

**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)

**REPLY MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

TABLE OF CONTENTS

Table of Authorities ii

Introduction..... 1

Argument 2

I. The Regulation violates New Hope’s free speech rights..... 2

 A. New Hope’s Free Speech claim concerns actual and identified speech, not
 “conduct.” 2

 B. The Regulation compels and censors speech based on content and
 viewpoint..... 2

 C. The State’s other arguments for avoiding strict scrutiny are meritless..... 5

 1. The choice to regulate does not confer the power to censor..... 5

 2. New Hope’s speech is not governmental speech..... 5

II. The Regulation violates New Hope’s expressive associational rights..... 7

III. The Regulation violates New Hope’s free exercise rights..... 9

 A. The Regulation is neither generally applicable nor neutral. 9

 B. The Regulation impermissibly interferes with New Hope’s “faith and
 mission.” 12

IV. The Regulation as applied to New Hope cannot survive strict scrutiny..... 14

V. New Hope is entitled to a permanent injunction..... 15

Conclusion 15

TABLE OF AUTHORITIES

Cases

Agency for International Development v. Alliance For Open Society International, Inc.,
570 U.S. 205 (2013)..... 2

Boy Scouts of America v. Dale,
530 U.S. 640 (2000)..... 8, 9, 13

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)..... 12

Democratic Party of the United States v. Wisconsin ex rel. La Follette,
450 U.S. 107 (1981)..... 8

Employment Division, Department of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990)..... 9, 10

Fifth Avenue Presbyterian Church v. City of New York,
293 F.3d 570 (2d Cir. 2002)..... 7

Fulton v. City of Philadelphia,
141 S. Ct. 1868 (2021)..... 10

Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.,
565 U.S. 171 (2012)..... 12, 13

In re Jacob,
660 N.E.2d 397 (N.Y. 1995)..... 15

Matal v. Tam,
137 S. Ct. 1744 (2017)..... 4

McCullen v. Coakley,
573 U.S. 464 (2014)..... 14

National Institute of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018)..... passim

New Hope Family Services, Inc. v. Poole,
493 F. Supp. 3d 44 (N.D.N.Y. 2020)..... 3, 6, 11

New Hope Family Services, Inc. v. Poole,
966 F.3d 145 (2d Cir. 2020)..... passim

New York Progress & Protection PAC v. Walsh,
733 F.3d 483 (2d Cir. 2013)..... 15

<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	4, 5
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	4
<i>Rumsfeld v. Forum for Academic & Institutional Rights, Inc.</i> , 547 U.S. 47 (2006).....	9
<i>Tandon v. Newsom</i> , 141 S. Ct. 1294 (2021).....	10
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	4
<u>Statutes</u>	
N.Y. Dom. Rel. Law § 110	11
<u>Regulations</u>	
18 NYCRR § 421.16(d)	11
18 NYCRR § 421.3(d)	1
<u>Other Authorities</u>	
<i>James</i> 1:27 (NIV).....	12

INTRODUCTION

The State's Response to Plaintiff's Statement of Facts (ECF No. 76-1) confirms that no disputed issues of fact stand in the way of summary judgment for New Hope. In that response, the State denies essentially none of New Hope's "undisputed facts" except based on what are, in reality, legal arguments rather than factual disputes. The State's opposition to New Hope's motion for summary judgment boils down to this legal argument: The State says it can force New Hope to speak messages it disagrees with and violate its religious beliefs about marriage and family simply because the State has chosen to regulate adoption agencies. But that "logic" is limitless and would allow the government to violate constitutional rights any time it decides to impose a licensing requirement. That is precisely why the Supreme Court has rejected it. *See Nat'l Inst. of Fam. & Life Advoc. v. Becerra* ("NIFLA"), 138 S. Ct. 2361, 2375 (2018). Otherwise, States would have "unfettered power to reduce a group's First Amendment rights" and "choose the protection that speech receives under the First Amendment." *Id.* Thankfully, our constitutional rights do not depend on whether the government labels our speech and activity as "regulated" or "unregulated."

As explained below and in New Hope's moving memorandum, the undisputed record evidence establishes that the State's decision to enforce 18 NYCRR § 421.3(d) (the "Regulation") against New Hope violates New Hope's First Amendment rights in a manner that triggers and fails strict scrutiny. Accordingly, New Hope is entitled to summary judgment, and the Court should enter a permanent injunction in its favor.

