UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

LETITIA JAMES, in her official capacity as New York State Attorney General; **LICHA NYIENDO**, in her official capacity as Commissioner of the New York Division of Human Rights; **MELISSA FRANCO**, in her official capacity as Deputy Commissioner for Enforcement of the New York Division of Human Rights; **GINA MARTINEZ**, in her official capacity as Deputy Commissioner for Regional Affairs of the New York Division of Human Rights; **JULIA DAY**, in her official capacity as Syracuse Regional Director of the New York Division of Human Rights; **WILLIAM FITZPATRICK**, in his official capacity as Onondaga County District Attorney,

Defendants.

No.: 5:21-cv-01031-MAD-TWD

MEMORANDUM OF LAW IN FURTHER SUPPORT OF NEW HOPE'S MOTION FOR PRELIMINARY INJUNCTION

and

IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

For the past three years, the State of New York has been trying to force New Hope Family Services—a private, Christian adoption agency—to counsel adoptive parents who hold beliefs about marriage, family, and the best interests of children fundamentally irreconcilable with those of New Hope, to refrain from speaking what it believes to be true on these topics, and to recommend to birthmothers and adoptive parents placements that it does not believe to be in the best interests of the child. The State has threatened New Hope with closure unless it "compromises" its beliefs. And the State's threat would have been realized had it not been for the Second Circuit and this Court issuing preliminary injunctions protecting New Hope's right to speak and operate consistently with its faith.

But New York State views those injunctions as speed bumps rather than stop signs. Here, the State utterly disregards both the reasoning and the obvious intention of this Court's pending in-force injunction, contending that that injunction has no relevance except to one regulation (18 NYCRR § 421.3(d)) and one executive agency (the Office of Children and Family Services). State Defs.' Mem. of Law in Opp'n to Pl.'s Mot. for Prelim. Inj. and in Supp. of State Defs.' Cross-Mot. to Dismiss 13, ECF No. 34-6 ("Defs.' Opp'n"). If it may not destroy New Hope with a right punch, it claims the right to do so with a left punch. So here we are, with the State again coming after New Hope for the very same protected speech and conduct. This time, the State's Division of Human Rights has moved to investigate a baseless discrimination complaint filed against New Hope, implicitly threatening the ministry with fatal fines and penalties. And this based on literally nothing except that New Hope explained to an individual who inquired about the ministry's adoption services *exactly* its beliefs and policies that are the subject of the ongoing litigation against the State of New York, and of the existing injunction.

So, again, New Hope needs the protection of an injunction. And the State effectively admits that the strength of New Hope's constitutional claims would entitle it to one. Yet the State argues that this Court is powerless to issue that injunction and must dismiss the case under *Younger v. Harris*, 401 U.S. 37 (1971).

The State is wrong, because it severely misreads *Younger* abstention. As New Hope details below, that doctrine does not empower state evasion of ongoing federal litigation, nor is the action thus far taken by the NYDHR a type that triggers federal abstention. The federal courts have a "virtually unflagging" obligation, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citation omitted), to decide federal constitutional claims brought before them under Section 1983, "[t]he purpose [of which] is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). No exception to that obligation applies to the present case. New Hope's case cannot be dismissed, and the preliminary injunction it has requested should be granted.

ARGUMENT

I. The State Essentially Concedes That New Hope Is Entitled to a Preliminary Injunction on the Merits.

The State does not dispute that New Hope has standing to bring this action. Nor could it. New Hope "engage[s] in a course of conduct arguably affected with a constitutional interest," its activities are "arguably" proscribed by the challenged laws, and it faces a "credible threat of prosecution," *Susan B. Anthony List v. Driehaus* (*SBA List*), 573 U.S. 149, 159 (2014) (citation omitted)—facts which amply establish New Hope's standing to bring this pre-enforcement challenge. This is all the more true where, as here, the State has actually begun an administrative

investigative process against New Hope, and asserts that it broadly interprets its Human Rights Law to cover private foster and adoption agencies. *See* Defs.' Opp'n 10.

