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June 28, 2020

Hon. Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

**Re: New Hope Family Services v. Poole
Docket No. 19-1715
Opposition to Appellant's Motion to Modify the
Preliminary Injunction**

Dear Ms. Wolfe:

Please accept this letter as the corrected response of appellee Commissioner Poole to the motion of appellant New Hope Family Services ("New Hope") for an order modifying the preliminary injunction granted by this Court on November 4, 2019. The response has been corrected to cite to the correct ECF number of appellant's motion.

The motion should be denied because appellants have not demonstrated a likelihood of success on the merits on the basis of existing law, New Hope suggests only speculative harm, and, as this Court previously recognized, the public interest will be seriously

harmed by allowing New Hope to discriminate against unmarried and same sex couples pending the outcome of the appeal.

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. Such discrimination is prohibited by state regulation. *See* N.Y. Code of R. & Reg., tit. 18, § 421.3(d) (prohibiting authorized adoption agencies from discriminating against applicants for adoption services on the basis of, among other things, sex, sexual orientation, gender identity or expression, and marital status). New Hope brought this suit challenging the regulation as an unconstitutional infringement of its free exercise, free speech, and expressive association rights. The United States District Court for the Northern District of New York (D'Agostino, J.), rejected New Hope's constitutional claims, granted the State's motion to dismiss, and denied New Hope's motion for a preliminary injunction. This appeal followed.

Before briefing was completed, this Court granted New Hope the limited preliminary injunction it sought pending appeal. Under the terms of this injunction, New Hope was excused from confirming compliance with the regulation and allowed to continue to engage in numerous adoption activities, including completing the adoption study process of applicants who had completed the orientation process, supervising existing placements, accepting surrenders of children, and placing out children in its custody. New Hope was not permitted, however, to accept any new prospective adoptive parents for adoption services. ECF No. 160, at 5.

In granting this limited injunction, the Court did not find that New Hope had established a likelihood of success on the merits. Instead, the Court noted that it could not predict the likelihood of New Hope's constitutional claims without reviewing the parties' merits briefs, which would more fully describe the circumstances under which New Hope discriminates and the applicable law. ECF No. 160, at 3-4. The Court nonetheless granted the limited injunction because it found New Hope faced serious and irreparable harm if the limited injunction were not granted and the public interest weighed in favor of the limited

relief sought. More specifically, the Court noted that enforcing the regulation would require New Hope to either compromise its religious beliefs or close its adoption agency, which the Court described as “specific, irreparable First Amendment injury.” ECF No. 160, at 4. Moreover, the limited injunction would serve the public interest by allowing New Hope to continue its supervision of existing placements without disruption to affected families, and complete its review of pending applications of prospective adoptive parents so that more children could be adopted without New Hope engaging in additional discriminatory acts. ECF No. 160, at 4. Most significantly, the Court found the public did not face serious injury from the limited injunction because the prohibition on accepting new prospective adoptive parents would “avoid[] future disparate treatment of same-sex and unmarried couples relative to other prospective adoptive parents pending appeal.” ECF No. 160, at 4. While the Court recognized that there was a strong countervailing public interest in providing equal access to public services, it concluded that such concern was “significantly reduced by New Hope’s agreement not to accept any new applicants for adoptive services pending this appeal.” ECF No. 160, at 5.

Now, following briefing and oral argument, New Hope seeks to modify the injunction by striking the very provision that this Court relied on in granting the limited relief—namely the prohibition on accepting new applications from, and thereby discriminating against, prospective adoptive parents. The modification should not be granted because New Hope suggests only speculative harm to its reputation from the challenged prohibition, and the public interest will be disserved by the modification. In addition, New Hope has failed to demonstrate a likelihood of success on the merits on the basis of existing law.

New Hope Has Failed to Demonstrate a Likelihood of Success on the Merits

In its motion, New Hope does not even attempt to demonstrate a likelihood of success on the merits under existing law. Instead, it argues only that it is likely to succeed on its free exercise claim because the Supreme Court has granted certiorari in *Fulton v. City of Philadelphia*,

922 F.3d 140 (3d Cir. 2019), in which the petitioner has asked the Court to revisit the test outlined in *Employment Division v. Smith*, 494 U.S. 872 (1990), and the Supreme Court reverses appeals in approximately 70% of its cases. ECF 195, at 6. However, in determining whether New Hope has demonstrated a likelihood of success on the merits, this Court must look to existing law, not to potential future legal standards.

In our brief to this Court, we demonstrated that the regulation at issue does not violate New Hope's free exercise rights because it is a generally applicable and neutral law that only incidentally effects New Hope's exercise of religion. ECF 120, at 17-45. We also demonstrated that New Hope fails to state a free speech or expressive association claim, ECF 120, at 46-61, claims that New Hope does not address in its motion to modify the preliminary injunction. Accordingly, New Hope has failed to demonstrate a likelihood of success on the merits.

