

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**NEW HOPE FAMILY SERVICES, INC.,**  
Plaintiff,

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

vs.

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

**CIVIL CASE MANAGEMENT  
PLAN**

Defendants.

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**IT IS HEREBY ORDERED that**, pursuant to Rule 16(b), Federal Rules of Civil Procedure, a telephonic status and scheduling conference will be held in this case before the Honorable Therese Wiley Dancks, United States Magistrate Judge, on October 24, 2022 at 10:30 a.m. EST. Counsel for all parties in the above-captioned action are directed to confer in accordance with Fed. R. Civ. P. 26(f) with respect to all of the agenda items listed below before the scheduled Rule 16 Conference. Following that Rule 26(f) conference, a report of the results of the conference, in the format set forth below, must be filed with the clerk no later than seven (7) days prior to the scheduled Rule 16 conference with the Court. Matters which the Court will discuss at the status conference will include the following:

**1) JOINDER OF PARTIES:** Any application to join any person as a party to this action shall be made on or before **November 7, 2022**.

**2) AMENDMENT OF PLEADINGS:** Any application to amend the pleadings to this action shall be made on or before **November 7, 2022**.

**3) DISCOVERY:** The parties have conferred and are discussing whether the legal issues presented in this case can and should be resolved without the delay and expense required by discovery. To the extent that discovery is necessary, the parties propose that all discovery is completed by **August 1, 2023**.

**4) MOTIONS:** If the parties agree that discovery is unnecessary, dispositive motions shall be filed by **March 3, 2023**. If the parties conduct discovery, dispositive motions shall be filed on or before **October 2, 2023**.

**5) PROPOSED DATE FOR THE COMMENCEMENT OF TRIAL:** The parties propose that a date for commencement of trial, if needed, be set at the convenience of the court following decision of any dispositive motions.

**6) HAVE THE PARTIES FILED A JURY DEMAND: NO.**

**7) DOES THE COURT HAVE SUBJECT MATTER JURISDICTION? ARE THE PARTIES SUBJECT TO THE COURT'S JURISDICTION? HAVE ALL PARTIES BEEN SERVED?**

The Court has subject matter jurisdiction over Plaintiff's claims under 28 U.S.C. §§ 1331 and 1343, because this action involves claims based on the First and Fourteenth Amendments to the United States Constitution and seeks to prevent state officials from allegedly interfering with Plaintiff's constitutional rights. The Court has personal jurisdiction over the parties. All parties have been served.

**8) WHAT ARE THE FACTUAL AND LEGAL BASES FOR PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES (INCLUDE COUNTERCLAIMS & CROSSCLAIMS, IF APPLICABLE)?**

Plaintiff is a privately funded Christian ministry and adoption agency that has operated in Syracuse, New York, since 1965. Based on its religious beliefs regarding marriage, family, and the best interests of children, Plaintiff's policy is to place the children within its care in homes consisting of a married husband and wife.

On August 19, 2021, an individual contacted Plaintiff purporting to inquire generally about adoption. Plaintiff's Executive Director responded with general information about its services, including a statement that, "[b]ecause of New Hope's convictions as a Christian adoption service, New Hope works with adoptive families

built around a married husband and wife. Others may be eligible to adopt under New York law, and upon request New Hope can provide contact information about other adoption services in the area.” Four days later, on August 23, 2021, the inquiring individual filed a complaint with the New York Division of Human Rights (“NYDHR”), alleging discrimination on the basis of sexual orientation and marital status. Also on August 23, 2021, the NYDHR sent a letter to Plaintiff enclosing the complaint and demanding that Plaintiff respond to all allegations within 15 days.

Plaintiff challenges the constitutionality of New York Executive Law § 296 and New York Civil Rights Law § 40-c, alleging that each violates its rights protected by the First and Fourteenth Amendments to the United States Constitution. The Executive Law provides that it “shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the . . . sexual orientation, gender identity or expression, . . . sex, . . . [or] marital status . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.” N.Y. Exec. Law §296(2)(a). The Civil Rights Law provides that “[n]o person shall, because of . . . sex, marital status, sexual orientation, [or] gender identity or expression . . . , be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.” N.Y. Civ. Rights Law § 40-c(2).