Nor does the State dispute the decisive facts. During the pre-motion conference held on October 25, 2021, the Court observed that the Supreme Court's recent decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), would make a motion to dismiss on the merits more challenging. The State evidently agreed after consideration and does not meaningfully challenge the legal sufficiency of Plaintiff's allegations. The Court will find that in its opposition to New Hope's motion for preliminary injunction and cross-motion to dismiss, the State nowhere disputes any of the following:

- New Hope engages in protected, value-laden speech toward multiple audiences, Pl.'s Mem. of Law in Supp. of Mot. for Prelim. Inj. 8, ECF No. 31-1 ("Pl.'s Br.");
- The challenged laws compel New Hope's speech based on content and viewpoint, *id.* at 8–10;
- The challenged laws censor New Hope's speech based on content and viewpoint, *id.* at 10–12;
- The challenged laws infringe New Hope's right to expressively associate with like-minded individuals to practice and communicate their faith, *id.* at 12–14;
- The challenged laws substantially burden New Hope's free exercise of religion, *id.* at 14;
- The challenged laws are not generally applicable because they allow multiple secular exemptions, *id.* at 14–16;
- Applying the challenged laws to New Hope is not neutral with respect to religion, *id.* at 16–17;
- The challenged laws intrude on historic beliefs at the heart of New Hope's faith and mission, id. at 18–19; and
- The challenged laws trigger and fail strict scrutiny as applied to New Hope, *id.* at 19–21.

Meanwhile, the State's cursory discussions of "irreparable injury" and the "balance of the equities" rely entirely on citing the wrong law and ignoring the controlling law. *None* of the cases cited by the State on these points involved First Amendment claims. *See* Defs.' Opp'n 15–17. But where First Amendment rights are at stake, these aspects of a traditional preliminary injunction analysis collapse into the "probability of success on the merits" question, because deprivation of First Amendment rights "for even minimal periods" is "irreparable injury" as a matter of law,[1] *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (citation omitted); the balance of hardships is entirely one-sided because "the Government does not have an interest in the enforcement of an unconstitutional law," *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (citation omitted); and protection of First Amendment rights is per se "in the public interest," *id*. As a result, "in the First Amendment context, . . . the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Id*. And here the State has elected not to dispute the merits.

Thus, unless *Younger* abstention requires this Court to stay its hand while New Hope's undisputed First Amendment rights are threatened, burdened, and chilled, a preliminary injunction must issue. And as a matter of law, *Younger* abstention does not apply.

[1] New Hope has also submitted evidence of tangible irreparable harm in addition to deprivation of First Amendment rights, including loss of key and difficult-to-replace staff members; loss of reputation and referral relationships that will be difficult to rebuild; and the destruction or severe crippling of an over 50-year-old ministry which has placed over 1,000 New York children into loving homes. Verified Compl. ¶¶ 92–101, ECF No. 1; Jerman Aff. ¶¶ 68–93, ECF No. 31-4. The State complains that some of New Hope's declarations were first submitted by New Hope in the related litigation in 2018. But the passage of two and a half years has not eroded the veracity or relevance of those declarations, and the Verified Complaint in this case reaffirms many of the relevant facts, ECF No. 1.

II. *Younger* Abstention Does Not Apply to Plaintiff's Claims for Multiple Reasons.

A. The boundaries of *Younger* abstention

Younger and its progeny do not teach a general policy that federal courts should defer and abstain wherever state authorities have an interest in enforcing state laws or regulations. Under no circumstances does *Younger* abstention require (or even authorize) a federal court to "stand down" if a state court is the "second comer," taking up an issue *after* "proceedings of substance on the merits" are already underway in a federal court. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982) (citation omitted). And even when state proceedings are the first to begin, the "dominant instruction" is that federal courts have a "virtually unflagging" obligation to decide cases "within the scope of federal jurisdiction," and "should not refuse to decide a case in deference to the States." *Sprint*, 571 U.S. at 72–73, 77, 81 (cleaned up). Instead, abstention is reserved only for "exceptional circumstances." *Id.* at 78 (quoting *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989)).

