UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee

MEMORANDUM OF LAW FOR APPELLEE IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

New Hope Family Services ("New Hope") is a faith-based agency that operates, among other things, an adoption program in New York. It refuses to place children for adoption with unmarried cohabitating couples and same-sex couples. It thereby operates in violation of a regulation of the New York State Office of Children and Family Services ("OCFS") that prohibits adoption agencies (public and private) from discriminating against applicants for adoption services on the basis of, among other things, sex, sexual orientation, gender identity or expression, and marital status.

In this action under 42 U.S.C. § 1983, New Hope challenges the regulation as applied, arguing that it violates its rights of religion, speech and association under the First Amendment, and also its right to equal protection. After its complaint was dismissed for failure to state a claim, it appealed. And solely on the basis of its First Amendment claims, New

Hope now seeks a preliminary injunction pending appeal that would enjoin OCFS from enforcing its nondiscrimination regulation against it.[1]

The Court should deny the motion because New Hope cannot show a likelihood of success on appeal on any of its First Amendment claims.

BACKGROUND

A. Factual Background

New Hope operates an authorized adoption program that primarily places infants and toddlers up to age two. (Complaint ¶ 76.[2]) It also operates a pregnancy resource center that encourages pregnant women to choose parenting or adoption over abortion. (Complaint ¶¶ 58-62). Some of the birth mothers whose infants New Hope places for adoption come to New Hope through its pregnancy resource center. (Complaint ¶¶ 68, 75.)

In September 2018, OCFS learned that New Hope refuses to provide adoption services to unmarried and same-sex couples, in

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[1] Indeed, in its recently filed merits brief, New Hope has abandoned its equal protection claim.

[2] All of the record documents cited herein are attached as exhibits to New Hope's motion or to the accompanying declaration of Laura Etlinger, where so indicated.

violation of its regulation prohibiting such discrimination. *See* N.Y. Code Rules & Reg., tit. 18, ("18 N.Y.C.R.R.") § 421.3(d). OCFS thus notified New Hope that its practice violated state regulation and was impermissible. (Complaint ¶ 10.) The notice also directed New Hope to file a formal written response identifying whether it intended to come into compliance or to submit a close-out plan for its adoption program. *Id.*

Instead of responding, New Hope commenced this litigation, arguing that the regulation as applied violated its First Amendment rights and its right to equal protection. New Hope also promptly moved for preliminary injunctive relief. OCFS thereupon moved to dismiss the complaint for failure to state a claim and opposed the request for injunctive relief.

On May 16, 2019, the U.S. District Court for the Northern District of New York (D'Agostino, J.), rejected New Hope's constitutional claims, granted OCFS's motion to dismiss, and dismissed the motion for a preliminary injunction as moot. (Decision and Order, at 42.)

New Hope appealed and thereafter sought an agreement from OCFS that would allow it to continue specified adoption activities at least

as long as the appeal remained pending. *See* Etlinger Dec. Ex. A. While OCFS initially considered such an agreement and even proposed specified terms, it ultimately determined that it could not countenance continued discrimination by New Hope, even pending appeal.[3] Accordingly, on August 9, 2019, OCFS sent New Hope a second notice of noncompliance directing New Hope within fifteen days either to confirm that it would come into compliance with the nondiscrimination regulation or to submit a plan to close out its adoption program. (Etlinger Dec. Ex. B.) As New Hope recognizes, OCFS thereafter clarified that a close-out plan would not result in immediate closure of New Hope's program; rather, New Hope was to submit a proposal specifying the steps it intended to take to cease operation of its adoption program within a reasonable time period (typically 90 days or as extended). (Motion Ex. G.)

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[3] Contrary to New Hope's claim (Motion at 6), OCFS's motion to remove the appeal from the expedited appeals calendar did not rest on the status of those negotiations. OCFS only referenced those negotiations in connection with its alternative request for an extension to file its brief. *See* Etlinger Dec. Ex. C, ¶ 14.

This emergency motion for a preliminary injunction seeking to enjoin OCFS from enforcing its nondiscrimination regulation pending appeal followed.