ARGUMENT

I. The Regulation violates New Hope’s free speech rights.

A. New Hope’s Free Speech claim concerns actual and identified speech, not “conduct.”

The State’s leading argument against New Hope’s Free Speech claim is that New Hope’s adoption services are conduct and not “imbued with expressive qualities.” Def.’s Opp’n to Pl.’s Mot. for Summ. J. 7–8, ECF No. 76 (“Def. Opp’n”). But New Hope has identified in detail the messages about marriage and family that it conveys to birth and adoptive parents, and the messages it must (and does) convey to birth parents, adoptive parents, and the State about the best interests of children. *E.g.*, Aff. of Kathleen Jerman ¶¶ 8–49, ECF No. 75-3 (“Jerman Aff.”). These facts are undisputed. What’s more, the Second Circuit has already held that “all New Hope’s adoption services” are “laden with speech.” *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 171 (2d Cir. 2020). So while the State is free to preserve this argument for any appeal, it cannot provide a basis for denying New Hope summary judgment.

B. The Regulation compels and censors speech based on content and viewpoint.

Because New Hope’s adoption services are “laden with speech,” the State cannot defeat New Hope’s motion for summary judgment unless it can avoid strict scrutiny. As previously explained, however, strict scrutiny must apply for multiple reasons. Pl.’s Mem. of Law in Supp. of Mot. for Summ. J. 14–16, ECF No. 75-1 (“Pl’s Br.”).

A law that “*alters* the content of [New Hope’s] speech” must be subjected to strict scrutiny. *NIFLA*, 138 S. Ct. at 2371 (emphasis added) (citation omitted). Likewise, a law that *compels* speech is subject to strict scrutiny: the “government also cannot tell people that there are things ‘they must say.’” *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 Regulation here does both.

To start, the State does not dispute that the Regulation would force New Hope to say something it believes to be false—that placing a child with a same-sex or unmarried couple is in the child’s best interests. Yet the State insists it can nonetheless compel New Hope’s speech because child placements result from “the application of regulatory factors” and thus are not a “purely discretionary process.” Def. Opp’n 9. But that is no answer; it just repeats the problem. By applying the Regulation against New Hope, the State is limiting New Hope’s discretion and dictating what it must say—*in writing*—about whether the placement is in the child’s best interests. This “plainly violates the First Amendment.” *New Hope*, 966 F.3d at 170 (cleaned up); *accord New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44, 61 (N.D.N.Y. 2020).

The State also does not deny that complying with the Regulation will force New Hope to “alter” the content of its messages to all its audiences. In fact, despite suggesting that New Hope might be allowed to discuss its “values and beliefs about marriage and family with adoption applicants,” “birthmothers,” and “prospective adoptive parents,” the State clarifies that any such discussion would have to be “unrelated” to New Hope’s “adoption services.” Def. Opp’n 11–12. So whatever “concession” the State thinks it is making, the Second Circuit has already recognized it as being “meaningless.” *New Hope*, 966 F.3d at 176. “New Hope does not claim that OCFS would compel or limit its speech if it loses authorization to provide adoption services. Rather, New Hope sues OCFS for violating its right to free speech as an authorized adoption agency.” *Id.* The State could have disavowed its earlier representation to the Second Circuit that New Hope is free to “espouse its beliefs about marriage and family” only “*outside* the contours of its” adoption program. *Id.* It has instead doubled down on its intention to control and alter New Hope’s speech.

This attempted censoring and compulsion of New Hope’s speech triggers strict scrutiny for another reason: it is content- and viewpoint-based. *See* Pl.’s Br. 15–16; Pl.’s Mem. of Law in Opp’n to Def.’s Mot. for Summ. J. 5–6, ECF No. 77 (“Pl.’s Opp’n”). As the Second Circuit held, 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 the State has only confirmed its intention to change or silence New Hope’s messages *inside* “the contours of its adoption program” because it disagrees with those messages. For example, the State explicitly says that it wishes to silence New Hope’s speech because it believes the message conveyed is “stigmatizing.” Def. Opp’n 25. Strict scrutiny therefore must apply. *Reed v. Town of Gilbert*, 576 U.S. 155, 168–69 (2015).

