* ¶ 117. Married couples are interviewed together and separately to determine the "intimacy and strength of the marriage" in order to ensure that their home "will be a safe, stable environment for the [adopted] child." *Id.* ¶¶ 116, 118, 120.

Following this session, the caseworker and New Hope's Executive Director together review the entire case file to decide whether to approve or disapprove applicants as prospective adoptive parents based on "the best interest of any child who may be placed in the home." *Id.* ¶ 121.

Approved adoptive parents then participate in the fourth step of the process where, among other things, New Hope instructs them as to how to prepare their "profiles." New Hope shows approximately five such profiles to a birthmother for her ***157** to "select the adoptive family with whom she feels comfortable entrusting her child." *Id.* ¶¶ 66, 97, 125. New Hope states that "[a]ll" birthmothers with whom it has worked "have been able to find a family with whom they were comfortable placing their child for adoption from the profiles" thus provided. *Id.* ¶ 99.

At the fourth step, New Hope also asks approved adoptive parents whether they are willing to participate in "open adoptions," *i.e.*, adoptions where birth parents maintain some contact with the adopted child pursuant to a "Contact Agreement" facilitated by New Hope until the child turns 18. Because almost all New Hope's adoptions are "open," its involvement in adoptions thus continues well after a court finalizes transfer of a child's custody. *Id.* ¶¶ 78–81.

Finalization does not occur, however, until after a child spends no fewer than three months, and sometimes as much as a year, living with approved adoptive parents under New Hope's supervision. During this period, New Hope maintains legal custody of the child and conducts regular visits to ensure that the child is being well cared for and to assess the degree of attachment developing between the adoptive parents and the child. *See id.* ¶¶ 133–138.

New Hope's "field reports" about the placement, together with its home study report, are then finalized and notarized and become its "official recommendation of the adoptive family for the adoption of the specific child." *Id.* ¶¶ 139–141.

C. New Hope's Religious Beliefs and 18 NYCRR § 421.3(d)

The particular religious belief subscribed to by New Hope and relevant to this appeal is that "[t]he biblical model for the family as set out in the Bible—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 specifically for the upbringing of children." *Id.* ¶ 56. Because of this belief, New Hope asserts that it "will not recommend or place children with unmarried couples or same-sex couples as adoptive parents." *Id.* ¶ 153. It does not believe that such a placement is in a child's best interests.

New Hope maintains that its religious views about marriage do not otherwise limit its ministry. In providing pregnancy counseling, New Hope routinely works with unmarried women and does so without regard to their sexual orientation. But, as to adoption, New Hope's religious views about marriage are formalized in a "Special Circumstances" policy, which states,

> If the person inquiring to adopt is single ... [t]he Executive Director [of New Hope] will talk with them to discern if they are truly single or if they are living together without the benefit of marriage. ... [B]ecause New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage.
>
> If the person inquiring to adopt is in a marriage with a same sex partner ... [t]he Executive Director will ... explain that because New Hope is a Christian Ministry, we do not place children with same sex couples[ ].

Id. ¶ 154. [13]

Nevertheless, mindful that its religious beliefs are not universal, New Hope does not itself "reject" unmarried or same-sex couples as adoptive parents. *See* ***158** *supra* at 152 (discussing rejection of adoption applicants). Rather, it effectively recuses itself from considering their adoption applications, referring them at the outset to "the appropriate county social services office or another [authorized adoption services] provider." *Id.* ¶ 156. New Hope asserts on information and belief that "no same-sex couple or unmarried couple who has inquired with New Hope about adoption has ever complained to OCFS about how New

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Hope handled their inquiry." *Id.* Nor is there anything in the present record indicating that New Hope's policy has prevented any same-sex or unmarried couple wishing to adopt from doing so.

OCFS appears not to have questioned New Hope's practice respecting unmarried and same-sex couples until 2018 when, pursuant to what OCFS characterized as a "new policy" implemented that year, it conducted a "comprehensive on-site review[ ] of each private provider's procedures." *Id.* ¶ 182. [14] In advance of a September 6, 2018 site review of New Hope, OCFS Permanency Specialist Suzanne Colligan requested, and New Hope's then-Acting Executive Director Judith Geyer provided, a copy of New Hope's policies and procedures manual, which included the above-quoted Special Circumstances policy.

Approximately one month after the site visit, on October 1, 2018, Colligan sent Geyer a review letter issued by OCFS's Regional Director for Child Welfare and Community Services. That letter commends New Hope for "a number of strengths" in providing adoption services, specifically, (1) "the strong emphasis [placed] on assisting the birth parents in making an informed decision for their newborn," (2) "providing them time to make the [adoption] decision," and—perhaps most notably for purposes of this appeal—(3) "a supportive and detailed adoptive family selection process." *Id.,* Exh. 6. It identifies only three areas for follow-up: (1) "[i]mmediate implementation" of OCFS's "Foster/Adoptive Home Certification Approval Process," (2) better procurement of health information pertaining to adoptive families, the adoptee, or birth parent; and (3) New Hope's role and limitations regarding the exchange of information pertinent to surrender of custody. *Id.* The review letter makes no mention of New Hope's Special Circumstances policy or of 18 NYCRR § 421.3(d).

A week later, however, in an October 9, 2018 telephone call to Geyer, Colligan stated that she had read New Hope's manual, and that its Special Circumstances policy violated § 421.3(d). Colligan presented New Hope with two options: comply with the regulation by agreeing to place children with unmarried and same-sex couples, or "choos[e] to close." *Id.* ¶¶ 188–190. Geyer responded that New Hope was unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples, and that it would "never choose to close." *Id.* ¶¶ 191, 193. Rather, OCFS would be "forcing" New Hope to close in violation of its religious freedom. *Id.* ¶ 193. Colligan told Geyer that "[s]ome Christian ministries have decided to compromise and stay open." *Id.* ¶ 192 (brackets in original). [15]

***159** On October 11, 2018, Colligan advised Geyer that New Hope would be receiving a letter requesting a formal written response to the choices it had been given. The referenced letter from Laura Velez, Deputy Commissioner of Child Welfare and Community Services, states that New Hope's "policy pertaining to not placing 'children with those who are living together without the benefit of marriage' or 'same sex couples' violates Title 18 NYCRR § 421.3, and is discriminatory and impermissible." *Id.,* Exh. 7. The letter requests that "within 15 days of receipt of this letter," New Hope state in writing whether it will or will not "revise the policy so as to comply with the above-cited regulation" and, thus, "continue the existing adoption program." *Id.* It advises that should New Hope "fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program." *Id.*

D. Procedural History

Rather than accept either of OCFS's options, New Hope commenced this action on December 6, 2018. On December 12, 2018, it moved preliminarily to enjoin OCFS from forcing the closure of New Hope's adoption services. OCFS opposed the motion, and on January 14, 2019, moved to dismiss New Hope's complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Following oral argument, the district court granted OCFS's motion to dismiss and denied New Hope's motion for a preliminary injunction as moot. *See New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d 194. The district court ruled that New Hope failed to state a plausible Free Exercise claim because 18 NYCRR § 421.3(d) is "[o]n its face ... generally applicable and ... neutral," and no evidence indicated that the regulation "was drafted or enacted with the object to infringe upon or restrict practices because of their religious motivation." *Id.* at 213–14 (internal quotation marks omitted). The district court ruled that New Hope failed to state a plausible Free Speech claim because § 421.3(d) "simply do[es] not compel speech," or only compels

"government[ ] speech." *Id.* at 217. Insofar as New Hope also cast its Free Speech claim as one of "expressive association," the district court ruled that § 421.3(d) caused only "slight impairment to New Hope's expressive activity," which, in any event, was outweighed by "the state's compelling interest in prohibiting the discrimination at issue." *Id.* at 219–20. [16]

***160** New Hope timely filed this appeal, moving for a preliminary injunction that would allow it, pending a final ruling by this court, to continue servicing pending adoptions subject to New Hope's agreement not to accept any new adoption applications. This court granted such an injunction on November 4, 2019. On June 18, 2020, New Hope moved for this court to expand its injunction pending appeal to allow New Hope to accept new adoption applications.

II. Discussion

A. Motion To Dismiss

1. Standard of Review

We review *de novo* the dismissal of a complaint for failure to state a claim. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d at 110. In doing so, we "accept[ ] all factual allegations in the complaint as true, and draw[ ] all reasonable inferences in the plaintiff's favor." *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) (internal quotation marks omitted); *accord DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d at 111 ("When there are well-pleaded factual allegations, a court should assume their veracity and *then* determine whether they plausibly give rise to an entitlement to relief." (emphasis in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009))).

2. Free Exercise Claim

New Hope argues that the district court erred in concluding that it failed to plead a plausible Free Exercise claim against OCFS. Specifically, New Hope challenges the district court's determination that OCFS was simply enforcing a neutral and generally applicable anti-discrimination regulation when it insisted that New Hope either agree to approve unmarried and same-sex applicants for adoption or close its adoption service. For reasons explained herein, we conclude that the dismissal of New Hope's Free Exercise claim was premature. The pleadings allege that OCFS's actions preclude New Hope from pursuing its adoption ministry consistent with its religious beliefs. Even if such intrusion on the exercise of religion would not violate the First Amendment if compelled by a valid and neutral law (or regulation) of general application, the pleadings here, when viewed in the light most favorable to New Hope, do not permit a court to conclude, as a matter of law, that OCFS's actions in promulgating and enforcing the regulation at issue were neutral and not informed by hostility toward certain religious beliefs.

a. Applicable Legal Principles

To explain that conclusion, we start with the First Amendment, which famously states that "Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof ...." U.S. CONST. amend. I. The Fourteenth Amendment extends the protections of these Establishment and Free Exercise Clauses against state and local governments. *See* U.S. CONST. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

As the Supreme Court reiterated only last term, "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously," not a society devoid of religious beliefs and symbols. *American Legion v. Am. Humanist Assoc.*, ––– U.S. ––––, 139 S. Ct. 2067, 2074, 204 L.Ed.2d 452 (2019); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 623, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (observing that First Amendment does not require courts to "sweep away all ***161** government recognition and

acknowledgment of the role of religion"). The Free Exercise Clause, in particular, guarantees to all Americans the "right to believe and profess whatever religious doctrine [they] desire[ ]," even doctrines out of favor with a majority of fellow citizens. *Employment Div. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Thus, it has long been the rule—as famously pronounced by Justice Jackson—that no government "official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *accord Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* ––– U.S. ––––, 138 S. Ct. 1719, 1731, 201 L.Ed.2d 35 (2018). Rather, "[t]he Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1731 (internal quotation marks omitted).

These principles are particularly relevant to beliefs about family and marriage, where society's views have sometimes proved more fluid than religion's. As pertinent here, the Supreme Court recently traced how society's view of same-sex marriage has evolved over the last forty years, such that what was once prosecuted as a criminal offense is now recognized as a fundamental right. *See Obergefell v. Hodges,* 576 U.S. 644, 135 S. Ct. 2584, 2596–605, 192 L.Ed.2d 609 (2015). Nevertheless, some religions maintain that same-sex marriage is morally wrong, just as some religions view unmarried co-habitation, remarriage after divorce, or conception without marriage as morally wrong notwithstanding society's general acceptance of such conduct. The Supreme Court has declined to fault such religious views about marriage, observing that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id.* at 2602. Indeed, the Court has suggested that differing secular and religious views in this area should be allowed to coexist. This is evident from the fact that, at the same time that the Court ruled that the Constitution does not permit government to prohibit same-sex marriage, it "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at 2607. Indeed, such advocacy is constitutionally protected:

> The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Id. The Court reiterated the point the next year: "[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1727; *cf. Bostock v. Clayton Cty.*, ––– U.S. ––––, 140 S. Ct. 1731, 1753–54, 207 L.Ed.2d 218 (2020) (construing Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), to prohibit discrimination on the basis of sexual orientation, but recognizing fear that compliance "may require some employers to violate their religious convictions" and expressing "deep[ ] concern[ ] with preserving ***162** the promise of the free exercise of religion enshrined in our Constitution").

But if some accommodation on this matter is the Court's expectation, delineating constitutional boundaries is challenging. As the Chief Justice observed in *Obergefell*, anticipating the very case now before us, "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, ... a religious adoption agency declines to place children with same-sex married couples." *Obergefell v. Hodges*, 135 S. Ct. at 2625–26 (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting).

In confronting those hard questions here, we are mindful that the Supreme Court has recognized that the exercise of religion can involve not only belief and expression, but also "physical acts," such as "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Employment Div. v. Smith*, 494 U.S. at 877, 110 S.Ct. 1595. The Free Exercise Clause does not permit government to "ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious

belief that they display," *id.*, at least not without showing that the ban "is justified by a compelling interest and is narrowly tailored to advance that interest," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi v. Hialeah*"), 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). But the law has permitted government to avoid showing a compelling interest and narrow tailoring if the challenged ban on a religious practice is required by a valid and neutral law of general applicability. *Employment Div. v. Smith,* 494 U.S. at 879, 110 S.Ct. 1595 (stating that Free Exercise Clause does "not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (internal quotation marks omitted)).

Almost from its pronouncement, *Smith*'s construction of the Free Exercise Clause has prompted criticism. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1420 & n.43 (1990); *see also Kennedy v. Bremerton Sch. Dist.,* ––– U.S. ––––, 139 S. Ct. 634, 637, 203 L.Ed.2d 137 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of *certiorari*) (observing that case did not ask Court to revisit *Employment Division v. Smith*, which "drastically cut back on the protection provided by the Free Exercise Clause"). The Supreme Court has recently agreed to revisit its decision in *Smith,* with argument expected some time next term. *See Fulton v. City of Philadelphia*, ––– U.S. ––––, 140 S. Ct. 1104, 206 L.Ed.2d 177 (2020) (mem.). We need not delay deciding this case, however, to see if *Fulton* yields a more protective Free Exercise standard than *Smith* because we conclude that New Hope's Free Exercise claim should not have been dismissed even under the *Smith* standard as presently applied. A court construing the pleadings in the light most favorable to New Hope could not conclude as a matter of law that OCFS was simply applying a valid neutral law of general application when it instructed New Hope either to agree to approve unmarried and same-sex couples as adoptive parents or to close its 50-year adoption ministry.

The Supreme Court has instructed that a law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation." *Lukumi v. Hialeah*, 508 U.S. at 533, 113 S.Ct. 2217. ***163** To determine the object of a law, a court "begin[s] with its text, for the minimum requirement of neutrality is that a law not discriminate on its face" against religion. *Id.* Like the district court, we conclude that the regulation here at issue, 18 NYCRR § 421.3(d), does not on its face discriminate against religion because its prohibitions apply equally to all adoption services, both secular and religious.

But facial neutrality is only the first, and by no means the determinative, step in a Free Exercise inquiry. *See Lukumi v. Hialeah*, 508 U.S. at 534, 113 S.Ct. 2217. Mindful that government hostility to religion can be "masked, as well as overt," a court must proceed to a second step of inquiry to identify even those "subtle departures from neutrality," or "covert suppression of particular religious beliefs" that will be not be tolerated unless supported by a compelling interest and narrow tailoring. *Id.* at 534, 546, 113 S.Ct. 2217 (internal quotation marks omitted); *accord Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1731. At this second step, a court must "survey meticulously" the totality of the evidence, "both direct and circumstantial." It must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi v. Hialeah*, 508 U.S. at 534, 540, 113 S.Ct. 2217 (internal quotation marks omitted); *accord Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1731. It must also carefully consider "the effect of a law in its real operation," which "is strong evidence of its object." *Lukumi v. Hialeah*, 508 U.S. at 535, 113 S.Ct. 2217.

Applying those principles here, we conclude that the pleadings give rise to a sufficient "suspicion" of religious animosity to warrant "pause" for discovery before dismissing New Hope's claim as implausible. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. at 1731.

b. The District Court's Cited Authorities Do Not Support Dismissal

New Hope maintains that the following pleadings indicate that 18 NYCRR § 421.3(d), as promulgated and enforced, is not neutral and generally applicable.

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(1) Amended Dom. Rel. Law § 110—the law OCFS contends 18 NYCRR § 421.3(d) "is consistent with" and "implements," Appellee Br. at 6–7—is permissive, not mandatory. Moreover, New York's then-Governor, in signing the law, specifically stated that it "allow[s] for ... adoptions [by unmarried and same-sex couples] without compelling any agency to alter its present policies." Compl. ¶ 7.

(2) Initially, OCFS took the position that amended § 110 "does not change or alter the standards currently in place for the approval of an individual as an adoptive parent." *Id.* ¶ 162.

(3) OCFS then shifted its position. Despite the Governor's statement that the amended statute did not require agencies to "alter [their] present policies," OCFS asserted that it "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." *Id.* ¶ 164.

(4) During the rulemaking process preceding promulgation of 18 NYCRR § 421.3(d), OCFS stated that the regulation was needed to "eliminate ***164** *archaic* regulatory language, which implies that the sexual orientation of gay, lesbian and bisexual prospective parents ... is relevant to evaluating their appropriateness as adoptive parents." *Id.* ¶ 166 (emphasis in original).

(5) When New Hope told OCFS that its comply-or-close order violated New Hope's freedom of religion, OCFS told the agency that "some Christian ministries have decided to compromise and stay open." *Id.* ¶ 192 (brackets removed).

(6) Since § 421.3(d) took effect, "several voluntary faith-based authorized [adoption] agencies that were listed on OCFS'[s] website in January of 2018" and that "share similar beliefs" to New Hope's "have been removed by OCFS from that posted list." These include "several Catholic providers, a Jewish provider, an LDS provider, and a Muslim provider." *Id.* ¶¶ 202–203.

(7) In a 2018 news report about the closure of a Christian adoption ministry operating for 95 years in Buffalo, New York, an OCFS spokeswoman is quoted stating that "[d]iscrimination of any kind is illegal .... There is no place for providers that choose not to follow the law." *Id.* ¶ 204.

(8) The State's statutory and regulatory scheme governing adoption "provides exemptions for secular, nonreligious purposes" and "allow[s] adoption providers to consider protected characteristics when making placements," while imposing an "absolute bar" against consideration of sexual orientation. *Id.* ¶¶ 248–250.

In concluding that these allegations were insufficient to state a plausible Free Exercise claim, the district court observed that the allegations did not indicate "[the] type of hostility or bias demonstrated in *Masterpiece Cakeshop* or *Lukumi*." *New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d at 214. Instead, the district court thought that New Hope's pleadings "more closely align with *Fulton* [*v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, ––– U.S. ––––, 140 S. Ct. 1104, 206 L.Ed.2d 177, *see supra* at 162–63], where the Third Circuit found that the plaintiff was unlikely to succeed on its claim because the record demonstrated that the defendant respected the plaintiff's sincerely held beliefs while enforcing the anti-discrimination provision at issue." *Id.*

We cannot agree. At first glance, *Fulton* may appear similar to this case in that, there, a religious foster care agency, Catholic Social Services ("CSS"), claimed that a government entity, the City of Philadelphia, violated its Free Exercise and Free Speech rights by insisting that CSS not discriminate against same-sex couples as a condition of its continuing to provide foster care services. But, in fact, this case differs from *Fulton* in ways important to our review.

First, the relationship between CSS and Philadelphia was contractual and compensatory. *See Fulton v. City of Philadelphia*, 922 F.3d at 147–48 (discussing contract between Philadelphia and CSS, which provided for City to compensate CSS for certain services at per diem rate for each child placed in foster care). By contrast, while New Hope is authorized by New York to provide adoption services, it does not do so pursuant to any government contract, nor does it receive any government funding.

Thus, whatever authority a government entity might claim to limit the free exercise of religion by those who become its agents or accept its funding, no such authority can be claimed here.

***165** Second, in *Fulton*, the issue under review was not the sufficiency of the pleadings, but the denial of CSS's motion for a preliminary injunction. To secure such relief, CSS had to demonstrate a reasonable likelihood of success on its Free Exercise claim, a heavier burden than New Hope bears in pleading the plausible claim necessary to avoid dismissal. *See id.* at 151–52. The Third Circuit agreed with the district court that CSS failed to carry its burden "at the preliminary injunction stage" under the *Smith* standard. *Id.* at 158–59. Whether or not this ruling survives Supreme Court review, what is important here is that in making it, the *Fulton* courts were not required to accept all CSS's allegations as true or to draw all reasonable inferences in its favor. *Compare id.* at 152 (setting forth preliminary injunction standard), *with Shomo v. City of New York*, 579 F.3d at 183 (stating motion to dismiss standard). Nowhere in *Fulton* does the Third Circuit suggest that CSS's allegations, if assumed true, were insufficient to state a Free Exercise claim. [17]

As for *Masterpiece Cakeshop* and *Lukumi*, the Supreme Court there discussed Free Exercise violations based on fully developed evidentiary records. *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1726 (reviewing rulings made on cross-motions for summary judgment); *Lukumi v. Hialeah*, 508 U.S. at 528, 113 S.Ct. 2217 (reviewing findings of fact and conclusions of law following nine-day bench trial). Where, as here, the parties have not yet commenced discovery, New Hope can hardly be required to plead facts as specific and detailed as those referenced in *Masterpiece Cakeshop* and *Lukumi* to avoid dismissal.

c. The Pleadings Raise a Plausible Suspicion of Hostility to Certain Religious Beliefs

In any event, New Hope's pleadings easily give rise to the "slight suspicion" of religious animosity that the Supreme Court, in both *Lukumi* and *Masterpiece Cakeshop*, indicated could raise constitutional concern. *Lukumi v. Hialeah*, 508 U.S. at 547, 113 S.Ct. 2217; *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. at 1731. In explaining this conclusion, we are obliged to discuss certain pleadings individually, but it is the totality that precludes dismissal.

First, suspicion is raised by an apparent disconnect between 18 NYCRR § 421.3(d) and the law it purports to implement, N.Y. Dom. Rel. Law § 110. As New Hope correctly observes, the statutory text is permissive, expanding the persons who "may adopt" to include unmarried and same-sex couples. It contains no mandate requiring adoption agencies to approve adoption by any persons. Moreover, the wording choice appears to have been deliberate, and even intended to allow for accommodation of religious beliefs. This can be inferred from § 110's enactment history. In a letter to the Governor that is included in the bill jacket, the New York State Catholic Conference voiced concern that the new legislation might be construed to require faith-based adoption agencies "to facilitate adoption for same-sex [couples] in violation of our religious beliefs and faith." Ltr. from N.Y.S. Catholic Conf. to Governor (July 29, 2010), New York Bill Jacket, 2010 S.B. 1523, ch. 509. The letter urged an amendment to ensure that authorization certifications were not denied or revoked on that ***166** ground. *See id.* The enacted law contained no such amendment, but the Governor, in his signing statement, sought to assuage concern. 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*." Gov. Mem., New York Bill Jacket, 2010 S.B. 1523, ch. 509 (emphasis added). Indeed, the Governor stated that the law was "a wise, just and compassionate measure that expands the rights of New Yorkers, *without in any way treading on the views of any citizen or organization*." *Id.* (emphasis added). In short, the statutory text and history, viewed in the light most favorable to New Hope, can reasonably be construed to have alerted OCFS that what the legislature and executive intended in amending § 110 was to expand the class of potential adoptive parents to include unmarried and same-sex couples, but with reasonable accommodation for religious adoption agencies whose faiths compelled narrower views. [18]

Section 421.3(d) is not consistent with this intent. Its language is not permissive, but mandatory. It unqualifiedly prohibits any "discrimination and harassment" against adoption applicants based on "race, creed, color, national origin, age, sex, *sexual orientation*, gender identity or expression, *marital status*, religion, or disability." 18 NYCRR § 421.3(d) (emphases added).

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Of course, OCFS has wide discretion in promulgating regulations setting forth the "standards and procedures to be followed by authorized agencies in evaluating" adoption applicants. N.Y. Soc. Serv. Law § 372-e(2). And a generally applicable anti-discrimination regulation will usually be understood to indicate neutrality rather than religious animosity. But where, as here, a regulation purports to implement a statute whose text and history signal an intent for some accommodation of religious beliefs, further inquiry is warranted to determine if agency actions affording no such accommodation are grounded in any animosity to the particular religious beliefs at issue.

Second, a suspicion of religious animosity is further raised here by the fact that for five years after 18 NYCRR § 421.3(d) was promulgated—from 2013 until 2018—OCFS voiced no objection to the practice New Hope appears to have adopted to avoid being seen as "discriminat[ing]" against unmarried or same-sex couples wishing to adopt, *i.e.*, New Hope recused itself from considering such couples' adoption applications and referred them to other agencies whose consideration would not be limited by New Hope's particular religious beliefs about family and marriage.

To be sure, New Hope's recusal policy meant that unmarried and same-sex couples could not obtain adoption services *from* New Hope. We need not here consider what discrimination concerns this might raise if New Hope qualified as a public accommodation under New York law, *see* N.Y. Exec. Law §§ 292(9), 296, because OCFS does not attempt formally to denominate it as such. This is not surprising. New Hope's adoption services are not easily analogized to traditional public accommodations such as barbershops that provide haircuts, accounting firms that offer tax advice, or bakeshops that make wedding cakes. And children awaiting adoption hardly equate to a commodity, even if their "supply" in New York (unfortunately) ***167** greatly exceeds "demand." Moreover, it appears that an authorized agency offers adoption services not only for the benefit of a public clientele (prospective parents) but, also, so that the agency itself can render a *judgment*: whether it is in the best interests of a child to be adopted by a particular applicant or applicants. Recusal is a familiar and accepted way for decisionmakers to step aside when they recognize that personal interest, predispositions, or even religious beliefs might unduly influence (or appear to influence) their ability to render impartial judgment. Thus, when an agency such as New Hope knows that, although New York law allows adoption by unmarried and same-sex couples, its religious beliefs will not permit it to conclude that adoption by such a couple is in a child's best interests, recusal and referral might be understood as a means to avoid its religious views adversely informing its assessment of a couple's particular adoption application. [19] The pleadings suggest that New Hope's recusal still leaves scores of other authorized agencies available to consider the referred adoption applications. And New Hope's recusal would not seem to diminish the number of children available for adoption. [20]

This is not to suggest that no legal concerns can arise when a decisionmaker uses recusal to avoid rendering judgments for members of a protected class. We here conclude simply that, in the circumstances described, OCFS's abrupt—and as yet unexplained—2018 change of mind on the matter of whether New Hope's recusal-and-referral practice adequately avoided violating 18 NYCRR § 421.3(d), coupled with its insistence that New Hope agree to approve unmarried and same-sex couples as adoptive parents or shut down a 50-year adoption ministry, raise a sufficient suspicion of hostility toward New Hope's particular religious beliefs to warrant further inquiry. *See Lukumi v. Hialeah*, 508 U.S. at 538, 113 S.Ct. 2217 (stating that where law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends[,] [i]t is not unreasonable to infer" that such a law "seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation"). [21]

Third, even before discovery, New Hope points to some statements by OCFS personnel ***168** that are similar to statements in *Masterpiece Cakeshop* that the Supreme Court interpreted as arguably evincing religious hostility. Notably, New Hope asserts that when it invoked religious freedom to protest OCFS's directive that it either agree to approve unmarried and same-sex adoption applicants or close its adoption services, OCFS responded that "[s]ome Christian ministries have decided to compromise and stay open." Compl. ¶ 192 (brackets in original). *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1729 (quoting statement by Colorado Civil Rights Commissioners that businessman who "wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, *he needs to look at being able to compromise*" (emphasis added) (internal quotation marks omitted)). Further, when OCFS was asked by a reporter to comment on the closure of a long-established Christian adoption agency in Buffalo, its spokeswoman stated that "[t]here is no place for

providers that choose not to follow the law." Compl. ¶ 204; *see Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1729 (quoting Commissioners that plaintiff "can believe 'what he wants to believe' but cannot act on his religious beliefs 'if he decides to do business in the state' "). As in *Masterpiece Cakeshop*, these statements are subject to various interpretations, some benign. [22] But on a motion to dismiss, we must draw the inference most favorable to New Hope, *i.e.*, that OCFS did not think New Hope's religious beliefs about family and marriage could "legitimately be carried into the public sphere." *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1729. Indeed, for OCFS, it was not enough that New Hope used recusal and referral to avoid denying adoption approval to unmarried and same-sex couples based on its own religious beliefs. Rather, for New Hope to continue its adoption ministry in New York, OCFS insisted that it "compromise"—*i.e.*, abandon—its own religious views about family and marriage and subscribe to the state's orthodoxy on such matters. *See generally West Va. Bd. of Educ. v. Barnette*, 319 U.S. at 642, 63 S.Ct. 1178. Construed in this light, the allegations cannot be dismissed for failing to state a plausible Free Exercise claim.

Fourth, another matter bearing on religious hostility and making dismissal premature is the severity of OCFS's actions in ordering New Hope's closure. 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. All the more serious when, as just discussed, the agency has, for five years and without objection by OCFS, used recusal and referral to avoid rejecting applicants on the basis of its religious beliefs. A court properly starts by asking what authority OCFS had to order such a shut down, and what procedures attend such a decision. There may be clear answers for these questions, but they are not apparent on the present record.

***169** New York Soc. Serv. Law § 371(10)(a) authorizes OCFS to "visit[ ], inspect[ ] and supervise[ ]" adoption agencies. Thus, OCFS was well within its authority in visiting and inspecting New Hope in 2018. But § 371(10)(a) makes no mention of closing adoption agencies or invalidating the certificates of incorporation authorizing them to provide adoption services. *C.f.* N.Y. Bus. Corp. Law § 109(a)(1), (2) (empowering Attorney General to maintain action to dissolve corporation). And while N.Y. Soc. Serv. Law § 385 does authorize OCFS to issue an order prohibiting an authorized agency from "thereafter placing out or boarding out any child," that authority is limited to four circumstances: where OCFS determines that a child was placed (1) for "gain," (2) "without due inquiry as to the character and reputation of the person with whom such child is placed," (3) "in such manner that such child is subjected to cruel or improper treatment or neglect or immoral surroundings," or (4) "in such manner that the religious faith of the child is not preserved and protected" as provided by law. N.Y. Soc. Serv. Law § 385(1). None of these circumstances obtains here. To the contrary, in October 2018, OCFS commended New Hope for its "supportive and detailed adoptive family selection process." J. App'x at 84.

In response to an inquiry from this court as to the source of its authority to order New Hope's closure, OCFS cites N.Y. Soc. Serv. Law § 34(3)(e), which authorizes the agency to "enforce," *inter alia*, laws and regulations pertaining to adoption. But nothing in that section, or any other authority cited by OCFS, indicates the scope of the enforcement authority conferred by § 34(3)(e), specifically, whether OCFS's enforcement authority is akin to that of police and prosecutors, who investigate and charge violators, or whether it also extends to judicial-like authority to prescribe the punishment for violations, specifically, the punishment of closure.

We do not here decide whether OCFS's closure authority reaches further than that expressly afforded by N.Y. Soc. Serv. Law § 385(1). We conclude only that until the source of any broader authority is identified and considered in light of the circumstances of this case, the severity of OCFS's comply-or-close decision adds some weight to New Hope's claim of hostility toward its religious beliefs.

Fifth, New Hope asserts that OCFS's 2018 actions in enforcing 18 NYCRR § 421.3(d) has forced the closure of several other adoption agencies sharing its religious beliefs about family and marriage. This warrants further inquiry because "the effect of a law in its real operation" can be "strong evidence of its object." *Lukumi v. Hialeah*, 508 U.S. at 535, 113 S.Ct. 2217. If we assume, as we must on dismissal, that the effect of OCFS's comply-or-close method for enforcing § 421.3(d) fell almost exclusively on adoption services holding particular religious beliefs, that is some reason to suspect that the object of the law

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was to target those beliefs and to exclude those who maintain them from the adoption process. This suspicion is reinforced by circumstances, already discussed, indicating OCFS's awareness (at the pleadings stage) (1) that neither the state legislature nor executive intended for adoption agencies to have to compromise religious beliefs in order to continue operating in the state, and (2) that recusal and referral were available means for agencies to avoid having their religious beliefs adversely affect the adoption applications of unmarried and same-sex couples.

In sum, the pleadings, if accepted as true and viewed in the light most favorable to New Hope, do not permit a court to ***170** conclude as a matter of law that 18 NYCRR § 421.3(d), as promulgated and enforced by OCFS, was neutral and not based on some hostility to New Hope's religious beliefs. Thus, dismissal of New Hope's Free Exercise claim was premature. The matter warrants discovery.

3. Free Speech Claim

New Hope claims that OCFS also violated its constitutional right to Free Speech in two ways: (a) by compelling it to say something it does not believe, *i.e.*, that adoption by unmarried or same-sex couples can be in the best interests of a child; and (b) by requiring it to associate with such couples, thereby impeding New Hope's ability to promote its own beliefs and values about religion, marriage, and family.

The district court dismissed the compelled speech part of this claim on two grounds: (1) any speech at issue is "government[ ] speech," for which New Hope cannot claim First Amendment protection; and (2) New Hope failed plausibly to plead that its speech was being compelled in any way. These two conclusions, in turn, informed the district court's decision to dismiss New Hope's expressive association claim because it could not plausibly plead more than "slight" injury to its expressive activities. *See New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d at 217, 219.

For the reasons explained herein, the pleadings, viewed most favorably to New Hope, do not permit a court to reach these conclusions now as a matter of law.

a. Compelled Speech

"At the heart of the First Amendment" is the principle "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 213, 133 S.Ct. 2321 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)). Consistent with this principle, freedom of speech means that the "government may not prohibit the expression of an idea," even one that society finds "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *see generally Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631, ––– U.S. ––––, ––––, 140 S.Ct. 2335, 207 L.Ed.2d 784 (U.S. July 6, 2020) (plurality opinion) (describing First Amendment as "a kind of Equal Protection Clause for ideas" (internal quotation marks omitted)). For much the same reason, government also cannot tell people that there are things "they must say." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 213, 133 S.Ct. 2321 (quoting *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)); *accord Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, ––– U.S. ––––, 138 S. Ct. 2448, 2463, 201 L.Ed.2d 924 (2018) (stating that First Amendment prevents government from "[c]ompelling individuals to mouth support for views they find objectionable"). Thus, when government "direct[ly] regulat[es] ... speech" by mandating that persons explicitly agree with government policy on a particular matter, it "plainly violate[s] the First Amendment." *Agency v. Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 213, 133 S.Ct. 2321.[23]

***171** The pleadings here, viewed most favorably to New Hope, plausibly charge OCFS with an impermissible direct regulation of speech. As discussed *supra* at 155–57, all New Hope's adoption services—from counseling birthmothers, to instructing and

evaluating prospective adoptive parents, to filing its ultimate reports with the court—are laden with speech. But, more to the point, these services are provided so that, at their end, New Hope itself can *speak* on the determinative question for any adoption: whether it would be in the best interests of a child to be adopted by particular applicants. New Hope asserts that, based on its religious beliefs about marriage and family, it does not believe and, therefore, cannot state, that adoption by unmarried or same-sex couples would ever be in the best interests of a child. It charges OCFS with requiring it to say just that—or to close down its voluntary, privately funded adoption ministry. *See* Compl. ¶ 271 (alleging that OCFS "requires New Hope to engage in speech and expression that it does not wish to convey—speech and expression that violate[ ] its core religious beliefs—by compelling it to recommend same-sex couples or unmarried couples as adoptive parents"). These pleadings are sufficient to withstand dismissal.

Moreover, neither reason cited by the district court supports a contrary conclusion at this stage of the case.

i. Government Speech

The district court concluded that because New Hope is a state-authorized adoption agency, any speech involved in its provision of adoption services is "government[ ] speech" for which New Hope cannot claim First Amendment protection. *New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d at 217 ("New Hope's speech, to the extent any is required when performing its services as an authorized [adoption] agency, constitutes governmental speech. ..."); *see, e.g.*, *Matal v. Tam*, ––– U.S. ––––, 137 S. Ct. 1744, 1757, 198 L.Ed.2d 366 (2017) (collecting cases recognizing that Government's own speech is exempt from First Amendment scrutiny). The Supreme Court, however, has held that the mere fact that government authorizes, approves, or licenses certain conduct does *not* transform the speech engaged therein into government speech. The reason is plain: "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. at 1758 (holding that federal registration of trademark does not make the mark government speech); *see also National Inst. of Family and Life Advocates v. Becerra*, ––– U.S. ––––, 138 S. Ct. 2361, 2375, 201 L.Ed.2d 835 (2018) (rejecting idea that government acquires "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement");[24] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion) (holding advertising limits on liquor retailers violated First Amendment, explaining that state decision to license its liquor retailers did ***172** not permit it to condition license on "surrender of a constitutional right").

The district court relied primarily on two cases to support its identification of "government[ ] speech" here. Both are inapt because the speech-challenged conditions were there imposed on government-funded services. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (challenging federal funding condition prohibiting legal services corporations from using funds to "challenge existing welfare law"); *Fulton v. City of Philadelphia,* 320 F. Supp. 3d 661 (challenging non-discrimination provision of contract with City to provide foster care services).[25] In *Velazquez*, the Supreme Court observed that "*[w]hen the government disburses public funds to private entities* to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 531 U.S. at 541, 121 S.Ct. 1043 (brackets in original) (emphasis added) (internal quotation marks omitted); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 214, 133 S.Ct. 2321 (collecting cases recognizing that, under Spending Clause, Congress can impose some conditions on federal funding that it could not impose directly without violating First Amendment). The district court in *Fulton* relied on *Velazquez*'s quoted language in holding that Philadelphia permissibly included a non-discrimination condition in its contract with CSS funding a part of the organization's foster care services. *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d at 696–97. The reasoning of these cases does not apply here because New Hope receives no government funding, either by way of a grant program or a contract. Indeed, New Hope alleges that it avoids government funding precisely to "ensure its autonomy to operate in accordance with its religious beliefs." Compl. ¶ 51. Thus, "subsidized speech" cases cannot support the identification of "government speech" here. *See Matal v. Tam*, 137 S. Ct. at 1760–61 (Alito, J., plurality opinion).[26]

Insofar as a particular viewpoint might be identified as "government speech" without regard to government funding, the *Matal* Court urged "great caution" in extending ***173** the doctrine beyond its established precedents. *Id.* at 1758. As Justice Alito explained, the government-speech doctrine is both "essential" and "dangerous": essential to avoid "paralyzing" government, *id.* at 1757 (observing that when "government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others"), but dangerous because, as we have already noted, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints," *id.* at 1758. [27]

In *Matal v. Tam*, 137 S. Ct. at 1759–60, the Court identified three circumstances where Supreme Court precedents identified government speech: a federally created advertising program to promote the sale of beef, *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005); a local government's acceptance of a Ten Commandments monument for display in a city park, *see Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853; and a state's allowance of specialty license plates, *see Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015).

In the first circumstance, the Court held that the ads were government speech because "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government." *Matal v. Tam*, 137 S. Ct. at 1759 (brackets in original) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. at 560, 125 S.Ct. 2055, and noting that Congress and Secretary of Agriculture provided guidelines for content of ads, Agriculture officials attended meetings at which content of ads was discussed, and Secretary could edit or reject any proposed ad).

