

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

-against-

18-CV-1419

SHEILA J. POOLE,

MAD/TWD

Defendant.

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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Defendant, Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family Services (“OCFS”), respectfully submits this memorandum of law in opposition to the motion for summary judgment made by plaintiff New Hope Family Services, Inc. (“New Hope”). ECF No. 75.

PRELIMINARY STATEMENT

Adoption changes the most fundamental legal relationship that exists between people in our society – that of parent and child. The role of adoption agencies entails more than just matching children with adoptive parents. Adoption agencies, both public and private, take legal custody and guardianship of children, and are entrusted with ensuring their well-being while they are in an adoptive placement, before an adoption is finalized. N.Y. Soc. Serv. Law §§ 384, 383(2); 18 N.Y.C.R.R. § 421.6; N.Y. Dom. Rel. Law § 113(1). As such, the state stringently regulates those who provide authorized adoption services according to established standards and criteria. To carry out this highly-regulated regime, the State partners with both public and private entities.

New Hope, an authorized agency providing adoption services in New York pursuant to the authorization, and under the supervision, of the New York State Office of Children and Family Services (“OCFS”), is one of those entities. However, it refuses to provide services to unmarried or same sex couples, notwithstanding the existence of a properly-promulgated regulation that prohibits discrimination against adoption applicants based on, inter alia, marital status or sexual orientation. 18 N.Y.C.R.R. § 421.3(d) (“§ 421.3(d)”). New Hope seeks a declaration that § 421.3(d) violates its rights to free exercise, free speech and expressive association, together with corresponding injunctive relief. Complaint (“Compl.”), ECF No. 1.

New Hope seeks to rely on its past success in this litigation, and recent Supreme Court decisions, to establish that it is entitled to summary judgment on its free speech, expressive association and free exercise claims. Plaintiff’s Memorandum of Law (“Pl. Mem. of Law”), ECF

No. 75-1. However, neither the Second Circuit's 2020 decision reversing dismissal of the complaint for failure to state a claim, nor the Supreme Court's holdings in *Fulton v. City of Philadelphia* and *Tandon v. Newsom*, Pl. Mem. of Law, ECF No. 75-1, p. 8, require a summary judgment decision in favor of New Hope. Instead, the factual record now before the Court establishes that § 421.3(d) does not compel speech by New Hope and, instead, requires that New Hope apply statutory and regulatory factors, established by the state, when considering an adoption application, regardless of an applicant's marital status or sexual orientation. It also establishes that New Hope's right to expressive association is not implicated by the regulation.

Additionally, the factual record now before the Court resolves the concerns raised by the Second Circuit and establishes that § 421.3(d) is a neutral and generally applicable regulation promulgated to prohibit discrimination against adoption applicants and increase the state's pool of prospective adoptive families. It also establishes that, unlike the law at issue in *Fulton*, 141 S. Ct. 1868 (2021), § 421.3(d) does not provide any individualized exemptions. The concerns that were dispositive in *Fulton* are simply not present here and, therefore, the case is not controlling. Similarly, the record here does not support an argument that § 421.3(d) operates to treat comparably similar religious and secular activities differently. Therefore, *Tandon*, 141 S. Ct. 1294 (2021), is not controlling.

Although New Hope argues that § 421.3(d) triggers strict scrutiny, the regulation need only satisfy lower levels of scrutiny, and it does so. However, even if, *arguendo*, strict scrutiny is triggered, the record now before the Court establishes that § 421.3(d) survives such review.

For the reasons discussed below, and those set forth in Defendant's moving Memorandum of Law ("Def. Mem. of Law"), ECF No. 74-21, and in the Declarations of Jara Traina ("Traina Decl."), ECF Nos. 74-7, 74-8, 74-9, 74-10, 74-11, 74-12, 74-13, 74-14, 74-15, Carol McCarthy ("McCarthy Decl."), ECF Nos. 74-4, 74-5, 74-6, Suzanne Colligan ("Colligan Decl."), ECF Nos. 74-

16, 74-17, 74-18, and Monica Mahaffey (“Mahaffey Decl.”), ECF No. 74-19, and the exhibits annexed to the Declaration of Adrienne J. Kerwin (“Kerwin Decl.”), ECF Nos. 74-2, 74-3, incorporated herein, New Hope is not entitled to a permanent injunction and its motion for summary judgment should be denied in its entirety.

STATEMENT OF FACTS¹

A. Authority to Provide Adoption Services

An entity must qualify as an “authorized agency” under the law before it may provide adoption services in New York. N.Y. Soc. Serv. Law § 371(10)(a); *see also* N.Y. Soc. Serv. Law § 374(2). To so qualify, an entity must have the authority “to place out or to board out children...,” N.Y. Soc. Serv. Law § 371(10)(a); *see also* N.Y. Soc. Serv. Law § 374(2), and “receive children for purposes of adoption.” N.Y. Dom. Rel. Law § 109(4). It must also be “incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children . . . and submit and consent to the approval, visitation, inspection and supervision of [OCFS].” N.Y. Soc. Serv. Law § 371(10)(a).

To have the authority to place out children, an agency must first file its Certificate of Incorporation with the New York State Department of State. *Id.*, ¶ 12. The Certificate of Incorporation establishes the authorized agency as a corporate entity and must be approved by OCFS. N.Y. Soc. Serv. Law § 460-a. *See* Declaration of Carol McCarthy (“McCarthy Decl.”), ECF No. 74-4, ¶ 11. If an agency intends to have an adoption program, it must also obtain an approval from OCFS, to be filed in conjunction with its Certificate of Incorporation. *Id.* To obtain the OCFS approval, an agency must submit an application packet and business plan to the appropriate OCFS regional office. *Id.* Upon receipt, OCFS conducts a site visit, which includes a full review of the

¹ A full recitation of all facts is contained in Defendant’s moving memorandum of law (ECF No. 74-21) and statement of material facts (ECF No. 74-20) and is incorporated herein.

proposed adoption program and a fiscal review, and determines whether to issue the approval. *Id.* It is the act of filing of the Certificate of Incorporation with OCFS approval that gives the authorized agency the legal authority to operate an adoption program in New York. *Id.*

The authorized agency also must be approved, visited, inspected, and supervised by OCFS, or must submit and consent to such oversight. *Id.*, ¶ 17. The authorized agency remains subject to ongoing approval and supervision. *Id.* Such oversight includes determining whether an agency is complying with state law, regulations, and policies, and such compliance may be a condition for ongoing approval. *Id.* OCFS may review the adoption program and withhold its approval for failure to meet OCFS standards. An agency that fails to comply with all relevant laws, regulations and policies and, as a result, loses OCFS approval to continue operating an adoption program, may not provide adoption services in this State. *Id.*

B. Processing of Adoptive Parent Applications

Agencies authorized to provide adoption services in New York receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective adoptive parents. 18 N.Y.C.R.R. § 421.11(a)-(f). *See also* McCarthy Decl., ECF No. 74-4, ¶ 34. After an adoption application is received, the agency must complete an adoption study. 18 N.Y.C.R.R. § 421.13; McCarthy Decl., ECF No. 74-4, ¶ 34. An adoption study must explore various characteristics of prospective adoptive parents including their capacity to give and receive affection and ability to provide for a child's physical and emotional needs. 18 N.Y.C.R.R. § 421.16. *See also* McCarthy Decl., ECF No. 74-4, ¶ 34.

