19-1715

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

v.

SHEILA J. POOLE

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of New York

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* The Becket Fund for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

By: /s/ Lori Windham
Lori Windham

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference. Becket has also represented religious people and institutions with a wide variety of views about the interaction of First Amendment and LGBT rights, including religious people and institutions on all sides of the same-sex marriage debate, as well as both LGBT and non-LGBT clients.

This appeal raises issues of direct concern to Becket, which currently represents Catholic adoption and foster agencies in Michigan and Pennsylvania. Both agencies are currently in litigation to protect their religious ministry and continue caring for those most in need without having to abandon their religious convictions. *See* Petition, *Fulton v. City*

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[1] *Amicus* represents, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for any party authored this brief, no party or party's counsel contributed money that was intended to fund this brief, and no person other than the *Amicus* or its counsel contributed money that was intended to fund this brief.

All parties have consented to the filing of this brief.

of Philadelphia, No. 19-123 (U.S. July 22, 2019); *Buck v. Gordon*, No. 19-cv-286 (W.D. Mich. 2019).

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988). When a government compels private speech, it "vitiate[s] the individual's decision either to express a perspective by means of silence, or to remain humbly absent from the arena." *Burns v. Martuscello*, 890 F.3d 77, 84 (2d Cir. 2018). This is why laws that compel speech—that force private speakers to serve as a mouthpiece for the government—are subject to the most exacting scrutiny.

New Hope Family Services is a private, non-profit, voluntary adoption agency. New Hope receives no government funding, relying only on private donations to support its religious mission of providing loving homes for infants and young children. Before New Hope can endorse any prospective adoptive family and recommend that family to one or more of the birthparents the agency works with, that family must complete a homestudy. Through the homestudy process, New Hope evaluates prospective adoptive families on a number of objective and subjective criteria. New Hope is required by state law to analyze everything from the applicants' past relationship history to the strengths and weaknesses of their marriage. State law also requires New Hope to apply its "critical thinking skills" when determining whether it believes the family's home

is well-suited for a child in need and then to create a written report. If New Hope's assessment results in a favorable evaluation of the applicants, it will certify and endorse the prospective adoptive family—and recommend that family to its birthparents—in a written report.

New Hope's religious beliefs prevent it from endorsing the relationships of cohabitating unmarried couples or same-sex couples. Accordingly, New Hope has—for over 50 years—consistently chosen to "remain humbly absent from the arena," referring unmarried or same-sex couples to other agencies that can provide similar services. *See Burns*, 890 F.3d at 84. This hasn't prevented *anyone* from adopting a child and ensures that New Hope can continue caring for those in need without compromising its religious beliefs and character.

Yet the State of New York has told New Hope that it must change its policy and start evaluating, endorsing, and certifying same-sex and unmarried couples—or lose its license. This ultimatum would compel New Hope to speak, and to speak in a way that would contradict its sincere religious beliefs. Forcing a privately funded adoption agency to convey a governmental message that it does not believe—on this sensitive and deeply personal topic—cannot withstand even modest scrutiny.

FACTUAL BACKGROUND

A. Homestudies require adoption and foster agencies to assess, evaluate, and endorse the families they certify.

"A homestudy is a series of meetings, interviews, and training sessions involving the agency and the prospective adoptive family." *The Adoption Process*, OCFS: Adopt a Child, https://perma.cc/HD5Q-N4CZ. During a homestudy, private voluntary adoption agencies (like New Hope) gather information from prospective adoptive families, ask questions about numerous deeply personal matters, and then use their knowledge and experience to evaluate and assess the family. As New York's Office of Children and Family Services (OCFS) recognizes, "[t]he process can be intense[.]" *Id.*

While New York law requires adoption agencies to assess prospective adoptive families across a number of specific criteria, agencies are also required to make numerous subjective assessments of the applicant(s) and their family as part of the evaluation process. An agency must ask an applicant detailed questions about "current and former relationships," "childhood experiences and defining moments," "traditions and religion/spirituality," "family history and relationships," "life experiences of loss and/or trauma," "impact of life experiences on current functioning," "coping strategies," and "infertility." *Household Composition and Relationships Form*, OCFS Forms of Adoption, https://perma.cc/MJ6G-KQKD. Agencies also assess the behavioral

health of everyone living in the applicant's home, inquiring into "alcohol and substance abuse," "mental health," "family/partner violence," and "threats" of violence. *Id.*