B. Statutory and Regulatory Framework

The State has a vital interest in ensuring that prospective adoptive parents provide safe and appropriate homes for adopted children, and that adoptive placements serve each child's best interests. N.Y. Domestic Relations Law ("DRL") § 114(1); *see also* 18 N.Y.C.R.R. 421.2(a). In furtherance of these interests, the State stringently regulates those who provide authorized adoption services while implementing standards and criteria pursuant to which adoption services are provided and placement decisions are made.

Only a public or private "authorized agency" may provide adoption services. N.Y. Soc. Sec. Law ("SSL") § 374(2). An "authorized agency" is an agency organized under New York law with corporate authority to care for children, place out children for adoption, or board out children for foster care. SSL § 371(10). Authorized agencies thus exercise significant authority under New York law in administering adoption services. They accept applications from prospective adoptive parents,

conduct adoption studies regarding applicants' suitability to serve as adoptive parents based on specified factors, *see* 18 N.Y.C.R.R. §§ 421.13, 421.15, 421.16, and applying regulatory standards, approve or disapprove applicants for adoption, *id.* § 421.15(g). The decisions of authorized agencies disapproving applicants are subject to fair-hearing review before OCFS. *See* SSL § 372-e(4). State law also vests authorized agencies with authority to accept surrender of a child from its parents, and thereby transfer legal custody and guardianship of a child to the authorized agency. SSL § 384; 18 N.Y.C.R.R. § 421.6. An authorized agency chooses a prospective adoptive home for the child, making a decision on the basis of the "best interests" of the child, taking into consideration the factors specified in 18 N.Y.C.R.R. § 421.18(d). Guardianship and legal custody of the child remain with the authorized agency during any period of supervised pre-adoptive placement. DRL § 113(1); SSL § 383(2). And critically, the adoption agency's consent is required to complete an adoption for a child the agency has placed. DRL § 113. The district court thus rightly characterized New Hope's adoption activities as involving the "administ[ration] of public services." (Decision and Order, at 42.)

An authorized agency's adoption activities are also subject to significant government oversight. A private adoption agency's certificate of incorporation is subject to OCFS approval, SSL § 460-a(1), and all of its adoption activities are subject to approval, visitation, inspection and supervision by OCFS, DRL § 109; SSL § 371(10).

Thus, under the statutory scheme, an authorized agency wields significant authority and occupies a special status in approving applicants, exercising guardianship and custody of a child, and choosing a safe and appropriate adoptive home.

C. OCFS's Nondiscrimination Regulation

In 2013, OCFS promulgated a series of regulatory amendments designed to eliminate discrimination on the basis of sexual orientation and gender identity in "essential social services." N.Y. State Register (Nov. 6, 2013), at 3.[4] One of these amendments enacted the regulatory provision at issue here prohibiting authorized adoption agencies from "discrimination and harassment against applicants for adoption services

[4] Available at https://docs.dos.ny.gov/info/register/2013/nov6/pdf/rulemaking.pdf.

on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d); *see also* N.Y. Human Rights Law § 296(2)(a) (prohibiting discrimination in the provision of public accommodations on the same bases as OCFS's regulation).

And with respect to the specific protected characteristics that New Hope's discriminatory policy targets—marital status, sex and sexual orientation—New York law has long recognized that none of these characteristics "may alone be determinative in an adoption proceeding." *In re Jacob*, 86 N.Y.2d 651, 663, 667 (1995). Indeed, state law was amended in 2010 to confirm the ability of unmarried and same sex-couples to adopt. *See* N.Y. Laws 2010, c. 509 (*codified at* DRL § 110).

ARGUMENT

THE COURT SHOULD DENY THE MOTION FOR A PRELIMINARY INJUNCTION FOR FAILURE TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Generally, a party seeking a preliminary injunction must show (1) irreparable harm, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking the injunctive

relief. *Covino v. Patrissi,* 967 F.2d 73, 76-77 (2d Cir. 1992). Here, however, because New Hope seeks to stay "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," it may not obtain an injunction by meeting that second less rigorous "serious questions" standard. *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) (internal quotation omitted). As the Court has explained, "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). And New Hope has not demonstrated the requisite likelihood of success on any of its First Amendment claims.

A. New Hope Cannot Demonstrate a Likelihood of Success on its Free-Exercise Claim.

New Hope's religious beliefs do not excuse it from complying with a neutral, generally-applicable regulation, even if the regulation prescribes conduct that its religion proscribes. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990). As the Supreme

Court recently explained, while religious and philosophical objections to specified conduct are protected, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018). New Hope acknowledges as much by arguing only that OCFS's regulation is not generally applicable and that its enforcement is motivated by religious animosity. (Motion, at 11-17.) As the district court properly found, New Hope's allegations do not support that claim.