In *Sprint*, against a background of sometimes imprecise articulations, the Supreme Court clarified or perhaps even tightened the scope of those "exceptional circumstances," and cautioned against looser readings, like the State's here, that "would extend *Younger* to virtually all parallel state and federal proceedings . . . where a party could identify a plausibly important state interest." *Sprint*, 571 U.S. at 81.

Those "exceptional circumstances," the Court held, were limited to "parallel" and preexisting state "criminal prosecutions" or "civil enforcement proceedings" "akin to criminal prosecution."[2] *Id.* at 78–79. The principle of *Younger* extends to these "exceptional

[2] The Court identified a third type of "exceptional circumstance" not relevant here, "civil proceedings involving certain orders [that are] uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78 (citation omitted).

circumstances . . . but no further." *Id.* at 82; *accord Disability Rts. N.Y. v. New York*, 916 F.3d 129, 133 (2d Cir. 2019) ("*Younger*'s scope is limited to these [specific] 'exceptional' categories.").

Younger abstention has no application to Plaintiff's present action for at least three reasons: because the federal courts have been addressing the substance of the issues presented by New Hope's case since long before the NYDHR began its preliminary investigation; because that "nascent" investigation does not constitute a "judicial proceeding" within the meaning of *Younger*, and because the State's nascent or threatened action cannot, at this stage, be considered "akin to a criminal prosecution."

B. *Younger* abstention does not apply because the federal courts got here first.

This is not a case where a party is asking a federal court to disrupt an already in-process state proceeding. On the contrary, here the State of New York is the second-comer, attempting to do an end-run around an injunction already issued by this Court in preexisting and ongoing federal litigation. Here, the State is again threatening fatal penalties against New Hope unless it abandons precisely the policy which this Court has held is likely within the protected sphere of New Hope's Free Speech and Free Exercise rights. Here, "proceedings of substance" in federal court concerning New Hope's claim of constitutional right to continue its faith-based speech and practices have been underway since 2019, when this Court first heard and ruled on motions for preliminary injunction and to dismiss in *New Hope Family Services, Inc. v. Poole*, No. 5:18-cv-01419 (N.D.N.Y.). These decisive substantive issues have already been decided by this Court, appealed to the Second Circuit, and further decided on remand by this Court. It is telling that the State cannot bring itself even to *mention* the ongoing litigation concerning these questions until near the end of its brief. Defs.' Opp'n 13. But the State cannot be permitted to evade this reality through the expedient of attacking the identical policy, and threatening the identical

constitutional interests, through a different executive agency and different state officials. *See People United for Child., Inc. v. City of New York*, 108 F. Supp. 2d 275, 288 (S.D.N.Y. 2000) ("[A]bstention in civil rights cases brought under § 1983 is particularly disfavored . . . .").

The State attempts to avoid this conclusion by misdescribing both lawsuits. It is not the case that the constitutional questions presented in the two lawsuits are "entirely distinct." Defs.' Opp'n 13. It is not the case that any ruling in the existing federal litigation turned on "whether a regulation of [OCFS] . . . applies to New Hope." Defs.' Opp'n 13. It is not the case that New Hope's claims in the present case turn on "whether New Hope is entitled to a religious exemption under the HRL." Defs.' Opp'n 6, 13. Instead, both turn centrally on the identical question: Is New Hope's right to conduct its adoption ministry in compliance with its faith-based beliefs about marriage and the nature of healthy families protected by the First Amendment's guarantees of Freedom of Speech and Free Exercise? On this decisive question, substantive proceedings have been underway in federal court for more than two years.

