



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

September 14, 2022

Via ECF

Honorable Mae A. D'Agostino
United States District Court
Northern District of New York
James T. Foley - U.S. Courthouse
445 Broadway, Room 509
Albany, NY 12207-2924

Re: *New Hope Family Services, Inc. v. James, et al.*, 21-CV-1031 (MAD)(TWD)

Dear Judge D'Agostino:

This letter is submitted on behalf of Defendants Letitia James, in her official capacity as New York State Attorney General, Licha Nyiendo, in her official capacity as New York Division of Human Rights (“DHR”) Commissioner¹, Melissa Franco, in her official capacity as DHR Deputy Commissioner for Enforcement, Gina Martinez, in her official capacity as DHR Deputy Commissioner for Regional Affairs, and Julia Day, in her official capacity as DHR Syracuse Regional Director (collectively “State Defendants”) pursuant to the Court’s September 8, 2022 Text Order (ECF No. 38) in the above-referenced action.

DHR’s Administrative Proceeding against New Hope Remains Ongoing

DHR has completed its investigation into New Hope’s policy of refusing to provide adoption services to individuals based on sexual orientation and marital status and issued a Determination After

¹ Licha Nyiendo is no longer the DHR Commissioner. Commissioner Maria L. Imperial should be substituted as a Defendant pursuant to Fed. R. Civ. Pro. 25(d).

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Investigation dated September 7, 2022 (1) making a preliminary finding that probable cause exists to believe that New Hope has engaged, or is engaged, in an unlawful practice under the New York Human Rights Law (“HRL”) and (2) recommending the matter for public hearing before an Administrative Law Judge. At that de novo hearing, New Hope will have a full opportunity to raise its defenses, including constitutional issues, after which the DHR Commissioner will issue a final order based upon the evidentiary record developed at the hearing. It is anticipated that a pre-hearing settlement conference will be scheduled to take place in early 2023.

The Decision in *New Hope Family Services, Inc. v. Poole*

The Court’s September 6, 2022 Memorandum-Decision and Order (“Decision”) in *New Hope Family Services, Inc. v. Poole*, 18-CV-1419 (“*New Hope I*”), has no effect on the motions pending in this case. The issue before the Court in *New Hope I* was whether New York State Office of Children and Family Services (“OCFS”) regulation § 421.3(d) violated New Hope’s First Amendment rights. Decision, ECF No. 80. The Court held that § 421.3(d), to the extent that it prohibits discrimination in adoption services based on sexual orientation or marital status, violates New Hope’s right to free speech, *id.* at 13, and issued a permanent injunction prohibiting OCFS from enforcing that portion of § 421.3(d) against New Hope. *Id.* at 14.

This action challenges the authority of DHR (a different agency than that involved in *New Hope I*) to investigate and resolve violations of the New York State Human Rights Law (not an OCFS regulation) by New Hope. While the Decision in *New Hope I* rested on an evaluation of whether the factual record supported a finding that § 421.3(d) was narrowly tailored, Decision, ECF No. 80, a record supporting the tailoring of the State’s statutory anti-discrimination statute will necessarily be different, making the relevant issues unique to those in *New Hope I*.

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The Decision in *New Hope I* has no impact on the issues raised in State Defendants' Motion to Dismiss (ECF No. 34), or in New Hope's Motion for a Preliminary Injunction (ECF No. 31), and those motions need to be decided on their own merits. State Defendants' motion to dismiss in this case does not address the merits of New Hope's free speech claim. Instead, it argues that the Court must abstain because the DHR administrative proceeding is ongoing against New Hope.² State Defendants' Memorandum of Law, ECF No. 34-6.

The issues that New Hope raises in this case, such as whether New Hope is a "public accommodation" under New York law and whether New Hope is entitled to a religious exemption under the HRL, are among the issues that will be determined by the DHR in the administrative proceeding. These issues of state law were not raised or decided in *New Hope I*. In fact, the Second Circuit specifically left open the possibility that New Hope may be deemed a public accommodation subject to the HRL under New York Law. *New Hope Family Servs., Inc. v. Poole*, 966 F. 3d 145, 166 (2d Cir. 2020). Nothing about *New Hope I* changes the fact that the Court should abstain under these circumstances. As a result, notwithstanding *New Hope I*, New Hope cannot establish that it will succeed on the merits³ in this action, and the Complaint should be dismissed.

Respectfully submitted,

s/ Adrienne J. Kerwin
Adrienne J. Kerwin
Assistant Attorney General

² *New Hope I* also did not address the other grounds raised in State Defendants' Motion to Dismiss: (1) whether the Attorney General is a proper defendant and (2) whether Civil Rights Law § 40 and § 40-c have been enforced against New Hope. State Defendants' Memorandum of Law, ECF No. 34-6, pp. 20-21.

³ Nothing in the *New Hope I* Decision changes the fact that New Hope failed to submit any evidence of irreparable harm necessary for a preliminary injunction to be issued. State Defendants' Memorandum of Law, ECF No. 34-6, pp. 21-23.

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cc (via ECF): All counsel of record