

19-1715

United States Court of Appeals for the Second Circuit

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

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.

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

BRIEF FOR APPELLEE

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Dated: October 21, 2019

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PRELIMINARY STATEMENT

A New York State regulation prohibits public and private agencies that provide adoption services from discriminating against unmarried cohabitating couples or same-sex couples in the provision of those services. Plaintiff-appellant New Hope Family Services (“New Hope”) is a faith-based private agency that provides adoption services, but refuses to place children for adoption with unmarried cohabitating couples or same-sex couples. In this action under 42 U.S.C. § 1983, New Hope claims that its First Amendment rights to free exercise, free speech and expressive association allow it to discriminate in this manner and, thus, prevent the State from enforcing its nondiscrimination regulation against it. The United States District Court for the Northern District of New York (D’Agostino, J.) disagreed, dismissed the complaint for failure to state a claim, and denied injunctive relief. For the reasons set forth below, this Court should affirm.

QUESTIONS PRESENTED

1. Whether the complaint fails to state a free-exercise claim on the ground that, on its face and in operation, the challenged nondiscrimination regulation is a valid and neutral law of general application.

2. Whether the complaint fails to state a free-speech claim on the grounds that the challenged nondiscrimination regulation regulates conduct, not speech, and any effect on New Hope's speech is in any event incidental to its prohibition of discriminatory conduct and occurs only within the contours of the provision of regulated public services.

3. Whether the complaint fails to state an expressive-association claim on the grounds that New Hope's provision of adoption services does not implicate an expressive-association right and any incidental burden on such a right would in any event be constitutional in light of the State's compelling interest in prohibiting nondiscrimination.

4. Whether, in the event the Court nonetheless reinstates any of these claims, it should remand to the district court for a ruling on the motion for a preliminary injunction in the first instance.

STATEMENT OF THE CASE

A. 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* N.Y. Comp. Codes R. & Regs. tit. 18 ("18 N.Y.C.R.R.") § 421.2(a) (explaining need to place children where they will have the opportunity for growth, development, and parental guidance). In furtherance of these interests, the State stringently regulates those who provide authorized adoption services according to established standards and criteria. Although it may well be that historically adoptions were arranged by private parties with little government oversight, that system was long ago replaced with a highly regulated regime in which the State partners with both public and private entities.

Only a public or private "authorized agency" may provide adoption services in New York.¹ N.Y. Social Services Law ("SSL") § 374(2). An

¹ Private placement adoptions are allowed in New York and are separately regulated. Those situations do not involve adoptive services.
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“authorized agency” is an agency organized under New York law with corporate authority to care for children, place out children for adoption or care, or board out children for foster care. SSL § 371(10).

The statutory scheme bestows significant authority on authorized agencies. Authorized agencies 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 approve or disapprove applicants for adoption based on applicable regulatory standards, *id.* § 421.15(g). State law also vests authorized agencies with authority to accept surrender of a child from its parents, which transfers legal custody and guardianship of the child to the authorized agency. SSL § 384; 18 N.Y.C.R.R. § 421.6. And authorized agencies choose prospective adoptive homes for children accepted for placement, making decisions on the basis of the “best interests” of the respective children, taking into consideration the factors specified in 18 N.Y.C.R.R. § 421.18(d). Guardianship and legal custody of a child accepted for adoption remain with the authorized

Instead, private parties seek judicial approval to transfer custody of the child from birth parents directly to the chosen adoptive placement.

agency during any period of supervised pre-adoptive placement. DRL § 113(1); SSL § 383(2). And the adoption agency's consent is required to complete an adoption for a child the agency has placed. DRL § 113(1).

Moreover, public and private authorized agencies alike are subject to state oversight. The decisions of authorized agencies disapproving applicants are subject to fair-hearing review before the State's Office of Children and Family Services ("OCFS"). *See* SSL § 372-e(4). And all of a private adoption agency's adoption activities are subject to approval, visitation, inspection and supervision by OCFS. SSL § 371(10)(a); *see* DRL 109(4). Indeed, the only way in which public and private authorized agencies differ is that a private adoption agency's certificate of incorporation is subject to OCFS approval. SSL § 460-a(1). The district court thus rightly characterized New Hope's adoption activities as involving the "administ[r]ation of] public services." (JA282.²)

An authorized agency's adoption activities are subject to government oversight in several respects.

² Citations to "JA__" refer to documents in the joint appendix. Citations to documents filed with this Court that are not included in the joint appendix are denoted as "Second Cir. Dkt. No. 19-1715, ECF ___."

B. 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 the provision of “essential social services” for children, including adoption services. N.Y. State Register (Nov. 6, 2013), at 3.³ One of these amendments added the regulatory provision at issue here prohibiting authorized adoption agencies from “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.”⁴ 18 N.Y.C.R.R. § 421.3(d).⁵ This nondiscrimination regulation is consistent with, and

³ Available at <https://docs.dos.ny.gov/info/register/2013/nov6/pdf/rulemaking.pdf> (last accessed Oct. 16, 2019).

⁴ The regulation also requires authorized agencies providing adoption services to “take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur.” 18 N.Y.C.R.R. § 421.3(d).

⁵ As part of the same regulatory package, OCFS prohibited discrimination on all of these bases in the provision of foster-care services and eliminated existing regulatory language that indicated that adoption applicants could be rejected on the basis of marital status or homosexuality. See N.Y. State Register (August 7, 2013), at 4, *available*
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implements, state laws prohibiting discrimination. New York Civil Rights Law § 40-c prohibits such discrimination against any person in the exercise of civil rights and New York Executive § 296 prohibits such discrimination in the provision of public accommodations. Moreover, the New York Court of Appeals has long recognized that neither marital status, nor sex, nor sexual orientation “may alone be determinative in an adoption proceeding.” *In re Jacob*, 86 N.Y.2d 651, 663, 667 (1995). And the New York Legislature has expressly amended the law to confirm the right of unmarried and same sex-couples to adopt on equal terms as married, heterosexual couples. *See* N.Y. Laws 2010, ch. 509 (*codified at* DRL § 110); *see also* Memorandum of Senate Sponsor, Bill Jacket for same, at 6-7 (describing legislation as codifying *In re Jacob* and ensuring that same-sex couples have “equal rights to adopt a child together”).

New York is not alone in prohibiting discrimination on the basis of sexual orientation or gender identity by adoption agencies. Seven other states (California, Massachusetts, Maryland, Michigan, Nevada, New

at <https://docs.dos.ny.gov/info/register/2013/aug7/pdf/rulemaking.pdf> (adding 18 N.Y.C.R.R. § 441.24 and amending 18 N.Y.C.R.R. § 421.16(e) and (h)(2)) (last accessed Oct. 16, 2019).

Jersey, and Rhode Island), the District of Columbia, and two United States territories (Puerto Rico and Guam) prohibit discrimination on one or both bases. See Movement Advancement Project, *Equality Maps: Foster and Adoption Laws*.⁶ Relatedly, New York and eight states, the District of Columbia and one territory also prohibit discrimination on one or both bases in the provision of foster-care services. *Id* Some localities also prohibit discrimination against same-sex couples in the provision of child-welfare services, by interpreting more general nondiscrimination provisions to have that effect. See *Fulton v. City of Phila.*, 922 F.3d 140, 158 (3d Cir. 2019) (applying Philadelphia’s nondiscrimination laws to foster-care services), *pet. for cert. filed* July 22, 2019.