The Seventh Circuit concluded that *Younger* had no application in closely related circumstances, holding that where the relevant statute "has already been held [facially] unconstitutional," "*Younger* therefore would not apply even if the [state action] were the sort of adjudicative proceeding that would otherwise call for abstention." *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 818 (7th Cir. 2014). Indeed, the court there found that the state's enforcement effort in the face of this prior ruling "shaves very close to harassment or bad faith prosecution." *Id*. Here, where the focus in this Court's prior ruling was on the scope of New Hope's protected rights (through its as-applied challenge) rather than on facial invalidity of a particular law, the same "first-comer" logic applies with equal force. *Younger* is not a license for evasion and relitigation of matters already before the federal courts.

C. *Younger* abstention does not apply because the State's "incipient" investigation is not a "formal enforcement proceeding."

The Supreme Court noted half a century ago that "merely incipient or threatened" state proceedings cannot qualify as "pending proceeding[s]" to which *Younger* abstention is even potentially due. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975). The Second Circuit has never had occasion to explore that boundary, but the Circuits that have done so have been nearly unanimous—and completely so since the Supreme Court's ruling in *Sprint*—that an administrative investigation prior to any formal charge by the State is not a state "judicial proceeding" for purposes of *Younger*. We take space to catalog this strong consensus because this is the simplest reason that Defendants' claim to *Younger* abstention must fail. *See Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519–20 (1st Cir. 2009) (Extensive insurance regulatory investigation including agency subpoenas and issuance of *ex parte* order remained "at too preliminary a stage to constitute a 'proceeding' triggering *Younger* abstention" because these steps comprised merely "a threat of enforcement."); *PDX North, Inc. v. Comm'r of N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871, 886 (3d Cir. 2020) (State agency's initiation of audit into whether a plaintiff employer was complying with state employment law was "insufficient to serve as an ongoing judicial proceeding for *Younger* purposes."); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1227–29 (4th Cir. 1989) (Where state agency had sent a letter "specifying violations of state law" and initiated an administrative fact-finding process, but no formal charges had been filed by the state, proceedings were merely "incipient" and did not constitute "ongoing state proceedings."); *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1490–91 (5th Cir. 1995) (citing *Telco* to uphold lower court conclusion that no "ongoing state proceeding" within the meaning of *Younger* existed where private individual had filed public accommodation discrimination complaints and city

Commission had served notice of those complaints, sent an information request, and proposed steps for accused clubs to achieve compliance, but no formal charges had been made by the Commission); *Google, Inc. v. Hood*, 822 F.3d 212, 218–20, 223 (5th Cir. 2016) (Service by state Attorney General of extensive administrative subpoena along with letters accusing Google of various violations did not constitute an "ongoing judicial proceeding" sufficient to trigger *Younger* abstention. "*Younger* does not apply merely because a state bureaucracy has initiated contact with a putative federal plaintiff." (quotation omitted)); *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (Where state Judicial Conduct Commission had issued probable cause letters but had not yet initiated formal enforcement proceedings, no "proceeding" within the meaning of *Younger* existed, and federal court had an "obligation" to exercise its jurisdiction.); *Mulholland*, 746 F.3d at 814–17 (7th Cir. 2014) (Actions by county Election Board finding violation of state law, ordering seizure of election flyers, and scheduling fuller hearing did not constitute ongoing proceedings "judicial in nature" such as could merit *Younger* abstention. "The possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun.").[3]

District courts in at least two more Circuits have reached the same conclusion. *See Downtown Soup Kitchen v. Mun. of Anchorage*, 406 F. Supp. 3d 776, 789 (D. Alaska 2019) (Where "at the time this action was filed" a Commission investigation of a discrimination

[3] The Tenth Circuit's decision in *Amanatullah v. Colorado Board of Medical Examiners*, 187 F.3d 1160, 1163–64 (10th Cir. 1999), is the only exception to this consensus, according abstention to an earlier procedural stage. But that case long predated *Sprint*, and the Tenth Circuit has since noted that *Sprint* "significantly limited the reach of *Younger*" and specifically "discounted reliance on the three factors" that the *Amanatullah* court treated as the determinative test for abstention. *Catanach v. Thomson*, 718 F. App'x 595, 597 n.2 (10th Cir. 2017) (unpublished).