In the monuments case, "many factors" indicated that park monuments represented government speech, among them, (a) government's historic use of monuments to speak to the public, (b) a tradition of parks selectively accepting and displaying donated monuments, (c) the public's close identification of public parks with the government owning the parkland, and (d) the accepted monuments were meant to and had the effect of conveying a government message. *Id.* at 1759–60 (citing *Pleasant Grove City v. Summum*, 555 U.S. at 472, 129 S.Ct. 1125).

Finally, in the specialty plates case—described by *Matal* as "likely mark[ing] the outer bounds of the government-speech doctrine"—three factors were determinative: (a) States had long used license plates to convey government messages; (b) the public closely identified license plates with the State because it manufactured and owned the plates, generally designed them, and used them as a form of government identification; and (c) Texas maintained direct control over the messages conveyed on specialty plates. *Id.* at 1760 (citing ***174** *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. at 207–13, 135 S.Ct. 2239). [28]

The factors highlighted in these cases are either not present here, or not sufficiently present at the pleading stage to warrant reliance on government speech as a ground for dismissal.

First, by contrast to the monuments discussed in *Pleasant Grove* and the license plates at issue in *Walker*, 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.

Second, by contrast to any of the three precedents cited in *Matal,* nothing in the pleadings suggests that the public understands New Hope's expressive activities, either in generally providing adoption services or, ultimately, in recommending a child's placement, to be the State's own message. The general principle that State authorization by itself does not transform the authorized actor's speech into government speech, *see Matal v. Tam,* 137 S. Ct. at 1758, applies with particular force here, where New York itself operates 58 state-denominated adoption agencies at the same time that it authorizes some 70 private, non-profit organizations also to offer adoption services. Many of those organizations, including New Hope, have done so for decades and have long established private identities.

The pleadings further indicate that, from its first meeting with prospective adoptive parents, New Hope makes its private identity clear, specifically, its identity as a religious ministry. It starts meetings with a prayer and uses scripture passages and religious texts to explore "how faith in God can help [adoption] applicants." Compl. ¶¶ 105, 109, 111–112. A person listening to such explicitly religious messages from a private entity operating from a non-state location would not be likely to understand the messages conveyed as those of the State of New York, rather than New Hope's own. *Cf. Pleasant Grove City v. Summum*, 555 U.S. at 472, 129 S.Ct. 1125 (holding government's acceptance of monument for public parkland, where government had used monuments to convey its messages to public, identified monument as "government speech"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. at 560, 125 S.Ct. 2055 (stating that message set out in challenged promotion was "from beginning to end the message established by the Federal Government"). Indeed, OCFS itself does not seem to think there is much risk of misattribution because it nowhere suggests that there is anything improper in New Hope conveying religious messages or employing religious rituals in providing adoption services, which presumably New Hope could not do if it were speaking for the State.

Viewed most favorably to New Hope, then, the pleadings suggest that OCFS is not seeking to avoid having New Hope's views attributed to the State but, rather, is demanding that New Hope—in order to continue operating as an authorized adoption agency—express a State view with which it disagrees, *i.e.*, that it can be in the best interests of a child to be adopted by an unmarried or same-sex couple. In *Walker,* the Supreme Court stated that "the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private ***175** party disagrees." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. at 219, 135 S.Ct. 2239. Indeed, this limitation may apply even when the government is looking to communicate its own message through a private entity. *See id.* at 208, 135 S.Ct. 2239 (stating that "Free Speech Clause itself may constrain the government's speech if ... the government seeks to compel private persons to convey the government's speech").

Third, although the adoption process in New York is certainly more regulated than the trademark process at issue in *Matal v. Tam,* 137 S. Ct. at 1758–59, a court cannot conclude at the pleadings stage that "from beginning to end" the messages conveyed by New Hope are so controlled by New York as to be the State's own, *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. at 560, 125 S.Ct. 2055. As discussed *supra* at 151–53, the laws and regulations identifying factors relevant to determining the best interests of a child awaiting adoption appear to afford authorized agencies considerable discretion in weighing those factors and in exercising independent judgment as to the propriety of any particular placement. By contrast to the extensive involvement of federal officials in the promotional campaign at issue in *Johanns*, it seems no New York officials engage directly with private authorized agencies as they recruit, instruct, evaluate, and ultimately recommend adoptive parents to a child's birth parents and to the court. Nothing in the pleadings indicates that OCFS officials ever review, edit, or reject a private authorized agency's best-interests assessment before a child's placement in an adoptive family. *Cf. Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. at 213, 135 S.Ct. 2239 (highlighting State's maintenance of direct control over messages conveyed on specialty plates); *Pleasant Grove City v. Summum,* 555 U.S. at 471–72, 129 S.Ct. 1125 (referencing tradition of parks selectively accepting and displaying donated monuments); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. at 561, 125 S.Ct. 2055 (stating that government could edit, or even reject, proposed advertisement).

In sum, 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. Nor do they compel that conclusion as a matter of law when considered together. Further proceedings may produce additional evidence that casts these pleadings in a different light. We here hold only that New Hope's First Amendment compelled speech claim cannot be dismissed now on the ground that any speech at issue is government speech.

ii. No Compelled Speech

Alternatively, the district court dismissed New Hope's free speech claim because OCFS and 18 NYCRR § 421.3(d) "simply do not compel speech" or even compel New Hope "to change the message it wishes to convey." *New Hope Family Servs. v. Poole*, 387 F. Supp. 3d at 217–18. The court acknowledged New Hope's assertion that it provides "extensive" information to potential

adoptive parents and birthparents consistent with its religious views on marriage and the family. *Id.* at 218. Nevertheless, it concluded that "nothing is preventing New Hope from continuing to share its religious beliefs throughout the entire process." *Id.* Indeed, the court expressed "no doubt that New Hope's general disapproval of cohabitating unmarried couples and same sex couples will continue to be made clear." *Id.* Similarly, while acknowledging New Hope's complaint that forcing it to approve and recommend unmarried and same-sex couples as adoptive parents would "send a message ... that [New Hope] accepts such relationships as ***176** appropriate and believes that adoption by such couples can be in the best interests of the child," *id.* at 217 (brackets in original) (internal quotation marks omitted), the district court concluded that, in fact, "the only message that would be conveyed" by New Hope's approving an unmarried or same-sex couple for adoption "is that, applying the [relevant] regulatory criteria ..., placement with such a couple would be in the child's best interest," *id.*; *see also id.* at 218 ("[T]he only statement being made by approving such couples as adoptive parents is that they satisfy the criteria set forth by the state, without regard to any views as to the marital status or sexual orientation of the couple.").

Both conclusions are premature. It is hardly evident from the pleadings that OCFS, in requiring New Hope to conform its policies to 18 NYCRR § 421.3(d), would permit New Hope to counsel unmarried and same-sex couples that it is in the best interests of a child to be adopted by a heterosexual married couple and *not* in the best interests of a child to be adopted by an unmarried or same-sex couple. The regulation, after all, prohibits harassment as well as discrimination and, as the district court itself recognized in a colloquy exchange, if New Hope were to express such views, it would likely face a lawsuit "the next day." J. App'x at 237.

In its brief to this court, OCFS no longer disclaims the possibility of it restricting New Hope's speech in providing adoption services. Rather, OCFS acknowledges that "any restriction on New Hope's expressive activities within the contours of its provision of adoption activities remains unclear." Appellee Br. at 54.[29] While OCFS maintains that "New Hope remains free to espouse its beliefs about marriage and family," and to "advocat[e] for adoptions by married heterosexual couples, *outside* the contours of its provision of ... adoption services," *id.* (emphasis added), that concession is meaningless. New Hope does not claim that OCFS would compel or limit its speech if it loses authorization to provide adoption services. Rather, New Hope sues OCFS for violating its right to free speech as an authorized adoption agency. The pleadings record admits a plausible inference that New Hope cannot both comply with 18 NYCRR § 421.3(d), as required to retain its authorization to provide adoption services, *and* express its view that adoption by unmarried and same-sex couples is not in the best interests of a child. Thus, discovery is warranted to determine the extent to which the required compliance will restrict or compel New Hope's speech.

Nor is a different conclusion warranted by OCFS's assertion that "all" it has done to date is "regulate New Hope's conduct—its refusal to provide adoption services to or place children with unmarried and same-sex couples." *Id.* at 51. As the Supreme Court has long recognized, even conduct can claim the protections of Free Speech where "[a]n intent to convey a particularized message [is] present, and ... the likelihood [is] great that the message would be understood by those who viewed" or learned of the conduct. *Texas v. Johnson*, 491 U.S. at 404, 109 S.Ct. 2533 (first brackets in original) (internal quotation marks omitted); *see Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004) (same). In any event, the pleadings here, viewed most favorably to New Hope, demonstrate more than conduct. New Hope asserts that, consistent with New York law, it can only ***177** place a child with an adoptive couple if it approves the placement as in the best interests of the child. *See* 18 NYCRR § 421.18(d). Thus, New Hope has a plausible claim that by compelling it to place children with unmarried and same-sex couples, OCFS is necessarily compelling New Hope to engage in the speech required for that conduct—speech with which New Hope does not agree.

The district court recognized the inextricable link between New Hope's speech and conduct in the placement of a child for adoption. Nevertheless, the court dismissed New Hope's free speech claim upon concluding that the only message that its approval would convey is that an unmarried or same-sex couple satisfies the State regulations' criteria for an adoptive placement. *See New Hope Family Services v. Poole,* 387 F. Supp. 3d at 217. This implies that approval communicates no judgment by New Hope itself. Again, this conclusion cannot be reached at the pleadings stage.

As we have already observed, the regulatory criteria applicable to adoption provide agencies with no mere quantitative checklist. [30] Rather, the regulations, by their nature, entrust authorized agencies with considerable discretion to exercise judgment in determining the best interests of a child. *See supra* at 151–53 (discussing various regulations). OCFS acknowledges as much in stating that "[t]he statutory [and regulatory] scheme bestows significant authority on authorized agencies." Appellee Br. at 4. Nowhere do the regulations define "best interests." They state only that the determination should consider, (1) "the appropriateness of placement in terms of the age of the child and of the adoptive parent(s)"; (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s)"; and (3) "the requirement ... to place minor siblings or half-siblings together ... unless ... such placement [is determined] to be detrimental to the best interests of one or more of the children." *Id.* § 421.18(d). These factors admit no single answer, but require the exercise of agency judgment. Moreover, the regulation states that a best-interests determination is "not limited to" these factors, *id.*, which further cautions against a narrow characterization of the message conveyed by such a determination.

Related regulations are similarly broadly cast. For example, in the home study that adoption agencies must conduct before deciding whether it is in the particular interest of a child to be placed with an applicant, the agency must "explore each applicant's ability to be an adoptive parent," discussing a range of topics including "principles related to the development of children," "reasons a person seeks to become an adoptive parent," the applicant's "understanding of the adoptive parent role," the applicant's "psychological readiness to assume responsibility for a child," and the agency's role in "supervising and supporting the adoptive placement." *Id.* § 421.15(d). Agencies must also "explore" an applicant's "capacity to give and receive affection," and "ability to provide for a child's physical and emotional needs." *Id.* § 421.16(a). The regulations do not instruct authorized agencies as to how they should evaluate or weigh these factors. Rather, these matters are left to the exercise of agency judgment and discretion, which will necessarily be informed, to at least some degree, by the agency's conception of a child's best interests.

***178** In New Hope's case, that conception has, as its starting point, the "biblical model for the family" as "one man married to one woman for life." Compl. ¶ 56. Given the discretion inherent in New York laws and regulations pertaining to the identification of adoption placements that are in the best interests of a particular child, a court could not conclude on the pleadings that New Hope can identify a child's best interests, and, therefore, approve an adoption placement, without communicating its viewpoint —or the one that it complains OCFS is compelling it to adopt. Thus, it was premature for the district court to conclude that requiring New Hope to provide adoption services to unmarried and same-sex couples compelled no speech subject to First Amendment protection.

b. Expressive Association

As a second part of its Free Speech claim, New Hope charges OCFS with impeding its right of association.

"Association" occupies a clearer place in American history than in American law. As to the former, what Tocqueville famously observed in 1835 has remained true for almost two centuries: "In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 191 (Phillips Bradley ed., Vintage Books 1990) (1835). As pertinent here, one of the "objects" for which Americans have laudably associated throughout their history has been to care for orphaned and abandoned children. *See supra* at 150 n.3.

The law, however, recognizes no fundamental "right of association." The First Amendment does not, by its terms, pronounce such a right. *See City of Dallas v. Stanglin*, 490 U.S. 19, 23–24, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). Nevertheless, the Supreme Court has applied the First Amendment to association claims in two limited circumstances: "choices to enter into and maintain certain intimate human relationships," and "associat[ion] for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see Jacoby & Meyers, LLP v. Presiding Justices of*

the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of N.Y., 852 F.3d 178, 187–88 (2d Cir. 2017). It is the latter—so–called "expressive association"—that New Hope invokes in this case.

New Hope asserts that its adoption ministry is an expressive association in that it employs protected speech 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." Compl. ¶ 270. New Hope alleges that OCFS's actions in applying 18 NYCRR § 421.3(d) impair New Hope's ability to advocate for its values. Specifically, New Hope maintains that requiring it to "[i]nclud[e] unmarried or same-sex couples in [its] comprehensive evaluation, training, and placement programs and adoptive-parent profiles would change New Hope's message and counseling to adoptive families and birthparents." *Id.* ¶ 273. [31]

***179** In dismissing New Hope's association claim, the district court concluded that the adoption agency could show only "slight impairment" to its expressive activity because New Hope was "not being required to hire employees that do not share [its] same religious values," and was not "prohibited in any way from continuing to voice [its] religious ideals." *New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d at 219. For the same reasons the latter conclusion cannot be reached at the pleading stage with respect to New Hope's compelled speech claim, *see supra* at 175–78, it cannot be reached with respect to New Hope's expressive association claim.

As for the "slight impairment" conclusion, it too is premature. Compelled hiring, like compelled membership, may be a way in which a government mandate can "affect[ ] in a significant way [a] group's ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. at 648, 120 S.Ct. 2446. But it is not the only way. *Cf. Rumsfeld v. FAIR,* 547 U.S. at 69, 126 S.Ct. 1297 (acknowledging that "freedom of expressive association protects more than just a group's membership decisions").

The pleadings, viewed most favorably to New Hope, indicate that OCFS, in enforcing 18 NYCRR § 421.3(d), may require New Hope to "correct[ ] or disciplin[e]" employees who, sharing New Hope's religious beliefs, act on, or even express, those beliefs in interacting with birthparents or prospective adoptive parents. 18 NYCRR § 421.3(d) (prohibiting discrimination and harassment and requiring authorized agencies to correct or discipline employees who engage in such). In short, New Hope complains that OCFS is not only directly limiting its own ability to promote its beliefs and values through its adoption services, but also, OCFS is requiring New Hope to use discipline to enforce those same expressive limitations as to its employees. This admits a plausible inference that OCFS is making 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. *See Rumsfeld v. FAIR,* 547 U.S. at 68–69, 126 S.Ct. 1297.

In *Rumsfeld*, the Supreme Court rejected an expressive association challenge to a federal law requiring schools to afford equal campus access to military recruiters. The Court observed that such compelled access did not affect "a law school's associational rights" because "[s]tudents and faculty" remained "free to associate to voice their disapproval of the military's message" and "nothing about the statute affect[ed] the composition of the group by making group membership less desirable." *Id.* at 69–70, 126 S.Ct. 1297. By contrast, here, the pleadings admit a plausible inference that neither New Hope nor any employees that associate with it in its adoption ministry will be free to voice their religious beliefs about the sorts of marriages and families that they believe best serve the interests of adopted children. Thus, discovery is required to determine what, if any, leeway OCFS will grant New Hope and its like-minded employees in expressing their religious views before any determination can be made as to how significantly ***180** OCFS's challenged actions will impede New Hope's associational ability to advocate its religious viewpoints.

Because New Hope's expressive association claim survives dismissal on these grounds, we need not now conclusively decide whether a claim of compelled association with unmarried and same-sex couples pursuing adoption implicates expressive association. While such couples may not be seeking the sort of affiliation with New Hope generally associated with membership organizations, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554, neither is theirs the "chance encounter[ ]" of dance-hall patrons, *City of Dallas v. Stanglin*, 490 U.S. at 25, 109 S.Ct. 1591. Rather, the pleadings, viewed most favorably to New Hope, indicate that OCFS is requiring New Hope to associate with unmarried and same-sex couples for

the purpose of providing services leading to adoption, an outcome that could tie New Hope, the couple, and an adopted child together for months, or even years. *See supra* at 155–57. To the extent New Hope maintains that such compelled association would impede its ability to convey its religious beliefs about adoption in a way distinct from that resulting from the compelled speech of which it complains, it will have the opportunity to develop supporting evidence during discovery. We do not here predict whether New Hope will be able to do so. *Cf. Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019) (holding expressive association challenge to law prohibiting videographers from discriminating between heterosexual and same-sex weddings was "really a disguised free-speech claim" duplicative of claim on compelled-speech theory, and allowing only latter to proceed). We conclude only that the expressive association claim does not fail as a matter of law on the pleadings.

In sum, we conclude that none of New Hope's First Amendment claims—for Free Exercise of Religion, for Free Speech on a theory of compelled speech, and for Free Speech on a theory of expressive association—can be dismissed at the pleadings stage. Accordingly, we reverse the judgment of dismissal as to these claims.

III. Preliminary Injunction

We review the denial of a motion for a preliminary injunction for abuse of discretion, which we will identify only if the decision rests on an error of law or a clearly erroneous finding of fact, or cannot be located within the range of permissible decisions. *See, e.g., North Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018). The district court's denial of New Hope's preliminary injunction motion as moot rests on an error of law, specifically, the court's dismissal of all New Hope's claims. For reasons stated in the preceding sections of this opinion, New Hope's Free Exercise and Free Speech claims should not have been dismissed and, thus, its preliminary injunction motion was not moot.

New Hope urges that in vacating the denial of its preliminary injunction motion, this court direct entry of the requested injunction on remand. We recognize our authority to do so. *See, e.g.*, *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 489 (2d Cir. 2013); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 873 (2d Cir. 1996) ("Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a finding of merit in plaintiff's case, can in the alternative direct the district court to issue the injunction." (quoting *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986))). But we leave it to the ***181** district court in the first instance to decide if such equitable relief is warranted and its exact scope. Nevertheless, a few observations may be useful to guide the district court's exercise of its discretion on remand.

First, because New Hope seeks a preliminary injunction to stay government action taken in the public interest pursuant to a statutory (and regulatory) scheme, it must establish both a likelihood of success on the merits and irreparable harm in the absence of an injunction. *See Alliance for Open Soc'y Int'l, Inc. v. Agency for Int'l Dev.*, 651 F.3d 218, 230 (2d Cir. 2011), *aff'd.*, 570 U.S. 205, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013); *Alleyne v. N. Y. State Educ. Dep't*, 516 F.3d 96, 101 (2d Cir. 2008). The "loss of First Amendment freedoms ... unquestionably constitutes irreparable injury." *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (1996) (internal quotation marks omitted). Thus, "the dominant, if not the dispositive, factor" in deciding whether to grant a preliminary injunction in this case is New Hope's ability to demonstrate likely success on the merits of its Free Exercise and Free Speech claims. *New York Progress & Prot. PAC v. Walsh*, 733 F.3d at 488.

Second, when the pleadings are viewed in the light most favorable to New Hope, serious concerns arise as to whether OCFS's challenged actions violate the Free Exercise and Free Speech Clauses. *See supra* at 160–70 (discussing Free Exercise claim); *id.* at 175–78 (discussing compelled speech claim). In considering a motion for an injunction, however, a court is not required to view the pleadings in the light most favorable to New Hope. *See Pope v. Cty. of Albany*, 687 F.3d 565, 570 (2d Cir. 2012). Nevertheless, because New Hope's complaint is verified, the district court can treat its detailed factual allegations as evidence. *See Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir. 1995); 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1339 (4th ed. 1990).

In doing so here, the district court should consider that the facts alleged in the verified complaint, as well as those in sworn affidavits submitted by New Hope in support of a preliminary injunction, are largely unrefuted in OCFS's filings in opposition

to injunctive relief. The single opposing affidavit submitted by OCFS asserts that 18 NYCRR § 421.3(d) applies uniformly and neutrally to all authorized adoption agencies in New York. J. App'x at 169. But the assertion is conclusory and, while true as applied to the statutory text, *see supra* at 162–63, does not address pleaded circumstances raising neutrality concerns, detailed *supra* at 165–70. The district court may properly consider the lack of evidence assuaging these concerns in determining the likelihood of New Hope succeeding on its Free Exercise claim.

Similarly, in determining the likelihood of New Hope succeeding on its Free Speech claim, the district court can consider OCFS's failure to provide factual support for its contention that a privately funded, faith-based adoption agency such as New Hope engages in "government speech" when it makes adoption recommendations based on its determination of the best interests of a child. Nothing in the existing record indicates that any listener has ever understood New Hope to be speaking or acting as an agent of the State in providing adoption services. Indeed, an affidavit submitted by New Hope indicates the contrary. *See generally* J. App'x 131–134 (Bleuer Aff.). Nor is there existing record evidence that state officials exercise the degree of control over New Hope's expressive activities generally reflective of government speech. *See supra* at 174–75.

***182** As to the likelihood of New Hope showing that OCFS is compelling it to speak contrary to its beliefs, the district court should consider whether an agency's adoption recommendation—expressly or implicitly—pronounces a particular placement to be in the "best interests" of the child. It should also consider the possibility of New Hope's expressive activities in the provision of adoption services being restricted or penalized, particularly in light of OCFS's inability to assure otherwise in this court. *See supra* at 176.

Third, in opposing a preliminary injunction, OCFS characterizes "adoptive services" as "government services." J. App'x at 168–69. To the extent this characterization bears on the likelihood of New Hope succeeding on its claims, the district court can consider whether laws permitting only State "authorized" agencies to provide adoption services and establishing criteria for the provision of such services warrant recognizing the services themselves as governmental. Factors relevant to this determination can include that (a) authorized agencies, as in New Hope's case, can be privately funded and faith based; (b) the State does not preclude faith-based organizations from referencing religious beliefs and using religious rituals in providing adoption services, something that the State itself could not do; (c) the State itself operates over 50 adoption agencies at the same time it authorizes some 70 private adoption agencies; (d) the State's criteria for adoption services appear to afford authorized agencies considerable discretion in the final identification of the best interests of an adopted child; and (e) State regulations prohibit (or at least limit) consideration of certain facts, including a prospective parent's sexual orientation and marital status, in identifying the best interests of an adopted child.

Fourth, OCFS's declaration stresses the State's strong interest in preventing discrimination against prospective unmarried and same-sex couples. It maintains that preventing such discrimination serves the bests interests of children awaiting adoption by "provid[ing] a broad and diverse pool of adoptive parents" and, thereby, "maximiz[ing] the number of prospective adoptive parents." *Id.* at 168. It also serves "to prevent the trauma and social harm caused by discrimination against lesbian, gay, bisexual, transgender, queer or questioning (LGBTQ) people." *Id.*

Should the district court determine that New Hope is likely to succeed in demonstrating that 18 NYCRR § 421.3(d) is not being applied neutrally but, rather, is being used to exclude its religious beliefs from the public arena or to compel (or preclude) its speech, OCFS must do more than identify a State interest. It must demonstrate that its challenged actions are narrowly tailored to serve that interest without unnecessarily impairing New Hope's Free Exercise of Religion or Free Speech. *See, e.g.*, *Lukumi v. Hialeah*, 508 U.S. at 546, 113 S.Ct. 2217. Should the district court consider tailoring, record evidence raises certain concerns.

To state the obvious, it is no small matter for the State to order the closure of a privately funded, religious adoption ministry that has, over 50 years of authorized operation, successfully placed approximately 1,000 children in adoptive homes, particularly when there is no suggestion that any placement was not in the best interests of the adopted child. While there is no question that OCFS is authorized to enforce 18 NYCRR § 421.3(d), the exact source of its authority to order closure for a violation of

that regulation is not clear on the present record. *See supra* at 168–69. ***183** Thus, identifying that authority may be important to any tailoring determination.

Even assuming such authority, however, other tailoring concerns warrant consideration. For example, New Hope asserts that it does not provide adoption services to unmarried and same-sex couples because its religious beliefs do not permit it to state that it would be in the best interests of a child to be placed for adoption with such couples. To avoid its beliefs preventing such couples' pursuit of adoption, New Hope is willing now, as it has in the past, to recuse itself from their cases, and to refer them to other adoption agencies, including those operated by the State. The question arises: Is this recusal-and-referral practice a narrowly tailored means for avoiding discrimination without impairing New Hope's Free Exercise and Free Speech rights?

To be sure, recusal and referral do not permit unmarried and same-sex couples to obtain adoption services from New Hope. But the existing record reveals no complaint from any referred couple. Nor does it indicate that any couple was unable to adopt as a result of referral. In the absence of any such evidence, it is not evident that, pending resolution of the merits of this case, recusal and referral poses such a risk of trauma and social harm to unmarried and same-sex adoption applicants that nothing less than the closure of New Hope's adoption operation can adequately safeguard the State's interests. [32] Should OCFS adduce such evidence on remand, the district court can properly consider it in light of the totality of the circumstances, including how, if at all, New Hope's recusal-and-referral practice limits the ability of unmarried and same-sex couples easily to obtain adoption services; [33] and how well the State's interest in maximizing both the number and diversity of prospective adoptive parents is served by (a) allowing New Hope to continue providing adoption services subject to a recusal-and-referral practice, as compared to (b) requiring New Hope to close its adoption operation. These questions, like adoption itself, must also take into account the best interests of the many children awaiting adoption in a State where they number far more than the persons willing to adopt them.

In sum, because we reverse the dismissal of New Hope's Free Exercise and Free Speech claims, we also vacate the denial of New Hope's preliminary injunction motion as moot. This court does not order the district court on remand to grant such an injunction. Rather, we leave it to the district court, in the first instance, to weigh the merits of the motion consistent with this opinion.

IV. Conclusion

To summarize,

(1) The pleadings, viewed in the light most favorable to plaintiff New Hope, state plausible claims under the Free Exercise and Free Speech Clauses of the Constitution. Among other things, the pleadings,

(a) raise a plausible suspicion that OCFS acted with hostility towards New Hope because of the latter's religious beliefs,

(b) plausibly allege that New Hope would be compelled to speak or ***184** associate in violation of those beliefs if the regulation in question were enforced, and

(c) do not permit a court to conclude as a matter of law that New Hope's speech equates to government speech merely because New York State has authorized New Hope to provide adoption services.

(2) This case is not analogous to *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, ––– U.S. ––––, 140 S. Ct. 1104, 206 L.Ed.2d 177 (2020), now pending before the Supreme Court, because,

(a) New Hope is not under contract with and receives no funding from OCFS,

(b) OCFS has not identified New Hope as a public accommodation, and

(c) the issue on this appeal is whether New Hope has pleaded sufficiently plausible claims to defeat dismissal, not whether it has demonstrated the likelihood of success on the merits required for the injunctive relief denied in *Fulton*.

(3) Because New Hope's Free Exercise and Free Speech claims should not have been dismissed, its motion for a preliminary injunction was not moot and should not have been denied on that ground.

Accordingly, we REVERSE the district court's judgment insofar as it dismissed New Hope's Free Exercise and Free Speech claims, and we VACATE that judgment insofar as it denied New Hope's motion for a preliminary injunction. We REMAND the case to the district court for further proceedings consistent with this opinion, including prompt consideration of the merits of the reinstated preliminary injunction motion. To facilitate prompt review, we ORDER any party wishing to supplement its initial preliminary injunction filings in the district court to do so within ten days of the issuance of this court's mandate. Any appeal from a ruling by the district court on the preliminary injunction motion shall return to this panel. The limited injunction entered by this court pending appeal shall remain in effect unless and until vacated or modified by the district court. New Hope's June 18, 2020 motion for this court to expand this injunction pending appeal is DENIED as moot.

All Citations

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Footnotes

* Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

1 *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963) (observing that "freedom of expression" is "an essential element in a good society" that cannot be regulated or restricted even to achieve "other or more inclusive ends—such as virtue, justice, equality ..."; these must be pursued by "counter-expression and the regulation or control of conduct which is not expression").

2 Because Acting Commissioner Poole is sued only in her official capacity, in this opinion we refer to defendant as the State agency Poole heads, *i.e.*, "OCFS."

3 For example, in 1806, a group of New York City women—including Mrs. Alexander Hamilton—founded the Orphan Asylum Society, the city's first private charity devoted to caring for orphaned children who would otherwise have been consigned to public almshouses. *See* 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 280 (Robert H. Bremner *et al.*, eds., 1970); Mary Kelley, Book Review, 90 J. OF AM. HIST. 1023, 1023 (2003) (reviewing ANNE M. BOYLAN, THE ORIGINS OF WOMEN'S ACTIVISM: NEW YORK AND BOSTON, 1797–1840 (2002)). In 1817, Catholic nuns affiliated with the Sisters of Charity began caring for New York City orphans at the St. Patrick's Asylum. *See* ROBERT ERNST, IMMIGRANT LIFE IN NEW YORK CITY, 1825–1863, 35 (1949). The Hebrew Orphan Asylum was established in Manhattan in 1822. *See* REPORT OF THE PRESIDENT, THE HEBREW BENEVOLENT AND ORPHAN ASYLUM SOCIETY OF THE CITY OF NEW YORK, PROCEEDINGS OF THE SEVENTY-FOURTH ANNUAL MEETING 15–16 (1897). The Catholic Orphan Society of Brooklyn was founded in 1826. *See* MARY J. OATES, THE CATHOLIC PHILANTHROPIC TRADITION IN AMERICA 6 (1995). New York's Episcopal Church created an Orphan Home and Asylum in New York City in 1851. *See* COMMITTEE ON THE HISTORY OF CHILD-SAVING WORK, NATIONAL CONFERENCE ON SOCIAL WELFARE, HISTORY OF CHILD-SAVING IN THE UNITED STATES 158 (1893). New York's two best known institutions devoted to caring for orphaned, abandoned, and otherwise needy children, the Children's Aid Society and the New York Foundling Hospital, were created, respectively, in 1853 by private philanthropists and in 1869 by the Sisters of Charity. *See* Joseph M. Hawes, *Creating New Families: The History of Adoption in the United States*, 32 REVIEWS IN AM. HIST. 90, 91 (2004) (book review); MARTIN GOTTLIEB, THE FOUNDLING 11–12 (2001).

4 Children are "placed out" for adoption; they are "boarded out" for foster care. *See* N.Y. Soc. Serv. Law § 371(12), (14).

5 18 NYCRR § 421.16(d) states with respect to "[m]arital status":

Agencies must not consider marital status in their acceptance or rejection of applicants. However, one married partner may not adopt without the other unless one partner is living separate and apart from his or her spouse pursuant to a legally recognizable separation agreement or decree of separation, or one partner has been or will be living separate and apart from his or her spouse for a period of three years or more prior to the commencement of the adoption proceeding.

6 *See* 18 NYCRR § 421.18(c) (requiring authorized agency to place child in adoptive home "as similar to and compatible with his or her religious background as possible with particular recognition that section 373(3) of the Social Services Law requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child"); *id.* § 421.18(d)(2) (permitting authorized agency, when making placement decisions, to "consider 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 one of a number of factors used to determine best interests," but only where "[r]ace, color or national origin of the child or the adoptive parent ... can be demonstrated to relate to the specific needs of an individual child").

7 It is undisputed on this appeal that this enforcement authority, originally conferred on the Commissioner of the New York State Department of Social Services, *see* N.Y. Soc. Serv. Law § 34(3)(e), now rests with OCFS, a branch of the New York State Department of Family Assistance, the successor agency to the Department of Social Services, *see* 1997 N.Y. Laws 2922.

8 The referenced regulation stated that adoption "[a]pplicants shall not be rejected solely on the basis of homosexuality." 18 NYCRR § 421.16(h)(2) (2009). Rather, "[a] decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children." *Id.* This regulation, promulgated in or about 1981, remained in effect until 2013, when it was supplanted by 18 NYCRR § 421.3(d), discussed *infra* at 154–56.

9 18 NYCRR § 421 concerns "Standards of Practice for Adoption Services." Section 421.3 lists "General Requirements." At the time of the proposed amendment, the provision required adoption agencies (a) to have written policies and procedures; (b) to make provisions for those policies to be available and provide them to parents, adoptive applicants, and legal guardians; and (c) to maintain appropriate records.

10 In opposing New Hope's motion for a preliminary injunction in this litigation, OCFS assigned three other purposes to 18 NYCRR § 421.3(d): (1) it helps "provide a broad and diverse pool of adoptive parents" and "maximizes the number of prospective adoptive parents who may be assessed"; (2) it "seeks to prevent the trauma and social harm caused by discrimination against [LGBTQ] people" and "provides support and affirmation to LGBTQ youth awaiting an adoptive placement"; and (3) it reinforces "the State['s] ... strong interest in preventing discrimination in the provision of government services." J. App'x at 168–69 (McCarthy Decl.).

11 New Hope traces the long tradition of Christian adoption ministries to the following biblical passage: "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress." James 1:27 (quoted in Compl. ¶ 35).

12 *See* N.Y. Bus. Corp. Law § 202(a)(1) ("Each corporation, subject to any limitations provided in this chapter or any other statute of this state or its certificate of incorporation, shall have power in furtherance of its purposes ... [t]o have perpetual duration.").

13 While it appears that New Hope's religious view of marriage has remained constant throughout its history, it is not clear from the record exactly when this policy was committed to writing.

14 The record does not indicate the impetus for this new policy or detail how it departs from previous practice.

15 As evidence that OCFS forced religious adoption agencies that did not compromise their beliefs to close, New Hope points to the 2018 disappearance of a number of religious authorized adoption agencies from OCFS's website. *See* Compl. ¶ 202. It also observes that in a *Buffalo News* report about Catholic Charities Buffalo ending its 95-year history of adoption and foster care services, an OCFS spokeswoman is quoted as saying, "[d]iscrimination of any kind is illegal and in this case OCFS will vigorously enforce the laws designed to protect the rights of children and same sex couples. In New York State, we welcome all families who are ready to provide loving and nurturing homes to foster or adoptive children. There is no place for providers that choose not to follow the law." *Id.* ¶ 204 (quoting Stephen T. Watson

& Harold McNeil, *Catholic Charities Ending Foster, Adoption Programs Over Same-Sex Marriage Rule*, BUFFALO NEWS, August 23, 2018).

16 In granting dismissal, the district court observed that "OCFS does not contend that New Hope is not acting in the best interests of the children" it places for adoption, *New Hope Family Servs. v. Poole*, 387 F. Supp. 3d at 224, and expressed regret that the parties had not themselves been able to reach some accommodation:

> Until recent events, the parties have had a fruitful relationship; a relationship that has benefitted New York's children in immeasurable ways. For this reason, the Court would prefer that the parties seek out some compromise to their current dispute without further judicial intervention ... to avoid what may appear ... to be harsh legal results.

Id. at 225 (internal quotation marks omitted).

17 This case also differs from *Fulton* in that OCFS does not identify New Hope as a "public accommodation," *see Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 678–79 (E.D. Pa. 2018) (identifying CSS foster care services as such), *aff'd on other grounds*, 922 F.3d 140, a point we discuss further *infra* at 166–67.

18 Gubernatorial signing statements are routinely relied on in construing the reach of New York statutes. *See, e.g.*, *People v. Cagle*, 7 N.Y.3d 647, 651, 826 N.Y.S.2d 589, 860 N.E.2d 51 (2006); *Greer v. Wing*, 95 N.Y.2d 676, 680–81, 723 N.Y.S.2d 123, 746 N.E.2d 178 (2001).

19 *See generally Ward v. Polite,* 667 F.3d 727, 735 (6th Cir. 2012) (reinstating Free Exercise and Free Speech claims of graduate student dismissed from counseling program because, based on her religious views on homosexuality, she had sought to refer certain gay and lesbian clients to other counselors, observing, "[t]he point of the referral request was to *avoid* imposing her values on gay and lesbian clients" (emphasis in original)).

20 In its letter brief opposing New Hope's motion to expand this court's injunction pending appeal, OCFS asserts that "each time New Hope accepts a new placement request, there are fewer adoption opportunities available elsewhere," particularly for newborns—the focus of New Hope's ministry—for whom there is "especially high demand." Appellee Ltr. Br., ECF Doc. No. 199, at 7. OCFS offers no evidence to support this conclusion but will have the opportunity to do so on remand during discovery.

21 Recusal and referral might also be understood to avoid another constitutional concern—compelled speech—that could arise from OCFS using 18 NYCRR § 421.3(d) to compel New Hope to render adoption judgments contrary to its religious beliefs as a condition for its continued authorization to pursue an adoption ministry. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013) (reiterating "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say" (internal quotation marks omitted)). We pursue this point further *infra* at 170–71, 175–78, in discussing New Hope's Free Speech claim.

22 In *Masterpiece Cakeshop*, the Supreme Court acknowledged that the statements from that case quoted here—not the most egregious at issue, *see id.* at 1729— might mean "simply that a business cannot refuse to provide services based on sexual orientation." *Id.* But it observed that the statements could also be understood to endorse the impermissible view "that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.*

23 At issue in *Agency for International Development* was a challenged mandate that federal funding recipients "explicitly agree with the Government's policy to oppose prostitution and sex trafficking." 570 U.S. at 213, 133 S.Ct. 2321. The Supreme Court observed that if that requirement had been "enacted as a direct regulation of speech," it "would plainly violate the First Amendment." *Id.* The Court then proceeded to explain why the requirement violated the First Amendment even as a funding condition. *See id.* at 213–18, 133 S.Ct. 2321.

24 In *Becerra*, the Supreme Court ruled, *inter alia*, that requiring a licensed pregnancy center to provide women with notice of certain state services, including abortion, violated the First Amendment by altering the content of the clinic's speech. 138 S. Ct. at 2371–76.

25 *See supra* at 162–63, 164–65 (discussing *Fulton* history).

26 In *Matal v. Tam,* a Supreme Court plurality treated the questions of "government speech" and "subsidized speech" as distinct, noting that subsidized speech can "implicate a notoriously tricky question of constitutional law" because, at the same time that the law recognizes that "government is not required to subsidize activities that it does not wish to promote," it also prohibits government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." 137 S. Ct. at 1760–61 (internal quotation

marks omitted). Applying these principles in *Agency for International Development* and *Velazquez*, the Supreme Court ruled that the latter was determinative and that the challenged speech conditions there violated the First Amendment *even* as applied to funding recipients. *See* *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 214–15, 217–18, 133 S.Ct. 2321 (holding unconstitutional funding condition requiring recipients to affirm opposition to prostitution because it compelled grant recipient "to adopt a particular belief as a condition of funding"); *Legal Servs. Corp. v. Velazquez*, 531 U.S. at 540–41, 548–49, 121 S.Ct. 1043 (holding challenged funding condition on legal services unconstitutional because it "exclude[d] certain vital theories and ideas"). In *Matal v. Tam,* the plurality explained that there was no need to weigh the identified competing principles in that case because trademarks involved no government subsidy or expenditure beyond that associated with any government service. *See* 137 S. Ct. at 1761. The same conclusion obtains with respect to New Hope's privately funded, authorized adoption services.