The cases relied on by the State are not to the contrary. The Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989), addressed the “legal standard applicable to governmental regulation of the time, place, or manner of protected speech.” So that case concerned the question of when a regulation that passes the general test for content and viewpoint neutrality (in that case a regulation governing permitted amplification equipment) may nevertheless amount to *covert* content- or viewpoint-based discrimination; it neither addressed nor altered the general test for such discrimination applicable here. *See Reed*, 576 U.S. at 167 (“*Ward*’s framework applies only if a statute is content neutral.” (cleaned up)). And the Supreme Court in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), emphasized that 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.

Finally, the State’s assertion that the Regulation cannot be “content-based” because it “applies to all authorized agencies,” Def. Opp’n 8, is just plain wrong. The “content-based” sign code in *Reed* applied to anyone who posted outdoor signs, 576 U.S. at 159. It is often true that laws imposing impermissible content- or viewpoint-based censorship “apply” to all speakers, but only “bite” those who hold the minority, disfavored viewpoint.

C. The State’s other arguments for avoiding strict scrutiny are meritless.

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

At bottom, the State’s real argument seems to be that it has a right to control New Hope’s speech because adoption is a highly regulated area. *See, e.g.*, Def. Opp’n 10 (“[B]y voluntarily engaging in the government-regulated area of adoption services, New Hope agrees” to comply with all governmental regulations); *id.* (“New Hope cannot provide adoption services without following the relevant laws as the State has enacted them.”). In other words, the State believes its choice to regulate gives it the power to censor. But as New Hope has explained, the Supreme Court rejected this precise argument in *NIFLA*. Pl’s Opp’n 7. To conclude otherwise would give the government “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” *NIFLA*, 138 S. Ct. at 2375. The government “cannot choose the protection that speech receives under the First Amendment.” *Id.*

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

The State also tries to control New Hope’s speech by labeling it “government speech” that “do[es] not trigger First Amendment protections.” Def. Opp’n 10. But that label doesn’t fit, as New Hope thoroughly explained in opposition to the State’s summary judgment motion. *See* Pl’s Opp’n 7–12. Rather than repeat all the opposing arguments here, New Hope incorporates them by reference and provides a brief summary.

In short, the Second Circuit and this Court have already rejected the State’s government-speech argument based on the allegations before it, *New Hope*, 966 F.3d at 171–75; *New Hope*, 493 F. Supp. 3d at 62–63, and those allegations now stand as undisputed facts for New Hope’s motion. Nothing in the record warrants a repudiation of the Second Circuit’s analysis and a reversal of its holding. Nor does regulating New Hope’s adoption services somehow convert its private speech into government speech, as the State contends. *See* Def. Opp’n 11. Indeed, the Second Circuit reached its decision despite being well aware of the “thicket of regulations” surrounding the adoption process. *New Hope*, 966 F.3d at 151. No case applying the government-speech doctrine asks whether the private actor is engaged in a “purely discretionary process,” Def. Opp’n 9, or enjoys “unbridled” discretion, *id.* at 11.

Any speculation about how the public might perceive New Hope’s messages in light of the regulatory framework, *see* Def. Opp’n 11, also is irrelevant. No authority says that public perception can transform a private actor’s speech into governmental speech. And regardless, the undisputed record evidence shows that New Hope holds itself out to the public as a private, Christian ministry. *See, e.g.*, Pl.’s Statement of Material Facts ¶¶ 3, 5–8, 16–34, ECF No. 75-1, pp. 2–12 (“Pl’s SOF”); *New Hope*, 966 F.3d at 174 (faith-based adoption agencies, “including New Hope,” “have long established private identities”).

Finally, the State’s assertion that state adoption agencies provide the “same adoption services” as do private agencies is both inaccurate and immaterial. Unlike New Hope, state agencies neither pray with adoptive parents nor discuss how faith in God affects the adoption process, *see* Pl’s SOF ¶ 25, and the State governs governmental adoption services very differently, by staffing them from top to bottom with state employees. The State also cites no authority—and Plaintiff is aware of none—holding that a state’s decision to provide a particular

service in parallel with private actors or religious ministries (as happens today with many social services) converts the private actor's speech into governmental speech. As explained before, the implications of the State's "same services" argument are grave and should be rejected. *See* Pl's Opp'n 11. New York is free to provide services that have traditionally been provided by religious charities, like adoption, but the decision to do so does not empower it to eliminate or control those religious ministries. *See Fifth Ave. Presbyterian 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 authorize it to prevent church from welcoming homeless on its property).

