UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York,

Defendant.

No.: 5:18-cv-1419 (MAD/TWD)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

With its motion for summary judgment, the State asks this Court to step aside so that it can shut down New Hope Family Services, a private adoption agency that has placed over 1,000 children into permanent homes since opening its doors more than 60 years ago. The State does not, however, argue that New Hope ever acts contrary to the best interests of the children New Hope places for adoption. Nor has it submitted any evidence establishing how forcing New Hope to close its doors could further the State's interest in finding adoptive homes for more children.

Instead, the State contends that 18 NYCRR § 421.3(d) (the "Regulation") requires New Hope to speak messages it disagrees with and violate its religious beliefs about marriage and family or else permanently close its adoption ministry. But as detailed below, the First Amendment forbids the State from putting New Hope to such a "choice." Indeed, the Second Circuit and this Court have already held that the facts previously presented by New Hope demonstrate a likelihood of success in showing that the Regulation violates New Hope's Free Speech and Free Exercise rights. Those key facts remain unchanged and undisputed.

What's more, the Supreme Court has since clarified key questions of *law* in a manner that further supports New Hope's claims. In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–79 (2021), the Court *unanimously* held that a city violated a faith-based foster provider's constitutional rights "by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." Because that is precisely what the State seeks to do here, the Court should deny the State's motion for summary judgment and grant summary judgment in favor of New Hope instead. *See* New Hope's Mot. for Summ. J., ECF No. 75.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate only when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Coyle v. United States*, 954 F.3d 146, 148 (2d Cir. 2020) (cleaned up). In making this determination, the court must "draw all factual inferences and resolve all ambiguities in favor of the non-moving party." *Id.*

ARGUMENT

I. The Regulation impairs New Hope's free-speech and expressive-association rights in a manner that triggers strict scrutiny.

The State's motion for summary judgment against New Hope's Free Speech and Expressive Association claims (Count II) rests on a mischaracterization of New Hope's claims, citation of the wrong precedents, and rather frank requests that this Court overrule the Second Circuit. The Second Circuit has already held that New Hope's ministry is "laden" with substantive, value-infused speech. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 171 (2d Cir. 2020). The State's effort to alter and censor that speech must survive strict scrutiny for multiple reasons, and making all inferences in New Hope's favor, the State cannot establish otherwise. As explained below (and in Plaintiff's own motion for summary judgment, *see* New Hope Mem. in Supp. of Mot. for Summ. J. at 29–32, ECF No. 75-1 ("Pl's Br.")), the Regulation cannot survive strict scrutiny, much less overcome it on summary judgment.

A. New Hope's Free Speech claim concerns actual and identified speech, not "conduct."

The State attempts to dodge the First Amendment entirely by misstating New Hope's Free Speech claim as though it were only about messages that might be *implicit* in the act of "the placement of a child," and thus describes the Policy as restricting only "conduct, not speech." Def.'s Mem. in Supp. of Mot. for Summ. J. at 22, ECF No. 74-21 ("Def. Br."). But New Hope's

claim has always been based on actual, identified speech—oral or written—*not* on a theory of some sort of "performance art" or endorsement implicit in conduct. New Hope has identified in detail the value-laden messages about marriage and family that it conveys in counseling and interaction with both birth parents and adoptive parents, and the messages that it must and does convey to birth parents, adoptive parents, and the State about the best interests of children entrusted to its care. *E.g.*, Aff. of Kathleen Jerman ¶¶ 8–49, ECF No. 75-3 ("Jerman Aff."). Certainly that speech is inseparable from New Hope's choices about whom to work with, and with whom to place children, but it is not "incidental" to New Hope's ministry; counseling and walking with both birth parents and adoptive parents through the intensely personal and emotional adoption process is at its very heart a communicative, talking ministry. Pl's Br. 13–14.

There is in fact no open question here. The Second Circuit has already recognized that "all New Hope's adoption services" are "laden with speech." *New Hope*, 966 F.3d at 171. And in introducing their "conduct not speech" argument, Defendants forthrightly acknowledge that "the Second Circuit found otherwise." Def. Br. 22. They are entitled to preserve the argument for further appeal, but it cannot provide a basis for summary judgment.

B. The Regulation as applied to New Hope must survive strict scrutiny for multiple reasons.

Once it is recognized that New Hope's adoption services are "laden with speech," the State has no path to prevailing on summary judgment unless it can escape the application of strict scrutiny. This it cannot do. For multiple reasons, the Regulation as applied to New Hope must be subjected to strict scrutiny, which means that it is *presumptively* unconstitutional, with a heavy burden on the State to prove otherwise. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

A law that "'*alters* the content' of [New Hope's] speech" must be subjected to strict scrutiny. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2371 (2018)

(emphasis added) (quoting *Riley v. Nat'l Fed'n of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988)). Similarly, a law that *compels* speech is subject to strict scrutiny: "[G]overnment also cannot tell people that there are things 'they must say,'" and "plainly violates the First Amendment" when it attempts to do so. *New Hope*, 966 F.3d at 170 (quoting *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)).

The State does not deny that compliance with the Regulation will force New Hope to "alter" the content of its messages to all of its audiences—to self-censor and refrain from speaking what it believes to be true about marriage, family, and the best interests of children throughout its conversations with birth parents and adoptive parents, and to offer counsel, guidance, and recommendations which it believes to be false or harmful. Quite the contrary, the State is quite clear as to its desire and intention to alter, censor, and compel New Hope's speech on these topics, precisely because it believes the messages New Hope speaks are contrary to New York's public policies. Def. Br. 27; *see also* Pl's Statement of Material Facts ¶¶ 50–51, ECF No. 75-1 ("Pl's SOF")). The State has now passed up multiple opportunities to back down from its assertion to the Second Circuit that compliance with the Regulation will leave New Hope free to "espouse its beliefs about marriage and family" only "*outside* the contours of its" adoption program. *New Hope*, 966 F.3d at 176. In its present motion, the State doubles down on its intention to control New Hope's speech through its repeated contention that New Hope does and must speak merely as an instrumentality of the State. *See* Def. Br. 24–26. Certainly, making all inferences in New Hope's favor, applying the Regulation against New Hope must be deemed to have both the intent and the effect of "altering" New Hope's messages to all of its audiences.

Having declared its intention to muzzle and alter New Hope's speech, the State may argue about the requirements of strict scrutiny, but it cannot evade them.

The censoring and compulsion of New Hope's speech imposed by the Regulation is subject to strict scrutiny for the additional reason that it is content- and viewpoint-based. *See* Pl's Br. 14–16. The Second Circuit recognized throughout its analysis that the Regulation threatens to "silence or muffle the expression of disfavored viewpoints," *New Hope*, 966 F.3d at 171 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017)), and recognized a "plausible inference [from the facts presented] 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," *id*. at 179. Leaving an opening for the State to prove otherwise, the Second Circuit said that discovery might "determine what, if any, leeway OCFS will grant New Hope and its like-minded employees in expressing their religious views." *Id*. at 179–80. But as noted above, the State has passed up this opportunity, instead unabashedly declaring that no "leeway" is permissible, and proclaiming its intention to change or silence New Hope's messages *inside* "the contours of its adoption program" because it disagrees with those messages. *See* Def. Br. 26–27. What was a "plausible inference" at the time the Second Circuit wrote is now an openly declared policy. New York is seeking to silence a disfavored viewpoint that it condemns as "stigmatiz[ing]." Def. Br. 27. The Supreme Court has denounced viewpoint-based regulation of speech as a particularly "egregious form of content discrimination." *Reed*, 576 U.S. at 168–69 (citation omitted).

The State cites *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), to make a technical argument to reach a counter-factual conclusion: that the State's application of the Regulation against New Hope is content- and viewpoint-neutral. Def. Br. 21. The State cites the wrong law to reach a patently false conclusion. *Ward* addressed the "legal standard applicable to governmental regulation of the time, place, or manner of protected speech" (there, required use

of particular amplifying equipment at the Red Rock outdoor amphitheater), *Ward*, 491 U.S. at 789, and thus concerned the question of when a regulation that *passes* the general test for viewpoint neutrality reviewed above may nevertheless amount to *covert* viewpoint discrimination. *Ward* did not address and did not alter the general test for such discrimination articulated in the cases cited above and many others. *See Reed*, 576 U.S. at 167 ("*Ward*'s framework applies only if a statute is content neutral."). There can be no argument that the Regulation is a neutral "time-place-manner" regulation.

The State's citation to *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), is equally misguided. There, after a record developed through full trial, the Supreme Court was at pains to emphasize that the application of the challenged law would not "impede the organization's ability to . . . disseminate its preferred views," nor limit "the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id*. at 627. Here, exactly the opposite is true.

The State's contention that the Regulation cannot be "content-based" because it "applies to all authorized agencies," Def. Br. 21, is a non-sequitur. The "content-based" signage regulation stricken in *Reed*, 576 U.S. 155, applied to anyone who posted outdoor signs. It is routinely true that laws that impose impermissible content- or viewpoint-based censorship "apply" to all speakers, but only "bite" those who hold the minority, disfavored viewpoint

C. The State's alternative arguments to dodge strict scrutiny are meritless.

1. The choice to regulate does not confer the power to censor.

The State's real argument is not that it does not seek to apply the Regulation to alter the contents of New Hope's communications, nor that this censorship and compulsion is not viewpoint-based, but rather that the State is *entitled* to control New Hope's speech.

The State leads by contending that the State's *choice* to regulate gives it the *power* to censor. "New Hope has chosen to operate an adoption program" and so must comply with "the statutory and regulatory construct"; "By voluntarily engaging in a government-regulated area, New Hope agrees" to comply with all governmental regulations. Def. Br. 23. New Hope "cannot provide adoption services without following the relevant laws as the State has enacted them." *Id.* But all this, of course, is the question, not the answer. The First Amendment acts to protect citizens' freedoms precisely against "laws as the State has enacted them." *Id.* Indeed, the State is advancing precisely the sort of bootstrapping logic that the Supreme Court condemned in *NIFLA* when it rejected the argument that the state's *choice* to license a particular activity carries with it the *power* to censor. That reasoning, the Supreme Court said, would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment . . . ." *NIFLA*, 138 S. Ct. at 2375. If the choice to regulate confers the power to censor, then no regulation can violate citizens' Free Speech rights. As the Supreme Court recently made clear by upholding the application of strict scrutiny to invalidate the Trademark Office's anti-disparagement policy, *Matal*, 137 S. Ct. at 1754, 1765, that is not the law. *See New Hope*, 966 F.3d at 171; *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250–51 (2d Cir. 2014) (the government "may not directly mandate that [organizations] affirmatively espouse the government's position on a contested public issue through regulations" that "threaten . . . to forcibly shut down non-compliant entities" (cleaned up)). The fact that New York (like all states) chooses to regulate the adoption process is the context for the present dispute, not the answer.

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

The State next argues that it is entitled to control New Hope's speech because that speech is "governmental speech which [does] not trigger First Amendment protections." Def. Br. 24.

But the settings in which speech originating from a private actor has been deemed to be "governmental speech" are tightly limited, and the Supreme Court has strongly cautioned that even that Court must "exercise great caution before extending our government-speech precedents." *Matal*, 137 S. Ct. at 1758.

New York now invites this Court to radically extend that doctrine. Along the way, the State is again asking this Court to overrule the Court of Appeals, which in the course of an extended analysis identified multiple (and independently sufficient) reasons why New Hope's speech *cannot* be treated as governmental speech. *New Hope*, 966 F.3d at 171–75. It is true that the Court of Appeals noted that its analysis was based only on the pleadings. But as explained below, while the State disputes various characterizations and inferences, the allegations that the Court of Appeals found decisive at the preliminary injunction stage now stand as uncontested facts for purposes of the present motion. As a result, summary judgment in favor of the State would represent repudiation of the Second Circuit's analysis and reversal of its holding. It would also ignore on-point Supreme Court precedent.

a. The fact that the State regulates the adoption process does not convert New Hope's speech to governmental speech.

All the cases cited by the State in which speech arguably associated with a private actor has been deemed to be governmental speech involve either government funding of the message, *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), or actual government ownership of the property on which the message is emblazoned, *see Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (monument to be erected in city-owned park); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) (license plates manufactured and owned by the state). Neither factor exists here.

Instead, the State points to facts that have nothing to do with any legal standard whereby privately funded speech can be transmogrified into "governmental speech." The State asserts that New Hope's operation as an adoption service is not a "purely discretionary process," Def. Br. 22, and that New Hope's "discretion is not unbridled," *id.* at 25, because of the many statutes and regulations that govern the adoption process. These are irrelevant phrases. No case applying the "governmental speech doctrine" asks whether the private actor is engaged in a "purely discretionary process" or enjoys "unbridled" discretion. The State is in fact just repackaging the rejected argument that the State's choice to regulate confers the power to censor. Private action and choice is to some extent "bridled" by regulation in a vast range of modern social service, business, and educational activities. The State cites no case that holds that evidence of regulatory limitations on private discretion transforms associated private speech into governmental speech.

The State's declarations detailing regulations surrounding the adoption process also add nothing to the analysis already conducted by the Second Circuit, and do not contradict the core facts that that court found decisive. The Court of Appeals was well aware of the "thicket of regulations" surrounding the adoption process and indeed cited many, including "regulations [that] single out certain factors that should not be considered," *New Hope*, 966 F.3d at 151–52. Conversely, the State's new declarations do not deny that "nowhere do the regulations define 'best interests,'" *id.* at 177, and do not contradict that the regulatory structure leaves "considerable discretion" in "weighing those factors" and requires adoption services to exercise "independent judgment as to the propriety of any particular placement," *id.* at 175. And the State affirmatively concedes that OCFS *never* even "review[s]," much less "edit[s] or reject[s] a[n] . . . authorized agency's best-interests assessment." *Id.*; *see* Def. Br. 25.