An application may only be rejected if (1) an applicant does not cooperate with the adoption study; (2) an applicant is “physically incapable of caring for an adoptive child;” (3) an applicant is “emotionally incapable of caring for an adopted child;” or (4) an applicant's approval “would not be

in the best interests of children awaiting adoptions.”² 18 N.Y.C.R.R. § 421.15(g). *See also* McCarthy Decl., ECF No. 74-4, ¶ 35. Authorized agencies are prohibited from denying an application for adoption services due to the applicant’s membership in any of the protected classes enumerated in 18 N.Y.C.R.R. § 421.3. McCarthy Decl., ECF No. 74-4, ¶ 35.

C. Matching of Children and Adoptive Parents

Whether a particular child should be placed with a particular prospective adoptive parent for adoption must be made on the “basis of the best interests of the child.” 18 N.Y.C.R.R. § 421.18(d). When making placement decisions, the agency must consider (1) the ages of the child and prospective parent(s); (2) the “physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);” (3) 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;” and (4) the ability of a child to be placed in a home with siblings. *Id.* Additionally, agencies must “[m]ake an effort to place each child in a home as similar to and compatible with his or her religious background as possible.” *Id.* at § 421.18(c); *see also* N.Y. Soc. Serv. Law § 373(7) (requiring consideration of religious wishes of the birthparents).

D. Promulgation of 18 N.Y.C.R.R. § 421.3(d)

Section 421.3(d) was promulgated by OCFS in 2013 to prohibit discrimination against adoption applicants and maximize the pool of potential adoptive families available to adopt the thousands of New York children awaiting adoptive families. McCarthy Decl., ECF No. 74-4, ¶¶ 25-28, 30. In 2006, as part of a settlement of a lawsuit challenging the treatment of a juvenile transgender female in court-ordered OCFS custody, OCFS agreed to engage in six “Information Meetings” to discuss the care provided to transgender youth in court-ordered OCFS custody.

² Additionally, an applicant must be at least eighteen years old. 18 N.Y.C.R.R. § 421.16(b).

Traina Decl., ECF No. 74-7, ¶¶ 4-7. To meet that obligation, OCFS assembled a work group that ultimately concluded that a policy was necessary to prohibit discrimination against, and harassment of, all LGBTQ youth. *Id.*, ¶¶ 8-9. Thereafter, the work group expanded its scope to include protections against discrimination on the basis of sexual orientation, gender identity or gender expression in other OCFS program areas, including Adoption Services. *Id.*, ¶ 13. The work group assembled a package of proposed regulations and amendments, including § 421.3(d), which proceeded through rulemaking and were promulgated in November 2013. *Id.*, ¶ 15.

As relevant here, that regulation states that “[a]uthorized agencies providing adoption services shall...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).

E. New Hope

New Hope is an authorized agency that operates several programs including an adoption program. Compl., ECF No. 1, ¶ 50. As an adoption provider, New Hope provides services to birth mothers seeking adoptive placements for their newborns, infants and young toddlers, *id.* at ¶¶ 71-102, and single individuals and married opposite-sex couples seeking to adopt. *Id.* at ¶¶ 103-134. Its adoption program is subject to OCFS approval to provide adoption services; New Hope may not provide adoption services without the approval of OCFS. N.Y. Soc. Serv. Law § 371(10)(a).

During a comprehensive review of New Hope in 2018, OCFS discovered that New Hope’s policies prohibit the processing of applications from, or placement of children for adoption with, unmarried couples or same sex couples. Colligan Decl., ECF No. 74-16, ¶ 4. If unmarried or same sex couples seek adoption services from New Hope, New Hope does not accept an application from them, but refers them to other authorized agencies under a “recusal and referral” policy. Compl., ECF No. 1, ¶¶ 153-156. OCFS’s 2018 review of New Hope was its first review subsequent to

promulgation of 18 N.Y.C.R.R. § 421.3(d). McCarthy Decl., ECF No. 74-16, ¶ 42. This review was also the first time that OCFS learned of New Hope's practices with respect to unmarried and same sex couples. *Id.*

OCFS thereafter informed New Hope that such policies are in violation of 18 N.Y.C.R.R. § 421.3 and that OCFS wanted to discuss with New Hope how it could come into compliance. Colligan Decl., ECF No. 74-16, ¶ 6. New Hope responded that it did not intend to comply with the regulation because it was "unwilling to compromise [its] beliefs." *Id.* While OCFS has historically worked collaboratively with New Hope to address various issues, McCarthy Decl., ECF No. 74-16, ¶ 43, New Hope has fully refused to comply with § 421.3(d). Compl., ECF No. 1, ¶ 191.

STANDARD OF REVIEW

A party is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Roe v. City of Waterbury*, 542 F. 3d 31, 35 (2d Cir. 2008). To defeat a motion for summary judgment, a non-movant must raise issues of material fact "based on specific facts" as demonstrated by affidavits based on personal knowledge, or other admissible evidence. *Wagner v. Swarts*, 827 F. Supp. 2d 85, 92 (N.D.N.Y. 2011). The parties agree that this case can be resolved on summary judgment.

ARGUMENT

POINT I

NEW HOPE CANNOT ESTABLISH A FREE SPEECH CLAIM

New Hope argues that it engages in protected speech when it speaks to (1) birthmothers, (2) adoptive couples and (3) the state, Pl. Mem. of Law, ECF No. 75-1, pp. 19-21, and that any restriction on this speech must be narrowly tailored to a compelling state interest. *Id.*, pp. 19-23. New Hope mischaracterizes the social service that its adoption program provides in an effort to

characterize it as imbued with expressive qualities when, in fact, the service is one that can only be provided in compliance with stringent government standards and with the authorization and supervision of the state.

As fully discussed in Defendant’s moving memorandum, Def. Mem. of Law, ECF No. 74-21, the First Amendment prohibits the promulgation of a law “abridging the freedom of speech,” U.S. Const. amend. I, and the applicable free speech analysis differs depending on whether the law is “content-based” or “content-neutral.” *Universal City Studios v. Corley*, 273 F. 3d 429, 450-451 (2d Cir. 2001). “The principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.... A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Section 421.3(d) applies to all authorized agencies and, therefore, its applicability is not based on the content of an agency’s speech. *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 426 (2015).³ Additionally, the regulation was promulgated to ensure that “discrimination on the basis of sexual orientation, gender identity or expression in essential social services,” does not occur, N.Y.S. Register, Nov. 6, 2013, p. 3, when individuals apply to be prospective adoptive parents and in determining if an adoption is in a child’s best interests. The regulation “does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.” *Roberts v. United States Jaycees*, 468 U.S. 609,

³ Defendant continues to maintain that the regulation does not compel speech because the placement of a child with a prospective adoptive parent pursuant to rules prohibiting discrimination is conduct, not speech. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

623 (1984) (discussing nondiscrimination statute). The goal of preventing discrimination “is unrelated to the suppression of expression.” *Id.* at 624. The regulation is therefore content-neutral.