27 Members of the Court had also expressed reservations about the government-speech doctrine in *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), discussed *infra* at 173–74, 175. *See* *Pleasant Grove City v. Summum*, 555 U.S. at 481, 129 S.Ct. 1125 (Stevens, J., joined by Ginsburg, J., concurring) (stating that "decisions relying on the recently minted government speech doctrine to uphold government action have been few, and, in my view, of doubtful merit"); *id.* at 484, 129 S.Ct. 1125 (Breyer, J., concurring) (expressing understanding that doctrine is "a rule of thumb, not a rigid category"); *id.* at 485, 129 S.Ct. 1125 (Souter, J., concurring in judgment) (urging Court to "go slow in setting" bounds of government-speech doctrine).

28 This court has relied on these three *Walker* factors in considering government-speech claims. *See, e.g.*, *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34–36 (2d Cir. 2018) (considering factors in determining that names of food vendors at state-organized lunch program were not government speech).

29 This represents a departure from OCFS's position before the district court. It there asserted that 18 NYCRR § 421.3(d) "neither compels, nor prohibits, New Hope from ... expressing its beliefs, religious or otherwise." J. App'x at 188.

30 We have no occasion here to consider whether other regulations, including quantitative factors, might implicate compelled speech in certain circumstances.

31 OCFS argues on appeal that New Hope is not engaged in expressive association because it is "not open to membership and was not organized for the purpose of engaging in expressive activities." Appellee Br. at 58. The membership argument fails for reasons stated in text *infra* at 178–80 with respect to compelled hiring. As for "purpose," even if OCFS's urged conclusion could be reached at the pleadings stage, it would not compel dismissal. The Supreme Court has required that an organization "engage in some form of expression"—not that it be expressly constituted for that purpose—to claim expressive association protection. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000), *as amended* (Nov. 29, 2000) (stating that Supreme Court has not required organization to be "primarily expressive[ ] in order to receive constitutional protection for expressive associational activity"). The pleadings easily satisfy this standard.

32 Insofar as OCFS also asserts a State interest in avoiding trauma and social harm to LGBTQ children awaiting adoption, that appears not to be at issue in this case given that New Hope professes to focus its adoption efforts on infants under the age of two. But, of course, if OCFS thinks otherwise, it can clarify its position on remand.

33 *See supra* at 167 n.20.

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EXHIBIT 3

493 F.Supp.3d 44
United States District Court, N.D. New York.

NEW HOPE FAMILY SERVICES, INC., Plaintiff,
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.

5:18-CV-1419 (MAD/TWD)
|
Signed 10/05/2020

Synopsis
Background: Christian adoption agency brought action alleging that New York Office of Children and Family Services (OCFS) regulation prohibiting adoption agencies from discriminating on basis of sexual orientation and marital status violated its rights under Free Exercise, Free Speech, and Equal Protection Clauses. The United States District Court for the Northern District of New York, Mae A. D'Agostino, J., 387 F.Supp.3d 194, dismissed complaint, and denied agency's motion for preliminary injunction. The United States Court of Appeals for the Second Circuit, Raggi, Senior Circuit Judge, 966 F.3d 145, reversed in part, vacated in part, and remanded.

Holdings: The District Court, Mae A. D'Agostino, J., held that:

regulation was not narrowly tailored to advance the state's compelling interests;

OCFS was attempting to compel speech by Christian adoption agency; and

agency's message was not so controlled by the State of New York as to constitute government speech.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

Attorneys and Law Firms

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MEMORANDUM-DECISION AND ORDER

MAE A. D'AGOSTINO, U.S. District Judge:

I. INTRODUCTION

Plaintiff New Hope Family Services, Inc. ("New Hope") commenced this civil rights action on December 6, 2018 challenging the constitutionality of the New York Office of Children and Family Services ("OCFS") interpretation and application of 18 N.Y.C.R.R. § 421.3(d). *See* Dkt. No. 1. On December 12, 2018, New Hope filed a motion for a preliminary injunction seeking to prevent OCFS from revoking New Hope's perpetual authorization to ***49** place children for adoption during the pendency of this litigation. *See* Dkt. No. 15. On January 14, 2019, OCFS cross-moved to dismiss the complaint in its entirety. *See* Dkt. No. 34. The Court granted OCFS's motion to dismiss in its entirety and denied New Hope's motion for a preliminary injunction as moot. *See* Dkt. No. 38. New Hope timely appealed. *See* Dkt. No. 40. On July 21, 2020, the Second Circuit Court of Appeals issued an order reversing this Court's dismissal of New Hope's Free Exercise and Free Speech claims and remanded this case for consideration of the motion for a preliminary injunction with specific instructions that the Court is bound to follow, and also noted that any appeal would be returned to the same panel. *See* Dkt. Nos. 44, 45. Currently before the Court is Plaintiff's motion for a preliminary injunction. *See* Dkt. No. 15.

II. BACKGROUND

A. Regulatory Scheme

In September 2010, New York State amended its Domestic Relations Law to codify the right to adopt by unmarried adult couples and married couples regardless of sexual orientation or gender identity. *See* 2010 S.B. 1523, Ch. 509; N.Y. Dom. Rel. Law § 110. "New York law authorizes the Commissioner of OCFS to enforce laws and rules pertaining to adoption." *New Hope Family Servs. v. Poole*, 966 F.3d 145, 153 (2d Cir. 2020) (citing N.Y. Soc. Serv. Law § 34(3)(e)). Pursuant to that authority, in January 2011, OCFS informed authorized adoption agencies in New York that the amendment brought the Domestic Relations Law into compliance with existing case law and was "intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home." After providing further guidance, adoption agencies were advised that, among other things, "discrimination based on sexual orientation in the adoption study assessment process is prohibited."

In November 2013, OCFS promulgated 18 N.Y.C.R.R. § 421.3(d) which, in accordance with existing law, prohibits "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" and requires that agencies authorized by New York to provide adoption services "shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." 18 N.Y.C.R.R. § 421.3(d).

"Adoption services in New York can only be provided by 'authorized agencies,' *i.e.*, entities incorporated or organized under New York law with corporate or legal authority 'to care for, to place out or to board out children.' " *New Hope*, 966 F.3d at 150 (quoting N.Y. Soc. Serv. Law §§ 371(10)(a), 374(2)). Agencies authorized to provide adoption services in New York must receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective parents. *See* 18 N.Y.C.R.R. § 421.15. After an adoption application is received, an adoption study must be completed. *See id.* at § 421.13. An adoption study must explore the following characteristics of prospective parents:

(1) capacity to give and receive affection;

(2) ability to provide for a child's physical and emotional needs;

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(3) ability to accept the intrinsic worth of a child, to respect and share his past, to understand the meaning of separation ***50** he has experienced, and to have realistic expectations and goals;

(4) flexibility and ability to change;

(5) ability to cope with problems, stress and frustration;

(6) feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and

(7) ability to use community resources to strengthen and enrich family functioning.

Id. at § 421.16(a). An application may only be rejected if (1) an applicant does not cooperate with the adoption study; (2) an applicant is "physically incapable of caring for an adoptive child;" (3) an applicant is "emotionally incapable of caring for an adopted child;" or (4) an applicant's approval "would not be in the best interests of children awaiting adoptions." *Id.* at § 421.15(g). Once an application is approved, the agency must add the applicant to the adoptive parent registry. *See id.* at §§ 421.15(i), 424.3(a).

"Authorized agencies can then board such children in foster homes or place them in prospective adoptive homes based on the agencies' assessment of the children's 'best interests.' Most relevant here, authorized agency approval, or consent, is required to finalize the adoption of any child placed by that agency." *New Hope*, 966 F.3d at 151 (quoting N.Y. Dom. Rel. Law §§ 111(1)(f), 113(1)). In making placement decisions, the agency must consider, among other things, (1) the ages of the child and prospective parent(s); (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);" (3) "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;" and (4) the ability of a child to be placed in a home with siblings and half-siblings. *See id.* Additionally, agencies must

> [m]ake an effort to place each child in a home as similar to and compatible with his or her religious background as possible with particular recognition that section 373(3) of the Social Services Law requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child.

Id. at § 421.18(c). Further, the Social Services Law provides that, "so far as consistent with the best interests of the child, and where practicable," the religious wishes of the birth parents should be honored. *See* N.Y. Soc. Serv. Law § 373(7).

B. New Hope Family Services

When an entity seeks to facilitate adoptions in New York, it must qualify as an "authorized agency" under the law before it may provide those services. *See* N.Y. Soc. Serv. Law § 371(10)(a); N.Y. Soc. Serv. Law § 374(2). New Hope is an "authorized agency" with the authority to "place out or to board out children ...," N.Y. Soc. Serv. Law § 371(10)(a), and "receive children for purposes of adoption." N.Y. Dom. Rel. Law § 109(4). As an "authorized agency," New Hope must be "incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children ... [and] shall submit and consent to the approval, visitation, inspection and supervision of such office as to any and all acts in relation to the welfare of children performed or to be performed under this title." N.Y. Soc. Serv. Law § 371(10)(a). Additionally, OCFS must approve an agency's certificate of incorporation. *See id.* at § 460-a.

In 1965, Evangelical Family Service, Inc., New Hope's predecessor agency, obtained a two-year certificate of incorporation ***51** from New York's Board of Social Welfare authorizing it "to accept legal custody and guardianship of children; to provide protective service for children; to provide foster care service to child[ren] and unwed mother[s]; to place children for adoption;

and [to] function in complete cooperation with all existing social welfare agencies." *New Hope*, 966 F.3d at 155-56 (quotation omitted). In 1967, New York made Evangelical Family Service's certificate of incorporation "perpetual." *Id.* at 156.

C. The Complaint

In 1958, Pastor Clinton H. Tasker founded what became New Hope Family Services as a Christian ministry to care for and find adoptive homes for children whose birth parents could not care for them. *See* Dkt. No. 1 at ¶ 3. New Hope dedicates a considerable portion of the complaint setting forth its religious beliefs, which the Court will not fully recount here. The Court fully accepts that New Hope and its employees have these sincerely held religious beliefs.

It is because of these religious beliefs that "New Hope will not recommend or place children with unmarried couples or same sex couples as adoptive parents." *Id.* at ¶ 153. New Hope's "Special Circumstances" policy states, in part, as follows:

> If the person inquiring to adopt is single ... [t]he Executive Director will talk with them to discern if they are truly single or if they are living together without the benefit of marriage ... because New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage.
>
> If the person inquiring to adopt is in a marriage with a same sex partner ... ([t]he Executive Director will ... explain that because New Hope is a Christian Ministry, we do not place children with same sex couples).

Id. at ¶ 154.

New Hope claims that it has worked with unmarried individuals who are truly single in the past and remains willing to work with such individuals. *See id.* at ¶ 155. Further, New Hope claims that because it "handles inquiries from unmarried couples and same-sex couples pursuant to the policy and practice described above, New Hope has never denied an unmarried couple or same-sex couple's application." *Id.* at ¶ 156. "Whenever a same-sex couple or unmarried couple is interested in a referral, New Hope refers them to the appropriate county social services office or another provider." *Id.*

Until recently, New York adoption law required that authorized agencies could only place children for adoption with "an adult unmarried person or an adult husband and his adult wife." N.Y. Dom. Rel. Law § 110 (2009). As mentioned above, in September 2010, New York amended its law to allow authorized agencies to place children for adoption with "an adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together." N.Y. Dom. Rel. Law § 110 (2010). New Hope notes that permissive language is used throughout the amended law and claims that "New York has *never* amended its law to *require* authorized agencies to place children for adoption with 'an adult unmarried person,' a same-sex 'adult married couple together,' or 'two unmarried adult intimate partners together.' " Dkt. No. 1 at ¶ 163 (emphasis in original). New Hope contends that "OCFS is attempting to use regulations to require exactly that: on July 11, 2011, OCFS issued a second letter that purported to clarify, but in fact materially changed, the adoption regulations then found in 18 NYCRR 421.16 and subpart ***52** (h). In that letter, OCFS declared that 'the intent of' subpart (h) 'is to prohibit discrimination based on sexual orientation in the adoption study assessment process. In addition, 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.' " *Id.* at ¶ 164 (quoting Office of Children & Family Services, Informational Letter, 11-OCFS-INF-05 (July 11, 2011)).

In 2013, OCFS amended its adoption regulations, declaring that authorized agencies, "providing adoption services shall ... (d) 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 (2018). Following the 2013 changes, OCFS issued another informational letter in 2016 which stated as follows:

> [T]his policy directive requires the formalization of any existing nondiscrimination and harassment policies and procedures, and possibly the revision of such policies and procedures, by requiring that ...

> [voluntary agencies] ... not engage in or condone discrimination ... on the basis of race, creed, color, national origin, sex, religion, sexual orientation, gender identity or expression, marital status or disability against ... applicants for adoption services, ... prospective foster parents, foster parents, or children in foster care.

Dkt. No. 1 at ¶ 167. New Hope claims that OCFS promulgated these new regulations "purporting to require adoption providers to place children with unmarried and same-sex couples in complete disregard for the law, the scope of OCFS's authority, and the rights of adoption providers." *Id.* at ¶ 168.

In January or February of 2018, Suzanne Colligan of OCFS called New Hope's then Acting Executive Director, Judith A. Geyer. *See id.* at ¶ 182. During the call, Ms. Colligan conveyed that, under a new policy implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures. *See id.* On July 18, 2018, Ms. Colligan sent an email to Ms. Geyer to schedule the adoption program review and included a list of things she needed to review, including New Hope's policies and procedures. *See id.* at ¶ 183. Based on Ms. Colligan's direction that she would need a copy of New Hope's policies and procedure manual, Ms. Geyer updated New Hope's formal policies and procedures on adoption into one consolidated manual. *See id.* at ¶ 184.

On August 28, 2018, Ms. Geyer received an email from Ms. Colligan, stating in part:

> I also thought that it might be helpful for you to see the application we use with agencies requiring reauthorization for corporate authority. Since you are authorized in perpetuity, your agency is not required to complete/submit this form. However, I will be asking many of the program questions on it, so you may find it helpful in preparing for my visit.

Dkt. No. 1 at ¶ 185.

On September 6, 2018, Ms. Colligan met with Ms. Geyer and Kathy Decesare, New Hope's Center Director, and took a copy of New Hope's policy and procedure manual with her when she left. *See id.* at ¶ 186. On October 1, 2018, OCFS sent a letter to Ms. Geyer that praised a number of strengths in New Hope's program, thanked New Hope for its professionalism during the meeting, and suggested a follow-up meeting to discuss a few opportunities for improvement. *See id.* at ¶ 187. On or about October 9, 2018, Ms. Geyer received a call ***53** from Ms. Colligan. During the call, Ms. Colligan stated that she had been reading New Hope's policies and procedures manual, and that New Hope's policy not to place children with those who are living together without the benefit of marriage or with same-sex couples violated 18 N.Y.C.R.R. § 421.3. *See id.* at ¶ 188. New Hope claims that Ms. Colligan told Ms. Geyer that New Hope would have to comply with § 421.3 by placing children with unmarried couples and same-sex couples. *See id.* at ¶ 189. Further, Ms. Colligan stated that if New Hope did not comply, New Hope would be "choosing to close." *Id.* at ¶ 190. Ms. Geyer responded that New Hope would be unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples. *See id.* at ¶ 191. Ms. Colligan responded by stating that " '[s]ome Christian ministries have decided to compromise and stay open.' " *Id.* at ¶ 192. Ms. Colligan informed Ms. Geyer that she would be getting a letter from OCFS mandating compliance by a specific date. *See id.* at ¶ 194.

On October 11, 2018, Ms. Colligan emailed Ms. Geyer, stating in part as follows:

> You will be receiving a letter from our office soon requesting a formal written response regarding your agency's position. When OCFS receives written notification of an agency's intention to close a program, OCFS will respond with written instructions to the agency with the steps they must take. These steps

> include the agency's responsibility to seek and obtain agreement with another NYS authorized agency to maintain and store their adoption records, of which includes the handling of activities outlined in the legally bound agreements with birth parents.

Id. at ¶ 195.

On October 12, 2018, Ms. Colligan sent an email to Ms. Geyer stating that "[w]e will put Monday's follow up meeting [to discuss a few minor improvements identified during the visit] on hold for now. The purpose of the follow up meeting would be to work on the necessary changes to your agency policy manual. Based on our recent phone call, the follow up meeting for those purposes does not appear needed at this time." *Id.* at ¶ 196. On October 17, 2018, Ms. Colligan indicated in an email to Ms. Geyer that she had mailed out a certified letter. That email stated that "[o]nce the letter is returned providing us with written notice of your intent, we will send out a letter outlining our expectations around the handling of those that you are currently providing services and the adoption records." *Id.* at ¶ 197.

On October 26, 2018, Ms. Geyer received an electronic copy of the letter to which Ms. Colligan had referred. The letter stated that New Hope's policy pertaining to "not placing 'children with those who are living together without the benefit of marriage' or 'same-sex couples' violates Title 18 NYCRR § 421.3." *Id.* at ¶ 198. The letter further stated:

> OCFS hereby requests a formal written response from [New Hope] stating the agency's position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the above-cited regulation. Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New ***54** Hope] will be required to submit a close-out plan for the adoption program.

Id. (quoting Dkt. No. 1-7). New Hope was given until November 30, 2018 to respond to OCFS's letter. *See id.* at ¶ 199.

D. Procedural History

On December 6, 2018, New Hope filed its complaint alleging that OCFS has violated various constitutional rights protected by the First and Fourteenth Amendments. *See* Dkt. No. 1. In its first cause of action, New Hope contends that OCFS's interpretation and enforcement of 18 N.Y.C.R.R. § 421.3(d) "targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices" in violation of the First Amendment's Free Exercise Clause. *See id.* at ¶¶ 230-63. In its second cause of action, New Hope argues that applying "section 421.3(d) to New Hope requires New Hope to engage in speech and expression that it does not wish to convey – speech and expression that violates its core religious beliefs – by compelling it to recommend same-sex couples or unmarried couples as adoptive parents" in violation of the First Amendment. *See id.* at ¶¶ 264-78. In its third cause of action, New Hope contends that section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it in violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at ¶¶ 279-90. Finally, in its fourth cause of action, New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." *Id.* at ¶¶ 291-95.

On December 12, 2018, New Hope filed a motion for a preliminary injunction. *See* Dkt. No. 15. On January 14, 2019, OCFS moved to dismiss the complaint in its entirety. *See* Dkt. No. 34. On February 19, 2019, after the motions were fully briefed,

the Court held oral arguments on both pending motions. On May 16, 2019, the Court granted OCFS's motion to dismiss the complaint and denied New Hope's motion for a preliminary injunction as moot. *See* Dkt. No. 38. New Hope timely appealed. *See* Dkt. No. 40. On July 21, 2020, the Second Circuit issued a decision reversing the Court's dismissal of New Hope's Free Exercise and Free Speech claims and remanded the case for a decision on the motion for a preliminary injunction. *See* Dkt. No. 44. In its decision, however, the Circuit listed numerous factors and pieces of evidence that this Court should consider in reaching its conclusion. *See New Hope*, 966 F.3d at 180-83. For the following reasons, New Hope's motion for a preliminary injunction is granted.

III. DISCUSSION

A. Standard of Review

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005) (citation omitted). "A decision to grant or deny a preliminary injunction is committed to the discretion of the district court." *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 78 (2d Cir. 1994) (citation omitted).

A party seeking a preliminary injunction must establish " 'a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party.' " ***55** *Allied Office Supplies, Inc. v. Lewandowski*, 261 F. Supp. 2d 107, 108 (D. Conn. 2003) (quoting *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003)).

The Supreme Court has observed that the decision of whether to award preliminary injunctive relief is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Consonant with this view, the Second Circuit has held that a district court may consider hearsay evidence when deciding whether to grant preliminary injunctive relief. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010). Therefore, the strict standards for affidavits under the Federal Rules of Evidence and in support of summary judgment under Rule 56(c)(4) of the Federal Rules of Civil Procedure requiring that an affidavit be made on personal knowledge are not expressly applicable to affidavits in support of preliminary injunctions. *See Mullins v. City of New York*, 634 F. Supp. 2d 373, 384 (S.D.N.Y. 2009) (citations omitted). Nevertheless, courts have wide discretion to assess the affidavit's credibility and generally consider affidavits made on information and belief to be insufficient for a preliminary injunction. *See* 11A Charles Alan Wright et al., Federal Practice and Procedure § 2949 (2d ed. 1995); *Mullins*, 634 F. Supp. 2d at 373, 385, 390 n.115 (declining to fully credit the "defendants' hearsay affidavit" and noting that while the court "may consider hearsay evidence in a preliminary injunction hearing ..., a court may weigh evidence based on whether such evidence would be admissible under the Federal Rules of Evidence").

Even if the plaintiff demonstrates irreparable harm and a likelihood of success on the merits, the remedy of preliminary injunctive relief may still be withheld if equity so requires. "An award of an injunction is not something a plaintiff is entitled to as a matter of right, but rather it is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999) (citation omitted).

"[B]ecause New Hope seeks a preliminary injunction to stay government action taken in the public interest pursuant to a statutory (and regulatory) scheme, it must establish both a likelihood of success on the merits and irreparable harm in the absence of an injunction." *New Hope*, 966 F.3d at 181 (citing *Alliance for Open Soc'y Int'l, Inc. v. Agency for Int'l Dev.*, 651 F.3d 218, 230 (2d Cir. 2011), *aff'd.*, 570 U.S. 205, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2020); *Alleyne v. N. Y. State Educ. Dep't*, 516 F.3d 96, 101 (2d Cir. 2008)). "The 'loss of First Amendment freedoms ... unquestionably constitutes irreparable injury.' " *Id.* (quoting *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (1996)). "Thus, 'the dominant, if not the dispositive, factor' in deciding whether to grant

a preliminary injunction in this case is New Hope's ability to demonstrate likely success on the merits of its Free Exercise and Free Speech claims." *Id.* (quoting *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013)).

B. Likelihood of Success on the Merits

1. Free Exercise Claim

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof ...." U.S. Const. amend. I. "The Fourteenth Amendment extends the protections of these Establishment and Free Exercise Clauses against state and local governments." ***56** *New Hope*, 966 F.3d at 160 (citing U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). "The Free Exercise Clause, in particular, guarantees to all Americans the 'right to believe and profess whatever religious doctrine [they] desire[ ],' even doctrines out of favor with a majority of fellow citizens." *Id.* at 161 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)).

" 'At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.' " *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210 (2d Cir. 2012) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). "Nonetheless, 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Id.* (quoting *Smith*, 494 U.S. at 879, 110 S.Ct. 1595). " '[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.' " *Id.* (quoting *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217) (internal citation omitted). "But the law has permitted government to avoid showing a compelling interest and narrow tailoring if the challenged ban on a religious practice is required by a valid and neutral law of general applicability." *New Hope*, 966 F.3d at 162 (citing *Smith*, 494 U.S. at 879, 110 S.Ct. 1595).

"The Supreme Court has instructed that a law is not neutral if its object 'is to infringe upon or restrict practices because of their religious motivation.' " *Id.* (quoting *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217). Both this Court and the Second Circuit have found that the regulation at issue here, 18 N.Y.C.R.R. § 421.3(d), is facially neutral. *See id.* at 163. However, this is only the first step. At the second step, "a court must 'survey meticulously' the totality of the evidence, 'both direct and circumstantial.' " *Id.* "It must consider 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.' " *Id.* (quoting *Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217 (internal quotation marks omitted); *accord Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, — U.S. ——, 138 S. Ct. 1719, 1731, 201 L.Ed.2d 35 (2018)). Finally, "the effect of a law in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535, 113 S.Ct. 2217.

In its supplemental briefing, New Hope argues that section 421.3(d) is neither neutral in either its origin or its enforcement nor narrowly tailored to advance a compelling interest. *See* Dkt. No. 52 at 17, 22. Specifically, New Hope points to multiple examples of conduct or statements which, when viewed in their totality, create suspicion of religious animosity. *See id.* at 17. Additionally, New Hope argues that OCFS has failed to identify any relevant compelling state interest and that, even if it had, closing New Hope does not meet strict scrutiny. *See id.* at 25-27. In opposition, OCFS argues that section 421.3(d) is neutral and generally applied. *See* Dkt. No. 53-4 at 1, 5-6. OCFS also argues that section 421.3(d) and its enforcement of the regulation through closure of New Hope is ***57** narrowly tailored to advance multiple compelling government interests. *See id.* at 6-13.

In examining the issue of neutrality of section 421.3(d), the Second Circuit found that the pleadings "give rise to the 'slight suspicion' of religious animosity[.]" *New Hope*, 966 F.3d at 165. The Second Circuit identified a number of allegations which, in totality, led to its conclusion and urged this Court to consider the same on remand. *See id.* First, the Second Circuit noted the disconnect between the seemingly permissive language used in the Domestic Relations Law and OCFS's mandatory approach in section 421.3(d). *See id.* at 165-66. Second, the Second Circuit noted OCFS's almost five year delay in enforcing section

421.3(d) against New Hope. *See id.* at 166. Third, the complaint alleges that OCFS personnel stated, in effect, that adoption agencies were essentially required to abandon their religious views if they conflicted with state law. *See id.* at 167-68. Fourth, the Second Circuit noted the severity of OCFS's action against New Hope. *See id.* at 168-69. Forcing New Hope to close was perceived by the Circuit as an incredibly severe reaction which "add[s] some weight to New Hope's claim of hostility toward its religious beliefs." *See id.* at 168-69. Finally, the Circuit noted allegations that OCFS forced the closure of multiple other adoption agencies which shared New Hope's beliefs about family and marriage. *See id.* at 169. These allegations, the Circuit explained, seem to be evidence of the " 'effect of the law in its real operation' " which can be strong evidence of the object of the law. *See id.* (citing *Lukumi*, 508 U.S. at 535, 113 S.Ct. 2217).

In its decision, the Second Circuit recommended that the Court consider the lack of evidence that section 421.3(d) applies uniformly and neutrally to all authorized adoption agencies. *See id.* at 181. In their supplemental briefing, OCFS argues only that "[a]s the Second Circuit recognized, 'a generally applicable anti-discrimination regulation will usually be understood to indicate neutrality rather than religious animosity.' " *See* Dkt. No. 53-4 at 8.

As previously mentioned, the Second Circuit noted a "disconnect between [section 421.3(d)] and the law it purports to implement, [New York Domestic Relations Law Section 110]." *New Hope*, 966 F.3d at 165. The Circuit described the statute as "permissive" and found that it does not contain a mandate "requiring adoption agencies to approve adoption by any persons." *Id.* Citing debate transcripts from the New York State Assembly, OCFS argues that it "reasonably interpreted the statute as permitting the agency to require that unmarried and same-sex couples be treated equally[.]" *See* Dkt. No. 53-4 at 10-12. However, in light of the Circuit's finding that the statute is "permissive," the Court cannot find OCFS's interpretation reasonable.

The plain language of section 110 serves to expand the persons who "may adopt." *See* N.Y. Dom. Rel. Law § 110; *New Hope*, 966 F.3d at 165. It does not impose any requirement on adoption agencies as to which adoption applications the agency must approve. *See* N.Y. Dom. Rel. Law § 110. Additionally, as the Second Circuit explained, examination of the enactment history reveals that included in the bill jacket is a statement from the Governor which states that the law allows more people to adopt than ever before "without compelling any agency to alter its present policies." *New Hope*, 966 F.3d at 166 (quoting Gov. Mem., New York Bill Jacket, 2010 S.B. 1523, ch. 509). This evidence indicates that the law was permissive, thereby indicating that OCFS's implementation of ***58** section 421.3(d) demonstrates some animosity towards particular religious beliefs.

In its supplemental briefing, OCFS provides an explanation for the delay in enforcement of section 421.3(d) against New Hope. *See* Dkt. No. 53-4 at 6-8. OCFS essentially argues that they were unaware of New Hope's discriminatory practices until 2018. *See id.* at 8. This lack of review is because New Hope was one of a small number of adoption agencies that operated with perpetual corporate authority. *See id.* at 7-8. OCFS's previous review process would occur during the corporate re-authorization process, but in 2017, it was discovered that this process resulted in agencies operating with perpetual corporate authority going significant lengths of time without review or visits from OCFS. *See id.* As a result of this discovery, OCFS modified its review procedures to include regular reviews for agencies operating with perpetual corporate authority, such as New Hope. *See id.* at 8. Also following this discovery, OCFS, as part of a remedial effort, reviewed all approved adoption agencies with perpetual corporate authority, including New Hope. *See id.* This evidence appears to cut against a finding that New Hope was targeted for review and action because of their religious beliefs.

However, the Second Circuit also considered allegations of certain statements made by OCFS personnel in evaluating hostility towards religious beliefs. *See New Hope*, 966 F.3d at 167-68. Specifically, New Hope alleges that when it protested OCFS's instruction to approve adoptions for same-sex couples or close its adoption service, OCFS responded that "[s]ome Christian ministries have decided to compromise and stay open." *See* Dkt. No. 1 at ¶ 192. New Hope also cites to a statement of OCFS's spokeswoman which she made in commenting on the closure of a Christian adoption agency in Buffalo. *See id.* at ¶ 204. New Hope alleges that OCFS stated that

> New York State law is clear ... discrimination of any kind is illegal and in this case OCFS will vigorously enforce the laws designed to protect the rights of children and same sex couples. In New York State, we welcome all families who are ready to provide loving and nurturing homes to foster or adoptive children. There is no place for providers that choose not to follow the law.

See id. In its supplemental briefing, OCFS argues that New Hope has mischaracterized the statement and that the statement only declares that agencies must obey the law. *See* Dkt. No. 53-4 at 13. However, consideration of the statement as a whole suggests that the adoption agency being discussed did not comply with the regulations regarding adoption of children by same sex couples and that OCFS utilized enforcement mechanisms against it.

As to the allegation that OCFS informed New Hope that it could "compromise and stay open," OCFS argues that this is a hearsay statement and is not sufficient to demonstrate likelihood of success on the merits. *See id.* However, the Second Circuit noted that this allegation, which was included in a verified complaint, and has not been contested by OCFS, may be treated as evidence. *See New Hope*, 966 F.3d at 181.

Another factor that was noted by the Circuit as bearing on religious hostility is the severity of OCFS's action in ordering the closure of New Hope. *See id.* at 168. During the appeal, the issue of the source of OCFS's authority to close New Hope was never resolved, but was flagged as an issue for the Court to consider as possible evidence of hostility towards New Hope's religious beliefs. *See id.* at 169. OCFS now argues that New Hope has left it with no choice but to force closure of the agency ***59** due to its non-compliance with the regulation. *See* Dkt. No. 53-4 at 13. Certainly, OCFS has the authority to enforce section 421.3(d), which presumably provides them authority to close agencies that choose not to comply with state law. However, because the Second Circuit questioned, without deciding, the legitimacy of OCFS's attempt to close New Hope, the Court finds this information to be neutral.

Finally, the Second Circuit noted that New Hope's allegations that other adoption agencies with similar religious beliefs about marriage and family were forced to close by OCFS may be evidence of hostility towards religious beliefs. *See New Hope*, 966 F.3d at 169. In its supplemental briefing, OCFS has denied that it closed any authorized adoption agencies in New York State in 2018 and 2019. *See* Dkt. No. 53-4 at 6. OCFS explains that a number of secular and faith-based adoption agencies voluntarily discontinued adoption services, others were removed for lack of corporate authority, and others lost accreditation or changed names. *See id.* At this point, the Court cannot know how many of the voluntary closures were the result of pressure from OCFS based on their religious beliefs, or if any such pressure was applied by OCFS at all. Thus, the Court finds this information to be neutral.

While not all of the evidence discussed weighs in favor of a finding of hostility when viewed individually, the totality of the evidence indicates that section 421.3(d), as promulgated and enforced by OCFS, is not neutral and appears to be based on some hostility towards New Hope's religious beliefs. In light of the Second Circuit's all but explicit direction, the Court finds that the totality of the evidence weighs in favor of a finding of hostility. In finding hostility, the Court relies on a number of factors that the Circuit noted in its decision. Those factors include OCFS's implementation of the seemingly permissive language of New York Domestic Relations Law Section 110 as mandatory requirements in section 421.3(d), the severity of OCFS's actions and the lack of explanation as to the legal authority to engage in such action, and statements made by OCFS personnel which demonstrate their motivations in enforcing section 421.3(d).[1] ***60** Because the regulation is not neutral and generally applied, then OCFS must demonstrate that section 421.3(d) is narrowly tailored to advance a compelling governmental interest. *See Commack*, 680 F.3d at 210 (quoting *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217). For the following reasons, the Court finds that OCFS has failed to make such a showing.

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Throughout this litigation, OCFS has argued that section 421.3(d) serves the state's interest in providing homes to children by increasing the number of prospective adoptive parents. *See* Dkt. No. 37 at 12. Most recently, OCFS has also argued that the state has a compelling interest in avoiding discrimination on the basis of marital status or sexual orientation. *See* Dkt. No. 53-4 at 14. Additionally, OCFS argues that there is no way to more narrowly tailor section 421.3(d) because permitting adoption agencies to refuse to consider applications of prospective families on grounds unrelated to their ability to parent serves to reduce the number of prospective adoptive parents. *See* Dkt. No. 37 at 12. New Hope argues that OCFS has failed to identify any relevant compelling state interest and, alternatively, that applying section 421.3(d) to close New Hope does not actually advance, nor is it narrowly tailored to advance, any compelling state interest. *See* Dkt. No. 52 at 23-27.

Certainly, the state has a compelling interest in fighting discrimination. *See Fulton v. City of Phila.*, 922 F.3d 140, 163 (3d Cir. 2019) (collecting cases). However, the regulation is not narrowly tailored to advance the state's compelling interest. The Second Circuit interpreted the amendment of the Domestic Relations Law as "signal[ing] an intent for some accommodation of religious beliefs[.]" *New Hope*, 966 F.3d at 166. By failing to provide such an accommodation to New Hope, section 421.3(d) is broader than is necessary to advance the state's compelling interest. Additionally, no one disputes that the state has a compelling interest in maximizing the number of families available to adopt. New Hope argues, however, that enforcing section 421.3(d) to close New Hope actually runs contrary to the state's interest in maximizing the number of families available for adoption. *See* Dkt. No. 52 at 23. The Court agrees. In this instance, section 421.3(d) is not narrowly tailored to advance the state's interest.

In its decision, the Second Circuit asked whether New Hope's "recusal-and-referral" practice is the most narrowly tailored means of avoiding discrimination without impairing New Hope's Free Exercise and Free Speech rights. *See New Hope*, 966 F.3d at 183. The Circuit noted that the record does not contain evidence of any complaints from referred couples nor does it indicate that couples were unable to adopt as a result of referral. *See id.* Absent such evidence, "it is not evident that, pending resolution of the merits of this case, recusal and referral poses such a risk of trauma and social harm to unmarried ***61** and same-sex adoption applicants that nothing less than the closure of New Hope's adoption operation can adequately safeguard the State's interests." *Id.* Accordingly, the Court finds that New Hope has demonstrated that it is likely to succeed on this claim.

2. Free Speech Claim

"New Hope claims that OCFS also violated its constitutional right to Free Speech in two ways: (a) by compelling it to say something it does not believe, *i.e.*, that adoption by unmarried or same-sex couples can be in the best interests of a child; and (b) by requiring it to associate with such couples, thereby impeding New Hope's ability to promote its own beliefs and values about religion, marriage, and family." *Id.* at 170. In opposition, OCFS argues that to the extent the Court finds that New Hope engages in speech in processing adoption applications, that such speech is government speech. *See* Dkt. No. 53-4 at 14. Alternatively, OCFS argues that section 421.3(d) is narrowly tailored to advance compelling state interests. *See id.* at 14-15.

a. Compelled Speech

" 'At the heart of the First Amendment' is the principle 'that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.' " *New Hope*, 966 F.3d at 170 (quoting *Agency for Int'l Dev.*, 570 U.S. at 213, 133 S.Ct. 2321 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994))). "Consistent with this principle, freedom of speech means that the 'government may not prohibit the expression of an idea,' even one that society finds 'offensive or disagreeable.' " *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Barr v. Am. Ass'n of Political Consultants*, ––– U.S. ––––, 140 S. Ct. 2335, 2354, 207 L.Ed.2d 784 (2020)). Similarly, the government may not tell people that there are things that they must say. *See Agency for Int'l Dev.*, 570 U.S. at 213, 133 S.Ct. 2321. "Thus, when government 'direct[ly] regulat[es] ... speech' by mandating that persons explicitly agree with government policy on a particular matter, it 'plainly violate[s] the First Amendment.' " *New Hope*, 966 F.3d at 170 (quoting *Agency for Int'l Dev.*, 570 U.S. at 213, 133 S.Ct. 2321) (alterations in original).

The Court continues to acknowledge the "inextricable link between New Hope's speech and conduct in the placement of a child for adoption." *Id.* at 176. On appeal, the Second Circuit identified three types services which are "laden with speech" relevant to New Hope's claims: "counseling birthmothers", "instructing and evaluating adoptive parents", and New Hope's reports regarding whether it is in the best interests of a child to be adopted by a particular applicant. *See id.* at 171. New Hope provides adoption services "so that, at their end, New Hope itself can speak on the determinative question for any adoption: whether it would be in the best interests of a child to be adopted by particular applicants." *Id.* New Hope argues that, because of its religious beliefs about marriage and family, "it does not believe and, therefore, cannot state, that adoption by unmarried or same-sex couples would ever be in the best interests of a child." *Id.*

The Court finds that by attempting to force New Hope to say that it is in a child's best interests to be placed with an unmarried or same sex couple, despite New Hope's sincere disagreement with that statement, OCFS is attempting to compel speech. Although OCFS argues that New Hope is not compelled to speak because there is an alternative, closure is ***62** surely a harsh alternative for New Hope and, as discussed below, it is not the most narrowly tailored means of advancing the state's compelling interests.

b. Government Speech

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009)). "That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech." *Id.* (citing *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000)). "Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Id.* (citing *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 559, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005)). "The Supreme Court, however, has held that the mere fact that government authorizes, approves, or licenses certain conduct does not transform the speech engaged therein into government speech." *New Hope*, 966 F.3d at 171.

Here, the Court previously found that any expressive conduct or other speech in which New Hope engaged in the course of providing adoption services constitutes government speech. *See* Dkt. No. 38 at 28. The Second Circuit disagreed. *See New Hope*, 966 F.3d at 175. In doing so, the Circuit noted that none of the traditional indicators of government speech are present here. *See id.* at 174. "[A]doption has not historically been treated by government as a means for it to communicate with the public on various matters." *Id. c.f. Pleasant Grove*, 555 U.S. 460, 129 S.Ct. 1125; *Walker*, 576 U.S. 200, 135 S.Ct. 2239. Additionally, the record does not "suggest that the public understands New Hope's expressive activities, either in generally providing adoption services or, ultimately, in recommending a child's placement, to be the State's own message." *New Hope*, 966 F.3d at 174. OCFS has not provided any information or evidence which indicates otherwise on either of these points. *See* Dkt. No. 53-4 at 14-18.