The State also attempts to use the mere fact of regulation to fabricate an argument based on public perception, contending that "[s]ince adoption is regulated by the state as a social service, it is not reasonable that the public would somehow believe that an authorized agency engages in purely private conduct." Def. Br. 24. Everything about this argument is wrong. No authority says that a citizen who engages in anything less than "purely" private speech has thereby forfeited his Free Speech rights. No authority says that public perception is sufficient to transform a private actor's speech into governmental speech; where public perception was mentioned in the *Pleasant Grove* case, the Court was referring to a clear and indeed ancient public perception, and then only as a factor *in addition* to the government's actual ownership of the physical forum (a public park). *Pleasant Grove City*, 555 U.S. at 471–73.

In any case, the State's hypothesis about how New Hope's audiences perceive its messages has no basis at all in the evidentiary record. Indeed, the State is not really making any assertion about how New Hope's audiences *do* perceive its messages, but about how (in the State's opinion) those messages *should* be "properly understood." Def. Br. 23. But in the next breath the State cites strongly contrary (and undisputed) record evidence, acknowledging that New Hope "identifies itself to applicants as a religious ministry, starts meetings with prayer and uses scripture to explore how faith in God can help adoption applicants." Def. Br. 25. As the Second Circuit rightly recognized, faith-based adoption agencies "including New Hope" that have provided private adoption services "for decades" "have long established private identities." *New Hope*, 966 F.3d at 174. It is no great leap to say that against that background, hearers are extremely *unlikely* to believe that when New Hope speaks its views about marriage, family, and the best interests of children, it is speaking on behalf of New York State.

b. *The fact that the State itself provides adoption services does not transform New Hope's speech in the course of its privately-funded adoption services into governmental speech.*

The State asserts that state adoption agencies provide the "same . . . services" as do private agencies, and that "[t]here is no difference between how the state governs government authorized agencies and voluntary authorized agencies." Def. Br. 24. The premise is false—for example, state agencies do not pray with adoptive parents nor "explore how faith in God can help adoption applicants," Def. Br. 25, and the State "governs" governmental adoption services very differently, by staffing them from top to bottom with state employees.[1] And in any case nothing would follow: the State cites no authority holding that where the state chooses to provide a particular service in parallel with private actors or religious ministries (as happens today with many social services), speech by the private actors is thereby converted to governmental speech.

The implications of the State's "same services" argument are grave. The State writes as though New Hope and other religious providers have chosen to move into a traditional state function. But on the contrary, religious ministries were serving and finding homes for orphans long before governments in this state and nation took any hand in such work. *New Hope*, 966 F.3d at 150 n.3; *Fulton*, 141 S. Ct. at 1874–75. No authority teaches that government's decision to begin providing services that have traditionally been provided by religious charities carries with it the power to essentially expropriate, squeeze out, or control those religious ministries. *See Fifth Ave. Presby. Church v. City of New York*, 293 F.3d 570, 575 (2d Cir. 2002) (City's choice to provide and regulate homeless shelters did not empower it to prevent church from welcoming homeless on its property).

[1] Remarkably, the State tries to argue that even its *lack* of oversight of private agencies somehow supports a finding of "government speech," because the State "also does not [review best-interest determinations] for a government authorized agency." Def. Br. 26.

The State's suggestion that it has the authority to dictate how New Hope operates and speaks in the course of its adoption ministry because adoption "changes the most fundamental legal relationship that exists between people in our society—that of parent and child," Def. Br. 23, is equally misguided. Adoption concerns what has long been considered one of the most fundamental and sacred *human* relationships, and as with marriage, this is all the more reason why the State may *not* compel a religious ministry to act and speak against conscience in this area. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (state could not compel clergy to "perform [a same-sex wedding] ceremony").

Nor does the State's assertion that in the field of adoption, "the State *partners* with both public and private entities," Def. Br. 23 (emphasis added), have any relevance to any test for conversion of speech by a private individual to unprotected governmental speech.

D. The Regulation must be subjected to strict scrutiny for the additional reason that it infringes rights of expressive association protected by the First Amendment.

The State attempts to dispose of New Hope's expressive association claim by misdescribing New Hope's claim, New Hope's mission, and the law.

The State attempts to change the analysis by focusing strictly on the act of "placement," and simply denying that New Hope has a communicative mission. But the State does not get to define New Hope's mission, and New Hope is not limited to one mission. New Hope has detailed, and will not here repeat, the evidence that amply establishes that the New Hope organization itself (including board members, employees, and volunteers) forms an expressive association dedicated to conveying a common "system of values" about "life, marriage, family, and sexuality" to those it serves. *See* Pl's Br. 16–17. And likewise, that New Hope forms a voluntary expressive association with those candidate adoptive parents who choose New Hope over alternative agencies because they wish to discuss difficult personal topics within the faith-

based framework that New Hope very openly professes. *See id*. at 17–18. The Second Circuit's analysis unambiguously recognized that both of these constitute legitimate and threatened "expressive associations." The only open question was whether the State's application of the Regulation against New Hope threatens more than a "slight impairment" of "New Hope's associational ability to advocate its religious viewpoints." *New Hope*, 966 F.3d at 178–80.

As to that, as the Second Circuit recognized, the State has now abandoned its earlier position that the Regulation does not prevent "New Hope from continuing to share its religious beliefs throughout the entire process." *Id*. at 175–76 (citation omitted). Instead, the State's unapologetic efforts to commandeer New Hope's speech as "governmental speech" in order to silence views that the State believes to be hurtful and contrary to the State's policies—along with its dogged insistence that it cannot make a "religious exception" for New Hope—have now confirmed that OCFS will grant no "leeway" at all to "New Hope and its like-minded employees in expressing their religious views." *Id*. at 179–80; *see* supra Section I.C.2.

None of this can be reconciled with an argument that enforcement of the Regulation against New Hope will have no more than a minor and incidental impact on "the message[s] [New Hope] wishes to convey," *New Hope*, 966 F.3d at 175 (citation omitted), within and by means of the expressive associations it forms with its staff, and with candidate adoptive parents. Further—and particularly in the context of a motion for summary judgment—courts must "give deference to [New Hope's] view of what would impair its expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

The State attempts to dodge these decisive facts by means of legally spurious arguments.

Expressive association claims are inherently closely related to free speech claims, but they are not identical. *Contra* Def. Br. 31. Here, the associational claims focus on the message-

disruptive impact of the forced inclusion of unmarried or same-sex couples in New Hope's instructional and counseling community, and of the Regulation's apparent requirement that New Hope itself discipline its employees who speak faith-motivated messages lauding the importance of heterosexual marriage to healthy families. *New Hope*, 966 F.3d at 179. In any case, logical overlap itself is no grounds for dismissal; the case cited by the State dismissed an associational claim that was "duplicative" of a free speech claim only because it had held that Free Speech claim to be meritless. *See DeFabio v. E. Hampton Union Free Sch. Dist.*, 658 F. Supp. 2d 461, 484 (E.D.N.Y. 2009).

Associational rights are not limited to membership organizations or to members. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 69 (2006) ("[F]reedom of expressive association protects more than just a group's membership decisions . . . ."); *In re Primus*, 436 U.S. 412, 431 (1978) (ACLU attorney's solicitation letter to potential client fell "within the generous zone of First Amendment protection reserved for associational freedoms"). Nor do associations have to be organized *ab initio* "for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Dale*, 530 U.S. at 655. The holding in *Roberts v. U.S. Jaycees* was predicated on the factual finding after trial that inclusion of women would not impair the Jaycees' ability to promulgate their chosen messages. 468 U.S. at 626–27. The intimate, speech-laden, value-laden, and selective association of New Hope with its constituents and adoptive parents bears no relationship to the fleeting and recreational "association" of dance hall patrons, *see Dallas v. Stanglin*, 490 U.S. 19 (1989). Summary judgment cannot be entered against New Hope's expressive association claims.

II. The Regulation also impairs New Hope's right to freely exercise its religion in a manner that triggers strict scrutiny.

Strict scrutiny also applies because the Regulation violates New Hope's free exercise of religion. Indeed, the State does not—and cannot—dispute that forcing New Hope to recommend child placements with unmarried and same-sex couples would substantially burden New Hope's religious exercise. *See Fulton*, 141 S. Ct. at 1876 (substantial burden for the government to put a foster agency "to the choice of curtailing its mission or approving relationships inconsistent with its beliefs"). Yet the State claims it has the power to shut down New Hope for following its beliefs. This is wrong for two independent reasons. First, the Free Exercise Clause prevents the government from burdening religious exercise through the enforcement of a law that is neither neutral nor generally applicable—at least without satisfying strict scrutiny. Second, the First Amendment protects against government intrusion of historic beliefs at the heart of a religious ministry's "faith and mission," regardless of whether the law is neutral or generally applicable.

A. The Regulation is neither neutral nor generally applicable.

A law that burdens religious exercise is subject to strict scrutiny if it is neither "neutral" nor "generally applicable." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990). Neutrality and general applicability are separate concepts, so the failure to satisfy just one triggers strict scrutiny. *See Fulton*, 141 S. Ct. at 1877. The Regulation here, however, fails to meet either requirement.

1. The Regulation is not "generally applicable" because the State allows discrimination in the adoption context for secular reasons.

Although the Regulation is not neutral in either its promulgation or enforcement, *see* infra Section II.A.2, it is "more straightforward to resolve" New Hope's Free Exercise claim "under the rubric of general applicability." *Fulton*, 141 S. Ct. at 1877.

The State contends that its nondiscrimination rule is generally applicable because "it applies to all providers of adoption services without exception." Def's Br. 17. But that misunderstands the general-applicability requirement. "[G]overnment regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.*; *accord Fulton*, 141 S. Ct. at 1877. So the Court cannot merely ask whether the Regulation applies to "all" adoption providers; it must instead determine whether the State forbids discrimination in the adoption context "across-the-board." *Smith*, 494 U.S. at 884. The State does not.

Indeed, the Regulation purports to prohibit "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," 18 NYCRR § 421.3(d), but numerous other state statutes and regulations explicitly allow—in fact, sometimes require—such discrimination throughout all stages of the adoption process.

For example, state law requires adoption agencies to focus their recruiting efforts on "communities of populations" consisting of "ethnic, racial, religious or cultural characteristics similar to those of the children . . . composing the largest number" of children waiting to be adopted. 18 NYCRR § 421.10(a). In other words, the State favors prospective adoptive parents who have the "right" ethnicity, race, religion, or culture, and disfavors those who have the "wrong" characteristics.

The State mandates race discrimination for other secular reasons. It instructs adoption agencies to give "first priority" in the adoption-study process to "Indians seeking to adopt Indian

children." 18 NYCRR § 421.13(a)(1). And it requires adoption agencies to discriminate in making placement decisions based on an adoptive parent's "[r]ace, color or national origin" whenever—in the agency's sole discretion—it believes these otherwise protected characteristics "relate to the specific needs of an individual child." 18 NYCRR § 421.18(d)(2).

New York also endorses sex and religious discrimination. State law instructs that children should be placed with individuals and agencies who share the child's religious faith, N.Y. Soc. Serv. Law § 373(1) & (2); that adoptive parents can discriminate against available children based on the child's sex, 18 NYCRR § 421.16(g); and that birth parents may discriminate against adoptive parents for essentially any reason, including race and religion, N.Y. Soc. Serv. Law § 373(7); *accord Spence-Chapin Adoption Serv. v. Polk*, 274 N.E.2d 431, 436 (N.Y. 1971) ("[T]hat the mother should have the say on issues of race and religion seems reasonable and is accepted doctrine, so long as she has not abandoned the child or is unfit.").

Adoption agencies can also legally decline and refer applicants for multiple other secular reasons that would otherwise be prohibited by the Regulation. For instance, an adoption agency may decline applicants for "poor health" (i.e., "disability") or "limited life expectancy" (i.e., "age"). N.Y. Dom. Rel. Law § 110. The State even mandates marital-status discrimination in some circumstances, preventing certain married persons from adopting individually if they are living apart from their spouse. *Id.* So New York "discriminates" against a class of married individuals in adoption eligibility *because* they are married, while declaring it unacceptable that New Hope "discriminates" *in favor of* married couples. What's more, the State has adopted "Guidelines for Good Childcare Practices with Lesbian, Gay, Bisexual, Transgender, and Questioning Youth," which explicitly allows "youth placement" to be based on "sexual orientation, gender identity, or gender expression." Traina Decl., Ex. D, ECF No. 74-11 at 6.

Such examples of state-sanctioned discrimination could go on. The point is that New York allows—and even requires—the very sort of discrimination purportedly prohibited by the Regulation. So why the double standard for New Hope? According to the State, New Hope's religious policy and practice is worse than the state-sanctioned discrimination because it is a "categorical exclusion" of same-sex and unmarried couples that does not "serve the best interests of waiting children." Def. Br. 17, 19. Not so. As the Second Circuit found, there is "no question" that each of New Hope's "placements ha[ve] been in the best interests of the adopted child." *New Hope*, 966 F.3d at 149. And there is no evidence that New Hope's referral policy has ever prevented an unmarried or same-sex couple from adopting or receiving adoption services. Pl's SOF ¶ 15. In any event, applicable statutes and regulations *do* categorically exclude applicants based on otherwise protected characteristics. For example, under N.Y. Dom. Rel. Law § 110 and 18 NYCRR § 421.16(d), a person otherwise eligible to adopt who is married and has been separated for less than a year may not adopt—precisely because of her marital status. Thus, the State is making "a value judgment in favor of secular motivations, but not religious motivations," as justifying various forms of discrimination. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). "This precise evil is what the requirement of general applicability is designed to prevent." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545–46 (1993).