II. The Regulation violates New Hope's expressive associational rights.

The State tries to dispose of New Hope's expressive association claim 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. As detailed in New Hope's moving memorandum, the record shows that New Hope—together with its 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. Pl's Br. 16–17. New Hope likewise forms a voluntary expressive association with those candidate adoptive parents who choose New Hope over other agencies because they wish to discuss difficult personal topics within New Hope's faith-based framework. *Id.* at 17–18; Pl's SOF ¶¶ 17, 25–26, 31–32. Because the Second Circuit recognized that these are legitimate and threatened expressive associations, the only question is whether applying the Regulation to New Hope threatens more than a "slight impairment" of its "associational ability to advocate its religious viewpoints." *New Hope*, 966 F.3d at 178–80.

As to that, the Second Circuit emphasized that the State has 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). And if any doubt remained, the State’s efforts to hijack New Hope’s speech as “governmental speech” and steadfast refusal to grant a religious exception have obliterated it. The State has now confirmed that it will grant no “leeway” at all to “New Hope and its like-minded employees in expressing their religious views.” *Id.* at 179–80. While the State says New Hope has not “substantiated” the Second Circuit’s concern that the Regulation will make employment with New Hope less desirable and interfere with New Hope’s associational rights, Def. Opp’n 16, the record in fact includes such substantiating testimony, *e.g.*, Jerman Aff. ¶ 58 (New Hope’s Executive Director testifying that she “could no longer associate with New Hope” if New Hope began recommending and facilitating child placements with unmarried or same-sex couples).

For this reason, the record contradicts the State’s argument that the Regulation will have only an “incidental” impact on New Hope’s messages and expressive association. *See* Def. Opp’n 16–17. This is especially so because 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); *accord Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 123–24 (1981) (in considering whether the challenged law burdens the plaintiff’s associational rights, “a State, or a court, may not constitutionally substitute its own judgment for that of the [plaintiff]”).

The State’s other arguments also are meritless. Expressive association claims are closely related to free speech claims, but they are not identical. *Contra* Def. Opp’n 13 n.6. 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 discipline employees who speak faith-motivated messages lauding the importance of heterosexual marriage to healthy families.

Nor are associational claims limited to membership organizations, as the State contends. Def. Opp'n 14. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006), the Supreme Court plainly stated that “the freedom of expressive association protects more than just a group’s membership decisions.” Associational claims may be brought when, as here, the challenged law makes joining the group “less attractive” and thus “affect[s] the group’s ability to express its message.” *Id.*

Equally misguided is the State’s assertion that New Hope has no associational rights because it “was not organized for the purpose of engaging in expressive activities.” Def. Opp'n 14. As the Supreme Court has explained, an association need not be created “for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.” *Dale*, 530 U.S. at 655. Rather, it “must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Id.* New Hope easily meets that test here.

III. The Regulation violates New Hope’s free exercise rights.

Strict scrutiny also applies because the Regulation violates New Hope’s free exercise of religion. The State does not dispute that forcing New Hope to comply with the Regulation would substantially burden New Hope’s religious exercise. Yet it claims the power to punish New Hope for following its beliefs because it believes the Regulation is “generally applicable” and “neutral.” The State is wrong.

A. The Regulation is neither generally applicable nor neutral.

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; the failure to satisfy either one is sufficient to trigger strict scrutiny. And the Supreme Court has recently emphasized the

rigorous nature of the “generally applicable” requirement. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Here, the Regulation fails to meet either requirement.

The Regulation is not generally applicable. According to the State, its nondiscrimination rule is generally applicable because it “applies to all providers of adoption services without exception.” Def. Opp’n 21. 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.* So the question is not whether the Regulation applies to “all” adoption providers; the question is whether the State forbids discrimination in the adoption context “across-the-board.” *Smith*, 494 U.S. at 884. The State undeniably does not. As New Hope has explained in detail, and will not repeat here, New York statutes and regulations explicitly allow—and even require—otherwise prohibited discrimination throughout all stages of the adoption process. *See* Pl’s Br. 21–22; Pl’s Opp’n 16–17.