Finally, the Second Circuit noted that based on the pleadings, a court cannot conclude "that 'from beginning to end' the messages conveyed by New Hope are so controlled by New York as to be the State's own." *See New Hope*, 966 F.3d at 175 (quoting *Johanns*, 544 U.S. at 560, 125 S.Ct. 2055). In reaching this conclusion, the Circuit considered the amount of discretion afforded to each adoption agency in reaching a conclusion regarding the propriety of placements. *See id.* In its supplemental briefing, OCFS that "[a]gency discretion is not unbridled." *See* Dkt. No. 53-4 at 14. OCFS argues that it has the authority to decide what factors may or may not be considered in evaluating applicants and that compliance with such factors cannot be deemed speech. *See id.*

Although OCFS may use its judgment to determine what factors adoption agencies may or may not consider in processing adoption application, this does not eliminate the significant discretion that agencies have in determining whether placement with prospective adoptive parents is in the best interests of the child. *See New Hope*, 966 F.3d at 175. This discretion and authority has been recognized by OCFS. *See id.* at 177. In fact, the applicable regulations do not define what is in the best interests of the child, but rather provides a list of factors which the adoption agency must consider. *See id.* ***63** There is no

single determinative factor, rather this process requires an exercise of discretion by the agency. *See id.* Thus, the Court finds that New Hope's message is not so controlled by the State of New York as to be government speech.

The Second Circuit also urged caution in extending the doctrine of government speech beyond its established precedents. *See id.* at 172-73. Finding no precedent which would apply to this case, the Court cannot find that New Hope engaged in government speech in making recommendations as to the best interests of the child. *See id.* at 181.

In the alternative, OCFS argues that even if section 421.3(d) compels speech, it is narrowly tailored to avoid discrimination on the basis of marital status or sexual orientation and to promote the pool of potential adoptive families. *See* Dkt. No. 53-4 at 15. As discussed above, each of these interests are certainly compelling. However, section 421.3(d) is not narrowly tailored to advance those interests. As the Second Circuit explicitly asked: is New Hope's "recusal-and-referral" practice a narrowly tailored means for avoiding discrimination without impairing New Hope's Free Speech rights? *See New Hope*, 966 F.3d at 183. Based on the current record, the Court finds that it is.

As it stands, New Hope has demonstrated likelihood of success as to its claim that section 421.3(d) compels it to speak contrary to its religious beliefs by requiring that New Hope say that placement with unmarried or same sex couples is in the best interests of the child. At present, OCFS has presented New Hope with an ultimatum: make such a statement or close. However, the Court finds that the recusal-and-referral approach is more narrowly tailored to the state's interests while protecting New Hope's Free Speech rights. [2] Accordingly, the Court finds that New Hope has demonstrated likelihood of success on the merits of its Free Speech claim.

IV. CONCLUSION

After careful review of the record, the parties' arguments, and the applicable law, the Court hereby

ORDERS that Plaintiffs' motion to for a preliminary injunction (Dkt. No. 15) is **GRANTED**; and the Court further

ORDERS that OCFS may not revoke New Hope's perpetual authorization to place children for adoption during the pendency of this litigation;

ORDERS that, seeing no request from either party, Plaintiffs are not required to post a bond or undertaking as security for granting the above-mentioned preliminary injunction at this time; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

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Footnotes

1 In conducting its analysis, the Court cannot ignore the drastic difference in the circumstances which have historically led to findings of religious hostility and the circumstances of the present case. In fact, this Court previously made the same observation. *See* Dkt. No. 38 at 16-24. The Second Circuit disagreed. In *Lukumi*, the Supreme Court noted that the sessions surrounding the creation of the law at issue were rife with hostility, with municipal leaders calling the church "an abomination of the Lord." *See Lukumi*, 508 U.S. at 541, 113 S.Ct. 2217. In *Masterpiece Cakeshop*, the Supreme Court noted hostile comments from members of the Colorado Civil Rights Commission and the commission's inconsistent treatment of religious discrimination and sexual-orientation discrimination to conclude that the commission's treatment of a cake shop owner "violated the [s]tate's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. In *Trump v. Hawaii*, the record contained significant amounts of anti-Muslim animus. *See Trump v. Hawaii*, ––– U.S. ––––, 138 S. Ct. 2392, 2417-18, 201 L.Ed.2d 775 (2018) (noting statements by the President that "Islam hates us" and that the country is "having problems with Muslims coming into the country"). In *Buck v. Gordon*, 429 F. Supp. 3d 447, 451 (W.D. Mich. 2019), the court considered statements by the Attorney General prior to her election in which she described an agency in a similar position to that of New Hope as " 'hate-mongers' who disliked gay people more than they cared about children." Here, the only statements upon which the Second Circuit relies indicate, at worst, that OCFS intends to ensure compliance with anti-discrimination law in the adoption process, regardless of an organization's religious beliefs. The Court finds the argument that these statements indicate hostility tenuous. Although the Second Circuit found the *Fulton* case distinguishable, in that case, the court, in finding a nearly identical regulation neutral, noted that the regulation did not " 'proscribe particular conduct only or primarily when religious motivated;' they proscribe only CSS's ability to turn away qualified Philadelphians on the basis of particular character traits without regard to secular or religious reasons." *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 683 (E.D.Pa.2018) (quoting *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007)). However, the Second Circuit rejected that analysis, finding that "New Hope's pleadings easily give rise to the 'slight suspicion' of religious animosity that the Supreme Court, in both *Lukumi* and *Masterpiece Cakeshop*, indicated could raise constitutional concern." *See New Hope*, 966 F.3d at 165. Although this Court respectfully disagrees, it is bound by the Second Circuit's interpretation.

2 Because the Court has found that New Hope is likely to succeed on its Free Speech claim based on the compelled speech theory, the Court need not examine New Hope's arguments with respect to its expressive association arguments.

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EXHIBIT 4

Kathy Jerman

From: Michael McWilliams <mpmcwilliams314@gmail.com>
Sent: Friday, August 20, 2021 5:01 PM
To: Kathy Jerman
Subject: Re: Adoption Services

Hi, Kathy:

I don't know if you realize: but this is discriminatory and against NYS law. You are not allowed to discriminate against LGBTQ+ couples and/or marital status. Please see human rights law.

You can confirm this with Kevin and/or Sherr.

I'll be filing a NYS DHR complaint against you first thing on Monday morning.

On Fri, Aug 20, 2021 at 4:21 PM Kathy Jerman <kjerman@newhopefamilyservices.com> wrote:

> Hi Michael,
>
> Thank you for inquiring about our adoption program. New Hope is a Christian ministry that serves birth mothers, infants, and adoptive parents through the adoption process. New Hope Family Services, Inc., is a private, voluntary, nonprofit corporation that is authorized by the New York State Department of Social Services to provide adoption services. We work with birth moms and adoptive families throughout New York State, with the exception of those who reside in the five boroughs of NYC and Long Island. We have been bringing families together through adoption since 1965.
>
> Because of New Hope's convictions as a Christian adoption service, New Hope works with adoptive families built around a married husband and wife. Others may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area.
>
> New Hope facilitates domestic infant adoptions up to age two. Generally, we work with expectant moms and do adoptions while the child is still an infant. We average about 8 adoptions per year. Our adoptive parent process is as follows:
>
> 1. Attend an orientation meeting where you will learn more about New Hope and the adoption process.
>
> 2. Fill out our adoption application and submit all other necessary paperwork, such as background checks.
>
> 3. Complete a Home Study. Our Home study process lasts for about 3-4 months and is a series of trainings and interviews. We only conduct home studies for 6-7 families at one time.
>
> 4. Once you have been approved as an adoptive family, you will create a profile. This is what expectant moms will look at as they decide which family to pick for their child.

In general, our process to become approved can take about 6 months. However, the time spent waiting for a child varies. It could be a few days or a few years.

In terms of fees, it is about $22,000-23,000 total to adopt through New Hope. This is paid out slowly throughout the application process. We also require $4,000 to be deposited in an escrow account at time of approval for legal fees. If this is not completely used for the fees incurred, the remainder will be returned to you.

Another thing to consider is to do a private adoption. The attorney we work with does private adoptions as well. These are cheaper, about $10,000-$15,000. The difference is that you would be working only with the attorney and not going through New Hope. Additionally, it also means that you may have to do some of the "leg work" yourself to find a child to adopt. For people going this route, we suggest letting your family and friends know you are looking to adopt, as they may have a connection to an expectant mom considering adoption. If you would like to learn more about this option, you can call our attorney Kevin Harrigan or his assistant Sherry Kline at 315-478-3138.

Please let me know if you have any further questions.

Warmest Regards,

Kathy Jerman

Executive Director

3519 James Street

Syracuse, NY 13206

315-437-8300 Ext. 113

www.newhopefamilyservices.com

From: Michael McWilliams <mpmcwilliams314@gmail.com>
Sent: Thursday, August 19, 2021 3:30 PM
To: Kathy Jerman <kjerman@newhopefamilyservices.com>
Subject: Adoption Services

To Whom It May Concern:

I'm extremely interested in your adoption program!

May you tell me a bit about it?

Best,

Michael

EXHIBIT 5

141 S.Ct. 1868
Supreme Court of the United States.

Sharonell FULTON, et al., Petitioners
v.
CITY OF PHILADELPHIA, PENNSYLVANIA, et al.

No. 19-123
|
Argued November 4, 2020
|
Decided June 17, 2021

Synopsis
Background: State-licensed foster care agency affiliated with Roman Catholic Archdiocese, together with three foster parents affiliated with the agency, brought § 1983 action against city and city departments, alleging the city's refusal to contract with the agency unless it agreed to certify same-sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment. After organizations intervened as defendants, the United States District Court for the Eastern District of Pennsylvania, Petrese B. Tucker, J., 320 F.Supp.3d 661, denied the motions for a temporary restraining order (TRO) and preliminary injunction filed by the agency and foster parents, and they appealed. The United States Court of Appeals for the Third Circuit, Ambro, Circuit Judge, 922 F.3d 140, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

city burdened agency's religious exercise by putting agency to choice of curtailing its mission or approving relationships inconsistent with its beliefs;

non-discrimination requirement in city's standard foster care contract was not generally applicable, and thus was subject to strict scrutiny;

agency was not a public accommodation subject to city ordinance's prohibition on discrimination on the basis of sexual orientation when agency certified foster parents;

maximizing the number of foster families was not a compelling interest that justified city's burdening of agency's free exercise rights;

protecting city from liability was not a compelling interest that justified city's burdening of agency's free exercise rights; and

city's interest in the equal treatment of prospective foster parents and foster children, though weighty, was not a compelling interest that justified city's burdening of agency's free exercise rights.

Reversed and remanded.

Justice Barrett filed a concurring opinion, in which Justice Kavanaugh joined, and in which Justice Breyer joined in part.

Justice Alito filed an opinion concurring in the judgment, in which Justice Thomas and Justice Gorsuch joined.

Justice Gorsuch filed an opinion concurring in the judgment, in which Justice Thomas and Justice Alito joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO).

***1871** *Syllabus* *

Philadelphia's foster care system relies on cooperation between the City and private foster care agencies. The City enters standard annual contracts with the agencies to place children with foster families. One of the responsibilities of the agencies is certifying prospective foster families under state statutory criteria. Petitioner Catholic Social Services has contracted with the City to provide foster care services for over 50 years, continuing the centuries-old mission of the Catholic Church to serve Philadelphia's needy children. CSS holds the religious belief that marriage is a sacred bond between a man and a woman. Because CSS believes that certification of prospective foster families is an endorsement of their relationships, it will not certify unmarried couples —regardless of their sexual orientation—or same-sex married couples. But other private foster agencies in Philadelphia will certify same-sex couples, and no same-sex couple has sought certification from CSS. Against this backdrop, a 2018 newspaper story recounted the Archdiocese of Philadelphia's position that CSS could not consider prospective foster parents in same-sex marriages. Calls for investigation followed, and the City ultimately informed CSS that unless it agreed to certify same-sex couples the City would no longer refer children to the agency or enter a full foster care contract with it in the future. The City explained that the refusal of CSS to certify same-sex couples violated both a non-discrimination provision in the agency's contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.

CSS and three affiliated foster parents filed suit seeking to enjoin the City's referral freeze on the grounds that the City's actions violated the Free Exercise and Free Speech Clauses of the First Amendment. The District Court denied preliminary relief. It reasoned that the contractual non-discrimination requirement and the Fair Practices Ordinance were both neutral and generally applicable under *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, and that CSS's free exercise claim was therefore unlikely to succeed. The Court of Appeals for the Third Circuit affirmed. Given the expiration of the parties' contract, the Third Circuit examined whether the City could condition contract renewal on the inclusion of new language forbidding discrimination on the basis of sexual orientation. The court concluded that the City's proposed contractual terms stated a neutral and generally applicable policy under *Smith.* CSS and the foster parents challenge the Third Circuit's determination that the City's actions were permissible under *Smith* and also ask the Court to reconsider that decision.

Held: The refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. Pp. 1876 – 1882.

(a) The City's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs. *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable. 494 U.S. at 878–882, 110 S.Ct. 1595. This case falls outside *Smith* because the City has burdened CSS's religious exercise through policies that do not satisfy the threshold requirement of being neutral and generally applicable. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472. A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. *Smith*, 494 U.S. at 884, 110 S.Ct. 1595. Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason. *Ibid.* Pp. 1876 – 1878.

(1) The non-discrimination requirement of the City's standard foster care contract is not generally applicable. Section 3.21 of the contract requires an agency to provide services defined in the contract to prospective foster parents without regard to their sexual orientation. But section 3.21 also permits exceptions to this requirement at the "sole discretion" of the Commissioner.

This inclusion of a mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable. *Smith*, 494 U.S. at 884, 110 S.Ct. 1595. The City maintains that greater deference should apply to its treatment of private contractors, but the result here is the same under any level of deference. Similarly unavailing is the City's recent contention that section 3.21 does not even apply to CSS's refusal to certify same-sex couples. That contention ignores the broad sweep of section 3.21's text, as well as the fact that the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples "explicit" in future contracts. Finally, because state law makes clear that the City's authority to grant exceptions from section 3.21 also governs section 15.1's general prohibition on sexual orientation discrimination, the contract as a whole contains no generally applicable non-discrimination requirement. Pp. 1877 – 1880.

(2) Philadelphia's Fair Practices Ordinance, which as relevant forbids interfering with the public accommodations opportunities of an individual based on sexual orientation, does not apply to CSS's actions here. The Ordinance defines a public accommodation in relevant part to include a provider "whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Phila. Code § 9–1102(1)(w). Certification is not "made available to the public" in the usual sense of the words. Certification as a foster parent is not readily accessible to the public; the process involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The District Court's contrary conclusion did not take into account the uniquely selective nature of foster care certification. Pp. 1879 – 1881.

(b) The contractual non-discrimination requirement burdens CSS's religious exercise and is not generally applicable, so it is subject to "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests. *Ibid*. The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Under the circumstances here, the City does not have a compelling interest in refusing to contract with CSS. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless the agency agrees to certify same-sex couples as foster parents cannot survive strict scrutiny and violates the Free Exercise Clause of the First Amendment. The Court does not consider whether the City's actions also violate the Free Speech Clause. Pp. 1881 – 1882.

922 F.3d 140, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. BARRETT, J., filed a concurring opinion, in which KAVANAUGH, J., joined, and in which BREYER, J., joined as to all but the first paragraph. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS and GORSUCH, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined.

Attorneys and Law Firms

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***1874** Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

I

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. H. Folks, The Care of Destitute, Neglected, and Delinquent Children 10 (1902). During the 19th century, nuns ran asylums for orphaned and destitute ***1875** youth. T. Hacsi, Second Home: Orphan Asylums and Poor Families in America 24 (1997). When criticism of asylums mounted in the Progressive Era, see *id.*, at 37–40, the Church established the Catholic Children's Bureau to place children in foster homes. Petitioner CSS continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. 55 Pa. Code § 3700.61 (2020). Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. § 3700.64. The agency must decide whether to "approve, disapprove or provisionally approve the foster family." § 3700.69.

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." App. 171. Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." App. to Pet. for Cert. 147a. The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." App. 366. Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract ***1876** with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission. The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants. As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment. CSS sought a temporary restraining order and preliminary injunction directing the Department to continue referring children to CSS without requiring the agency to certify same-sex couples.

The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and that the free exercise claim was therefore unlikely to succeed. 320 F.Supp.3d 661, 680–690 (E.D. Pa. 2018). The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program. *Id.*, at 695–700.

The Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the court focused on whether the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal. 922 F.3d 140, 153 (2019). The court concluded that the proposed contractual terms were a neutral and generally applicable policy under *Smith*. 922 F.3d at 152–159. The court rejected the agency's free speech claims on the same grounds as the District Court. *Id.*, at 160–162.

CSS and the foster parents sought review. They challenged the Third Circuit's determination that the City's actions were permissible under *Smith* and also asked this Court to reconsider that precedent.

We granted certiorari. 589 U. S. ——, 140 S.Ct. 1104, 206 L.Ed.2d 177 (2020).

II

A

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise" of religion. As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. 494 U.S. at 878–882, 110 S.Ct. 1595. CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so, see *post*, pp. 1883 – 1884 (opinion of ALITO, J.); *post*, p. 1926 (opinion of GORSUCH, J.). ***1877** But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ——, —— – ——, 138 S.Ct. 1719, 1730–1732, 201 L.Ed.2d 35 (2018); *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing " 'a mechanism for individualized exemptions.' " *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Bowen v. Roy*, 476 U.S. 693, 708, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (opinion of BURGER, C. J., joined by POWELL AND REHNQUIST, JJ.)). For example, in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. *Id.*, at 399–400, 83 S.Ct. 1790. The State denied her application under a law prohibiting eligibility to claimants who had "failed, without good cause ... to accept available suitable work." *Id.*, at 401, 83 S.Ct. 1790 (internal quotation marks omitted). We held that the denial infringed her free exercise rights and could be justified only by a compelling interest. *Id.*, at 406, 83 S.Ct. 1790.

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. See 494 U.S. at 884, 110 S.Ct. 1595 (citing *Roy*, 476 U.S. at 708, 106 S.Ct. 2147; *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790). *Smith* went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147); see also *Lukumi*, 508 U.S. at 537, 113 S.Ct. 2217 (same).

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. See *id.*, at 542–546, 113 S.Ct. 2217. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. *Id.*, at 524–528, 113 S.Ct. 2217. The City claimed that the ordinances were necessary in part to protect public health, which was "threatened by the disposal of animal carcasses in open public places." *Id.*, at 544, 113 S.Ct. 2217. But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. *Id.*, at 544–545, 113 S.Ct. 2217. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable. *Id.*, at 545–546, 113 S.Ct. 2217.

***1878** B

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith*. The current version of section 3.21 specifies in pertinent part:

> "**Rejection of Referral**. Provider shall not reject a child or family including, but not limited to, ... prospective foster or adoptive parents, for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." Supp. App. to Brief for City Respondents 16–17.

This provision requires an agency to provide "Services," defined as "the work to be performed under this Contract," App. 560, to prospective foster parents regardless of their sexual orientation.

Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS. App. to Pet. for Cert. 168a. But the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147).

The City and intervenor-respondents resist this conclusion on several grounds. They first argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. The government, they observe, commands heightened powers when managing its internal operations. See *NASA v. Nelson*, 562 U.S. 134, 150, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011); *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598–600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). And when individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. See *Garcetti v. Ceballos*, 547 U.S. 410, 418–420, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 677–678, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). Given this context, the City and intervenor-respondents contend, the government should have a freer hand when dealing with contractors like CSS.

These considerations cannot save the City here. As Philadelphia rightly acknowledges, "principles of neutrality and general applicability still constrain the government in its capacity as manager." Brief for City Respondents 11–12. We have never suggested that the government may discriminate against religion when acting in its managerial role. And *Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. See 494 U.S. at 883–885, and n. 2, 110 S.Ct. 1595 (citing *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *Roy*, 476 U.S. 693, 106 S.Ct. 2147). The City and intervenor-respondents accordingly ask only that courts apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context. We find no need to resolve that narrow issue in this case. No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

Perhaps all this explains why the City now contends that section 3.21 does not ***1879** apply to CSS's refusal to certify same-sex couples after all. Contrast App. to Pet. for Cert. 167a–168a with Brief for City Respondents 35–36. Instead, the City says that section 3.21 addresses only "an agency's right to refuse 'referrals' to place a child with a certified foster family." Brief for City Respondents 36. We think the City had it right the first time. Although the section is titled "Rejection of Referral," the text sweeps more broadly, forbidding the rejection of "prospective foster ... parents" for "Services," without limitation. Supp. App. to Brief for City Respondents 16. The City maintains that certification is one of the services foster agencies are hired to perform, so its attempt to backtrack on the reach of section 3.21 is unavailing. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 222 (2012) ("[A] title or heading should never be allowed to override the plain words of a text."). Moreover, the

City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples "explicit" in future contracts, App. to Pet. for Cert. 170a, confirming our understanding of the text of the provision.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. See Supp. App. to Brief for City Respondents 31. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." *Shehadi v. Northeastern Nat. Bank of Pa.*, 474 Pa. 232, 236, 378 A.2d 304, 306 (1977); see *Commonwealth ex rel. Kane v. UPMC*, 634 Pa. 97, 135, 129 A.3d 441, 464 (2015). Applying that "fundamental" rule here, *Shehadi*, 474 Pa. at 236, 378 A.2d at 306, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude, *Smith*, 494 U.S. at 884, 110 S.Ct. 1595—here, at the Commissioner's "sole discretion."

The concurrence objects that no party raised these arguments in this Court. *Post*, at 1928 – 1929 (opinion of GORSUCH, J.). But CSS, supported by the United States, contended that the City's "made-for-CSS Section 3.21 permits discretionary 'exception[s]' from the requirement 'not [to] reject a child or family' based upon 'their ... sexual orientation,' " which "alone triggers strict scrutiny." Reply Brief 5 (quoting Supp. App. to Brief for City Respondents 16; some alterations in original); see also Brief for Petitioners 26–27 (section 3.21 triggers strict scrutiny); Brief for United States as *Amicus Curiae* 21–22 (same). The concurrence favors the City's reading of section 3.21, see *post*, at 1928 – 1929, but we find CSS's position more persuasive.

C

In addition to relying on the contract, the City argues that CSS's refusal ***1880** to certify same-sex couples constitutes an "Unlawful Public Accommodations Practice[ ]" in violation of the Fair Practices Ordinance. That ordinance forbids "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, ... disability, marital status, familial status," or several other protected categories. Phila. Code § 9–1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents.

CSS counters that "foster care has never been treated as a 'public accommodation' in Philadelphia." Brief for Petitioners 13. In any event, CSS adds, the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise. But that constitutional issue arises only if the ordinance applies to CSS in the first place. We conclude that it does not because foster care agencies do not act as public accommodations in performing certifications.

The ordinance defines a public accommodation in relevant part as "[a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." § 9–1102(1)(w). Certification is not "made available to the public" in the usual sense of the words. To make a service "available" means to make it "accessible, obtainable." Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2005); see also 1 Oxford English Dictionary 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach"). Related state law illustrates the same point. A Pennsylvania antidiscrimination statute similarly defines a public accommodation as an accommodation that is "open to, accepts

or solicits the patronage of the general public." Pa. Stat. Ann., Tit. 43, § 954(*l*) (Purdon Cum. Supp. 2009). It fleshes out that definition with examples like hotels, restaurants, drug stores, swimming pools, barbershops, and public conveyances. *Ibid.* The "common theme" is that a public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire." *Blizzard v. Floyd*, 149 Pa.Commw. 503, 506, 613 A.2d 619, 621 (1992).

Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships." 55 Pa. Code § 3700.64. Such inquiries would raise eyebrows at the local bus station. And agencies understandably approach this sensitive process from different angles. As the City itself explains to prospective foster parents, "[e]ach agency has slightly different requirements, specialties, and training programs." App. to Pet. for Cert. 197a. All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.

***1881** The City asks us to adhere to the District Court's contrary determination that CSS qualifies as a public accommodation under the ordinance. The concurrence adopts the City's argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. See *post*, at 1927 (opinion of GORSUCH, J.). We respectfully disagree with the view of the City and the concurrence. Although "we ordinarily defer to lower court constructions of state statutes, we do not invariably do so." *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (citation omitted). Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS's position, which it has maintained from the beginning of this dispute, that its "foster services do not constitute a 'public accommodation' under the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance." App. to Pet. for Cert. 159a. We therefore have no need to assess whether the ordinance is generally applicable.

III

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. The concurrence protests that the "Court granted certiorari to decide whether to overrule [*Smith*]," and chides the Court for seeking to "sidestep the question." *Post*, at 1926 (opinion of GORSUCH, J.). But the Court also granted review to decide whether Philadelphia's actions were permissible under our precedents. See Pet. for Cert. i. CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under those precedents. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217 (internal quotation marks omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–432, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (discussing the compelling interest test applied in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). Rather than rely on "broadly formulated interests," courts must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211. The question, then, is not whether the City has

a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals ***1882** at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, see *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799–800, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), particularly because the authority to certify foster families is delegated to agencies by the State, not the City, see 55 Pa. Code § 3700.61.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop*, 584 U. S., at ––––, 138 S.Ct., at 1727. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. See *Lukumi*, 508 U.S. at 546–547, 113 S.Ct. 2217. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

* * *

As Philadelphia acknowledges, CSS has "long been a point of light in the City's foster-care system." Brief for City Respondents 1. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BARRETT, with whom Justice KAVANAUGH joins, and with whom Justice BREYER joins as to all but the first paragraph, concurring.
In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a ***1883** neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of

conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Should there be a distinction between indirect and direct burdens on religious exercise? Cf. *Braunfeld v. Brown*, 366 U.S. 599, 606–607, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion). What forms of scrutiny should apply? Compare *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (assessing whether government's interest is " 'compelling' "), with *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (assessing whether government's interest is "substantial"). And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way? See *Smith*, 494 U.S. at 888–889, 110 S.Ct. 1595.

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. See *id.,* at 884, 110 S.Ct. 1595 (law not generally applicable "where the State has in place a system of individual exemptions" (citing *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790)); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (subjecting statute to heightened scrutiny because exemptions lay in discretion of government official). As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it. I join the Court's opinion in full.

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, concurring in the judgment.
This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

I

There is no question that *Smith*'s interpretation can have startling consequences. ***1884** Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. See Pub. L. 66, § 3, 41 Stat. 308–309. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. [1] Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. [2] That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. [3] Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. [4] A San Francisco ballot initiative in 2010 proposed just that. [5] A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. [6] Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

We may hope that legislators and others with rulemaking authority will not go as far as *Smith* allows, but the present case shows that the dangers posed by *Smith* are not hypothetical. The city of Philadelphia (City) has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children.

Many people believe they have a religious obligation to assist such children. Jews and Christians regard this as a scriptural ***1885** command, [7] and it is a mission that the Catholic Church has undertaken since ancient times. One of the first known orphanages is said to have been founded by St. Basil the Great in the fourth century, [8] and for centuries, the care of orphaned and abandoned children was carried out by religious orders. [9]

In the New World, religious groups continued to take the lead. The first known orphanage in what is now the United States was founded by an order of Catholic nuns in New Orleans around 1729. [10] In the 1730s, the first two orphanages in what became the United States at the founding were established in Georgia by Lutherans and by Rev. George Whitefield, a leader in the "First Great Awakening." [11] In the late 18th and early 19th centuries, Protestants and Catholics established orphanages in major cities. One of the first orphanages in Philadelphia was founded by a Catholic priest in 1798. [12] The Jewish Society for the Relief of Orphans and Children of Indigent Parents began its work in Charleston in 1801. [13]

During the latter part of the 19th century and continuing into the 20th century, the care of children was shifted from orphanages to foster families, [14] but for many years, state and local government participation in this field was quite limited. As one of Philadelphia's *amici* puts it, "[i]nto the early twentieth century, the care of orphaned and abandoned children in the United States remained largely in the hands of private charitable and religious organizations." [15] In later years, an influx of federal money [16] spurred States and local governments to take a more active role, and today many governments administer what is essentially a licensing system. As is typical in other jurisdictions, no private charitable group may recruit, vet, or support foster parents in Philadelphia without the City's approval.

Whether with or without government participation, Catholic foster care agencies in Philadelphia and other cities have a long record of finding homes for children whose parents are unable or unwilling to care for them. Over the years, they have helped thousands of foster children and parents, and they take special pride in finding homes for children who are hard to place, including older children and those with special needs. [17]

***1886** Recently, however, the City has barred Catholic Social Services (CSS) from continuing this work. Because the Catholic Church continues to believe that marriage is a bond between one man and one woman, CSS will not vet same-sex couples. As far as the record reflects, no same-sex couple has ever approached CSS, but if that were to occur, CSS would simply refer the couple to another agency that is happy to provide that service—and there are at least 27 such agencies in Philadelphia. App. 171; App. to Pet. for Cert. 137a; see also *id.,* at 286a. Thus, not only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect.

None of that mattered to Philadelphia. When a newspaper publicized CSS's policy, the City barred CSS from continuing its foster care work. Remarkably, the City took this step even though it threatens the welfare of children awaiting placement in foster homes. There is an acute shortage of foster parents, both in Philadelphia and in the country at large. [18] By ousting CSS, the City eliminated one of its major sources of foster homes. And that's not all. The City went so far as to prohibit the placement of any children in homes that CSS had previously vetted and approved. Exemplary foster parents like petitioners Sharonell Fulton and Toni Lynn Simms-Busch are blocked from providing loving homes for children they were eager to ***1887** help. [19]

The City apparently prefers to risk leaving children without foster parents than to allow CSS to follow its religiously dictated policy, which threatens no tangible harm.

CSS broadly implies that the fundamental objective of City officials is to force the Philadelphia Archdiocese to change its position on marriage. Among other things, they point to statements by a City official deriding the Archdiocese's position as out of step with Pope Francis's teaching and 21st century moral views. [20] But whether or not this is the City's real objective, there can be no doubt that Philadelphia's ultimatum restricts CSS's ability to do what it believes the Catholic faith requires.

Philadelphia argues that its stance is allowed by *Smith* because, it claims, a City policy categorically prohibits foster care agencies from discriminating against same-sex couples. Bound by *Smith*, the lower courts accepted this argument, 320 F.Supp.3d 661, 682–684 (E.D. Pa. 2018), 922 F.3d 140, 156–159 (C.A.3 2019), and we then granted certiorari, 589 U. S. ——, 140 S.Ct. 1104, 206 L.Ed.2d 177 (2020). One of the questions that we accepted for review is "[w]hether *Employment Division v. Smith* should be revisited." We should confront that question.

Regrettably, the Court declines to do so. Instead, it reverses based on what appears to be a superfluous (and likely to be short-lived) feature of the City's standard annual contract with foster care agencies. *Smith*'s holding about categorical rules does not apply if a rule permits individualized exemptions, 494 U.S. at 884, 110 S.Ct. 1595, and the majority seizes on the presence in the City's standard contract of language giving a City official the power to grant exemptions. *Ante*, at 1877. The City tells us that it has never granted such an exemption and has no intention of handing one to CSS, Brief for City Respondents 36; App. to Pet. for Cert. 168a, but the majority reverses the decision below because the contract supposedly confers that never-used power. *Ante*, at 1879 – 1880, 1882.

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. [21] If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started. The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will ***1888** reject that argument; and CSS will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?

Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions. From 2006 to 2011, Catholic Charities in Boston, San Francisco, Washington, D. C., and Illinois ceased providing adoption or foster care services after the city or state government insisted that they serve same-sex couples. Although the precise legal grounds for these actions are not always clear, it appears that they were based on laws or regulations generally prohibiting discrimination on the basis of sexual orientation. [22] And some jurisdictions have adopted anti-discrimination rules that expressly target adoption services. [23] Today's decision will be of no help in other cases involving the exclusion of faith-based foster care and adoption agencies unless by some chance the relevant laws contain the same glitch as the Philadelphia contractual provision on which the majority's decision hangs. The decision will be even less significant in all the other important religious liberty cases that are bubbling up.

We should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause. Contrary to what many initially expected, *Smith* has not provided a clear-cut rule that is easy to apply, and experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to "anarchy." 494 U.S. at 888, 110 S.Ct. 1595.

***1889** When *Smith* reinterpreted the Free Exercise Clause, four Justices—Brennan, Marshall, Blackmun, and O'Connor—registered strong disagreement. *Id.,* at 891, 892, 110 S.Ct. 1595 (O'CONNOR, J., joined in part by BRENNAN, MARSHALL,

and BLACKMUN, JJ., concurring in judgment); *id.,* at 907–908, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). After joining the Court, Justice Souter called for *Smith* to be reexamined. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 559, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (opinion concurring in part and concurring in judgment). So have five sitting Justices. *Kennedy v. Bremerton School Dist.*, 586 U. S. ––––, –––– – ––––, 139 S.Ct. 634, 636–637, 203 L.Ed.2d 137 (2019) (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., concurring in denial of certiorari); *City of Boerne v. Flores*, 521 U.S. 507, 566, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (BREYER, J., dissenting). So have some of the country's most distinguished scholars of the Religion Clauses. See, *e.g.,* McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109 (1990) (McConnell, Free Exercise Revisionism); Laycock, The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed, 8 J. L. & Religion 99 (1990). On two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*), and the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*), Congress tried to restore the constitutional rule in place before *Smith* was handed down. Those laws, however, do not apply to most state action, and they leave huge gaps.

It is high time for us to take a fresh look at what the Free Exercise Clause demands.

II

A

To fully appreciate what the Court did in *Smith*, it is necessary to recall the substantial body of precedent that it displaced. Our seminal decision on the question of religious exemptions from generally applicable laws was *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), which had been in place for nearly three decades when *Smith* was decided. In that earlier case, Adell Sherbert, a Seventh-day Adventist, was fired because she refused to work on Saturday, her Sabbath Day. 374 U.S. at 399, 83 S.Ct. 1790. Unable to find other employment that did not require Saturday work, she applied for unemployment compensation but was rejected because state law disqualified claimants who "failed, without good cause ... to accept available suitable work when offered." *Id*., at 399–401, 83 S.Ct. 1790, and n. 3 (internal quotation marks omitted). The State Supreme Court held that this denial of benefits did not violate Sherbert's free-exercise right, but this Court reversed.

In an opinion authored by Justice Brennan, the Court began by surveying the Court's few prior cases involving claims for religious exemptions from generally applicable laws. *Id.,* at 402–403, 83 S.Ct. 1790. In those decisions, the Court had not articulated a clear standard for resolving such conflicts, but as the *Sherbert* opinion accurately recounted, where claims for religious exemptions had been rejected, "[t]he conduct or actions [in question] invariably posed some substantial threat to public ***1890** safety, peace or order." *Id*., at 403, 83 S.Ct. 1790. (As will be shown below, this description of the earlier decisions corresponds closely with the understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. See *infra*, at 1899 – 1903.)

After noting these earlier decisions, the Court turned to the case at hand and concluded that the denial of benefits imposed a substantial burden on Sherbert's free exercise of religion. 374 U.S. at 404, 83 S.Ct. 1790. It "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Ibid*. As a result, the Court reasoned, the decision below could be sustained only if it was "justified by a 'compelling state interest.' " *Id*., at 403, 406, 83 S.Ct. 1790. The State argued that its law was needed to prevent "the filing of fraudulent claims by unscrupulous claimants feigning religious objections," but Justice Brennan's opinion found this justification insufficient because the State failed to show that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id*., at 407, 83 S.Ct. 1790.

The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next 27 years. Applying that test, the Court sometimes vindicated free-exercise claims. In *Wisconsin v. Yoder*, 406 U.S. 205, 234, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), for example, the Court held that a state law requiring all students to remain in school until the age of 16 violated the free-exercise rights of Amish parents whose religion required that children leave school after the eighth grade. The Court acknowledged the State's "admittedly strong interest in compulsory education" but concluded that the State had failed to "show with ... particularity how [that interest] would be adversely affected by granting an exemption to the Amish." *Id.*, at 236, 92 S.Ct. 1526. And in holding that the Amish were entitled to a special exemption, the Court expressly rejected the interpretation of the Free Exercise Clause that was later embraced in *Smith*. Indeed, the *Yoder* Court stated this point again and again: "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*"; "*[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality* if it unduly burdens the free exercise of religion"; insisting that Amish children abide by the compulsory attendance requirement was unconstitutional *even though it* "*applie[d] uniformly to all citizens of the State* and d[id] not, on its face, discriminate against religions or a particular religion, [and was] motivated by legitimate secular concerns." *Id.*, at 220, 92 S.Ct. 1526 (emphasis added).

Other decisions also accepted free-exercise claims under the *Sherbert* test. In *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 710, 720, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court concluded that a State could not withhold unemployment benefits from a Jehovah's Witness who quit his job because he refused to do work that he viewed as contributing to the production of military weapons. In so holding, the Court reiterated that " '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' " *Id.*, at 717, 101 S.Ct. 1425 (quoting *Yoder*, 406 U.S. at 220, 92 S.Ct. 1526).

***1891** Subsequently, in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), the Court found that a state rule that was " 'neutral and uniform in its application' " nevertheless violated the Free Exercise Clause under the *Sherbert* test. A similar violation was found in *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989).

Other cases applied *Sherbert* but found no violation. In *United States v. Lee*, 455 U.S. 252, 258, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the Court held that mandatory contributions to Social Security were constitutional because they were "indispensable to the fiscal vitality of the social security system." In *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), denying conscientious-objector status to men whose opposition to war was limited to one particular conflict was held to be "strictly justified by substantial governmental interests." In still other cases, the Court found *Sherbert* inapplicable either because the challenged law did not implicate the conduct of the individual seeking an exemption, see *Bowen v. Roy*, 476 U.S. 693, 700, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450–451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), or because the case arose in a context where the government exercised broader authority over assertions of individual rights, see *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 353, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (prison); *Goldman v. Weinberger*, 475 U.S. 503, 506, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (military). None of these decisions questioned the validity of *Sherbert*'s interpretation of the free-exercise right.

B

This is where our case law stood when *Smith* reached the Court. The underlying situation in *Smith* was very similar to that in *Sherbert*. Just as Adell Sherbert had been denied unemployment benefits due to conduct mandated by her religion (refraining from work on Saturday), Alfred Smith and Galen Black were denied unemployment benefits because of a religious practice (ingesting peyote as part of a worship service of the Native American Church). 494 U.S. at 874, 110 S.Ct. 1595. Applying the *Sherbert* test, the Oregon Supreme Court held that this denial of benefits violated Smith's and Black's free-exercise rights, and this Court granted review. [24]

The State defended the denial of benefits under the *Sherbert* framework. It argued that it had a compelling interest in combating the use of dangerous drugs and that accommodating their use for religious purposes would upset its enforcement scheme. Brief for Petitioners in *Employment Div., Dept. of Human Resources* v. *Smith*, No. 88–1213, O. T. 1988, pp. 5–7, 12, 16. The State never suggested that *Sherbert* should be overruled. See Brief for Petitioners in No. 88–1213, at 11. Instead, the crux of its disagreement with Smith ***1892** and Black and the State Supreme Court was whether its interest in preventing drug use could be served by a more narrowly tailored rule that made an exception for religious use by members of the Native American Church.