2. The Regulation is not "neutral" in either its promulgation or enforcement.

Although the lack of general applicability alone is enough to trigger strict scrutiny, the record also shows that the Regulation is not "neutral."

The "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at

1877. A lack of neutrality can be "masked, as well as overt," so courts must scrutinize the law or regulation for even "subtle departures from neutrality." *New Hope*, 966 F.3d at 163 (quoting *Lukumi*, 508 U.S. at 534). Courts therefore must "'survey meticulously' the totality of the evidence," analyzing "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 by members of the decisionmaking body." *Id.* (quoting *Lukumi*, 508 U.S. at 534). A "slight suspicion" of hostility is all that is needed to trigger strict scrutiny. *Id.* at 161 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1731).

Here, the Second Circuit already found that many of the facts support a "slight suspicion" of "religious animosity." *New Hope*, 966 F.3d at 165. While the State insists that the current record no longer supports the Second Circuit's finding, Def. Br. 10, the key facts remain evidentiary and uncontradicted. As explained in New Hope's cross-motion, the current record establishes that the Regulation is not "neutral" in either its origin or enforcement. *See* Pl's Br. 23–29.

To start, the State's aggressive overreaching in adopting the Regulation—without and contrary to statutory authority—evinces zealous determination to silence or exclude a disfavored viewpoint. As the Second Circuit held, the Regulation's mandatory language has no basis in the law it purports to implement, N.Y. Dom. Rel. Law § 110, and instead is directly contrary to that statute's intent. *New Hope*, 966 F.3d at 165. The statute's choice of permissive rather than mandatory language, the Second Circuit found, "appears to have been deliberate, and even intended to allow for accommodation of religious beliefs." *Id*. This Court agreed. *See New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44, 57 (N.D.N.Y. 2020) ("[I]n light of the Circuit's

finding that the statute is 'permissive,' the Court cannot find OCFS's [argument on neutrality] reasonable.").

The Governor of New York also confirmed this reading. When signing the law, he sought to "assuage concern[s]" that the law "might be construed to require faith-based adoption agencies 'to facilitate adoption for same-sex [couples] in violation of'" their religious beliefs. *New Hope*, 966 F.3d at 165–66 (citation omitted). "He explained that the statutory text was permissive, *i.e.*, it allowed adoptions by more persons than before, but '*without compelling any agency to alter its present policies*.'" *Id*. at 166 (quoting Gov. Mem., New York Bill Jacket, 2010 S.B. 1523, ch. 509).

Despite this legislative history and the statute's permissive language, OCFS decided to *prohibit* by regulation precisely what the statute *permits* by its terms. This was quintessential administrative overreach. And it reflects hostility towards the beliefs held by New Hope and other faith-based adoption providers. In fact, the State confirmed its contempt for those beliefs during the rulemaking process that led to adoption of the Regulation, labeling such beliefs as "archaic." Pl's SOF ¶ 43; *New Hope*, 966 F.3d at 163–64.[2] The State's decision not to include a religious exemption—even though the State allows numerous instances of otherwise prohibited "discrimination"—is an impermissible value judgment that faith-based reasons are illegitimate, and unworthy of respect. *See Tandon*, 141 S. Ct. at 1296 ("government regulations are not neutral and generally applicable" whenever they treat "comparable secular activity more

[2] The State now claims that OCFS's use of the term "archaic" referred to its amendment of 18 NYCRR § 421.16(h), "which required certain considerations of homosexuality in an adoption study," not § 421.3(d). Def. Br. 12 n.5. But OCFS used the term in connection with *all* the "proposed amendments," including § 421.3(d). Traina Decl., Ex. G at 39, ECF No. 74-14. Regardless of which amendments OCFS had in mind, it still disparaged the *beliefs* held by New Hope as "archaic." That falls far short of the "neutral and respectful consideration" of religious beliefs demanded by the First Amendment. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

favorably than religious exercise"); *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("A double standard is not a neutral standard.").

Faced with this record, the State resorts to reframing the Regulation. First, it argues that the Regulation is neutral in origin because it "grew out of a work group focused on the treatment of transgender youth living in OCFS custody." Def. Br. 10. Next, it argues that the Regulation is neutral because it was never meant to implement N.Y. Dom. Rel. Law § 110, but rather was promulgated pursuant to OCFS's broad authority to "maintain *enlightened* adoption policies." Def. Br. 14 (emphasis added). Both arguments just highlight the hostility.

Simply put, the State could—and should—have addressed the treatment of "transgender youth" living in *state* custody without interfering with the religious policies and practices of *private* adoption providers. No state law required such interference. To the contrary: "[W]hat 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." *New Hope*, 966 F.3d at 166. OCFS chose to ignore this intent, and in doing so, "suppress[ed] much more religious conduct than [was] necessary in order to achieve the [Regulation's] legitimate ends." *Lukumi*, 508 U.S. at 542. Thus, the Regulation's promulgation was "not neutral." *Id.*

Nor can the State evade this conclusion by now claiming that the Regulation was enacted pursuant to its power to adopt "enlightened" adoption policies. Def. Br. 14. After all, that's just another way of saying New Hope's beliefs are "not enlightened, or "archaic," and another reason to apply strict scrutiny. *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

In addition to lacking neutrality in its promulgation, the Regulation's enforcement against New Hope also is not neutral. As noted, the State reversed its live-and-let-live approach to New Hope in the complete absence of any complaints or experienced problems. For five years after the Regulation was enacted, "OCFS voiced no objection to" New Hope's child-placement policy. *New Hope*, 966 F.3d at 166; Jerman Aff. ¶¶ 12, 15, 18, 30, 44, 49. Not one "complaint" was filed during that time, *New Hope*, 966 F.3d at 168; Geyer Aff. ¶ 140, and the State consistently praised New Hope right up until the moment it threatened closure. Verified Compl. ¶¶ 187-88, ECF No. 1 ("VC"). This is strong evidence that the State, again, is "proscrib[ing] more religious conduct than is necessary to achieve [its] stated ends." *Lukumi*, 508 U.S. at 538.

And the State's after-the-fact explanation for its actions changes nothing. The State asserts that it had no knowledge of New Hope's child-placement policy until it "conducted a comprehensive review of New Hope in 2018"—five years after the Regulation's enactment. Def. Br. 7. This just further proves that enforcing the Regulation against New Hope is a solution in search of a problem. The uncontroverted record shows that when the State adopted the Regulation, New Hope had been "operating without complaint for 50 years, taking no government funding, successfully placing approximately 1,000 children." *New Hope*, 966 F.3d at 168; Pl's SOF ¶¶ 3, 8, 11; VC ¶¶ 51, 73; Geyer Aff. ¶¶ 29, 140.

Even now, the State cannot reasonably explain its abrupt leap to the extreme threat of a closure order. As the Second Circuit noted, "[i]t is plainly a serious step to order an authorized adoption agency such as New Hope . . . to close all its adoption operations." *New Hope*, 966 F.3d at 168. Yet the State has not identified any relevant statutory authority that empowers it to order New Hope to cease its adoption services. To be sure, the State says in a footnote that its authority to close New Hope's longstanding adoption ministry "stems from the requirement in N.Y. Social

Services Law 371(10) that an authorized agency must be 'approved' by OCFS." Def. Br. 12 n.6. But that statutory provision merely defines "authorized agency"; it does not give the State the power to withhold its "approval" and shut down private agencies for any reason. *See New Hope*, 966 F.3d at 169 (agreeing that Section 371(10) "makes no mention of closing adoption agencies or invalidating certificates of incorporation authorizing them to provide adoption services").

In any event, the State's own declarations admit that OCFS was not required to threaten New Hope with closure. *See* Decl. of Carol McCarthy ¶ 17, ECF No. 74-4 ("McCarthy Decl.") (compliance with regulations "*may* be a condition for ongoing approval"); *id*. ("OCFS *may* review the adoption program and withhold its approval for failure to meet OCFS standards."). And the records attached to the Declaration of Carol McCarthy document denial of reauthorization to a grand total of three secular adoption agencies since 2004, in every case involving allegations of fraud, financial impropriety, or insolvency. *See* McCarthy Decl., Ex. A, ECF No. 74-5. By contrast, it is undisputed that New Hope has always operated at the very highest level of integrity and responsibility. *See* VC ¶¶ 187–88; *New Hope*, 966 F.3d at 168.

In sum, the record shows that hostility and non-neutrality pervaded both the promulgation of the Regulation and its enforcement against New Hope. Strict scrutiny therefore must apply.[3]

B. The Regulation also triggers strict scrutiny because it intrudes on historic beliefs at the heart of New Hope's "faith and mission."

While courts often evaluate Free Exercise claims under *Smith*'s general rule, the State fails to mention that the rule does not always control. *See Trinity Lutheran Church of Columbia*,

[3] New Hope has also submitted evidence that State officials made statements that could be perceived as being hostile towards New Hope's religious beliefs. The State now, after the fact, disputes the existence and meaning of those statements. *See* Def. Br. 13. Although the inference of animus and credibility of those statements ordinarily would be a question for the fact finder, not amenable to summary judgment in favor of the State, the record also allows summary judgment to be granted in favor of New Hope on other grounds.

Inc. v. Comer, 137 S. Ct. 2012, 2021 n.2 (2017) (rejecting the idea that "any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause"). The Supreme Court has held that even "neutral and generally applicable" laws are unconstitutional when, as here, their application would disrupt the "faith and mission of the [religious organization] itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012).

Thus, the Supreme Court could conclude—without applying *Smith*—that the Free Exercise Clause prohibits using employment nondiscrimination laws to second guess a religious school's decision to release a teacher responsible for the spiritual instruction of children. *Id.* at 190, 196. Similarly, no *Smith* analysis was needed for the Court to state as obvious that the Free Exercise Clause prohibits even a "neutral law of general applicability" from requiring a ministry to ordain women, *id.* at 190, or members of the clergy to perform same-sex weddings, *Masterpiece Cakeshop*, 138 S. Ct. at 1727. The First Amendment "must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 572 U.S. 565, 576–77 (2014) (cleaned up). "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

This exception to *Smith* applies here. New Hope is engaged in an ancient historical practice that has withstood time and change for millennia. Pl's SOF ¶¶ 1–2; *see also Fulton*, 141 S. Ct. at 1884–85 (Alito, J., concurring) (discussing history of religious organizations providing foster and adoption services). Caring for orphans has been a mandate of the Christian faith for 2,000 years. *See* Holy Bible, *James* 1:27. And since its founding, New Hope's central mission has been to obey and fulfill this command by placing orphaned children into loving families. Pl's SOF ¶ 3. From a faith perspective, being forced to arrange and finalize an adoption is much like

being forced to perform a marriage. Both involve the formation of family and lifelong relationships that all historic faiths believe to be ordained by God. For a Christian ministry devoted to the formation of families and the wellbeing of children, New Hope's beliefs about the nature of God, man, woman, and family lie at the heart of its "faith and mission."

For this reason, and without regard to the *Smith* test, the State may not force New Hope to perform this historic Christian ministry in a manner that conflicts with its beliefs or close its doors.

III. The Regulation as applied to New Hope cannot satisfy strict scrutiny.

A. The requirements of strict scrutiny.

As New Hope has previously detailed, once strict scrutiny is triggered, whether by intrusions on Free Speech, Freedom of Association, or Free Exercise of Religion, then the Regulation is presumptively invalid; all burdens associated with overcoming strict scrutiny rest with the State. *See* Pl's Br. 29–30. The Regulation must be enjoined unless the State carries its burden to demonstrate that the application of the Regulation *against New Hope specifically* advances interests of the highest order and is so "narrowly tailored to serve that interest without unnecessarily impairing New Hope's Free Exercise of Religion or Free Speech," *New Hope*, 966 F.3d at 182, and that any less restrictive means "would fail," *McCullen v. Coakley*, 573 U.S. 464, 467 (2014). Logically, one "less restrictive" alternative is to grant an exception to faith- or conscience-inspired dissenters. And the Supreme Court recently held exactly that, instructing that "[t]he question . . . is not whether [New York] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [New Hope]." *Fulton*, 141 S. Ct. at 1881.

Mere "speculation" as to the effect of a policy, or of an exception, is "insufficient to satisfy strict scrutiny." *Fulton*, 141 S. Ct. at 1882. "[A]necdote and supposition" do not suffice to

carry the State's burden. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822-23 (2000). Here, the State lacks even "anecdote," and offers nothing but supposition to show that continuing to allow New Hope to speak and operate in accordance with its beliefs would materially damage any compelling governmental interest. Accordingly, summary judgment should be granted declaring the unconstitutionality of the Regulation as applied to New Hope, and cannot be granted for the State.

B. The State cannot establish that granting an exception for New Hope would materially harm any compelling interest.

Over the course of this litigation, the State has thrown up first one then another asserted interest, suggesting a policy in search of an interest, rather than a policy in service of an interest.

The State asserts an interest of "increasing the pool of prospective adoptive parents" (*i.e.*, there are too *few* applicant parents). Def. Br. 26. But now it simultaneously asserts a directly contradictory "interest"—that the problem is that New Hope's policy "decreases" the "pool of *children*" available to applicants, leaving them on "waiting lists" (*i.e.*, there are too *many* applicant parents), Def. Br. 28. In fact, the State offers nothing but speculation to show that New Hope's operation has ever had, or would ever have, either of those contradictory effects.

The Supreme Court, the Second Circuit, and this Court have all rejected the former argument as implausible, and New Hope has submitted concrete evidence that its faith-based nature and policy actually *increases* the number of adoptive parents. *See* Pl's Br. 31.