First, the regulation is by its terms general in application. *All* private and public adoption agencies must "prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d). And contrary to New Hope's argument (Motion, at 12), the statutory and regulatory scheme for adoption contains no exception to OCFS's nondiscrimination regulation. The scheme thus does not "in a selective manner impose burdens only on conduct motivated by religious

belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 543 (1993) (considering targeted nature of prohibition together with secular exception to prohibition as evidence of religious gerrymandering).

The provisions on which New Hope relies (and that it mischaracterizes in any event) create no exceptions to the nondiscrimination regulation. Rather, they allow an agency making a placement determination to consider various factors (including religion) to further the interest in obtaining for each child the most appropriate placement from the pool of approved applicants. For example, state law favors placing a child with adoptive parents of the same faith "when practicable" and honoring a religious preference of the birth mother "when practicable" and in the child's best interest. SSL § 373(2) and (7) (derived from N.Y. Const. art. VI, § 32). In like manner, 18 N.Y.C.R.R. § 421.18(d) allows consideration of "the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet

the needs of the child with such a background" as part of an agency's best-interest placement decision.[5]

As the Third Circuit recently explained in rejecting a challenge similar to New Hope's, there are significant differences between prohibiting agencies from refusing to serve unmarried and same-sex applicants and allowing agencies to consider protected characteristics in placement decisions in order "to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Fulton v. Philadelphia,* 922 F.3d 140, 158 (3d Cir. 2019).

The district court correctly applied the same reasoning here. (Decision and Order, at 24-25).

Moreover, New Hope does not plausibly allege that OCFS's nondiscrimination regulation was motivated by religious hostility. As the

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[5] The two additional provisions New Hope cites simply allow for priorities in recruiting from certain communities or processing applications based on applicants' matching various characteristics of the majority of children available for adoption. *See* 18 N.Y.C.R.R. §§ 431.10(a), 421.18(a)(1). Finally, New Hope cites to the prior version of DRL § 110 for the proposition that state law limits adoption on the basis of marital status. But not only did the Court of Appeals interpret that statute more broadly in *In re Jacob,* 86 N.Y.2d 651, the statute was amended in 2010 to expressly remove references to any such limitation. *See* N.Y. Laws 2010, c. 509.

Court has explained, a litigant challenging the neutrality of a generally applicable and rational law must demonstrate the absence of a neutral, secular basis for the lines the government has drawn. *See Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (2d Cir. 2012). As explained, *supra* at 9, OCFS adopted the challenged regulation as part of a regulatory package that had the neutral and rational purpose of eliminating discrimination on the basis of sexual orientation and gender identity in essential social services, a quintessentially valid public purpose. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

Nor do New Hope's remaining allegations give rise to an inference that OCFS applied its regulation in a manner hostile toward religion. New Hope primarily relies on the allegations that (1) OCFS by December 2018 removed from its website the names of several voluntary faith-based agencies authorized at the start of year to make adoption placements, some of which may share New Hope's views on cohabitating and same-sex couples, and (2) OCFS officials made four statements indicating they would not tolerate discriminatory policies.

As to the first allegation, any alleged disparate impact of the regulation on religiously-affiliated agencies flows not from any hostility to religion, but rather from the fact that social services agencies with similarly discriminatory policies often have religious affiliations. After all, there is a long history of social service by religious institutions, as well as a history of opposition by certain religious groups to cohabitation outside of marriage and same-sex marriage. *See, e.g.,* Human Rights Campaign, Religion and Faith: Faith Positions, *available at* https://www.hrc.org/resources/faith-positions. Critically, New Hope has not alleged that OCFS allows agencies to discriminate against unmarried or same-sex couples for secular reasons. As the Third Circuit explained in *Fulton,* "a challenger under the Free Exercise Clause must show that it was treated differently *because of* its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Fulton*, 922 F.3d at 154. And like the plaintiff agencies in *Fulton*, New Hope has failed to allege that discrimination against unmarried or same-sex couples is tolerated when based on secular grounds. As in that case, then, the fact that "[New Hope's] conduct

springs from sincerely held and strongly felt religious beliefs does not imply that [OCFS's] desire to regulate that conduct springs from antipathy to those beliefs." *Id.* at 159.