The question divided the four Justices who objected to the *Smith* majority's rationale. Compare 494 U.S. at 905–907, 110 S.Ct. 1595 (O'CONNOR J., concurring in judgment), with *id.,* at 909–919, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). And the *Smith* majority wanted no part of that question. Instead, without briefing or argument on whether *Sherbert* should be cast aside, the Court adopted what it seems to have thought was a clear-cut test that would be easy to apply: A "generally applicable and otherwise valid" rule does not violate the Free Exercise Clause "if prohibiting the exercise of religion ... is not [its] object ... but merely the incidental effect of " its operation. 494 U.S. at 878, 110 S.Ct. 1595. Other than cases involving rules that target religious conduct, the *Sherbert* test was held to apply to only two narrow categories of cases: (1) those involving the award of unemployment benefits or other schemes allowing individualized exemptions and (2) so-called "hybrid rights" cases. See 494 U.S. at 881–884, 110 S.Ct. 1595. [25]

To clear the way for this new regime, the majority was willing to take liberties. Paying little attention to the terms of the Free Exercise Clause, it was satisfied that its interpretation represented a "permissible" reading of the text, *Smith*, 494 U.S. at 878, 110 S.Ct. 1595, and it did not even stop to explain why that was so. The majority made no effort to ascertain the original understanding of the free-exercise right, and it limited past precedents on grounds never previously suggested. *Sherbert*, *Thomas*, and *Hobbie* were placed in a ***1893** special category because they concerned the award of unemployment compensation, *Smith*, 494 U.S. at 883, 110 S.Ct. 1595, and *Yoder* was distinguished on the ground that it involved both a free-exercise claim and a parental-rights claim, *Smith,* 494 U.S. at 881, 110 S.Ct. 1595. Not only did these distinctions lack support in prior case law, the issue in *Smith* itself could easily be viewed as falling into both of these special categories. After all, it involved claims for unemployment benefits, and members of the Native American Church who ingest peyote as part of a religious ceremony are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause. See, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

None of these obstacles stopped the *Smith* majority from adopting its new rule and displacing decades of precedent. The majority feared that continued adherence to that case law would "cour[t] anarchy" because it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U.S. at 888, 110 S.Ct. 1595. The majority recognized that its new interpretation would place small religious groups at a "relative disadvantage," but the majority found that preferable to the problems it envisioned if the *Sherbert* test had been retained. 494 U.S. at 890, 110 S.Ct. 1595.

Four Justices emphatically disagreed with *Smith*'s reinterpretation of the Free Exercise Clause. Justice O'Connor wrote that this new reading "dramatically depart[ed] from well-settled First Amendment jurisprudence" and was "incompatible with our Nation's fundamental commitment to individual religious liberty." 494 U.S. at 891, 110 S.Ct. 1595 (opinion concurring in judgment). Justices Brennan, Marshall, and Blackmun protested that the majority had "mischaracteriz[ed]" and "discard[ed]" the Court's free-exercise jurisprudence on its way to "perfunctorily dismiss[ing]" the "settled and inviolate principle" that state laws burdening religious freedom may stand only if "justified by a compelling interest that cannot be served by less restrictive means." *Id.,* at 907–908, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

Smith's impact was quickly felt, and Congress was inundated with reports of the decision's consequences. [26] In response, it attempted to restore the *Sherbert* test. In the House, then-Representative Charles Schumer introduced a bill that made a version of that test applicable to all actions taken by the Federal Government or the States. H. R. 1308, 103d Cong., 1st Sess. (1993). This bill, which eventually became the Religious Freedom Restoration Act (RFRA), passed in the House without dissent, ***1894** was approved in the Senate by a vote of 97 to 3, and was enthusiastically signed into law by President Clinton. 139 Cong. Rec.

27239–27341 (1993) (House voice vote); *id*., at 26416 (Senate vote); Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. of Pres. Doc. 2377 (1993). And when this Court later held in *City of Boerne*, 521 U.S. 507, 117 S.Ct. 2157, that Congress lacked the power under the 14th Amendment to impose these rules on the States, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA) under its spending power and its power to regulate interstate commerce. See 114 Stat. 803. Introduced in the Senate by Sen. Orrin Hatch and cosponsored by Sen. Edward Kennedy, RLUIPA imposed the same rules as RFRA on land use and prison regulations. S. 2869, 106th Cong., 2d Sess. (2000); 42 U.S.C. § 2000cc *et seq*; 146 Cong. Rec. 16698 (2000). RLUIPA passed both Houses of Congress without a single negative vote and, like RFRA, was signed by President Clinton. *Id*., at 16703, 16623; Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 Weekly Comp. of Pres. Doc. 2168 (2000).

RFRA and RLUIPA have restored part of the protection that *Smith* withdrew, but they are both limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

III

A

That project must begin with the constitutional text. In *Martin v. Hunter's Lessee*, 1 Wheat. 304, 338–339, 4 L.Ed. 97 (1816), Justice Story laid down the guiding principle: "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." And even though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution's text. See, *e.g.*, *Chiafalo v. Washington*, 591 U. S. ––––, –––– – ––––, 140 S.Ct. 2316, 2323–2326, 207 L.Ed.2d 761 (2020) (starting with the text of Art. II, § 1, before considering historical practice); *Knick v. Township of Scott*, 588 U. S. ––––, ––––, 139 S.Ct. 2162, 2169–2170, 204 L.Ed.2d 558 (2019) (beginning analysis with the text of the Takings Clause); *Gamble v. United States*, 587 U. S. ––––, –––– – ––––, 139 S.Ct. 1960, 1964–1965, 204 L.Ed.2d 322 (2019) (starting with the text of the Fifth Amendment before turning to history and precedent); *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157 ("In assessing the breadth of § 5's enforcement power, we begin with its text").

Smith, however, paid shockingly little attention to the text of the Free Exercise Clause. Instead of examining what readers would have understood its words to mean when adopted, the opinion merely asked whether it was "permissible" to read the text to have the meaning that the majority favored. 494 U.S. at 878, 110 S.Ct. 1595. This strange treatment of the constitutional text cannot be justified—and is especially surprising since it clashes so sharply with the way in which *Smith*'s author, Justice Scalia, generally treated the text of the Constitution (and, indeed, with his entire theory of legal interpretation). As he put it, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text." A. Scalia, A Matter of Interpretation 38 (1997). See also *NLRB v. Noel Canning*, 573 U.S. 513, 575–583, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (SCALIA, J., concurring in judgment); ***1895** *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 722, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (plurality opinion of SCALIA, J.); *Maryland v. Craig*, 497 U.S. 836, 860–861, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (SCALIA, J., dissenting).

Justice Scalia's opinion for the Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), is a prime example of his usual approach, and it is a model of what a reexamination of the Free Exercise Clause should entail. In *Heller*, after observing that the "Constitution was written to be understood by the voters," Justice Scalia's opinion begins by presuming that the "words and phrases" of the Second Amendment carry "their normal and ordinary ... meaning." *Id*., at 576, 128 S.Ct. 2783 (internal quotation marks omitted). The opinion then undertakes a careful examination of all the Amendment's key terms. It does not simply ask whether its interpretation of the text is "permissible." *Smith*, 494 U.S. at 878, 110 S.Ct. 1595.

B

Following the sound approach that the Court took in *Heller*, we should begin by considering the "normal and ordinary" meaning of the text of the Free Exercise Clause: "Congress shall make no law ... prohibiting the free exercise [of religion]." Most of these terms and phrases—"Congress,"[27] "shall make," "no law,"[28] and "religion" ***1896** [29]—do not require discussion for present purposes, and we can therefore focus on what remains: the term "prohibiting" and the phrase "the free exercise of religion."

Those words had essentially the same meaning in 1791 as they do today. "To prohibit" meant either "[t]o forbid" or "to hinder." 2 S. Johnson, A Dictionary of the English Language (1755) (Johnson (1755)).[30] The term "exercise" had both a broad primary definition ("[p]ractice" or "outward performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private"). 1 *id*.[31] (The Court long ago declined to give the First Amendment's reference to "exercise" this narrow reading. See, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).) And "free," in the sense relevant here, meant "unrestrained." 1 Johnson (1755).[32]

If we put these definitions together, the ordinary meaning of "prohibiting the free exercise of religion" was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted.

***1897** As interpreted in *Smith*, the Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct. *Smith* made no real attempt to square that equal-treatment interpretation with the ordinary meaning of the Free Exercise Clause's language, and it is hard to see how that could be done.

The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the "exercise of religion") the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group.

The oddity of *Smith*'s interpretation can be illustrated by considering what the same sort of interpretation would mean if applied to other provisions of the Bill of Rights. Take the Sixth Amendment, which gives a specified group of people (the "accused" in criminal cases) a particular right (the right to the "Assistance of Counsel for [their] defence"). Suppose that Congress or a state legislature adopted a law banning counsel in *all litigation*, civil and criminal. Would anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants?

Or consider the Seventh Amendment, which gives a specified group of people (parties in most civil "Suits at common law") "the right of trial by jury." Would there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the Seventh Amendment's scope?

Other examples involving language similar to that in the Free Exercise Clause are easy to imagine. Suppose that the amount of time generally allotted to complete a state bar exam is 12 hours but that applicants with disabilities secure a consent decree allowing them an extra hour. Suppose that the State later adopts a rule requiring all applicants to complete the exam in 11 hours. Would anyone argue that this was consistent with the decree?

Suppose that classic car enthusiasts secure the passage of a state constitutional amendment exempting cars of a certain age from annual safety inspections, but the legislature later enacts a law requiring such inspections for all vehicles regardless of age. Can there be any doubt that this would violate the state constitution?

It is not necessary to belabor this point further. What all these examples show is that *Smith*'s interpretation conflicts with the ordinary meaning of the First Amendment's terms.

C

Is there any way to bring about a reconciliation? The short answer is "no." Survey all the briefs filed in support of respondents (they total more than 40) and three decades of law review articles, and what will you find? Philadelphia's brief refers in passing to one possible argument—and the source it cites is a law review article by one of *Smith*'s leading academic critics, Professor Michael W. McConnell. See Brief for City Respondents 49 (citing McConnell, Free Exercise Revisionism 1115). Trying to see if there was any way to make *Smith* fit with the constitutional text, Professor McConnell came up with this argument—but then rejected it. McConnell, Free Exercise Revisionism 1115–1116.

The argument goes as follows: Even if a law prohibits conduct that constitutes an essential religious practice, it cannot be said to "prohibit" the free exercise of religion ***1898** unless that was the lawmakers' specific object.

This is a hair-splitting interpretation. It certainly does not represent the "normal and ordinary" meaning of the Free Exercise Clause's terms. See *Heller*, 554 U.S. at 576, 128 S.Ct. 2783. Consider how it would play out if applied to some of the hypothetical laws discussed at the beginning of this opinion. A law categorically banning all wine would not "prohibit" the celebration of a Catholic Mass? A law categorically forbidding the slaughter of a conscious animal would not "prohibit" kosher and halal slaughterhouses? A rule categorically banning any head covering in a courtroom would not "prohibit" appearances by orthodox Jewish men, Sikh men, and Muslim women who wear hijabs? It is no wonder that *Smith*'s many defenders have almost uniformly forgone this argument.

D

Not only is it difficult to square *Smith*'s interpretation with the terms of the Free Exercise Clause, the absence of any language referring to equal treatment is striking. If equal treatment was the objective, why didn't Congress say that? And since it would have been simple to cast the Free Exercise Clause in equal-treatment terms, why would the state legislators who voted for ratification have read the Clause that way?

It is not as if there were no models that could have been used. Other constitutional provisions contain non-discrimination language. For example, Art. I, § 9, cl. 6, provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." Under Art. IV, § 2, cl. 1, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Language mandating equal treatment of one sort or another also appeared in the religious liberty provisions of colonial charters and state constitutions.[33] But Congress eschewed those models. The contrast between these readily available anti-discrimination models and the language that appears in the First Amendment speaks volumes.

IV

A

While we presume that the words of the Constitution carry their ordinary and normal meaning, we cannot disregard the possibility that some of the terms in the Free Exercise Clause had a special meaning that was well understood at the time. *Heller*,

again, provides a helpful example. *Heller* did not hold that the right to keep and bear arms means that everyone has the right to keep and bear every type of weaponry in all places and at all times. Instead, it held that the Second Amendment protects a known right that was understood to ***1899** have defined dimensions. 554 U.S. at 626–628, 128 S.Ct. 2783.

Following *Heller*'s lead, we must ask whether the Free Exercise Clause protects a right that was known at the time of adoption to have defined dimensions. But in doing so, we must keep in mind that there is a presumption that the words of the Constitution are to be interpreted in accordance with their "normal and ordinary" sense. *Id.*, at 576, 128 S.Ct. 2783 (internal quotation marks omitted). Anyone advocating a different reading must overcome that presumption.

B

1

What was the free-exercise right understood to mean when the Bill of Rights was ratified? And in particular, was it clearly understood that the right simply required equal treatment for religious and secular conduct? When *Smith* was decided, scholars had not devoted much attention to the original meaning of the Free Exercise Clause, and the parties' briefs ignored this issue, as did the opinion of the Court. Since then, however, the historical record has been plumbed in detail, [34] and we are now in a good position to examine how the free-exercise right was understood when the First Amendment was adopted.

By that date, the right to religious liberty already had a long, rich, and complex history in this country. What appears to be the first "free exercise" provision was adopted in 1649. Prompted by Lord Baltimore, [35] the Maryland Assembly enacted a provision protecting the right of all Christians to engage in "the free exercise" of religion. [36] Rhode Island's 1663 Charter extended the right to all. See Charter of Rhode Island and Providence Plantations (1663), in Cogan 34. Early colonial charters and agreements in Carolina, Delaware, ***1900** New Jersey, New York, and Pennsylvania also recognized the right to free exercise, [37] and by 1789, every State except Connecticut had a constitutional provision protecting religious liberty. McConnell, Origins 1455. In fact, the Free Exercise Clause had more analogs in State Constitutions than any other individual right. See Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition? 85 S. Cal. L. Rev. 1451, 1463–1464, 1472–1473 (2012). In all of those State Constitutions, freedom of religion enjoyed broad protection, and the right "was universally said to be an unalienable right." McConnell, Origins 1456. [38]

***1901** 2

What was this right understood to protect? In seeking to discern that meaning, it is easy to get lost in the voluminous discussion of religious liberty that occurred during the long period from the first British settlements to the adoption of the Bill of Rights. Many different political figures, religious leaders, and others spoke and wrote about religious liberty and the relationship between the authority of civil governments and religious bodies. The works of a variety of thinkers were influential, and views on religious liberty were informed by religion, philosophy, historical experience, particular controversies and issues, and in no small measure by the practical task of uniting the Nation. The picture is complex.

For present purposes, we can narrow our focus and concentrate on the circumstances that relate most directly to the adoption of the Free Exercise Clause. As has often been recounted, critical state ratifying conventions approved the Constitution on the understanding that it would be amended to provide express protection for certain fundamental rights, [39] and the right to religious liberty was unquestionably one of those rights. As noted, it was expressly protected in 12 of the 13 State Constitutions, and these state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment.

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When we look at these provisions, we see one predominant model. This model extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger "the public peace" or "safety."

This model had deep roots in early colonial charters. It appeared in the Rhode Island Charter of 1663, [40] the Second Charter ***1902** of Carolina in 1665, [41] and the New York Act Declaring Rights & Priviledges in 1691. [42]

By the founding, more than half of the State Constitutions contained free-exercise provisions subject to a "peace and safety" carveout or something similar. The Georgia Constitution is a good example. It provided that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the *peace and safety* of the State." Ga. Const., Art. LVI (1777), in Cogan 16 (emphasis added). The founding era Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina all contained broad protections for religious exercise, subject to limited peace-and-safety carveouts. [43]

***1903** The predominance of this model is highlighted by its use in the laws governing the Northwest Territory. In the Northwest Ordinance of 1787, the Continental Congress provided that "[n]o person, demeaning himself in *a peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory." Art. I (emphasis added). After the ratification of the Constitution, the First Congress used similar language in the Northwest Ordinance of 1789. See Act of Aug. 7, 1789, 1 Stat. 52 (reaffirming Art. I of Northwest Ordinance of 1787). Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect. See, *e.g., Town of Greece v. Galloway*, 572 U.S. 565, 575–578, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Harmelin v. Michigan*, 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.); *Marsh v. Chambers*, 463 U.S. 783, 786–792, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); *Carroll v. United States*, 267 U.S. 132, 150–151, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

3

The model favored by Congress and the state legislatures—providing broad protection for the free exercise of religion except where public "peace" or "safety" would be endangered—is antithetical to *Smith*. If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary. Legislatures enact generally applicable laws to protect public peace and safety. If those laws are thought to be sufficient to address a particular type of conduct when engaged in for a secular purpose, why wouldn't they also be sufficient to address the same type of conduct when carried out for a religious reason?

Smith's defenders have no good answer. Their chief response is that the free-exercise provisions that included these carveouts were tantamount to the *Smith* rule because any conduct that is generally prohibited or generally required can be regarded as necessary to protect public peace or safety. See *City of Boerne*, 521 U.S. at 539, 117 S.Ct. 2157 (SCALIA, J., concurring in part) ("At the time these provisos were enacted, keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws").

This argument gives "public peace and safety" an unnaturally broad interpretation. Samuel Johnson's 1755 dictionary defined "peace" as: "1. Respite from war.... 2. Quiet from suits or disturbances.... 3. Rest from any commotion. 4. Stil[l]ness from riots or tumults.... 5. Reconciliation of differences.... 6. A state not hostile.... 7. Rest; quiet; content; freedom from terrour; heavenly rest...." 2 Johnson. [44]

***1904** In ordinary usage, the term "safety" was understood to mean: "1. Freedom from danger.... 2. Exemption from hurt. 3. Preservation from hurt...." *Ibid*. [45]

When “peace” and “safety” are understood in this way, it cannot be said that every violation of every law imperils public “peace” or “safety.” In 1791 (and today), violations of many laws do not threaten “war,” “disturbances,” “commotion,” “riots,” “terrour,” “danger,” or “hurt.” Blackstone catalogs numerous violations that do not threaten any such harms, including “cursing”; [46] refusing to pay assessments for “the repairs of sea banks and sea walls” and the “cleansing of rivers, public streams, ditches and other conduits”; [47] “retaining a man's hired servant before his time is expired”; [48] an attorney's failure to show up for a trial; [49] the unauthorized “solemniz[ing of a] marriage in any other place besides a church, or public chapel wherein banns have been usually published”; [50] “transporting and seducing our artists to settle abroad”; [51] engaging in the conduct of “a common scold”; [52] and “exercis[ing] a trade in any town, without having previously served as an apprentice for seven years.” [53]

In contrast to these violations, Blackstone lists “offences against the public peace.” 4 Commentaries on the Laws of England 142–153 (1769). Those include: riotous assembling of 12 persons or more; unlawful hunting; anonymous threats and demands; destruction of public floodgates, locks, or sluices on a navigable river; public fighting; riots or unlawful assemblies; “tumultuous” petitioning; forcible entry or detainer; riding or “going armed” with dangerous or unusual weapons; spreading false news to “make discord between the king and nobility, or concerning any great man of the realm”; spreading “false and pretended” prophecies to disturb the peace; provoking breaches of the peace; and libel “to provoke ... wrath, or expose [an individual] to public hatred, contempt, and ridicule.” *Ibid.* (emphasis deleted); see also McConnell, Freedom from Persecution 835–836. These offenses might inform what constitutes actual or threatened breaches of public peace or safety in the ordinary sense of those terms. [54] But the ***1905** ordinary meaning of offenses that threaten public peace or safety must be stretched beyond the breaking point to encompass *all* violations of *any* law. [55]

C

That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States. When there were important clashes between generally applicable laws and the religious practices of particular groups, colonial and state legislatures were willing to grant exemptions—even when the generally applicable laws served critical state interests.

Oath exemptions are illustrative. Oath requirements were considered “indispensable” to civil society because they were thought to ensure that individuals gave truthful testimony and fulfilled commitments. McConnell, Origins 1467. Quakers and members of some other religious groups refused to take oaths, *ibid.*, and therefore a categorical oath requirement would have resulted in the complete exclusion of these Americans from important civic activities, such as testifying in court and voting, see *ibid.*

Tellingly, that is not what happened. In the 1600s, Carolina allowed Quakers to enter a pledge rather than swearing an oath. *Ibid.* In 1691, New York permitted Quakers to give testimony after giving an affirmation. *Ibid.* Massachusetts did the same in 1743. *Id.,* at 1467–1468. In 1734, New York also allowed Quakers to qualify to vote by making an affirmation, and in 1740, Georgia granted an exemption to Jews, allowing them to omit the phrase “ ‘on the faith of a Christian’ ” from the State's naturalization oath. *Id.,* at 1467. By 1789, almost all States had passed oath exemptions. *Id.*, at 1468.

Some early State Constitutions and declarations of rights formally provided oath exemptions for religious objectors. For instance, the Maryland Declaration of Rights of 1776 declared that Quakers, Mennonites, and members of some other religious groups “ought to be allowed to make their solemn affirmation” instead of an oath. § 36, in Cogan 18. Similarly, the Massachusetts Constitution of 1780 permitted Quakers holding certain government positions to decline to take the prescribed oath of office, allowing affirmations instead. Pt. II, ch. VI, Art. I, in *id.,* at 22. The Federal Constitution likewise permits federal and state officials to make either an “Oath *or* Affirmation, to support this Constitution.” Art. VI, cl. 3 (emphasis added); see also Art. I, § 3, cl. 6; Art. II, § 1, cl. 8.

Military conscription provides an even more revealing example. In the Colonies ***1906** and later in the States, able-bodied men of a certain age were required to serve in the militia, see *Heller*, 554 U.S. at 595–596, 128 S.Ct. 2783, but Quakers, Mennonites, and members of some other religious groups objected to militia service on religious grounds, see McConnell, Origins 1468. The militia was regarded as essential to the security of the State and the preservation of freedom, see *Heller*, 554 U.S. at 597–598, 128 S.Ct. 2783, but colonial governments nevertheless granted religious exemptions, see McConnell, Origins 1468. Rhode Island, Maryland, North Carolina, and New Hampshire did so in the founding era. *Ibid.* In 1755, New York permitted a conscientious objector to obtain an exemption if he paid a fee or sent a substitute. *Ibid.* Massachusetts adopted a similar law two years later, and Virginia followed suit in 1776. *Ibid.*, and n. 297.

The Continental Congress also granted exemptions to religious objectors because conscription would do "violence to their consciences." Resolution of July 18, 1775, in 2 Journals of the Continental Congress, 1774–1789, p. 189 (W. Ford ed. 1905) (quoted in McConnell, Origins 1469, and n. 299). This decision is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers, [56] the very survival of the new Nation often seemed in danger, [57] and the Members of Congress faced bleak personal prospects if the war was lost. [58] Yet despite these stakes, exemptions were granted.

Colonies with established churches also permitted non-members to decline to pay special taxes dedicated to the support of ministers of the established church. McConnell, Origins 1469. Massachusetts and Connecticut exempted Baptists and Quakers in 1727. *Ibid.* Virginia provided exemptions to Huguenots in 1700, German Lutherans in 1730, and dissenters from the Church of England in 1776. *Ibid.*; see also S. Cobb, The Rise of Religious Liberty in America 98, 492 (1902). Beginning in 1692, New Hampshire exempted those who could prove they were " 'conscientiously' " of a " 'different persuasion,' " regularly attended their own religious services, and contributed financially to their faith. McConnell, Origins 1469.

Various other religious exemptions were also provided. North Carolina and Maryland granted exemptions from the requirement that individuals remove their hats in court, a gesture that Quakers viewed as an impermissible showing of respect to a secular authority. *Id.*, at 1471–1472. And Rhode Island exempted Jews from some marriage laws. *Id.*, at 1471.

In an effort to dismiss the significance of these legislative exemptions, it has been argued that they show only what the Constitution permits, not what it requires. *City of Boerne*, 521 U.S. at 541, 117 S.Ct. 2157 ***1907** (opinion of SCALIA, J.). But legislatures provided those accommodations before the concept of judicial review took hold, and their actions are therefore strong evidence of the founding era's understanding of the free-exercise right. See McConnell, Free Exercise Revisionism 1119. Cf. *Heller*, 554 U.S. at 600–603, 128 S.Ct. 2783 (looking to state constitutions that preceded the adoption of the Second Amendment).

D

Defenders of *Smith* have advanced historical arguments of their own, but they are unconvincing, and in any event, plainly insufficient to overcome the ordinary meaning of the constitutional text.

1

One prominent argument points to language in some founding-era charters and constitutions prohibiting laws or government actions that were taken "for" or "on account" of religion. See *City of Boerne*, 521 U.S. at 538–539, 117 S.Ct. 2157 (opinion of SCALIA, J.). That phrasing, it is argued, reaches only measures that target religion, not neutral and generally applicable laws. This argument has many flaws.

No such language appears in the Free Exercise Clause, and in any event, the argument rests on a crabbed reading of the words "for" or "on account of" religion. As Professor McConnell has explained, "[i]f a member of the Native American Church is arrested for ingesting peyote during a religious ceremony, then he surely is molested 'for' or 'on account of' his religious practice—even though the law under which he is arrested is neutral and generally applicable." Freedom From Persecution 834.

This argument also ignores the full text of many of the provisions on which it relies. *Id.,* at 833–834. While some protect against government actions taken "for" or "on account of" religion, they do not stop there. Instead, they go on to provide broader protection for religious liberty. See, *e.g.,* Maryland Act Concerning Religion (1649), in Cogan 17 (guaranteeing residents not be "troubled ... in the free exercise [of religion]"); New York Constitution (1777), in *id.*, at 26 (guaranteeing "the free Exercise and Enjoyment of religious Profession and Worship").

2

Another argument advanced by *Smith*'s defenders relies on the paucity of early cases "refusing to enforce a generally applicable statute because of its failure to make accommodation," *City of Boerne*, 521 U.S. at 542, 117 S.Ct. 2157 (opinion of SCALIA, J.). If exemptions were thought to be constitutionally required, they contend, we would see many such cases.

There might be something to this argument if there were a great many cases denying exemptions and few granting them, but the fact is that diligent research has found only a handful of cases going either way. Commentators have discussed the dearth of cases, and as they note, there are many possible explanations. [59] Early 19th century legislation imposed only limited restrictions on private conduct, and this minimized the chances of conflict between generally applicable laws and religious practices. The principal conflicts that arose—involving oaths, conscription, and taxes to support an established church—were largely resolved by state constitutional ***1908** provisions and laws granting exemptions. And the religious demographics of the time decreased the likelihood of conflicts. The population was overwhelmingly Christian and Protestant, the major Protestant denominations made up the great bulk of the religious adherents, [60] and other than with respect to the issue of taxes to support an established church, it is hard to think of conflicts between the practices of the members of these denominations and generally applicable laws that a state legislature might have enacted.

Members of minority religions are most likely to encounter such conflicts, and the largest minority group, the Quakers, who totaled about 10% of religious adherents, [61] had received exemptions for the practices that conflicted with generally applicable laws. As will later be shown, see *infra*, at 1908 – 1911, the small number of religious-exemption cases that occurred during the early 19th century involved members of what were then tiny religious groups—such as Catholics, Jews, and Covenanters. [62] Given the size of these groups, one would not expect a large number of cases. And where cases arose, the courts' decisions may not have always been reported. Barclay, The Historical Origins of Judicial Religious Exemptions, 96 Notre Dame L. Rev. 55, 70 (2020).

3

When the body of potentially relevant cases is examined, they provide little support for *Smith*'s interpretation of the free-exercise right. Not only are these decisions few in number, but they reached mixed results. In addition, some are unreasoned; some provide ambiguous explanations; and many of the cases denying exemptions were based on grounds that do not support *Smith.*

The most influential early case granting an exemption was *People* v. *Philips*, 1 W. L. J. 109, 112–113 (Gen. Sess., N. Y. 1813), where the court held that a Catholic priest could not be compelled to testify about a confession. The priest's refusal, the court reasoned, was protected by the state constitutional right to the free exercise of religion and did not fall within the exception for

"acts of licentiousness" and "practices inconsistent with the peace or safety of th[e] State."[63] This, of course, is exactly the understanding of the free-exercise right that is seen in the founding era State Constitutions.

Although *Philips* was not officially reported, knowledge of the decision appears to have spread widely. Four years later, another New York court implicitly reaffirmed the principle *Philips* recognized but found the decision inapplicable because the Protestant minister who was called to testify did not feel a religious obligation to refuse. See *Smith's Case*, 2 N. Y. City-Hall Recorder 77, 80, and n. (1817); McConnell, Origins 1505–1506; Walsh 40–41.

***1909** In 1827, a South Carolina court relied on *Philips* as support for its decision to grant an exemption from a state law relied on to bar the testimony of a witness who denied a belief in punishment after death for testifying falsely, and the State's newly constituted high court approved that opinion. *Farnandis* v. *Henderson*, 1 Carolina L. J. 202, 213, 214 (1827).[64]

In *Commonwealth v. Cronin*, 2 Va.Cir. 488, 498, 500, 505 (1855), a Virginia court followed *Philips* and held that a priest's free-exercise right required an exemption from the general common law rule compelling a witness to "disclose all he may know" when giving testimony.

On the other side of the ledger, the most prominent opponent of exemptions was John Bannister Gibson of the Pennsylvania Supreme Court. Today, Gibson is best known for his dissent in *Eakin v. Raub*, 12 Serg. & Rawle 330, 355–356 (1825), which challenged John Marshall's argument for judicial review in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). See McConnell, Origins 1507. Three years after *Eakin*, Gibson's dissent in *Commonwealth v. Lesher*, 17 Serg. & Rawle 155 (Pa. 1828), advanced a related argument against decisions granting religious exemptions. Gibson agreed that the state constitutional provision protecting religious liberty conferred the right to do or forbear from doing any act "not prejudicial to the public weal," but he argued that judges had no authority to override legislative judgments about what the public weal required. *Id.,* at 160–161 (emphasis deleted).

Three years later, he made a similar argument in dicta in *Philips's Executors v. Gratz*, 2 Pen. & W. 412, 412–413 (Pa. 1831), where a Jewish plaintiff had taken a non-suit (agreed to a dismissal) in a civil case scheduled for trial on a Saturday. Gibson's opinion for the Court set aside the non-suit on other grounds but rejected the plaintiff's religious objection to trial on Saturday. *Id.,* at 416–417. He proclaimed that a citizen's obligation to the State must always take precedence over any religious obligation, and he expressly registered disagreement with the New York court's decision in *Philips*. *Id.,* at 417.

In South Carolina, an exemption claim was denied in *State v. Willson*, 13 S. C. L. 393, 394–397 (1823), where the court refused to exempt a member of the Covenanters religious movement from jury service. Because Covenanters opposed the Constitution on religious grounds, they refused to engage in activities, such as jury service and voting, that required an oath to support the Constitution or otherwise enlisted their participation in the Nation's scheme of government.[65] It is possible to read the opinion in *Willson* as embodying something like the *Smith* rule—or as concluding that granting the exemption would have opened the floodgates and undermined public peace and safety. See 13 S. C. L. at 395 ("who could distinguish ... between the pious asseveration of a holy ***1910** man and that of an accomplished villain"). But if *Willson* is read as rejecting religious exemptions, South Carolina's reconstituted high court reversed that position in *Farnandis*.[66]

Other cases denying exemptions are even less helpful to *Smith*'s defenders. Three decisions rejected challenges to Sunday closing laws by merchants who celebrated Saturday as the Sabbath, but at least two of these were based on the court's conclusion that the asserted religious belief was unfounded. See *City Council of Charleston v. Benjamin*, 33 S. C. L. 508, 529 (1848) ("There is ... no violation of the Hebrew's religion, in requiring him to cease from labor on another day than his Sabbath, if he be left free to observe the latter according to his religion" (emphasis deleted)); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 50, 51 (Pa. 1817) ("[T]he Jewish Talmud ... asserts no such doctrine" and the objection was made "out of mere caprice"). That reasoning is contrary to a principle that *Smith* reaffirmed: "Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." 494 U.S. at 887, 110 S.Ct. 1595.

A third Sunday closing law decision appears to rest at least in part on a similar ground. See *Specht v. Commonwealth*, 8 Pa. 312 (1848). The court observed that the merchant's conscience rights might have been violated if his religion actually required him to work on Sunday, but the court concluded that the commandment to keep holy the Sabbath had never been understood to impose "an imperative obligation to fill up each day of the other six with some worldly employment." *Id.*, at 326.

Other cases cited as denying exemptions were decided on nebulous grounds. In *Stansbury v. Marks*, 2 Dall. 213, 1 L.Ed. 353 (Pa. 1793), a decision of the Pennsylvania Supreme Court, the case report in its entirety states: "In this cause (which was tried on Saturday, the 5th of April) the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The Court, therefore, fined him £10; but the defendant, afterwards, waving the benefit of his testimony, he was discharged from the fine." (Emphasis deleted.) What can be deduced from this cryptic summary? Was the issue mooted when the defendant waived the benefit of Phillips's testimony? Who can tell?

In *Commonwealth v. Drake*, 15 Mass. 161 (1818), the Supreme Judicial Court of Massachusetts summarily affirmed the conviction of a criminal defendant who was convicted after the trial court admitted the testimony of his fellow church members before whom he had confessed. The State argued that the defendant had voluntarily confessed, that his confession was not required by any "ecclesiastical rule," and that he had confessed "not to the church" but "to his friends and neighbours." *Id.*, at 162. Because the court provided no explanation of its decision, this case sheds no light on the understanding of the free-exercise right.

All told, this mixed bag of antebellum decisions does little to support *Smith*, and extending the search past the Civil War does not advance *Smith*'s cause. One of the objectives of the Fourteenth Amendment, ***1911** it has been argued, was to protect the religious liberty of African-Americans in the South, where a combination of laws that did not facially target religious practice had been used to suppress religious exercise by slaves. See generally Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994).

4

Some have claimed that the drafting history of the Bill of Rights supports *Smith*. See Brief for First Amendment Scholars as *Amici Curiae* 10–11; Muñoz, Original Meaning 1085. But as Professor Philip Hamburger, one of *Smith*'s most prominent academic defenders, has concluded, "[w]hat any of this [history] implies about the meaning of the Free Exercise Clause is speculative." Religious Exemption 928.

Here is the relevant history. The House debated a provision, originally proposed by Madison, that protected the right to bear arms but included language stating that "no person, religiously scrupulous, shall be compelled to bear arms." 1 Annals of Cong. 749, 766 (1789); see also Muñoz, Original Meaning 1112. Some Members spoke in favor of the proposal, [67] others opposed it, [68] and in the end, after adding the words "in person" at the end of the clause, the House adopted it. [69] The Senate, however, rejected the proposal (for reasons not provided on the public record), *id.*, at 1116, and the House acceded to the deletion.

Those who claim that this episode supports *Smith* argue that the House would not have found it necessary to include this proviso in the Second Amendment if it had thought that the Free Exercise Clause already protected conscientious objectors from conscription, Muñoz, Original Meaning 1120, but that conclusion is unfounded. Those who favored Madison's language might have thought it necessary, not because the free-exercise right *never* required religious exemptions but because they feared that exemption from military service would be held to fall into the free-exercise right's carveout for conduct that threatens public safety. [70] And of course, it could be argued that the willingness of the House to constitutionalize this exemption despite its potential effect on national security shows the depth of the Members' commitment to the concept of religious exemptions.

As for the Senate's rejection of the proviso, we have often warned against drawing inferences from Congress's failure to adopt a legislative proposal. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act"); *Brecht v. Abrahamson*, 507 U.S. 619, 632–633, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (collecting cases). And in this instance, there are many possible explanations for what happened in the Senate. The rejection of the proviso *could* have been due to a general objection to religious exemptions, but it could also have been based on ***1912** any of the following grounds: opposition to this particular exemption, the belief that conscientious objectors were already protected by the Free Exercise Clause, a belief that military service fell within the public safety carveout, or the view that Congress should be able to decide whether to grant or withhold such exemptions based on its assessment of what national security required at particular times.

* * *

In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for *Smith* fails to overcome the more natural reading of the text. Indeed, the case against *Smith* is very convincing.

V

That conclusion cannot end our analysis. "We will not overturn a past decision unless there are strong grounds for doing so," *Janus v. State, County, and Municipal Employees,* 585 U. S. ––––, ––––, 138 S.Ct. 2448, 2478, 201 L.Ed.2d 924 (2018), but at the same time, *stare decisis* is "not an inexorable command." *Ibid.* (internal quotation marks omitted). It "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). And it applies with "perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus*, 585 U. S., at ––––, 138 S.Ct., at 2478; see also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (SCALIA, J., concurring in part and concurring in judgment) ("This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)" (internal quotation marks omitted)); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 365, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)).

In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down. See *Janus*, 585 U. S., at –––– – ––––, 138 S.Ct., at 2478–2479. No relevant factor, including reliance, weighs in *Smith*'s favor.

A

Smith's reasoning. As explained in detail above, *Smith* is a methodological outlier. It ignored the "normal and ordinary" meaning of the constitutional text, see *Heller*, 554 U.S. at 576, 128 S.Ct. 2783, and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption. And the Court adopted its reading of the Free Exercise Clause with no briefing on the issue from the parties or *amici*. Laycock, 8 J. L. & Religion, at 101.

Then there is *Smith*'s treatment of precedent. It looked for precedential support in strange places, and the many precedents that stood in its way received remarkably rough treatment.

Looking for a case that had endorsed its no-exemptions view, *Smith* turned to *Gobitis*, 310 U.S. at 586, 60 S.Ct. 1010, a decision ***1913** that Justice Scalia himself later acknowledged was "erroneous," *Wisconsin Right to Life, Inc.*, 551 U.S. at 500–501, 127 S.Ct. 2652 (opinion concurring in part). William Gobitas, [71] a 10-year-old fifth grader, and his 12-year-old sister Lillian refused to salute the flag during the Pledge of Allegiance because, along with other Jehovah's Witnesses, they thought the salute constituted idolatry. 310 U.S. at 591–592, 60 S.Ct. 1010. [72] William's "teacher tried to force his arm up, but William held on to his pocket and successfully resisted." [73] The Gobitas children were expelled from school, and the family grocery was boycotted. [74]

This Court upheld the children's expulsion because, in ringing rhetoric quoted by *Smith*, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." 310 U.S. at 594, 60 S.Ct. 1010; see also *Smith*, 494 U.S. at 879, 110 S.Ct. 1595 (quoting this passage). This declaration was overblown when issued in 1940. (As noted, many religious exemptions had been granted by legislative bodies, and the 1940 statute instituting the peacetime draft continued that tradition by exempting conscientious objectors. Selective Training and Service Act, 54 Stat. 885, 889.) By 1990, when *Smith* was handed down, the pronouncement flew in the face of nearly 30 years of Supreme Court precedent.