As to the State's newly manufactured "waiting list" argument, the undisputed evidence is that the "substantial majority" of children that New Hope serves fall into "hard-to-place" categories—and "hard-to-place" infants and toddlers are by definition *not* in short supply, but rather tragically hard to find homes for. Jerman Aff. ¶ 5; *see* Pl's Br. 31. In fact, as a result of New Hope's faith-based orientation and the "faith and sense of ministry and mission" among the

couples it is uniquely positioned to recruit, New Hope has "in every case found a loving home even for newborn infants with hard-to-place characteristics" including severe physical or mental disabilities and grave medical conditions. Jerman Aff. ¶¶ 6–7. Against these *facts*, the State provides nothing—beyond speculation—that suggests that New Hope's faithful service to children has slowed the ability of a single legally qualified couple to receive a child they are willing to adopt.

The State has asserted an interest in protecting unmarried or same-sex couples from "discrimination." But that catch-phrase requires closer division. As noted above, the argument that New Hope's policy has ever made adoption harder or slower for any adult or any child is speculation unsupported by a shred of evidence. Equally speculative is the State's new contention that New Hope's policy may cost unmarried or same-sex applicants "great time and expense." Def. Br. 28. Given that New Hope is up front about its beliefs and policy (and indeed no doubt notorious among the LGBTQ community), and is willing to refer applicants to alternative services, it is also implausible.

The State attempts to manufacture a scenario of harm by imagining an alternative world in which *many* adoption agencies in New York adhered to beliefs and policies like New Hope's. *See* Def. Br. 28. This is the wrong question as a matter of law. *Fulton*, 141 S. Ct. at 1882. It is also counterfactual speculation. The State denies that any agency has ceased to operate as a result of the Regulation, Def. SOF ¶ 114, and offers no evidence as to how many other agencies—if any—hold beliefs that might lead them to adopt New Hope's policy if permitted to do so.

In short, the Court will comb the record without success for any evidence that New Hope's speaking and operating in accordance with its beliefs has measurably disadvantaged a single New Yorker, whether child or adult. Indeed, not only does the State fail to attempt any

such showing, it also fails to offer any response to the wider public record evidence that multiple jurisdictions (now including the City of Philadelphia) *do* grant religious exemptions to faith-based adoption and foster services, demonstrating that they find this to be a viable "less restrictive alternative" to coercion contrary to conscience. *See* Pl's Br. 31–32 & n.4 (identifying jurisdictions with religious exemptions).[4]

C. The State's zeal not to "permit" messages that some may find offensive is not a legitimate governmental interest.

The reality is that the State's ever-shifting theories of concrete harm are makeweights. The State's true driving motivation is to silence dissenting voices, its desire not to "permit[] the message" that unmarried or non-traditional families are in any way disapproved, or less healthy for children. Def. Br. 27. It is for this reason that the State contends that even a single exemption is irreconcilable with its "state interests." In short, the State continues to adhere to the attitude that launched this lawsuit, that there is "no place" in New York for those who disagree about the wisdom of same-sex marriage to voice and obey their consciences. *See* VC ¶ 204.

But here the State again confuses state action with private action, and strays beyond any legitimate government interest. The State is mistaken in thinking that respecting citizens' First Amendment rights amounts to "state sanction" of their beliefs. Rather, it is "state sanction" of freedom. And if New York disagrees with messages expressed by a private citizen or faith-based organization, its legitimate response is "more speech" rather than censorship and compulsion—

[4] *See McCullen v. Coakley*, 573 U.S. 464, 496 (2014) (State cannot meet burden of demonstrating "least restrictive means" by "simply [saying] that other approaches have not worked"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (State failed to demonstrate that COVID restriction on religious meetings was "least restrictive means" where lesser restrictions were found adequate by "many other jurisdictions hard-hit by the pandemic"); *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J. concurring) (where other jurisdictions have found religious exemption to be workable, state attempting to demonstrate "least restrictive means" "bore the burden" to demonstrate "why it cannot offer . . . this same alternative").

that is, the State may proclaim its preferred position to the public, as indeed the State of New York does often and loudly in this area. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) ("more speech, not enforced silence," is the "least restrictive alternative" where the government disapproves of a message).

Once we recognize that New Hope's speech and conduct are private, not governmental, then we must state this strongly: the State has *no legitimate interest* in "protecting" individuals who voluntarily contact New Hope from exposure to New Hope's beliefs and "message." At the threshold, the notion that an applicant will be shocked and harmed by being exposed to New Hope's beliefs about marriage and family is a fantasy. It is no secret—it is universally known—that many ancient faiths and many individuals "deem same-sex marriage to be wrong" and hold that "marriage . . . is by its nature a gender-differentiated union" and that the biologically reproductive "gender-differentiated union" is the natural and healthiest environment for children. *Obergefell v. Hodges*, 576 U.S. 644, 657, 672 (2015).

More fundamentally, New Hope's right to speak what it believes is not lessened because some may find those beliefs offensive. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt."); *Int'l Soc'y For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 447 (2d Cir. 1981) ("Our commitment to precious First Amendment freedoms is tested when unpopular organizations seek refuge within its scope.").

On this point, the Court's teaching in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (which concerned a parade conducted subject to a

government issued permit), that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful," is on point. Even more so the Court's closing reminder in *Obergefell* that the change in the *legality* of same-sex marriage left intact the protected freedom of those who disagree to "advocate with the utmost, sincere conviction" for the value and even sacredness of the traditional "family structure." *Obergefell*, 576 U.S. at 679-80.

Finally, the State's references to "stigma" cannot change the picture. First, the concept of "stigma" has no relevance to New Hope's private response to a private query about adoption services. New Hope never speaks about individual applicants in public. Second, the "stigma" that the *Obergefell* Court spoke of was that which might be associated with the official voice of society as represented by the "marriage *laws*." *Obergefell*, 576 U.S. at 668 (emphasis added). As the other quotations from *Obergefell* along with the many cases cited above confirm, the Court was not approving the silencing of disagreement or even disapproval from private voices. Third, the fact of the matter is that the notion that a dissenting voice against contemporary orthodoxy on questions of marriage and family could—even if publicly broadcast—inflict damaging "stigma" in New York is itself "archaic." The past is history; the new order and new beliefs hold the commanding heights in law, education, and culture, and it is the minority religious view that is fiercely "stigmatized" and made the target of public attack. The State's assertion of an alleged interest in preventing "stigma" is legally illegitimate and factually unsupported.

CONCLUSION

For the reasons set forth above and those set forth in New Hope's cross-motion, the State's Motion for Summary Judgment should be denied and summary judgment entered in favor of New Hope.

Respectfully submitted this 19th day of November, 2021,

s/ Mark A. Lippelmann

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, I electronically filed the foregoing Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment 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 A. Lippelmann*
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC., Plaintiff, vs. SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York, Defendant.	No.: 5:18-cv-1419 (MAD/TWD) **RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS**

Pursuant to Local Rule 56.1(b), Plaintiff New Hope Family Services, Inc., hereby submits its Response to Defendant's Statement of Material Facts:

Authorized Adoption Agencies and OCFS Oversight

1. OCFS regulates and oversees authorized agencies. Declaration of Carol McCarthy ("McCarthy Decl."), ¶¶ 8-9.

Admitted.

2. Only authorized agencies with approved adoption programs are permitted to provide adoption services in New York State. *Id*., ¶ 9.

Denied.

As set out in a letter to New Hope from the New York OCFS dated January 17, 2008 (and other similar letters received by New Hope over multiple years), "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 this Office, of a certificate of incorporation . . . containing the appropriate corporate powers and authority. . . . New Hope currently has the requisite authority to place children for adoption and to perform other adoption services, including home studies. The agency's authority to conduct such activities in New York is perpetual." Verified Compl. ("VC"), Ex. 4, ECF No. 1-4; *see also* VC ¶¶ 46, 200, ECF No. 1.

This official letter from OCFS confirms that New Hope's perpetual authority to provide adoption services is not contingent on any "approval" or "permission" by OCFS of its adoption programs.

3. Authorized agencies include both local departments of social services and not-for-profit agencies (voluntary authorized agencies). *Id*.

Admitted.

4. In many cases, the local departments of social services contract with voluntary authorized agencies to provide adoption services on the government's behalf. *Id*.

Denied. New Hope provides adoption services at its own expense and on its own behalf as part of a religiously motivated ministry. It does not provide adoption services "on the government's behalf." VC ¶¶ 34–57; Aff. of Judith A. Geyer ¶¶ 10–22, ECF No. 75-2 ("Geyer Aff.").

5. Prospective adoptive parents served by voluntary authorized agencies may seek a child in the custody and guardianship of a local department of social services and may be eligible for government-funded adoption subsidy, even if the voluntary authorized agency itself does not receive government funding. *Id*.

Denied. New Hope only places children for adoption who are in New Hope's custody. *See* VC ¶ 133; Geyer Aff. ¶ 117; Aff. of Kathleen Jerman ¶¶ 3–7, ECF No. 75-3 ("Jerman Aff."). OCFS cites no evidence that adoptive parents served by New Hope receive any government subsidies.

6. As voluntary authorized agencies provide the same adoption services as the local departments of social services, the laws, regulations, and policies that govern authorized agencies with respect to adoption services do not distinguish between them. *Id*.

Denied. Because of its faith-based nature, New Hope provides adoption services that are materially different than those provided by local departments of social services. *See* Jerman Aff. ¶¶ 50–54; Aff. of Charity Loscombe ¶¶ 12–13, ECF No. 75-6 ("Loscombe Aff."); Aff. of Elaine Bleuer ¶¶ 6–10, ECF No. 75-7 ("E. Bleuer Aff."); Aff. of Jeremy Johnston ¶ 14, ECF No. 75-9 ("Johnston Aff."); Aff. of Justin Bleuer ¶¶ 4–5, 16, ECF No. 75-10 ("J. Bleuer Aff."). In addition, New Hope possesses the legal authority to provide adoption services as a result of laws and a process that are different than those that pertain to local departments of social services. *See* Response No. 2. And unlike local departments of social services, New Hope is not subject to laws, regulations, or policies to the extent those laws, regulations,

or policies violate the constitutional rights of New Hope, its staff and volunteers, or candidate adoptive parents that it serves.

7. OCFS' government website contains a comprehensive list of all voluntary authorized agencies with adoption programs and represents to the public that all listed providers are approved by OCFS. *Id.*

Denied. New Hope is without knowledge as to whether the list of agencies at the indicated website is "comprehensive." The website contains no representation that all listed agencies (which include New Hope) are "approved by OCFS." New Hope received its "perpetual" authorization to act as an adoption agency in 1967, prior to the creation of OCFS in 1998. *See* Response No. 2; VC, Ex. 4 (letter from OCFS dated January 17, 2008).

8. An authorized agency must meet three distinct requirements: (1) it must be organized under the laws of the state and have the corporate authority to place out children; (2) it must have its actual place of business in New York; and (3) it must be "approved, visited, inspected and supervised by the office of children and family services or . . . 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 . . . ." *Id.*, ¶ 11 (quoting N.Y. Soc. Serv. Law § 371(10)).

Denied. New Hope's perpetual authority to provide adoption services is not contingent upon subsequent "approval, visitation, inspection [or] supervision." *See* Response No. 2.

9. In order to meet the first requirement, an agency must file a Certificate of Incorporation or Certificate of Amendment with the New York State Department of State. *Id.*, ¶ 12.

Admitted.

10. The Certificate of Incorporation establishes the authorized agency as a corporate entity. *Id.*

Admitted that this is one function of the Certificate of Incorporation.

Denied that this is the only function of the Certificate of Incorporation. As set out by OCFS in the letter previously quoted, "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 this Office, of a certificate of incorporation . . . containing the appropriate corporate powers and authority." VC, Ex. 4.

11. If an agency intends to have an adoption program, it must also obtain an approval from OCFS, to be filed in conjunction with its Certificate of Incorporation. *Id*.

Denied that an approval "from OCFS" is necessary. *See* Response No. 2. New Hope received its perpetual approval and authorization in 1967, prior to the formation of OCFS. *See* VC, Ex. 4.

12. To obtain the OCFS approval, an agency must submit an application packet and business plan to the appropriate OCFS regional office. *Id*.

Denied. New Hope received its perpetual approval and authorization in 1967, prior to the formation of OCFS. *See* VC, Ex. 4. This documentation does not indicate that New Hope was required to submit any "application packet" or "business plan" in order to receive that perpetual authorization.

13. Upon receipt, OCFS conducts a site visit, which includes a full review of the proposed adoption program and fiscal review, and determines whether to issue the approval. *Id*.

Denied. New Hope received its perpetual approval and authorization in 1967, prior to the formation of OCFS. *See* VC, Ex. 4. This documentation does not indicate that New Hope was required to undergo a "full review of the proposed adoption program and fiscal review" in order to receive that perpetual authorization.

14. It is the act of filing of the Certificate of Incorporation and approval that gives the authorized agency the legal authority to operate an adoption program in New York. *Id*.

Admitted.

15. Corporate authority can be ended by: (1) the corporation itself filing a Certificate of Amendment to remove that authority; (2) the corporation filing a Certificate of Dissolution to

end the corporate entity; (3) expiration of the corporate authority, if the authority was limited in duration; or (4) by court order. *Id*., ¶ 13.

Admitted.

16. In New York State, nearly all authorized agencies have corporate authority for a limited duration and must seek reauthorization prior to expiration. *Id*., ¶ 14. OCFS must provide its approval for each reauthorization. *Id*.

Denied. New Hope holds perpetual authority to provide adoption services, and has no legal obligation to seek reauthorization. *See* Response No. 2. New Hope is without knowledge as to how many other private adoption services may hold perpetual authority, and such information is in any event irrelevant to the constitutionality of 18 NYCRR § 421.3(d) ("the Regulation") as applied to New Hope.