C. Factual Background and Procedural History

New Hope, operating under a prior name, was incorporated in 1965 with the corporate purpose of operating, among other child welfare programs, an authorized adoption program in New York. (JA66.) New Hope currently operates an authorized adoption program that places

⁶ Available at https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last accessed October 16, 2019).

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newborns, infants and toddlers up to age two. (JA21.) It also operates a pregnancy resource center that encourages pregnant women to choose parenting or adoption over abortion.⁷ (JA18-19). Some of the birth mothers whose infants New Hope places for adoption come to New Hope through its pregnancy resource center. (JA20.)

In September 2018, OCFS learned that New Hope refuses to provide adoption services to unmarried or same-sex couples.⁸ OCFS promptly notified New Hope in writing that it was operating in violation of OCFS's regulation prohibiting such discrimination and directed it to file a formal written response identifying whether it intended to come

⁷ While New Hope claims that it also operates a foster-care program (JA31), in fact, it does not operate a traditional publicly-funded foster boarding program, which serves children placed in the care of the local commissioner of social services. Rather, New Hope makes short-term placements while birth parents remain undecided about adoption placements. (JA31).

⁸ New Hope's written policy provides that inquiries from prospective applicants who are single or in a marriage with a spouse of the same sex are referred to the agency's executive director because "New Hope will place children with those who are truly single, but . . . will not place children with those living together without the benefit of marriage" or "with same sex couples." (JA88.)

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into compliance or to submit a close-out plan for its adoption program. (JA11, 87.)

Instead of responding, New Hope commenced this litigation, arguing, among other things, that the regulation as applied violated its First Amendment rights.⁹ (JA48-56.) New Hope also promptly moved for preliminary injunctive relief. (JA89-92.) OCFS thereupon moved to dismiss the complaint for failure to state a claim and opposed the request for injunctive relief. (JA166-170, 171-193.)

D. The District Court Decision

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 the complaint, and dismissed as moot New Hope's motion for a preliminary injunction. (JA282.)

⁹ New Hope also asserted equal-protection and unconstitutional-conditions claims. (JA54-56.) In its brief to this Court (Br. at 12 n.1), New Hope expressly declines to challenge the district court's dismissal of these claims. We therefore do not address them further. *See Vlad-Berindan v NY City Metro. Transp. Auth.*, No. 17-3397, 2019 U.S. App. LEXIS 20248, at *2, n 1 (2d Cir. July 9, 2019) (declining to address claim that appellant expressly abandoned).

Applying the proper standard for a motion to dismiss for failure to state a claim, i.e., whether the allegations of the complaint, “however true, . . . raise a claim of entitlement to relief” (JA252 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 570 (2007))), the district court concluded that the complaint failed to state any constitutional claim.

The district court rejected New Hope’s free-exercise claim under the rule of *Employment Division v. Smith*, 494 U.S. 872 (1990), which holds that the Free Exercise Clause does not relieve a party from the obligation to comply with a valid and neutral law of general application. The court found that the regulation was valid and neutral because its plain language, its stated purpose, and the context of its promulgation all showed it was intended for the valid and neutral purpose of eliminating discrimination and not intended to interfere with an authorized agency’s exercise of religion. (JA262-263.) And the court found that the regulation was one of general application because it applied equally to all authorized agencies. (JA262.) The court reasoned that none of New Hope’s contrary allegations were sufficient to suggest otherwise. (JA264-266.)

The district court rejected New Hope’s free-speech claim on the ground that the provision of nondiscriminatory adoption services would

not require New Hope to convey a message with which it disagreed (the message that it approved of unmarried or same-sex families); at most a placement would convey the message that a given placement was in the child's best interest according to the criteria that state law required it to apply. (JA268-269.) The court reasoned further that the regulation merely forbids the act of discrimination against prospective adoptive parents and does not appear to prevent New Hope from continuing to share its religious beliefs throughout the adoption process. (JA269-270.) Alternatively, the court found that because New Hope's provision of adoption services was governmental in nature, to the extent the nondiscrimination regulation restricted any speech in the provision of adoption services, it could be viewed as merely promoting the government's message that "adoption and foster care services are provided to all New Yorkers consistent with [the] anti-discrimination policy set forth in 18 N.Y.C.R.R. § 421.3(d)." (JA267-268.)

The district court rejected New Hope's expressive-association claim without deciding whether New Hope's expressive-association right was implicated. Instead, the district court assumed that the right was implicated and found that any impairment of that right was too

incidental to exempt New Hope from application of the nondiscrimination rule. (JA272.) Alternatively, the court held that even if the regulation impaired New Hope's expressive-associational rights, the State's compelling interest in prohibiting discrimination outweighed any such harm. (JA272-273.)

E. Subsequent Events

After New Hope filed its notice of appeal, it moved in this Court for a preliminary injunction that would allow it, among other things, to continue to evaluate a specified group of adoption applicants and accept surrenders of children and place out such children during the pendency of the appeal. Second Cir. Dkt. No. 19-1715, ECF 56-1. While the motion for a preliminary injunction was under review, OCFS agreed not to act on its latest letter seeking compliance with its policy or submission of a close-out plan. As of this writing, New Hope's motion for a preliminary injunction remains pending.

SUMMARY OF ARGUMENT

The district court properly rejected New Hope's claims that the First Amendment protects its right to discriminate against unmarried

and same-sex couples in its provision of adoption services, in violation of OCFS's nondiscrimination regulation. The district court therefore properly dismissed New Hope's complaint for failure to state a claim and denied as moot its motion for a preliminary injunction. This Court should affirm.

The nondiscrimination regulation does not violate New Hope's free-exercise right. It is well settled that a party is not excused from complying with a valid and neutral law of general application, even if the law prescribes conduct that the party's religion proscribes. *See Employment Division v. Smith*, 494 U.S. 872, 879 (1990). And the nondiscrimination regulation is precisely such a law. While New Hope and proposed amicus Jewish Coalition for Religious Liberty claim that *Smith* is inapplicable here, their arguments rely on inapposite cases and present no good reason to exempt New Hope from the settled rule of *Smith*. And New Hope's allegations fail to suggest that the nondiscrimination regulation in operation is not in fact neutral or of general application.

The nondiscrimination regulation does not violate New Hope's free-speech right. The Supreme Court has long held that nondiscrimination rules like the regulation at issue here regulate conduct, not speech. To

the extent New Hope claims that compliance with the regulation will dilute its message, it fails to state a claim because any such effect on New Hope's speech is incidental to the regulation of New Hope's conduct.

The nondiscrimination claim also does not violate New Hope's right to expressive association, for either of two reasons. First, New Hope's expressive-association right is not implicated. New Hope was formed to provide adoption services and place children in homes with prospective adoptive parents; it was not formed to engage in expressive activity such as lobbying, civil rights litigation, or instilling values in young people—the types of protected expressive association recognized by the Supreme Court. Second, even if New Hope's expressive-association right is implicated, any burden on that right is merely incidental and thus insufficient to state a claim.