But even if all that is put aside, *Smith*'s recourse to *Gobitis* was surprising because the decision was overruled just three years later when three of the Justices in the majority had second thoughts. See *Barnette*, 319 U. S. at 642, 63 S.Ct. 1178; *id.,* at 643–644, 63 S.Ct. 1178 (Black and Douglas, JJ., concurring); *id.,* at 644–646, 63 S.Ct. 1178 (MURPHY, J., concurring). Turning *Gobitis*'s words on their head, *Barnette* held that students with religious objections to saluting the flag were indeed "relieved ... from obedience to a general [rule] not aimed at the promotion or restriction of religious beliefs." *Gobitis*, 310 U.S. at 594, 60 S.Ct. 1010.

After reviving *Gobitis*'s anti-exemption rhetoric, *Smith* turned to *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244, an 1879 decision upholding the polygamy conviction of a member of the Church of Jesus Christ of Latter-day Saints. Unlike *Gobitis*, *Reynolds* at least had not been overruled, [75] but the decision was not based on anything like *Smith*'s interpretation of the Free Exercise Clause. It rested primarily on the proposition that the Free Exercise Clause protects beliefs, not conduct. 98 U.S. at 166–167. The Court had repudiated that distinction a half century before *Smith* was decided. See *Cantwell*, 310 U.S. at 303–304, 60 S.Ct. 900; *Murdock v. Pennsylvania*, 319 U.S. 105, 110–111, 117, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). And *Smith* itself agreed! See 494 U.S. at 877, 110 S.Ct. 1595.

The remaining pre-*Sherbert* cases cited by *Smith* actually cut against its interpretation. None was based on the rule that *Smith* adopted. Although these decisions ended up denying exemptions, they did so on other grounds. In ***1914** *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), where a Jehovah's Witness who enlisted a child to distribute religious literature was convicted for violating a state child labor law, the decision was based on the Court's assessment of the strength of the State's interest. *Id*., at 159–160, 162, 169–170, 64 S.Ct. 438; see also *Yoder*, 406 U.S. at 230–231, 92 S.Ct. 1526 (describing the *Prince* Court's rationale).

In *Braunfeld v. Brown*, 366 U.S. 599, 601, 609, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), which rejected a Jewish merchant's challenge to Pennsylvania's Sunday closing laws, the Court balanced the competing interests. The Court attached diminished weight to the burden imposed by the law (because it did not require work on Saturday), *id.,* at 606, 81 S.Ct. 1144, [76] and on the other side of the balance, the Court accepted the Commonwealth's view that the public welfare was served by providing a uniform day of rest, *id*., at 608–609, 81 S.Ct. 1144; see *Sherbert*, 374 U.S. at 408–409, 83 S.Ct. 1790 (discussing *Braunfeld*).

When *Smith* came to post-*Sherbert* cases, the picture did not improve. First, in order to place *Sherbert*, *Hobbie*, and *Thomas* in a special category reserved for cases involving unemployment compensation, an inventive transformation was required. None of those opinions contained a hint that they were limited in that way. And since *Smith* itself involved the award of unemployment

compensation benefits under a scheme that allowed individualized exemptions, it is hard to see why that case did not fall into the same category.

The Court tried to escape this problem by framing Alfred Smith's and Galen Black's free-exercise claims as requests for exemptions from the Oregon law criminalizing the possession of peyote, see 494 U.S. at 876, 110 S.Ct. 1595, but neither Smith nor Black was prosecuted for that offense even though the State was well aware of what they had done. The State had the discretion to decline prosecution based on the facts of particular cases, and that is presumably what it did regarding Smith and Black. Why this was not sufficient to bring the case within *Smith*'s rule about individualized exemptions is unclear. See McConnell, Free Exercise Revisionism 1124.

Having pigeon-holed *Sherbert*, *Hobbie*, and *Thomas* as unemployment compensation decisions, *Smith* still faced problems. For one thing, the Court had previously applied the *Sherbert* test in many cases not involving unemployment compensation, including *Hernandez v. Commissioner*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (disallowance of tax deduction); *Lee*, 455 U.S. 252, 102 S.Ct. 1051 (payment of taxes); and *Gillette,* 401 U.S. 437, 91 S.Ct. 828 (denial of conscientious objector status to person with religious objection to a particular war). To get these cases out of the way, *Smith* claimed that, because they ultimately found no free-exercise violations, they merely "*purported* to apply the *Sherbert* test." 494 U.S. at 883, 110 S.Ct. 1595 (emphasis added).

This was a curious observation. In all those cases, the Court invoked the *Sherbert* test but found that it did not require relief. See *Hernandez*, 490 U.S. at 699, 109 S.Ct. 2136; *Lee*, 455 U.S. at 257–260, 102 S.Ct. 1051; *Gillette*, 401 U.S. at 462, 91 S.Ct. 828. Was the *Smith* Court questioning the sincerity of these earlier opinions? If not, then in what sense did those decisions merely "purport" to apply *Sherbert*?

Finally, having swept all these cases from the board, *Smith* still faced at least one big troublesome precedent: *Yoder*. ***1915** *Yoder* not only applied the *Sherbert* test but held that the Free Exercise Clause required an exemption totally unrelated to unemployment benefits. 406 U.S. at 220–221, 236, 92 S.Ct. 1526. To dispose of *Yoder*, *Smith* was forced to invent yet another special category of cases, those involving "hybrid-rights" claims. *Yoder* fell into this category because it implicated both the Amish parents' free-exercise claim and a parental-rights claim stemming from *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See *Smith*, 494 U.S. at 881, 110 S.Ct. 1595. And in such hybrid cases, *Smith* held, the *Sherbert* test survived. See 494 U.S. at 881–882, 110 S.Ct. 1595.

It is hard to see the justification for this curious doctrine. The idea seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough. So perhaps the doctrine requires the assignment of a numerical score to each claim. If a passing grade is 70 and a party advances a free-speech claim that earns a grade of 40 and a free-exercise claim that merits a grade of 31, the result would be a (barely) sufficient hybrid claim. Such a scheme is obviously unworkable and has never been recognized outside of *Smith*.

And then there is the problem that the hybrid-rights exception would largely swallow up *Smith*'s general rule. A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims. Take the claim in *Smith* itself. To members of the Native American Church, the ingestion of peyote during a religious ceremony is a sacrament. When Smith and Black participated in this sacrament, weren't they engaging in a form of expressive conduct? Their ingestion of peyote "communicate[d], in a rather dramatic way, [their] faith in the tenets of the Native American Church," and the State's prohibition of that practice "interfered with their ability to communicate this message" in violation of the Free Speech Clause. McConnell, Free Exercise Revisionism 1122. And, "if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under *another* constitutional provision, then there would have been no reason for the Court in [the so-called] hybrid cases to have mentioned the Free Exercise Clause at all." *Lukumi*, 508 U.S. at 566–567, 113 S.Ct. 2217 (opinion of SOUTER, J.); see also Laycock, 8 J. L. & Religion, at 106 (noting that *Smith* "reduces the free exercise

clause to a cautious redundancy, relevant only to 'hybrid' cases"). It is telling that this Court has never once accepted a "hybrid rights" claim in the more than three decades since *Smith*.

In addition to all these maneuvers—creating special categories for unemployment compensation cases, cases involving individualized exemptions, and hybrid-rights cases—*Smith* ignored the multiple occasions when the Court had directly repudiated the very rule that *Smith* adopted. See *supra,* at 1881 – 1882.

Smith's rough treatment of prior decisions diminishes its own status as a precedent.

B

Consistency with other precedents. *Smith* is also discordant with other precedents. *Smith* did not overrule *Sherbert* or any of the other cases that built on *Sherbert* from 1963 to 1990, and for the reasons just discussed, *Smith* is tough to harmonize with those precedents.

The same is true about more recent decisions. In ***1916** *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012), the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq*. When the school discharged a teacher, she claimed that she had been terminated because of disability. 565 U.S. at 178–179, 132 S.Ct. 694. Since the school considered her a "minister" and she provided religious instruction for her students, the school argued that her discharge fell within the so-called "ministerial exception" to generally applicable employment laws. *Id.,* at 180, 132 S.Ct. 694. The Equal Employment Opportunity Commission maintained that *Smith* precluded recognition of this exception because "the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability." *Id.*, at 190, 132 S.Ct. 694; see *id.*, at 189–190, 132 S.Ct. 694. We nevertheless held that the exception applied. *Id.,* at 190, 132 S.Ct. 694.[77] Similarly, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U. S. ––––, –––– – ––––, 140 S.Ct. 2049, 2066–2067, 207 L.Ed.2d 870 (2020), we found that other religious schools were entitled to similar exemptions from both the ADA and the Age Discrimination in Employment Act of 1967.

There is also tension between *Smith* and our opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 584 U. S. ––––, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). In that case, we observed that "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." *Id*., at ––––, 138 S.Ct., at 1727. The clear import of this observation is that such a member of the clergy would be entitled to a religious exemption from a state law restricting the authority to perform a state-recognized marriage to individuals who are willing to officiate both opposite-sex and same-sex weddings.

Other inconsistencies exist. *Smith* declared that "a private right to ignore generally applicable laws" would be a "constitutional anomaly," 494 U.S. at 886, 110 S.Ct. 1595, but this Court has often permitted exemptions from generally applicable laws in First Amendment cases. For instance, in *Boy Scouts of America v. Dale*, 530 U.S. 640, 656, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), we granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), parade sponsors' speech was exempted from the requirements of a similar law.

The granting of an exemption from a generally applicable law is tantamount to a holding that a law is unconstitutional as applied to a particular set of facts, see ***1917** Barclay & Rienzi, Constitutional Anomalies or As-Applied *Challenges*? *A Defense of Religious* Exemptions, 59 Boston College L. Rev. 1595, 1611 (2018), and cases holding generally applicable laws unconstitutional as applied are unremarkable. "[T]he normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ayotte v.*

Planned Parenthood of Northern New Eng., 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (internal quotation marks omitted; emphasis added). Thus, in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982), we held that a law requiring disclosure of campaign contributions and expenditures could not be "constitutionally applied" to a minor party whose members and contributors would face "threats, harassment or reprisals." *Id.*, at 101–102, 103 S.Ct. 416. Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (exempting the NAACP from a disclosure order entered to purportedly investigate compliance with a generally applicable statute). In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), and *Snyder v. Phelps*, 562 U.S. 443, 459, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011), the Court held that an established and generally applicable tort claim (the intentional infliction of emotional distress) could not constitutionally be applied to the particular expression at issue. Similarly, breach-of-the-peace laws, although generally valid, have been held to violate the Free Speech Clause under certain circumstances. See *Cohen v. California*, 403 U.S. 15, 16, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Cantwell*, 310 U.S. at 300, 311, 60 S.Ct. 900; see also *Bartnicki v. Vopper*, 532 U.S. 514, 517, 535, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) (respondents not liable under law prohibiting disclosure of illegally intercepted communications because their speech was protected by the First Amendment); *United States v. Treasury Employees*, 513 U.S. 454, 477, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (respondents not subject to the honoraria ban because it would violate their First Amendment rights); *United States v. Grace*, 461 U.S. 171, 175, 179, 183, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (respondents engaging in expressive conduct on public sidewalks not subject to law generally regulating conduct on Supreme Court grounds).

Finally, *Smith*'s treatment of the free-exercise right is fundamentally at odds with how we usually think about liberties guaranteed by the Bill of Rights. As Justice Jackson famously put it, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *Barnette*, 319 U.S. at 638, 63 S.Ct. 1178. *Smith*, by contrast, held that protection of religious liberty was better left to the political process than to courts. 494 U.S. at 890, 110 S.Ct. 1595. In *Smith*'s view, the Nation simply could not "afford the luxury" of protecting the free exercise of religion from generally applicable laws. *Id.*, at 888, 110 S.Ct. 1595. Under this interpretation, the free exercise of religion does not receive the judicial protection afforded to other, favored rights.

C

Workability. One of *Smith*'s supposed virtues was ease of application, but things have not turned out that way. Instead, at least four serious problems have arisen and continue to plague courts when called upon to apply *Smith*.

***1918** 1

"Hybrid-rights" cases. The "hybrid rights" exception, which was essential to distinguish *Yoder*, has baffled the lower courts. They are divided into at least three camps. See *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244–247 (C.A.3 2008) (describing Circuit split). Some courts have taken the extraordinary step of openly refusing to follow this part of *Smith*'s interpretation. The Sixth Circuit was remarkably blunt: "[H]old[ing] that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights ... is completely illogical." *Kissinger v. Board of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (1993). The Second and Third Circuits have taken a similar approach. See *Leebaert v. Harrington*, 332 F.3d 134, 144 (C.A.2 2003) ("We ... can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated"); *Knight v. Connecticut Dept. of Pub. Health*, 275 F.3d 156, 167 (C.A.2 2001); *Combs*, 540 F.3d at 247 ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta").

A second camp holds that the hybrid-rights exception applies only when a free-exercise claim is joined with some other independently viable claim. See *Archdiocese of Washington* v. *WMATA*, 897 F.3d 314, 331 (C.A.D.C. 2018) (A "hybrid rights claim ... requires independently viable free speech and free exercise claims"); *Gary S. v. Manchester School Dist.*, 374 F.3d

15, 19 (C.A.1 2004) (adopting District Court's reasoning that "the [hybrid-rights] exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim," 241 F.Supp.2d 111, 121 (D.N.H. 2003)); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 539 (C.A.1 1995). But this approach essentially makes the free-exercise claim irrelevant. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296–1297 (C.A.10 2004) ("[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary"); see also *Lukumi*, 508 U.S. at 567, 113 S.Ct. 2217 (opinion of SOUTER, J.) (making the same point).

The third group requires that the non-free-exercise claim be "colorable." See *Cornerstone Christian Schools v. University Interscholastic League*, 563 F.3d 127, 136, n. 8 (C.A.5 2009); *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1032–1033 (C.A.9 2004); *Axson-Flynn,* 356 F.3d at 1295–1297. But what that means is obscure. See, *e.g., id*., at 1295 (referring to "helpful" analogies such as the " 'likelihood of success on the merits' standard for preliminary injunctions" or the pre-Antiterrorism and Effective Death Penalty Act standard for obtaining an evidentiary hearing, *i.e.*, a " 'colorable showing of factual innocence' "). [78]

It is rare to encounter a holding of this Court that has so thoroughly stymied or elicited such open derision from the Courts of Appeals.

2

Rules that "target" religion. Post-*Smith* cases have also struggled with the task of ***1919** determining whether a purportedly neutral rule "targets" religious exercise or has the restriction of religious exercise as its "object." *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217; *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A threshold question is whether "targeting" calls for an objective or subjective inquiry. Must "targeting" be assessed based solely on the terms of the relevant rule or rules? Or can evidence of the rulemakers' motivation be taken into account? If subjective motivations may be considered, does it matter whether the challenged state action is an adjudication, the promulgation of a rule, or the enactment of legislation? Should courts consider the motivations of only the officials who took the challenged action, or may they also take into account comments by superiors and others in a position of influence? And what degree of hostility to religion or a religious group is required to prove "targeting"?

The genesis of this problem was *Smith*'s holding that a rule is not neutral "if prohibiting the exercise of religion" is its "object." 494 U.S. at 878, 110 S.Ct. 1595. *Smith* did not elaborate on what that meant, and later in *Lukumi*, which concerned city ordinances that burdened the practice of Santeria, 508 U.S. at 525–528, 113 S.Ct. 2217, Justices in the *Smith* majority adopted different interpretations. Justice Scalia and Chief Justice Rehnquist took the position that the "object" of a rule must be determined by its terms and that evidence of the rulemakers' motivation should not be considered. 508 U.S. at 557–559, 113 S.Ct. 2217. This interpretation had the disadvantage of allowing skillful rulemakers to target religious exercise by devising a facially neutral rule that applies to both the targeted religious conduct and a slice of secular conduct that can be burdened without eliciting unacceptable opposition from those whose interests are affected.

The alternative to this approach takes courts into the difficult business of ascertaining the subjective motivations of rulemakers. In *Lukumi*, Justices Kennedy and Stevens took that path and relied on numerous statements by council members showing that their object was to ban the practice of Santeria within the city's borders. *Id.,* at 540–542, 113 S.Ct. 2217. Thus, *Lukumi* left the meaning of a rule's "object" up in the air.

When the issue returned in *Masterpiece Cakeshop*, the question was only partially resolved. Holding that the Colorado Civil Rights Commission violated the free-exercise rights of a baker who refused for religious reasons to create a cake for a same-sex wedding, the Court pointed to disparaging statements made by commission members, and the Court noted that these comments, "by an adjudicatory body deciding a particular case," "were made in a very different context" from the remarks by the council members in *Lukumi*. *Masterpiece Cakeshop,* 584 U. S., at ––––, 138 S.Ct., at 1729–1730. That is as far as this Court's decisions have gone on the question of targeting, and thus many important questions remain open.

The present case highlights two—specifically, which officials' motivations are relevant and what degree of disparagement must be shown to establish unconstitutional targeting. In *Masterpiece Cakeshop*, the commissioners' statements—comparing the baker's actions to the Holocaust and slavery and suggesting that his beliefs were just an excuse for bigotry—went too far. *Id.,* at –––– – ––––, 138 S.Ct., at 1728–1730. But what about the comments of Philadelphia officials in this case? The city council labeled CSS's policy "discrimination that occurs under the guise of religious freedom." App. to Pet. for Cert. 147a. The mayor had said that the Archbishop's actions were not "Christian," and ***1920** he once called on the Pope "to kick some ass here." *Id.*, at 173a, 177a–178a. In addition, the commissioner of the Department of Human Services (DHS), who serves at the mayor's pleasure, [79] disparaged CSS's policy as out of date and out of touch with Pope Francis's teachings. [80]

The Third Circuit found this evidence insufficient. Although the mayor conferred with the DHS commissioner both before and after her meeting with CSS representatives, the mayor's remarks were disregarded because there was no evidence "that he played a *direct* role, or even a *significant* role, in the process." 922 F.3d at 157 (emphasis added). The city council's suggestion that CSS's religious liberty claim was a "guise" for discrimination was found to "fal[l] into [a] grey zone," and the commissioner's debate with a CSS representative about up-to-date Catholic teaching, which "some might think ... improper" "if taken out of context" was "best viewed as an effort to reach common ground with [CSS] by appealing to an authority within their shared religious tradition." *Ibid*. One may agree or disagree with the Third Circuit's characterization and evaluation of the statements of the City officials, but the court's analysis highlights the extremely impressionistic inquiry that *Smith*'s targeting requirement may entail.

Confusion and disagreement about "targeting" have surfaced in other cases. Recently in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ––––, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (*per curiam*), there were conflicting views about comments made by the Governor of New York. On the day before he severely restricted religious services in Brooklyn, the Governor "said that if the 'ultra-Orthodox [Jewish] community' would not agree to enforce the rules, 'then we'll close the institutions down.' " *Agudath Israel of America v. Cuomo*, 980 F.3d 222, 229 (C.A.2 2020) (PARK, J., dissenting). A dissenting judge on the Second Circuit thought the Governor had crossed the line, *ibid.*, and we ultimately enjoined enforcement of the rules, *Roman Catholic Diocese*, 592 U. S., at ––––, 141 S.Ct., at ––––. But two Justices who dissented found the Governor's comments inconsequential. *Id.,* at –––– – ––––, 141 S.Ct., at 79–81 (opinion of SOTOMAYOR, J., joined by KAGAN, J.).

In *Stormans, Inc. v. Wiesman*, 579 U. S. ––––, 136 S.Ct. 2433, 195 L.Ed.2d 870 (2016) (denying certiorari), there was similar disagreement. That case featured strong evidence that pro-life Christian pharmacists who refused to dispense emergency contraceptives were the object of a new rule requiring every pharmacy to dispense every Food and Drug Administration-approved drug. A primary drafter of the rule all but admitted that the rule was aimed at these pharmacists, and the Governor took unusual steps to secure adoption of the rule. ***1921** *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 937–943 (W.D. Wash. 2012). After a 12-day trial, the District Court found that Christian pharmacists had been targeted, *id.,* at 966, 987, but the Ninth Circuit refused to accept that finding, *Stormans, Inc.*, 794 F.3d 1064, 1079 (2015). Compare *Stormans, Inc.*, 579 U. S., at –––– – ––––, and n. 3, 136 S.Ct., at 2436–2437, and n. 3 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting from denial of certiorari) (questioning Ninth Circuit's finding).

Decisions of the lower courts on the issue of targeting remain in disarray. Compare *F. F. v. State*, 66 Misc.3d 467, 479–482, 114 N.Y.S.3d 852, 865–867 (2019) (declining to consider individual legislators' comments); *Tenafly Eruv Assn., Inc. v. Tenafly*, 309 F.3d 144, 168, n. 30 (C.A.3 2002) (declining to reach issue), with *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (C.A.2 2012) (considering legislative history); *St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 633 (C.A.7 2007) ("[W]e must look at ... the 'historical background of the decision under challenge' " (quoting *Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217)); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (C.A.8 2000) (targeting can be evidenced by legislative history).

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The nature and scope of exemptions. There is confusion about the meaning of *Smith*'s holding on exemptions from generally applicable laws. Some decisions apply this special rule if multiple secular exemptions are granted. See, *e.g., Horen v. Commonwealth*, 23 Va.App. 735, 743–744, 479 S.E.2d 553, 557 (1997); *Rader v. Johnston*, 924 F.Supp. 1540, 1551–1553 (D.Neb. 1996). Others conclude that even one secular exemption is enough. See, *e.g., Midrash Sephardi, Inc. v. Surfside*, 366 F.3d 1214, 1234–1235 (C.A.11 2004); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359, 365 (C.A.3 1999). And still others have applied the rule where the law, although allowing no exemptions on its face, was widely unenforced in cases involving secular conduct. See, *e.g., Tenafly Eruv Assn.*, 309 F.3d at 167–168.

4

Identifying appropriate comparators. To determine whether a law provides equal treatment for secular and religious conduct, two steps are required. First, a court must identify the secular conduct with which the religious conduct is to be compared. Second, the court must determine whether the State's reasons for regulating the religious conduct apply with equal force to the secular conduct with which it is compared. See *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. In *Smith*, this inquiry undoubtedly seemed straightforward: The secular conduct and the religious conduct prohibited by the Oregon criminal statute were identical. But things are not always that simple.

Cases involving rules designed to slow the spread of COVID–19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID–19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities ***1922** that should be used for comparison has been hotly contested.

In *South Bay United Pentecostal Church v. Newsom*, 590 U. S. ——, 140 S.Ct. 1613, 207 L.Ed.2d 154 (2020), where the Court refused to enjoin restrictions on religious services, THE CHIEF JUSTICE's concurrence likened religious services to lectures, concerts, movies, sports events, and theatrical performances. *Id.,* at ——, 140 S.Ct., at 1614–1615. The dissenters, on the other hand, focused on "supermarkets, restaurants, factories, and offices." *Id.,* at ——, 140 S.Ct., at 1615 (opinion of KAVANAUGH, J., joined by THOMAS and GORSUCH, JJ.).

In *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. ——, 140 S.Ct. 2603, 207 L.Ed.2d 1129 (2020), Nevada defended a rule imposing severe limits on attendance at religious services and argued that houses of worship should be compared with "movie theaters, museums, art galleries, zoos, aquariums, trade schools, and technical schools." Response to Emergency Application for Injunction, O. T. 2019, No. 19A1070, pp. 7, 14–15. Members of this Court who would have enjoined the Nevada rule looked to the State's more generous rules for casinos, bowling alleys, and fitness facilities. 591 U. S., at —— – ——, 140 S.Ct., at 2614–2615 (ALITO, J., joined by THOMAS and KAVANAUGH, JJ., dissenting).

In *Roman Catholic Diocese of Brooklyn*, 592 U. S. ——, 141 S.Ct. 63, Justices in the majority compared houses of worship with large retail establishments, factories, schools, liquor stores, bicycle repair shops, and pet shops, *id.,* at ——, 141 S.Ct., at 69; *id.,* at ——, 141 S.Ct., at 69–70 (GORSUCH, J., concurring), *id.,* at ——, 141 S.Ct., at 73–74 (KAVANAUGH, J., concurring), while dissenters cited theaters and concert halls, *id.,* at ——, 141 S.Ct., 77–78 (opinion of SOTOMAYOR, J., joined by KAGAN, J.).

In *Danville Christian Academy, Inc. v. Beshear*, 592 U. S. ——, 141 S.Ct. 527, 208 L.Ed.2d 504 (2020), the District Court enjoined enforcement of an executive order that compelled the closing of a religiously affiliated school, reasoning that the State permitted pre-schools, colleges, and universities to stay open and also allowed attendance at concerts and lectures. *Danville Christian Academy, Inc. v. Beshear*, 503 F.Supp.3d 516, 523–24 (E.D. Ky., 2020). The Sixth Circuit reversed, concluding that

the rule was neutral and generally applicable because it applied to all elementary and secondary schools, whether secular or religious. *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 509 (2020).

Much of *Smith*'s initial appeal was likely its apparent simplicity. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise.

D

Subsequent developments. Developments since *Smith* provide additional reasons for changing course. The *Smith* majority thought that adherence to *Sherbert* would invite "anarchy," 494 U.S. at 888, 110 S.Ct. 1595, but experience has shown that this fear was not well founded. Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and we have observed that the courts are well "up to the task" of applying that test. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). See also *Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (noting "no cause to believe" the test could not be "applied in an appropriately balanced way").

***1923** Another significant development is the subsequent profusion of studies on the original meaning of the Free Exercise Clause. When *Smith* was decided, the available scholarship was thin, and the Court received no briefing on the subject. Since then, scholars have explored the subject in great depth. [81]

* * *

Multiple factors strongly favor overruling *Smith*. Are there countervailing factors?

E

None is apparent. Reliance is often the strongest factor favoring the retention of a challenged precedent, but no strong reliance interests are cited in any of the numerous briefs urging us to preserve *Smith*. Indeed, the term is rarely even mentioned.

All that the City has to say on the subject is that overruling *Smith* would cause "substantial regulatory ... disruption" by displacing RFRA, RLUIPA, and related state laws, Brief for City Respondents 51 (internal quotation marks omitted), but this is a baffling argument. How would overruling *Smith* disrupt the operation of laws that were enacted to abrogate *Smith*?

One of the City's *amici*, the New York State Bar Association, offers a different reliance argument. It claims that some individuals, relying on *Smith*, have moved to jurisdictions with anti-discrimination laws that do not permit religious exemptions. Brief for New York State Bar Association as *Amicus Curiae* 11. The bar association does not cite any actual examples of individuals who fall into this category, and there is reason to doubt that many actually exist.

For the hypothesized course of conduct to make sense, all of the following conditions would have to be met. First, it would be necessary for the individuals in question to believe that a religiously motivated party in the jurisdiction they left or avoided might engage in conduct that harmed them. Second, this conduct would have to be conduct not already protected by *Smith* in that it (a) did not violate a generally applicable state law, (b) that law did not allow individual exemptions, and (c) there was insufficient proof of religious targeting. Third, the feared conduct would have to fall outside the scope of RLUIPA. Fourth, the conduct, although not protected by *Smith*, would have to be otherwise permitted by local law, for example, through a state version of RFRA. Fifth, this fear of harm at the hands of a religiously motivated actor would have to be a but-for cause of the decision to move. Perhaps there are individuals who fall into the category that the bar association hypothesizes, but we should not allow violations of the Free Exercise Clause in perpetuity based on such speculation.

Indeed, even if more substantial reliance could be shown, *Smith*'s dubious standing would weigh against giving this factor too much weight. *Smith* has been embattled since the day it was decided, and calls for its reexamination have intensified in recent years. See *Masterpiece Cakeshop,* 584 U. S., at ––––, 138 S.Ct., at 1734 (GORSUCH, J., joined by ALITO, J., concurring); ***1924** *Kennedy*, 586 U. S., at –––– – ––––, 139 S.Ct., at 636–637 (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., concurring in denial of certiorari); *City of Boerne* 521 U.S. at 566, 117 S.Ct. 2157 (BREYER, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided"); *id.*, at 565, 117 S.Ct. 2157 (O'CONNOR, J., joined by BREYER, J., dissenting) ("[I]t is essential for the Court to reconsider its holding in *Smith*"); *Lukumi*, 508 U.S. at 559, 113 S.Ct. 2217 (SOUTER, J., concurring in part and concurring in judgment) ("[I]n a case presenting the issue, the Court should reexamine the rule *Smith* declared"). Thus, parties have long been on notice that the decision might soon be reconsidered. See *Janus,* 585 U. S., at ––––, 138 S.Ct., at 2484–2485.

* * *

Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in *Smith* should now be corrected.

VI

A

If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future.

CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry. Many people today find this idea not only objectionable but hurtful. Nevertheless, protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights.

We have covered this ground repeatedly in free speech cases. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. See *Matal v. Tam*, 582 U. S. ––––, –––– – ––––, 137 S.Ct. 1744, 1751, 198 L.Ed.2d 366 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend"); *Hurley*, 515 U.S. at 579, 115 S.Ct. 2338 ("[T]he law ... is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government"); *Johnson*, 491 U.S. at 414, 109 S.Ct. 2533 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (opinion of STEVENS, J.) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection"); *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves ***1925** offensive to some of their hearers"); Cf. *Coates v. Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of ... constitutional freedoms").

The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers. Proclaiming that there is only one God is offensive to polytheists, and saying that there are many gods is anathema to Jews, Christians, and Muslims. Declaring that Jesus was the Son of God is offensive to Judaism and Islam, and stating that Jesus was not the Son of God is insulting to Christian belief. Expressing a belief in God is nonsense to atheists, but denying the existence of God or proclaiming that religion has been a plague is infuriating to those for whom religion is all-important.

Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed "decent and honorable," *id*., at 672, 135 S.Ct. 2584, with racism, which is neither. And it promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id*., at 679, 135 S.Ct. 2584. An open society can keep that promise while still respecting the "dignity," "worth," and fundamental equality of all members of the community. *Masterpiece Cakeshop*, 584 U. S., at ––––, 138 S.Ct., at 1727.

B

One final argument must be addressed. Philadelphia and many of its *amici* contend that preservation of the City's policy is not dependent on *Smith*. They argue that the City is simply asserting the right to control its own internal operations, and they analogize CSS to either a City employee or a contractor hired to perform an exclusively governmental function.

This argument mischaracterizes the relationship between CSS and the City. The members of CSS's staff are not City employees; the power asserted by the City goes far beyond a refusal to enter into a contract; and the function that CSS and other private foster care agencies have been performing for decades has not historically been an exclusively governmental function. See, *e.g., Leshko v. Servis*, 423 F.3d 337, 343–344 (C.A.3 2005) ("No aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government"); *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (C.A.11 2001) (acknowledging that foster care is not traditionally an exclusive state prerogative); *Milburn v. Anne Arundel Cty. Dept. of Social Servs.*, 871 F.2d 474, 479 (C.A.4 1989) (same); *Malachowski v. Keene*, 787 F.2d 704, 711 (C.A.1 1986) (same); see also *Ismail v. County of Orange*, 693 Fed.Appx. 507, 512 (C.A.9 2017) (concluding that foster parents were not state actors). On the contrary, States and cities were latecomers to this field, and even today, they typically leave most of the work to private agencies.

The power that the City asserts is essentially the power to deny CSS a license ***1926** to continue to perform work that it has carried out for decades and that religious groups have performed since time immemorial. Therefore, the cases that provide the basis for the City's argument—such as *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996)—are far afield. A government cannot "reduce a group's First Amendment rights by simply imposing a licensing requirement." *National Institute of Family and Life Advocates v. Becerra*, 585 U. S. ––––, ––––, 138 S.Ct. 2361, 2375, 201 L.Ed.2d 835 (2018).

* * *

For all these reasons, I would overrule *Smith* and reverse the decision below. Philadelphia's exclusion of CSS from foster care work violates the Free Exercise Clause, and CSS is therefore entitled to an injunction barring Philadelphia from taking such action.

After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.
The Court granted certiorari to decide whether to overrule *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). As Justice ALITO's opinion demonstrates, *Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. A majority of our colleagues, however, seek to sidestep the question. They agree that the City of Philadelphia's treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there's no "need" or "reason" to address the error of *Smith* today. *Ante,* at 1876 – 1877 (majority opinion); *ante*, at 1883 (BARRETT, J., concurring).

On the surface it may seem a nice move, but dig an inch deep and problems emerge. *Smith* exempts "neutral" and "generally applicable" laws from First Amendment scrutiny. 494 U.S. at 878–881, 110 S.Ct. 1595. The City argues that its challenged rules qualify for that exemption because they require all foster-care agencies—religious and non-religious alike—to recruit and certify same-sex couples interested in serving as foster parents. For its part, the majority assumes (without deciding) that Philadelphia's rule is indeed "neutral" toward religion. *Ante,* at 1876 – 1877. So to avoid *Smith*'s exemption and subject the City's policy to First Amendment scrutiny, the majority must carry the burden of showing that the policy isn't "generally applicable."

*

That path turns out to be a long and lonely one. The district court held that the City's public accommodations law (its Fair Practices Ordinance or FPO) *is* both generally applicable and applicable to CSS. At least initially, the majority chooses to bypass the district court's major premise—that the FPO qualifies as "generally applicable" under *Smith*. It's a curious choice given that the FPO applies only to certain defined entities that qualify as public accommodations while the "generally applicable law" in *Smith* was "an across-the-board criminal prohibition" enforceable against anyone. 494 U.S. at 884, 110 S.Ct. 1595. But if the goal is to turn a big ***1927** dispute of constitutional law into a small one, the majority's choice to focus its attack on the district court's minor premise—that the FPO applies to CSS as a matter of municipal law—begins to make some sense. Still, it isn't exactly an obvious path. The Third Circuit did not address the district court's interpretation of the FPO. And not one of the over 80 briefs before us contests it. To get to where it wishes to go, then, the majority must go it alone. So much for the adversarial process and being "a court of review, not of first view." *Brownback v. King*, 592 U. S. ——, ——, n. 4, 141 S.Ct. 740, 747, n. 4, 209 L.Ed.2d 33 (2021) (internal quotation marks omitted).

Trailblazing through the Philadelphia city code turns out to be no walk in the park either. As the district court observed, the City's FPO defines "public accommodations" expansively to include "[a]ny provider" that "solicits or accepts patronage" of "the public or whose ... services [or] facilities" are "made available to the public." App. to Pet. for Cert. 77a (alteration omitted; emphasis deleted). And, the district court held, this definition covers CSS because (among other things) it "publicly solicits prospective foster parents" and "provides professional 'services' to the public." *Id.,* at 78a. All of which would seem to block the majority's way. So how does it get around that problem?

It changes the conversation. The majority ignores the FPO's expansive definition of "public accommodations." It ignores the reason the district court offered for why CSS falls within that definition. Instead, it asks us to look to a *different* public accommodations law—a Commonwealth of Pennsylvania public accommodations statute. See *ante,* at 1879 – 1880 (discussing Pa. Stat. Ann., Tit. 43, § 954(*l*) (Purdon Cum. Supp. 2009)). And, the majority promises, CSS fails to qualify as a public accommodation under the terms of *that* law. But why should we ignore the City's law and look to the Commonwealth's? No one knows because the majority doesn't say.

Even playing along with this statutory shell game doesn't solve the problem. The majority highlights the fact that the state law lists various examples of public accommodations—including hotels, restaurants, and swimming pools. *Ante,* at 1880. The

majority then argues that foster agencies fail to qualify as public accommodations because, unlike these listed entities, foster agencies "involv[e] a customized and selective assessment." *Ibid.* But where does *that* distinction come from? Not the text of the state statute, not state case law, and certainly not from the briefs. The majority just declares it—a new rule of Pennsylvania common law handed down by the United States Supreme Court.

The majority's gloss on state law isn't just novel, it's probably wrong. While the statute lists hotels, restaurants, and swimming pools as examples of public accommodations, it also lists over 40 other kinds of institutions—and the statute emphasizes that these examples are illustrative, not exhaustive. See § 954(*l*). Among its illustrations, too, the statute offers public "colleges and universities" as examples of public accommodations. *Ibid.* Often these institutions *do* engage in a "customized and selective assessment" of their clients (students) and employees (faculty). And if *they* can qualify as public accommodations under the state statute, it isn't exactly clear why foster agencies cannot. What does the majority have to say about this problem? Again, silence.

If anything, the majority's next move only adds to the confusion. It denies cooking up any of these arguments on its own. It says it merely means to "agree with CSS's position ... that its 'foster services do not constitute a "public accommodation" ***1928** under the City's Fair Practices Ordinance.' " *Ante,* at 1881 (quoting App. to Pet. for Cert. 159a). But CSS's cited "position"—which comes from a letter it sent to the City before litigation even began—includes nothing like the majority's convoluted chain of reasoning involving a separate state statute. *Id.*, at 159a–160a. Instead, CSS's letter contends that the organization's services do not qualify as "public accommodations" because they are "only available to at-risk children who have been removed by the state and are in need of a loving home." *Ibid.* The majority tells us with assurance that it "agree[s] with" this position, adding that it would be "incongru[ous]" to "dee[m] a private religious foster agency a public accommodation." *Ante,* at 1881.

What to make of all this? Maybe this part of the majority opinion should be read only as reaching for something—anything—to support its curious separate-statute move. But maybe the majority means to reject the district court's major premise after all—suggesting it would be incongruous for public accommodations laws to qualify as generally applicable under *Smith* because they do not apply to everyone. Or maybe the majority means to invoke a canon of constitutional avoidance: Before concluding that a public accommodations law is generally applicable under *Smith*, courts must ask themselves whether it would be "incongru[ous]" to apply that law to religious groups. Maybe all this ambiguity is deliberate, maybe not. The only thing certain here is that the majority's attempt to cloak itself in CSS's argument introduces more questions than answers.

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Still that's not the end of it. Even now, the majority's circumnavigation of *Smith* remains only half complete. The City argues that, in addition to the FPO, *another* generally applicable nondiscrimination rule can be found in § 15.1 of its contract with CSS. That provision independently instructs that foster service providers "shall not discriminate or permit discrimination against any individual on the basis of ... sexual orientation." Supp. App. to Brief for City Respondents 31. This provision, the City contends, amounts to a second and separate rule of general applicability exempt from First Amendment scrutiny under *Smith*. Once more, the majority must find some way around the problem. Its attempt to do so proceeds in three steps.

First, the majority directs our attention to another provision of the contract—§ 3.21. See *ante,* at 1877 – 1879. Entitled "Rejection of Referral," this provision prohibits discrimination based on sexual orientation, race, religion, or other grounds "unless an exception is granted" in the government's "sole discretion." Supp. App. to Brief for City Respondents 16–17. Clearly, the majority says, *that* provision doesn't state a generally applicable rule against discrimination because it expressly contemplates "exceptions." *Ante,* at 1878.

