UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

-against-

SHEILA J. POOLE,

Defendant.

DECLARATION

18-CV-1419

MAD/TWD

Adrienne J. Kerwin, on the date noted below and pursuant to § 1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1. I am an Assistant Attorney General of counsel in this matter to Letitia James, Attorney General of the State of New York, attorney for Defendant Sheila J. Poole, Acting Commissioner of the New York State Office of Children and Family Services ("OCFS").

2. For the court's convenience, a copy of the legislative history of the 2010 amendment to New York Domestic Relations Law § 110, which is referenced in Defendant's memorandum of law, is annexed hereto at **Exhibit A**.

3. A copy of Commissioner Poole's Appellee Brief from the Second Circuit is annexed hereto at **Exhibit B**.

Dated: October 8, 2021
Albany, New York

s/ *Adrienne J. Kerwin*

Adrienne J. Kerwin

Kerwin Exhibit A

LEGISLATIVE HISTORY CHECKLIST
STATUTE CITATION: Domestic Relations Law § 110
LAWS OF: 2010 CHAPTER: 509
POPULAR NAME: n/a

BILL NO: S.1523-A (substituted for A.5652-B)

SPONSOR(S): Rosenthal (Assembly) / Duane (Senate)

DATE INTRODUCED: 2/17/09 (Assembly) / 2/2/09 (Senate)

COMMITTEE(S) THAT CONSIDERED BILL:
SENATE: Children and Families
ASSEMBLY: Judiciary; Rules

DATE OF PASSAGE:
SENATE: 6/24/10
ASSEMBLY: 7/1/10

GOVERNOR'S ACTION: signed 9/17/10

FOLLOWING ARE INCLUDED:

BILL JACKET

BILL DOCUMENTS:
BILL # / TEXT: S.1523,-A; A.5652, -A, -B
MEMORANDA: sponsors memos; Governor's approval memo (see bill jacket)
DEBATE: Senate (6/24/10); Assembly (7/1/10)

RELATED BILLS - PRIOR SESSIONS:
BILL # (S): A.8329 (2005-06); A.3239/S.4756 (2007); A.7449-A/S.7321 (2007-08)
RELATED DOCUMENTS: Sponsors' memos

HEARINGS: n/a

ADDITIONAL SOURCES: Press releases of Assemblymember Rosenthal 7/1/10 & 9/20/10

2018/PW

S 1523-A DUANE Same as A 5652-B Rosenthal (MS)
ON FILE: 05/25/10 Domestic Relations Law
TITLE....Relates to permitting two unmarried persons to adopt a child together

02/02/09	REFERRED TO CHILDREN AND FAMILIES
01/06/10	REFERRED TO CHILDREN AND FAMILIES
03/02/10	1ST REPORT CAL.185
03/03/10	2ND REPORT CAL.
03/04/10	ADVANCED TO THIRD READING
05/24/10	AMENDED ON THIRD READING (T) 1523A
06/24/10	PASSED SENATE
06/24/10	DELIVERED TO ASSEMBLY
06/25/10	referred to judiciary
06/29/10	substituted for a5652b
06/29/10	ordered to third reading rules cal.427
07/01/10	passed assembly
07/01/10	returned to senate
09/07/10	DELIVERED TO GOVERNOR
09/17/10	SIGNED CHAP.509
09/17/10	APPROVAL MEMO.25

A5652-B Rosenthal (MS) Same as S 1523-A DUANE
Domestic Relations Law
TITLE....Permits adoption by two unmarried adult intimate partners

02/17/09	referred to judiciary
01/06/10	referred to judiciary
04/12/10	amend (t) and recommit to judiciary
04/12/10	print number 5652a
05/17/10	amend and recommit to judiciary
05/17/10	print number 5652b
06/03/10	reported referred to rules
06/29/10	reported
06/29/10	rules report cal.427
06/29/10	substituted by s1523a
S01523	**DUANE AMEND=A**
02/02/09	REFERRED TO CHILDREN AND FAMILIES
01/06/10	REFERRED TO CHILDREN AND FAMILIES
03/02/10	1ST REPORT CAL.185
03/03/10	2ND REPORT CAL.
03/04/10	ADVANCED TO THIRD READING
05/24/10	AMENDED ON THIRD READING (T) 1523A
06/24/10	PASSED SENATE
06/24/10	DELIVERED TO ASSEMBLY
06/25/10	referred to judiciary
06/29/10	substituted for a5652b
06/29/10	ordered to third reading rules cal.427
07/01/10	passed assembly
07/01/10	returned to senate
09/07/10	DELIVERED TO GOVERNOR
09/17/10	SIGNED CHAP.509
09/17/10	APPROVAL MEMO.25