As to the allegations involving statements by OCFS officials, which New Hope quotes in its complaint but misleadingly describes in its motion papers, they establish only that OCFS does not tolerate discrimination, whatever its source. New Hope alleges four statements for this purpose: (1) a statement by an OCFS spokesperson that "[t]here is no place for providers that choose not to follow the law" (Complaint ¶ 204); (2) a statement that the regulatory amendments that included the nondiscrimination regulation at issue were intended to "eliminate archaic regulatory language" (Complaint ¶ 166); (3) a statement in a policy directive that "OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent" (Complaint ¶ 164); and (4) a staff member's reference to the fact that "[s]ome Christian ministries have decided to compromise and stay open." (Complaint ¶ 192). Contrary to New Hope's argument (Motion, at 16 n.2), these statements do not resemble the statements of the adjudicatory

administrators that the Supreme Court found problematic in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1729. Unlike those problematic statements, which evinced an "animosity to religion or distrust of its practices," *id.* at 1731, the statements at issue here are neutral toward religion and indicate only that OCFS will not tolerate discriminatory action in contravention of its regulation.

New Hope thus cannot show a likelihood of success on its free-exercise claim.

B. New Hope Cannot Demonstrate a Likelihood of Success on its Free-Speech Claim.

New Hope cannot demonstrate a likelihood of success on its free-speech claim for either of two reasons: First, the regulation does not, as New Hope insists, compel speech, but rather regulates New Hope's conduct—the provision of nondiscriminatory services. Indeed, New Hope has not alleged, and the record does not show, that OCFS will enforce the regulation to restrict any aspect of New Hope's speech, even in connection with its provision of services. Second, even if it the regulation restricted New Hope's speech, it would do so only within the contours of the

provision of regulated public services, and thus would not run afoul of New Hope's free-speech rights.

The Supreme Court has made clear that an equal-access requirement "regulates conduct, not speech." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) ("*FAIR*") (upholding a law requiring that law schools grant military recruiters equal access to their campuses). Like the law upheld in *FAIR*, the nondiscrimination regulation "affects what [adoption agencies] must *do*—afford equal access to [applicants protected by the law]—not what they may or may not *say*." *Id.* (emphasis in original). Its only function is to ensure that providers of adoption services—like appellant—not exclude qualified prospective adoptive parents from its services.

The Supreme Court has also explained that such equal-access laws do not regulate speech: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62. Similarly here, New Hope cannot through its discriminatory policy in effect

proclaim, "Single and Married Heterosexual Applicants Only." By prohibiting New Hope from discriminating in its provision of services, OCFS regulates conduct, not speech.

The effect of OCFS's nondiscrimination regulation further confirms that the regulation addresses conduct, not speech. It requires New Hope to exercise its statutory powers in a manner that is neutral toward marital status and sexual orientation. It thus regulates New Hope's *conduct* in approving adoption applicants and making placement decisions; it does not compel New Hope "to disseminate an ideology" with which it disagrees. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713-14 (1977) (individual may not be forced to disseminate state's ideological message on his license plate). The other cases New Hope cites are distinguishable because they similarly involve government-mandated speech. *E.g., Pac. Gas & Elec. Co. v. Pub. Util. Com.*, 475 U.S. 1, 18 (1986) (requiring access to content-based message); *Evergreen Ass'n Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (requiring posting of specified information).

To the extent New Hope argues that complying with the regulation would dilute its message, its claim fares no better because any such effect on New Hope's speech is incidental to the regulation of New Hope's

conduct. And "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Natl. Inst. of Family & Life Advocates v Becerra*, 138 S. Ct. 2361, 2373 (2018) (internal quotation omitted); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (rejecting First Amendment challenge to requirement of specific informed-consent language because it regulated speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State").

Indeed, New Hope does not allege that OCFS has ever sought to enforce its regulation by restricting New Hope's speech, as opposed to its conduct. Rather, OCFS's enforcement actions have thus far been directed only at New Hope's conduct—its refusal to place children with unmarried and same-sex couples. New Hope alleges no facts—let alone submits with its motion evidence to support any such allegations—suggesting that OCFS intends to regulate New Hope's speech in the absence of discriminatory conduct. Indeed, the district court thought it likely that the regulation did not address such speech. (Decision and Order, at 29-30.) New Hope thus cannot obtain an injunction on the ground that the regulation impermissibly restricts its speech.