But how does that help? As § 3.21's title indicates, the provision contemplates exceptions only when it comes to the referral stage of the foster process—where the government seeks to place a particular child with an available foster family. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 221 (2012) ("The title and headings are permissible indicators of meaning" (boldface deleted)). So, for example, the City has taken race into account when placing a child who "used racial slurs" to avoid placing him with parents "of that race." Tr. of Oral Arg. 61. Meanwhile, our case has nothing to do with the

referral—or placement—stage of the foster process. This case concerns the recruitment and certification stages—where foster agencies like CSS ***1929** screen and enroll adults who wish to serve as foster parents. And in *those* stages of the foster process, § 15.1 seems to prohibit discrimination absolutely.

That difficulty leads the majority to its second step. It asks us to ignore § 3.21's title and its limited application to the referral stage. See *ante,* at 1879. Instead, the majority suggests, we should reconceive § 3.21 as authorizing exceptions to the City's nondiscrimination rule at *every* stage of the foster process. Once we do that, the majority stresses, § 3.21's reservation of discretion is irreconcilable with § 15.1's blanket prohibition against discrimination. See *ante,* at 1879.

This sets up the majority's final move—where the real magic happens. Having conjured a conflict within the contract, the majority devises its own solution. It points to some state court decisions that, it says, set forth the "rule" that Pennsylvania courts shouldn't interpret one provision in a contract "to annul" another part. *Ibid.* To avoid nullifying § 3.21's reservation of discretion, the majority insists, it has no choice but to rewrite § 15.1. All so that—*voila*—§ 15.1 now contains *its own* parallel reservation of discretion. See *ante,* at 1879. As rewritten, the contract contains no generally applicable rule against discrimination anywhere in the foster process.

From start to finish, it is a dizzying series of maneuvers. The majority changes the terms of the parties' contract, adopting an uncharitably broad reading (really revision) of § 3.21. It asks us to ignore the usual rule that a more specific contractual provision can comfortably coexist with a more general one. And it proceeds to resolve a conflict it created by rewriting § 15.1. Once more, too, no party, *amicus*, or lower court argued for any of this.

To be sure, the majority again claims otherwise—representing that it merely adopts the arguments of CSS and the United States. See *ante,* at 1879. But here, too, the majority's representation raises rather than resolves questions. Instead of pursuing anything like the majority's contract arguments, CSS and the United States suggest that § 3.21 "*alone* triggers strict scrutiny," Reply Brief 5 (emphasis added), because that provision authorizes the City "to grant formal exemptions *from its policy*" of nondiscrimination, Brief for United States as *Amicus Curiae* 26 (emphasis added). On this theory, it's irrelevant whether § 3.21 or § 15.1 reserve discretion to grant exemptions at all stages of the process or at only one stage. Instead, the City's power to grant exemptions from its nondiscrimination policy *anywhere* "undercuts its asserted interests" and thus "trigger[s] strict scrutiny" for applying the policy *everywhere*. *Id.,* at 21. Exceptions for one means strict scrutiny for all. See, *e.g., Tandon* v. *Newsom*, *ante*, at 1874 – 1875 (*per curiam*). All of which leaves us to wonder: Is the majority just stretching to claim some cover for its novel arguments? Or does it actually mean to adopt the theory it professes to adopt?

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Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith*'s fate that it is willing to say pretty much anything about municipal law and the parties' briefs. One way or another, the majority seems determined to declare there is no "need" or "reason" to revisit *Smith* today. *Ante,* at 1876 – 1877 (majority opinion); *ante,* at 1883 (BARRETT, J., concurring).

But tell that to CSS. Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path Justice ALITO outlines—holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case ***1930** would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the § 3.21 loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference

that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it *even means*.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price —in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ––––, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. Because certain government officials responsible for deciding Mr. Phillips's compliance with a local public accommodations law uttered statements exhibiting hostility to his religion, the Court held, those officials failed to act "neutrally" under *Smith*. See 584 U. S., at –––– – ––––, 138 S.Ct., at 1730–1732. But with *Smith* still on the books, all that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. See Associated Press, Lakewood Baker Jack Phillips Sued for Refusing Gender Transition Cake (Mar. 22, 2021), https://denver.cbslocal.com/2021/03/22/jack-phillips-masterpiece-cakeshop-lakewood-transgender/. A nine-year odyssey thus barrels on. No doubt, too, those who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects.

The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how *Smith* works. See, *e.g., Tandon*, *ante,* at p. 1874; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ––––, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (*per curiam*); *High Plains Harvest Church v. Polis*, 592 U. S ––––, 141 S.Ct. 527, 208 L.Ed.2d 503 (2020). To be sure, this Court began to resolve at least some of the confusion surrounding *Smith*'s application ***1931** in *Tandon*. But *Tandon* treated the symptoms, not the underlying ailment. We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created.

It's not as if we don't know the right answer. *Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. See *ante,* at 1887 – 1889 (ALITO, J., concurring in judgment); *ante*, at 1882 – 1883 (BARRETT, J., concurring). The Court granted certiorari in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem. Justice ALITO has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?

We hardly need to "wrestle" today with every conceivable question that might follow from recognizing *Smith* was wrong. See *ante,* at 1883 (BARRETT, J., concurring). To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to *Smith* until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, see *American Legion v. American Humanist Assn.*, 588 U. S. ––––, ––––, 139 S.Ct. 2067, 2086–2087, 204 L.Ed.2d 452 (2019) (plurality opinion), the Court should overrule it now, set us back on the correct course, and address each case as it comes.

What possible benefit does the majority see in its studious indecision about *Smith* when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the

controversial subject matter and avoid "picking a side." But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution *is* picking a side. *Smith* committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Code of Canon Law, Canon § 924 (Eng. transl. 1998).

2 See Law Library of Congress, Global Legal Research Center, Legal Restrictions on Religious Slaughter in Europe (Mar. 2018), www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf.

3 *Id.*, at 1–2.

4 See Frisch et al., Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision, 131 Pediatrics 796, 799 (2013) (representatives of pediatric medical associations in 16 European countries and Canada recommending against circumcision because the practice "has no compelling health benefits, causes postoperative pain, can have serious long-term consequences, constitutes a violation of the United Nations' Declaration of the Rights of the Child, and conflicts with the Hippocratic oath").

5 See Initiative Measure To Be Submitted Directly to the Voters: Genital Cutting of Male Minors (Oct. 13, 2010) (online source archived at www.supremecourt.gov); see also *Jewish Community Relations Council of San Francisco v. Arntz*, 2012 WL 11891474, *1 (Super. Ct. San Francisco Cty., Cal., Apr. 6, 2012) (ordering that the proposed initiative be removed from the ballot because it was preempted by California law).

6 See 4 Encyclopaedia Judaica 730 (2d ed. 2007) ("Jewish circumcision originated, according to the biblical account, with Abraham"); The Shengold Jewish Encyclopedia 62 (3d ed. 2003) ("[Circumcision] has become a basic law among Jews. In times of persecution, Jews risked their lives to fulfill the commandment"); B. Abramowitz, The Law of Israel: A Compilation of the Hayye Adam 206 (1897) ("It is a positive commandment that a father shall circumcise his son or that he shall appoint another Israelite to act as his agent therein"); 3 Encyclopedia of Religion 1798 (2d ed. 2005) ("Muslims agree that [circumcision] must occur before marriage and is required of male converts"); H. Gibb & J. Kramers, Shorter Encyclopaedia of Islam 254 (1953).

7 See Holy Bible, Deuteronomy 10:18, 16:11, 26:12–13; James 1:27.

8 See A. Crislip, From Monastery to Hospital: Christian Monasticism & the Transformation of Health Care in Late Antiquity 104, 111 (2005) (describing Basil of Caesarea's use of his 4th century monastery as a "place for the nourishment of orphans," who "lived in their own wing of the monastery," "were provided with all the necessities of life[,] and were raised by the monastics acting as surrogate parents" (internal quotation marks omitted)).

9 Ransel, Orphans and Foundlings, in 3 Encyclopedia of European Social History 497, 498 (2001).

10 T. Hacsi, Second Home: Orphan Asylums and Poor Families in America 17 (1997).

11 *Id.*, at 17–18; F. Chapell, The Great Awakening of 1740, pp. 90–91 (1903).

12 2 Encyclopedia of the New American Nation 477 (2006); Hacsi, Second Home, at 18.

13 15 Encyclopaedia Judaica 485.

14 2 Encyclopedia of Children and Childhood 639–640 (2004); Brief for Historians of Child Welfare as *Amici Curiae* 16–17.

15 Brief for Annie E. Casey Foundation et al. as *Amici Curiae* 4–5.

16 See Social Security Act, § 521, 49 Stat. 627, 633; Social Security Act Amendments of 1961, 75 Stat. 131.

17 See United States Conference of Catholic Bishops, Discrimination Against Catholic Adoption Services (2018), https://www.usccb.org/issues-and-action/religious-liberty/upload/Discrimination-against-Catholic-adoption-services.pdf.

18 See Brief for Petitioners 11–12 (citing Wax-Thibodeaux, "We Are Just Destroying These Kids": The Foster Children Growing Up Inside Detention Centers, Washington Post (Dec. 30, 2019), https://www.washingtonpost.com/national/we-are-just-destroying-these-kids-thefoster-children-growing-up-inside-detention-centers/2019/12/30/97f65f3a-eaa2-11e9-9c6d-436a0df4f31d_story.html (describing the placement of foster children in emergency shelters and juvenile detention centers)); Brief in Opposition for City Respondents 4 (acknowledging 5,000 children in need of care in Philadelphia); Terruso, Philly Puts Out "Urgent" Call —300 Families Needed for Fostering, Philadelphia Inquirer (Mar. 8, 2018), https://www.inquirer.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html; see also Haskins, Kohomban, & Rodriguez, Keeping Up With the Caseload: How To Recruit and Retain Foster Parents, The Brookings Institution (Apr. 24, 2019), https://www.brookings.edu/blog/upfront/2019/04/24/keeping-up-with-the-caseload-how-to-recruit-and-retain-foster-parents/ (explaining that "[t]he number of children in foster care ha[d] risen for the fifth consecutive year" to nearly 443,000 in 2017 and noting that "between 30 to 50 percent of foster families step down each year"); Adams, Foster Care Crisis: More Kids Are Entering, but Fewer Families Are Willing To Take Them In, NBC News (Dec. 30, 2020), https://www.nbcnews.com/news/nbcblk/ foster-care-crisis-more-kids-are-entering-fewer-families-are-n1252450 (explaining how the COVID–19 pandemic has overwhelmed the United States' foster care system); Satija, For Troubled Foster Kids in Houston, Sleeping in Offices Is "Rock Bottom," Texas Tribune (Apr. 20, 2017), https://www.texastribune.org/2017/04/20/texas-foster-care-placement-crisis/ (describing Texas's shortage of placement options, which resulted in children sleeping in office buildings where "no one is likely to stop them" if they decide to run away); Associated Press, Indiana Agencies Desperate To Find Foster Parents With Children Entering System at All-Time High, Fox 59 (Mar. 7, 2017), https://fox59.com/news/indianaagencies-desperate-to-find-foster-parents-with-children-entering-system-at-all-time-high/ (noting that nearly 1,000 children in Indiana are in need of care and that, in the span of one month, the State's largest not-for-profit child services agency was able to place 3 children out of 150 to 200 in one region); Lawrence, Georgia Foster Care System in Crisis Due to Shortage of Foster Homes, ABC News Channel 9 (Feb. 15, 2017), https://newschannel9.com/news/local/georgia-foster-care-system-in-crisis-due-to-shortage-of-foster-homes (reporting on a county in Georgia with 116 children in need of care but only 14 foster families).

19 See App. to Pet. for Cert. 19a, 64a, 140a; see also App. 59 (plaintiff Cecilia Paul testifying that, at the time of the evidentiary hearing below, she had no children in her care due to the City's policy).

20 *Id.,* at 182, 365–366 (describing Department of Human Services commissioner's comments to CSS that "it would be great if we followed the teachings of Pope Francis" and that "things have changed since 100 years ago").

21 The Court's decision also depends on its own contested interpretation of local and state law. See *post*, at 1926 – 1930 (GORSUCH, J., concurring in judgment). Instead of addressing whether the City's Fair Practices Ordinance is generally applicable, the Court concludes that the ordinance does not apply to CSS because CSS's foster care certification services do not constitute "public accommodations" under the FPO. *Ante*, at 1880. Of course, this Court's interpretation of state and local law is not binding on state courts. See, *e.g., West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236, 61 S.Ct. 179, 85 L.Ed. 139 (1940); see also *Danforth v. Minnesota*, 552 U.S. 264, 291, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (ROBERTS, C. J., dissenting) ("State courts are the final arbiters of their own state law"). Should the Pennsylvania courts interpret the FPO differently, they would effectively abrogate the Court's decision in this case.

22 See 102 Code Mass. Regs. 1.03(1) (1997) (prohibiting discrimination on the basis of sexual orientation as a condition of receiving the state license required to provide adoption services); San Francisco Admin. Code § 12B.1(a) (2021) (requiring that all contracts with the city include a provision "obligating the contractor not to discriminate on the basis of " sexual orientation and noting that the code section was last amended in 2000); D. C. Code §§ 2–1401.02(24), 2–1402.31 (2008) (prohibiting, on the basis of sexual orientation, the direct or indirect denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations," defined to include "establishments dealing with goods or services of any kind"); Ill. Comp. Stat., ch. 775, §§ 5/1–103(O–

1), (Q), 5/5–101(A), 5/5–102 (2011) (prohibiting discrimination on the basis of sexual orientation in a "place of public accommodation," defined by a list of non-exclusive examples).

23 See, *e.g.,* Cal. Welf. & Inst. Code Ann. § 16013(a) (West 2018) (declaring that "all persons engaged in providing care and services to foster children, including ... foster parents [and] adoptive parents ... shall have fair and equal access to all available programs, services, benefits, and licensing processes, and shall not be subjected to discrimination ... on the basis of ... sexual orientation"); D. C. Munic. Regs., tit. 29, § 6003.1(d) (2018) (providing that foster parents are "[t]o not be subject to discrimination as provided in the D. C. Human Rights Act," which prohibits discrimination on the basis of sexual orientation); see also 110 Code Mass. Regs. 1.09(1) (2008) ("No applicant for or recipient of Department [of Children and Families] services shall, on the ground of ... sexual orientation ... be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in connection with any service, program, or activity administered or provided by the Department").

24 This Court actually granted review twice: once, after the state court first held that the denial of benefits was unconstitutional, see *Smith v. Employment Div., Dept. of Human Resources*, 301 Ore. 209, 220, 721 P.2d 445, 451 (1986), cert. granted 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987), and then again after the case was remanded for the state court to determine whether peyote consumption for religious use was unlawful under Oregon law, see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 485 U.S. 660, 662, 673–674, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988). When the state court held that it was and reaffirmed its prior decision, 307 Ore. 68, 72–73, 763 P.2d 146, 147–148 (1988), the Court granted certiorari, 489 U.S. 1077, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989).

25 Justice BARRETT makes the surprising claim that "[a] longstanding tenet of our free exercise jurisprudence" that "pre-dates" *Smith* is "that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions." *Ante*, at 1883 (concurring opinion). If there really were such a "longstanding [pre-*Smith*] tenet," one would expect to find cases stating that rule, but Justice BARRETT does not cite even one such case. Instead, she claims to find support by reading between the lines of what the Court said in a footnote in *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790, and a portion of the opinion in *Cantwell v. Connecticut*, 310 U.S. 296, 303–307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). *Ante*, at 1883. But even a close interlinear reading of those cases yields no evidence of this supposed tenet.

In the *Sherbert* footnote, the Court responded to the dissent's argument that South Carolina law did not recognize any exemptions from the general eligibility requirement for unemployment benefits. 374 U.S. at 419–420, 83 S.Ct. 1790 (HARLAN, J., dissenting). The footnote expressed skepticism about this interpretation of South Carolina law, but it did not suggest that its analysis would have been any different if the dissent's interpretation were correct.

In *Cantwell*, the Court addressed the constitutionality of a state statute that generally prohibited the solicitation of funds for religious purposes unless a public official found in advance that the cause was authentically religious. See 310 U.S. at 300–302, 60 S.Ct. 900. The Court held that the Free Exercise Clause prohibited the State from conditioning permission to solicit funds on an administrative finding about a religious group's authenticity, but the Court did not suggest that a blanket ban on solicitation would have necessarily been sustained. On the contrary, it said that the State was "free to regulate *the time and manner* of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Id*., at 307–308, 60 S.Ct. 900 (emphasis added). And the Court said not one word about "strict scrutiny," a concept that was foreign to Supreme Court case law at that time. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1284 (2007) ("Before 1960, what we would now call strict judicial scrutiny ... did not exist").

26 A particularly heartbreaking example was a case in which a judge felt compelled by *Smith* to reverse his previous decision holding the state medical examiner liable for performing the autopsy of a young Hmong man who had been killed in a car accident. The young man's parents were tortured by the thought that the autopsy would prevent their son from entering the afterlife. See *Yang v. Sturner*, 750 F.Supp. 558, 560 (D.R.I. 1990); see also 139 Cong. Rec. 9681 (1993) (remarks of Rep. Edwards). Members of Congress were also informed that veterans' cemeteries had refused to allow burial on weekends even when that was required by the deceased's religion, *id*., at 9687 (remarks of Rep. Cardin), and that churches were prohibited from conducting services in areas zoned for commercial and industrial uses, *id.*, at 9684 (remarks of Rep. Schumer). In just the first three years after *Smith*, more than 50 cases were decided against religious claimants. 139 Cong. Rec., at 9685 (remarks of Rep. Hoyer); see also *id.,* at 9684 (remarks of Rep. Schumer) ("Smith was a devastating blow to religious freedom").

27 Although the First Amendment refers to "Congress," we have held that the Fourteenth Amendment—which references the entire "State," not just a legislature—makes the rights protected by the Amendment applicable to the States. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934); *Cantwell*, 310 U.S. 296, 60 S.Ct. 900; *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). And we have long applied that Amendment to actions taken by those responsible for enforcing the law. See, *e.g., Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (considering First Amendment claim based on federal agency's decision); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (applying First Amendment against a state agency); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (applying First Amendment against local board of education); see also U. S. Const., Amdt. 14, § 1 ("No State shall make *or enforce* any law which shall abridge the privileges or immunities of citizens of the United States" (emphasis added)).

28 The phrase "no law" applies to the freedom of speech and the freedom of the press, as well as the right to the free exercise of religion, and there is no reason to believe that its meaning with respect to all these rights is not the same. With respect to the freedom of speech, we have long held that "no law" does not mean that every restriction on what a person may say or write is unconstitutional. See, *e.g.*, *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); see also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.); *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–49, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961). Many restrictions on what a person could lawfully say or write were well established at the time of the adoption of the First Amendment and have continued to this day. Fraudulent speech, speech integral to criminal conduct, speech soliciting bribes, perjury, speech threatening physical injury, and obscenity are examples. See, *e.g., Donaldson v. Read Magazine*, Inc., 333 U.S. 178, 190–191, 68 S.Ct. 591, 92 L.Ed. 628 (1948) (fraud); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949) (speech integral to criminal conduct); *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 191–192, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion) (*quid pro quo* bribes); *United States v. Dunnigan*, 507 U.S. 87, 96–97, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (perjury); *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (threats); *Miller*, 413 U.S. at 23, 93 S.Ct. 2607 (obscenity). The First Amendment has never been thought to have done away with all these rules. Alexander Meiklejohn reconciled this conclusion with the constitutional text: The First Amendment "does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech." Free Speech and Its Relation to Self-Government 19 (1948) (emphasis deleted). In other words, the Free Speech Clause protects a right that was understood at the time of adoption to have certain defined limits. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49, and n. 10, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). As explained below, the same is true of the Free Exercise Clause. See *infra*, at 1898 – 1903. No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice.

29 Whatever the outer boundaries of the term "religion" as used in the First Amendment, there can be no doubt that CSS's contested policy represents an exercise of "religion."

30 See also N. Bailey, Universal Etymological English Dictionary (22d ed. 1770) (Bailey) ("to forbid, to bar, to keep from"); T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771) (Dyche & Pardon) ("to forbid, bar, hinder, or keep from any thing"); 2 Johnson (6th ed. 1785) ("1. To forbid, to interdict by authority.... 2. To debar; to hinder"); 2 J. Ash, The New & Complete Dictionary of the English Language (2d ed. 1795) (Ash) ("To forbid, to interdict by authority; to debar, to hinder"); 2 N. Webster, An American Dictionary of the English Language (1828) (Webster) ("1. To forbid; to interdict by authority; ... 2. To hinder; to debar; to prevent; to preclude"); 2 J. Boag, The Imperial Lexicon of the English Language 275 (1850) (Boag) ("To forbid; to interdict by authority. To hinder; to debar; to prevent; to preclude").

31 See also Bailey ("to practice"); Dyche & Pardon ("to practice or do a thing often; to employ one's self frequently in the same thing"); 1 Ash ("Practise, use, employment, a task, an act of divine worship"); 2 Johnson (9th ed. 1805) ("Practice; outward performance"; "Act of divine worship, whether publick or private"); 1 Webster ("1. Use, practice; ... 2. Practice; performance; as the *exercise* of religion ... 10. Act of divine worship"); 1 Boag 503 ("Use; practice; ... Practice; performance ... Act of divine worship").

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32 See also Dyche & Pardon ("at liberty, that can do or refuse at his pleasure, that is under no restraint"); 1 Ash ("Having liberty," "unrestrained," "exempt"); 1 Webster ("1. Being at liberty; not being under necessity or restraint, physical or moral ... 5. Unconstrained; unrestrained; not under compulsion or control"); 1 Boag 567–568 ("Being at liberty; not being under necessity or restraint, physical or moral ... Unconstrained; unrestrained, not under compulsion or control. Permitted; allowed; open; not appropriated. Not obstructed").

33 See, *e.g.*, Del. Declaration of Rights § 3 (1776), in The Complete Bill of Rights 15 (N. Cogan ed. 1997) (Cogan) ("That all persons professing the Christian religion ought forever to enjoy *equal rights and privileges* in this state" (emphasis added)); Md. Declaration of Rights, Art. 33 (1776), in *id.,* at 17 ("[A]ll persons professing the christian religion are *equally entitled* to protection in their religious liberty" (emphasis added)); N. Y. Const., Art. XXXVIII (1777), in *id*., at 26 ("[T]he free Exercise and Enjoyment of religious Profession and Worship, *without Discrimination or Preference*, shall forever hereafter be allowed within this State to all Mankind" (emphasis added)); S. C. Const., Art. VIII, § 1 (1790), in *id*., at 41 ("The free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, shall, forever hereafter, be allowed within this state to all mankind" (emphasis added)).

34 See, *e.g.,* McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990) (McConnell, Origins); McConnell, Free Exercise Revisionism 1109; McConnell, Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in *City of Boerne* v. *Flores*, 39 Wm. & Mary L. Rev. 819 (1998) (McConnell, Freedom From Persecution); Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992) (Hamburger, Religious Exemption); Hamburger, More Is Less, 90 Va. L. Rev. 835 (2004) (Hamburger, More Is Less); Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313 (1996); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245 (1991); Campbell, Note, A New Approach to Nineteenth Century Religious Exemption Cases, 63 Stan. L. Rev. 973 (2011) (Campbell, A New Approach); Kmiec, The Original Understanding of the Free Exercise Clause and Religious Diversity, 59 UMKC L. Rev. 591 (1991); Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994); Lombardi, Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions, 85 Ore. L. Rev. 369 (2006) (Lombardi, Free Exercise); Muñoz, The Original Meaning of the Free Exercise Clause: The Evidence From the First Congress, 31 Harv. J. L. & Pub. Pol'y 1083 (2008) (Muñoz, Original Meaning); Nestor, Note, The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion, 42 Harv. J. L. & Pub. Pol'y 971 (2019) (Nestor); M. Nussbaum, Liberty of Conscience 120–130 (2008); Walsh, The First Free Exercise Case, 73 Geo. Wash. L. Rev. 1 (2004) (Walsh).

35 McConnell, Origins 1425 (describing Lord Baltimore's directive to the new Protestant governor and councilors of Maryland to refrain from interfering with the "free exercise" of Christians, particularly Roman Catholics).

36 Act Concerning Religion (1649), in Cogan 17; see also McConnell, Origins 1425.

37 See Second Charter of Carolina (1665), in Cogan 27–28 (recognizing the right of persons to "freely and quietly have and enjoy ... their Judgments and Consciences, in Matters of Religion" and declaring that "no Person ... shall be in any way molested, punished, disquieted, or called in Question, for any Differences in Opinion, or Practice in Matters of religious Concernments, who do not actually disturb the Civil Peace"); Charter of Delaware, Art. I (1701), in *id.,* at 15 (ensuring "[t]hat no person ... who shall confess and acknowledge One Almighty God ... shall be in any case molested or prejudiced, in his ... person or estate, because of his ... consciencious persuasion or practice, nor ... to do or suffer any other act or thing, contrary to their religious persuasion"); Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New-Jersey (1664), in *id*., at 23 (declaring the right of all persons to "freely and fully have and enjoy ... their Judgments and Consciences in matters of Religion throughout the said Province" and ensuring "[t]hat no person ... at any Time shall be any ways molested, punished, disquieted or called in question for any Difference in Opinion or Practice in matter of Religious Concernments, who do not actually disturb the civil Peace of the said Province"); Concessions and Agreements of West New-Jersey, ch. XVI (1676), in *id*., at 24 (providing that "no Person ... shall be any ways upon any pretence whatsoever, called in Question, or in the least punished or hurt, either in Person, Estate, or Priviledge, for the sake of his Opinion, Judgment, Faith or Worship towards God in Matters of Religion"); Laws of West New-Jersey, Art. X (1681), *ibid.* ("That Liberty of Conscience in Matters of Faith and

Worship towards God, shall be granted to all People within the Province aforesaid; who shall live peacably and quietly therein"); Fundamental Constitutions for East New-Jersey, Art. XVI (1683), *ibid.* ("All Persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and holds themselves obliged in Conscience to live peacably and quietly in a civil Society, shall in no way be molested or prejudged for their Religious Perswasions and Exercise in matters of Faith and Worship"); New York Act Declaring ... Rights & Priviledges (1691), in *id.*, at 25 ("That no Person ... shall at any time be any way molested, punished, disturbed, disquieted or called in question for any Difference in Opinion, or matter of Religious Concernment, who do not under that pretence disturb the Civil Peace of the Province"); Charter of Privileges Granted by William Penn (1701), in *id.*, at 31–32 (declaring that "no Person ... who shall confess and acknowledge *One* almighty God ... and profess ... themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced ... because of ... their consciencious [*sic*] Persuasion or Practice, nor ... suffer any other Act or Thing, contrary to their religious Persuasion").

38 See *infra*, at 1901 – 1902, and n. 43; N. J. Const., Art. XVIII (1776), in Cogan 25 ("THAT no Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping Almighty GOD in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretence whatsoever compelled to attend any Place of Worship contrary to his own Faith and Judgment"); N. C. Decl. of Rights § XIX (1776), in *id.,* at 30 ("That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Conscience"); Pa. Const., Declaration of Rights of the Inhabitants of the State of Pa., Art. II (1776), in *id.,* at 32 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship"); Va. Declaration of Rights, Art. XVI (1776), in *id.,* at 44 ("THAT religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other"); see also Vt. Const., ch. 1, § 3 (1777), in *id.,* at 41 ("THAT all Men have a natural and unalienable Right to worship ALMIGHTY GOD according to the Dictates of their own Consciences and Understanding ... and that no Man ought or of Right can be compelled to attend any religious Worship, or erect, or support any Place of Worship, or maintain any Minister contrary to the Dictates of his Conscience; nor can any Man who professes the Protestant Religion, be justly deprived or abridged of any civil Right, as a Citizen, on Account of his religious Sentiment, or peculiar Mode of religious Worship, and that no Authority can, or ought to be vested in, or assumed by any Power whatsoever, that shall in any Case interfere with, or in any Manner control the Rights of Conscience, in the free Exercise of religious Worship").

39 See *McDonald v. Chicago*, 561 U.S. 742, 769, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); see also Creating the Bill of Rights 281, 282 (H. Veit., K. Bowling, & C. Bickford eds. 1991); 1 A. Kelly, W. Harbison, & H. Belz, The American Constitution: Its Origins and Development 110, 118 (7th ed. 1991).

40 See Charter of Rhode Island and Providence Plantations (1663), in Cogan 34 (protecting the free exercise of religion so long as residents "do not Actually disturb the Civil Peace of Our said Colony" and "Behav[e] themselves Peaceably and Quietly, And not Using This Liberty to Licentiousness and Prophaneness; nor to the Civil Injury, or outward Disturbance of others" (emphasis deleted)).

41 See Second Charter of Carolina (1665), in *id.,* at 27–28 (guaranteeing free exercise to persons "who do not actually disturb the Civil Peace" and who "behav[e] themselves peaceably, and [do] not us[e] this Liberty to Licentiousness, nor to the Civil Injury, or outward Disturbance of others").

42 New York Act Declaring ... Rights & Priviledges (1691), in *id.,* at 25 (protecting the right to free exercise for all persons "who do not under that pretence disturb the Civil Peace" and who "behav[e] themselves peaceably, quietly, modestly and Religiously, and [do] not us[e] this Liberty to Licentiousness, nor to the civil Injury or outward Disturbance of others").

43 Del. Declaration of Rights §§ 2–3 (1776), in *id.,* at 15 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings .... That all persons professing

the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man *disturb the peace, the happiness or safety of society*" (emphasis added)); Md. Declaration of Rights, Art. 33 (1776), in *id.,* at 17 ("That as it is the duty of every man to worship God in such manner as he thinks most acceptable to him, all persons professing the christian religion are equally entitled to protection in their religious liberty, wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless under colour of religion any man shall *disturb the good order, peace or safety of the state,* or shall *infringe the laws of morality, or injure others,* in their natural, civil or religious rights" (emphasis added)); Mass. Const., pt. I, Art. II (1780), in *id.,* at 20–21 ("It is the right as well as the duty of all men in society, publickly, and at stated seasons, to worship the **SUPREME BEING**, the Great Creator and Preserver of the Universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping **GOD** in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not *disturb the publick peace, or obstruct others in their religious worship*" (emphasis added)); N. H. Const., pt. I, Art. V (1783), in *id.,* at 22–23 ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, ... provided he doth not *disturb the public peace, or disturb others in their religious worship*" (emphasis added)); N. Y. Const., Art. XXXVIII (1777), in *id.,* at 26 ("[T]he free Exercise and Enjoyment of religious Profession and Worship, without Discrimination or Preference, shall forever hereafter be allowed within this State to all Mankind. *Provided*, That the Liberty of Conscience hereby granted, shall not be so construed, as to *excuse Acts of Licentiousness*, or justify Practices inconsistent with *the Peace or Safety of this State*" (some emphasis added)); Charter of Rhode Island and Providence Plantations (1663), in *id.,* at 34 (guaranteeing free exercise for matters that "do not Actually *disturb the Civil Peace* of Our said *Colony*" so long as persons "[b]ehav[e] themselves *Peaceably and Quietly, And [do] not Us[e] This Liberty to Licentiousness and Prophaneness;* nor to the Civil Injury, or outward Disturbance of others" (some emphasis added)); S. C. Const., Art. VIII, § 1 (1790), in *id.,* at 41 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed within this state to all mankind; provided that the liberty of conscience thereby declared shall not be so construed as to *excuse acts of licentiousness*, or justify practices inconsistent with *the peace or safety of this state*" (emphasis added)).

44 See also 2 Webster ("1. In *a general sense*, a state of quiet or tranquility; freedom from disturbance or agitation.... 2. Freedom from war with a foreign nation; public quiet. 3. Freedom from internal commotion or civil war. 4. Freedom from private quarrels, suits or disturbance. 5. Freedom from agitation or disturbance by the passions, as from fear, terror, anger, anxiety or the like; quietness of mind; tranquillity; calmness; quiet of conscience.... 6. Heavenly rest; the happiness of heaven.... 7. Harmony; concord; a state of reconciliation between parties at variance. 8. Public tranquility; that quiet, order and security which is guarauteed by the laws; as, to keep the *peace*; to break the *peace*"); 2 Ash ("Rest, quiet, respite from war, respite from tumult; reconciliation, an accommodation of differences").

45 See also Bailey ("Freedom from Danger, Custody, Security"); 2 Ash ("Security from danger, freedom from hurt; custody, security from escape"); 2 Webster ("[1.] Freedom from danger or hazard .... 2. Exemption from hurt, injury or loss.... 3. Preservation from escape; close custody.... 4. Preservation from hurt").

46 4 W. Blackstone, Commentaries on the Laws of England 59 (1769).

47 3 *id.,* at 73–74 (1768).

48 *Id*., at 141–142.

49 *Id.*, at 164.

50 4 *id.,* at 163.

51 *Id.,* at 160 (emphasis deleted).

52 *Id.,* at 169 (emphasis deleted).

53 *Id.,* at 160 (emphasis deleted).

54 Some late 18th century and early 19th century dictionaries provided special definitions of the term "peace" as used in the law, and these definitions fit the offenses on Blackstone's list. See, *e.g.*, 1 Johnson (6th ed. 1785) ("That general security and quiet which the king warrants to his subjects, and of which he therefore avenges the violation; every forcible injury is a breach of the king's peace" (emphasis deleted)); 5 G. Jacob, Law-Dictionary (1811) ("[P]articularly in law, ['peace']

intends a quiet behaviour towards the King and his Subjects"); Bailey (defining "peace" in the "*Law Sense*" as "quiet and inoffensive Behaviour towards King and Subject").

55 Such an interpretation would also clash with the way in which the scope of state legislative power was understood. If any violation of the law had been regarded as a breach of public peace or safety, there would have been no need for the lawmaking authority of a state legislature to extend any further, but there is no evidence that state legislative authority was understood that way. New York's 1777 Constitution demonstrates the point. As noted above, it protected free exercise unless a person invoked that protection to "excuse Acts of Licentiousness, or justify Practices inconsistent with the Peace or Safety of this State." Art. XXXVIII, in Cogan 26. But the New York Constitution authorized the legislature to enact laws to further broader aims, including "good government, welfare, and prosperity." Art. XIX, in 5 Federal and State Constitutions 2633 (F. Thorpe ed. 1909). That authority obviously goes well beyond the prohibition of "Practices inconsistent with" the "Peace" and "Safety" (or "Licentiousness"). See McConnell, Freedom from Persecution 835–836. In like manner, State Constitutions and other declarations of rights commonly proclaimed that government should pursue broader goals, such as the promotion of "prosperity" and "happiness." See Nestor, Table III: Comparing the Provisos to the Scope of Legislative Power (online source archived at www.supremecourt.gov).

56 Mayer, The Continental Army, in A Companion to the American Revolution 309 (J. Greene & J. Pole eds. 2000); R. Wright, The Continental Army 153–154, 163 (1983).

57 See The Oxford Companion to American Military History 606–608, 611 (J. Chambers ed. 1999).

58 See Declaration of Independence ¶ 31 ("[W]e mutually pledge to each other our Lives, our Fortunes and our sacred Honor"); see also P. Maier, American Scripture 152–153 (1997); Boyd, The Declaration of Independence: The Mystery of the Lost Original, 100 Pa. Mag. Hist. & Bio. 438, 445 (1976); L. Montross, The Reluctant Rebels 165 (1970); E. Burnett, The Continental Congress 196–197 (1941). Of the 56 signers of the Declaration of Independence, 9 were taken as prisoners of war; 2 had sons who died; 3 had sons who were taken captive; 9 had their homes destroyed; and 13 saw their homes occupied, confiscated, or damaged. M. Novak, On Two Wings: Humble Faith and Common Sense at the American Founding 157–158 (2002).

59 See Barclay, The Historical Origins of Judicial Religious Exemptions, 96 Notre Dame L. Rev. 55, 69–73 (2020); McConnell, Free Exercise Revisionism 1118; Campbell, A New Approach 978, 987; Lombardi, Free Exercise 385; Campbell, Religious Neutrality in the Early Republic, 24 Regent U. L. Rev. 311, 314–315, n. 20 (2012).

60 W. Newman & P. Halvorson, Atlas of American Religion 18 (2000).

61 *Ibid.*

62 The Covenanters originated in Scotland, where they opposed the Stuart kings' right to rule over the Presbyterian Church. See Emery, Church and State in the Early Republic: The Covenanters' Radical Critique, 25 J. L. & Religion 487, 488 (2009). They immigrated to the United States and, in the 1790s, organized a branch of the Reformed Presbyterian Church. *Id.,* at 489. Members subscribe to two foundational documents—the Scottish National Covenant of 1638 and the Solemn League and Covenant of 1643—and believe in the supremacy of God over man in both civil and ecclesiastical matters. *Id.,* at 488; see also J. McFeeters, The Covenanters in America: The Voice of Their Testimony on Present Moral Issues 57 (1892).

63 Privileged Communications to Clergymen, 1 Cath. Law. 199, 207–209 (1955).

64 See also Walsh 41; Campbell, A New Approach 992, n. 99; Lombardi, Free Exercise 408, and n. 152.

65 See McFeeters, The Covenanters in America 121–129; *id.,* at 122 (Covenanters "must refuse upon the grounds of honor, conscience, and consistency, to be identified by oath or ballot with such a political system"); *id.,* at 129 (Covenanters "decline to take any responsible part in the administration of civil power"); W. Gibson & A. McLeod, Reformation Principles Exhibited, by the Reformed Presbyterian Church in the United States of America 138 (1807) ("The juror voluntarily places himself upon oath, under the direction of a law which is immoral. The Reformed Presbytery declare this practice inconsistent with their Testimony, and warn Church-members against serving on juries under the direction of the constituted courts of law").

66 See O'Neall, Early History of the Judiciary of South Carolina, p. xi, in 1 Biographical Sketches of the Bench and Bar of South Carolina (1859); Walsh 41–42 (explaining that South Carolina "dismantled" the "five-member constitutional court" that decided *Willson* and replaced it with a new high court—the South Carolina Court of Appeals—which concurred in the opinion in *Farnandis*).

67 Hamburger, Religious Exemption 928, and n. 56 (quoting the statement of Rep. Boudinot).

68 *Id.,* at 928, and n. 57 (quoting the statement of Rep. Benson).

69 Muñoz, Original Meaning 1115.

70 Several State Constitutions contained both Free Exercise Clause analogs and provisions protecting conscientious objectors, and this has been cited as evidence that the free-exercise analogs did not confer any right to exemptions. See *id*., at 1118–1119. This argument is unpersuasive for the reasons explained above.

71 The family name was apparently misspelled in the case caption. See Sutton, *Barnette,* Frankfurter, and Judicial Review, 96 Marq. L. Rev. 133, 134 (2012).

72 See also N. Feldman, Scorpions 179 (2010).

73 *Ibid.*

74 *Id.,* at 180.

75 This discussion does not suggest that *Reynolds* should be overruled.

76 “The clear implication was that a ‘direct’ interference would have been unconstitutional.” McConnell, Free Exercise Revisionism 1125.