Conceding this fact, the State instead argues that the state-sanctioned discrimination is not truly “comparable” to New Hope’s policy because the discrimination allowed by the State “does not undermine the state’s interest in preventing discrimination against prospective adoptive parents and ensuring the largest possible pool of prospective adoptive parents.” Def. Opp’n 22. But this contradicts both reality and this Court’s prior ruling. Applicable statutes and regulations exclude applicants based on otherwise protected characteristics, thereby undermining the State’s interest in preventing discrimination against prospective adoptive parents and decreasing the pool of prospective parents. As just one 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. In contrast, there is no evidence that New Hope’s policy has ever prevented an unmarried or same-sex couple from adopting or receiving adoption services. Pl’s SOF ¶ 15. And this Court has recognized that enforcing the Regulation against New Hope “runs contrary to the state’s interest in maximizing the number of families available for adoption.” *New Hope*, 493 F. Supp. 3d at 60.

Along with not being generally applicable, the Regulation is not neutral. The State tries hard to convince this Court otherwise, Def. Opp’n 23–27, but the Second Circuit already found that many of the facts support a “slight suspicion” of “religious animosity,” *New Hope*, 966 F.3d at 165. The State’s arguments for different inferences cannot eliminate that “slight suspicion,” and that suspicion alone triggers strict scrutiny. As previously detailed, the key facts remain evidentiary and uncontradicted. *See* Pl’s Br. 22–29; Pl’s Opp’n 18–23.

Faced with this record, the State resorts to reframing the Regulation. It says the Court must consider the Regulation neutral because it “stemmed from meetings of a work group assembled to address the care provided to transgender youth in court-ordered OCFS custody.” Def. Opp’n 25. But as already explained, *see* Pl’s Opp’n 21, 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 [Dom. Rel. Law] § 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. By ignoring this intent, OCFS “suppress[ed] much more religious conduct than [was] necessary in order to achieve the

[Regulation’s] legitimate ends.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). The Regulation therefore is “not neutral.” *Id.*

B. The Regulation impermissibly interferes with New Hope’s “faith and mission.”

On top of not being neutral or generally applicable, the Regulation also is unconstitutional as applied to New Hope because it intrudes into and impairs the very core of New Hope’s mission. The Supreme Court has repeatedly found that such intrusions violate protected free exercise apart from the test articulated in *Smith*. See Pl’s Br. 19–20; Pl’s Opp’n 23–25. The State tries to paint the leading example, *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), as an arbitrary exception to *Smith* that should be cabined in every way possible. See Def. Opp’n 18–20. But *Hosanna-Tabor* was not a historical quirk. In applying the ministerial exception in that case, the Supreme Court implemented the broader and clearly stated principle that courts should respect “a spirit of freedom for religious organizations, an independence from secular control or manipulation,” which bars even neutral legislation from interfering with matters at the center of a religious organization’s “faith and mission.” *Hosanna-Tabor*, 565 U.S. at 185–86, 190.

This Court need not demark the outermost applications of these principles because New Hope’s adoption ministry falls well within the protected core. The ministry obeys the Apostle James’s command to “look after orphans and widows in their distress.” *James* 1:27 (NIV); see Pl’s SOF ¶ 3. And many Christian and other religious traditions teach as a fundamental tenet that marriage is a sacred creation of God and that families are best built around a married mother and father. New Hope’s effort to place children in families with a married mother and father—and its counseling of adoptive and birth parents consistently with that goal—are indeed at the center of its “faith and mission.” *Hosanna-Tabor*, 565 U.S. at 190.

The State offers several excuses for interfering with New Hope’s faith and mission. None has merit. *First*, the State argues that New Hope is not a “church” and not led by “clergy.” Def. Opp’n 19, 20. This is true but irrelevant. *Hosanna-Tabor* itself involved a school, and the Court referred broadly to “religious organizations” in its analysis. 565 U.S. at 186–89, 195.

Second, the State overreads *Hosanna-Tabor*’s distinction between “outward physical acts” and internal decisions affecting a religious organization’s “faith and mission.” Def. Opp’n 20. Almost all internal decisions manifest in some “outward physical acts.” In fact, the State is restating precisely the argument asserted and rejected in *Hosanna-Tabor*. There, the EEOC urged that the ADA’s neutral and generally applicable nondiscrimination provision could be applied to punish a religious school’s “physical act” of discharging a teacher, “even when applied to religious entities and even when the entity claims a religious motivation for its actions.” Br. for Resp’t E.E.O.C, *Hosanna-Tabor*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 3319555, at *24. The Supreme Court rejected that logic. *Hosanna-Tabor*, 565 U.S. at 190.