Second, and in any event, OCFS's regulation does not in fact purport to restrict New Hope's speech unrelated to its provision of adoption services, and any restriction on New Hope's speech in connection with its delivery of adoption services would flow from the fact that New Hope has "chosen to partner with the government to help provide what is essentially a public service." *Fulton,* 922 F.3d at 161.

Adoption services are provided only by operation of an adoption agency's special status as an authorized agency imbued with statutory authority to wield significant influence over the creation of familial relationships, one of the most powerful legal structures in people's lives. Thus, notwithstanding that New Hope operates as a privately-funded agency, the rule regarding speech restrictions in government programs is instructive. In that context, the Supreme Court has distinguished situations in which the government defines the contours of a government program, which is permissible, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), from those in which the government requires a program participant to espouse the government's message on its "own dime and time," which runs afoul of the free speech clause, *Agency for Intl. Dev. v. Alliance for Open Socy. Intl., Inc.*, 570 U.S. 205, 218-19 (2013). Here, OCFS has

merely defined the contours of the regulated services—applicants may not be rejected and placement decisions may not be made on the basis of protected characteristics. New Hope is not precluded from espousing its beliefs about marriage and family, including by advocating for adoptions by married heterosexual couples, outside the contours of its adoption program. The nondiscrimination regulation thus does not impermissibly regulate New Hope's speech.

C. New Hope Cannot Demonstrate a Likelihood of Success on its First Amendment Association Claim.

New Hope cannot demonstrate a likelihood of success on its claim that the nondiscrimination regulation violates its expressive association rights by requiring it to include unmarried and same-sex couples in its group sessions and recommend such couples as adoptive parents.

In support of its claim, New Hope relies primarily on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). That reliance is misplaced. *Dale* involved the associational rights of the Boy Scouts, whose primary mission is "to instill values in young people." *Id.* at 649. The *Dale* Court held that because the Boy Scouts' members came together specifically for "expressive association," application of a state nondiscrimination law so

as to require the reinstatement of a homosexual scoutmaster violated the Boy Scouts' association rights. *Id.* at 648. In contrast here, New Hope is not open to membership and it was not organized for the purpose of engaging in expressive activities. Its primary mission is to provide adoption services under state law. (*See* Complaint Ex. 2 (certificate of incorporation).) "To the extent that the [nondiscrimination regulation] restricts the activities of charitable or religious groups, it places limits on the non-expressive *conduct* in which they may engage, rather than on their right to associate for the purpose of expressing their views." *United States v. Thompson*, 896 F.3d 155, 165 (2d Cir. 2018).

To be sure, requiring New Hope to provide equal access to its services without regard to marital status or sexual orientation will compel it to associate with unmarried and same-sex couples in the sense of interacting with them for purpose of assisting them to become adoptive parents. But just as the right of association was not infringed by a rule requiring law schools to interact with military recruiters by allowing them on campus and providing the same incidental services provided to other recruiters, *see FAIR*, 126 S. Ct. 1297, New Hope's right of association is not infringed here. That right is infringed only when an

organization is forced to alter its selection of members or constituents, interfering with the critical means by which a group "express[es] those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. "Mere incidental burdens on the right to associate do not violate the First Amendment; rather, to be cognizable, the interference with plaintiffs' associational rights must be direct and substantial or significant." *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (internal quotation and alteration from original omitted). Here, they are neither.

Although New Hope proclaims a viewpoint about the marital status and sexual orientation of adoptive parents, it does not accept those individuals as members of its organization merely by providing services to them as required by state law. Such transactional association does not directly or substantially interfere with New Hope's associational rights.

Finally, OCFS is not enforcing its nondiscrimination regulation for the very purpose of altering New Hope's expression. OCFS's enforcement merely "assur[es] its citizens equal access to publicly available goods and services"—a goal "which is unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624 (rejecting challenge to application of equal-

access law that required Jaycees to include women as full voting members). Thus, even if the nondiscrimination regulation impacts New Hope's right to expressive association in some way, enforcement of the regulation would not unconstitutionally violate that right.

