UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

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

Defendants.

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

MEMORANDUM OF LAW IN SUPPORT OF NEW HOPE FAMILY SERVICES, INC.'s MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF FACTS

New Hope Family Services, Inc. is a Christian ministry that has served abandoned infants by placing them in loving homes for over half a century, motivated and guided by its faith. New Hope does so without a single dollar of public funds; its adoption ministry is funded solely by private donations. Verified Compl. ("VC") ¶ 18. Yet the State of New York is on a mission to shut New Hope down. Why? Because New Hope's faith teaches it that the best environment for a child is with a married mother and father. New Hope speaks and conducts its adoption ministry guided by and consistently with that belief, placing infants only with adoptive couples consisting of a married mother and father (the "Policy"). VC ¶ 22.

The State's campaign against New Hope started about three years ago. In 2018, the State—through its Office of Child and Family Services (OCFS)—claimed that a regulation prohibiting adoption agencies from discriminating based on sexual orientation, 18 NYCRR § 421.3(d) ("the Regulation"), prohibited New Hope from following its religious beliefs about marriage and family. Relying on the Regulation, OCFS demanded that New Hope begin working with, counseling, and recommending as adoptive parents unmarried and same-sex couples, in violation of New Hope's beliefs, or else lose its authorization to act as an adoption agency. VC ¶ 75. This ultimatum led New Hope to file a lawsuit in this Court, alleging that the Regulation violated its free-speech and free-exercise rights. VC ¶ 76. Last year, guided by a thorough opinion from the Second Circuit, *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020), this Court granted a preliminary injunction enjoining the State from enforcing the Regulation against New Hope. *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44 (N.D.N.Y. 2020). That litigation is ongoing, and the preliminary injunction remains in force.

Now, with striking disrespect for the decisions of this Court and the Second Circuit and the existing injunction, the State attempts to use a different weapon to force New Hope to violate its beliefs or shut down.

The relevant facts are quickly summarized.

On August 19, 2021, an individual ("the Complainant") contacted New Hope purporting to inquire generally about adoption. VC ¶ 81. The next day, on Friday, August 20, New Hope director Kathy Jerman responded providing basic information, including an accurate description of New Hope's faith beliefs and the resulting boundaries of its services (as permitted and protected by the in-force preliminary injunction):

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

Id.

On Monday morning, August 23, this individual filed a lengthy, single-spaced complaint with the New York State Division of Human Rights ("the Complaint"). VC ¶ 83; *see also* Ex. A to Decl. of Mark Lippelmann ("Lippelmann Decl."), attached as Ex. 1. The Complainant never requested or applied for any services from New Hope, and indeed asserts that he has *already* been "approved for foster care/adoption by three other agencies." Lippelmann Decl., Ex. A, p. 14. Nevertheless, the Complaint references New York Executive Law § 296 (the New York "Human Rights Law"), and appears to accuse New Hope of violating two clauses of that law:

- The "Accommodations Clause," which makes it unlawful for "public accommodation[s]" to deny someone "accommodations, advantages, [and] privileges" because of sexual orientation or marital status. N.Y. Exec. Law § 296(2)(a).

- The "Publication Clause," which prohibits "any written or printed communication" that access to any public accommodation shall be

> denied, or that the patronage of any person is "unwelcome, objectionable or not . . . desired," on account of sexual orientation or marital status. N.Y. Exec. Law § 296(2)(a).

See Lippelmann Decl., Ex. A, pp. 13–14.

New York's Civil Rights Law is similar to the Human Rights Law in prohibiting any person or business from "discriminat[ing]" in a public accommodation against anyone "because of … sexual orientation" or "marital status." N.Y. Civ. Rights Law § 40-c(2). While the Complaint and the State have not yet cited this law, New Hope also moves to preliminarily enjoin application of that law against New Hope's Policy given the State's demonstrated willingness to assert different provisions *seriatim* to harass New Hope, and given precedent that states that "facts sufficient to sustain a cause of action under [the Human Rights Law's Accommodations Clause] will support a cause of action under [the Civil Rights Law's Discrimination Clause]." *Gordon v. PL Long Beach, LLC*, 74 A.D.3d 880, 885 (N.Y. App. Div. 2010). Plaintiff refers herein to the relevant portions of the Human Rights Law and the Civil Rights Law collectively as "the Laws."