A content-neutral law does not violate the free speech guarantee of the First Amendment if it “(1) ‘advances important government interests unrelated to the suppression of speech’ and (2) ‘does not burden substantially more speech than necessary to further those interests.’” *Time Warner Cable, Inc. v. FCC*, 729 F. 3d 137, 160 (2d Cir. 2013) (stating the factors set forth in *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). Prohibiting discrimination and expanding the number of people who may adopt children are important government interests; these interests in turn advance the important state interest of providing permanent families best suitable to meet a child’s needs. *New Hope Family Services, Inc. v. Poole*, 493 F. Supp. 3d 44, 63 (N.D.N.Y. 2020); *In re Jacob*, 86 N.Y.2d 651, 658, 661 (1995). Toward those ends, § 421.3(d) goes no further than ensuring that the most people entitled to adopt in New York are considered and afforded an equal opportunity as prospective adoptive parents by state-authorized adoption agencies; this is “plainly” a “compelling state interest[] of the highest order.” *Roberts v. United States Jaycees*, 468 U.S. at 624.

New Hope argues that § 421.3(d) compels it to say something that it does not believe—i.e. that adoption of a child by a couple who happens to be unmarried or same sex can be in a child’s best interests, and restricts New Hope from saying anything to the contrary. Pl. Mem. of Law., ECF No. 75-1, pp. 19-23. However, this characterization of the adoption process incorrectly construes the application of regulatory factors as a purely discretionary process that results in the expression of a viewpoint by the agency.

In its moving memorandum of law, New Hope argues that one’s right to free speech is restricted when it is “mandate[ed] that persons agree with government policy on a particular matter.” *Id.*, p. 22. This characterization supports Defendant’s position that determinations made in compliance with § 421.3(d), and all other regulations governing adoption, are properly understood as

constrained by the relevant regulatory criteria, including the requirement that placements be made without regard to the prospective adoptive parent's marital status or sexual orientation. While New Hope may disagree with this policy, compliance with the regulation that implements that policy is not speech protected by the First Amendment.

Instead, by voluntarily engaging in the government-regulated area of adoption services, New Hope agrees to provide a social service in compliance with state laws and is therefore duty-bound to comply with the statutory and regulatory construct enacted to govern adoption services. New Hope cannot provide adoption services without following the relevant laws as the State has enacted them.

As a result, the determinations made by New Hope in connection with the processing of adoption applications and placing children in adoptive families are government speech, which do not trigger First Amendment protections.⁴ *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2001) (“...government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules...”).

While the Second Circuit rejected Defendant's government speech argument at the motion to dismiss stage, it indicated the possibility that Defendant may be able to offer proof sufficient to implicate the government speech doctrine. *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 174 (2d Cir. 2020). *See also id.* at 175 (“Further proceedings may produce additional evidence that casts [pleadings about factors related to speech] in a different light.”). As discussed in its moving memorandum, Defendant has done so on this record. Def. Mem. of Law, ECF No. 74-21, pp. 29-33. As demonstrated by the declaration of Carol McCarthy, voluntary authorized agencies provide

⁴The Second Circuit quotes dictum from *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) to the effect that limitations may apply when the government communicates its own message through a private entity. *New Hope*, 966 F.3d at 174-75. But here the State is not seeking to compel private parties to convey “the State's ideological message.” *Walker*, 576 U.S. at 220, rather the State is regulating the activities in which New Hope engages.

the same adoption services as local departments of social services, and laws, regulations and policies that govern authorized agencies with respect to adoption services do not distinguish between them. McCarthy Decl., ECF No. 74-4, ¶ 9. Since adoption is highly regulated by the state as a social service, it is not reasonable that the public would somehow believe that an authorized agency engages in purely private conduct. There is nothing in the record before the Court to the contrary.

Indeed, the record before the Court demonstrates that, in approving adoption applications and placing children in adoptive families, the determinations of adoption agencies are in fact ““from beginning to end”” “so controlled by New York as to be the State’s own” message. *See New Hope*, 966 F. 3d at 175 (quoting *Johanns v. Livestock Mktg Ass’n*, 544 U.S. 550, 560 (2005)). While the application of certain factors, in either the application stage or the placement stage of an adoption, requires the exercise of some agency discretion, that discretion is not unbridled. It must be exercised within the parameters set forth in statute and regulation. There are factors that agencies must consider, and there are some that they cannot consider. Whether an agency agrees with these requirements is irrelevant. It must comply with them or it cannot provide adoption services.

For this reason, the public would view the placement of a child with a same sex couple by an agency like New Hope, that expresses the view that children should not be raised by same sex parents, as conveying the message that such placement is in the child’s best interest in light of the regulatory restriction prohibiting consideration of the prospective parent’s sexual orientation. McCarthy Decl., ¶ 9. *New Hope*, 966 F.3d 173-74 (recognizing that factors determining whether speech is government speech include degree of government control and public perception).

Notwithstanding, New Hope asserts that it discusses its “values and beliefs” about marriage and family with adoption applicants and birthmothers, Pl. Mem. of Law, ECF No. 75-1, pp. 20-21, and assists prospective adoptive parents to prepare their portfolios. *Id.* These activities are unrelated to the criteria that New Hope, as an agency authorized under state law to provide

adoption services, must follow to carry out that service, and there is no factual support in the record now before the Court to support a finding that § 421.3(d) interferes with New Hope's ability to do these things. Accordingly, New Hope cannot meet its burden on this issue.

OCFS cannot "review, edit or reject" a best-interests assessment made by either a private or government authorized agency.⁵ *New Hope*, 966 F. 3d at 175. It is precisely *because* OCFS does not review or edit the best-interests assessments of authorized agencies that strict controls need to be placed on the criteria that may be considered by agencies in making those assessments. Private agencies, like New Hope, are entrusted by the state with a responsibility typically reserved for government actors and for this reason their discretion is not unconstrained.

In sum, no "message" is conveyed by an agency's placement of a child with adoptive parents. Rather, the placement decision is viewed as the agency's determination within the strict confines of regulatory parameters. Thus, the placement decision is understood as having been made within applicable regulatory criteria, even if the agency exercises its discretion within those parameters. To the extent New Hope's application of the best interests criteria conveys its viewpoint at all, such speech may be considered "hybrid" or "mixed" speech that has aspects of both private speech and government speech. *West Virginia Assn. of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). In considering whether the government may limit such "mixed speech," the Courts consider whether, as here, the government speech predominates or whether the speech has a significant private component. *Grosjean v. Bommarito*, 302 Fed. Appx. 430, 436 (6th Cir. 2008).

