

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.

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

LETTIA JAMES
Attorney General
State of New York
Attorney for Defendant Sheila J. Poole
The Capitol
Albany, New York 12224

Adrienne J. Kerwin
Assistant Attorney General, of Counsel
Bar Roll No. 105154
Telephone: (518) 776-2608
Fax: (518) 915-7738 (Not for service of papers)

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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 reply memorandum of law in further support of her motion for summary judgment, ECF No. 74, pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56.1(a).

PRELIMINARY STATEMENT

New Hope’s reliance on statements made by the Second Circuit when ruling on Defendant’s motion to dismiss the Complaint is misplaced here where the Court is now presented with a non-hearsay factual record instead of only New Hope’s self-serving allegations. Statements made, and conclusions reached, by the Second Circuit premised only upon New Hope’s Complaint are no longer controlling when the evidence before the Court contradicts New Hope’s bald and unsupported allegations.

As demonstrated in Defendant’s opening submissions, ECF Nos. 74 – 74-21, fully incorporated herein, Defendant is entitled to summary judgment dismissing the complaint. Defendant addresses here New Hope’s factual and legal counterarguments and demonstrate that, on this record, New Hope is not entitled to relief on its free exercise, free speech or expressive association claims.

Section 421.3(d) does not permit individualized exemptions or permit secular conduct that undermines the state’s interests, and is therefore generally applicable. Additionally, neither the plain language nor the promulgation history of § 421.3(d) demonstrate hostility toward or targeting of religion. The promulgations history of § 421.3(d) is undisputed on the record, and resulted from extensive efforts by a work group endeavoring to eradicate discrimination in OCFS programs. Further, none of the other allegations relied upon by the Second Circuit as potentially indicative of hostility are borne out by the record before the Court. Instead, § 421.3(d) is neutral, generally applicable and supported by a rational basis.

New Hope cannot provide adoption services without the continuing approval of OCFS and compliance with all state laws related to adoption. Accordingly, it provides a social service to New York citizens within a state-established statutory and regulatory scheme. Its efforts in this regard are actions confined by established criteria, and not protected speech. In addition, New Hope operates an adoption program and its purpose is not to engage in expressive activities. To the extent it is considered an expressive association, any burden on the right to expressive association is merely incidental and insufficient to state a claim

For these reasons, and those set forth in Defendant's moving submissions, ECF Nos. 74 – 74-21, and in opposition to New Hope's motion, ECF Nos. 76, 76-1, Defendant's motion for summary should be granted in its entirety.

ARGUMENT

POINT I: NEW HOPE FAILED TO COMPLY WITH LOCAL RULE 56.1(B)

While New Hope asserts that a number of Defendant's statements are "improper" because they "do[] not provide any 'citation to the record where the fact is established,'" *see e.g.* Response to Defendant's Statement of Material Facts, ECF No. 77-1, ¶¶ 56, 58, 96, 97, 98, 103, 104, 105, 108, each statement contained in Defendant's Statement of Material Facts does, in fact, contain a citation to the factual record before the Court. Defendant's Statement of Material Facts, ECF No. 74-20. It is New Hope, and not Defendant, which has denied statements without a citation to the record, in violation of Local Rule 56.1(b). *See e.g.* Response to Defendant's Statement of Material Facts, ECF No. 77-1, ¶¶ 27, 36, 37, 44, 45, 46, 47, 48, 49, 52, 53, 54, 55, 57, 59, 60, 63, 64, 66, 91, 92, 93, 99, 100, 112 (citation to hearsay), 113 (citation to hearsay), 114 (citation to hearsay), 115, 116, 117, 119, 120, 125.

New Hope's failure to provide record support for its denials demonstrates that New Hope simply disagrees with Defendant's statements. In most of its responses, New Hope mischaracterizes

Defendant's clear statements to improperly lodge unsupported denials and improper objections.¹ *See e.g.* Response to Defendant's Statement of Material Facts, ECF No. 77-1, ¶¶ 2, 4, 5, 6, 8, 10, 11, 12, 13, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 33, 34, 35, 36, 42, 43, 45, 46, 47, 48, 49, 52, 56, 57, 59, 60, 67, 68, 70, 77, 79, 83, 104, 105, 106, 107, 111, 113, 123, 125. These efforts directly frustrate the purpose of Local Rule 56.1. In opposing Defendant's motion for summary judgment, New Hope had the opportunity to submit factual evidence to contradict the supported statements asserted by Defendant. But it did not; presumably because no such contradictory evidence exists.