In addition to referencing the Human Rights Law, the Complaint repeatedly references 18 NYCRR §421.3(d)—precisely the regulation that is currently the subject of the prior decisions of this Court and the Second Circuit Court of Appeals. *See* Lippelmann Decl., Ex. A, p.13. It also attaches more than 30 pages of exhibits. Lippelmann Decl., Ex. A.

This context, rapid sequence, and voluminous Complaint leave little doubt that this Complaint was set-up and pretextual, an effort to invoke the power of New York State to harass New Hope *despite* this Court's in-force injunction. Unfortunately, the State is cooperating with that game.

In August 2021, the New York Division of Human Rights ("the Division")— rather than dismiss or "pass upon" this Complaint as the law allows it to do, N.Y. Exec. Law § 295(6)(a)—

demanded that New Hope respond to the Complaint within 15 days or face severe penalties. VC ¶ 86. After New Hope wrote, calling the Division's attention to the pending litigation and preliminary injunction, the Division, in a letter signed by Regional Director Julia Day, nevertheless asserted that it is "proceeding with investigation of the subject case," and demanded that New Hope respond to the allegations by October 18. Lippelmann Decl., Ex. B, pp. 2, 3.

This punitive and burdensome investigation is improper given this Court's prior ruling. At the threshold, precedent makes clear that New Hope is not even a place of "public accommodation" subject to New York's Human Rights Law on which the Division's investigation purports to rest. And regardless, that Law, as well as New York's closely parallel Civil Rights Law, are unconstitutional as applied against New Hope's Policy for the very same reasons already adjudicated by this Court, and more.

As the Court has previously found, "all New Hope's adoption services" are "laden with speech." *New Hope*, 966 F.3d at 171; *see New Hope*, 493 F. Supp. 3d at 61. Compelling New Hope to both counsel and recommend unmarried or same-sex adoptive parents in the course of its ministry would inevitably "alter the content of [New Hope's] speech," *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("NIFLA"), 138 S. Ct. 2361, 2371 (2018) (cleaned up); *see New Hope*, 966 F.3d at 171 n.24 (quoting this language), both by chilling New Hope's expression of what it believes to be true and wishes to say about family and the best interests of children, and by compelling New Hope to say things it believes to be false. And the law here goes even further than the law at issue in the prior litigation, since the Human Rights Law (at least as construed by the Complaint that the Division is requiring New Hope to respond to) prohibits New Hope from declaring and explaining its faith-based beliefs and Policy to the wider public through any "written or printed communication." N.Y. Exec. Law § 296(2)(a).

In addition to censoring and compelling New Hope's speech, the challenged Laws, if applied against New Hope in the manner implied by the Complaint, would compel New Hope to *act* in a manner contrary to the teachings of its faith. Because the challenged Laws provide exceptions and a mechanism for individualized exceptions for other reasons, *infra* Section I.C.1, they may not be asserted to compel New Hope to act contrary to its faith unless they satisfy strict scrutiny. For very much the same reasons already preliminarily adjudicated by this Court and the Second Circuit, the Laws, as applied, cannot pass that high bar.

The burden of this new investigation on New Hope is immediate, and the threat is severe. The Laws authorize the Division to enter "cease and desist" orders and impose fines of up to $100,000, N.Y. Exec. Law § 297(4)(c), (e)—an amount that would destroy New Hope as surely as an order from OCFS revoking New Hope's license. But the law goes even further and authorizes the Attorney General and the District Attorney to criminally prosecute anyone who violates a Division order or the State's discrimination laws and seek up to a year in jailtime. N.Y. Exec. Law §§ 63(10), 299; N.Y. County Law § 700; N.Y. Civ. Rights Law § 40-d. Because this investigation and these penalties threaten New Hope's rights and chill its speech, a preliminary injunction is warranted.

LEGAL STANDARD

For a preliminary injunction, New Hope must show (1) irreparable harm, (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions on the merits, (3) public interest weighing in the injunction's favor, and (4) equities tipping in its favor. *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020); *see also Fair Hous. in Huntington Comm., Inc. v. Town of Huntington*, 316 F.3d 357, 365 (2d Cir. 2003). A temporary "loss of First Amendment freedoms … unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). So

in the First Amendment context, the likelihood of success is "the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

ARGUMENT

I. New Hope is likely to succeed on the merits of its claims.

The Second Circuit and this Court have already recognized that New Hope has free-speech and free-exercise rights deeply entwined with the daily conversations and decisions of its adoption ministry. *New Hope*, 966 F.3d at 151; *New Hope*, 493 F. Supp. 3d at 61. These rights served as the predicate for enjoining one New York State agency (OCFS); they also support an injunction here.