⁵ An adoption is subject to approval by a court, however, which must be satisfied the adoption is in the child's best interests. N.Y. Domestic Relations Law §§ 113(1), 114. But in approving an adoption, the court is not required to consider the specific best interests criteria that must be applied by an authorized agency is making a placement.

Because determinations related to approving applications to adopt and placing children with adoptive families are government speech or at least speech made within the confines of a closely regulated program, New Hope is not entitled to summary judgment on its free speech claim.

POINT II

NEW HOPE CANNOT ESTABLISH AN EXPRESSIVE ASSOCIATION CLAIM

New Hope argues that § 421.3(d) infringes upon expressive relationships among (1) its board members, employees and volunteers and (2) its representatives and adoptive couples, Pl. Mem. of Law., ECF No. 75-1, pp. 23-25, and is therefore subject to strict scrutiny. *Id.*, p. 25.

To establish an expressive association claim, a plaintiff must prove that it is a group that engages in some type of expression and that its “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends” is violated by state action. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). New Hope’s motion for summary judgment on New Hope’s expressive association claim must be denied.⁶

A. New Hope Cannot Establish that it is an Expressive Association

Not every group can assert an expressive-association right; the right can be asserted only by those engaged in “expressive association.” *Id.* at 648. “[T]he 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

⁶In addition to the reasons discussed below, New Hope is not entitled to summary judgment on its expressive association claim because it is duplicative of New Hope’s free speech claim. *DeFabio v. E. Hampton Union Free Sch. Dist.*, 658 F. Supp. 2d 461, 484 (E.D.N.Y. 2009).

be intended “to convey a particularized message.” *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397 (1989)).

The Second Circuit did not address whether New Hope is an expressive association, and New Hope fails to establish that it engages in association protected by the First Amendment.

Unlike cases in which a right to expressive association was found, *see e.g. Dale*, 530 U.S. at 649-650, 656 (purpose of Boy Scouts was to “to instill values in young people,” and it did so by having leaders who “inculcate” those values expressly and by example); *Roberts*, 468 U.S. at 626-627 (substantial part of activities of membership organization was taking public positions on, and lobbying for, political, economic, cultural, and social issues), New Hope is not open to membership and was not organized for the purpose of engaging in expressive activities. In fact, New Hope does not limit its adoption services to people who share its religious beliefs. Pl. Mem. of Law, ECF 75-1, p. 24⁷; Compl., ECF No. 1, *generally*. *Cf.* Compl., ECF No. 1, ¶ 60 (stating that New Hope provides pregnancy resources services “without consideration of the recipient’s...religious belief”).

It is important to limit the Court’s consideration to New Hope’s adoption program, and not any of the other services that New Hope provides or activities in which it engages. New Hope spends significant effort informing the Court of its beliefs and other work that it does, including operating a pregnancy resource center. Geyer Aff., ECF No. 75-2, §§ 28, 31-33, 35, 38-40, 43, 45, 48, 50, 52. Section 421.3(d) does not apply to any of those activities. In fact, if New Hope continued to operate all of its other programs, but not an adoption program, § 421.3(d) would not apply to New Hope at all. Its reach only extends to the treatment of applicants for adoption services. Therefore, an analysis of whether § 421.3(d) restricts New Hope’s rights under the First

⁷ Interestingly, New Hope will associate with those who do not share its faith, but it objects to associating with those who disagree with its view of government policy. Pl. Mem. of Law, ECF No. 75-1, pp. 24-25.

Amendment must be limited to consideration of that regulation within the context of New Hope's adoption program only.

In an effort to convince the Court that its adoption program is an expressive association, New Hope argues that it engages with prospective adoptive parents “for the purpose of discussing topics including fertility, relationships, adoption and family dynamics within the faith-based framework that New Hope very openly confesses.” Pl. Mem. of Law, ECF No. 75-1, p. 24. These activities are not adoption services and therefore fall outside the authorization required by OCFS to operate an adoption program. If New Hope's expressive purpose is to discuss these topics, it can do so without approval from, or supervision by, OCFS. However, to the extent New Hope exists for the purpose of operating an important, government-regulated social service, it is not an expressive association.

While New Hope's provision of adoption services likely entails verbal and written communications, the mission of its adoption program 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.” Compl., ECF No. 1, ¶ 3. As noted, 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. *Dale*, 530 U.S. at 648. Instead, it is a business providing a social service in compliance with state law. Accordingly, New Hope is not entitled to summary judgment on its expressive association claim.

B. There is No Support in the Record that § 421.3(d) Affects New Hope's Relationships with its Employees, Board Members or Volunteers

New Hope alleges that § 421.3(d) “disrupts” the relationships among its employees, board members and volunteers. Pl. Mem. of Law., ECF No. 75-1, pp. 23-24. However, there is no evidence in the record before the Court that the regulation affects the ability of those individuals “to

speak... ‘shared beliefs and values’ together.” *Id.*, p. 23. In fact, there is no allegation in this case, whatsoever, that OCFS has taken any action against New Hope concerning discussions among employees, board members and volunteers. And nothing about the plain language of § 421.3(d) limits such discussions; § 421.3(d) only prohibits discrimination against “applicants for adoption services.” New Hope’s employees, board members, and volunteers are not applicants for adoption services.

Nor has New Hope substantiated the Second Circuit’s concern that compliance with the nondiscrimination rule would make employment with New Hope less desirable and impact its hiring practices in a way that would affect its associational rights. *New Hope*, 966 F.3d at 179 (finding complaint “admits a plausible inference” that its ability to associate with employees is impacted by the regulation’s requirement to correct and discipline incidents of harassment and discrimination). The affidavits submitted by New Hope do not contain any non-hearsay evidence to support a claim that taking action with respect to its employees’ *acts* of discrimination would impact its expressive activities. As a result, New Hope is not entitled to summary judgment on this claim.

C. Any Burden on New Hope’s Right to Expressive Association is Incidental

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. 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 cannot show how its message is affected merely by providing services to them as required by state law. *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. New Hope cannot show that serving such couples directly or substantially interferes with its alleged associational rights.

Finally, OCFS is not enforcing its nondiscrimination regulation for the very purpose of altering New Hope's expression. Section 421.3(d) is enforced to prohibit discrimination and increase the pool of prospective adoptive parents. Thus, 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. *Roberts*, 468 U.S. at 624 (finding no constitutional violation where state's compelling interest in public accommodation law outweighed any minimal impact on organization's expressive activities).

Nothing in the record before the Court supports a finding that New Hope exists for expressive purposes or that § 421.3(d) interferes with New Hope's right to expressive association in any direct or significant way. As a result, New Hope has failed to satisfy its burden and its motion for summary judgment on this claim should be denied.