### **Plaintiff's Position:**

Plaintiff alleges that Defendants lack authority to prosecute Plaintiff under the Executive Law or the Civil Rights Law because it is not a place of public accommodation. Plaintiff also alleges that that the Executive Law and the Civil Rights Law violate the constitutional rights of Plaintiff, and other religious employers like them, forcing Plaintiff to choose between violating its sincerely held religious beliefs or facing investigations, fines, and imprisonment. The Executive Law and Civil Rights Law infringe Plaintiff's right to free speech and expressive association by censoring and compelling speech to birthmothers, adoptive couples, and the State. The Laws also infringe Plaintiff's right to the free exercise of its religion by requiring Plaintiff to renounce its sincerely held religious beliefs to receive a public benefit for which it is otherwise qualified, by establishing a system of individualized assessments, and by evincing animus against religious beliefs in its promulgation and enforcement. Plaintiff seeks declaratory and injunctive relief.

**Defendant's Position:**

Defendants allege that whether Plaintiff is subject to the New York State Human Rights Law is a determination that has not yet been made by the Commissioner of DHR or ruled upon by a New York state court. Additionally, the Commissioner has not yet determined whether Plaintiff is entitled to a religious exemption under New York law. This proceeding was commenced before DHR could reach these issues, or the merits of complainant McWilliams's complaint or Plaintiff's defenses. As a result, this Court should abstain from reaching these issues of state law. Additionally, Defendants allege that defendant James is an improper and/or unnecessary party in this litigation.

**9) WHAT FACTUAL AND LEGAL ISSUES ARE GENUINELY IN DISPUTE?**

On September 28, 2022, Judge D'Agostino granted Plaintiff's Motion for Preliminary Injunction, finding that Plaintiff is likely to succeed on the merits of its claims because it is not a place of public accommodation under the Executive or Civil Rights Laws. The parties continue to dispute whether the Executive and Civil Rights Laws apply to Plaintiff and violate the Plaintiff's constitutional rights, and therefore whether Plaintiff is entitled to the relief it seeks.

**10) CAN THE ISSUES IN LITIGATION BE NARROWED BY AGREEMENT OR BY MOTIONS? ARE THERE DISPOSITIVE OR PARTIALLY DISPOSITIVE ISSUES APPROPRIATE FOR DECISION ON MOTION?**

Given the fixed positions of the parties as to the constitutional issues implicated by the Executive and Civil Rights Laws, they do not believe that any issues can or will be further narrowed by agreement. The parties presently consider it reasonably likely that issues in this litigation will be amenable to decision on summary judgment.

**11) WHAT SPECIFIC RELIEF DO THE PARTIES SEEK? WHAT ARE THE DAMAGES SOUGHT?**

Plaintiff seeks permanent injunctive relief, preventing Defendants and any person acting in concert with them from enforcing the Executive Law or the Civil Rights Law against them. Plaintiff also seeks a declaration that the Executive Law and the Civil Rights Law are unconstitutional under the United States Constitution as applied to Plaintiff, on its free exercise and free speech claims. Plaintiff also seeks nominal damages and the costs of the litigation, including reasonable attorneys' fees and expenses under 42 U.S.C. § 1988.

Defendant seeks judgment in its favor, and costs of this litigation.

**12) DISCOVERY PLAN:**

**A. Mandatory Disclosures**

The parties will exchange the mandatory disclosures required under Rule 26(a)(1) on **October 17, 2022**.

**B. Subjects of Disclosure**

Plaintiff will disclose the identity of individuals likely to have discoverable information, and will identify documents potentially relevant to its claims, including documents regarding Plaintiff's incorporation, status as an adoption agency, policies and procedures, religious beliefs, and correspondence following the complaint and attempted investigation by NYDHR.

Defendants will disclose the information required by FRCP 26(a)(1) and, if discovery is needed, it will most likely be on the subject of Plaintiff's alleged harm.

**C. Discovery Sequence**

**Describe the parties' understanding regarding the timing of discovery, and state whether it is anticipated that discovery will be phased to address different issues in stages.**

The parties are discussing whether any discovery is necessary. If the parties agree that any discovery is necessary, all discovery shall be completed by **August 1, 2023**. The parties do not anticipate that discovery will be phased.