A. New Hope is not a place of public accommodation.

As an initial matter, New Hope is likely to prevail on its claims because it is not a "place of public accommodation" and therefore not subject to either New York's Human Rights Law or Civil Rights Law. *See Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (exposure "to civil penalties under Section 40-c of the New York Civil Rights Law" depends on "[a] valid cause of action based on a violation of section 296 of the New York [Human Rights Law]"). While the State's decision to investigate shows that it disagrees, this threshold issue is all but settled.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021), the Supreme Court unanimously held that a faith-based foster care agency was not a "public accommodation" under a similarly worded city ordinance because the agency's foster services were "not readily accessible to the public." The Court explained that certifying a foster parent "involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus." *Id.* Indeed, the certification process "takes three to six months,"

"[a]pplicants must pass background checks and a medical exam," and "[f]oster agencies are required to conduct an intensive home study." *Id.* "All of this," the Court concluded, "confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system." *Id.*

All this is equally true of New Hope and its work. Thus, even before the *Fulton* decision, the Second Circuit deemed it "not surprising" that the State did not "attempt formally to denominate" New Hope as a "public accommodation," given that "New Hope's adoption services are not easily analogized to traditional public accommodations," such as "barbershops" or "accounting firms." *New Hope*, 966 F.3d at 166. Indeed, given the exhaustive nature of the application process and the small number of candidate adoptive parents served by New Hope each year, New Hope could hardly be less "public," or less comparable to "traditional public accommodations."

At the very threshold, then, the State cannot properly subject New Hope to the Laws. Its unjustified threat to do so by launching its investigation is simply more evidence of animus and targeted hostility against New Hope's beliefs and speech.

B. The Laws violate New Hope's freedom of speech and association in a manner that triggers strict scrutiny.

"At the heart of the First Amendment is the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *New Hope*, 966 F.3d at 170 (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)) (cleaned up). This right means speakers have "editorial control and judgment" over the content of their speech. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The State "'may not prohibit the expression of an idea,' even one that society finds

'offensive or disagreeable.'" *New Hope*, 966 F.3d at 170 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

1. New Hope speaks its "ideas and beliefs" toward multiple audiences.

New Hope is committed to conveying a "system of values about life, marriage, family and sexuality to both birthparents and adoptive parents through its comprehensive evaluation, training, and placement programs." VC ¶ 105; Aff. of Judith A. Geyer ("Geyer Aff.") ¶¶ 86–87, attached as Ex. 2; *New Hope*, 966 F.3d at 156. This system of values includes the belief that the biblical model for the family—one man married to one woman for life—"is the ideal and healthiest family structure for mankind and . . . for the upbringing of children." VC ¶ 22; Suppl. Aff. of Kathleen Jerman ("Jerman Aff.") ¶ 14, attached as Ex. 3.

New Hope speaks these beliefs, and messages guided by these beliefs, to multiple audiences in the course of its adoption ministry: when it is "counseling birthmothers," "instructing and evaluating prospective adoptive parents," and "filing its ultimate reports" with the State. *New Hope*, 966 F.3d at 171; Jerman Aff. ¶¶ 8–63; Aff. of Charity Loscombe ("Loscombe Aff.") ¶¶ 8–11, attached as Ex. 4. This Court and the Second Circuit have already recognized that "all New Hope's adoption services" are "laden with speech." *New Hope*, 966 F.3d at 171; *see New Hope*, 493 F. Supp. 3d at 61.

2. The Accommodations and Discrimination Clauses compel speech based on content and viewpoint.

Counseling unmarried or same-sex candidates to prepare them for adoption; recommending such candidates to birth-mothers; and certifying to the State that a particular adoption by unmarried or same-sex parents is in the best interests of that child: each one of these settings would inevitably compel New Hope to speak a message it believes to be false: that an adoption by such individuals will provide the best and healthiest home and life for that child. On

the contrary, New Hope's religious beliefs teach that the best environment for a child is with a married mother and father. VC ¶ 22; Jerman Aff. ¶ 14.