If the Court disagrees and reinstates any of these claims, however, it should remand to allow the district court to rule on the merits of New Hope's preliminary injunction motion in the first instance. Because the district court denied New Hope's motion for a preliminary injunction as moot upon dismissing the complaint for failure to state a claim, there is no exercise of district court discretion for this Court to review.

ARGUMENT

POINT I

NEW HOPE FAILS TO STATE A FREE-EXERCISE CLAIM

The district court correctly found that New Hope’s complaint fails to state a claim for relief under the Free Exercise Clause because the nondiscrimination regulation is a valid and neutral rule of general application.

A. The Nondiscrimination Regulation on its Face is a Valid and Neutral Law of General Application.

It is well settled that New Hope’s religious purpose do not excuse it from complying with a valid and neutral regulation of general applicability, even if the regulation prescribes conduct that its religion proscribes. *See Smith*, 494 U.S. at 879. A law that is “neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Applying this rule, this Court has repeatedly upheld application of rationally based, neutral, and generally applicable laws and government policies, though they may incidentally burden religious beliefs or practices. *See, e.g., Commack Self-Service*

Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 210-12 (2d Cir. 2012) (law preventing fraud in the kosher food market); *Universal Church v. Geltzer*, 463 F.3d 218, 227-28 (2d Cir. 2006) (fraudulent conveyance provisions of Bankruptcy Code); *United States v. Amer.*, 110 F.3d 873, 879 (2d Cir. 1997) (application of International Parental Kidnapping Crime Act); *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York*, 914 F.2d 348, 354 (2d Cir 1990) (landmarks preservation law), *cert. denied sub nom., Comm. to Oppose Sale v. Rector*, 499 U.S. 905 (1991); *Intercommunity Ctr. for Justice & Peace v. I.N.S.*, 910 F.2d 42, 44-45 (2d Cir. 1990) (federal immigration employer verification and sanctions requirements).

As the Supreme Court has explained, “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *United States v. Lee*, 455 U.S. 252, 261 (1982). By choosing to perform adoption services, which are now highly regulated services provided in partnership with the State, New Hope

subjects itself to the neutral and generally applicable rules that govern all such providers.

On its face, the nondiscrimination rule is neutral toward religion and generally applicable. By its terms, 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). Thus, on its face, the regulation is neutral toward religion because it simply requires authorized agencies to serve adoption applicants in a nondiscriminatory manner. The regulation thus does not have as its object to regulate, target, or punish religious beliefs. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533; *Smith*, 494 U.S. at 877. The regulation is also generally applicable because *all* authorized agencies must comply with its nondiscrimination mandate.

And there can be no doubt that the nondiscrimination regulation is rationally related to valid state interests. As the district court properly found, the nondiscrimination regulation is rationally related to at least two legitimate state interests—prohibiting discrimination in the

provision of adoption services and expanding the pool of prospective adoptive parents available to accept specific placements. (See JA266.) As discussed, *infra* at 34-37, the regulatory history confirms that the regulation was adopted to specifically serve those two interests. As the Supreme Court has recently reaffirmed, if a nondiscrimination requirement is neutral and generally applicable, religious 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.” *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm’n*, 138 S. Ct. 1727 (2018).

New Hope nonetheless argues that the nondiscrimination rule violates its free-exercise rights for two reasons: (1) that the *Smith* rule, requiring compliance with neutral and generally applicable laws, does not apply to the facts of this case, and even if it does, (2) the nondiscrimination rule is not in operation generally applicable or neutral. As explained below, neither argument has merit.

B. New Hope Is Not Exempted from the *Smith* Rule for Neutral and Generally Applicable Laws.

New Hope argues that the *Smith* rule permitting, over free exercise challenges, valid and neutral laws of general application, *see Smith*, 494 U.S. 872, does not govern this case because the nondiscrimination regulation intrudes on its “operations in a manner ‘affect[ing] the faith and mission of the church itself.’” (Br. at 17 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012))). New Hope is mistaken about the effect of the nondiscrimination rule. Indeed, the case on which New Hope relies, *Hosanna-Tabor Evangelical Lutheran Church*, demonstrates why that is so.

In *Hosanna-Tabor*, 565 U.S. 171, the Supreme Court held that a church could assert the Free Exercise Clause as a defense to a claim for reinstatement and damages under the Americans with Disabilities Act by a religiously called (i.e., not lay) teacher. The teacher both held the title of minister and had engaged in required Lutheran education to qualify to be “called” by God through the congregation to educate its youth. *Id.* at 177-78. Noting that the lower courts had been applying a “ministerial exception” to nondiscrimination laws for forty years, the

Court adopted the exception and applied it to the facts before it. *Id.* at 190-92.

In so doing, the Court distinguished *Smith* on the ground that *Smith* involved the regulation of “outward physical acts,” while the case before it involved an application of the Americans with Disabilities Act that caused “government interference with an internal church decision that affects the faith and mission of the church itself.” *Hosanna-Tabor*, 565 U.S. at 190. But in rejecting the “parade of horrors” that the E.E.O.C. argued would flow from such a decision, the Court carefully explained that it was deciding only the narrow legal issue before it, which rested on the “interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.” *Id.* at 196.

This Court has continued to recognize a “ministerial exception” to nondiscrimination laws in equally narrow circumstances, i.e., claims of employment discrimination by religious ministers. See *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 192 (2d Cir. 2017). But *New Hope* cites, and we could find, no case in which courts have applied the “ministerial exception” to other contexts.

Nor would it make sense to apply the ministerial exception here. As the Supreme Court explained in *Hosanna-Tabor*, the ministerial exception is intended to protect a religious organization from interference with an “internal church decision that affects the faith and mission of the church itself.” 565 U.S. at 190. This is because a religious organization’s choice of “who will preach their beliefs, teach their faith, and carry out their mission” affects the very core of a religious organization’s purpose and identity. *Id.* at 196. That principle has no application here. Like the neutral, generally applicable law at issue in *Smith* (a prohibition on the use of peyote), the nondiscrimination regulation, by prohibiting discrimination against adoption applicants in the provision of adoption services, regulates New Hope’s “outward physical conduct,” not its “internal church decision.” *Id.* at 190 (distinguishing *Smith* on this basis).

Further, New Hope does not claim that it is a church or that it was incorporated for the purpose of inculcating a religious belief. Rather, it was incorporated to serve the religious purpose of finding homes for orphan children. And it serves that purpose by providing adoption services, which are now highly regulated services provided in partnership

with the State under state-established criteria. Thus, New Hope's provision of adoption services is "outward physical conduct" that remains subject to a valid and neutral law of general application.

For all these reasons, *Hosanna-Tabor* does not support New Hope's free-exercise claim.