POINT III

NEW HOPE CANNOT ESTABLISH A FREE EXERCISE CLAIM

To “state a free exercise claim, a plaintiff generally must establish that ‘the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation,’ or that the law’s ‘purpose...is the suppression of religion or religious conduct.’” *Congregation of Rabbinical College of Tartikov, Inc. v. Vill. Of Pomona*, 915 F. Supp. 2d 574, 619 (S.D.N.Y. 2013) (quoting *Church of*

Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)). The right to free exercise of religion does not relieve an individual or entity of the obligation to comply with a “valid and neutral law of general applicability.” *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). Therefore, such a law that only incidentally imposes a burden on the exercise of religion need only be supported by a rational basis. *WTC Families for a Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 539-540 (S.D.N.Y. 2008).

New Hope argues that § 421.3(d) is subject to strict scrutiny because (1) it interferes with New Hope’s “historic beliefs” and “faith and mission,” and (2) it is not generally applicable or neutral. Pl. Mem. of Law., ECF No. 75-1, pp. 26-29. Neither of these theories is supported by applicable law or the record before this Court. Instead, the factual record demonstrates that § 421.3(d) is a neutral regulation of general applicability that is rationally related the state’s interests in prohibiting discrimination and ensuring the largest pool of available adoptive parents.

A. The *Smith* Doctrine Applies to § 421.3(d)’s Application to New Hope

New Hope argues that the rational basis scrutiny applicable to neutral and generally applicable laws under *Smith* does not apply because New Hope is a religious organization, citing to case law applying the ministerial exception. Pl. Mem. of Law, ECF No. 75-1, pp. 26-27. New Hope argues that application of § 421.3(d) is unconstitutional here because it “intrudes on New Hope’s faith and mission.” But this church autonomy doctrine does not apply to an authorized agency like New Hope that performs adoption services and, even assuming it did, the doctrine has no application to these facts.

The church-autonomy doctrine traditionally protected religious organizations from direct interference in disputes over the control of church property and the appointment of church leadership. *See Serbian E. Orthodox Diocese for United States and Canada v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440

(1969). In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), the Supreme Court extended the doctrine to religious educational institutions with respect to their control over the employment of individuals who play a “role in conveying the Church’s message and carrying out its mission.” *Id.* at 192. The Court subsequently explained that religious institutions are protected by this “ministerial exception” because of “the close connection that religious institutions draw between their central purpose and educating the young in the faith.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020). And religious schools may assert the “ministerial exception” as a defense to an employment discrimination claim brought by teachers holding certain positions 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. *Hosanna Tabor*, 565 U.S. at 196.

The doctrine has no application to a religiously motivated adoption agency’s actions in placing children with prospective adoptive parents.⁸ First, notwithstanding its repeated characterization of itself as a “ministry,” *see e.g.* Pl. Mem. of Law, ECF 75-1, pp. 9, 11, 21, 22, 25, 27, 35, 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 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.

In any event, the activity of placing children with prospective adoptive parents is not akin to a religious organization’s choice of “who will preach their beliefs, teach their faith, and carry out their mission.” *Hosanna Tabor*, 565 U.S. at 196.

⁸ In *Penn v. N.Y. Methodist Hosp.*, 884 F. 3d 416, 424 (2d Cir. 2018), the Second Circuit applied the ministerial exception to the pastoral department of a religiously-affiliated hospital because the pastoral department was “a religious group” and the employee’s role in that department was to provide religious care. An authorized adoption agency is not like a pastoral department of a hospital.

Indeed, in *Hosanna Tabor*, 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.

Like the neutral, generally applicable law at issue in *Smith* (a prohibition on the use of peyote), § 421.3(d), by prohibiting discrimination against adoption applicants in the provision of adoption services, regulates New Hope’s “outward physical conduct,” not an “internal church decision.” *Id.* at 190 (distinguishing *Smith* on this basis).

Thus, New Hope’s provision of adoption services remains subject to a valid and neutral law of general application.

For like reason, the *dictum* in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018), cited by New Hope, Pl. Mem. of Law, ECF No. 75-1, p. 26, 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. The employees of New Hope are not members of the clergy engaged in religious ceremony. They are employees of an adoption agency. As a result, New Hope fails to show that the rule outlined in *Smith* does not apply.

B. Section 421.3(d) is Generally Applicable

A law is not generally applicable if it (1) “invite[s] the government to consider the

particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions,'" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884) (internal quotations omitted). Section 421.3(d) does not do either of these things. Instead, it applies to all providers of adoption services without exception.

The statutory and regulatory provisions that govern adoption services in New York do not single out any specific religious practices or views. And, contrary to New Hope's argument, Pl. Mem. of Law, ECF No. 75-1, pp. 28-29, they also do not contain exceptions to § 421.3(d) that allow discrimination on the basis of certain factors, but not discrimination based on marital status or sexual orientation for religious reasons. Nor does the nondiscrimination rule permit the granting of individualized exemptions. In this way, § 421.3(d) is entirely distinguishable from the anti-discrimination contract provision in *Fulton*. 141 S. Ct. 1868 at 1878, 1881.

Here, unlike in *Fulton*, there is no mechanism for individualized exemptions from compliance with the anti-discrimination policy of § 421.3(d). All organizations, both secular and faith-based agencies, must comply with it if they wish to provide adoption services in this state. No one is excused from 421.3(d) based on the particular reasons for their conduct.

In an effort to confuse the Court, New Hope argues that the statutory scheme contains numerous exceptions but in doing so, it conflates two distinct phases of the adoption process: (1) evaluation of applications to become adoptive parents and (2) placement of a particular child with a particular adoptive parent. Pl. Mem. of Law, ECF No. 75-1, pp. 28-29. As fully discussed in Defendant's moving memorandum of law, Def. Mem. of Law, ECF No. 74-21, pp. 25-27, the relevant factors for these determinations are not proper comparators. *Fulton*, 141 S. Ct. at 1921 (concurring opinion) (citing *Lukumi*, 508 U.S. at 543) (a secular comparator must be identified to determine if it is treated differently than a religious comparator). Section 421.3(d) protects adoption

applicants from discrimination; it focuses on the individuals who must be provided adoption services on a nondiscriminatory basis. By contrast, the consideration of certain characteristics, such as the child's religion, at the placement stage—where the goal is to make a placement that serves the best interests of that particular child—does not undermine the state's interest in preventing discrimination against prospective adoptive parents and ensuring the largest possible pool of prospective adoptive parents. Indeed, prohibiting discrimination and ensuring a larger pool of prospective adoptive parents increases the ability to make the best fit for each child. Thus, the consideration of individual characteristics at the placement stage does not undermine the interests served by § 421.3(d) in the way that plaintiff's exclusionary rule—that applies to exclude all affected prospective adoptive couples from consideration—would.

Although cited by New Hope in support of its argument, Pl. Mem. of Law, ECF No. 75-1, p. 29, the Supreme Court holding in *Tandon* supports Defendant's position. The Court confirmed that “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” 141 S. Ct. 1294, 1296 (2021). The interests that are served by § 421.3(d) are prohibiting discrimination based on sexual orientation or marital status and increasing the number of available prospective adoptive families. The interests that are served by the various placement statutes and regulations, and the provisions allowing consideration of protected characteristics in making those decisions, are ensuring that a particular child is placed with a family best equipped to parent that child. New Hope's exclusionary policy undermines the state's interest in prohibiting discrimination and increasing the availability of protected characteristics in making placement decisions do not. Under *Tandon*, these two sets of factors are not proper comparators.