complaint under a public accommodation ordinance was "in the investigative phase" and the Commission "had not yet determined whether [the plaintiff's] conduct violated the [statutory] provisions at issue," the investigation did not constitute a pending "quasi-criminal enforcement action" to which *Younger* deference could be due.); *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1137–38 (D. Mont. 2016) (While proceedings before a bar disciplinary committee could potentially become "akin to criminal proceedings," where the committee's actions "ha[d] not progressed beyond the investigation stage" they did not constitute "proceedings" to which *Younger* deference could be due.); *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1319–22 (N.D. Fla. 2001) (No "proceeding" within the meaning of *Younger* when state Attorney General had issued extensive civil investigative demands but no formal charges had been filed.).

The Fourth Circuit's decision in *Telco*, the earliest of these cases, is cited with approval in almost every one of these decisions. There, a state agency began investigating Telco for alleged violations of laws governing charitable solicitations. The agency had notified Telco of the claims and conducted a fact-finding conference in which Telco participated but had not yet filed "formal charges." *Telco*, 885 F.2d at 1227-28. At this point, Telco filed suit in federal court seeking to enjoin further action by the state agency as infringing Telco's free-speech rights. *Id.* at 1227. On appeal, the Fourth Circuit rejected the state agency's argument that "*Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff." *Id.* at 1229. The court instead held that "[w]here no formal enforcement action has been undertaken, any disruption of state process will be slight. While important state interests are present in connection with this or any state statute, the strength of those interests will be respected by any court assessing a plaintiff's constitutional claims." *Id.*

Indeed, the *Telco* court affirmatively identified "the period between the threat of enforcement and the onset of formal enforcement proceedings" as "an appropriate time for a litigant to bring its [constitutional] challenges in federal court." *Id.* Otherwise, the constitutional rights of the target of the state's investigation would be left "in limbo" for a potentially extended time, with the target "placed 'between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed' in enforcement proceedings." *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). That uncertainty would impermissibly chill New Hope's First Amendment freedoms—the very same freedoms that this Court has previously acted to protect by its prior preliminary injunction.

The cases cited by the State in which *Younger* abstention was applied confirm rather than contest the line drawn by *Telco* and its progeny, and only highlight the inapplicability of *Younger* to the present case. All involved formal state-initiated enforcement proceedings well beyond the investigatory stage presented in *Telco* and its progeny and the present case. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623–24 (1986) (Commission had made a probable cause determination and "initiated administrative proceedings . . . by filing a complaint" and respondent had filed an answer.); *Spargo v. N.Y. State Comm'n on Jud. Conduct*, 351 F.3d 65, 69–70, 75 (2d Cir. 2003) (There was "no dispute" that a "pending state proceeding" existed where the state judicial ethics body had served formal charges, defendant had served formal affirmative defenses, and a hearing before a referee had been scheduled.); *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 196 (2d Cir. 2002) (investigation concluded and monetary penalties imposed); *Univ. Club v. City of New York*, 842 F.2d 37, 39 (2d Cir. 1988) (City Human Rights Commission had filed a formal complaint, conducted an investigation, made

a finding of probable cause, and referred the case for a formal hearing on the Commission's charges); *Jackson Hewitt Tax Serv., Inc. v. Kirkland*, 735 F. Supp. 2d 91, 94–95 (S.D.N.Y. 2010) (NYDHR enforcing antidiscrimination law had filed an administrative complaint against Jackson Hewitt, issued a Determination after Investigation finding probable cause, and thereby triggered a hearing on the charges before an ALJ).

The Supreme Court's discussion in *Sprint* reinforces the distinction between investigation of a private complaint—which does not arise to the level of "akin to a criminal prosecution"—and formal charges leveled by a state authority that may merit that designation. *Sprint*, 571 U.S. at 79 (citation omitted). In cataloging cases in which civil administrative actions had been held to qualify, the Court was at pains to highlight that every single case had proceeded beyond mere investigation of suspicions or of privately-filed complaints to formal "state-initiated" proceedings. *Id.* at 79–80. Here, the discrimination complaint was initiated by a private individual (not the State), and no state actor has "lodged a formal complaint" against New Hope. *Id.* at 80.