For like reason, the *dictum* in *Masterpiece Cakeshop*, 138 S. Ct. 1719, cited by New Hope (Br. at 18), does not support New Hope's free exercise claim. In *Masterpiece Cakeshop*, the Court assumed that a member of the clergy who opposed same-sex marriage on religious grounds could not be required by the government to officiate a same-sex marriage. *Id.* at 1727. But a requirement that a member of the clergy officiate a religious ceremony contrary to the religious teachings of that member's faith intrudes directly on a religious organization's core internal operations and the clergy member's religious practices in a way that is entirely distinct from the rule at issue here, which requires a state-regulated authorized agency to apply state standards in offering regulated adoption services. New Hope has thus failed to show that the rule outlined in *Smith* does not apply.

Nor does New Hope’s free-exercise claim finds support in older precedent recognizing parental interests in the upbringing and education of children, as suggested by proposed amicus Jewish Coalition for Religious Liberty (“Jewish Coalition”) (Br. at 4, 9-10, 12). First, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), on which proposed amicus relies, are simply inapposite because the right recognized in those cases was the parents’ liberty interest in being able to send their children to private school. *See Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003) (describing scope of such liberty interest). No comparable parental right is at issue here. Second, even if these decisions stand more broadly, as proposed amicus suggests, for the proposition that parents have a liberty interest in deciding the scope and nature of their children’s religious education, any such interest is furthered, not hampered, by New York’s laws and regulations. New York favors placing a child with adoptive parents of the same faith “when practicable” and honoring a religious preference of the birth parents “when practicable” and in the child’s best interest. SSL § 373(2) and (7). Thus, New York law already addresses the concern of proposed amicus Jewish Coalition (Br. at 14-15, 22, 23) that an authorized agency should

be able to place a child with a prospective adoptive family of the same faith as the child.

And while the Jewish Coalition relies (Br. at 9-12) on a reference in *Pierce* to the liberty interest of “guardians” in the education of their wards, the Court there was merely acknowledging that the challenged compulsory public-school law required “every parent, guardian or other person having control or charge or custody of a child” to send the child to public school. *Pierce*, 268 US at 530. *Pierce* did not recognize an independent constitutional right of authorized adoption agencies, that have temporary guardianship and custody of a child for placement with a prospective adoptive family, to make placement decisions based on the *agency’s* religious beliefs. Nor did any of these cases recognize a right of a child’s religious community to direct an adoption placement decision, as proposed amicus Jewish Coalition appears also to argue (Br. at 7-8.). Thus, neither New Hope nor proposed amicus argue persuasively that the underlying free-exercise challenge should not be evaluated under *Smith*.

C. New Hope’s Allegations Are Insufficient to Cast Doubt on the Neutrality and General Applicability of the Nondiscrimination Rule.

New Hope correctly notes that facially neutral and generally applicable laws are subject to heightened scrutiny if they operate or are enforced in a manner that targets religion for disfavored treatment. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32. And New Hope argues that its allegations are sufficient to overcome that facial neutrality and general applicability here. The district court correctly rejected that argument. As explained below, New Hope’s allegations here neither suggest any “religious gerrymander,” as found in *Church of the Lukumi Babalu Aye*, 508 U.S. at 535, nor evidence any religious animosity, as found in *Masterpiece Cakeshop*, 138 S. Ct. at 1731-32.

1. The Allegations Are Insufficient to Suggest that in Operation the Nondiscrimination Regulation Targets Religion.

Contrary to New Hope’s argument (Br. at 19-28), the statutory and regulatory scheme governing adoption services does not contain exceptions to the nondiscrimination regulation that allow discrimination on the basis of other factors, while singling out the form of discrimination in which New Hope engages.

The statutory and regulatory provisions on which New Hope relies do not single out any specific religious practices or views. They do not, as New Hope argues (Br. at 20), in effect provide “secular exceptions” to the nondiscrimination regulation. The subject provisions merely allow an authorized agency to focus recruitment efforts and prioritize parents for home studies based on the needs of children and, in 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, 18 N.Y.C.R.R. §§ 421.10 and 421.13 direct authorized agencies to focus recruitment efforts on, and give first priority in home studies to, parents seeking a child with the age, race, disability and other significant characteristics of the largest proportion of waiting children. These regulations recognize that where an agency has limited resources to serve adoption applicants, priority should be given to those applicants who will meet the needs of the majority of waiting children. And consistent with federal law, 18 N.Y.C.R.R. § 421.13 additionally requires agencies to give first priority in home studies to Indian prospective adoption applicants seeking to adopt Indian children. This provision

implements the federal Indian Child Welfare Act, which establishes minimum federal standards for the placement of Indian children in foster care and adoptive homes in order to “promote the stability and security of Indian tribes and families.” 25 U.S.C. § 1902; *see* 25 U.S.C. § 1915(a) (establishing preference for adoption placement with Indian families). Both of these regulations thus serve the best interests of waiting children, but do not exclude applicants from services on the basis of any protected characteristics.

New Hope also relies (Br. at 21-22) on two other aspects of state statutory and regulatory law.¹⁰ SSL § 373(2) and (7) favor placing a child with adoptive parents of the same faith “when practicable,” and honoring a religious preference of the birth parents “when practicable” and in the child’s best interest. *See also* 18 N.Y.C.R.R. § 421.18(c) (implementing

¹⁰ New Hope’s additional reliance on DRL § 110 is based on a mischaracterization of that statute. DRL § 110 allows married individuals to adopt *individually* only if they have been legally separated for at least one year. This provision does not discriminate on the basis of marital status, as New Hope contends. Rather, it was enacted to allow adults legally separated, but not yet divorced, to adopt individually so that marital status would not preclude an otherwise eligible prospective adoptive parent from adopting. *In re Jacob*, 86 N.Y.2d at 660 (citing legislative history).

same). 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.

These provisions do not, however, create exceptions to the nondiscrimination regulation, which prohibits discrimination against adoption applicants on the basis of a variety of characteristics, including race and religion. Rather, they require the consideration of the *child’s* characteristics in furthering the State’s interest in approving adoption placements that serve a child’s best interests.

The provisions on which New Hope relies thus do not address which applicants or prospective adoptive parents will be served or allow an authorized agency to turn away a prospective adoption applicant on the basis of any of the pertinent characteristics. They simply allow authorized agencies to consider specified protected characteristics in focusing their recruitment and home-study efforts and in making 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 at 158 (rejecting similar argument to application of nondiscrimination rule to exclusionary policy of a foster care agency).

And because the statutory and regulatory adoption scheme does not in fact allow discrimination in the provision of adoption services on other bases, the statutory scheme at issue here is unlike the laws and policies at issue in the cases on which New Hope relies.

For example, in *Church of the Lukumi Babalu Aye*, 508 U.S at 535-36, the Supreme Court found local ordinances, which were adopted in response to concerns about animal sacrifice practiced by adherents of the Santeria religion, were not generally applicable in operation and effectively targeted the Santeria practice because numerous other types of animal killings, both secular and religious, were exempted from the prohibition. And in *Central Rabbinical Congress of the United States v. N.Y. City Dept. of Health & Mental Hygiene*, 763 F.3d 183, 196-97 (2d Cir. 2014), this Court found a law that regulated conduct practiced by some orthodox Jews—a practice in which oral suction is used to draw blood from the area of the wound during traditional Jewish circumcision—also appeared to target the practice for unfavorable treatment because the regulation was severely under-inclusive to serve the government purpose

for which it was purportedly enacted (to reduce the transmission of a specific infection to infants). *Id.* at 197. Likewise, in *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012), the university’s referral policy applicable to student counselors was found to target religion in practice because it allowed student counselors to refer clients to other students for numerous secular reasons, but not religious ones. *Id.* at 739; *see also FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (applying heightened scrutiny to application of police department’s “no beard” rule to religious observants because department allowed medical exemptions, which undermined its stated interest in uniformity of appearance).