77 Our strained attempt to square the ministerial exception with *Smith* highlights the tension between the two decisions. *Smith* held that a generally applicable law satisfies the First Amendment if “prohibiting the exercise of religion ... is not the object of the [government action] but merely the incidental effect.” 494 U.S. at 878, 110 S.Ct. 1595. But the ADA's effect on religion in *Hosanna-Tabor* was “incidental” in the sense in which the term was used in *Smith*. The opinion in *Hosanna-Tabor* tried to distinguish *Smith* as involving only “outward physical acts” instead of “the faith and mission of the church itself.” 565 U.S. at 190, 132 S.Ct. 694. But a prohibition of peyote use surely affected “the faith and mission” of the Native American Church, which regards the ingestion of peyote as a sacrament.

78 Recently, some lower courts have proceeded under yet another approach, which analyzes whether the claims presented are sufficiently similar to those raised in the cases that this Court purported to distinguish in *Smith*. See *Henderson v. McMurray*, 987 F.3d 997, 1006–1007 (C.A.11 2021); see also *Illinois Bible Colleges Assn. v. Anderson*, 870 F.3d 631, 641 (C.A.7 2017).

79 App. 367–369 (Commissioner Figueora testifying that she was appointed by the mayor, reports ultimately to him, and considers herself part of his administration); Phila. Home Rule Charter, Art. IX, ch. 2, § 9–200 (Removal of Appointive Officers).

80 App. 182, 365–366. Apart from the statements made by City officials, other evidence suggested that the City was targeting CSS. For instance, the City changed its justification for the closure of intake to CSS numerous times. Brief for Petitioners 12–15 (describing six different justifications). And although the City's stated harm was that CSS's process for certifying *new* families was discriminatory, it responded by prohibiting placement with all CSS families, including those already certified. The City's response therefore appears to “proscribe more religious conduct than is necessary to achieve [its] stated ends.” *Lukumi*, 508 U.S. at 538, 113 S.Ct. 2217.

81 See, *e.g.,* McConnell, Origins 1409; McConnell, Free Exercise Revisionism 1109; McConnell, Freedom From Persecution 819; Hamburger, Religious Exemption 915; Hamburger, More Is Less 835; Laycock, 7 J. Contemp. Legal Issues 313; Bradley, 20 Hofstra L. Rev. 245; Campbell, A New Approach 973; Kmiec, 59 UMKC L. Rev. 591; Lash, 88 Nw. U. L. Rev. 1106; Lombardi, Free Exercise 369; Muñoz, Original Meaning 1083; Nestor 971; Nussbaum, Liberty of Conscience, at 120–130; Walsh 1.

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In the Matter of the Complaint of

MICHAEL PAUL MCWILLIAMS,

Complainant-Petitioners,

For Review by the New York State Division of Human Rights ,

- against -

KATHY JERMAN, capacity as Executive Director; and
NEW HOPE ADOPTION FAMILY SERVICES

Defendants-Respondents.

Date: 20th-October-2021

cc: Julia Day,
Regional Director,
NYS Division of Human Rights,
333 E Washington St., Room #543
Syracuse, NY, 13202
Telephone No. (315) 428-4633
eFax: (315) 428-4106
InfoSyracuse@dhr.ny.gov

PRIMA FACIE CASE FOR SEXUAL ORIENTATION AND MARTIAL STATUS DISCRIMINATION:

New Hope admits the aforementioned discrimination in the reubttal presented to the NYS Division of Human Rights. Therefore, the question of *whether* discriminiation is transpiring, at this point, is confirmed and not up for debate. Moreover, the discriminatioin admitted is directed towards two protected classes: marital status and sexual orientation. The legal question brought forward is whether the NYS DHR has jurisdiction over New Hope. The Complainant argues: NYS DHR does, in fact, have jurisdiction over this matter.

First Argument's Rebuttal:

New Hope suggests, due to the Respondent challenging the Office of Children and Family Services (OCFS) on the same issue, that they are immune from an investigation by the New York State Division of Human Rights. See New Hope, 966 F.3d at 145; New Hope, 493 F. Supp. 3d at 63. Indeed, the Respondent is challenging OCFS and further: "the State is presently enjoined from using one of its executive agencies (OCFS) to penalize New Hope's faith-based choice by enforcing Section 421.3(d)". However, the Respondent--in that case--is the one requesting review from our courts; the Respondent is arguing that the State is violating their constitutional rights and is therefore requesting 18 CRR-NY § 421.3(d) be reviewed. More specifically, the Respondent, in their aforementioned challenge concerning OCFS, is requesting 18 CRR-NY § 421.3(d) be modified with exceptions based on an organization's religious creed. This is markedly different than the *current* challenge. In this instance, they are the Respondent and the administrative agency in question is the NYS DHR. The Respondent's *current* challenge with respect to OCFS does not pertain to the Complainant and moreover, does not give the Respondent *carte blanc* to bend, break, and abdicate their responsibilities with regard to *current* law. Irrespective of how the Respondent may feel with respect to 18 CRR-NY § 421.3(d)--and whether 18 CRR-NY § 421.3(d) is indeed, unconstitutional--it is the *current* law. Thus, the Complainant has every right to challenge the Respondent irrespective of the Respondent's question on the constitutionality of 18 CRR-NY § 421.3(d) as 18 CRR-NY § 421.3(d) is *current* law until said time as the Courts strike it down.

Furthermore, no law prohibits the NYS DHR from investigating the aforesaid complaint due to the Respondent's current challenge of 18 CRR-NY § 421.3(d). Respondent, until said time as 18 CRR-NY § 421.3(d) is reviewed, is responsible for compliance with N.Y. Exec. Law § 296(1-a)(c). As mention in the original complaint, the statute states "[t]o discriminate against any person in his or her pursuit of such programs or to discriminate

against such a person in the terms, conditions or privileges of such programs because of ...sexual orientation [and]..marital status" is prohibited and unlawful. Notwithstanding, even if the Respondent was found to be a "religious" and/or "private institution", as denoted N.Y. Exec. Law § 292(9), this may give Respondent license to "apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities", but said license is only to a point. The point ends at the following: "[the organization's] selective criteria do not constitute discriminatory practices under this article or any other provision of law". Discrimination against "sexual orientation" and "marital status" do constitution as "discriminatory practices under [executive law]". It was well noted that the Respondent's legal counsel ignored this jurisdictional argument from their original rebuttal.

Lastly, one would be remiss to not overlook the fatuousness of the first argument as it relates to other situations. If the NYS DHR dismissed this complaint simply because the Respondents were challenging OCFS then that would be akin to a Defendant asking for a State case to be thrown out, because the Defendant was challenging appealing similar Federal charges. One has nothing to do with the other even if it is similar and cannot be the basis on whether a complaint is dismissed.

Second Argument:

The Respondent references *Fulton v. City of Philadelphia*. Please note, there exists staunch differences between *Fulton v. City of Philadelphia* and the current challenge to the Respondent. The Respondent is not offering certification and/or licensure for foster care; specifically, the Respondent is offering adoption services. Therefore, whether adoption services are a matter of "public accommodation" has yet to be delineated in our Supreme Court. Therefore, the Complainant argues *Fulton v. City of Philadelphia* does not offer a resolution on the *current* legal question and whether the Respondent is justified in denying same-sex and/or single individuals services based on these aforesaid legally protected classifications. Furthermore, *foster care* certification/services are a continual relationship between the client and/or certification organization. In *adoption services*: this is a single event. Incidentally, whether *adoption* services will be interpreted the same as *foster* services is yet to be known given the timeframe of the relationship between the client and the organization. Lastly, in *Fulton v. City of Philadelphia* there were no State laws--such as N.Y. Exec. Law § 292(9)--defining the limits of a religious organization's selective criteria. Should a State law have existed--i.e., N.Y. Exec. Law § 292(9)--the Supreme Court may have ruled differently as the 10th Amendment preserves the rights of individual States to make their own laws. Consequently, given the staunch differences between *Fulton v. City of Philadelphia*,

Complainant argues: the relevance of *Fulton v. City of Philadelphia* is limited with respect to this investigation.

Third Argument:

The Respondent suggests the Complainant was not denied services. However, in the very same rebuttal admits stating: “Because of New Hope’s convictions as a Christian adoption service, New Hope works with adoptive families built around a married husband and wife. Others may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area.” This statement, in itself, is a denial of services. The service in question: *adoption*.

Response to the Respondent’s Statement

Respondent states: “Finally, on information and belief, Complainant’s purported query to New Hope was not made as part of a good faith effort to obtain adoption services, but rather was made with awareness of the widely publicized pending litigation and preliminary injunctions protecting New Hope’s right to conduct adoption services in a manner consistent with its faith, and for the sole purpose of harassing New Hope.”

Argument: The Respondent's attorney is practicing *defamation per se*. Complainant can show that the Complainant made several inquiries with several different adoption agencies in close proximity (and time) to the Respondent. The Complainant was looking to be approved by a different adoption agency due to relocation. Therefore, Complainant made several inquiries with different agencies hoping to compare and/or contrast programs and/or prices for adoption services. To claim that the Complainant was aware of pending litigation--and/or was attempting to harass the Respondent--is defamation *per se* and completely inappropriate. As to the statement regarding a quick reply, the Complainant is a College Professor who often replies to emails within 15 to 30 minutes irrespective of the source of the email. This is easily verifiable.

Respondent states: “New Hope admits that it is authorized by OCFS to provide adoption services. However, New Hope denies Complainant’s suggestion that its authorization by OCFS renders New Hope a public accommodation.”

Argument: OCFS clearly agrees that New Hope should be required--based on NYS laws--to provide adoption services to same-sex couples and single individuals. The current challenge to OCFS’ regulations is within the Respondent’s rights. Nevertheless, until a Court rules on the overarching question: the Respondent is liable for 18 CRR-NY 421.3(d) when it comes to individual challenges (such as the Complainant's challenge).

The “in-force injunctions” do not constitute a victory for the Respondent--as the Respondent is trying to suggest--but rather: a methodology to allow the Respondent to continue to do business until said time as the question of constitutionality is resolved. The “in-force injunctions” only provide the Respondent’s relief against enforcement by OCFS. The aforesaid injunctions do not provide the Respondent relief against a NYS DHR investigation.

For the foregoing reasons: the Complainant requests the investigation proceeds forward as the Respondent’s legal challenge with respect to OCFS has nothing to do with him.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

-against-

21-CV-1031

LETITIA JAMES, in her official capacity
as New York State Attorney General, et al.

MAD/TWD

Defendants.

STATE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION TO DISMISS

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Defendants Letitia James, Licha Nyiendo[1], Gina Martinez, Julia B. Day, and Melissa Franco, sued here in their official capacities ("State Defendants"), respectfully submit this Memorandum of Law, along with the Declaration of Gina Martinez, dated November 16, 2021 ("Martinez Decl.), and all attached exhibits, in opposition to the Motion for Preliminary Injunction ("Mot. Prelim. Inj."), ECF No. 31, filed by Plaintiff New Hope Family Services, Inc. ("New Hope"), and in support of State Defendants' cross-motion to dismiss the Complaint ("Compl."), ECF No. 1.

PRELIMINARY STATEMENT

In 1945, New York enacted the predecessor statute to the Human Rights Law ("HRL"), which affords every citizen "an equal opportunity to enjoy a full and productive life." This law prohibits discrimination in employment, housing, credit, places of public accommodation, and non-sectarian educational institutions, based on age, race, creed, national origin, sex, sexual orientation, gender identity or expression, marital status, disability, military status, and other specified classes. N.Y. Exec. Law § 296. The New York State Division of Human Rights ("DHR") was created to enforce the HRL and vindicate the public interest by eliminating and preventing unlawful discrimination. *See* N.Y. Exec. Law § 290(3).

DHR's mission is to ensure that "every individual . . . has an equal opportunity to participate fully in the economic, cultural and intellectual life of the State." *See id.* Toward that end, DHR receives and investigates complaints of discrimination. N.Y. Exec. Law § 297. This administrative process requires the participation of the person or entity alleged to have committed the discriminatory act so that a complete record is developed, and any defenses may be raised and considered. N.Y. Exec. Law §§ 297(2)(a), 297(4)(a). Whether a complaint is one

[1]Licha Nyiendo is no longer Commissioner of the New York State Division of Human Rights.

subject to DHR's administrative process, and whether an act constitutes discrimination under the HRL, are issues to be determined by DHR. N.Y. Exec. Law §§ 297(2)(a), 297(4)(c); 9 N.Y.C.R.R. §§ 465.5(d)(1), 465.17. As such, it is vital that the federal court permit New York State to determine such issues in the first instance.

STATEMENT OF FACTS AS ALLEGED IN THE COMPLAINT

New Hope, according to the Complaint, is a religious non-profit corporation that provides services in New York, including adoption services. Compl. ¶¶ 4, 14. As part of its State-authorized adoption program, New Hope works with both birth mothers and prospective adoptive parents. *Id.*, ¶ 16. Although unmarried and same-sex couples may legally adopt in New York, New Hope refuses to consider adoption applications from unmarried or same-sex couples. *Id.*, ¶ 22. Instead, New Hope informs such couples that it "cannot serve them" and "is willing to provide referrals to other agencies that will." *Id.*, ¶ 23.

After contacting New Hope about its adoption program and learning about New Hope's policy not to work with unmarried or same-sex couples, an individual filed a complaint ("Administrative Complaint") with DHR on August 23, 2021. *Id.*, ¶¶ 81-83. On the same date, DHR provided New Hope with a copy of the Administrative Complaint and directed New Hope to respond to the allegations contained therein pursuant to the Human Rights Law. *Id.*, ¶¶ 86-87.

New Hope seeks an order preliminarily and permanently enjoining DHR and the Attorney General from enforcing N. Y. Exec. Law § 296 or Civil Rights Law §§ 40, 40-c against New Hope. *Id.*, p. 37; *see also* Pl.'s Notice of Mot. for Prelim Inj., ECF No. 31, pp. 1-2.

STANDARD OF REVIEW

Injunctive relief, such as the preliminary injunction sought by New Hope here, is "an extraordinary remedy *never* awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)

(emphasis added). Specifically, the movant bears the burden of establishing, by clear and convincing evidence, that (a) it is likely to succeed on the merits; (b) it is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in its favor; and (d) an injunction is in the public interest. *Winter*, 555 U.S. at 20. The final two factors—the balance of equities and the public interest—"merge when the Government is the opposing party." *L&M Bus Corp. v. Bd. of Educ. of the City Sch. Dist. N.Y.*, 2018 U.S. Dist. LEXIS 88354, **45-46 (E.D.N.Y. May 25, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

In addition, the Second Circuit has "held the movant to a heightened standard" where (i) an injunction is "mandatory" (i.e., altering the status quo, rather than maintaining it), or (ii) the injunction "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *New York v. Actavis PLC*, 787 F. 3d 638, 650 (2d Cir. 2015). In such cases, the movant must show a "clear" or "substantial" likelihood of success on the merits and make a "strong showing" of irreparable harm, in addition to showing that the preliminary injunction is in the public interest. *See id*. (quoting *Beal v. Stern*, 184 F .3d 117, 123 (2d Cir. 1999) and *Doe v. New York University*, 666 F. 2d 761, 773 (2d Cir. 1981)).

New Hope's motion for a preliminary injunction should be denied. First, New Hope cannot succeed on the merits of its claims because (1) *Younger* abstention applies, (2) the Complaint fails to state a claim against the Attorney General and (3) the Civil Rights Law has not been enforced against New Hope. For the same reasons, State Defendants' cross-motion to dismiss should be granted. Fed. Rule Civ. Pro 12(b)(1), 12(b)(6).

Second, New Hope fails to provide any evidence sufficient to establish that it will suffer irreparable harm if a preliminary injunction is not granted. Finally, the equities and the public

interest weigh in favor of permitting the State's investigation into alleged discrimination to continue.

ARGUMENT

I. NEW HOPE WILL NOT SUCCEED ON THE MERITS

A. The Court Should Abstain From Exercising Jurisdiction

As a threshold matter, principles of comity and federalism should lead this federal court to decline jurisdiction over the Plaintiff's lawsuit. The *Younger* doctrine handed down by the Supreme Court in 1971, *Younger v. Harris*, 401 U.S. 37, 44 (1971), requires that federal courts "abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings*.*" *Diamond "D" Constr. Corp. v. McGowen*, 282 F. 3d 191, 198 (2d Cir. 2002). Abstention under *Younger* is necessary to provide the comity and deference that is "the cornerstone of our federal system." *Id*. at 200. The *Younger* doctrine provides states "the first opportunity–but not the only, or last–to correct those errors of a federal constitutional dimension that infect its proceedings." *Id.* (citing *Younger*, 401 U.S. at 44).

While the *Younger* doctrine was first applied in the context of state criminal proceedings, it is now settled law that the doctrine applies equally to state administrative law proceedings. *See Ohio Civ. Rts. Comm'n v. Dayton Christian Schs, Inc*., 477 U.S. 619, 627 (1986); *Diamond "D"*, 282 F. 3d at 198. Specifically, abstention has been applied in federal cases challenging a DHR proceeding. *See e.g. Jackson Hewitt Tax Serv. v. Kirkland*, 735 F. Supp. 2d 91, 95 (S.D.N.Y. 2010) *aff'd* 455 F. App'x 16 (2d Cir. 2012).

Younger abstention applies when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review. *Diamond*

"D," 282 F. 3d at 198 (citing *Grieve v. Tamarin*, 269 F. 3d 149, 152 (2d Cir. 2001)). When these conditions are satisfied, *Younger* abstention is mandatory absent a showing by the plaintiff that bad faith or extraordinary circumstances "would call for equitable relief." *Diamond "D,"* 282 F. 3d at 198 (quoting *Younger*, 401 U.S. at 54). The burden to establish whether one of these narrow exceptions applies rests with the plaintiff. *Id.*

1. Younger Abstention is Mandatory

The three conditions of *Younger* abstention are satisfied here. First, DHR's service of the Administrative Complaint on New Hope on August 23, 2021 pursuant to N.Y. Exec. Law § 297(1) initiated a state proceeding. Specifically, DHR acted in accordance with its authority to receive and investigate complaints alleging the denial of equal opportunity and discrimination in places of public accommodation in violation of the HRL. N.Y. Exec. Law § 290(3). Under the HRL, DHR must, after receiving a complaint, "promptly serve a copy thereof upon the respondent . . . and make prompt investigation in connection therewith." N.Y. Exec. Law § 297(2). Within 180 days after a complaint has been filed, DHR must determine whether it has jurisdiction and whether there is probable cause that prohibited violations are occurring, after which it may hold an administrative hearing within 270 days to determine if discriminatory actions occurred. N.Y. Exec. Law §§ 297(2), (4).

At the time Plaintiff filed this Complaint, DHR was, and continues to be, within the 180-day period from receiving the complaint against New Hope in which to investigate the allegations contained in the Administrative Complaint, and determine whether DHR has jurisdiction over the complaint. Therefore, there is an "ongoing state proceeding" and the first condition under *Younger* is satisfied.

Importantly, the issues that New Hope raises in this case, such as whether New Hope is a "public accommodation" under New York law and whether New Hope is entitled to a religious exemption under the HRL, Compl. ¶¶ 87, 91, are among the issues that DHR can consider within the 180-day investigative period. This illustrates the importance of *Younger* abstention – to allow the state to make such determinations in the first instance.

Second, an important state interest is implicated in the ongoing proceeding. The Supreme Court in *Ohio Civil Rights Comm'n v. Dayton Christian Schs, Inc*., affirmatively held that an important state interest is implicated in state administrative proceedings aimed at addressing claims of discrimination. 477 U.S. 619, 628 (1986). In that case, a Christian school system sought a federal injunction on First Amendment grounds against an administrative proceeding brought by the Ohio Civil Rights Commission for alleged prohibited sex discrimination. *Id*. at 624-25. The Supreme Court ultimately determined that abstention was required, stating, "[w]e have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest" to bring a state administrative proceeding under *Younger* abstention. This decision was further applied by the Second Circuit Court of Appeals in *University Club v. City of N.Y.,* where the court held that proceedings brought by the New York City Human Rights Commission for alleged violations of the city's public accommodations law qualified as a "'sufficiently important state interest to' justify *Younger* abstention." *University Club v. City of N.Y.*, 842 F. 2d 37, 40 (2d Cir. 1988) (quoting *Ohio Civil Rights Comm'n*, 477 U.S. at 628).

The Administrative Complaint against New Hope alleges that New Hope is a place of public accommodation, and that it employs a discriminatory practice by refusing to serve members of the public based on marital status and sexual orientation. Administrative Complaint

("Admin. Compl."), Declaration of Gina N. Martinez ("Martinez Decl."), Exh. B. Discrimination based on marital status and sexual orientation are prohibited under the HRL. N.Y. Exec. Law § 296(1-a)(c). Accordingly, as the courts in *Ohio Civil Rights Comm'n* and *University Club* held, the ongoing DHR proceeding regarding alleged prohibited discrimination is a sufficiently important state interest that satisfies the second condition under the *Younger* doctrine.

Third, the procedures that DHR is bound to apply provide New Hope with adequate opportunity for judicial review. New Hope's constitutional claims rest on alleged violations of New Hope's rights to free speech and free exercise under the First Amendment caused by DHR's investigation and potential penalties for violation of the HRL. Compl., ¶¶ 32-33. Specifically, New Hope alleges that DHR, by "investigating or threatening to investigate New Hope under threat of penalty . . . is violating and burdening New Hope's protected Free Exercise [of religion] rights" protected by the First and Fourteenth Amendment. *Id*. at ¶ 35.

New Hope has not alleged why DHR is not capable of providing New Hope with an adequate opportunity to review these constitutional claims. "Noting that abstention is based on the fundamental principle that parties should assert any available constitutional defenses in state proceedings unless it is plainly apparent that they are barred from raising such constitutional claims, the Supreme Court placed the burden of establishing the inadequacy of state proceedings squarely on the party seeking to avoid abstention." *Spargo v. New York State Comm'n*, 351 F. 3d 65, 76 (2d Cir. 2003) (citing *Middlesex Ethics Comm'n. v. Garden State Bar Ass'n,* 457 U.S. 423, 435-36 (1982)). No New York law or regulation prohibits DHR from considering New Hope's constitutional claims. New Hope has an opportunity to respond to the discrimination allegations, and then if DHR makes a finding of probable cause and the proceeding continues

beyond that point, New Hope will again be afforded an opportunity to raise its claims in a public hearing where it may submit testimony and evidence to support its arguments. N.Y. Exec. Law § 297(4); 9 N.Y.C.R.R. § 465.12(b)(1) & (e).

Further, New Hope has a full opportunity to raise constitutional claims in a New York state court proceeding seeking judicial review of any potential adverse administrative determination. N.Y. Exec. Law § 298. "Such opportunity to raise constitutional claims upon subsequent 'state court judicial review [of an underlying] administrative proceeding' is sufficient to provide plaintiffs with a meaningful opportunity to seek effective relief through state proceedings." *Spargo v. New York State Comm'n*, 351 F. 3d at 79 (quoting *Ohio Civil Rights Comm'n*, 477 U.S. 619 at 629). Therefore, New Hope has sufficient opportunity for judicial review and the last condition of *Younger* is satisfied.

Because all three conditions are met, "*Younger* abstention is required" and "its application deprives the federal court of jurisdiction" in this matter absent a showing that the bad faith or extraordinary circumstances exception applies. *Diamond "D,"* 282 F. 3d at 197-198.

2. No Exceptions to *Younger* Apply

a. <u>New Hope Cannot Establish Bad Faith by State Defendants</u>

To establish the bad faith exception to the *Younger* doctrine, a federal plaintiff must show that "the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome" but rather "the state proceeding was initiated with and is animated by a retaliatory, harassing, or other illegitimate motive." *Cullen v. Fliengner*, 18 F. 3d 96, 103 (2d Cir. 1994); *Diamond "D,"* 282 F.3d at 199. Further, " [a] state proceeding that is legitimate in its purpose, but unconstitutional in its execution–even when the violations of constitutional rights

are egregious–will not warrant application of the bad faith exception." *Diamond "D,"* 282 F.3d at 199.

"The subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of, this inquiry." *Id*. Therefore, bad faith may only be invoked if the federal plaintiff meets the burden of showing that "the state proceeding was initiated with and is animated by a retaliatory, harassing, or other illegitimate motive." *Id.*

In this case, despite New Hope's conclusory allegation that DHR is acting to burden and harass New Hope, DHR is not acting with illegitimate motive, but rather fulfilling its duty under New York law to which is it is bound. Specifically, N. Y. Exec. Law§ 297(2) states that "[a]fter the filing of *any* complaint, the division *shall* promptly serve a copy upon respondent . . . and make prompt investigation in connection therewith" and "[w]ithin one hundred eighty days after the complaint is filed, the division *shall* determine whether it has jurisdiction, and if so, whether there is probable cause" that prohibited discrimination has occurred (emphasis added). DHR does not have the authority to summarily dismiss complaints prior to a probable cause determination, and therefore cannot be said to have any motivation whatsoever beyond the legitimate motive of complying with state law.

The Complaint alleges that the individual who made the Administrative Complaint did so with ill motives. Compl. ¶¶ 85, 86. Despite New Hope's speculative and conclusory allegation that DHR is "cooperating with the complaining individual in this effort to burden and harass New Hope," *id*., ¶ 86, it has failed to allege any facts, or submit any evidence, to support such a baseless conclusion. DHR is acting, as it must, in compliance with legitimate state law. Compl. ¶¶ 25-26; N.Y. Exec. Law § 297.

New Hope contends that the Administrative Complaint and DHR procedures, which require DHR to serve said Administrative Complaint and perform an investigation into its merits, are in violation of New Hope's constitutional rights in light of the Supreme Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Compl. pp. 26-27. This contention by New Hope fails for three reasons.

First, in *Fulton*, the Supreme Court found that a private adoption agency associated with a Catholic diocese was not a place of public accommodation as defined under the applicable city ordinance and was therefore not subject to anti-discriminatory requirements. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880-82 (2021). However, the Philadelphia ordinance differs significantly from applicable New York state law, in that New York law is much more expansive and inclusive. *See* N.Y. Exec. Law § 292(9); Philadelphia, Pa, Code. § 9-1102 (1)(w). New York's Legislature "used the phrase place of public accommodation 'in the broad sense of providing conveniences and service to the public' and [] it intended that the definition of place of public accommodation should be interpreted liberally." *Cahill v. Rosa*, 89 N.Y. 2d 14, 21 (1996) (quoting *Matter of United States Power Squadrons v. State Human Rights Appeal Board,* 59 N.Y.2d 401, 409-10 (1983)). The HRL

> [s]hall be construed liberally for the accomplishment of its remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

N.Y. Exec. Law § 300.

A determination of whether New Hope's adoption program is a "public accommodation" under the HRL is a legal issue to be determined by DHR, and ultimately, New York courts. The *Fulton* holding has no bearing on this issue.

Second, New Hope fails to establish why it would not have a full and fair opportunity to claim this defense in its response to the complaint served by DHR. In fact, as stated in the Declaration of Deputy Commissioner Gina N. Martinez, submitted herewith, the issue of whether a respondent provides a public accommodation under the HRL is an issue specifically under consideration in the administrative proceeding. Martinez Decl. ¶ 14.

Third, alleged issues of constitutionality are not a factor in a bad faith analysis because the DHR proceeding is "legitimate in its purpose." *Diamond "D,"* 282 F. 3d at 199. The bad faith exception is only applicable where the proceeding was "animated by a retaliatory, harassing, or other illegitimate motive." *Id.* Therefore, since DHR is investigating the duly filed Administrative Complaint in compliance with state law, DHR's motive is proper and legitimate and the bad faith exception does not apply.

b. <u>New Hope Cannot Establish Sufficient Extraordinary Circumstances</u>

The second exception to *Younger* abstention applies only where "extraordinary circumstances" render the federal plaintiff unable to obtain a meaningful and timely state remedy of alleged constitutional violations which will cause great and immediate harm without federal intervention. *Trainor v. Hernandez*, 431 U.S. 434, 443-43 & n.7 (1977). The Second Circuit has held there are "two predicates for application of this exception: (1) that there is no state remedy available to meaningfully, timely, and adequately remedy the alleged constitutional violation; and (2) that a finding be made that the litigant will suffer 'great and immediate' harm if the federal court does not intervene." *Diamond "D,"* 282 F. 3d at 201.

New Hope cannot establish that that sufficient extraordinary circumstances exist. New Hope has meaningful opportunity to remedy any alleged violations of its constitutional rights through the current state proceeding with DHR or subsequent judicial review in state court of any DHR administrative decision. N.Y. Exec. Law §§ 297, 298; 9 N.Y.C.R.R. § 465(12). Martinez Decl., ¶¶ 16, 21-22. While New Hope alleges that a state law-mandated proceeding would violate its rights regardless of the outcome, it fails to state why the DHR proceeding or potential subsequent judicial review would be unable to provide an adequate remedy. Further, "where such state remedies are available, 'a federal court should assume that state procedures will afford an adequate remedy.'" *Diamond "D,"* 282 F. 3d at 202 (quoting *Pennzoil v. Texaco*, 481 U.S. 1, 15 (1987)).

New Hope also alleges immediate and irreparable harm stating, "the burden and disruption on New Hope of being subjected to such an investigation would be severe," citing DHR authority to perform field visits, compel responses to written or oral inquiries and production of documents, subpoena witnesses, and administer oaths. Compl., ¶ 99. Any anticipated harm by this statutory process is merely speculative, however, because while DHR is empowered to do all of the above, there is no requirement to do so. Because the extent of the investigation is as of yet unknown, the alleged harm stemming from it is purely speculative and does not rise to the level that could be said to create "an extraordinary pressing need for immediate federal equitable relief." *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975). Further, New Hope has failed to cite to any case as support for its contention that being subjected to, and participating in, an administrative investigation and hearing is the type of "extraordinary circumstance" that excepts the application of *Younger* abstention.

The existence of the litigation in *New Hope Family Services, Inc. v. Poole*, 18-CV-1419 (MAD/TWD) (N.D.N.Y.) ("*Poole*"), or the preliminary injunction in effect in that case, are also not "extraordinary circumstances" warranting an exception from *Younger* abstention. The issue in *Poole* is whether a regulation of the New York State Office of Children and Family Services ("OCFS") prohibiting discrimination against adoption applicants applies to New Hope. *Poole*, 18-CV-1419 (MAD/TWD), Complaint, ECF No. 1. That regulation, 18 N.Y.C.R.R. § 421.3(d), applies to all State-authorized adoption agencies and does not provide a religious exemption. 18 N.Y.C.R.R. § 421.3(d). The injunction in *Poole* orders that "OCFS may not revoke New Hope's perpetual authorization to place children for adoption" during the pendency of the *Poole* litigation. *Poole*, 18-CV-1419 (MAD/TWD), Memorandum Decision and Order, ECF No. 57, p. 28.

Whether New Hope is a public accommodation under New York law is not affected by any issue in *Poole*. Additionally, whether New Hope is entitled to a religious exemption from the HRL's anti-discrimination provisions is not contingent on the outcome of the *Poole* litigation. Further, New Hope's constitutional claims in *Poole* are largely based on statutory and regulatory language and history unrelated to the HRL. *See e.g. New Hope Family Services, Inc. v. Poole*, 966 F. 3d 145 (2020), generally. Whether New Hope's constitutional rights are violated by the DHR's administrative proceeding against New Hope is an issue entirely distinct from whether New Hope's rights are violated by OCFS regulation § 421.3(d).

The Second Circuit recognized this difference when it noted that "discrimination concerns" related to New Hope's policy may arise under the Human Rights Law. *New Hope Family Services, Inc. v. Poole*, 966 F. 3d at 166. While stating in dicta its skepticism that adoption services could be deemed a public accommodation, that issue was not before the court,

no evidence on the issue was presented, and no analysis of the HRL was undertaken. However, that issue is now before the DHR and it, rather than this Court, should make that determination.

The extraordinary circumstance exception to *Younger* abstention does not apply. Accordingly, the Court must abstain and Defendants' cross-motion to dismiss the Complaint should be granted.

B. The Complaint Fails to State a Claim Against the New York Attorney General

The Complaint fails to state a claim against Attorney General James. The "Second Circuit has held that when '[t]he Attorney General has no connection with the enforcement of [the statute at issue, [s]he] cannot be a party to [the]suit.'" *Sabin v. Nelson*, 2014 U.S. Dist. LEXIS 88462, at *5 (N.D.N.Y. June 20, 2014) (quoting *Mendez v. Heller*, 430 F. 2d 457, 460 (2d Cir. 1976)). *See also Chrysafis v. James*, 2021 U.S. Dist. LEXIS 72602, at **45-63 (E.D.N.Y. April 14, 2021) (finding the Attorney General not a proper party in litigation challenging COVID foreclosure statute). New Hope is seeking to enjoin an ongoing administrative proceeding of DHR. Compl., generally. DHR, and not the Attorney General, is tasked with investigating and deciding administrative complaints. *Sabin*, 2014 U.S. Dist. LEXIS, at **5-6. In the administrative process at issue here, the Attorney General plays no role. Therefore, the Attorney General is not a proper party and the Complaint fails to state a claim against the Attorney General.

C. Because Civil Rights Laws §§ 40, 40-c Have Not Been Enforced Against New Hope, Plaintiff Cannot Assert a First Amendment Challenge to the Laws.

Without any context or explanation, New Hope seeks a preliminary and permanent injunction enjoining enforcement of Civil Rights Law §§ 40, 40-c. Compl., p. 37, and Pl.'s Notice of Mot. for Prelim. Inj., pp. 1-2, as against it. New Hope is not entitled to such relief.

First, Civil Rights Law § 40 prohibits discrimination based on race, creed, color or national origin. N.Y. Civ. Rights Law § 40. New Hope does not allege a claim of discrimination on any of these grounds. Second, there are no allegations in the Complaint that any State Defendant is seeking to enforce Civil Rights Law § 40-c against New Hope. Instead, the Complaint alleges only that DHR has commenced an administrative proceeding against it under the HRL.[2] Accordingly, there is no case or controversy ripe for review. *Lacewell v. Office of the Comptroller of the Currency*, 999 F.3d 130, 141, 148, 149 (2d Cir. 2021) (plaintiff lacks Article III standing, and a claim is not ripe, if plaintiff seeks premature redress of a speculative issue). Therefore, New Hope fails to allege facts sufficient to entitled it to injunctive relief related to the Civil Rights Law.

II. NEW HOPE FAILS TO ESTABLISH THAT IT WILL SUFFER IRREPARABLE HARM

"To satisfy the irreparable harm requirement, Plaintiff must demonstrate that absent a preliminary injunction they will suffer 'an injury that is neither remote nor speculative, but actual and imminent,' and one that cannot be remedied 'if a court waits until the end of trial to resolve the harm.'" *Freedom Holdings, Inc. v. Spitzer*, 408 F. 3d 112 (2d Cir. 2005). The possibility of a civil monetary fine does not constitute an irreparable injury entitling a party to preliminary injunctive relief. *Biocon Ltd. v. Abraxis Bioscience, Inc.,* 2016 U.S. Dist. LEXIS 139211, *9 (S.D.N.Y. Sept. 26, 2016) (citing *Bradley v. Cty. of Will*, 2011 U.S. Dist. LEXIS 40698, **11-12 (N.D. Ill., April 14, 2011) ("Plaintiffs argue that they will be irreparably harmed because they can be fined. However, if the potential harm is monetary damages, then the harm can be readily

[2] DHR does not enforce the Civil Rights Law. Martinez Decl. ¶ 7.

calculated and Plaintiffs can be made whole for such damages in the future, if appropriate. Such damages, by definition, are the opposite of irreparable harm.")).

New Hope has failed to submit any evidence of imminent harm. In support of its motion for a preliminary injunction, it submitted stale affidavits that were signed almost three years ago. *See* Affidavit of Judith Geyer, dated Dec. 11, 2018, ECF No. 31-3 ; Affidavit of Charity Loscombe, dated Nov. 29, 2018, ECF 31-5 ; Affidavit of Elaine Bleuer, dated Dec. 7, 2018, ECF No. 31-6 ; Affidavit of Ellie Stultz, dated Nov. 29, 2018, ECF No. 31-7 ; Affidavit of Jeremy Johnston, dated Nov. 30, 2018, ECF No. 31-8; Affidavit of Justin Bleuer, dated Nov. 20, 2018, ECF No. 31-9.[3] These affidavits fail to include any information about birth mothers, children or prospective adoptive families with which New Hope is currently working, and how the existence of DHR's administrative investigation and proceeding may affect New Hope's services to such people, or otherwise irreparably harm New Hope. Instead, New Hope appears to rely on an ultimate penalty being assessed against it at the conclusion of the administrative proceeding. Such a penalty is speculative and, in any event, would not occur until the DHR proceeding is concluded and DHR seeks judicial confirmation of DHR's determination and proposed penalty. Martinez Decl. ¶ 21. As a result, New Hope does not face any imminent irreparable harm.

On the other hand, the State suffers irreparable harm any time that it is enjoined by the court from enforcing one of its policies. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). In the present case, such harm is manifest because the administrative process that New Hope challenges is a statutory paradigm intended to prevent discrimination and ensure equal access to services. N.Y. Exec. Law §§ 296, 297. By permitting entities accused of having

[3] A declaration signed over one year ago was also submitted. Affidavit of Kathleen Jerman, dated Aug. 20, 2020., ECF No. 31-4.

discriminatory policies as defined under the HRL to file motions for preliminary relief to avoid investigation of discrimination undermines the State's interests in addressing potential discrimination in a timely manner.

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF DENYING NEW HOPE'S MOTION FOR INJUNCTIVE RELIEF

The balance of equities and considerations of the public interest decidedly weigh in favor of denying New Hope's request for emergency relief. "[A] plaintiff seeking a preliminary injunction must demonstrate not just that [it has] some likelihood of success on the merits and will suffer irreparable harm absent an injunction, but also that the 'balance of the equities tips in [its] favor and an injunction is in the public interest.'" *Otoe-Missouria Tribe v. N.Y.S. Dep't of Fin. Svcs.*, 769 F. 3d 105, 112 n.4. (2d Cir. 2014) (citing *Winter*, 555 U.S. 7, 20). "These factors merge when the Government is the opposing party." *Make the Rd. N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019) (citing *Nken*, 556 U.S. at 435).

Further, the court must ensure that the "public interest would not be disserved" by the issuance of a preliminary injunction. *Salinger v. Colting*, 607 F. 3d 68, 80 (2d Cir. 2010). In exercising their discretion in whether to enter an injunction, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *N.Y.S. Rifle & Pistol Ass'n v. City of N.Y.*, 86 F. Supp. 3d 249, 258 (S.D.N.Y. 2015) *aff'd* 883 F. 3d 45 (2d Cir. 2018) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

The public interest requires timely and comprehensive investigation of complaints of discrimination by the state agency with the expertise and administrative procedures to do so. When the alleged inconvenience of New Hope in having to cooperate with an investigation and provide a defense to a complaint is weighed against this important state interest, the equities weigh against granting New Hope's motion for preliminary injunctive relief.

CONCLUSION

For the reasons discussed above, New Hope's motion for preliminary injunctive relief should be denied, and State Defendants' cross-motion to dismiss the Complaint should be granted in its entirety with prejudice.

Dated: Albany, New York
November 16, 2021

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