The information gathered during this process is then reviewed and analyzed by the agency. This analysis requires far more than checking boxes; New York tells agencies to "*apply their critical thinking skills* to assess all the information they have received" and to "summarize and synthesize where the applicant has strengths and needs." *Foster/Adoptive Home Certification or Approval Process*, OCFS: Administrative Directive (Apr. 16, 2018), https://perma.cc/8GL2- AZ85 (emphasis added). An agency must also consider "all components of the application and home study process" before "making a final decision on whether the home can be certified or approved." *Id.*

If an agency "decides to discontinue" a homestudy or "denies certification" after a homestudy, the agency "must advise the applicant in writing of the reasons for the agency's decision and must offer an interview to discuss the decision." *Id.* If an agency endorses a family, it must "prepare a written summary" that will be used by the agency's birthparent caseworkers to help make "placement decisions about children." 18 N.Y.C.R.R. 421.15(e)(1).

Adoption homestudies are well understood to be deeply personal and invasive, requiring agencies to engage in critical thinking and exercise their own judgment when assessing an applicant's answers to probing

and open-ended questions. The Human Rights Campaign (HRC) has recognized that agencies can ask "all kinds of questions about [the applicant's] childhood and upbringing, including questions about puberty, sex and sexuality." J. R. Perry, *Promising Practices for Serving Transgender & Non-Binary Foster and Adoptive Parents*, Human Rights Campaign Foundation, 41-42 (2017), https://perma.cc/6P4X-X9M7; *see also* Gerald P. Mallon, *Assessing Lesbian and Gay Foster and Adoptive Families: A Focus on the Home Study Process*, 86 Child Welfare 67, 76 (March/April 2007) ("Clearly, sexual orientation will be an issue to be fully and openly discussed at this point in the assessment process."). And HRC specifically recommends that "staff with a high level of knowledge and demonstrated success working with transgender and non-binary people" perform homestudies for LGBT applicants because of the sensitive nature of the information discussed. Perry, *supra* at 41-42. They have also created a list of sample homestudy questions for social workers, highlighting both how intensely personal the home study process is, and the type of information agencies must assess and consider when making endorsement decisions:

- "In the past, have you ever been 'outed' by someone? How did you handle it?"
- "What has been the attitude of your extended family to your partner?"

- "How have homo/bi/transphobia and/or heterosexism or cissexism affected your life and how have you dealt with this?"
- "Where are you in the process of grieving any feelings of loss you may have around not having biological children?"

Sample LGBTQ Affirming Homestudy Questions & Rationale, Human Rights Campaign Foundation, 2, 5-6, https://perma.cc/Y3Z6-9YLX; *see also* Mallon, *supra* at 76-77 ("It will be important to explore with potential parents their experience of coming out, and the impact this process has had on their significant relationships within their family and community."). In short, it is widely understood that homestudies require agencies to engage with applicants on numerous sensitive and deeply personal topics while also making both objective and subjective assessments of the applicants, their relationships, and their suitability as adoptive parents.

B. New Hope's assessment, endorsement, and certification of prospective adoptive families

New Hope completes an in-depth homestudy for all prospective adoptive families[2] before determining whether to endorse and certify the

[2] New Hope also certifies and endorses "truly single" individuals under its special circumstances policy; in such cases, the agency is not speaking on the topic of marriage as it is not endorsing any marital relationships. JA32.