The New York adoption scheme is entirely different from the provisions at issue in these cases because, contrary to New Hope’s claim, it does not permit secular conduct that undermines the “legitimate government interests purportedly justifying” the nondiscrimination regulation. (Br. at 24 (quoting *Cent. Rabbinical Cong.*, 763 F.3d at 197).)

Finally, there is no merit to New Hope’s argument (Br. at 27) that the district court engaged in impermissible fact-finding in rejecting New Hope’s allegation that the adoption scheme is riddled with secular

exceptions.¹¹ As we demonstrated above, *see supra* at 27-29, it is self-evident, and in some cases express in the statutory provisions themselves, that the provisions on which New Hope relies are intended to serve the best interests of the child. Thus, no resolution of disputed facts was required here. And because the Court is “not required to credit conclusory allegations or legal conclusions couched as factual allegations,” *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014), the district court properly rejected New Hope’s claim that these other provisions demonstrate that the nondiscrimination regulation targets religion in operation.

¹¹ Nor, contrary to New Hope’s repeated assertions (Br. at 14, 31, 33), did OCFS concede in its motion seeking to remove the appeal from the expedited appeals calendar that the district court had engaged in fact-finding in dismissing the complaint. In the subject motion, OCFS explained that, in addition to presenting the question whether New Hope’s factual allegations (as to neutrality and general applicability) were sufficient to state an established claim, the appeal presented the legal question whether New Hope could successfully assert a constitutional claim to enforcement of a valid and neutral nondiscrimination law of general application. *See* Second Cir. Dkt. No. 19-1715, ECF 36, at 7.

2. The Allegations Are Insufficient to Suggest that Enactment and Enforcement of the Nondiscrimination Regulation Was Prompted by Hostility Toward Religion.

New Hope is also wrong to argue that, notwithstanding the facial neutrality of the nondiscrimination regulation, its allegations are sufficient to suggest that the regulation is intended to target religious beliefs, or has been enforced in a manner that does so, and must therefore satisfy heightened scrutiny. It is true that “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality,” *Church of Lukumi Babalu Aye*, 508 U.S. at 534. The Supreme Court has explained that a law is not neutral if its object “is to infringe upon or restrict practices because of their religious motivation,” whether the “governmental hostility” is “overt” or “masked.” *Id.* at 533-34. But this rule does not support New Hope’s free-exercise claim because New Hope does not plausibly allege that the promulgation or enforcement of OCFS’s nondiscrimination regulation was motivated by religious hostility or intended to target religious beliefs.

The Supreme Court has explained that the relevant evidence to determine actual neutrality includes “the historical background of the

decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history.” *Church of Lukumi Babalu Aye*, 508 U.S. at 540. Here, the history of the nondiscrimination regulation confirms its neutral purpose.

OCFS adopted the challenged regulation as part of a regulatory package that had the valid and neutral purpose of eliminating discrimination on the basis of sexual orientation and gender identity in the provision of 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). The regulatory package also sought to “promote fairness and equality in the child welfare adoption program” by eliminating outdated regulatory language that had indicated that the marital status of applicants and the sexual orientation of gay, lesbian, and bisexual individuals were relevant to applicants’ evaluation as appropriate adoptive parents. N.Y. State Register (August 7, 2013), at 5.

OCFS promulgated the nondiscrimination regulation after DRL § 110 was amended to confirm the right of unmarried and same sex couples to adopt on terms equal to those applicable to married

heterosexual couples. *See* N.Y. Laws 2010, c. 509 (*codified at* DRL § 110). Soon after DRL § 110 was amended, OCFS informed authorized agencies that the statutory amendment brought the Domestic Relations Law into compliance with existing case law and was “intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home.” OCFS Informational Letter 11-OCFS-INF-01, at 3 (Jan. 11, 2011).¹² Later that year, OCFS provided further guidance to authorized adoption agencies to clarify, in light of the 2010 amendment, existing regulations that addressed marital status and sexual orientation in home-study assessments. At the time, existing regulations provided that adoption applicants could not be rejected on the basis of length of marriage, as long as they had been married at least one year, *see* 18 N.Y.C.R.R. former § 421.16(e), and provided that while adoption applicants could not be rejected “solely on the basis of homosexuality,” a decision to accept or reject an applicant “when homosexuality is at issue”

¹² Available at https://ocfs.ny.gov/main/policies/external/OCFS_2011/INFs/11-OCFS-INF-01%20Adoption%20by%20Two%20Unmarried%20Adult%20Intimate%20Partners.pdf.

was to be made on the basis of individual factors, *see* 18 N.Y.C.R.R. former § 421.16(h)(2).

In a July 2011 Informational Letter, OCFS explained:

It is important to recognize that all types of families are potential resources for children awaiting adoption and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, ability to meet the child’s needs, and availability of support systems are the critical assessments in identifying adoptive applicants’ appropriateness for specific children.

OCFS Informational Letter 11-OCFS-INF-05, at 3 (July 11, 2011).¹³

OCFS confirmed that under state law, applicants did not have to be married to adopt; thus, while the length of the relationship could be considered, the length of marriage was not a valid basis on which to reject applicants. *Id.* at 4. OCFS also advised agencies that “discrimination based on sexual orientation in the adoption study assessment process” is prohibited. *Id.* OCFS further stated that it could not

13 Available at https://ocfs.ny.gov/main/policies/external/OCFS_2011/INFs/11-OCFS-INF-05%20Clarification%20of%20Adoption%20Study%20Criteria%20Related%20to%20Length%20of%20Marriage%20and%20Sexual%20Orientation%20.pdf

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. The capacity of the prospective adoptive parents to meet the needs of children freed for adoption should be the primary consideration when making approval or rejection decisions of an adoptive applicant.

Id.

Then, in 2013, OCFS promulgated the regulation at issue here, confirming that adoption applicants could not be discriminated against on the basis of various characteristics, including sex, sexual orientation, gender identity or expression, and marital status. As part of the same regulatory package, OCFS eliminated the outdated references to consideration of the length of marriage and homosexuality in the home-study assessment. N.Y. State Register (August 7, 2013), at 4. Even viewing the history of the regulation in the light most favorable to New Hope, *see Papasan v. Allain*, 478 U.S. 265, 283 (1986), this history confirms that the regulation was adopted for a valid and neutral purpose—to prohibit discrimination against adoption applicants and bring the regulations into compliance with statutory standards. There is no indication anywhere that the regulation was targeted at religious beliefs.