**D. Written Discovery**

**Describe the written discovery demands which the parties contemplate serving under Rules 33, 34 and 36, including when they will be promulgated, the areas to be covered, and whether there is any need for any party to exceed the number of interrogatories permitted under Rule 33.**

The parties are discussing whether any discovery is necessary. If the parties determine that discovery is necessary, the parties anticipate serving initial written discovery requests, including interrogatories, requests for admission, and requests for production of documents. The parties do not seek leave to exceed the number of

interrogatories permitted under Rule 33 but reserve the right to seek leave from the Court to serve additional interrogatories if discovery proceeds.

**E. Depositions**

**Set forth the parties' expectations regarding depositions, including the approximate number to be taken, their location, a general description of the deponents, and an indication of whether any non-party fact depositions are anticipated.**

At this time, the parties are discussing whether discovery is necessary. If the parties later determine that discovery is required, depositions shall be completed by **August 1, 2023**. At this time, the parties anticipate that the number of depositions they will need to take will not exceed five individuals in addition to 30(b)(6) witnesses. The parties would take such depositions virtually or in-person within the Northern District of New York or as may be agreed between the parties, and such depositions will be completed by the close of discovery.

**F. Experts**

**Set forth the parties' expectations regarding the retention of experts, and identify any particular issues to be addressed by the court concerning the retention and exchange of the information regarding experts, including whether the parties seek a variance from the expert disclosure requirements of the form uniform pretrial scheduling order typically issued by the court (i.e., initial expert disclosure at least ninety days, responsive expert disclosures at least forty-five days, and rebuttal reports due at least thirty days, before the close of discovery).**

The parties do not yet know whether experts will be utilized in this matter. In the event that expert discovery is necessary, the parties will propose a revised discovery schedule once such a need becomes apparent.

**G. Electronic Discovery**

**Set forth the parties' understanding and expectations regarding discovery of electronically stored information. This description should include any agreements reached with respect to the retention of electronically stored information and the manner in which it will be produced, if requested. The parties should also identify any**

**agreements regarding the manner in which electronically stored information subject to claims of privilege or work product protection will be handled, and whether a court order will be requested, either on stipulation or otherwise, to address this issue. If an agreement has been reached on the entry of such an order, provide a brief description of the provisions which will be included in a proposed order.**

The parties agree to the following procedures for the preservation, disclosure and management of electronically stored information:

The parties will produce **electronically stored information** in the form of searchable .pdf files, with each page bearing a unique Bates number and preserving all metadata. If either party requires a native version of a document that has been produced as a searchable .pdf file, the parties will cooperate to request and produce the native version, even if a request for a native version occurs after the close of discovery. Spreadsheets (e.g., Excel documents) and media files will be produced in native format. The parties will confer and work together to determine reasonable protocol for searching for, identifying, and producing responsive text messages and social media materials, if any. The parties do not anticipate any issues involving electronically discoverable material; should one arise, the parties will work together to resolve it before seeking the intervention of the Court.

With respect to **hard copy documents**, the parties agree that such documents will be produced in a searchable .pdf format, with each page bearing a unique Bates number. The parties will maintain retention practices for electronic and hard-copy information for the duration of the case.

With respect to **privilege and work product protection**, the parties agree to the following procedures for asserting claims of privilege after production: In accordance with Federal Rule of Civil Procedure 26(b)(5), the parties agree that a party claiming that an otherwise responsive document is protected by privilege or work product immunity, that party will provide a privilege log, at the time such production is due, that separately lists each document as to which such privilege or immunity is claimed, and identifies each document pursuant to Fed. R. Civ. Pro. 26(b)(5) including by providing at least the date, author(s), recipients, and custodian of the document, and sufficient information about the subject of the document to enable the other party to assess the claim.

Consistent with Federal Rule of Evidence 502, if a party through inadvertence produces discovery that it believes is subject to a claim of attorney-client privilege or attorney work product, the producing party may give written notice to the receiving party requesting that the document or thing be returned to the producing party or destroyed. The receiving party shall return or destroy such document or thing, which

shall not constitute an admission or concession that the document or thing is properly subject to a claim of attorney-client privilege or attorney work product, unless within 10 days of receiving the notice, it files a motion for an in-camera review by the Court to determine whether the designation is proper. This agreement does not foreclose a party from later moving the Court pursuant to Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502 for an order that such document or thing has been improperly designated or should be produced.