family.[3] Over the course of four homestudy sessions, New Hope caseworkers meet with family members both individually and in groups to evaluate the family and determine whether New Hope can endorse their application. As part of the second session, for example, a New Hope caseworker travels to the family's home for a two-and-a-half-hour interview that covers, among other things: "family dynamics," "parenting philosophy," "family support," and "faith and religious practice." JA26. And during the third session, a New Hope caseworker explores topics ranging from "marital stability" to "mental-health history," "financial stability," and "pornography use" with each family member. JA27. For married couples, New Hope interviews both spouses separately to assess "the intimacy and strength of the marriage," and reviews any discrepancies uncovered during these interviews to determine whether there is "cause for concern regarding the marital relationship." *Id.*

New Hope's caseworker and Executive Director then meet to discuss the entire contents of a family's case file and determine whether New Hope can endorse and certify that family. *Id.* This evaluation process takes into account both objective and subjective observations made by the agency and results in a written assessment of the family's suitability to adopt a child. OCFS: Administrative Directive, *supra*, at 7.

[3] New Hope also provides private foster care services. *See* JA31. Because the homestudy process is similar for both foster care and adoption, this brief will focus on adoption.

New Hope then works with its certified prospective adoptive parents to write and edit a "parent profile." JA28. New Hope adds this profile to a list of recommended couples that it shows to birthparents considering adoption. JA24. After a child is placed with an adoptive family, New Hope conducts multiple in-person visits to the home and each time creates a field report documenting the caseworker's impressions of the child's development and the relationships among the family members. JA30. The field reports and the original homestudy report together serve as New Hope's official recommendation and endorsement of the family during the adoption finalization process. *Id.*

ARGUMENT

I. New York's regulation compels New Hope to engage in speech and requires strict scrutiny.

"When speech is compelled, . . . individuals are coerced into betraying their convictions." *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018). For this reason, the First Amendment protects speakers from government attempts to "compel[] them to voice ideas with which they disagree." *Id.* (citation and quotation marks omitted). "[T]ime and again" the Supreme Court has confirmed that "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.* at 2463 (citation omitted). School children may remain silent during the Pledge of Allegiance, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); New Hampshirites can

cover the State motto—"Live Free or Die"—on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977); and pro-life pregnancy centers can refuse to distribute government-mandated information about abortion services to their clients, *National Institute of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2376 (2018). Indeed, the right to remain silent receives the same protection as the right to speak freely. *Riley*, 487 U.S. at 782.

Constitutional protection also extends beyond stand-alone "expressions conveying a 'particularized message.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995). In *Hurley*, private parade organizers sought to defend their right to control the content of their speech—specifically, the choice of what groups to include in their parade—and were successful at the Supreme Court. As the Court explained, "every participating unit [in the parade] affects the message conveyed by the private organizers." *Id.* at 572, 576. Accordingly, "the parade's overall message is distilled from the individual presentations." *Id.* at 577. To force the inclusion of a particular group in the parade would therefore "compromise[]" the "speaker's right to autonomy over the message." *Id.* at 576; *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974) (holding that a "right of reply" statute violated the First Amendment right to "editorial control and judgment" over the "choice of material to go into a newspaper.").

The Supreme Court has also made clear that regulations compelling speech must run the gauntlet of strict scrutiny. *See, e.g.*, *Wooley*, 430 U.S. at 716; *Riley*, 487 U.S. at 798 (regulation impairing speakers' First Amendment rights under the compelled speech doctrine could not survive "exacting First Amendment scrutiny"); *see also Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 244 (2d Cir. 2014) ("We therefore consider laws mandating speech to be . . . subject to strict or exacting scrutiny.") (cleaned up). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It is thus only in rare circumstances that a government regulation compelling private speech will be upheld.

Speech and expressive conduct constitute a core part of New Hope's adoption services. As described above, a homestudy requires far more than merely checking off "regulatory criteria" that are "set forth by the state." *New Hope Family Servs., Inc. v. Poole*, No. 5:18-CV-1419 (MAD/TWD), 2019 WL 2138355, at *12-13 (N.D.N.Y. May 16, 2019). Over the course of multiple lengthy sessions, New Hope caseworkers ask open-ended questions, document their subjective assessments of prospective adoptive families, and use this information to evaluate the applicants. They investigate the applicants' family dynamics, parenting philosophy, marital stability, "level of readiness" to adopt, psychological health, and the "strengths and needs" of each family member. *Household*

Composition and Relationships Form, OCFS Forms of Adoption, https://perma.cc/MJ6G-KQKD; JA27.