While New Hope claims (Br. at 32) that the district court improperly assumed as true OCFS's statements regarding the purpose of the nondiscrimination regulation, the court did not do so. Instead, the court relied on public records to assess the historical context in which the regulation was promulgated. And the Court's reliance on these public records was entirely proper. "It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6)." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) (citing *Papasan v. Allain*, 478 U.S. at 283); accord *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 77 (2d Cir. 2007). The district court thus properly considered the regulatory filings, the amendment of DRL § 110, and the policy directives that implemented that amendment—all public records—in evaluating the sufficiency of the complaint.

Nor are New Hope's remaining allegations sufficient to suggest that OCFS has applied its regulation in a manner hostile toward religion. New Hope relies on 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> (last accessed Oct. 16, 2019). “The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.” *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015).

Indeed, this Court rejected a similar argument in *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v New York*, 914 F.2d at 354. There the plaintiff church argued persuasively that the facially

neutral landmarks preservation law would have a disparate impact on religious institutions because many such institutions have buildings that fit the statutory criteria, i.e., a building having “special character or special historical or aesthetic interest or value.” *Id.* The Court concluded, however, that any such disparate impact was “not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.” *Id.* So too here. 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.” *Fulton*, 922 F.3d at 159.

Critically, New Hope has not alleged that OCFS declines to enforce its regulation against authorized agencies who discriminate against unmarried or same-sex couples on the basis of secular beliefs. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1730-31 (fact that nondiscrimination policy was enforced against religiously motivated conduct but not against analogous secular conduct evidences hostility toward religion). As the Third Circuit explained in *Fulton*, in rejecting a free-exercise challenge to the application of a similar nondiscrimination policy in the foster-care context, “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. Because New Hope does not allege it was treated more harshly than secular agencies that similarly discriminate against unmarried and same-sex couples, its allegations of disproportionate impact do not give rise to an inference of disparate treatment. *See Rector, Wardens, & Members of Vestry of St. Bartholomew's Church*, 914 F.2d at 354.

As to the remaining allegations involving statements by OCFS officials, which New Hope quotes in its complaint but misleadingly describes in its brief, 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 in New York for providers that choose not to follow the law” (JA43);¹⁴ (2) a statement that the repeal of the regulations that allowed

¹⁴ Rather than quote the statement in its brief, New Hope misleadingly describes it as OCFS’s “avowed goal of driving providers
(continued on the next page)

an adoption applicant to be rejected on the basis of marital status and allowed unfavorable consideration of homosexual orientation was intended to “eliminate archaic regulatory language” (JA35);¹⁵ (3) a staff member’s reference to the fact that “[s]ome Christian ministries have decided to compromise and stay open” (JA40); and (4) a statement in the policy directive, issued in response to the 2010 amendment to DRL § 110, 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” (JA34).

Contrary to New Hope’s argument (Br. at 30, 32-33), these statements do not resemble the statements of the adjudicatory administrators that troubled the Supreme Court in *Masterpiece Cakeshop*. See 138 S. Ct. at 1729. Unlike those 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

who will not conform their policies to align with OCFS’s beliefs out of the State of New York.” (Br. at 30 (citing JA43).)

¹⁵ New Hope misleadingly characterizes this statement as OCFS labeling New Hope’s beliefs as “archaic.” (Br. at 30 (citing JA35).)

that, consistent with state law, OCFS will not tolerate discriminatory action in contravention of its regulation.

Indeed, the only statements cited by New Hope that resemble in any way any of the statements of the adjudicatory commissioners at issue in *Masterpiece Cakeshop*, are the statements that there is “no place in New York” for authorized agencies that will not follow the law and the reference to the fact that other faith-based authorized agencies with similar beliefs continue to provide adoption services in accordance with New York law. While New Hope argues that the Supreme Court found similar sentiments problematic in *Masterpiece Cakeshop*,¹⁶ in fact the Court found only that such statements “are susceptible of different interpretations.” 138 S. C. at 1729. “On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor’s personal views. On the other

¹⁶ In *Masterpiece Cakeshop*, at a public hearing concerning the plaintiff’s case, one of the seven commissioners responsible for applying the nondiscrimination policy to plaintiff’s case stated that a business person “cannot act on his religious beliefs ‘if he decides to do business in the state’” and later restated the same position, stating “‘if a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.’” 138 S. Ct. at 1729 (citing the hearing transcript).

hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for [plaintiff's] free exercise rights and the dilemma he faced.” *Id.* However, it was only “[i]n view of the comments that followed,” that the Court was troubled by these otherwise ambiguous statements. In his subsequent comments, the Commissioner made clear his distrust of and hostility toward plaintiff’s religious views, comparing plaintiff’s views to religious justification of slavery and the holocaust and stating such religious justification is “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” *Id.* (citing the hearing transcript).

Here, in contrast, according to New Hope’s allegations, the arguably ambiguous comments on which New Hope relies were neither followed nor preceded by any comments that expressed a view hostile toward New Hope’s religious beliefs. Instead, the remaining two comments cited by New Hope—that the regulatory amendments that brought the regulations in line with the 2010 amendment to DRL § 110 had removed “archaic” regulatory language and the explanation in the policy directive that in light of the change in the law sexual orientation was not a legitimate basis to deny an adoption application—merely

acknowledge that the legal landscape had changed in light of the Court of Appeals decision in *In re Jacob*, 86 N.Y.2d 651, and the 2010 amendment to DRL § 110. Moreover, all of the problematic statements in *Masterpiece Cakeshop* were made in direct reference to the plaintiff's case by the very adjudicators responsible for deciding the plaintiff's discrimination claim. Here, three of the cited statements were general pronouncements about the regulatory amendment and the statutory amendment that preceded it. The cited statements together merely express OCFS's view that its nondiscrimination regulation is consistent with state law and must be followed by all authorized agencies. These statements are thus insufficient to suggest that New Hope was targeted because of its religious beliefs. *See Fulton*, 922 F.3d at 156-57 (finding remarks in such "grey zone" insufficient to demonstrate that foster care agency was targeted because of its religious beliefs).

For all of these reasons, New Hope fails to state a free-exercise claim.

POINT II

NEW HOPE FAILS TO STATE A FREE-SPEECH CLAIM

The district court properly found that the complaint fails to state a free-speech claim because the regulation addresses conduct, not speech.

“[F]reedom of speech prohibits the government from telling people what they must say,” not what they must do. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (“*FAIR*”). The Supreme Court has made clear that nondiscrimination laws like that at issue here “regulate[] conduct, not speech.” *Id.* at 60.

The law at issue in *FAIR* required law schools to grant military recruiters equal access to their campuses. As the Supreme Court explained, the law thus affected “what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.” *Id.* (emphasis in original). The same is true here: OCFS’s nondiscrimination regulation requires providers of adoption services to afford equal access to *all* prospective adoptive parents.

In *FAIR*, the Supreme Court confirmed the longstanding principle that prohibitions on discrimination regulate conduct, not speech, even if they may impact statements about access to goods or services. “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, when New York prohibits adoption-service providers from discriminating against same-sex couples and unmarried couples, it is prohibiting conduct. Its regulation does not constitute a prohibition on speech merely because it prevents an agency from announcing that it will accept “Single and Married Heterosexual Applicants Only.”