17. In order to assess if it will approve the reauthorization, OCFS conducts a comprehensive review of the authorized agency, which includes an agency visit, completion of an adoption services assessment, and drafting of an Adoption Agency Program Review Report. *Id*., ¶ 15.

Admitted.

18. As part of this assessment, OCFS interviews staff members and reviews the authorized agency's application for authorization/reauthorization, business plan, financial information, policies and procedures, forms, and correspondence. *Id*.

Admitted.

19. OCFS utilizes this review process to determine if the authorized agency is in compliance with state laws, regulations, and policies. *Id*.

New Hope is without knowledge as to whether OCFS utilizes review processes to determine whether authorized agencies are in compliance with all potentially relevant state laws, regulations, and policies.

20. Only a small number of authorized agencies have corporate authority in perpetuity, and therefore do not need to re-file with the Department of State. *Id.*, ¶16.

Denied. New Hope holds perpetual authority to provide adoption services, and has no legal obligation to seek reauthorization. *See* Response No. 2. OCFS acknowledges that New Hope is not alone in this—that multiple adoption agencies possess perpetual authorization. *See* Defendant's Statement Pursuant to Rule 56.1(a) ¶ 28, ECF No. 74-20 ("Def. SOF". . New Hope is without knowledge as to how many other private adoption agencies may hold perpetual authority, and such information is in any event irrelevant to the constitutionality of the Regulation as applied to New Hope.

21. To meet the third requirement, the authorized agency must be approved, visited, inspected, and supervised by OCFS, or must submit and consent to such oversight. *Id.*, ¶17.

Denied. Although New Hope does cooperate with OCFS updates or annual inspections, New Hope's perpetual authority to provide adoption services is not contingent upon subsequent "approval, visitation, inspection [or] supervision." *See* Response No. 2.

22. In addition to the approval an adoption agency receives at the time of corporate authorization/reauthorization, the authorized agency remains subject to ongoing approval and supervision. *Id.*

Denied. Although New Hope does cooperate with OCFS updates or annual inspections, New Hope's perpetual authority to provide adoption services is not contingent upon subsequent "approval, visitation, inspection [or] supervision." *See* Response No. 2.

23. Such oversight includes determining whether an agency is complying with state law, regulations, and policies, and such compliance may be a condition for ongoing approval. *Id.*

Denied. Although New Hope does cooperate with OCFS updates or annual inspections, New Hope's perpetual authority to provide adoption services is not contingent upon subsequent "approval, visitation, inspection [or] supervision." *See* Response No. 2. Denied for the additional reason that compliance with state law, regulations, and policies may not be made a condition for ongoing approval to the extent those laws, regulations, and policies violate any right protected by the State or Federal constitutions.

24. This requirement is distinct from the requirement for corporate authority and applies to all authorized agencies, including those with perpetual corporate authority. *Id*.

Denied. New Hope's perpetual authority to provide adoption services is not contingent upon subsequent "approval, visitation, inspection [or] supervision." *See* Response No. 2.

25. OCFS may review the adoption program and withhold its approval for failure to meet OCFS standards, regardless of if or when the agency's corporate authority is up for renewal. *Id*.

Denied. New Hope's perpetual authority to provide adoption services is not contingent upon subsequent "approval, visitation, inspection [or] supervision." *See* Response No. 2.

26. Declining to approve an adoption program does not constitute a revocation or invalidation of the authorized agency's certificate of incorporation; it merely ends the specific program for which approval is required. *Id*.

Denied. New Hope possesses perpetual authority to place children for adoption, *see* Response No. 2, and OCFS has identified no statutory authority to "end" New Hope's adoption program except for specific enumerated violations of law, which do not include general compliance with all OCFS regulations. *See* VC ¶¶ 200–01; *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 169 (2d Cir. 2020).

27. Prior to 2017, it was OCFS's practice to utilize its corporate reauthorization approval process to satisfy its general oversight obligations; the adoption programs at authorized agencies were only reviewed when the agency sought approval for corporate reauthorization, unless special circumstances warranted additional monitoring or intervention. *Id*., ¶ 18.

Denied. New Hope possesses perpetual authorization to provide adoption services in the State of New York. Accordingly, New Hope is without knowledge as to how OCFS has interacted with private agencies that do not possess perpetual authorization.

28. As a result of this practice, authorized agencies with perpetual corporate authority, including New Hope, did not have their adoption programs visited and reviewed on a regular basis. *Id*., ¶ 19.

Denied. New Hope and other agencies with perpetual authority to provide adoption services did not have their adoption programs visited and reviewed on a regular basis because there is no statutory requirement for them to do so in order to maintain that perpetual authority. *See* Response Nos. 2, 26, 29.

29. In 2017, OCFS discovered and corrected this oversight by visiting and reviewing every authorized agency with perpetual authority. *Id*.

Denied. OCFS and its predecessor state organizations did not conduct such reviews from at least the time of New Hope's perpetual authorization in 1967 up until 2018. It is not a reasonable inference to refer to this half-century policy and practice as "an oversight." In addition, OCFS first conducted an on-site review of New Hope in 2018, not 2017. VC ¶¶ 182–86.

30. OCFS revised its practice to require an on-site visit for every adoption program every year; these annual visits consist of a substantially similar review to the one done at the time of corporate reauthorization. *Id*.

Denied. Because New Hope possesses a perpetual corporate authorization and authority to provide adoption services, *see* Response No. 2, it does not undergo reviews associated with "corporate reauthorization" to which OCFS's recently demanded annual reviews could be "substantially similar." How OCFS may interact with agencies that do not possess perpetual authority to perform adoption services is not relevant to the constitutionality of the Regulation as applied against New Hope.

31. If the authorized agency is seeking corporate reauthorization that year, the reauthorization visit replaces the agency visit. *Id*.

Denied. *See* Response No. 30.

32. During OCFS's program reviews, it assesses the quality of the adoption program and makes determinations regarding the agency's compliance with applicable laws, regulations, or policies. *Id*., ¶ 20.

Admitted.

33. OCFS routinely works with authorized agencies to ensure compliance so as to maintain the greatest number of resources available to families who wish to surrender or adopt a child. *Id*.

Denied. As is evident from its attempts to terminate New Hope's adoption services, OCFS is currently prioritizing conformance with its ideological goals over "maintain[ing] the greatest number of resources available to families who wish to surrender or adopt a child." Instead, closing New Hope's adoption services would reduce the number of candidate adoptive parents in New York, and reduce the availability of adoption services to candidate adoptive parents. VC ¶¶ 188–205; Geyer Aff. ¶¶ 172–82; Jerman Aff. ¶¶ 68–75, 89–109; *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44, 59 (N.D.N.Y. 2020).

34. Only if an agency is unwilling or unable to comply with all laws, regulations and policies will OCFS seek to disapprove an adoption program or deny a request for corporate recertification. *Id*., ¶ 22.

Denied. OCFS has attempted to disapprove New Hope's adoption program even though New Hope possesses a perpetual authorization and required no renewed approval, *see* Response No. 2, and even though New Hope has an undisputed excellent record of service, and of compliance with all laws and regulations to the extent they are constitutional and therefore valid as applied to New Hope. Geyer Aff. ¶ 54 (New Hope has placed more than 1,000 children over the past 50+ years); Jerman Aff. ¶¶ 4–7 (detailing New Hope's success in finding homes for "hard-to-place" children); Decl. of Carol McCarthy ¶ 43, ECF No. 74-4 ("McCarthy Decl.") (admitting New Hope "has historically worked collaboratively" with OCFS to address any issues). *See also* VC, Ex. 6, ECF No. 1-6 (OCFS letter congratulating New Hope for its "number of strengths").

35. OCFS has informed various agencies, both secular and faith-based, that they must close a program if the program does not comply with OCFS regulations. *Id*., ¶ 23.

Denied. Record evidence suggest that threats by OCFS relating to enforcement of the Regulation have caused Catholic Charities of Buffalo as well as other faith-based adoption services to cease operation, VC ¶¶ 202–05; *New Hope*, 966 F.3d at 164, and others to "compromise" (i.e., violate) their beliefs in order to stay open, VC ¶ 192. Meanwhile, the records attached as Exhibit A to the Declaration of Carol McCarthy document denial of reauthorization to a grand total of three secular adoption agencies since 2004, in every case involving allegations of fraud, financial impropriety, or insolvency. There is no evidence in the record that OCFS has ever denied reauthorization to secular agencies for failure to comply with any regulatory requirement in the absence of these grave factors.

Promulgation of 18 N.Y.C.R.R. § 421.3(d)

36. OCFS is authorized by State law to promulgate regulations that establish standards and criteria for adoption practices, including standards for evaluating prospective adoptive parents. *Id*., ¶ 24.

Denied. The State cites no statute that grants plenary power to OCFS to promulgate regulations establishing standards for evaluating prospective adoptive parents. Nor does OCFS possess the power to impose requirements governing evaluation and selection of prospective parents that are contrary to law or limitations imposed by the State or Federal constitutions.

37. In 2006, a lawsuit entitled *Rodriguez v. Johnson* ("*Rodriguez* litigation") was commenced in the United States District Court for the Southern District of New York against employees of OCFS challenging plaintiff's treatment, as a juvenile transgender female, while in court-ordered OCFS custody. Declaration of Jara Traina ("Traina Decl."), ¶ 4 & Exh. A.

Denied. New Hope is without knowledge concerning the *Rodriguez* litigation. New Hope objects that the *Rodriguez* litigation and issues surrounding treatment of individuals while in court-ordered OCFS custody are irrelevant to the scope of New Hope's constitutionally protected rights, and to this lawsuit.

38. On November 13, 2006, a Stipulation and Order of Settlement was endorsed by the court in the *Rodriguez* litigation. *Id*., ¶ 5 & Exh. B.

***See* Response No. 37.**

39. As a condition of the settlement of the *Rodriguez* litigation, OCFS entered into a Memorandum of Understanding ("MOU") with counsel for the plaintiff in the *Rodriguez* litigation, Lambda Legal Defense and Education Fund ("Lambda") and Sylvia Rivera Law Project ("SRLP"). *Id*., ¶ 6 & Exh. C.

***See* Response No. 37.**

40. The MOU required that OCFS, Lambda and SRLP engage in six "Informational Meetings" to discuss the care provided to Transgender Youth in court-ordered OCFS custody. *Id*., ¶ 7 & Exh. C at p. 2.

***See* Response No. 37.**

41. OCFS assembled a work group to address the issues raised in the *Rodriguez* litigation and MOU ("work group"), in accordance with the MOU. *Id*., ¶ 8.

***See* Response No. 37.**

42. The work group included employees of OCFS. *Id*.

***See* Response No. 37. In addition, the State does not state that the "work group" was limited to employees of OCFS, and New Hope denies that it was appropriate or consistent with OCFS's obligations to appoint a "work group" tasked to address "the issues raised in the *Rodriguez* litigation" that included representatives of LGBTQ advocacy groups and did not include representatives of religious organizations and faith-based foster-care and adoption agencies.**

43. As a result of its work on improving the services to, and treatment of, transgender youth living in OCFS facilities pursuant to a court-order, the work group concluded a policy was necessary to prohibit discrimination against, and harassment of, all LGBTQ youth. *Id*., ¶ 9.

***See* Response No. 37. In addition, any issue concerning "discrimination against, and harassment of, all LGBTQ youth" is not relevant to the purpose, legality, or constitutionality of the Regulation, which does not address any aspect of the treatment of any youth. In addition, the State identifies no statutory authority authorizing or empowering OCFS to issue regulations directed towards a goal of "prohibit[ing] discrimination against, and harassment of, all LGBTQ youth."**

44. In 2010, Lambda recommended OCFS expand the protections against discrimination on the basis of sexual orientation, gender identity or gender expression to other programs and services regulated by OCFS. *Id*., ¶ 12 & Exhs. E, F.

Denied. New Hope is without knowledge as to what the Lambda organization may have "recommended." Any such recommendation is irrelevant to the scope of New Hope's constitutionally protected rights, and to this lawsuit.

45. The work group then considered expanding its scope to include other program areas in furtherance of OCFS's commitment to protect individuals from discrimination based on sexual orientation, gender identity or gender expression. *Id.*, ¶ 13.

Denied that OCFS possesses a general authorization to "protect individuals from discrimination" or to issue regulations directed towards that end. New Hope is without knowledge as to what the referenced "work group" may have "considered." In any event, the scope of what this "work group" may have "considered" is irrelevant to the scope of New Hope's constitutionally protected rights, and to this lawsuit.

46. OCFS determined that it had an obligation to protect not only the children in its custody, but also the children and families it serves though programs and services it regulates, approves, funds, or otherwise oversees. *Id*.

Denied that OCFS legitimately made such a determination. The State identifies no statutory authority authorizing or empowering OCFS to issue regulations directed towards protection of children not in foster care or otherwise subject to OCFS legal supervision, nor to issue any regulations inconsistent with OCFS overriding mandate to protect the "best interests" of children in foster care and/or eligible for adoption. Nor does OCFS possess the power to impose requirements for any purpose that are contrary to law or limitations imposed by the State or Federal constitutions.

47. To this end, the work group considered how to protect LGBTQ people from discrimination in other programs or services regulated by OCFS including: (1) Child Protective Services; (2) Juvenile Detention Facilities; (3) Runaway and Homeless Youth Approved Programs; (4) Child Care Agencies; (5) Foster Services; and (6) Adoption Services. *Id*.