Any facts set forth by Defendant denied by New Hope without a citation to the factual record must be deemed admitted. N.D.N.Y. Local Rule 56.1(b). *See e.g.* Response to Defendant's Statement of Material Facts, ECF No. 77-1, ¶¶ 27, 36, 37, 44, 45, 46, 47, 48, 49, 52, 53, 54, 55, 57, 59, 60, 63, 64, 66, 91, 92, 93, 99, 100, 112 (citation to hearsay), 113 (citation to hearsay), 114 (citation to hearsay), 115, 116, 117, 119, 120, 125. Since the undisputed facts establish that Defendant is entitled to summary judgment, Defendant's motion should be granted and New Hope's motion should be denied.

¹For instance, in responding to Defendant's statement that "[t]he work group worked collaboratively with stakeholders to draft OCFS regulations to prohibit the discrimination and/or harassment of anyone involved in services regulated by OCFS on the basis of sexual orientation, gender identity or gender expression," Defendant's Statement of Material Facts, ECF No. 74-2, ¶ 48, New Hope responded, "Denied that the 'work group' consulted appropriately and collaboratively with 'stakeholders' including faith-based foster-care and adoption agencies to draft regulations." Response to Defendant's Statement of Material Facts, ECF No. 77-1, ¶ 48. Not only did this response deny Defendant's statement without a citation, it provided a response that is not only unresponsive, but false. *Id.* The Declaration of Jara Traina specifically states that "the workgroup actively engaged with faith leaders in its work." Declaration of Jara Traina, ECF No. 74-7, ¶ 17.

POINT II: DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON NEW HOPE'S FREE EXERCISE CLAIM

New Hope fails to undermine Defendant's strong showing that § 421.3(d) is neutral and generally applicable. Accordingly, because the regulation is rationally-based, New Hope's free exercise claim fails.

A. New Hope Cannot Prove that § 421.3(d) is Hostile Toward Religion

As the Second Circuit and this Court have found, whether a law is hostile toward religion is based on an analysis of the totality of circumstances. *New Hope Family Services, Inc. v. Poole*, 966 F. 3d 145, 163 (2d Cir. 2020); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534, 540 (1993). The totality of the circumstances based on the factual record now before the Court demonstrates that § 421.3(d) is neutral.

As previously and fully discussed, none of the alleged potential indicia of hostility cited by New Hope or the Second Circuit have been established by New Hope. *New Hope*, 966 F. 3d at 165-170. Specifically, New Hope has failed to offer any evidence to establish that any of the following demonstrate a hostility toward religion: (1) the promulgation history of § 421.3(d); (2) the alleged delay by OCFS in enforcing § 421.3(d) against New Hope between 2013 and 2018; (3) the alleged closure of other religious agencies after the promulgation of § 421.3(d); (4) the alleged severity of OCFS's action for New Hope's noncompliance with § 421.3(d); (5) the alleged "disconnect" between § 421.3(d) and Domestic Relations Law § 110; and (6) language contained in the rulemaking record. The evidence on these issues submitted by Defendant is undisputed. New Hope's mere allegations that OCFS's actions nonetheless demonstrate hostility despite OCFS's detailed explanation for each alleged action simply do not satisfy its burden on summary judgment.

In particular, New Hope continues to rely on a claimed inconsistency between Domestic Relations Law (DRL) § 110 and § 421.3(d). But it cannot refute Defendant's evidence that the

regulation grew out of a workgroup concerned with discrimination on the basis of sexual orientation and gender identity and was not promulgated under DRL § 110. Declaration of Jara Traina (“Traina Decl.”), ECF No. 74-7.