A compelled-speech claim has three elements: (1) speech, (2) that the government compels, (3) to which the speaker objects. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995) (applying elements). Thus, compelled speech occurs when the government infringes a speaker's "autonomy to choose the content of his own message." *Id.* at 573. For example, the government cannot force pregnancy centers to address abortion with potential clients because that "alters the centers' political speech" on "the morality … of contraception" by "mandating the manner in which the discussion of these issues begins." *Evergreen Ass'n Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014).

Here, New York does not simply compel New Hope to speak. It compels New Hope "to mouth support for views [it] find[s] objectionable." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). This "violates [a] cardinal constitutional command" which is almost "universally condemned." *Id*. In *Hurley*, an LGBT group tried to apply a public accommodation law to a parade. 515 U.S. at 561–62. The Supreme Court held that forcing the parade organizers to admit the LGBT group would alter the parade's content, infringe the organizers' right to speak their desired message, and treat "speech itself" as a public accommodation. *Id.* at 572–73. The same logic applies here. New York may not constitutionally apply its public accommodation Laws to alter New Hope's message by forcing it to declare to *any* of its audiences that unmarried and same-sex couples can provide the best home for adopted children.

While New Hope satisfies the three-part test for compelled speech, the Laws' Accommodations and Discrimination Clauses go even further and compel speech in a content-

and viewpoint-based way. This too triggers strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 164–65 (2015). A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 163. Viewpoint discrimination is a particularly "egregious form of content discrimination," in which the "government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). For example, the state "discriminates on the basis of viewpoint by permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious standpoint." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 384–85 (1993).

As applied to New Hope, the Accommodations and Discrimination Clauses compel speech based on both content and viewpoint. First, they compel New Hope to speak about unmarried or same-sex couples as adoptive parents, changing the content of their speech to birthmothers and to the State. Second, the Clauses require New Hope to endorse and promote a *specific* view—that placing children with unmarried and same-sex couples is in the child's best interest. This viewpoint-based requirement compels New Hope to express views with which it disagrees and does not believe to be true. Strict scrutiny therefore must apply. *See New Hope*, 493 F. Supp. 3d at 61–62 (the State "is attempting to compel speech" by "forc[ing] New Hope to say that it is in a child's best interests to be placed with an unmarried or same-sex couple, despite New Hope's sincere disagreement with that statement").

3. The Accommodations, Discrimination, and Publication Clauses censor speech based on content and viewpoint.

Besides *compelling* speech based on content and viewpoint, the challenged Laws as applied to New Hope by this investigation also *restrict* speech based on content and viewpoint.

First, the threat of massive fines and even criminal penalties inherent in an investigation of alleged violations of the Publication, Accommodations, and Discrimination Clauses inevitably chills New Hope's ability to speak its biblically-based beliefs about marriage, family and children. VC ¶¶ 110–11. In the preceding litigation, the State equivocated as to whether it intended to chill and muzzle New Hope's speech about its beliefs, finally acknowledging that it does—that under its interpretation of the regulation at issue in that case New Hope would remain free to speak its beliefs only "*outside* the contours of its . . . adoption program." *New Hope*, 966 F.3d at 176. As to the Laws challenged here, there is even less doubt, given the Publication Clause's express threat of penalties for any "written or printed communication" that New Hope might make concerning its beliefs that adoption by unmarried or same-sex couples is "unwelcome" or "not . . . desired or solicited." N.Y. Exec. Law § 296(2)(a). The Human Rights Law thus unabashedly prohibits New Hope from declaring and explaining its biblically-based beliefs in, e.g., its literature or e-mail communications to the public and those it serves.

Almost needless to say, this censorship is both content- and viewpoint-based. A law is content-based if "on its face [it] draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163–64 (cleaned-up). Here, New Hope is allowed to post a website statement supporting adoptions with unmarried and same-sex couples. Indeed, other New York adoption agencies do precisely that.[1] But an "About New Hope" post explaining New Hope's nature as a Christian ministry and its biblical belief that "a married mother and father is best" is forbidden because it would make an unmarried couple feel "unwelcome." "That is about as content-based

[1] "As a recipient of the Human Rights Campaign's 'All Children – All Families' seal of recognition, Spence-Chapin is committed to equality in adoption and [] proud of the many children we have placed in loving same-sex households." *Adoption Pathways for All Families*, Spence-Chapin, https://spence-chapin.org/lgbtq-adoption/ (last visited October 26, 2021).