Nor has New Hope met its burden to establish that the modification is necessary to avoid irreparable harm. First, while New Hope points to the fact that it placed out only one child in the fourteen-month period after this litigation commenced, it does not claim that the paucity of placements was due to its inability to accept applications from additional prospective adoptive parents. Rather, New Hope explains that the agency did not receive any requests to place out children during that time period because the entities from which it usually receives such requests assumed New Hope lacked authorization to make adoptive placements. ECF 195, at 18. Thus, New Hope has not shown that the inability to accept additional adoption applicants has affected its ability to place the children that come into its care. Rather, New Hope claims that its reputation will eventually be harmed when it lacks a sufficient number of prospective adoptive parents to allow it to accept new placement requests. Thus, New Hope explains that it currently has ten families approved for adoptive placements (and one more whose application will be approved shortly), but that this number will dwindle because it is now poised to receive requests for placements from a large crisis pregnancy center. ECF 195, at 19-20. New Hope is concerned that once it makes a number of additional placements it will not have a sufficient pool of prospective parents to enable it to accept additional placement requests, and that

this will harm its reputation. ECF 195, at 19-20 (“Having to turn referrals [of birth mothers] away based on our dwindling pool of couples will harm New Hope's reputation as an adoption provider.”).

New Hope has failed to satisfy its burden of demonstrating an irreparable harm that “is neither remote nor speculative,” but is “likely” to occur in the absence of the requested injunctive relief. *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1998); *accord New York v Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015); *Dexter 345, Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011). New Hope’s claim that its reputation will be irreparably harmed if, in the future, it is unable to accept new referrals for a temporary period is based on mere speculation. Accordingly, New Hope has failed to meet its burden to establish irreparable harm.

Moreover, harm to reputation is not ordinarily a sufficient basis for preliminary injunctive relief.¹ *See Miss Am. Org. v. Mattel, Inc.*, 945 F.2d 536, 545 (2d Cir. 1991). Certainly, the prospective injury New Hope now claims is very different from the injury on which this Court based the limited injunction it previously issued. Whereas at that time the Court was concerned that the limited injunction was necessary to avoid requiring New Hope to either compromise its religious beliefs or close its adoption agency, New Hope now claims only that the modification of the injunction is required to avoid potential reputational harm. This is an insufficient basis on which to modify the injunction especially where, as shown below, the modification will disserve the public interest.

¹ Harm to a business’s reputation has been found to be a sufficient basis for preliminary injunctive relief in limited types of cases, primarily trade mark infringement suits. *See, e.g., Really Good Stuff, LLC v. BAP Inv’rs, L.C.*, No. 19-3395-cv, __ F.3d __, 2020 U.S. App. LEXIS 17233, at *8 (2d Cir. June 1, 2020); *see also ExpertConnect, LLC v. Parmar*, 773 Fed. Appx. 651 (2d Cir. 2019) (summary order) (affirming preliminary injunction where irreparable harm to business reputation would result from use of trade secrets). This is because these suits are based on the harm to reputation and good will that results from such infringement.

The Requested Modification will Harm the Public Interest and the Balance of the Equities Tip Decidedly in Favor of Denying the Modification.

Finally, the public interest will not be served by the modification that New Hope seeks. Without the modification, New Hope will continue to be able to supervise its existing placements without disruption to the families involved and complete its review of adoption applications so as to avoid unnecessary delay in adoptions by those individuals. Thus, the modification is unnecessary to serve the public interests that this Court relied on in granting the limited injunction. However, if the Court grants the modification sought by New Hope and allows the agency to recommence its discriminatory practices against unmarried cohabitating and same sex couples, the public interest will be seriously harmed.

As this Court previously noted, the prohibition on accepting applications from additional prospective adoptive parents protects the State's interest in eliminating invidious discrimination in the provision of public services. ECF 160, at 4, 5. If this term of the injunction is eliminated, the State will suffer serious injury because New Hope will be permitted to discriminate against unmarried cohabitating couples and same-sex couples in the provision of state-regulated adoptive services. New York has a long history of prohibiting discrimination on the basis of marital status, sex, and sexual orientation. See New York Civil Rights Law § 40-c; New York Executive § 296. And 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). Allowing New Hope to discriminate in the face of this strong public policy without proving it is entitled to an exception under the Constitution will thus harm the public interest.

New Hope cannot ameliorate this harm merely by referring to other agencies applicants it unlawfully rejects on the basis of marital status or sexual orientation. An employer cannot justify its refusal to hire women by relying on opportunities for employment available

elsewhere. Moreover, each time New Hope accepts a new placement request, there are fewer adoption opportunities available elsewhere. That is because once New Hope accepts a placement request, the child in its custody is no available for adoption through any other agency unless New Hope affirmatively refers the child elsewhere. And there is an especially high demand for the adoption placement services that New Hope provides because it primarily places newborns. New Hope's offer to refer unmarried and same sex couples to other adoption agencies, rather than serve them itself, therefore fails to remedy its discriminatory practice.

Finally, the balance of the equities weighs in favor of denying the modification sought here because protecting the public from invidious discrimination outweighs the speculative harm to New Hope's reputation.

For all of these reasons, the motion to modify the injunction should be denied.

Respectfully submitted,

/s/ Laura Etlinger

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Cc: Counsel of Record (via ECF)