D. The Balance of Hardships Favor OCFS's Enforcement of the Nondiscrimination Regulation.

Because New Hope cannot establish a likelihood of success on the merits, the Court should deny New Hope's motion on that ground alone. But New Hope is not entitled to a preliminary injunction for the additional reason that the balance of the hardships weighs against it. Although New Hope has proposed interim relief under which it would not accept any new potential parents for adoption services pending appeal, all of the unmarried and same-sex couples who were previously excluded from New Hope's services, as well as those couples who refrained even from seeking services from New Hope on account of its discriminatory policy, would continue to be excluded from the opportunity to adopt any of the children New Hope is in a position to place. The hardship from precluding full enforcement of the nondiscrimination policy is thus not illusory. And the strong public interests that weigh in favor of equal-

access to public services balances the hardships in favor of enforcement. Accordingly, even under the traditional test, the injunction should be denied.

CONCLUSION

The motion seeking a preliminary injunction should be denied.

Dated: Albany, New York
August 23, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for

By: _____
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BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
LAURA ETLINGER
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Laura Etlinger, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4600 words exclusive of cover and tables and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Laura Etlinger

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee

DECLARATION OF LAURA ETLINGER IN OPPOSITION TO APPELLENT'S MOTION FOR A PRELIMINARY INJUNCTION

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family ("appellee" or "OCFS").[1]

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[1] At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She was subsequently appointed to serve as Commissioner of the agency.

2. I submit this declaration in opposition to New Hope's motion for a preliminary injunction, seeking to enjoin OCFS from enforcing its nondiscrimination regulation as to New Hope's regulated adoption program. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. I submit the following documents, consisting of copies of correspondence between the parties and their counsel and filed documents, in support of OCFS's opposition to appellant's motion.

a. Exhibit A: Letter from R. Brooks to A. Kerwin, dated July 3, 2019;
b. Exhibit B: Letter from L. Ghartey Ogundimu to K. Jerman, dated August 9, 2019;
c. Exhibit C: OCFS Motion to Remove Appeal from Expedited Appeal Calendar.

Dated: Albany, New York
August 22, 2019

/s/ Laura Etlinger
LAURA ETLINGER
Assistant Solicitor General

Exhibit A

ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

July 3, 2019

Via Email & First Class Mail

Adrienne Kerwin, Assistant Attorney General
99 Washington Ave., 2nd Floor
Albany, New York, 12210

Re: *New Hope Family Services, Inc. v. Poole*; NDNY Case No. 5:18-cv-04519

Dear Ms. Kerwin,

Now that we have filed our notice of appeal, I wanted to follow up on our earlier conversation. When we last spoke, you indicated you believed we had a prior "agreement" that New Hope would not take on new clients and that the State would not act to revoke New Hope's authorization to provide adoption and fostering-related services while we litigate the PI motion. Based on my recollection, though, and after looking back at our correspondence, I don't believe we have directly addressed this question before. In your opposition brief dated January 4, 2019, the State represented that "OCFS has no plans to interfere with New Hope's current legal custody of three children, or the placement of those children." (Opp'n Mem. at 11 n. 11.) But the State has not given any assurances regarding New Hope's work with its adoptive families, nor with respect to birthmothers who specifically request New Hope's assistance while the PI litigation is pending.

As New Hope detailed in its preliminary injunction papers, if it is unable to respond to these requests and commitments, New Hope and the individuals it serves will suffer harm that will be difficult or impossible to remedy. Obviously, the district court dismissed New Hope's claim and therefore did not consider New Hope's request for a preliminary injunction on the merits. We believe the district court erred and that this error stands a reasonable chance of being reversed on appeal. If we prevail on appeal, New Hope's request for a preliminary injunction will be renewed.

All that will proceed in an orderly manner. In the meantime, as I suggested when we spoke, if possible, we would like to avoid needlessly burdening your office, our office and the courts with briefing and deciding emergency motions for temporary protection pending appeal of the recent ruling. If the State will agree not to revoke New Hope's authorization until either the dismissal is affirmed *or* a substantive ruling on New Hope's preliminary injunction motion has been entered,

there will be no need for collateral litigation over maintaining the status quo during these appellate proceedings.

Please let me know your thoughts. In the meantime, I hope you enjoy a pleasant Fourth of July holiday.