Moreover, New Hope does not seek to rely on the alleged statements made by OCFS employees in opposing Defendant’s motion for summary judgment and, in moving for summary judgment in their favor; it relies only on the statement by an OCFS press officer in response to a media inquiry regarding another authorized agency that voluntarily withdrew from providing adoption services. Declaration of Monica Mahaffey, ECF No. 74-19, ¶¶ 3-4; Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment, ECF No. 75-1, at 27-28. That one ambiguous statement is insufficient to demonstrate that § 421.3(d) is not neutral and, instead, is hostile toward religion.

B. New Hope Cannot Prove that § 421.3(d) is Not Generally Applicable

To avoid the clear conclusion that § 421.3(d) is generally applicable New Hope continues to conflate § 421.3(d)’s purpose in prohibiting exclusion from adoption services based on protected characteristics with factors to be used to ascertain the best fit of a particular child with a particular prospective family. Exclusion from a program is discrimination. Consideration of factors to find the best fit for a child is not.

In attempting to convince the Court that Defendant “mandates race discrimination” while prohibiting discrimination based on sexual orientation or marital status, Plaintiff’s Memorandum of Law (“Pl. Mem. of Law”), ECF No. 77, pp. 23-24, New Hope intentionally mischaracterizes, by selective quotation, 18 N.Y.C.R.R. § 421.18(d)(2). *Id.*, p. 24. As relevant here, that regulation states:

Each authorized agency shall...[m]ake placement decisions on the basis of the best interests of the child, including but not limited to... consideration of the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s). When making placement decisions, an authorized agency may consider 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 one of a number of factors used to determine best interests. Race, color or natural origin of the child or the adoptive parent may be considered only where it can be demonstrated to relate to the specific needs of an individual child.

18 N.Y.C.R.R. § 421.18(d)(2). Unlike the mischaracterization afforded to this provision by New Hope, Pl. Mem. of Law, ECF No. 77, p. 24, this provision permits consideration of factors, including race, color or natural origin in a placement determination only to the extent that it is relevant to a particular child's best interests. It does not permit rejection of adoption applicants based on race, color or natural origin and, in fact, OCFS's MEPA expressly prohibits discrimination on this basis. *See* OCFS Administrative Directive 15-OCFS-ADM-05.²

New Hope's reliance on Domestic Relations Law § 110, which permits the disapproval of adoption applicants based on an applicants' poor health or limited life expectancy, as alleged evidence of secular reasons why adoption agencies may "decline and refer applicants", Pl. Mem. of Law, ECF No. 77, p. 24, is entirely misleading. Domestic Relations Law § 110 sets forth who is, and is not, legally permitted to adopt. The referenced provision clarifies that the law does not preclude consideration of poor health and life expectancy because those factors relate directly to a prospective adoptive parent's ability to physically care for a child and are thus relevant to the best interests determination. Domestic Relations Law § 110 does not, contrary to New Hope's assertion, permit authorized agencies to refuse to serve adoption applicants legally permitted to adopt based only on an applicant's protected characteristic.

Additionally, New Hope argues that "applicable statutes and regulations [] categorically exclude applicants based on otherwise protected characteristics," citing to N.Y. Dom. Rel. Law § 110 and 18 NYCRR § 421.16(d), which do not allow an individual who is married but separated for

² *See* https://ocfs.ny.gov/main/policies/external/OCFS_2015/ADMs/15-OCFS-ADM-05%20Multiethnic%20Placement%20Act%20of%201994%20as%20Amended%20by%20the%20Intereethnic%20Adoption%20Provisions%20of%201996.pdf (last visited 12/17/21).

less than three years to adopt alone. Pl. Mem. of Law, ECF No. 77, p. 25. However, Domestic Relations Law § 110 and 18 NYCRR § 421.16(d) do not undermine the state's interests in non-discrimination, but rather relate to the legal rights and obligations attendant to marriage.³

New Hope also incorrectly relies on regulations related to recruitment of prospective adoptive parents to bolster its unsupported argument that other regulations constitute secular exemptions that undermine § 421.3(d)'s purpose. Pl. Mem. of Law, ECF No. 77, p. 23. OCFS regulations related to recruitment of prospective adoptive parents do not exclude anyone from becoming an adoptive parent. To the contrary, they expand the pool of prospective adoptive parents. Recruitment efforts also promote continuity in children's lives. For instance, the availability of prospective adoptive parents in the local communities that reflect the characteristics of the children needing adoptive families will increase the possibility that children may be placed with less disruption to their location, identity and needs.⁴ Like § 421.3(d), recruitment regulations serve the state's interests in establishing a pool of prospective adoptive parents who will best serve the interests of children awaiting adoption. They do not permit exclusion from that pool based on a protected characteristic.