Denied that OCFS possesses any general authorization empowering it to issue regulations directed towards "protect[ing] LGBTQ people from discrimination," nor to issue any regulations inconsistent with OCFS overriding mandate to protect the "best interests" of children in foster care and/or eligible for adoption. New Hope is without knowledge as to what the "work group" may have "considered." In any event, the scope of what this "work group" may have "considered" is irrelevant to the scope of New Hope's constitutionally protected rights, and to this lawsuit.

48. The work group worked collaboratively with stakeholders to draft OCFS regulations to prohibit the discrimination and/or harassment of anyone involved in services regulated by OCFS on the basis of sexual orientation, gender identity or gender expression. *Id*., ¶ 14.

Denied that the "work group" consulted appropriately and collaboratively with "stakeholders" including faith-based foster-care and adoption agencies to draft regulations.

49. The work group assembled a package of proposed regulations and amendments, which proceeded through rulemaking and were promulgated in November 2013. *Id*., ¶ 15.

Admitted that a package of proposed regulations were promulgated in November 2013. Denied that it was consistent with law for OCFS to propose for rulemaking a "package" of regulations and amendments that was compiled by a non-representative, non-public "work group" that included representatives of LGBTQ advocacy organizations and did not include representatives of religious organizations and faith-based foster-care and adoption agencies.

50. Included in the package was 18 N.Y.C.R.R. 421.3(d) ("421.3(d)"). *Id.*

Admitted.

51. OCFS promulgated 18 NYCRR §421.3(d) to prohibit discrimination in adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion or disability. McCarthy Decl., ¶ 25.

Denied. The Regulation as applied in fact imposes discrimination on the basis of religion against religious adoption providers such as New Hope. Further, as detailed in Response Nos. 68 and 69, the Regulation does not categorically "prohibit discrimination in adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion or disability." Instead, relevant statutes and regulations permit or even require discrimination in eligibility and placement for reasons including at least race, color, creed, religion, age, disability, and marital status in various situations. *E.g.*, N.Y. Dom. Rel. Law § 110; N.Y. Soc. Serv. Law § 373; 18 NYCRR §§ 421.10(a), 421.13(a)(1), 421.16(d), 421.16(g)(2), 421.18(d)(2); *see also* Traina Decl., Ex. D at 6, ECF No. 74-11 (OCFS guidelines allow "youth placement[s]" to be based on "sexual orientation, gender identity, or gender expression").

52. Section 421.3(d) is critically important to the State's adoption policies and practices and was promulgated to further OCFS's mission to promote the safety and well-being of families and children. *Id.*, ¶ 26.

Denied. The Regulation as applied against New Hope negatively impacts OCFS's mission to promote the safety and well-being of children, by reducing the number of adoptive families in the State of New York available and willing to adopt children, by reducing the number of adoption services and staff available to assist families towards completed adoption, and by eliminating faith-inspired private resources which have historically been available to facilitate adoptions in New York, all with the effect of reducing the number of children able to escape the statistically unsafe and unhealthy foster care system and be adopted in any given year.

53. The State has a strong interest in preventing discrimination in the provision of adoption services. *Id.*, ¶ 27

Denied that OCFS is tasked by statute to prevent discrimination against adults where this conflicts with the best interest of children, and thus denied that OCFS has a "strong interest" in doing so. Denied that OCFS has a "strong interest" in any action that deprives New Hope or any individual or entity of rights protected by the First Amendment, given that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019).

54. Prohibiting discrimination serves the best interests of vulnerable children by ensuring the state has a broad and diverse pool of potential adoptive parents and, critical to meeting this objective, are policies that prohibit disqualification of any potential adoptive parents due to their sexual orientation, marital status, or any other characteristic that is wholly unrelated to parenting ability. *Id*.

Denied. The Regulation as applied against New Hope in no way increases the breadth or diversity of potential adoptive parents in New York, and New Hope's devotion of its private resources and energies to placing children into families built around a married mother and father in no way "disqualif[ies]" any legally eligible adult from adopting. Denied for the additional reason that the Regulation as applied against New Hope harms the best interests of children for the reasons stated in Response No. 52.

55. Prohibiting such discrimination maximizes the number of prospective adoptive parents who may be assessed to determine the safety and suitability of placing a child in their home and to determine whether they can appropriately meet the needs of a child including the child's safety, health, permanency, well-being and mental, emotional and physical development. *Id*.

Denied. *See* Response Nos. 52 and 54.

56. Section 421.3(d) also seeks to prevent the irreparable trauma and social harm caused by discrimination against lesbian, gay, bisexual, transgender, queer, or questioning

(LGBTQ) people—a group that has been historically excluded from family formation under the law. *Id.*, ¶ 28.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to the assertion that the policy of New Hope (or any other provider) to provide adoption services in accordance with its faith-based beliefs about marriage, family, and the best interests of children has ever inflicted "trauma," much less "irreparable trauma and social harm" on any individual. Based on the State's own narrative, the Regulation was adopted based on the speculations of a "work group," absent any evidence that practices such as those of New Hope have ever inflicted "irreparable trauma and social harm" on anyone. *See* Traina Decl. ¶¶ 7–15, ECF No. 74-7. Denied for the additional reason that unmarried and same-sex couples have been eligible to adopt in the State of New York for well more than a decade.

57. The State has a strong interest in preventing and remedying the stigmatization caused by the systemic exclusion of LGBTQ people from public and civic life based solely on their sexual orientation. *Id.*

Denied that individuals have been "systemic[ly] exclu[ded] . . . from public and civic life" in New York for well more than a decade. Denied that a choice by New Hope (or any religiously affiliated foster-care or adoption agency) to devote its energies to placing infants in a manner consistent with its religious beliefs constitutes or affects "public and civic life." Denied that the private choice of New Hope or similarly situated faith-based providers as to what candidate adoptive parents they can serve consistently with their religious beliefs does or could inflict any "stigma" on any individual, given that "stigma" is by its nature a matter of public perception. Denied that OCFS has any statutory authorization to issue regulations for the purpose of "preventing and remedying the stigmatization caused by the systemic exclusion of LGBTQ people from public and civic life based solely on their sexual orientation." Denied that the State has a "strong interest" in preventing religiously-affiliated foster-care or adoption services from operating in a manner consistent with their beliefs. Denied that OCFS has a "strong interest" in any action that deprives New Hope or any individual or entity of rights protected by the First Amendment, given that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n*, 916 F.3d at 758.

58. Section 421.3(d) prevents these harms to LGBTQ individuals by prohibiting authorized agencies from implementing policies or establishing practices that imply that the sexual orientation of gay, lesbian, and bisexual prospective parents, but not of heterosexual prospective parents, is relevant when evaluating their appropriateness as adoptive parents. *Id.*

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to the premise that the beliefs and practices of New Hope (or any similarly situated faith-based provider) have ever inflicted any "harms [on] LGBTQ individuals." As the Second Circuit found, "the existing record reveals no complaint from any referred couple," "[n]or does it indicate that any couple was unable to adopt as a result of referral." *New Hope*, 966 F.3d at 183; *accord* VC ¶ 156; Jerman Aff. ¶ 27. Since no evidence of any "harms" exists, denied that the Regulation "prevents" any harms.

59. The State has a strong interest in ensuring government services are provided on an equal basis to all residents. *Id.*, ¶30.

Denied that OCFS is tasked by statute to "ensuring government services are provided on an equal basis to all residents" where this in any way detracts from serving the best interest of children. Denied for the additional reason that applicable laws and regulations specifically allow "discrimination" between potential adoptive parents on a variety of criteria, in a variety of situations. *See* Response No. 51. Therefore denied that OCFS has a "strong interest" in categorically "ensuring government services are provided on an equal basis to all residents." Denied that OCFS has a "strong interest" in any action that deprives New Hope or any individual or entity of rights protected by the First Amendment, given that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n*, 916 F.3d at 758.

60. Since OCFS authorizes and regulates adoption programs operating in New York, allowing agencies with religious objections to refuse to serve all people equally would undermine the State's ability to provide government services on a nondiscriminatory basis and without favoring particular religious beliefs. *Id.*

Denied. Services provided by New Hope are not "government services," and permitting New Hope to continue to provide its private and privately-funded services in accordance with its religious beliefs does not "undermine" the State's ability to provide government services. Denied for the additional reason that permitting religious individuals and organizations to speak and conduct faith-based services in a manner consistent with their beliefs is tolerating, not "favoring," particular religious beliefs.

61. All authorized agencies are prohibited from engaging in discriminatory practices or harassment against applicants for adoption services based on sexual orientation or marital status. *Id*., ¶31.

Denied. Under certain circumstances, agencies are *required* by law to discriminate against applicants based on marital status, disqualifying certain persons who are married but living separately from their spouse, where that same individual would be eligible if unmarried and living separately. *See* N.Y. Dom. Rel. Law § 110; 18 NYCRR § 421.16(d). OCFS guidelines also permit "youth placement[s]" to be based on "sexual orientation, gender identity, or gender expression." Traina Decl., Ex. D at 6.

62. OCFS does not offer or provide exemptions to 18 NYCRR §421.3 to any agency or class of agencies on either a mandatory or discretionary basis. *Id*.

Denied. Relevant law and regulations provide multiple exceptions to the general nondiscriminatory requirement articulated in the Regulation. *See* Response No. 51.

63. The reference to "archaic regulatory language" in the OCFS rulemaking file referred to 18 N.Y.C.R.R. § 421.16(h), which required certain considerations of homosexuality, but not heterosexuality, in an adoption study. Traina Decl., Exh. G, pp. 22-23, 39.

Denied that the reference to "archaic regulatory language" referred only to Section 421.16(h). The quoted language from the New York State Register, which is found under the heading "Legislative Objectives," follows the text of both Section 421.3(d) and Section 421.16(h) (as amended), and expressly refers to "[t]hese proposed regulations" and "the amendments," referring to both.

64. The reference to "archaic regulatory language" in the OCFA rulemaking file did not refer to 421.3(d). *Id.*

Denied. The quoted language from the New York State Register, which is found under the heading "Legislative Objectives," follows the text of both Section 421.3(d) and Section 421.16(h) (as amended), and expressly refers to "[t]hese proposed regulations" and "the amendments," referring to both.

Adoption Services

65. Authorized agencies receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective adoptive parents. McCarthy Decl., ¶ 34.

Admitted.

66. After an authorized agency receives an adoption application, it must complete an adoption study. *Id*.

Denied. Authorized agencies are not required to complete an adoption study of each person who submits an adoption application. Under applicable regulations, authorized agencies "accept" applicants for adoption study "on a priority basis," and give "first priority" to those applicants seeking children who have the "age, race, handicap and other significant characteristics of the largest proportion of waiting children." 18 NYCRR § 421.13(a). Authorized agencies must inform the lowest-priority applicants "whether there is any likelihood of an adoption study being granted." *Id.* § 421.13(b)(3). Applicants may be "rejected" or "refer[red]" to another agency. *Id.* §§ 421.13(c) & (d).

67. As part of the adoption study, the authorized agency must explore the following characteristics of the prospective adoptive parent or parents: (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; (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*.

Admitted that these characteristics are considered as part of the adoption study. However, relevant regulations require the agency to consider additional characteristics, such as the applicant's age, health, marital status, fertility, and family composition. *See* 18 NYCRR § 421.16.

68. Authorized agencies are prohibited from denying an application for adoption services due to the applicant's membership in any of the protected classes enumerated in 18 NYCRR § 421.3. *Id*., ¶ 35.

Denied. Relevant statutes and regulations allow for numerous instances of otherwise prohibited discrimination against applicants, including discrimination based on race, ethnicity, national origin, religion, age, disability, and marital status. *See, e.g.*, N.Y. Dom. Rel. Law § 110; 18 NYCRR §§ 421.10(a), 421.13(a)(1), 421.18(d)(2). OCFS guidelines also permit "youth placement[s]" to be based on "sexual orientation, gender identity, or gender expression." Traina Decl., Ex. D at 6.

69. Section 421.3 prohibits discrimination with respect to placement decisions. *Id.*, ¶ 37.

Denied. Relevant statutes and regulations allow for numerous instances of otherwise prohibited discrimination with respect to placement decisions, including discrimination based on race, national origin, color, religion, and sex. *See, e.g.*, N.Y. Soc. Serv. Law § 373; 18 NYCRR §§ 421.10(a), 421.16(g)(2), 421.18(d)(2). OCFS guidelines also permit "youth placement[s]" to be based on "sexual orientation, gender identity, or gender expression." Traina Decl., Ex. D at 6.

70. OCFS policy, adopted in response to the federal Multiethnic Placement Act of 1994, also prohibits consideration of race, color, or national origin in placement decisions, or decisions as to whether an applicant may become a foster or adoptive parent. *Id*., ¶ 37.

Denied. Relevant statutes and regulations allow for numerous instances of otherwise prohibited discrimination against applicants and with respect to placement decisions, including discrimination based on race, color, and national origin. *See, e.g.*, 18 NYCRR §§ 421.10(a), 421.13(a)(1), 421.18(d)(2). New Hope is without knowledge as to whether OCFS adopted any policies in response to the federal Multiethnic Placement Act of 1994.

71. In rare circumstances, race, color, or national origin may be considered as part of an individualized assessment in order to make a placement decision that is in the child's best interests. *Id*., ¶ 38.

Admitted that race, color, and national origin may be considered in making placement decisions. *See, e.g.*, 18 NYCRR § 421.18(d)(2).