New Hope staff then meet to review this information and determine whether the agency can endorse the family's application. JA27. Afterwards, New Hope informs the family of its decision. Written notification is required by law. 18 N.Y.C.R.R. 421.15(e)(6); 18 N.Y.C.R.R. 421.15(g)(5). When rejecting an application, New Hope must "stat[e]" its "reason(s) for rejection." 18 N.Y.C.R.R. 421.15(g)(5). And if approving an application, New Hope must "prepare a written summary of the study findings." 18 N.Y.C.R.R. 421.15(e)(1).

New Hope also works hard to communicate a consistent Christian message across all its ministries, both to the families it supports and to the public. JA17, JA53 ("New Hope conveys a system of values about life, marriage, family and sexuality . . . through its comprehensive evaluation, training, and placement programs."). New Hope's curated messaging helps the agency differentiate itself from other private adoption providers and encourage faithful Christians (who might not otherwise choose to foster or adopt) to open their homes to young children in need, knowing they will be supported by an agency that shares their religious beliefs and values. JA16-JA17.

New Hope conveys this message in numerous ways. All of New Hope's paid staff and counseling volunteers are expected to counsel consistent with biblical truth. JA17. New Hope's board members pray at board

meetings. *Id.* All paid staff, board members, and counseling volunteers must sign a statement of faith and be willing to pray with any client who requests prayer. *Id.* New Hope also opens each orientation session in prayer and teaches prospective adoptive parents biblical principles like God's love for children. JA25. And all prospective adoptive parents are given a booklet highlighting many of New Hope's key Christian beliefs at the end of their first session. JA26.

One of New Hope's religious beliefs is that the biblical model of the family is the healthiest family structure for the upbringing of children. JA17-JA18. New Hope cannot endorse same-sex or unmarried couples as prospective adoptive families consistent with this religious belief. But instead of rejecting these applicants either during or after the homestudy process, New Hope has chosen to "remain humbly absent from the arena," referring them to other agencies that provide similar services. *See Burns*, 890 F.3d at 84. This hasn't stopped anyone from adopting a child in need and allows New Hope to continue helping children and birth parents find the help they need. JA32.

But New York's OCFS—disapproving of New Hope's religious beliefs—enacted a new policy that would compel New Hope to alter the content of its speech and "becom[e] the courier for [the government's] message." *Wooley*, 430 U.S. at 717; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("The danger that appellant will be required to alter its own message as a consequence of the government's

coercive action is a proper object of First Amendment solicitude, because the message itself is protected[.]"). Instead of remaining silent, New Hope would be forced by the State to speak—and to speak *only* an approved message: that of endorsement of same-sex and unmarried relationships. JA32.

This regulation would substitute New York's own beliefs for those of New Hope and force a private adoption agency to say something it does not believe. JA17-JA18, JA32, JA53; *All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev. (AOSI)*, 651 F.3d 218, 237 (2d Cir. 2011), *aff'd* 570 U.S. 205 (2013) (striking down a regulation that required private parties to "represent as their own an opinion . . . that they might not categorically hold"). New Hope would have to promote this message of endorsement through its homestudy reports, its multiple field reports, its written approvals to applicants, and its parent profiles. This message of endorsement would also be communicated to prospective adoptive families, birthparents, the State, and the general public.[4]

As in *Hurley*, New Hope's coherent Christian message is reflected in each adoption it facilitates and each family it endorses. Forced inclusion of individuals in relationships inconsistent with New Hope's sincere

[4] These expressive components of the homestudy and certification process distinguish this situation from other types of non-discrimination provisions, particularly run-of-the-mill applications of public accommodations laws that would prevent, for example, sexual orientation discrimination by shops selling train tickets or cups of coffee.

religious beliefs would fundamentally alter that message by requiring the agency to speak in favor of something it does not support. JA54. Such "[compelled] participation" would be a "severe intrusion" on New Hope's ability to speak its own message and promote its religious beliefs—both privately to its clients and publicly. *Burns*, 890 F.3d at 84.[5] New York is attempting to "prohibit the dissemination of ideas it disfavors" and "compel the endorsement of ideas it approves." *Knox v. Serv. Emps.*, 567 U.S. 298, 309 (2012). Its actions trigger strict scrutiny.