As a result, New Hope has failed to prove that that § 421.3(d) is not generally applicable. Therefore, because it is also neutral, as shown below, it need only be supported by a rational basis.

C. Section 421.3(d) is Neutral

“Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). The neutrality of a law is determined by the consideration of relevant factors, including: “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in questions, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Church of Lukumi Babalu Aye*, 508 U.S. at 540; see also *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (applying the neutrality factors).

New Hope alleges that § 421.3(d) is not neutral because of the following reasons: (1) inconsistency with Domestic Relations Law § 110, Pl. Mem. of Law, ECF No. 75-1, pp. 30-31; (2) alleged delay in its enforcement against New Hope, *id.*, p. 32; (3) the severity of the applicable penalty against New Hope, *id.*, p. 33; (4) two isolated statements by OCFS employees, *id.*, pp. 34-35; (5) the absence of a religious exemption, *id.*, pp. 31; (6) its promulgation was “in the absence of any problem calling for a solution,” *id.*, 32; (7) OCFS’s “failure to consider new Hope’s referral policy,” *id.*, p. 34; and (8) OCFS’s failure to act as a “neutral decisionmaker” when promulgating or enforcing the regulation, *id.*, p. 35.

The first four reasons listed above were fully discussed in Defendants’ moving memorandum of law, Def. Mem. of Law, ECF No. 74-21, pp. 17-23, are fully incorporated here and will not be repeated. Defendant’s analysis of those arguments requires denial of New Hope’s motion for summary judgment on its free exercise claim for the same reasons that Defendant’s motion should be granted on that claim. The same is true for New Hope’s remaining arguments.

1. The Lack of a Religious Exemption Does Not Indicate Hostility

New Hope alleges that the promulgation of § 421.3(d) without a religious exemption evinces hostility toward religion. Pl. Mem. of Law, ECF No. 75-1, pp. 31. There is no support for this argument in the record before the Court, and New Hope fails to cite any case as support for this proposition. *Id.* Instead, as set forth in the Declaration of Jara Traina, ECF 74-7, and fully discussed in Defendant’s moving memorandum, ECF No. 74-21, pp. 13, 17-18, § 421.3(d) was promulgated by a work group as part of a package of regulations aimed at prohibiting discrimination based on, inter alia, sexual orientation, throughout OCFS’s different program areas. Traina Dec., ECF No. 74-7, ¶¶ 13-15. At no time did the work group consider and reject the inclusion of a religious exemption, Traina Decl. ECF No. 74-7, ¶ 17, and the absence of a religious exemption did not contradict any other law. *See* Def. Mem. of Law, ECF No. 74-21, pp. 20-24 (discussing that § 421.3(d) does not contradict Domestic Relations Law § 110).

The Second Circuit very recently reaffirmed that “a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption.” *We the Patriots USA, Inc. v. Hochul*, 2021 U.S. App. LEXIS 32880, **23-24 (Nov. 4, 2021) (quoting *Central Rabbinical Congress of the U.S. & Canada v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 196 (2d Cir. 2014)), *clarified on other grounds*, 2021 U.S. App. LEXIS 33691 (2d Cir. Nov. 12, 2021). By promulgating § 421.3(d) without any exemptions, OCFS has done precisely that, and New Hope has not cited to any case law to support a different conclusion.

For these reasons, and those discussed in Defendant’s moving papers, ECF No. 74-21, pp. 20-23, New Hope has failed to establish that the promulgation of § 421.3(d) without a religious exemption demonstrates hostility.

2. Preemptively Prohibiting Discrimination is Not Evidence of Hostility

New Hope also alleges that the promulgation of § 421.3(d) “in the absence of any problem

calling for a solution” evinces religious hostility. Pl. Mem. of Law, ECF No. 75-1, p. 32. Contrary to New Hope’s contention, it is not necessary for a harm to have first occurred before it may be addressed. In any event, while New Hope argues, *id.*, that there was no evidence of any harm from its exclusionary policy in the absence of evidence that any couples had been dissuaded from adopting, we have explained, Pl. Mem. of Law, ECF 74-21, p. 34, 35, that New Hope’s policy causes harm by stigmatizing same sex couples and decreasing the pool of children available for adoption by them. Moreover, the Declaration of Jara Traina, ECF No. 74-7, describes the genesis of the regulation and the state interests justifying the promulgation of § 421.3(d). Specifically, as discussed above and in Defendant’s moving memorandum, Def. Mem. of Law, ECF No. 74-21, pp. 17-18, the promulgation of § 421.3(d) stemmed from meetings of a work group assembled to address the care provided to transgender youth in court-ordered OCFS custody. Traina Decl., ECF No. 74-7, ¶¶ 7-15. After developing policies to ensure that transgender youth in court-ordered OCFS custody were free from discrimination, OCFS determined that it had an obligation to similarly protect the other children and families it serves through programs and services that it regulates, approves or otherwise oversees. Traina Decl., ECF No. 74-7, ¶ 13.

It was reasonable for OCFS to anticipate that adoption agencies may attempt to discriminate against adoption applicants in this state when it included adoption services among the OCFS programs to which an antidiscrimination regulation would apply. And such a concern was not unwarranted since New Hope’s own existing policy does, in fact, do so. New Hope’s entire argument is circular: the regulation is unconstitutional because it is designed to attack a non-existent problem; but it is also unconstitutional because it forbids conduct in which New Hope, itself, wants to engage.

New Hope has not cited any case to support a conclusion that the state must know of an instance of discrimination before it may implement laws to prohibit such discrimination. Pl. Mem.

of Law, ECF No. 75-1, p. 32. Since neither the law nor the factual record support a finding that the promulgation of § 421.3(d) evinces hostility to religion, New Hope is not entitled to summary judgment.

3. Rejection of New Hope's Referral Policy is Not Evidence of Hostility

New Hope alleges that OCFS's refusal to consider its referral program as a "solution" to New Hope's discrimination against same sex and unmarried couples demonstrates hostility to religion. Pl. Mem. of Law, ECF No. 75-1, p. 34. As previously explained, Def. Mem. of Law, ECF No. 74-21, pp. 34-37, New Hope's referral policy undermines the state's interests in prohibiting discrimination based on protected characteristics and ensuring equal access of the most prospective adoptive parents to the most children awaiting adoption.

New Hope's referral program excludes certain people from participation in its adoption program. Such a policy infers that unmarried and same sex couples are "second class citizens" and permitting it to continue would amount to "state-sanctioned disapproval of same-sex relationships" and "disrespects and further marginalizes a historically disadvantaged population." McCarthy Decl., ECF No. 74-4, ¶ 47.