As the Supreme Court has explained, “[p]rovisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” *Hurley*, 515 U.S. at 572; *see also N.Y. State Club Assn. v City of N.Y.*, 487 U.S. 1, 13 (1988) (rejecting First Amendment challenge to ordinance that prohibited clubs with a specified number of members

from excluding individuals on the basis of various protected characteristics).

Hurley permitted the plaintiff parade organizer to assert a free-speech challenge to a nondiscrimination law only because the law was being applied to the parade organizer in a “peculiar way.” *Id.* at 572. Gay and lesbian individuals were not excluded from participating in the parade; instead they were prevented from marching as “a group imparting a message the organizers do not wish to convey.” 515 U.S. at 559, 572. The free-speech rights of the parade organizer were implicated only because of the expressive character of the parade itself and the effect on that expressive character of including a group of marchers with an identified message with which the parade organizer disagreed. *Id.* at 572-74, 576-77, 578. Application of the nondiscrimination law at issue thus burdened free-speech rights because it regulated “expressive activity.” *Id.* at 578.

Not so here. The activities of reviewing an adoption application, conducting a home study, and making a placement decision pursuant to statutory standards are quite different from the expressive activity at issue in *Hurley*. OCFS’s nondiscrimination regulation requires New Hope

to exercise its statutory powers in a manner that is neutral as to marital status and sexual orientation; the regulation 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).

Contrary to the claim of amicus Becket Fund for Religious Liberty (Becket Fund Br. at 15), the fact that New Hope’s evaluation of adoption applications and engagement in the home-study process require verbal and written communications does not make that evaluation and engagement an expressive activity. As the Supreme Court has explained, requiring a course of conduct does not abridge freedom of speech “merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *FAIR*, 547 U.S. at 62 (internal quotation omitted). New Hope no more engages in protected speech by evaluating prospective adoptive parents under state criteria than does an employer who evaluates a candidate for employment using nondiscriminatory criteria. As we have explained, OCFS’s nondiscrimination rule is akin to laws prohibiting discrimination

in employment practices. And the Supreme Court has squarely held that such laws regulate conduct, not speech.

To the extent New Hope argues (Br. at 40) that complying with the regulation will dilute its message, its claim fares no better. “The 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). As the Court explained in *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992), the State could require the use of specific informed-consent language because the requirement regulated speech “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” Similarly here, any effect that OCFS’s regulation has on New Hope’s speech is incidental to the regulation of New Hope’s conduct.

Indeed, New Hope does not suggest that OCFS has ever sought to use its regulation to restrict New Hope’s speech, as opposed to its

conduct.¹⁷ Nor could it; to date, all that OCFS has done is seek to regulate New Hope's conduct—its refusal to provide adoption services to or place children with unmarried and same-sex couples. Because OCFS has taken no further enforcement action, New Hope can allege no facts suggesting that in the absence of discriminatory conduct, OCFS intends to regulate speech rendered in the course of New Hope's conduct.

New Hope's reliance on *Matal v. Tam*, 137 S. Ct. 1744 (2017), is thus entirely misplaced. In *Matal*, the Court held that the fact that government required registration of a private entity's trademark did not transform the private speech communicated in the trademark into government speech. The Court explained that the trademark law did not authorize the government to review proposed trademarks for consistency with government policy. *Id.* at 1758. Rather, if a submitted trademark met the viewpoint neutral statutory requirements, registration was mandatory, even if the government found the trademark offensive. *Id.* As

¹⁷ The district court observed that the regulation likely did not address such speech. (JA269-270.)

we have just demonstrated, however, OCFS's nondiscrimination does not restrict private speech. It regulates conduct.

The district court nonetheless went on to rule, in the alternative, that New Hope could not state a free-speech claim, even if OCFS enforced the nondiscrimination regulation by restricting speech rendered in the course of providing adoption services. (JA268.) The district court thus addressed a hypothetical question, which New Hope devotes a substantial portion of its brief addressing (Br. at 41-45). This Court need not and should not address such a hypothetical question.

To the extent the Court nonetheless wishes to do so, *Matal* would not support New Hope's claim in any event. Unlike the trademark at issue in *Matal*, New Hope is not merely registered with a governmental entity. As an "authorized agency" under state law, it wields significant influence over the creation of familial relationships, one of the most powerful legal structures in people's lives. And New York long ago chose to replace a system in which private entities provided adoption services with little government oversight with a highly regulated regime in which the State partners with public and private entities to provide adoption services. Under this regime, the provision of those services is in effect a

public service, as the district court recognized (JA282.) As we previously explained, *see supra* at 5-7, New Hope exercises the same powers in providing adoption services that every local commissioner of social services exercises. By providing adoption services under this statutory scheme, New Hope has “chosen to partner with the government to help provide what is essentially a public service,” *Fulton*, 922 F.3d at 161.

Amicus Becket Fund predicts a parade of horrors will follow from the district court’s alternative ruling. It is simply not true, however, that the subject ruling would permit the State to coerce private entities to promote a particular government message by threatening to withhold a license, tax benefit, or other incidental government benefits. (Becket Fund Br. at 21-22.) New Hope is not merely licensed to provide adoption services. It is imbued with tremendous authority over the formation of legal and familial relationships when it provides in partnership with the State what are in effect public services.

Indeed, notwithstanding that New Hope operates as a privately funded agency, the rule regarding speech restrictions in government-funded programs is instructive. In that context, the Supreme Court held in *Rust v. Sullivan*, 500 U.S. 173 (1991), that the government can

regulate speech rendered in the contours of a government-funded program. *Id.* at 193. But as the Court has since made clear, the government cannot require a program participant to espouse the government’s message outside of the regulated program, on its “own dime and time.” *Agency for Intl. Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 218-19 (2013).

Even though New Hope is not operating a government-funded program, state law authorizes it to provide what is quintessentially a public service under a highly regulated regime. And as part of that regime, 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. While the extent of any restriction on New Hope’s expressive activities within the contours of its provision of adoption activities remains unclear—and is not challenged by New Hope’s complaint, *see supra* at 50—there is no question that New Hope remains free to espouse its beliefs about marriage and family, including by advocating for adoptions by married heterosexual couples, outside the contours of its provision of those adoption services.

For all of these reasons, the nondiscrimination regulation does not impermissibly regulate New Hope’s speech.

POINT III

NEW HOPE FAILS TO STATE AN EXPRESSIVE-ASSOCIATION CLAIM

The district court properly found that the complaint fails to state an expressive-association claim for either of two reasons. First, the First Amendment’s right to expressive association is not implicated because New Hope is not a group whose purpose is to associate with others for expressive purposes. Second, if that right is implicated, any burden on it is merely incidental and thus insufficient to state a claim.

A. New Hope’s Right to Expressive Association Is Not Implicated.

As New Hope recognizes (Br. at 46), the First Amendment protects the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Dale*, 530 U.S. at 647 (internal quotation omitted). But not every group can assert an expressive-association right; the right can be asserted only by those engaged in “expressive association.” *Id.* at 648.