Denied that consideration of these characteristics is "rare." Adoption agencies are *required* to focus their recruiting efforts on "communities of populations" consisting of "ethnic, racial, religious or cultural characteristics similar to those of the children . . . composing the largest number" of children waiting to be adopted. 18 NYCRR § 421.10(a). And they must always give "first priority" in the adoption-study process to "Indians seeking to adopt Indian children." 18 NYCRR § 421.13(a)(1). Likewise, birth parents can discriminate against prospective adoptive parents for essentially any reason, including the prospective adoptive parent's race. N.Y. Soc. Serv. Law § 373(7); *Spence-Chapin Adoption Serv. v. Polk*, 274 N.E.2d 431, 436 (N.Y. 1971) ("[T]hat the mother should have the say on issues of race and religion seems reasonable and is accepted doctrine, so long as she has not abandoned the child or is unfit.").

72. OCFS policy and regulation provide that race, color, or national origin may be considered *only* where it can be demonstrated to be related to the specific needs of an individual child. *Id*.

Denied. Relevant statutes and regulations allow race, color, and national origin to be considered in various circumstances regardless of whether those characteristics are demonstrated to be related to the specific needs of an individual child, for example based on the preference of birth parents or candidate adoptive parents, the characteristics of "the largest number" of children waiting to be adopted, and/or "Indian" biological heritage. *See* Response Nos. 68, 69, 70, 71. Counsel for OCFS represented to this Court that "I don't think there's anything about 421.3(d) that prohibits the inquiry of a birth parent about the type of family she or he wants their baby to go

to." 2/19/19 Hr'g Tr. at 38, ECF No. 52-5; Jerman Aff. ¶ 5 (parents seeking to adopt commonly are only willing to adopt a certain race).

73. The authorized agency may *not* make generalizations about the child's needs based on the child's membership in a particular race, color, or national origin, nor may the agency routinely consider these factors during the individualized assessment. *Id*.

Denied. Relevant statutes and regulations that allow and even require discrimination based on race, color, and national origin necessarily permit agencies to "make generalizations" about the child's needs based on the child's race, color, and national origin. *See* Response Nos. 68, 69, 70, 71. For example, the regulation requiring agencies to give "first priority for adoption studies" to "Indians seeking to adopt Indian children" *assumes* that it will be in the best interest of "Indian children" to be placed with "Indians." 18 NYCRR § 421.13(a)(1).

74. Section 421.3 prohibits discrimination with respect to placement decisions based on the religion of the prospective adoptive parent. *Id*., ¶ 39.

Denied. Relevant statutes and regulations allow for numerous instances of otherwise prohibited discrimination with respect to placement decisions, including discrimination based on the religion of the prospective adoptive parent. *See, e.g.*, N.Y. Soc. Serv. Law § 373(2) (requiring placement with "a person or persons of the same religious faith as that of the child"); *id.* § 373(3) (requiring the same with respect to orders of adoption); *id.* § 373(7) ("religious wishes of the birth mother" shall be "give[n] effect"); *see also Spence-Chapin Adoption Serv.*, 274 N.E.2d at 436 ("[T]hat the mother should have the say on issues of race and *religion* seems reasonable and is accepted doctrine, so long as she has not abandoned the child or is unfit.") (emphasis added).

75. New York law and regulations provide that, *where practicable*, the child shall be placed in the custody of a person of the same religious persuasion as the child. *Id*.; N.Y. Soc. Serv. Law § 373; 18 NYCRR § 421.18(c).

Admitted that the cited statute and regulation require placement with a person or persons having the same or similar "religious background" and "faith" as that of the child. However, neither the statute nor the regulation use the term "religious persuasion."

76. Nonetheless, as with all adoptive placements, the authorized agency must make placement decisions based on the best interests of the particular child. McCarthy Decl., ¶ 39 Exh. B.

Admitted.

77. Authorized agencies may not categorically exclude prospective adoptive parents based on the agency's beliefs regarding the applicants' religion. *Id*.

Denied. Relevant statutes and regulations allow for numerous instances of otherwise prohibited discrimination, including discrimination based on the religion of the prospective adoptive parent. *See, e.g.*, N.Y. Soc. Serv. Law § 373(2) (requiring placement with "a person or persons of the same religious faith as that of the child"); *id.* § 373(3) (requiring the same with respect orders of adoption); *id.* § 373(7) ("religious wishes of the birth mother" shall be "give[n] effect"); *see also Spence-Chapin Adoption Serv.*, 274 N.E.2d at 436 ("[T]hat the mother should have the say on issues of race and *religion* seems reasonable and is accepted doctrine, so long as she has not abandoned the child or is unfit.") (emphasis added). These statutes and regulations necessarily require agencies to act "based on the agency's beliefs regarding the applicants' religion."

78. Consideration of the foregoing factors is expressly limited to determining the best interests of the individual child during the placement decision. *Id*., ¶ 40.

Denied. Relevant statutes and regulations allow for numerous instances of otherwise prohibited discrimination at *all* stages of the adoption process, including discrimination based on race, ethnicity, color, national origin, religion, sex, age, disability, and marital status. *See, e.g.*, N.Y. Dom. Rel. Law § 110; N.Y. Soc. Serv. Law § 373; 18 NYCRR §§ 421.10(a), 421.13(a)(1), 421.16(g)(2), 421.18(d)(2).

79. State regulation and policy, in accordance with federal law, do not permit consideration of these factors when conducting the adoption study to assess the suitability of a prospective adoptive parent. *Id*.

Denied. "Judgment and discretion . . . necessarily inform the 'adoption study process' that must precede any placement." *New Hope*, 966 F.3d at 151 (citing 18 NYCRR § 421.15). And relevant statutes and regulations expressly

allow consideration of otherwise protected characteristics during the adoption study. For example, an agency may decline applicants for "poor health" (i.e., "disability") or "limited life expectancy" (i.e., "age"). N.Y. Dom. Rel. Law § 110; *accord* 18 NYCRR § 421.16(c) (requiring the agency to consider the prospective parent's "health" and "physical condition" during the adoption study). The State also mandates marital-status discrimination in some circumstances, preventing certain married persons from adopting individually if they are living apart from their spouse. N.Y. Dom. Rel. Law § 110; 18 NYCRR § 421.16(d).

80. Factors that authorized agencies must consider in making placement decisions are enumerated in New York Social Services Law and OCFS regulations. *Id*.

Admitted.

2018 Comprehensive Review of New Hope

81. OCFS conducted a comprehensive review of New Hope Family Services in 2018 as part of its effort to review authorized agencies with perpetual authority. McCarthy Decl., ¶ 41.

Admitted that OCFS conducted a review of New Hope in 2018. New Hope is without knowledge as to whether that review was part of its effort to review authorized agencies with perpetual authority.

82. OCFS's review of New Hope in 2018 was its first review subsequent to promulgation of 18 NYCRR § 421.3(d). *Id*., ¶ 42.

Admitted.

83. This review was the first time OCFS learned of New Hope's practices with respect to unmarried and same-sex couples. *Id*.

Denied. New Hope is without knowledge as to when OCFS first learned of New Hope's practices with respect to unmarried and same-sex couples. However, it is implausible that OCFS first learned about New Hope's religious beliefs in 2018. The record shows that New Hope has been up front about its religious identity and beliefs since its founding over 50 years ago. *See* VC ¶¶ 40–49; Geyer Aff. ¶¶ 13–22. The record also shows that OCFS was aware of New Hope's religious nature at least as early as 2008, when it

acknowledged New Hope's perpetual authorization to perform adoption services. *See* VC, Ex. 4 (letter from OCFS detailing New Hope's history).

84. On or about September 6, 2018, OCFS conducted a site visit of New Hope. Colligan Decl., ¶ 4.

Admitted.

85. During the visit, New Hope provided OCFS with a copy of its written policies to review as part of the assessment. *Id*.

Admitted.

86. While reading those policies, OCFS learned that New Hope maintained a policy of refusing to provide adoption services to same-sex and unmarried couples. *Id*.

Denied. New Hope is without knowledge as to when OCFS first learned of New Hope's religious beliefs and practices with respect to unmarried and same-sex couples. However, it is implausible that OCFS first learned about New Hope's religious beliefs in 2018. *See* Response No. 83.

87. On or about October 10, 2018, Suzanne Colligan contacted New Hope to advise that New Hope's policy was in violation of OCFS policy and to discuss how New Hope could come into compliance. *Id*., ¶ 6.

Admitted that Ms. Colligan contacted New Hope about its policy in October 2018.

Denied that Ms. Colligan advised New Hope that its policy violated "OCFS policy." Rather, Ms. Colligan stated that New Hope's policy violated the Regulation. *See* VC ¶ 188; Geyer Aff. ¶ 156.

88. New Hope advised that it did not intend to comply with the regulation and that it was "unwilling to compromise [its] beliefs." *Id*.

Denied. New Hope has never said that it would not comply with the Regulation, except to the extent that the Regulation violated constitutionally protected rights of New Hope and those it serves. New Hope's then-Executive Director, Judy Geyer, advised Ms. Colligan that New Hope was not willing to

violate its religious beliefs by placing children with unmarried or same-sex couples. VC ¶ 191; Geyer Aff. ¶¶ 159–61.

89. At no time did OCFS employee, Suzanne Colligan, indicate to New Hope that "Some Christian ministries have compromised their beliefs in order to remain open." *Id*., ¶ 7.

Denied. *See* VC ¶ 192; Geyer Aff. ¶ 160.

90. Suzanne Colligan is not aware of any faith-based adoption agencies who have changed their policies against providing adoption services to same-sex or unmarried couples in order to comply with OCFS non-discrimination regulation. *Id*.

Denied. On or about October 9, 2018, Ms. Colligan represented to New Hope that she had knowledge that "Some Christian ministries have compromised their beliefs in order to remain open." Geyer Aff. ¶¶ 156–60.

91. In 2003, Suzanne Colligan discovered that Broome Country Department of Social Services ("DSS") maintained a policy of refusing foster care applications from unmarried couples. *Id*., ¶ 8 & Exh. A.

Denied. New Hope is without knowledge as to whether Ms. Colligan discovered that Broome County Department of Social Services maintained a policy of refusing foster care applications from unmarried couples, and such information is in any event irrelevant to the constitutionality of the Regulation as applied to New Hope.

92. She notified Broome County DSS that its policy was in violation of OCFS policy and regulations and directed them to amend it. *Id.*

Denied. New Hope is without knowledge as to whether Ms. Colligan notified Broome County DSS that its policy was in violation of OCFS policy and regulations, and such information is in any event irrelevant to the constitutionality of the Regulation as applied to New Hope.

93. Broome County DSS subsequently updated its practices in accordance with OCFS' directive and no further action was necessary. *Id*.

Denied. New Hope is without knowledge as to whether Broome County DSS updated its practices in accordance with OCFS's directive, and such information is in any event irrelevant to the constitutionality of the Regulation as applied to New Hope.

94. OCFS has historically worked collaboratively with New Hope to address issues.

McCarthy Decl., ¶ 43.

Admitted.

95. New Hope refuses to comply with § 421.3(d). *Id*.

Denied. New Hope has never said that it would not comply with the Regulation, except to the extent that the Regulation violated constitutionally protected rights of New Hope and those it serves. New Hope has simply advised the State that it is unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples. VC ¶ 191; Geyer Aff. ¶¶ 159–61.

Recuse and Refer Policy

96. A recuse and refer policy, like the one used by New Hope, sends the message to

LGTBQ individuals that they are second class citizens. *Id*., ¶ 47.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to the "message" sent by a recuse-and-refer policy. In fact, Carol McCarthy's declaration admits that her opinion on this topic is based solely on her "belie[f]." McCarthy Decl. ¶ 46. Further denied because "the existing record reveals no complaint from any referred couple," "[n]or does it indicate that any couple was unable to adopt as a result of referral." *New Hope*, 966 F.3d at 183; *accord* VC ¶ 156; Jerman Aff. ¶ 27.

Denied for the additional reason that New Hope's choice to devote its resources to placing children in a manner consistent with its religious beliefs conveys no "message" that any individual is a "second class citizen," nor any message at all beyond the well-known fact that adherents of world faiths "have long revered" the "gender-differentiated union of man and woman" as the natural and best "family structure." *Obergefell v. Hodges*, 576 U.S. 644, 657, 680 (2015).

97. A recuse and refer policy disrespects and further marginalizes a historically disadvantaged population. *Id*.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to the effect a recuse-and-refer policy has on "a historically disadvantaged population." In fact, Carol McCarthy's declaration admits that her opinion on this topic is based solely on her "belie[f]." McCarthy Decl. ¶ 46. Further denied because "the existing record reveals no complaint from any referred couple," "[n]or does it indicate that any couple was unable to adopt as a result of referral." *New Hope*, 966 F.3d at 183; *accord* VC ¶ 156; Jerman Aff. ¶ 27.

Denied for the additional reason that New Hope's choice to devote its resources to placing children in a manner consistent with its religious beliefs does not "disrespect" any population, nor convey any message at all beyond the well-known fact that adherents of world faiths "have long revered" the "gender-differentiated union of man and woman" as the natural and best "family structure." *Obergefell*, 576 U.S. at 657, 680.

98. Under a recuse-and-refer policy, families turned away from one agency would need to seek out an agency willing to serve them and, without a universally applicable non-discrimination requirement, it is possible that there would be no adoption providers willing to serve them. *Id*., ¶ 48.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to how other adoption providers might respond if there was no "universally applicable non-discrimination requirement." The State denies that any agency has ceased to operate as a result of the Regulation, *see* Def. SOF ¶ 114, and offers no evidence as to how many other agencies—if any—hold beliefs that might lead them to adopt New Hope's policy if allowed to do so. Further, there is no evidence in the record that same-sex or unmarried couples had difficulty adopting before the Regulation was adopted in 2013. In contrast, "the existing record reveals no complaint from any referred couple," "[n]or does it indicate that any couple was unable to adopt as a result of referral." *New Hope*, 966 F.3d at 183; *accord* VC ¶ 156; Jerman Aff. ¶ 27.