Third, the State notes that New Hope was not “incorporated for the purpose of inculcating a religious belief.” Def. Opp’n 19. This, too, is irrelevant. The record shows that New Hope’s *present* mission is to obey and teach, “both expressly and by example,” *Dale*, 530 U.S. at 650, what it believes to be God-given principles affecting the best interests of children. Pl.’s SOF ¶¶ 9, 17. Neither logic nor precedent suggests that a later-adopted but sincere mission is less protected than an earlier one.

Finally, the State claims a special power to infringe the faith and mission of religious adoption ministries because adoption is “now highly regulated.” Def. Opp’n 19. But the Supreme Court has repeatedly rejected this sort of circular bootstrapping of governmental power at the expense of First Amendment liberties. *E.g.*, *NIFLA*, 138 S. Ct. at 2375 (rejecting argument that

states can “reduce a group’s First Amendment rights by simply imposing a licensing requirement”). Otherwise, the ability to regulate would give States “a powerful tool to impose invidious discrimination of disfavored subjects.” *Id.* (cleaned up).

IV. The Regulation as applied to New Hope cannot survive strict scrutiny.

Once strict scrutiny is triggered, the Regulation is presumptively invalid and all burdens associated with overcoming strict scrutiny rest with the State. *See* Pl’s Br. 29–30. So the Regulation must be enjoined unless the State can prove that enforcing the Regulation *against New Hope* 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). This the State cannot do.

Throughout this litigation, the State has gone back and forth on several asserted interests, showing the Regulation is a policy in search of an interest rather than a policy in service of an interest. For example, in arguing that its nondiscrimination rule is neutral and generally applicable, the State asserts an interest in “ensuring the largest possible pool of prospective adoptive parents.” Def. Opp’n 22. But the Supreme Court, the Second Circuit, and this Court have all rejected that argument as implausible, and New Hope has submitted undisputed evidence that its faith-based nature and policy actually *increases* the number of adoptive parents. *See* Pl’s Br. 30–31.

So the State claims a different interest when trying to overcome strict scrutiny, arguing instead that the Regulation’s purpose is to ensure that applicants can adopt the *specific* “children in New Hope’s custody.” Def. Opp’n. 28–29. Besides unwittingly admitting that the Regulation targets New Hope, and thus is not neutral and generally applicable, the State’s newest asserted interest cannot overcome strict scrutiny. The State cannot have a legitimate interest—let alone a

compelling one—in guaranteeing adults their preferred “pick” of orphaned children. Rather, the State’s interest in the adoption context is “ensuring the ‘best interest[s]’ of the child to be adopted.” *New Hope*, 966 F.3d at 150 (citing *In re Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995)). And on that point, the State has no compelling interest in forcing New Hope to speak and act contrary to its religious beliefs. Indeed, the record reveals that New Hope has placed more than 1,000 children into permanent homes over the past 60 years, and there has been “no question” that each of these “placements ha[ve] been in the best interests of the adopted child.” *Id.* at 149; *see also* SOF ¶¶ 11–15.¹

V. New Hope is entitled to a permanent injunction.

Remarkably, the State says the Court should not stop it from enforcing the Regulation against New Hope *even if* the Court holds that the Regulation violates New Hope’s First Amendment rights. Def. Opp’n 29–30. In the State’s view, the equities and public interest justify ignoring constitutional violations. *Id.* That view couldn’t be more wrong. “[T]he Government does not have an interest in the enforcement of an unconstitutional law,” and the protection of First Amendment rights is *per se* “in the public interest.” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). New Hope thus is entitled to a permanent injunction.

CONCLUSION

For all these reasons, and those set forth in New Hope’s moving memorandum, the Court should grant New Hope’s motion for summary judgment and enter a permanent injunction prohibiting the State from requiring New Hope to provide adoption services to unmarried or same-sex couples.

¹ As explained, most of the children served by New Hope fall into “hard-to-place” categories—and “hard-to-place” infants and toddlers are *not* in short supply, but rather tragically hard to find homes for. Pl’s Br. 31; Pl’s Opp’n 26. Yet New Hope has “in every case found a loving home even for newborn infants with hard-to-place characteristics.” Jerman Aff. ¶¶ 6–7.

Respectfully submitted this 17th day of December, 2021,

s/ Mark A. Lippelmann

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2021, I electronically filed the foregoing Reply Memorandum of Law in Support of Plaintiff'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.

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