[5] It is no answer to claim that New Hope would only be required to make factual statements about applicants or that New Hope can certify same-sex or unmarried couples while separately disavowing support for the symbolic meaning tied to that certification. Putting aside the factual dispute over these claims, both arguments fail as a matter of law. First Amendment protections are not limited to statements of opinion. There is no difference between "compelled statements of opinion" and "compelled statements of 'fact,'" as "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 782. And the Supreme Court has made clear that external actions cannot be divorced from the internal acceptance of the principles they make manifest. *Barnette*, 319 U.S. at 633 (confirming that "the compulsory flag salute and pledge require[ ]" a corresponding "affirmation of a belief and an attitude of mind" and holding that these actions constitute compelled speech regardless of whether the students can "simulate assent by words without belief and by a gesture barren of meaning"). And even if it were clearly the *government's* endorsement of prospective families (which it is not), "a law that requires a speaker to [speak] on behalf of the government offends the Constitution *even if it is clear that the government is the speaker*." *Evergreen*, 740 F.3d at 250 (2d Cir. 2014) (emphasis added).

II. New Hope's assessment and endorsement of prospective adoptive families is private speech, not government speech.

New Hope is a private, voluntary adoption agency that does not accept any government funding. JA17. Yet the District Court concluded that New Hope's speech constituted government speech. *New Hope*, 2019 WL 2138355, at *12. This argument does not withstand even a cursory review of the caselaw.

Government speech arises in two contexts: when "the government is itself the speaker," and when the government funds "private speakers to transmit specific information pertaining to its own program." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001); *AOSI*, 651 F.3d at 236 (similar). Thus, in addition to controlling its own speech, "[w]hen the government disburses *public funds* to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added).

When the government engages in speech, it retains the right to determine what message it will convey. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("First Amendment strictures . . . do not apply" to government speech.). Courts justify this "latitude" by pointing out that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular

idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Velazquez*, 531 U.S. at 541-42.

That said, courts have been quick to note the limits of government speech, explaining that neither providing incidental benefits to a speaker nor funding *non-speech* activities can turn private speech into government speech. *See Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34, 37 (2d Cir. 2018) ("This principle does not apply, however, when a government program is not designed to 'promote a governmental message.'") (quoting *Velasquez*, 531 U.S. at 542). Thus, the government can engage in viewpoint discrimination *only* when it is funding the dissemination of its own message through private speakers. For example, Congress *can* prevent private speakers from accepting government money allocated to promote a specific message and then distorting that message, but Congress *cannot* reach beyond the funded speech to restrict that speaker's unfunded speech or conduct, even if closely related to the government speech. *See AOSI*, 570 U.S. at 210, 218.

The Supreme Court has also advised courts to exercise "great caution before extending [] government-speech precedents," citing the risk that "private speech could be passed off as government speech" and "silence[d]" by "simply affixing a government seal of approval." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239-40 (2d Cir. 2019) ("The Supreme Court has described the government speech doctrine as

susceptible to dangerous misuse.") (citation and quotation marks omitted); *Wandering Dago,* 879 F.3d at 37 (expanding the government speech doctrine "would empower government to place speech-related conditions on citizens' access to numerous essential public services").

Applied to New Hope, the government speech analysis is an easy one: New Hope is a private, voluntary adoption agency and it does not accept government funding. As neither the government[6] nor a government funding recipient, New Hope is not engaged in the government's speech and is protected by the First Amendment.