Best Regards,

s/ Roger G. Brooks
Roger Brooks
Attorney for Plaintiff

Exhibit B

9171 9690 0935 0054 4740 21

NEW YORK STATE | Office of Children and Family Services

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Commissioner

August 9, 2019

Kathy Jerman
Executive Director
New Hope Family Services
3519 James Street
Syracuse, NY 13206

Dear Ms. Jerman:

The New York State Office of Children and Family Services (OCFS) is writing in furtherance of its letter, dated October 16, 2018, which informed New Hope Family Services (New Hope) of its determination that New Hope's policy precluding the placement of children with same sex couples or unmarried cohabitating couples was discriminatory and impermissible. That letter directed New Hope to submit a formal written response identifying whether it was going to revise its policy and practices to come into compliance with 18 NYCRR 421.3, or if it intended to submit a close-out plan for its adoption program.

By decision dated May 16, 2019, United States District Court Judge Mae D'Agostino determined that "OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services" and found that New Hope had failed to plausibly state a claim alleging an infringement of its right to free exercise of religion. As stated previously, OCFS cannot continue to approve New Hope's adoption program if it does not bring its policy and practices into compliance with the above-cited regulation.

Accordingly, please submit confirmation that New Hope will come into compliance with the regulation, or a plan to close New Hope's adoption program, within 15 calendar days of receipt of this letter. If New Hope chooses to close its adoption program, OCFS will provide all necessary guidance and assistance to ensure minimal disruption to children and families receiving adoption services.

Sincerely yours,

Lisa Ghartey Ogundimu
Deputy Commissioner
Child Welfare and Community Services

cc: Roger G. Brooks, Esq.

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

No. 19-1715

v.

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

Defendant-Appellee

DECLARATION OF LAURA ETLINGER IN SUPPORT OF MOTION TO REMOVE THE APPEAL FROM THE EXPEDITED APPEAL CALENDAR

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family ("appellee" or "OCFS").[1]

---

[1] At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She

2. I submit this declaration in support of appellee's motion pursuant to Local Rule 31.2(b)(2) to remove the appeal from the Expediated Appeal Calendar ("XAC") or, in the alternative, to extend the time for the filing of appellee's brief in this matter. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. As explained below, this appeal is not well-suited to expedited review for two reasons: (1) the appeal involves constitutional issues that implicate important public policies and merit sufficient time for briefing, argument, and decision, and (2) the District Court dismissed the complaint following a full substantive review of the merits of appellant's constitutional claims, which is not the type of dismissal for which the XAC was developed.

4. Appellant New Hope Family Services ("New Hope") is a faith-based not-for-profit agency that operates, among other things, an adoption program in New York State. New Hope commenced this action pursuant to 42 U.S.C. § 1983 to challenge an OCFS regulation that

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was subsequently appointed to serve as Commissioner of the agency.

prohibits public and private adoption agencies from discriminating against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. *See* N.Y. Code Rules & Reg., tit. 18, ("18 N.Y.C.R.R.") § 421.3(d). Dist. Ct. No. 18-cv-01419, ECF No. 1.[2] New Hope maintains a policy of not placing children with adoptive couples who are unmarried or of the same sex. Dist. Ct. No. 18-cv-01419, ECF No. 1, at 24. Upon learning of this policy during an on-site review, OCFS advised New Hope that if it failed to bring its policies into compliance with the non-discrimination regulation, OCFS would be unable to approve continuation of New Hope's adoption program. Dist. Ct. No. 18-cv-01419, ECF No. 1-7, at 3. New Hope then commenced this action, seeking a permanent injunction prohibiting enforcement of the non-discrimination regulation to its adoption program, claiming the regulation violates its free exercise, free speech, and equal protection rights and constitutes an unconstitutional condition. Dist. Ct. No. 18-cv-

[2] Citations to the record are to documents filed with the District Court in Docket No. 18-cv-01419 or with this Court in Docket No. 19-1715. Documents are referred to by document number and page in the courts' electronic court filing ("ECF") systems.

01419, ECF No. 1, at 24, 40, 44, 46, 48.