LAWS OF NEW YORK, 2010

CHAPTER 509

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

Became a law September 17, 2010, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [~~or~~], an adult [~~husband and his adult wife~~] **married couple** together**, or any two unmarried adult intimate partners together** may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor [~~husband and his adult or minor wife~~] **married couple** together may adopt a child of either of them born in or out of wedlock and an adult or minor [~~husband or an adult or minor wife~~] **spouse** may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

MALCOLM A. SMITH
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

EXPLANATION--Matter in ***italics*** is new; matter in brackets [-] is old law to be omitted.

STATE OF NEW YORK

1523--A

Cal. No. 185

2009-2010 Regular Sessions

IN SENATE

February 2, 2009

Introduced by Sens. DUANE, BRESLIN, KRUEGER, SCHNEIDERMAN, SQUADRON -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [or], an adult [husband and his adult wife] married couple together, or any two unmarried adult intimate partners together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor [husband and his adult or minor wife] married couple together may adopt a child of either of them born in or out of wedlock and an adult or minor [husband or an adult or minor wife] spouse may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01449-08-0

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S1523A

SPONSOR: DUANE

TITLE OF BILL:
An act to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

PURPOSE OF BILL:
The purpose of this bill is to permit adoption by two adult unmarried intimate partners in keeping with the state's policy to ensure the best interests of the child.

SUMMARY:
The bill amends Section 110 of the domestic relations law to permit two adult unmarried intimate partners to adopt a child together. In addition, by replacing current references in the law to husband and wife with the gender neutral term "married couple", this proposal also clarifies that all married couples may adopt a child together.

JUSTIFICATION:
Current statutory provisions in New York State allow an adult unmarried person or an adult husband and his adult wife together to adopt a child. In addition, the statutory provisions permit an adult or minor husband and his adult or minor wife to adopt each other's child.

Courts have misinterpreted the word "together" in the statute to have a preclusive effect on the ability of unmarried couples to adopt a child together. In Matter of Jacob and Matter of Dana, the Court of Appeals ruled that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. The court determined that the statute does not preclude an unmarried second parent from adopting his or her partner's children and that this principal applies regardless of the couple's marital status or sexual orientation. See Matter of Jacob, 86 N.Y.S. 2d 651 (1995).

Despite these decisions, there is confusion about whether New York law permits a joint adoption by unmarried adult couples, neither of which is the biological parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State. This legislation codifies the Court of Appeal's decision in Matter of Jacob and Matter of Dana, and will help ensure that unmarried adult couples may jointly adopt a child together where neither is the biological parent of the child - a question that was not addressed by the Court of Appeals decision. See In Re Adoption of Carolyn B., 774 N.Y.S. 2d 227 (N.Y. App, Div. 2004).

Allowing unmarried adult couples together to adopt a child will also

ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;
* Life insurance benefits in the event of a parent's death; The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;

* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

In addition, by replacing references to "husband and wife" with the gender-neutral term "married couple", this measure will help ensure that all married couples, regardless of their sexual orientation, have equal rights to adopt a child together.

LEGISLATIVE HISTORY:
Similar to 2009: A.5652 Referred to Judiciary
2007-2008: A.7449A Referred to Judiciary
2005-2006: A.8329 Referred to Judiciary

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:
None.

EFFECTIVE DATE:
Immediately.

STATE OF NEW YORK

1523

2009-2010 Regular Sessions

IN SENATE

February 2, 2009

Introduced by Sens. DUANE, KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [or], an adult husband and his adult wife together, or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01449-02-9

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S1523

SPONSOR: DUANE

TITLE OF BILL:
An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL:
To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS:
Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION:
Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one Spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;
* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;

* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY:
2005-06: A.8329 Referred to Judiciary

FISCAL IMPLICATIONS:
None.