as it gets." *Barr v. Am. Ass'n of Pol. Consultants, Inc*, 140 S. Ct. 2335, 2346 (2020); *see also*, *Rosenberger*, 515 U.S. at 829; *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (viewpoint discrimination to ban sign saying, "gay marriage is a sin" but allow sign advocating "person's right to choose whatever mate he or she wishes"); *Chelsey Nelson Photo. LLC v. Louisville/Jefferson Cnty. Metro Gov't.*, 479 F. Supp. 3d 543, 560–61 (W.D. Ky. 2020) (public accommodation law's application to photographer's statement declining to create photographs celebrating same-sex weddings was "content-based restriction on [her] expression").

4. The Accommodations and Discrimination Clauses interfere with New Hope's right to expressive association with like-minded individuals to practice and communicate their faith.

The right to freely associate with like-minded individuals is protected when that association serves the purpose "of engaging in those activities protected by the First Amendment [including] . . . speech . . . and the exercise of religion." *New Hope*, 966 F.3d at 178 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984)). For many of the same reasons already reviewed, the Laws violate New Hope's right of expressive association—with respect to both New Hope's association with its employees and volunteers, and its association with the adoptive parents with whom it works.

New Hope and its employees and volunteers form an expressive association that conveys the values and beliefs about marriage, family and children already discussed. VC ¶ 105; Geyer Aff. ¶¶ 86–87. Those who serve at New Hope do so in large part because they wish to communicate these messages. VC ¶¶ 25–31; Jerman Aff. ¶¶ 53–54, 57–63. And they have associated in part because doing so allows them to convey those "shared beliefs and values more effectively." *New Hope*, 966 F.3d at 179 (citing *Rumsfeld v. FAIR*, 547 U.S. 47, 68–69 (2006)); VC ¶¶ 25–26; Jerman Aff. ¶¶ 53–54, 57–63.

New Hope has a well-founded fear that the Accommodations and Discrimination Clauses will force it to muzzle its employees and volunteers. The Accommodations Clause explicitly regulates a place of public accommodation's "manager[s]," "agent[s]," and "employee[s]." N.Y. Exec. Law § 296(2)(a). And the Discrimination Clause extends broadly to any "person." N.Y. Civ. Rights Law § 40-c(2). So under both Laws, "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." *New Hope*, 966 F.3d at 179. And if the State prohibits New Hope from communicating its desired messages, and instead compels contrary messages, then many employees and volunteers who now associate with New Hope because of its beliefs and mission will stop doing so. VC ¶ 28; Jerman Aff. ¶ 58. Thus, applying the Laws will "mak[e] association with New Hope 'less attractive' for those who would otherwise combine their voices with the agency's in order to convey their shared beliefs and values more effectively." *New Hope*, 966 F.3d at 179 (quoting *Rumsfeld*, 547 U.S. at 68–69).

New Hope also enters into an expressive association with adoptive parents to discuss sensitive topics such as infertility, relationships, adoption, and family dynamics—all within the faith-based framework that New Hope openly professes. *See* VC ¶¶ 32–37; Jerman Aff. ¶¶ 13–17, 50–52; Aff. of Elaine Bleuer ("E. Bleuer Aff.") ¶ 10, attached as Ex. 5; *see also New Hope*, 966 F.3d at 156–58, 178–180. While New Hope does not require adoptive applicants to share its faith, it ensures that all who work with it are aware of New Hope's Christian faith and values, VC ¶ 36; Jerman Aff. ¶¶ 53–54, and many who choose to work with New Hope do so precisely because they wish to discuss and receive counsel about the deeply personal issues surrounding adoption in the setting and from the viewpoint that New Hope provides. VC ¶ 30; Jerman Aff. ¶

50; E. Bleuer Aff. ¶ 10; Aff. of Ellie Stultz ("Stultz Aff.") ¶¶ 3–31, attached as Ex. 6; Aff. of Jeremy Johnston ("Johnston Aff.") ¶¶ 3–14, attached as Ex. 7; Aff. of Justin Bleuer ("J. Bleuer Aff.") ¶¶ 3–17, attached as Ex. 8. Compelling or censoring New Hope's speech—in contradiction to New Hope's beliefs—would destroy not only the expression, but also the association that New Hope enters into with these adoptive parents. Such a violation of New Hope's protected right of expressive association is another, independent basis for the requested preliminary injunction.