³ A child born of married parents are deemed the legitimate children of both parents. See N.Y. Dom. Rel. Law §24; N.Y Family Court Act § 417. In this way, N.Y. Dom. Rel. Law § 110 places adoptive children on similar footing to biological children with married parents.

⁴ See <https://ocfs.ny.gov/programs/adoption/process.php> ("When selecting a family for a child, agencies try to select a family that will maintain the child's connections. Maintaining connections provides continuity in the child's life and respects the link between the child and his or her family, siblings, foster family, heritage, and culture.") (last visited 12/8/21). See also AdoptUSKids, *Finding a Fit That Will Last a Lifetime: A Guide to Connecting Adoptive Families with Waiting Children*, p. 27, <https://www.adoptuskids.org/assets/files/NRCRRFAP/resources/finding-a-fit-that-will-last-a-lifetime.pdf> (last visited 12/8/21) ("keeping children close to members of their birth family, friends, schools, and/or religious institutions may be in their best interests. Each child's situation and needs must be individually considered. In some cases, this may result in a priority consideration of families who are more easily able to provide continuity for the child's important relationships.").

Finally, the test set forth by the Supreme Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) applies, and § 421.3(d) need only satisfy rational basis review. Contrary to New Hope’s forced characterization, New Hope is not exempt from application of the *Smith* rule under the church-autonomy doctrine. Its provision of adoption services, a highly-regulated social service, is not an internal church matter protected by that doctrine.

The church-autonomy doctrine protects 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 (1960), and control over the employment of individuals who play a “role in conveying the Church’s message and carrying out its mission,” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2062 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012)). That doctrine has not been applied to a social service performed by a religiously-motivated entity. New Hope thus provides no basis for avoiding the *Smith* rule here.

C. Section 421.3(d) is Rationally Related to the State’s Interests

Throughout its arguments, New Hope ignores and downplays the state’s interest in prohibiting discrimination that led to the promulgation of § 421.3(d), and focuses only on the state’s other, although equally compelling, interest in increasing the pool of potential adoptive families. Pl. Mem. of Law, ECF No. 77, *generally*. New Hope also mischaracterizes the state’s interest as one in protecting individuals from New Hope’s message, ECF No. 77, at 29. The state does not seek to protect individuals from New Hope’s message; indeed, the state does not prevent New Hope from expressing that message. Rather, the state seeks to protect individuals from New Hope’s discriminatory *conduct* in excluding applicants on the basis of protected characteristics. And the state’s interest in protecting individuals, including same sex and unmarried couples, from

discrimination in adoption services is compelling, and cannot be ignored. For the reasons discussed in Defendant’s moving memorandum, ECF No. 74-21, and in opposition to New Hope’s motion, ECF No. 76, incorporated herein, § 421.3(d) is rationally related to this interest.

POINT III: DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON NEW HOPE’S FREE SPEECH/EXPRESSIVE ASSOCIATION CLAIMS

Fatal to New Hope’s free speech arguments is that (1) prohibiting discrimination is not stating a message, Plaintiff’s Memorandum of Law (“Pl. Mem. of Law”), ECF No. 77, pp. 29-30, and (2) regulation of a vital social service is not censorship. *Id.* pp. 13-14. The Declaration of Jara Traina submitted by Defendant describes in detail how and why § 421.3(d) came into existence, and the Declaration of Carol McCarthy describes the effect of discrimination on the lives of same sex couples. Traina Decl., ECF No. 74-7; Declaration of Carol McCarthy (“McCarthy Decl.”), ECF No. 74-4. Nowhere in these declarations, or anywhere else in the factual record, is there any evidence that § 421.3(d) was promulgated to “control New Hope’s speech,” Pl. Mem. of Law, ECF No. 77, p. 13, or that it does so in operation. There is no evidence that the “State’s true driving motivation is to silence dissenting voices.” *Id.*, p. 35.