EFFECTIVE DATE:
Immediately.

STATE OF NEW YORK

5652--B

2009-2010 Regular Sessions

IN ASSEMBLY

February 17, 2009

Introduced by M. of A. ROSENTHAL, DINOWITZ, GLICK, HOYT, JAFFEE, LAVINE, O'DONNELL, PAULIN, D. WEPRIN -- Multi-Sponsored by -- M. of A. BING, BOYLAND, BRENNAN, CAHILL, GOTTFRIED, JOHN, KELLNER, MAISEL, PHEFFER, N. RIVERA, SCHIMEL, TITONE, WEISENBERG -- read once and referred to the Committee on Judiciary -- recommitted to the Committee on Judiciary in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [or]*,* an adult [husband and his adult wife] *married couple* together*, or any two unmarried adult intimate partners together* may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor [husband and his adult or minor wife] *married couple* together may adopt a child of either of them born in or out of wedlock and an adult or minor [husband or an adult or minor wife]

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01449-06-0

spouse may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A5652B

SPONSOR: Rosenthal (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

PURPOSE OF BILL: The purpose of this bill is to permit adoption by two adult unmarried intimate partners in keeping with the state's policy to ensure the best interests of the child.

SUMMARY: The bill amends Section 110 of the domestic relations law to permit two adult unmarried intimate partners to adopt a child together. In addition, by replacing current references in the law to husband and wife with the gender neutral term "married couple", this proposal also clarifies that all married couples may adopt a child together.

JUSTIFICATION: Current statutory provisions in New York State allow an adult unmarried person or an adult husband and his adult wife together to adopt a child. In addition, the statutory provisions permit an adult or minor husband and his adult or minor wife to adopt each other's child.

Courts have misinterpreted the word "together" in the statute to have a preclusive effect on the ability of unmarried couples to adopt a child together. In Matter of Jacob and Matter of Dana, the Court of Appeals ruled that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. The court determined that the statute does not preclude an unmarried second parent from adopting his or her partner's children and that this principal applies regardless of the couple's marital status or sexual orientation. Sec Matter of Jacob, 86 N.Y.2d 651 (1995).

Despite these decisions, there is confusion about whether New York law permits a joint adoption by unmarried adult couples, neither of which is the biological parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State. This legislation codifies the Court of Appeal's decision in Matter of Jacob and Matter of Dana, and will help ensure that unmarried adult couples may jointly adopt a child together where neither is the biological parent of the child - a question that was not addressed by the court of appeals decision. See In re Adoption of Carolyn B., 774 N.Y.S.2d 227 (N.Y. App, Div. 2004).

Allowing unmarried adult couples together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability

* Life insurance benefits in the event of a parent's death; The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;

* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

In addition, by replacing references to "husband and wife" with the gender-neutral term "married couple", this measure will help ensure that all married couples, regardless of their sexual orientation, have equal rights to adopt a child together.

LEGISLATIVE HISTORY:
Similar to 2009: A5652 referred to Judiciary;
2007-2008: A7449A referred to Judiciary;
2005-06: A.8329 referred to Judiciary

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: None.

EFFECTIVE DATE: Immediately

STATE OF NEW YORK

5652--A

2009-2010 Regular Sessions

IN ASSEMBLY

February 17, 2009

Introduced by M. of A. ROSENTHAL, DINOWITZ, GLICK, HOYT, JAFFEE, LAVINE, O'DONNELL, PAULIN -- Multi-Sponsored by -- M. of A. BING, BOYLAND, BRENNAN, CAHILL, GOTTFRIED, JOHN, KELLNER, MAISEL, PHEFFER, N. RIVERA, SCHIMEL, TITONE, WEISENBERG -- read once and referred to the Committee on Judiciary -- recommitted to the Committee on Judiciary in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [or], an adult [husband and his adult wife] married couple together, or any two unmarried adult intimate partners together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01449-03-0

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A5652A

SPONSOR: Rosenthal (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that: the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

*Social security benefit in the event of a parent's death or disability;

*Life insurance benefits in the event of a parent's death;