C. The Laws violate New Hope's free exercise of religion in a manner that triggers strict scrutiny.

No one disputes that forcing New Hope to recommend child placements with unmarried and same-sex couples would substantially burden its religious exercise. *See Fulton*, 141 S. Ct. at 1876 (substantial burden for the government to put a foster or adoption agency "to the choice of curtailing its mission or approving relationships inconsistent with its beliefs"). The question here is whether the First Amendment allows the State to subject New Hope to intrusive investigations and potential fines and imprisonment for following its beliefs. It does not.

1. The Laws are not "generally applicable" because they allow exemptions for secular reasons.

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). Because neutrality and general applicability are separate concepts, the failure to satisfy just one triggers strict scrutiny. *See Fulton*, 141 S. Ct. at 1877. The Laws here fail to meet either requirement.

Start with general applicability. A law is not generally applicable if it provides "a mechanism for individualized exceptions" or "prohibits religious conduct while permitting

secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. The challenged Laws do both.

Under the public accommodation law, the Division may grant individualized exemptions "based on bona fide considerations of public policy." N.Y. Exec. Law § 296(2)(b). This creates a mechanism for individual exemptions and thus destroys any claim of general applicability. *Fulton*, 141 S. Ct. at 1878. And it does not matter whether the Division has ever granted an exemption. As the Supreme Court explained, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for complying with the policy are worthy of solicitude." *Id.* at 1879 (cleaned up).

The Laws lack general applicability for other reasons as well. Laws are not 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) (enjoining COVID restrictions that treated religious gatherings less favorably than some gatherings for secular or commercial purpose). For instance, both the Human Rights Law and Civil Rights Law prohibit public accommodations from discriminating based on race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, or marital status. N.Y. Exec. Law § 296(2)(a); N.Y. Civ. Rights Law § 40-c(2). But the State does not pursue its purported interest in stopping this discrimination "across-the-board." *Smith*, 494 U.S. at 884. It exempts schools, kindergartens, extension courses, and "distinctly private" clubs or institutions of fewer than 100 members. *See* N.Y. Exec. Law § 292(9) (defining "public accommodation"). Yet the small number of couples served by New Hope each year represent a much smaller, more intimate, and deeply personal and private association than any of these.

And in the adoption context specifically, the State *approves* of otherwise prohibited discrimination. For example, adoption agencies may recruit adoptive parents based on "ethnic, racial, religious or cultural characteristics," 18 NYCRR § 421.10(a); they *must* discriminate on the basis of the religion of the child and would-be adoptive parents in many instances, N.Y. Soc. Serv. Law § 373(2); 18 NYCRR § 441.11; birthparents may discriminate between adoptive parents for essentially any reason, including race and religion, N.Y. Soc. Serv. Law § 373(7); and adoptive parents may "discriminate" against available children based on the child's sex, 18 NYCRR § 421.16(g).

While just one exemption is enough to destroy general applicability, *Tandon*, 141 S. Ct. at 1296, there are many here. The State cannot insist that New Hope violate its faith in the name of "nondiscrimination" while allowing "discrimination" along similar lines for other reasons.

2. Applying the Laws to New Hope under these facts is not "neutral."

While the lack of general applicability alone triggers strict scrutiny, New York State's move to investigate New Hope under the Laws evinces animus rather than neutrality.

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. Because "government hostility to religion can be 'masked, as well as overt,'" courts must scrutinize the law or government action for even "subtle departures from neutrality." *New Hope*, 966 F.3d at 163 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

Here, the hostility is not subtle. New Hope has been engaged in litigation with the State since December 2018 after OCFS demanded that the ministry "compromise" its religious beliefs or lose its ability to serve adoptive parents and children. Fortunately, first the Second Circuit, *New Hope*, 966 F.3d at 184, then this Court, enjoined OCFS's effort to penalize New Hope for

its faith. But the State is so determined to silence or destroy New Hope that—rather than respecting the obvious import of that preliminary injunction and the constitutional rights it declares and protects—the State has used this manufactured Complaint as a pretext to launch a new harassing attack against exactly the same beliefs, speech, and Policy at issue in the prior ruling. In fact, the discrimination complaint even invokes 18 NYCRR § 421.3(d), the regulation that the State has already been enjoined from enforcing against New Hope. VC ¶ 83.