Moreover, a mere kernel of expression is not sufficient; “the fact that an activity contains a ‘kernel of expression’ does not compel the conclusion that the activity qualifies as a form of ‘expressive association’ and is shielded by the First Amendment.” *United States v. Thompson*, 896 F.3d 155, 164 (2d Cir. 2018) (quoting *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). The group’s conduct must instead be intended “to convey a particularized message.” *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397 (1989)).

Thus in *Dale*, the Supreme Court found that the Boy Scouts engaged in a form of expressive association because the very purpose of the Scouts was “to instill values in young people.” *Dale*, 530 U.S. at 649 (quoting mission statement). And because the Boy Scouts accomplished this goal by having leaders who “inculcate [the youth members] with the Boy Scouts’ values—both expressly and by example,” the forced inclusion of a leader whom the Boy Scouts felt did not represent its values impaired its expressive-association right. *Id.* at 649-50, 656. Key to the Court’s conclusion was the fact that the Boy Scouts existed to “transmit such a

system of values”; it was therefore an association that engaged in expressive activity.¹⁸ *Id.* at 650.

Likewise, in *Roberts*, a “not insubstantial part” of the Jaycees’ activities constituted “protected expression on political, economic, cultural, and social affairs.” 468 U.S. at 626. The organization took public positions on diverse issues and members regularly engaged in lobbying and other activities the Court found “worthy of constitutional protection under the First Amendment.” *Id.* at 626-27. Thus the Supreme Court considered whether a requirement to include women as full voting members would impact the Jaycees’ expressive activities, before determining that it would not. *Id.* at 627.

¹⁸ In stating that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment,” *Dale*, 530 U.S. at 655, the Court was not contradicting its earlier statement that a group has a protected expressive-association right only if it is formed for the purpose of and engages in protected expression. Rather, the Court’s statement was intended to refute the claim that an organization must be formed for the specific purpose of disseminating the particular message at issue in litigation. On that view, the expressive-association right of the Boy Scouts would have been implicated only if it were formed for the specific purpose of promoting an anti-gay message. In the statement relied on by *New Hope*, the Supreme Court rejected that view. *Id.* at 655-56.

In contrast here, New Hope is not open to membership and was not organized for the purpose of engaging in expressive activities. While New Hope’s provision of adoption services likely entails verbal and written communications, its mission is not to engage in protected speech or to inculcate values to its members, but to “care for and find adoptive homes for children whose birthmothers or parents c[an] not care for them.” (JA10.) This is a far cry from the forms of expressive association that the Supreme Court has found entitled to First Amendment protection. Consequently, New Hope is not a group that engages in “expressive association” within the meaning of the First Amendment, *see Dale*, 530 U.S. at 648.

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 the 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. The right of association is infringed only when a group is organized for expressive purposes and 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.

B. Even Assuming New Hope’s Right to Expressive Association Is Implicated, Any Burden on that Right Is Too Incidental to State a Claim

Even if OCFS’s nondiscrimination regulation implicates New Hope’s expressive-association right, any burden on that right is merely incidental, and is thus insufficient to state a claim. “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); accord *Fighting Finest v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (citing *Lyng v. Intl. Union*, 485 U.S. 360, 367 & n.5 (1988)). Here, they are neither. As the district court correctly reasoned (JA272), the nondiscrimination rule does not burden any expressive-association right that may exist here in either a direct or substantial way.

Although New Hope asserts 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. *See Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (dance hall patrons do not associate for expressive purposes). Indeed, were the rule otherwise, no organization that engaged in expressive activities could be required to serve members of the general public in a nondiscriminatory manner. Such transactional association does not directly or substantially interfere with any of New Hope's alleged associational rights.

Nor, contrary to New Hope's claim (Br. at 48-49), is its claimed interest in not serving unmarried or same-sex couples like the interest in soliciting certain legal clients that the Supreme Court found protected in *NAACP v. Button*, 371 U.S. 415 (1963). There the Court held that a legal advocacy organization's solicitation of clients was protected under the First Amendment because the organization sought to solicit plaintiffs in order to pursue social-justice litigation, an activity the Court found involved political speech. *See id.* at 429. Similarly, in *In re Primus*, 436 U.S. 412 (1978), the Court found that the ACLU's solicitation of clients

was protected under the First Amendment, not because the ACLU had a general First Amendment right to associate with the clients of its choice, but because the litigation it pursued was a “‘form of political expression’ and ‘political association.’” *Id.* at 428 (quoting *Button*, 371 U.S. at 429, 431).

These cases thus recognize that solicitation of clients may be protected under the First Amendment in the narrow circumstance when the solicitation is directly related to furthering political expression. The rule of *Button* has no application here because New Hope does not select clients to further any expressive activity; it selects clients to place children for adoption. “The Supreme Court has never held . . . that attorneys have their *own* First Amendment right as attorneys to associate with current or potential clients.” *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Depts.*, 852 F.3d 178, 186 (2d Cir. 2017) (emphasis in original). New Hope has thus failed to cite any authority for the proposition that a purveyor of goods or services has a general First Amendment right to select clients in a discriminatory manner.

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, as the district court found (JA272-273), even if the nondiscrimination regulation impairs New Hope’s right to expressive association in some minimal way, enforcement of the regulation would not unconstitutionally violate that right. *See id.* (finding no constitutional violation where state’s compelling interest in public accommodation law outweighed any minimal impact on organization’s expressive activities).

POINT IV

IF THE COURT REINSTATES THE COMPLAINT, IT SHOULD REMAND TO ALLOW THE DISTRICT TO RULE ON THE PRELIMINARY INJUNCTION MOTION IN THE FIRST INSTANCE

The district court properly dismissed as moot New Hope’s motion for a preliminary injunction on finding that the complaint fails to state a legally cognizable First Amendment claim. If the Court disagrees and

reinstates the complaint, it should nonetheless reject New Hope's suggestion that the Court resolve the merits of the preliminary injunction motion in the first instance.

A district court's decision to deny a preliminary injunction is reviewed for abuse of discretion. *See, e.g., Ragbir v Homan*, 923 F.3d 53, 62 (2d Cir. 2019). Here, however, the district court never exercised its discretion, instead dismissing the motion for a preliminary injunction as moot. There is therefore no exercise of discretion for the Court to review.

Although New Hope cites a few cases (Br. at 50) in which the Court directed entry of an order granting preliminary relief, none of those cases involved a situation like that here, where the district court had not determined the likelihood of success and the balance of the hardships itself in the first instance.

Accordingly, if the Court concludes that the district court erred in dismissing the complaint, the Court should not resolve the merits of the preliminary injunction motion in the first instance, but remand to the district court for it to do so. *See id.* at 78-79 (remanding to district court to consider merits of preliminary injunction motion where the court had erroneously dismissed the complaint for lack of subject matter

jurisdiction); *see also Frontera Resources Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 401 (2d Cir. 2009) (remanding to district court to exercise its discretion in the first instance where it had applied incorrect legal standard); *Consorti v. Armstrong World Indus.*, 103 F.3d 2, 4-5 (2d Cir. 1995) (same).

CONCLUSION

Judgment dismissing the complaint should be affirmed.

Dated: Albany, New York
October 21, 2019

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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 12,191 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Laura Etlinger