This conclusion does not change merely because New Hope is a licensed adoption provider. Both the Supreme Court and this Court have made clear that receipt of a government license or permit does not transform a private actor's speech into government speech. The Supreme Court in *NIFLA* recently held that a licensed (and heavily regulated) crisis pregnancy center was still engaging in private speech. 138 S. Ct. at 2371. Formal government registration or recognition is also insufficient to transform private speech into government speech. *See Matal*, 137

[6] Neither the District Court nor New York have claimed that New Hope is a state actor, and this conclusion rests on sound precedent. *See Husain v. Springer*, 494 F.3d 108, 134 (2d Cir. 2007) ("Extensive regulation and public funding, either alone or taken together, will not transform a private actor into a state actor[.]"); *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012) ("[A] private entity does not become a state actor . . . merely on the basis of the private entity's creation, funding, licensing, or regulation by the government.") (citations and quotation marks omitted).

S. Ct. at 1760 (rejecting the argument that government registration of a trademark turns private speech into government speech). Similarly, in *Hurley*, the Supreme Court noted that the parade organizers annually "applied for and received a permit for the parade," yet the Court did not question whether their speech was private. 515 U.S. at 560-61. And as this Court held in *Wandering Dago,* a state vendor's private speech "does not become speech of the government merely because the government . . . *in some way allows or facilitates it*" through a licensing or permitting program. 879 F.3d at 34 (emphasis added); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) ("[R]egulated speech is typically private speech, not government speech.") (Breyer, J., concurring).

Were a contrary rule to prevail, its implications would be staggering. Every architect, interior designer, massage therapist, creative arts therapist, midwife, and social worker, just to name a few, would be engaging in government speech—and thus lose any First Amendment protection—simply because their line of work requires a license. *See New York State Licensed Professions*, New York State Educ. Dep't, https://perma.cc/CR58-58V3; *PSEG Long Island LLC v. Town of N. Hempstead*, 158 F. Supp. 3d 149, 167 (E.D.N.Y. 2016) (rejecting the argument that the government can co-opt a public utility's speech because the utility is a "highly regulated" entity and explaining that this would allow the government to "circumvent the First Amendment rights

of non-government speakers simply by regulating their business activities").

New York does not fund New Hope nor any of its speech. The mere regulation or licensure of a private entity cannot transform it into a free government mouthpiece, forced to espouse a message with which it disagrees at no cost to the State.

III. Permitting New York to regulate New Hope's private speech will have enormous ramifications for free speech and religious liberty.

Allowing New York to force privately funded adoption agencies to alter the content of their speech and message would set dangerous precedent. Organizations would no longer enjoy the freedom to operate according to their own mission and beliefs. Rather, the state would have the power—by denying a license, refusing tax-exempt status, or withholding incidental government benefits—to force private entities to promote ideas or affirm beliefs with which they disagree. The implications of such a principle are far-reaching and alarming.

The government could compel Planned Parenthood to refer clients to pro-life pregnancy centers or adoption agencies—and pro-life pregnancy centers could be forced to point their clients to abortion providers, simply because both are licensed by the government. *Cf. NIFLA*, 138 S. Ct. at 2376 (enjoining a similar regulation on First Amendment grounds). A progressive political advocacy non-profit could be required to endorse Republican candidates or risk losing its state-granted tax-exempt status.

American Atheists could be forced to grant affiliate status to a religious institution or lose its tax-exempt status. And (because they have state permission to solemnize weddings), an Orthodox Jewish synagogue could be forced to marry interfaith couples while the Church of Jesus Christ of Latter-day Saints would have to recognize weddings conducted outside of a temple. These examples might seem far-reaching, but no less so than shutting down a private adoption agency on a government speech rationale.

The First Amendment is intended to protect and encourage a vibrant, diverse marketplace of ideas. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 354 (2010). Yet the District Court's holding does exactly the opposite, giving the government free rein over the content of private speech.

CONCLUSION

For the foregoing reasons, the Court should enjoin New York's challenged regulation and rule in favor of Appellant New Hope.

Respectfully submitted,

Date: August 22, 2019

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) and 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,571 words, according to the word-processing program used to prepare it.

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/s/ Lori H. Windham
Lori H. Windham

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 22, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

August 22, 2019

/s/ Lori H. Windham
Lori H. Windham