Contrary to New Hope’s argument, § 421.3(d) is not comparable to the notice provision in *National Institute of Family & Life Advocated v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”). Pl. Mem. of Law, ECF No. 77, p. 14. The notice in *NIFLA* compelled notice by pro-life clinics of how and where to obtain state-subsidized contraception and abortion services. *NIFLA*, 138 S. Ct. at 2369, 2371, 2376. Thus, it was found to “alter the content” of petitioner’s speech because it informed “women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option.” 138 S. Ct. at 2371. Nothing about § 421.3(d) requires New Hope to inform adoption applicants about anything. Instead, it merely prohibits discrimination based on a protected characteristic. That New Hope disagrees that sexual orientation

and marital status are not characteristics worthy of protection does not make § 421.3(d) an act of state censorship.

New Hope mischaracterizes the relevance of Defendant's citation to *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Pl. Mem. of Law, ECF No. 77, pp. 12-13. Defendant's reliance on *Ward* is not in support of a "technical argument," *id.*, p. 12, but a dispositive one: a regulation, like § 421.3(d), 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*, 491 U.S. at 791. Defendant's Memorandum of Law ("Def. Mem. of Law"), ECF No. 74-21, pp. 12-13. Contrary to New Hope's assertion, *Ward*'s discussion is not limited to "time-place-manner" regulations. *Id.*, p. 13. In fact, the cited language states, "The principal inquiry in determining content neutrality, **in speech cases generally** and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [Citation omitted] The government's purpose is the controlling consideration. [Footnote omitted] 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*, 491 U.S. at 791 (emphasis added). New Hope's attempt to distract the Court from this very straight-forward dispositive principle is yet another effort to avoid admitting that its real objection to § 421.3(d) is its underlying purpose—prohibiting discrimination—and not any incidental effect it may have on New Hope's message.

New Hope's reliance on *Evergreen Ass'n v. City of New York*, 740 F. 3d 233 (2d Cir. 2014) is similarly misplaced. Pl. Mem. of Law, ECF No. 77, p. 14. New Hope cites *Evergreen* to support its position that a private entity cannot be forced to comply with a regulation with which it disagrees. *Id.* Such an argument is not consistent with the holding in *Evergreen*.

Evergreen involved mandatory disclosures that pregnancy centers were required to make to clients in telephone calls, post in entryways and waiting rooms and include in advertisements.

Evergreen, 740 F. 3d at 238. The Court was concerned that private entities were being asked to “advertise on behalf of the [government].” *Id.* at 250. Here, § 421.3(d) does not similarly mandate dissemination of a message. Therefore, New Hope cannot rely on the holding in *Evergreen* as it is not applicable.

Finally, contrary to New Hope’s assertion, association with, and speech among, its board members, employees and/or volunteers is not regulated by § 421.3(d). Pl. Mem. of Law, ECF No. 77, p. 19. There is no evidence in the record before the Court that the regulation affects the ability of those individuals to speak and associate together about their shared beliefs and values. 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.

For these reasons, and those discussed in Defendant’s moving memorandum, ECF No. 74-21, and in opposition to New Hope’s motion, ECF No. 76, incorporated herein, Defendant is entitled to summary judgment on New Hope’s free speech and expressive association claims.

POINT IV: NEW HOPE CONTINUES TO MISUNDERSTAND THE DISTINCTION BETWEEN CORPORATE AUTHORITY AND OCFS ADOPTION PROGRAM APPROVAL

Notwithstanding the detailed explanation by OCFS both in opposition to New Hope’s motion for a preliminary injunction, Supplemental Declaration of Carol McCarthy, ECF No. 53-3, ¶¶ 6-14, and in support of Defendant’s motion for summary judgment, McCarthy Decl., ECF No. 74-4, ¶¶ 11-16, New Hope continues to conflate two separate and distinct requirements for being able to place out children for adoption: (1) corporate authority to do so and (2) OCFS-approval. A private agency cannot provide this social service without both. In other words, even if an agency

has perpetual corporate authority, such as New Hope, it cannot provide adoption services in New York without OCFS approval and oversight of its program.