The procedural setting of the present NYDHR action falls firmly within the merely investigatory phase held by all the authorities cited to be ineligible for *Younger* abstention. The State itself concedes that this matter is still in the early "investigat[ive]" phase, not the enforcement stage. *See* Martinez Decl. ¶¶ 28–29, ECF No. 34-1. All the State had done when New Hope first filed this lawsuit was to execute the clerical function of "promptly serv[ing] a copy" of the discrimination complaint on New Hope, *see* N.Y. Exec. Law § 297(2)(a), initiating the very first step of an investigation. And it has not done much more since then. As explained by the Deputy Commissioner for the New York State Division of Human Rights, the State's "investigation into the complaint remains ongoing" and it has not yet determined "if probable

cause exists" or even if "it has jurisdiction over the complaint." Martinez Decl. ¶¶ 28–29. No "state-initiated" proceeding "akin to a criminal prosecution" exists. *Sprint*, 571 U.S. at 79–80 (citation omitted).

D. *Younger* abstention does not apply because the complaint pending with the NYDHR and New Hope's present lawsuit are not sufficiently "parallel."

Yet another threshold requirement for *Younger* abstention is that the state proceeding must be "parallel" to the challenged federal action. *Sprint*, 571 U.S. at 72. Proceedings are "parallel" for this purpose only "when the two proceedings are essentially the same; that is, there is an identity of parties, and the issues and relief sought are the same." *Nat'l Union Fire Ins. Co. v. Karp*, 108 F.3d 17, 22 (2d Cir. 1997). The state proceeding at issue here fails this basic test.

Although the NYDHR investigation certainly threatens the same constitutional rights that are the subject of the prior rulings in the related case, and which New Hope seeks to vindicate by this action, "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint*, 571 U.S. at 72. The proceedings are not "parallel" for several reasons. *First*, the investigation and this federal lawsuit involve different claims, and an NYDHR formal proceeding, if ultimately initiated, cannot provide the relief that New Hope seeks here. The discrimination complaint pending before the NYDHR involves a third party's allegation of *past* discrimination. Verified Compl. ¶¶ 81–83, ECF No. 1 ("VC"). This lawsuit is a pre-enforcement action and encompasses constitutional challenges to the Human Rights Law (N.Y. Exec. Law § 296) and the Civil Rights Law (N.Y. Civ. Rights Law § 40-c) and their *future* application against New Hope's religious speech, beliefs, and policies. VC, Prayer for Relief.

Second, New Hope's pre-enforcement claims and requested relief implicate an additional law not raised by the pending private complaint—the New York Civil Rights Law (N.Y. Civ. Rights Law § 40-c). Again, even a favorable ruling for New Hope in a potential proceeding

before the NYDHR will not, and cannot, afford New Hope with all the relief it seeks from this Court.

Third—and reemphasizing the fact that the State has not yet leveled any charge against New Hope—the parties are different. A private individual filed the pending discrimination complaint against New Hope. VC ¶¶ 81–83. In this lawsuit, New Hope names and seeks injunctive relief against state and local government officials in their official capacities. VC ¶¶ 5–10. The private individual is not a party to this lawsuit; and the government officials are not parties to the discrimination complaint. Thus, they are not "parallel" cases. *Sprint*, 571 U.S. at 72.

E. Additional considerations also weigh against federal abstention in this case.

The objective procedural factors reviewed above are dispositive: *Younger* abstention cannot apply in the present setting. If any doubt remained, additional more subjective factors would also counsel against federal abstention.