99. Although each local department of social services operates an adoption program, these programs only place children in the foster care system. *Id*., ¶ 49.

Denied. No statute or regulation prohibits the Department of Social Services from facilitating the adoption of children outside of the foster care system.

100. A prospective adoptive parent seeking to adopt outside of the foster care system could not do so through the local department of social services. *Id*.

Denied. No statute or regulation prohibits the Department of Social Services from facilitating the adoption of children outside of the foster care system.

101. New Hope almost exclusively facilitates domestic adoptions of newborns, infants and young toddlers. *Id*., ¶ 50; Compl., ECF No. 1, ¶ 76.

Admitted.

102. New Hope is not a licensed foster care agency and is not authorized to place foster children for adoption in New York. McCarthy Dec., ¶ 50.

Admitted.

103. Typically, agencies that facilitate domestic adoptions of newborns, infants and young toddlers outside of foster care have a greater number of prospective adoptive parents than children in need of placement, resulting in waiting lists. *Id*., ¶ 51.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to the number prospective adoptive parents on a waiting list at any adoption agency. Further denied because the record shows that the "substantial majority" of children that New Hope serves fall into "hard-to-place" categories—and "hard-to-place" infants and toddlers are by definition *not* in short supply, but rather tragically hard to find homes for. Jerman Aff. ¶ 5.

104. Under recuse-and-refer, same-sex and unmarried couples turned away from agencies like New Hope would be segregated and funneled to the smaller subset of agencies

willing to work with them, making waiting lists at those agencies longer and the likelihood of placement slimmer. *Id*.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)). *See also* Response No. 98. Further denied because the record shows that the "substantial majority" of children that New Hope serves fall into "hard-to-place" categories—and "hard-to-place" infants and toddlers are by definition *not* in short supply, but rather tragically hard to find homes for. Jerman Aff. ¶ 5. Thus, qualified applicants willing to adopt "hard-to-place" children do not face long "waiting lists" or "slim[]" likelihoods of placement once they complete the qualification process, whether they work with New Hope or another agency.

Further denied because New Hope's presence as an adoption service provider in New York provides *additional* resources compared to a scenario in which New Hope is forced to cease operation, and so cannot *reduce* the number of agencies and the resources available to serve any legally eligible potential adoptive parent. *E.g.*, Jerman Aff. ¶ 108 (explaining that New Hope had to turn away more than 100 couples during the short period of time that the State's actions prevented it from accepting new applications); *see also New Hope*, 493 F. Supp. 3d at 60 (agreeing that forcing New Hope to close "actually runs contrary to the state's interest in maximizing the number of families available for adoption").

105. A recuse-and-refer policy diminishes the number of children available to same-sex and unmarried couples by reducing the number of agencies willing to serve them. *Id*., ¶ 52.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)). *See also* Response No. 98. Further denied because the record shows that the "substantial majority" of children that New Hope serves fall into "hard-to-place" categories—and "hard-to-place" infants and toddlers are by definition *not* in short supply, but rather tragically hard to find homes for. Jerman Aff. ¶ 5. Thus, qualified applicants willing to adopt "hard-to-place" children will find children available for adoption whether they work with New Hope or another agency.

Further denied because New Hope's presence as an adoption service provider in New York provides *additional* resources compared to a scenario in which New Hope is forced to cease operation, and so cannot *reduce* the number of agencies and the resources available to serve any legally eligible potential adoptive parent. *E.g.*, Jerman Aff. ¶ 108 (explaining that New Hope

had to turn away more than 100 couples during the short period of time that the State's actions prevented it from accepting new applications); *see also New Hope*, 493 F. Supp. 3d at 60 (agreeing that forcing New Hope to close "actually runs contrary to the state's interest in maximizing the number of families available for adoption").

106. Prospective adoptive parents who are categorically rejected by an authorized agency lose the ability to adopt the children in that agency's custody and guardianship. *Id.*

Denied. New Hope does not "categorically reject" unmarried or same-sex applicants, as formal rejection could complicate those applicants' ability to later obtain approval through any agency. Instead, New Hope informs them that because of its religious beliefs, New Hope cannot be the agency to serve them, and New Hope is willing to provide referrals to other agencies that will. VC ¶ 156; Jerman Aff. ¶ 27. There is no evidence that New Hope's beliefs, policies, and actions have ever prevented any legally eligible individuals or couples from successfully adopting a child. VC ¶ 156; Jerman Aff. ¶ 27.

107. Thus, the likelihood that a prospective adoptive parent will receive a child for an adoptive placement depends on the number of children in the custody and guardianship of the authorized agencies willing to work with them, not the number of children available for adoption statewide. *Id.*

Denied. The likelihood that a prospective adoptive parent will "receive" a child for an adoptive placement depends on whether such a placement is in "the best interests of the child," which encompasses a variety of factors. 18 NYCRR § 421.18(d). Importantly, the likelihood that a prospective adoptive parent will "receive" a child for an adoptive placement depends strongly on that parent's willingness to adopt a child with "hard-to-adopt" characteristics. Jerman Aff. ¶ 5.

108. Same sex couples adopt at rates disproportionately higher than other individuals. *Id.*, ¶ 53.

Denied. The State's purported "statement of undisputed fact" is improper because it does not provide any "citation to the record where the fact is established" (L.R. 56.1(a)) with respect to the rates at which same-sex couples or other individuals adopt. In any event, such information is irrelevant to the constitutionality of the Regulation as applied to New Hope.

109. New Hope's method of turning away unmarried and same sex couples through its recusal and referral policy prevents such couples from appealing such a decision by New Hope to OCFS. *Id*., ¶ 54.

Denied. New Hope does not reject unmarried or same-sex applicants because a formal rejection could complicate those applicants' ability to later obtain approval through any agency. Instead, New Hope informs them that because of its religious beliefs, New Hope cannot be the agency to serve them, and New Hope is willing to provide referrals to other agencies that will. VC ¶ 156; Jerman Aff. ¶ 27. Because New Hope's policy of devoting its energies to placing children in a manner consistent with New Hope's religious beliefs does not prevent any legally eligible individual from adopting, and because New Hope's practice is protected by the United States Constitution, there is no issue which could appropriately be "appealed" to OCFS in any case.

110. Couples who go through the application process at an agency and are not approved can appeal that denial to OCFS. *Id*.

Admitted.

111. By preventing unmarried and same sex couples from participating in the application process, New Hope's recusal and referral policy effectively leaves such couples with no avenue by which to challenge New Hope's action. *Id*.

Denied. *See* Response No. 109.

Agencies Removed from OCFS Website

112. In 2018 and 2019, OCFS did not disapprove any adoption program in New York State. *Id*., ¶ 44.

Denied. Catholic Charities of Buffalo ended its foster care and adoption program in 2018 because its religious beliefs about marriage, family, and the best interests of children conflicted with state law and regulations. *See, e.g.*, Stephen T. Watson & Harold McNeil, *Catholic Charities ending foster, adoption programs over same-sex marriage rule*, THE BUFFALO NEWS (Aug. 23, 2018), https://bit.ly/3c53tJg.

113. In 2018 and 2019, approximately twelve authorized agencies with perpetual authority, including both faith-based and secular agencies, were removed from OCFS's website because they voluntarily no longer operated an adoption program. *Id*.

Denied. Catholic Charities of Buffalo ended its foster care and adoption program in 2018 because its religious beliefs about marriage, family, and the best interests of children conflicted with state law and regulations. *See, e.g.*, Stephen T. Watson & Harold McNeil, *Catholic Charities ending foster, adoption programs over same-sex marriage rule*, THE BUFFALO NEWS (Aug. 23, 2018), https://bit.ly/3c53tJg. Such a closure cannot accurately be described as "voluntary." New Hope is without knowledge as to the exact number of adoption agencies that OCFS removed from its website in 2018 and 2019.

114. None of these authorized agencies were asked to or pressured by OCFS to close due to their religious beliefs or non-compliance with §421.3(d). *Id*.

Denied. Catholic Charities of Buffalo ended its foster care and adoption program in 2018 because its religious beliefs about marriage, family, and the best interests of children conflicted with state law and regulations. *See, e.g.*, Stephen T. Watson & Harold McNeil, *Catholic Charities ending foster, adoption programs over same-sex marriage rule*, THE BUFFALO NEWS (Aug. 23, 2018), https://bit.ly/3c53tJg.

115. In addition, approximately five agencies were removed from OCFS's website for a lack of corporate authority. *Id*., ¶ 45.

Denied. New Hope is without knowledge as to whether any adoption agencies were removed from OCFS's website for lack of corporate authority, and such information is in any event irrelevant to the constitutionality of the Regulation as applied to New Hope.

116. Two others were removed because they closed in response to losing Hague accreditation, and two others were removed because they changed names. *Id*.

Denied. New Hope is without knowledge as to whether any adoption agencies were removed from OCFS's website for losing Hague accreditation or because they changed names, and such information is in any event irrelevant to the constitutionality of the Regulation as applied to New Hope.

August 2018 OCFS Statement

117. In August 2018, OCFS was asked by the Buffalo News for a response to Catholic Charities Buffalo's voluntary closure. Declaration of Monica Mahaffey ("Mahaffey Decl."), ¶ 3.

> **Admitted that OCFS spokeswoman Monica Mahaffey made a statement to The Buffalo News about Catholic Charities of Buffalo ending its foster care and adoption program because its religious beliefs about marriage, family, and the best interests of children conflicted with state law and regulations.**
>
> **Denied that Catholic Charities of Buffalo "voluntarily" closed its foster care and adoption program. *See* Response No. 114.**
>
> **New Hope is without knowledge as to whether The Buffalo News specifically requested a statement from OCFS.**

118. In response to the request, OCFS Assistant Commissioner for Communications made the following statement: "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." *Id*.

> **Admitted. However, the full statement, as reported by The Buffalo News reads as follows: "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." Stephen T. Watson & Harold McNeil, *Catholic Charities ending foster, adoption programs over same-sex marriage rule*, THE BUFFALO NEWS (Aug. 23, 2018), https://bit.ly/3c53tJg**

119. This statement of Assistant Commissioner Mahaffey simply meant that an adoption or foster care agency cannot refuse to provide services based on sexual orientation or marital status under New York State law. *Id*., ¶ 4.

Denied. Ms. Mahaffey's statement cannot reasonably be understood to "simply" mean that an adoption or foster care agency cannot refuse to provide services based on sexual orientation or marital status under New York State law. Ms. Mahaffey stated that "[t]here is no place" for providers like Catholic Charities of Buffalo who follow their religious beliefs about marriage, family, and the best interests of children, reflecting an intent to exclude faith-based providers like Catholic Charities of Buffalo from serving their communities. In addition, Ms. Mahaffey's statement implies that foster care and adoption providers with religious beliefs like Catholic Charities of Buffalo fail to "provide loving and nurturing homes to foster or adoptive children."

120. The statement applies to all providers equally and was not intended to target faith-based providers, or to suggest that religious beliefs are not welcome in New York State. *Id*.

Denied. *See* Response No. 119.

New York Domestic Relations Law § 110

121. Section 421.3(d) was promulgated pursuant to Executive Law §§ 503 and 532-e and Social Services Law §§ 20(3)(d), 462(1), 372-b(3), 372-e(2), 378(5), 409 and 409-a. Traina Decl.. Exh. G, pp. 1, 16, 37, 38, 39, 60, 69.

Admitted that the cited pages of the New York State Register identify these statutes as "statutory authority."

Denied that the Regulation could be lawfully promulgated pursuant to each of these statutes, as many of them are entirely unrelated to adoption services. *E.g.*, N.Y. Exec. Law § 503 (detention facilities); *id.* § 532-e (runaway and homeless youth); N.Y. Soc. Serv. Law § 462(1) (residential programs for children); *id.* § 409-a (preventive services).

122. Section 421.3(d) was not promulgated pursuant to New York Domestic Relations Law ("DRL") § 110. *Id*.

Denied. As the Second Circuit observed, the Regulation "purports to implement N.Y. Dom. Rel. Law § 110." *New Hope*, 966 F.3d at 165. In addition, the State has asserted throughout this litigation that the Regulation "d[id] not create a new obligation for authorized adoption agencies," but rather was promulgated "in accordance with existing law," including Domestic Relations Law § 110. *See* Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Prelim. Inj. 1-2, ECF No. 32-1; Def.'s Mem. of Law in Supp. of Mot. to Dismiss 1-2, ECF No. 34-1.

123. The rulemaking record for, inter alia, § 421.3(d) does not include any assertion that 421.3(d) was implemented pursuant to DRL 110. *Id.*

Denied. As the Second Circuit observed, the Regulation "purports to implement N.Y. Dom. Rel. Law § 110." *New Hope*, 966 F.3d at 165. In addition, the State has asserted throughout this litigation that the Regulation "d[id] not create a new obligation for authorized adoption agencies," but rather was promulgated "in accordance with existing law," including Domestic Relations Law § 110. *See* Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Prelim. Inj. 1-2, ECF No. 32-1; Def.'s Mem. of Law in Supp. of Mot. to Dismiss 1-2, ECF No. 34-1.

124. DRL § 110 defines who may legally adopt in New York. 2010 legislative history of DRL § 110, Declaration of Adrienne J. Kerwin ("Kerwin Decl."), Exh. A; N.Y. Dom. Rel. Law § 110.

Admitted.

125. DRL § 110 does not permit or prohibit discrimination against those who apply for adoption services. 2010 legislative history of DRL ¶ 110, Kerwin Decl., Exh. A; N.Y. Dom. Rel. Law § 110.

Denied. As the Second Circuit found, the text of N.Y. Dom. Rel. Law § 110 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." *New Hope*, 966 F.3d at 165.

Respectfully submitted this 19th day of November, 2021,

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