This sequence radiates hostility—the same impatient hostility that previously inspired the State to attempt to shut New Hope down even while its appeal to the Second Circuit was pending. That aggressively hostile action triggered an emergency protective injunction pending appeal from the Second Circuit. *See* Order, *New Hope Fam. Servs. v. Poole*, No. 19-1715 (2d Cir. Nov. 4, 2019), ECF No. 160 (order granting emergency injunction pending appeal), attached as Ex. D to Lippelmann Decl. This new attack deserves an equally firm response.

Nor is the State compelled to this new action by any inflexible statutory mandate. The Complaint was filed by someone who never requested or applied for adoption services with New Hope. VC ¶¶ 81–85. The Complaint establishes no reasonable basis to conclude that New Hope is a "public accommodation." And the law gives the Division discretion to "pass upon complaints" without investigating. N.Y. Exec. Law § 295(6)(a). Instead, it chose investigation and harassment, knowing full well that it would be investigating New Hope for policies and practices that an injunction currently protects. Far from being a "neutral and respectful consideration" of New Hope's religious beliefs, the State's actions have been "neither tolerant nor respectful." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729, 1731 (2018). Strict scrutiny applies for this reason as well.

3. The Laws intrude on historic beliefs at the heart of New Hope's "faith and mission."

Although courts often evaluate free-exercise claims under *Smith*'s general rule, that rule does not always apply. *Trinity Lutheran Church of Columbia, 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 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).

Indeed, in *Hosanna-Tabor*, the Supreme Court *unanimously* held that the Religion Clauses bar the government from applying a neutral and generally applicable nondiscrimination law to a religious school when doing so would disrupt the school's faith and mission by interfering with its selection of teachers and ability to operate consistently with its convictions. 565 U.S. at 171. And the Supreme Court has explained that 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. *See Fulton*, 141 S. Ct. at 1884–85 (Alito, J., concurring) (discussing this history). 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. VC ¶¶ 13–16; Geyer Aff. ¶¶ 13–15. From a faith perspective, being forced to

arrange and finalize an adoption is much like being forced to perform a marriage, an act the Supreme Court has said the government cannot compel. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (member of clergy "could not be compelled to perform the [wedding] ceremony"). Both marriage and adoption 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." VC ¶¶ 13, 15, 22, 25–28.

Because applying the Laws to New Hope would impermissibly intrude on historic beliefs at the heart of New Hope's faith and mission, strict scrutiny applies.[2]

D. The Laws fail strict scrutiny as applied to New Hope.

Because the challenged Laws violate New Hope's free-speech and free-exercise rights, the State must prove that they are narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163; *Lukumi*, 508 U.S. at 546. It cannot do so.

As for a compelling interest, the State may say it has an interest in stopping discrimination. But courts must look beyond "broadly formulated interests" and consider "the asserted harm" of granting "specific exemptions to particular . . . claimants." *Fulton*, 141 S. Ct. at 1881 (cleaned up). "The question, then, is not whether [the State] has a compelling interesting in enforcing its non-discrimination policies *generally*, but whether it has such an interest in denying an exception to [New Hope]." *Id.* at 1881 (emphasis added). It does not.

[2] Besides this exception to *Smith* for historic religious practices central to an organization's faith and mission, the Laws also trigger strict scrutiny if they burden a hybrid of religious exercise and other constitutional rights. *See Smith*, 494 U.S. at 881–82. Although the Second Circuit has rejected the hybrid-rights doctrine, *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003), other courts disagree and correctly interpret *Smith* as recognizing this doctrine, *see Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019). New Hope preserves this issue for appeal.

To begin, since New Hope is not a place of public accommodation, the State has no legitimate—let alone compelling—interest in applying the Laws against it. Nor can the State identify an "actual problem" that would justify the violations of New Hope's constitutional rights. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). There are more than 130 adoption providers in New York, including *state-run* agencies, and nearly all of them place children with unmarried and same-sex couples. VC ¶ 24. Moreover, New Hope will refer any applicant who desires it to these other agencies. VC ¶ 23; *accord* Geyer Aff. ¶ 140; Jerman Aff. ¶ 109. So forcing New Hope to close its adoption ministry because it cannot violate its beliefs will lead to neither more adoptive parents nor more children being adopted. "If anything, including [New Hope] in the program seems likely to increase, not reduce, the number of available [adoptive] parents." *Fulton*, 141 S. Ct. at 1882; *accord New Hope*, 493 F. Supp. 3d at 60 (agreeing that threatening New Hope with closure "runs contrary to the state's interest in maximizing the number of families available for adoption").