First, it is implausible that the NYDHR administrative adjudication process, if launched, will provide an unbiased forum for the adjudication of New Hope's constitutional rights—an independent prerequisite for *Younger* abstention. *See Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (*Younger* abstention inappropriate where state professional board was "incompetent by reason of bias to adjudicate the [constitutional] issues pending before it."). "The very purpose of § 1983," after all, "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).[4] Of course, the

[4] *Accord W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political

State asserts that its agents are "capable" of being neutral, Defs.' Opp'n 7, but the fact of the matter is that the State of New York is actively, loudly, and persistently advocating against the very constitutional claims that New Hope invokes here, through two executive branch agencies as well as the Attorney General's office in these litigations. *See generally* State's Mot. for Summ. J., *New Hope Fam. Servs., Inc. v. Poole*, No. 5:18-cv-01419 (N.D.N.Y. Oct. 8, 2021), ECF No. 74. There is no realistic possibility that the NYDHR could reach a conclusion inconsistent with the State's firmly held policy on this point. Nor is it any answer to say that New Hope would ultimately have the opportunity to appeal an initial biased determination through the state court system. Citizens are entitled to impartial adjudication from "the first instance" on, *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972), and in the context of *Younger* abstention the Supreme Court has held that the ultimate availability of "judicial review, de novo or otherwise, . . . at the conclusion of the administrative proceedings" is not sufficient to cure the ill of first-instance bias and allow for abstention. *Gibson*, 411 U.S. at 577.

Second, in addition to the prerequisites for *Younger* abstention not being met here, abstention is not to be exercised if the state action reflects "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." *Mitchum*, 407 U.S. at 230 (cleaned up). Sadly, that is what we face here. This Court is thoroughly aware of the history of the related litigation, of the analysis of New Hope's constitutional claims by the Second Circuit, and of the scope of the preliminary injunction entered by this Court. Of course, that ruling is only preliminary, and the State of New York can and no doubt will continue to contest New Hope's

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controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

positions through further appeals. But to press its position through proper channels is one thing; a determined effort to deploy stratagems to end-run and evade the clear import of a protective injunction entered by a federal court, to threaten and chill New Hope's exercise of the very rights that injunction unambiguously recognized, is something else—it is bad faith.

What's more, the State's actions are completely unnecessary. The discrimination complaint was filed by an individual who never even requested or applied for adoption services with New Hope. VC ¶¶ 81–85. And, importantly, there is no reasonable basis to conclude that New Hope is a "public accommodation." *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 166 (2d Cir. 2020). And the State can freely "pass upon complaints" without investigating, N.Y. Exec. Law § 295(6)(a)—despite its claim to the contrary, *see* Defs.' Opp'n 9. In fact, less than a week after New Hope filed this lawsuit, the State advised New Hope that it would "not be[] required to submit a response" to the discrimination complaint. Lippelmann Decl., Ex. B at 4, ECF No. 31-2. The State later reversed course, presumably because it thought doing so would bolster its anticipated abstention argument. But its initial instruction proves the point: the State is under no legal obligation to investigate New Hope.

Bearing in mind Congress' purposes in enacting Section 1983, *Mitchum* counsels that the federal court should not leave a litigant's federal claims to the mercy of a state process in the face of such clear indicia of that state's energetic antagonism towards the plaintiff.

III. The State's Other Arguments Are Meritless.

The State argues that the Attorney General is not a proper defendant and that New Hope lacks standing to challenge the Civil Rights Law. Both arguments are misplaced, and in any case neither argument could affect New Hope's entitlement to a preliminary injunction

A. The Attorney General is a proper defendant because the challenged laws empower her to initiate, investigate, and prosecute complaints and lawsuits.