Further, New Hope's policy prevents unmarried and same sex couples from adopting children in New Hope's legal custody, thereby decreasing the pool of children available for adoption by them. *Id.*, ¶¶ 50, 52.

For all of the reasons why New Hope's referral policy cannot withstand strict scrutiny, Def. Mem. of Law, ECF No. 74-21, pp. 34-37, it also cannot serve as a "solution" to § 421.3(d)'s application to New Hope. As a result, OCFS's rejection of New Hope's referral policy is not evidence of religious hostility.

4. There is No Evidence that OCFS Acted as a Non-neutral Decisionmaker

Apparently trying to bring this case within the narrow holding of *Masterpiece Cakeshop*, 138 S.

Ct. 1719, *New Hope* likens OCFS's promulgation and enforcement of § 421.3(d) to the adjudicatory decision-making body in that case. Pl. Mem. of Law, ECF No. 75-1, p. 35. In *Masterpiece Cakeshop*, the plaintiff challenged the decision of the Civil Rights Commission that plaintiff was required to bake wedding cakes for same sex weddings pursuant to a state antidiscrimination statute. 138 S. Ct. at 1723. The Court determined that statements made by the Civil Rights Commission during a hearing on an administrative complaint brought against the plaintiff baker demonstrated hostility toward the plaintiff's religious beliefs. *Id.* at 1775-1776, 1731. Here, OCFS is the agency charged with enforcing its regulations. It does not act as neutral body determining the rights of aggrieved parties.

To the extent that *New Hope* argues that OCFS was acting as "an ideological adversary rather than a 'neutral decisionmaker,'" because it promulgated § 421.3(d) without a religious exemption, Pl. Mem. of Law, ECF No. 75-1, p. 35, such an argument is duplicative of the argument addressed at Point III(c)(1) above, and is an attempt to stretch the holding in *Masterpiece Cakeshop* beyond its intended reach. 138 S. Ct. at 1731-1732.

D. Section 421.3(d) is Rationally Related to the State's Interests

Because § 421.3(d) is neutral and generally applicable, it need only be rationally related to the state's interest to withstand *New Hope*'s free exercise challenge. *New Hope*, 966 F.3d at 162 (stating that a law is only subject to heightened scrutiny when it is not neutral and generally applicable). This Court has already determined that the State has compelling interests in (1) combating discrimination and (2) increasing the pool of prospective adoptive families, *New Hope*, 493 F. Supp. 3d at 60, and that § 421.3(d) is rationally related to the state's interests. *New Hope Family Services, Inc. v. Poole*, 387 F. Supp. 3d 194, 216 (N.D.N.Y. 2019). Accordingly, *New Hope*'s motion for summary judgment on its free exercise claim should be denied.

POINT IV**EVEN IF, ARGUENDO, STRICT SCRUTINY APPLIES, § 421.3(D) SATISFIES THAT STANDARD**

Even if, *arguendo*, the Court finds that § 421.3(d) triggers strict scrutiny under any of New Hope's claims, the regulation withstands such review. Contrary to the argument of New Hope, Pl. Mem. of Law, ECF No. 75-1, pp. 37-38, this Court already determined that the state interests served by § 421.3(d)—preventing discrimination and increasing the pool of prospective adoptive parents—are important and compelling state interests. *New Hope*, 493 F. Supp. 3d at 60. As promulgated, § 421.3(d) is narrowly tailored to satisfy these interests. There is no other way to ensure that no one is excluded from a program solely on the basis of a protected characteristic other than by forbidding such discrimination.

Notwithstanding, New Hope argues that the only way that § 421.3(d) can be narrowly-tailored is to include a religious exemption, and that this alternative is appropriate in light of, among other things, the lack of evidence that it has impeded a couple's ability to adopt and the existence of its referral policy. Pl. Memo. of Law, ECF No. 75-1, pp. 38-39.

However, for the reasons fully discussed in Defendant's moving memorandum of law, Def. Mem. of Law, ECF No. 74-21, pp. 34-37, New Hope's referral policy undermines the state's interests in ensuring that people are not categorically excluded from adoption services on the basis of protected characteristics, including marital status and sexual orientation, and are available as prospective parents for all children needing homes. Moreover, the fact that New Hope's referral policy limits the children available to be adopted by the prospective parents it refuses to serve, distinguishes this case from *Fulton*, where the children needing foster care were in the legal custody of the local governmental social services agency, not the plaintiff agency, and were available to be placed with any approved foster family. *Fulton*, 141 S. Ct. at 1875. Here, if New Hope refuses to work with a prospective adoptive couple, that couple is excluded from ever adopting the children in

New Hope's custody. McCarthy Decl., ECF No. 74-4, ¶¶ 49-52. Therefore, New Hope's referral policy is not an acceptable alternative to § 421.3(d).

The state cannot sanction discrimination against adoption applicants on the basis of marital status or sexual orientation. As a result, § 421.3(d) is narrowly tailored to satisfy the State's compelling interests, and Plaintiff's motion for summary judgment should be denied.

POINT V

NEW HOPE HAS NOT ESTABLISHED ITS ENTITLEMENT TO A PERMANENT INJUNCTION

To be entitled to a permanent injunction, a plaintiff must prove that it (1) "suffered an irreparable injury;" (2) "that remedies at law, such as monetary damages, are inadequate to compensate for that injury;" (3) "that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted;" and (4) "that the public interest would not be disserved by a permanent injunction." *Komatsu v. City of New York*, 2019 U.S. Dist. LEXIS 169527, **19-20 (S.D.N.Y. Sept. 30, 2019) (quoting *U.S.S.E.C. v. Citigroup Glob. Markets, Inc.*, 752 F. 3d 285, 296 (2d Cir. 2014)).

New Hope has failed to meet its burden to establish that it is entitled to a permanent injunction. It devotes a single sentence to this issue in its memorandum, arguing that all that it needs to do is prove a First Amendment violation. Pl. Mem. of Law, ECF No. 75-1. While a First Amendment violation establishes irreparable injury, it does not establish the balancing of the equities or the public interest elements. *Komatsu*, 2019 U.S. Dist. LEXIS at **20-21.

For the reasons discussed in Defendant's moving papers, and the discussion herein, New Hope cannot establish a First Amendment violation and, therefore, the permanent injunction analysis need go no further. However, even if, *arguendo*, New Hope establishes a First Amendment violation, it has failed to even argue, much less prove, that an order enjoining the enforcement of

§421.3(d) to protect “the right of New Hope and similarly situated adoption and foster care services⁹ to operate consistent with their beliefs,” Pl. Mem. of Law, ECF No. 75-1, p. 40, (1) does not disserve the public interest or (2) that any hardships experienced by New Hope outweigh the hardships to be experienced by the state if it is not permitted to protect unmarried and same sex couples from discrimination in adoption services.

Since New Hope has failed to satisfy this burden, its motion for summary judgment seeking a permanent injunction should be denied.

CONCLUSION

For the reasons discussed above, Plaintiff’s motion for summary judgment should be denied in its entirety.