*The right to sue for wrongful death of a parent;

*The rule to inherit under the rules of intestacy;

*Eligibility for health insurance coverage under both parents' health insurance policies;

*The right to have two parents participate in medical decisions in the event of an emergency;

*The right to receive economic support from two parents;

*The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
*The right to continue the relationships with both.parent and extended families in the event of a separation; and

*The right to have both parents named on the birth certificate. PRIOR

LEGISLATIVE HISTORY:; 2005-06: A.8329 referred to Judiciary

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: Immediately

STATE OF NEW YORK

5652

2009-2010 Regular Sessions

IN ASSEMBLY

February 17, 2009

Introduced by M. of A. ROSENTHAL, BRADLEY, DINOWITZ, GLICK, HOYT, JAFFEE, LAVINE, O'DONNELL, PAULIN -- Multi-Sponsored by -- M. of A. BING, BOYLAND, BRENNAN, CAHILL, GOTTFRIED, JOHN, KELLNER, MAISEL, PHEFFER, N. RIVERA, TITONE, WEISENBERG -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [or], an adult husband and his adult wife together, or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01449-02-9

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A5652

SPONSOR: Rosenthal (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does ~not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of" two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY:; 2005-06: A.8329 referred to Judiciary

FISCAL IMPLICATIONS:; None

EFFECTIVE DATE: Immediately

BILL JACKET

MAD
JG

CHAPTER 509

LAWS OF 20 10

SENATE BILL 1523-A

ASSEMBLY BILL _____

STATE OF NEW YORK

1523--A

Cal. No. 185

2009-2010 Regular Sessions

IN SENATE

February 2, 2009

Introduced by Sens. DUANE, BRESLIN, KRUEGER, SCHNEIDERMAN, SQUADRON -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

A. 5652-B Rosenthal

DATE RECEIVED BY GOVERNOR:

SEP 07 2010

ACTION MUST BE TAKEN BY:

SEP 18 2010

DATE GOVERNOR'S ACTION TAKEN:

SEP 17 2010

SENATE VOTE 40 Y 21 N HOME RULE MESSAGE ___ Y ___ N

DATE 6/24/10

ASSEMBLY VOTE 95 Y 44 N

DATE 7/1/10

S1523-A DUANE Same as A 5652-B Rosenthal (MS)

07/01/10	S1523-A	Assembly Vote	Yes: 95	No : 44
06/24/10	S1523-A	Senate Vote	Aye: 40	Nay: 21

Go to Top of Page

Floor Votes:

07/01/10 S1523-A Assembly Vote Yes: 95 No : 44

Yes Abbate	**Yes** Alessi	**Yes** Alfano	**No** Amedore
Yes Arroyo	**Yes** Aubry	**No** Bacalles	**No** Ball
No Barclay	**No** Barra	**Yes** Barron	**Yes** Benedetto
No Benjamin	**Yes** Bing	**Yes** Boyland	**Yes** Boyle
Yes Brennan	**Yes** Brodsky	**Yes** Brook-Krasny	**No** Burling
No Butler	**Yes** Cahill	**No** Calhoun	**No** Camara
Yes Canestrari	**ER** Carrozza	**No** Castelli	**Yes** Castro
No Christensen	**Yes** Clark	**No** Colton	**No** Conte
ER Cook	**No** Corwin	**No** Crespo	**ER** Crouch
No Cusick	**Yes** Cymbrowitz	**ER** DelMonte	**Yes** DenDekker
Yes Destito	**Yes** Dinowitz	**Yes** Duprey	**Yes** Englebright
No Errigo	**Yes** Espaillat	**Yes** Farrell	**Yes** Fields
No Finch	**No** Fitzpatrick	**Yes** Gabryszak	**Yes** Galef
Yes Gantt	**Yes** Gianaris	**No** Gibson	**No** Giglio
Yes Glick	**Yes** Gordon	**Yes** Gottfried	**ER** Gunther A
No Hawley	**No** Hayes	**Yes** Heastie	**Yes** Hevesi
ER Hikind	**No** Hooper	**Yes** Hoyt	**Yes** Hyer-Spencer
Yes Jacobs	**Yes** Jaffee	**ER** Jeffries	**Yes** John
No Jordan	**Yes** Kavanagh	**Yes** Kellner	**No** Kolb
Yes Koon	**Yes** Lancman	**Yes** Latimer	**Yes** Lavine
Yes Lentol	**Yes** Lifton	**No** Lopez P	**Yes** Lopez V
Yes Lupardo	**No** Magee	**Yes** Magnarelli	**Yes** Maisel
ER Markey	**Yes** Mayersohn	**No** McDonough	**Yes** McEneny
Yes McKevitt	**Yes** Meng	**No** Miller J	**Yes** Miller M
Yes Millman	**No** Molinaro	**No** Montesano	**Yes** Morelle
No Murray	**Yes** Nolan	**No** Oaks	**Yes** O'Donnell
No O'Mara	**Yes** Ortiz	**Yes** Parment	**Yes** Paulin
Yes Peoples-Stokes	**Yes** Perry	**Yes** Pheffer	**Yes** Powell
Yes Pretlow	**Yes** Quinn	**No** Rabbitt	**ER** Raia
Yes Ramos	**No** Reilich	**Yes** Reilly	**Yes** Rivera J
Yes Rivera N	**Yes** Rivera P	**No** Robinson	**Yes** Rosenthal
Yes Russell	**No** Saladino	**Yes** Sayward	**Yes** Scarborough
Yes Schimel	**No** Schimminger	**Yes** Schroeder	**Yes** Scozzafava
Yes Skartados	**Yes** Spano	**Yes** Stirpe	**Yes** Sweeney