To enjoin the Attorney General, New Hope need only show "some connection" between that official and enforcement of the challenged laws. *Ex Parte Young*, 209 U.S. 123, 157 (1908). Attorney General James argues that she is not a proper defendant by implying that New Hope only seeks to enjoin NYDHR's threatened investigation. Defs.' Opp'n 14. But as detailed above, New Hope seeks to enjoin future enforcement of the laws themselves, which explicitly empower the Attorney General to initiate, investigate, and prosecute complaints and lawsuits. VC ¶ 5; *see, e.g.*, N.Y. Exec. Law §§ 63(9), (10), (12), 297(1), 297.4(4)(a), 299; N.Y. Exec. Law, App. §§ 465.3(a)(2), 465.12(c)(1); N.Y. Civ. Rights Law § 40-d. The Attorney General's website even solicits complaints alleging discrimination under the State's Human Rights Law and Civil Rights Law.[5] And the Attorney General's office has, in fact, exercised its authority to prosecute businesses for violating anti-discrimination laws. VC ¶ 5. Because the Attorney General can enforce the challenged laws, she is a proper defendant.

B. The State's history of using different agencies and laws to penalize New Hope creates a credible threat that the State will enforce the Civil Rights Law against it.

New Hope asks the Court to enjoin the State from enforcing both the Human Rights Law and the Civil Rights Law. VC, Prayer for Relief. The State argues that New Hope is not entitled to an injunction of the Civil Rights Law, but its arguments are misplaced for two reasons.

First, the State suggests that § 40 of the Civil Rights Law only addresses discrimination based on race, creed, color, or national origin, and does not threaten New Hope's religious

[5] *See The Sexual Orientation Non-Discrimination Act ("SONDA")*, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, https://on.ny.gov/2SCIR4L (last visited Nov. 22, 2021) (complainants may "file a complaint with the New York State Attorney General's Civil Rights Bureau").

speech and conduct concerning marital status, sexual orientation, or gender identity. Defs.' Opp'n 15. But the primary provision of § 40 is not limited to *any* particular basis of discrimination, requiring that "[a]ll persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations . . . ." N.Y. Civ. Rights Law § 40. And the Civil Rights Law expressly prohibits discrimination on the basis of "sex, marital status, sexual orientation, [and] gender identity or expression . . . ." *Id.* § 40-c(2). So New Hope's speech and conduct of placing children only with families consisting of a married husband and wife fall within a zone of interests regulated by the Civil Rights Law.

Second, the State argues that an injunction cannot issue because it has not yet acted to enforce § 40 against New Hope. But "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *SBA List*, 573 U.S. at 157–59 (citation omitted). Instead, the Supreme Court permits pre-enforcement review so long as a plaintiff alleges "[1] an intention to engage in a course of conduct arguably affected with a constitutional interest, [2] but proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder." *Id.* (citation omitted). This Court and the Second Circuit have already recognized that New Hope's religious speech and policies are affected with a constitutional interest. And as explained above, it is undisputed that applying the Civil Rights Law to New Hope would infringe its constitutional rights.

There is also a credible threat that the State will enforce the Civil Rights Law against New Hope. Despite judicial recognition of New Hope's constitutional rights and an in-force injunction prohibiting enforcement of a related nondiscrimination law, the State has now

demonstrated a willingness to simply wield a new law to attack the very same speech and policies. VC ¶¶ 80–86. By requiring New Hope to respond to the discrimination complaint, and again in its opposition brief here, the State appears to endorse the (incorrect) position that New Hope is a public accommodation. Defs.' Opp'n 10. And notably, the State does not disavow enforcement of the Civil Rights Law against New Hope.

Simply put, New Hope has pre-enforcement standing to challenge the Civil Rights Law, and New Hope need not await prosecution to protect its constitutional rights.

CONCLUSION

The State has chosen not to dispute New Hope's substantive entitlement to a preliminary injunction on the record presented. Instead, it has staked everything on arguing that this Court should ignore that record and the State's blatant attempt to evade the in-force injunction, cover its eyes behind the veil of *Younger* abstention, and do nothing. But for the multiple reasons detailed above, *Younger* abstention cannot apply in the present situation. Accordingly, this Court should deny Defendants' motion to dismiss, grant New Hope's motion for a preliminary injunction, and enjoin the State from applying and enforcing N.Y. Exec. Law § 296 and N.Y. Civ. Rights Law § 40-c against New Hope.

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, I electronically filed the forgoing with the Clerk of the District Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ *Mark Lippelmann*
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