5. Immediately after commencing this action, New Hope filed a motion for a preliminary injunction. Dist. Ct. No. 18-cv-01419, ECF No.15. Shortly thereafter, OCFS moved to dismiss the complaint for failure to state a claim on the ground that the neutral, generally-applicable non-discrimination regulation could be constitutionally applied to New Hope's adoption program as a matter of law. Dist. Ct. No. 18-cv-01419, ECF Nos. 34, 34-1. In a thorough, 42-page decision, the District Court for the Northern District of New York (D'Agostino, J.) rejected all New Hope's constitutional claims on the merits, holding that the OCFS non-discrimination regulation could be constitutionally applied to New Hope's adoption program. The court accordingly denied the motion for a preliminary injunction and dismissed the complaint. Dist. Ct. No. 18-cv-01419, ECF No.38.

6. New Hope filed its notice of appeal on June 10, 2019. Dist. Ct. No. 18-cv-01419, ECF No. 40. On July 11, 2019, this Court issued a Notice of Expedited Appeal, placing the appeal on the Court's XAC, and directing that New Hope's opening brief be due by August 15, 2019 and appellee OCFS's brief be due by September 19, 2019. Second Cir. No.

19-1715, ECF No. 34.

7. There is good cause to remove this appeal from the XAC. First, the constitutional issue presented—whether a non-discrimination regulation may be constitutionally applied to a not-for-profit agency engaged in the regulated, public service of facilitating adoptions—involves important matters of public policy. The importance of this issue is demonstrated by the fact that fifteen amici briefs were filed in connection with a recent Third Circuit appeal involving an analogous issue—whether a similar non-discrimination policy may be constitutionally applied to a foster-care program operated by a faith-based not-for-profit agency. *See Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019). In addition, the plaintiff not-for-profit agency in that case has recently filed a petition for certiorari seeking review in the U.S. Supreme Court of the Third Circuit's decision rejecting its constitutional challenges to application of the non-discrimination policy. *See Fulton v. City of Philadelphia*, Supreme Court Docket No. 19-123 (pet. for cert. filed July 22, 2019).

8. Although plaintiff's appeal is from a judgment dismissing the complaint for failure to state a claim, that dismissal was based on a

full review of the merits of appellant's constitutional claims and application of substantive law, rather than a review of whether the allegations of the complaint satisfy pleading standards. Thus, the appeal does not involve the type of dismissal for which the XAC was designed. *See* Hon. Jon O. Newman, *Report: The Second Circuit's Expedited Appeals* 80 Brook. L. Rev. 429, 429-30 (2015) (stating that the Court's XAC was instituted in the aftermath of Supreme Court decisions requiring a more rigorous pleading standard so that cases in which the new pleading standards were deemed to have been improperly applied could be returned more quickly to the district court).

9. For these reasons, OCFS respectfully submits that there is good cause to remove this appeal from the XAC in order to allow sufficient time for the important constitutional issues presented by this appeal to be briefed, argued, and decided.

10. In the alternative, if the appeal is not removed from the XAC, appellee OCFS respectfully requests that it be granted a 30-day extension of the deadline for its brief, to October 21, 2019.

11. An extension is needed because it would be extremely difficult for my office to adequately research the issues and prepare a

brief within the timeframe contemplated under the current briefing schedule.

12. My own schedule is especially busy from now through mid-September, when among other work I will be preparing four other appellate briefs and presenting oral arguments in three appeals, including one in this Circuit and one in the New York Court of Appeals. Moreover, reassigning this matter to someone else is not feasible, as my office is currently short three attorneys due to extended family leaves and a recent departure.

13. In addition, the brief in this matter will require review by both a deputy solicitor general and the New York Solicitor General. The current expedited briefing schedule does not allow sufficient time for the necessary review process to take place.

14. Finally, New Hope has been able to continue to engage in some adoption service activities, even though its motion for a preliminary injunction was denied. Indeed, during the pendency of the litigation in District Court, OCFS permitted New Hope to continue to engage in certain of its adoption program services. *See* Dist. Ct. No. 18-cv-01419, ECF No. 32, at 4. And the parties are currently negotiating a

more formal partial stay of OCFS's enforcement activities, which would allow New Hope to engage in specified adoption activities during the pendency of this appeal.

15. Accordingly, for all of these reasons, OCFS respectfully requests that the Court remove this appeal from the XAC or, in the alternative, that the Court grant OCFS a 30-day extension to file its brief, to October 21, 2019.

Dated: Albany, New York
July 29, 2019

/s/ Laura Etlinger
LAURA ETLINGER
Assistant Solicitor General