No Tedisco	**Yes** Thiele	**Yes** Titone	**Yes** Titus
No Tobacco	**Yes** Towns	**No** Townsend	**Yes** Weinstein
Yes Weisenberg	**Yes** Weprin	**Yes** Wright	**ER** Zebrowski K
Yes Mr. Speaker			

Go to Top of Page

Floor Votes:

06/24/10 S1523-A Senate Vote Aye: 40 Nay: 21

Aye Adams	**Aye** Addabbo	**Aye** Alesi	**Nay** Aubertine
Nay Bonacic	**Aye** Breslin	**Nay** DeFrancisco	**Nay** Diaz
Aye Dilan	**Aye** Duane	**Aye** Espada	**Nay** Farley
Aye Flanagan	**Aye** Foley	**Aye** Fuschillo	**Nay** Golden
Nay Griffo	**Nay** Hannon	**Aye** Hassell-Thompson	**Aye** Huntley
Aye Johnson C	**Nay** Johnson O	**Aye** Klein	**Aye** Krueger
Aye Kruger	**Aye** Lanza	**Nay** Larkin	**Aye** LaValle
Nay Leibell	**Nay** Libous	**Aye** Little	**Aye** Marcellino
Nay Maziarz	**Nay** McDonald	**Aye** Montgomery	**Exc** Morahan
Nay Nozzolio	**Aye** Onorato	**Aye** Oppenheimer	**Aye** Padavan
Aye Parker	**Aye** Peralta	**Aye** Perkins	**Nay** Ranzenhofer
Aye Robach	**Nay** Saland	**Aye** Sampson	**Aye** Savino
Aye Schneiderman	**Aye** Serrano	**Nay** Seward	**Nay** Skelos
Aye Smith	**Aye** Squadron	**Aye** Stachowski	**Aye** Stavisky
Aye Stewart-Cousins	**Aye** Thompson	**Aye** Valesky	**Nay** Volker
Aye Winner	**Nay** Young		

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

APPROVAL # 25
CHAPTER # 509

SEP 17 2010

MEMORANDUM filed with Senate Bill Number 1523-A, entitled:

"AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child"

APPROVED

This bill would amend Domestic Relations Law § 110 to add to the delineated list of those who may adopt a child, an unmarried couple comprised of adult "intimate partners." In adding this language, the bill would make absolutely clear a principle that has already been established by the courts, *see In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (4th Dep't 2004) and that ensures fairness and equal treatment to families that are ready, willing and able to provide a child with a loving home. This includes same-sex couples, regardless of whether they are married. Moreover, since the statute is permissive, it would allow for such adoptions without compelling any agency to alter its present policies. It is a wise, just and compassionate measure that expands the rights of New Yorkers, without in any way treading on the views of any citizen or organization.