Dated: Albany, New York
November 19, 2021

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⁹ This case is not a class action, and does not involve a foster care program. Compl., ECF No. 1, generally.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

New Hope,

-against-

18-CV-1419

SHEILA J. POOLE,

MAD/TWD

Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
STATEMENT PURSUANT TO RULE 56.1(b)**

Pursuant to Rule 56.1(b) of the Local Rules of this Court, Defendant Sheila J. Poole responds to Plaintiff's Statement of Material Facts, ECF No. 75-1, pp. 9-19 as follows:

1. Admits that the statement is believed by New Hope and that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.
2. Admits that the statement is believed by New Hope and that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.
3. Admits that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.
4. Admits that the cited authority supports the statement.

5. Denies. New Hope is an authorized adoption agency. Declaration of Carol McCarthy (“McCarthy Decl.”), ECF No. 74-4 ¶ 8.

6. Admits the statement is believed by New Hope and that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.

7. Admits that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.

8. Denies that New Hope can exercise its autonomy in connection with its provision of adoption services, McCarthy Decl., ECF No. 74-4 ¶¶ 8, 9, but admits that New Hope receives no government funding.

9. Admits the statement is believed by New Hope, but contends that the statement is not material to the issues before the Court.

10. Admits.

11. Admits that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.

12. Admits.

13. Admits that the cited authority supports the statement to the extent of the affiant’s “knowledge,” but contends that the statement is not material to the issues before the Court.

14. Denies. New Hope “rejects” unmarried and same sex couples by not accepting applications from them. McCarthy Decl., ECF No. 74-4, ¶¶ 47-54.

15. Admits that OCFS is not aware of any evidence because New Hope's recuse and referral policy ensures that unmarried and same sex couples who seek its services have no administrative process available to them at OCFS. McCarthy Decl., ECF No. 74-4, ¶ 54.

16. Admits that New Hope's services are not confined to placing children for adoption, but contends that New Hope's other functions are not material to the issues before the Court.

17. Admits that the statement is believed by New Hope and that "VC ¶ 270" and "VC ¶ 56" support the statement; denies that "Geyer Aff. ¶ 86-87" or Jerman Aff. ¶ 14" support the statement; and contends that the statement is not material to the issues before the Court.

18. Admits that the cited authority supports the statement, but contends that the use of the word "associated" in the statement refers to working together in the workplace. Affidavit of Kathleen Jerman ("Jerman Aff."), ECF No. 75-3, ¶ 54.

19. Admits the statement is believed by New Hope and that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.

20. Denies. As an authorized agency, New Hope is applying statutory factors when it evaluates prospective adoptive parents and files reports. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40.

21. Denies. The adoption process, selection of adoptive parents and what may or may not be considered in connection with the best interests of children in adoption are governed by state statute, regulation and policy. As an authorized agency, New Hope must apply them. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40.

22. Denies. The statement mischaracterizes the function of the application of the statutory and regulatory factors applicable to adoption applications. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40. Additionally, paragraphs 8 and 9 of “Jerman Aff.” do not support the statement.

23. Denies. Actions taken on adoption applications and placement decisions are governed by law and not the discretion or personal judgment of an authorized agency like New Hope. McCarthy Decl., ECF No. 74-4 ¶¶ 34-40. Additionally, “Jerman Aff.” ¶¶ 19-32 pertain to adoption applicants, not discussions and recommendations to birthmothers.

24. Denies that OCFS has ever compelled or censored a message of New Hope, Jerman Aff., ECF No. 75-3, ¶¶ 12, 18, but admits that OCFS has ensured New Hope’s compliance with all applicable laws, regulations and policies.

25. Admits that the cited authority supports that New Hope discusses the listed topics with candidate adoptive couples, but contends that these discussions are not material to the issues before the Court.

26. Admits, except denies that the cited authority constitutes non-hearsay evidence that the contention that all adoptive applicants “have chosen to work with New Hope rather than with one of the many secular adoption services in the state.” Affidavit of Judith A. Geyer (“Geyer Aff.”), ECF No. 75-2, ¶ 86; Jerman Aff., 75-3, ¶ 51.

27. Admits.

28. Admits.

29. Denies. As an authorized agency, New Hope’s discussions about the application of statutory and regulatory factors relevant to approving adoption applications and placing

children with adoptive families do not involve discretion or personal judgment. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40.

30. Admits that the cited authority supports the statement as to New Hope’s belief, but denies that authorized agencies have the discretion not to comply with state law. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40.

31. Admits that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.

32. Admits that the cited authority supports the statement, but contends that the statement is not material to the issues before the Court.

33. Admits, but denies that the speech is value-laden. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40.

34. Admits that application of statutory and regulatory factors is not “merely clerical,” but denies that it permits an authorized agency to “exercise judgment and discretion in considering a wide and non-exhaustive range of factors. McCarthy Decl., ECF No. 74-4, ¶¶ 34-40.

35. Admits.

36. Admits.

37. Admits.

38. Admits, but contends that the statement is not material to the issues before the Court.

39. Denies. N.Y. Dom. Rel. Law § 110; transcript of legislative comment, Declaration of Adrienne J. Kerwin, ECF No. 74-2, pp. 49-51.

40. Admits, but contends that the statement is not material to the issues before the Court.

41. Admits.

42. Admits that the regulation was issued in November 2013, but denies that it was issued pursuant to DRL § 110 and, therefore, denies the remainder of the statement.

Declaration of Jara Traina (“Traina Decl.”), Exh. G, ECF No. 74-14, pp. 1, 16, 38, 60.

43. Denies. The “archaic regulatory language” phrase in the rulemaking record referred to the language that implies that the sexual orientation of some people, but not others, is relevant to evaluating adoption applications. Traina Decl., Exh. G, ECF No. 74-14, pp. 22-23, 39

44. Admits, but denies that OCFS conducted any comprehensive review of New Hope between 2013 and 2018. McCarthy Decl., ECF No. 74-4, ¶¶ 19, 41-42.

45. Admits, but denies that OCFS knew of New Hope’s policy as of the date of the letter. Declaration of Suzanne Colligan (“Colligan Decl.”), ECF No. 74-16, ¶¶ 4, 6; October 16, 2018 letter, ECF No. 1-7, pp. 3.

46. Denies. Colligan Decl. ¶¶ 6-7.

47. Denies. Colligan Decl. ¶¶ 6-7.

48. Denies. The October 16, 2018 letter requested a response within 15 days “indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the [421.3(d)].” October 16, 2018 letter, ECF No. 1-7, p. 3.

49. Denies. Appellee Brief, Kerwin Decl., Exh. B, ECF No. 74-3, pp. 61-62, 64-65.

50. Admits the Court made the statement during oral argument, but denies that it is evidence and contends that the statement is not material to the issues now before the Court.

51. Denies. Transcript of Proceedings, Lippelmann Aff., Exh. G, ECF No. 75-18, p. 45.

Dated: Albany, New York
November 19, 2021

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