#### **H. Protective Orders**

**If the parties anticipate requesting a protective order from the court pursuant to Rule 26(c), describe the basis for the request and nature of the proposed protective order.**

To the extent that a party deems a protective order necessary in connection with a particular discovery response, the parties will work in good faith to negotiate one, and then seek court intervention as needed. At the present time, the parties only anticipate that a protective order may be necessary to protect the privacy of complainant, individuals described in the complaint, the New York Division of Human Rights, adopted children, birthparents, and individuals who sought, or obtained, adoption services through Plaintiff, or are identified in Defendants; records. If a protective order is necessary, the parties will work to reach agreement on any such order.

#### **I. Anticipated Issues Requiring Court Intervention**

**Provide a brief description of any discovery related issues which, the parties reasonably anticipate, may require court intervention.**

At this time, the parties are not aware of any discovery issues which may require court intervention.

**13) IS IT POSSIBLE TO REDUCE THE LENGTH OF TRIAL BY STIPULATIONS, USE OF SUMMARIES OR STATEMENTS, OR OTHER EXPEDITED MEANS OF PRESENTING EVIDENCE? IS IT FEASIBLE AND DESIRABLE TO BIFURCATE ISSUES FOR TRIAL?**

At this time, the parties do not believe that bifurcation is appropriate. The parties believe that it may be possible to establish facts and narrow the issues in dispute by stipulation.

**14) ARE THERE RELATED CASES PENDING BEFORE THE JUDGES OF THIS COURT?**

No. This Court designated *New Hope Family Services, Inc. v. Poole*, Case No. 5:21-cv-01031-MAD-TWD, as a related case. However, that case is no longer pending because on September 7, 2022, this Court granted summary judgment in favor of Plaintiff in *Poole*, ECF No. 81, and the Defendant did not appeal.

**15) IN CLASS ACTIONS, WHEN AND HOW WILL THE CLASS BE CERTIFIED?**

Not applicable.

**16) WHAT ARE THE PROSPECTS FOR SETTLEMENT? Please circle below the prospect for settlement:**

1      2      3      4      5      6      7      8      9      10

(VERY UNLIKELY)

(LIKELY)

**HOW CAN SETTLEMENT EFFORTS BE ASSISTED?** The parties are unable to assess the prospects for settlement at this time. If it is determined that settlement can be explored, the parties will so alert the Court, and request the Court's assistance, if necessary.

*(Do not indicate any monetary amounts at this time, settlement will be explored by the Magistrate Judge at the time of the initial status conference)*

**COMPLETE QUESTION 17 ONLY IF YOUR FILING ORDER COVER SHEET WAS CHECKED AS AN ADR TRACK CASE - *Subject to Mandatory Mediation under General Order #47.***

**17) IF YOUR CASE WAS SELECTED AS A QUALIFYING MANDATORY MEDIATION CASE, CONFIRM THAT YOU HAVE:**

A. Reviewed General Order #47?

YES NO

B. Reviewed the List of Court Approved Mediators available on the NYND website?

YES NO

C. Prepared to discuss with the Court, at the conference, whether your case should be opted out of the program.

YES NO

D. Discussed the time frame needed to complete Mandatory Mediation?

YES NO

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Pursuant to Fed. R. Civ. P. 26(f) a conference was held on October 14, 2022, via teleconference, with the participation of: Mark A. Lippelmann, of Alliance Defending Freedom, for Plaintiff, and Adrienne Kerwin, with the Attorney General of the State of New York, for Defendant.

s/ Mark A. Lippelmann

Mark A. Lippelmann, Esq.\*  
Alliance Defending Freedom  
Attorneys for Plaintiff  
15100 N 90th St  
Scottsdale, AZ 85260  
Telephone: (480) 444-0020

s/ Adrienne J. Kerwin

Adrienne J. Kerwin, Esq.  
Assistant Attorney General  
Attorney for Defendant  
The Capitol  
Albany, NY 12224  
Telephone: (518) 776-2608

\* *Admitted Pro Hac Vice*