In any event, the Laws are not narrowly tailored to achieve any purported government interest. As this Court found, New Hope's "recusal-and-referral approach is more narrowly tailored to the state's interests while protecting New Hope's [constitutional] rights." *New Hope*, 493 F. Supp. 3d at 63. This is especially so since the Division can grant individualized exemptions from the public accommodation law "based on bona fide considerations of public policy." N.Y. Exec. Law § 296(2)(b). Such a "system of exceptions . . . undermines the [State's] contention that its non-discrimination polices can brook no departures." *Fulton*, 141 S. Ct. at 1882. And after authorizing exceptions based on "bona fide considerations of public policy," the State is not free to reject respect for religious beliefs as a qualifying "bona fide consideration."

Fulton, 141 S. Ct. at 1877; *see also Lukumi*, 508 U.S at 537 (same). Instead, the First Amendment makes it a *priority* consideration.

II. The remaining preliminary injunction factors favor an injunction.

The State can assert no interest here that it did not previously assert in opposing New Hope's motion for a preliminary injunction in *New Hope Family Services v. Poole*. The Second Circuit and this Court have already weighed those interests in the balance against New Hope's interest in the protection and enjoyment of its constitutional rights pending full trial on the merits—and found for New Hope. *New Hope*, 493 F. Supp. 3d at 63; *New Hope*, 966 F.3d at 181–84. As to that balance, there is no new issue to be decided.

But to summarize, the deprivation of First Amendment freedoms "for even minimal periods of time" is an "irreparable injury" that calls for preliminary injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). No further factual inquiry is necessary. However, New Hope has plausibly shown that the Laws present *additional* impending irreparable harm, including: the potential of crippling fines up to $100,000; the risk of criminal penalties including imprisonment; self-censorship; loss of key and difficult-to-replace staff members; loss of reputation and referral relationships that will be difficult to rebuild; and the destruction or severe crippling of an over 50-year-old ministry which has placed over 1,000 New York children into loving homes. VC ¶¶ 92–101; Jerman Aff. ¶¶ 68–93.

Further, because the investigation itself burdens and threatens New Hope's religious rights and chills its speech even before any conclusion is reached or penalty is imposed, an injunction is warranted without further delay. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that . . . may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

The equities also weigh heavily in New Hope's favor. For decades, New Hope has, in accordance with its religious beliefs, served New York's families and children, and served them well. A preliminary injunction will simply preserve the status quo while this litigation proceeds, allowing New Hope to continue this critical ministry. Meanwhile, a temporary injunction will not harm the State at all. As noted, other adoption agencies, including those operated by the State, readily recommend child placements with unmarried and same-sex couples.

Finally, "it is always in the public interest to protect First Amendment liberties." *Robar v. Vill. of Potsdam Bd. of Trs.*, 490 F. Supp. 3d 546, 574 (N.D.N.Y. 2020) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

CONCLUSION

For the reasons set forth above, this Court should grant New Hope's motion for a preliminary injunction and enjoin the State from applying and enforcing N.Y. Exec. Law § 296 and N.Y. Civ. Rights Law § 40-c against New Hope.

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s/ Mark Lippelmann
Roger Brooks, N.D.N.Y. Bar Roll No. 700663
rbrooks@adflegal.org
Mark Lippelmann, N.D.N.Y. Bar Roll No. 702308*
mlippelmann@adflegal.org
Jonathan A. Scruggs, N.D.N.Y Bar Roll No. 515373
jscruggs@ADFlegal.org
Jeremiah Galus, N.D.N.Y. Bar Roll No. 700629*
jgalus@ADFlegal.org
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
*Admitted *Pro Hac Vice*

David Cortman, N.D.N.Y. Bar Roll No. 502661
dcortman@ADFlegal.org
Alliance Defending Freedom

1000 Hurricane Shoals Rd, N.E. Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2021, I electronically filed the forgoing with the Clerk of the District Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ *Mark Lippelmann*
Attorney for Plaintiff