New Hope's position that, as an entity with perpetual corporate authority, OCFS is powerless to terminate New Hope's adoption program, amounts to putting New Hope above the law and not bound by any regulations. Not even New Hope believes this. It discusses at length its efforts used to evaluate applicants, conduct home studies and facilitate placement of children—all in compliance with New York law. *See e.g.* Affidavit of Kathleen Jerman, ECF No. 75-3, ¶¶ 20-45. New Hope does not argue that, as an authorized agency with perpetual corporate authority, it is not required to comply with the statutory and regulatory provisions related to adoption. Instead, it attempts to invent a way for it to avoid compliance with a regulation with which it disagrees: using its perpetual authority to exempt it from a generally applicable regulation.

The absurdity of this conclusion demonstrates that the straight-forward explanation provided by OCFS about the distinction between the separate requirements of (1) corporate authority and (2) OCFS approval, supported by relevant statutes, is the only reasonable one to be credited here.

POINT V: WHERE NEW HOPE'S POLICY DECREASES THE CHILDREN AVAILABLE TO SAME SEX OR UNMARRIED COUPLES IT DOES NOT DEMONSTRATE A FAILURE TO MEET STRICT SCRUTINY

In Defendant's moving memorandum, Def. Mem. of Law, ECF No. 74-21, pp. 33-37, Defendant fully explains that § 421.3(d) satisfies strict scrutiny, even if the court were to determine that such heightened scrutiny applies here. Defendant demonstrated that the rule serves the compelling government interests of prohibiting discriminatory conduct and increasing the pool of prospective adoptive parents and that New Hope's recusal and referral policy is not less restrictive means that serves those interests. New Hope's contrary arguments misconstrue the State's interests and ignore the effect of its recusal policy.

As explained above, New Hope incorrectly characterizes the state interest as seeking to protect individual's "from exposure to New Hope's beliefs and 'message.'" Pl. Mem. of Law, ECF No. 77, p. 36. But the state does not preclude New Hope from expressing its view against same sex and unmarried couples raising children or seek to insulate individuals from exposure that message. Rather, it seeks to protect individuals from the impact and harms of New Hope's discriminatory conduct in excluding applicants on the basis of protected characteristics.

And, as Defendant explained, those harms exist under New Hope's recusal and referral policy.

The undisputed fact is that, once New Hope refuses to work with a prospective adoptive parent, the children in New Hope's care are unavailable to those rejected applicants. McCarthy Decl., ECF No. 74-4, ¶¶ 48-52. In other words, children in New Hope's custody are prevented from being placed with someone legally permitted to adopt simply because of the applicant's sexual orientation or marital status. This is textbook discrimination. If New Hope's policy is permitted to continue, same-sex and unmarried couples will have *lesser* opportunity to adopt because there will be a smaller pool of children available to them across the state. This policy does not just harm same sex and unmarried couples. It harms such couples to the benefit of heterosexual and married people. It privileges them based only on their sexual orientation or marital status. Such an unequal two-tiered society is not supported by the Constitution. Accordingly, New Hope's recusal policy undermines the state's interest in prohibiting discrimination in adoption services.

CONCLUSION

For the reasons discussed above, and in Defendant's moving memorandum, ECF No. 74-21, and in opposition to New Hope's motion, ECF No. 76, incorporated herein, Defendant's motion for summary judgment should be granted in its entirety.

Dated: Albany, New York
December 17, 2021

LETTIA JAMES
Attorney General
State of New York
Attorney for Defendant Sheila J. Poole
The Capitol
Albany, New York 12224

By: s/ Adrienne J. Kerwin
Adrienne J. Kerwin
Assistant Attorney General, of Counsel
Bar Roll No. 105154
Telephone: (518) 776-2608
Fax: (518) 915-7738 (Not for service of papers)
Email: Adrienne.Kerwin@ag.ny.gov

TO (via ECF): Mark Lippelman
Roger Greenwood Brooks
David A. Cortman
Erik W. Stanley
Jeremiah Galus
Jonathan A. Scruggs
Robert E. Genant
Jacob P. Warner