There are two aspects of this legislation that I believe warrant my comment, so as to make clear my understanding of this bill as I sign it into law. First, the term "intimate partners," although at the heart of the bill, is not defined in it. That should not, however, create any confusion. The term is defined elsewhere in New York law, *see* CPL § 530.11(e), and I believe such definitions contained in other titles provide adequate specificity as to the term's meaning, and would be looked to by agencies and courts in determining the appropriate construction of this law.

Second, I note that this amendment at least clarifies, and at most expands, existing law. It does not in any way limit or restrict it. Therefore, to the extent the law prior to this bill has been, or may be, read to permit any particular individual or individuals to adopt, including individuals who are neither married nor "intimate partners," there is nothing in this bill that would disturb such a reading.

In sum, this bill will enhance the rights of New Yorkers longing to be parents. As such, it is a welcome addition to New York law.

The bill is approved.

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S1523A

SPONSOR: DUANE

TITLE OF BILL:
An act to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

PURPOSE OF BILL:
The purpose of this bill is to permit adoption by two adult unmarried intimate partners in keeping with the state's policy to ensure the best interests of the child.

SUMMARY:
The bill amends Section 110 of the domestic relations law to permit two adult unmarried intimate partners to adopt a child together. In addition, by replacing current references in the law to husband and wife with the gender neutral term "married couple", this proposal also clarifies that all married couples may adopt a child together.

JUSTIFICATION:
Current statutory provisions in New York State allow an adult unmarried person or an adult husband and his adult wife together to adopt a child. In addition, the statutory provisions permit an adult or minor husband and his adult or minor wife to adopt each other's child.

Courts have misinterpreted the word "together" in the statute to have a preclusive effect on the ability of unmarried couples to adopt a child together. In Matter of Jacob and Matter of Dana, the Court of Appeals ruled that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. The court determined that the statute does not preclude an unmarried second parent from adopting his or her partner's children and that this principal applies regardless of the couple's marital status or sexual orientation. See Matter of Jacob, 86 N.Y.S. 2d 651 (1995).

Despite these decisions, there is confusion about whether New York law permits a joint adoption by unmarried adult couples, neither of which is the biological parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State. This legislation codifies the Court of Appeal's decision in Matter of Jacob and Matter of Dana, and will help ensure that unmarried adult couples may jointly adopt a child together where neither is the biological

parent of the child - a question that was not addressed by the Court of Appeals decision. See In Re Adoption of Carolyn B., 774 N.Y.S. 2d 227 (N.Y. App, Div. 2004).

Allowing unmarried adult couples together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;
* Life insurance benefits in the event of a parent's death; The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;

* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

In addition, by replacing references to "husband and wife" with the gender-neutral term "married couple", this measure will help ensure that all married couples, regardless of their sexual orientation, have equal rights to adopt a child together.

LEGISLATIVE HISTORY:
Similar to 2009: A.5652 Referred to Judiciary
2007-2008: A.7449A Referred to Judiciary
2005-2006: A.8329 Referred to Judiciary

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:
None.

EFFECTIVE DATE:
Immediately.

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

DAVID A. PATERSON
GOVERNOR

LORRAINE A. CORTÉS-VÁZQUEZ
SECRETARY OF STATE

MEMORANDUM

To: Honorable Peter J. Kiernan, Esq.
Counsel to the Governor

From: Matthew W. Tebo, Esq.
Legislative Counsel

Date: July 21, 2010

Subject: S.1523-A (Senator Duane)
Recommendation: No comment

The Department of State has no comment on the above referenced bill.

If you have any questions or comments regarding our position on the bill, or if we can otherwise assist you, please feel free to contact me at (518) 474-6740.

MWT/mel

New York State
Office of
Children &
Family
Services

David Paterson
Governor

Gladys Carrión, Esq.
Commissioner

Capital View Office Park

52 Washington Street
Rensselaer, NY
12144-2796

August 11, 2010

Honorable Peter J. Kiernan
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: S.1523-A
Support

Dear Mr. Kiernan:

This is in response to your request for comments on the above referenced legislation. The bill amends the Domestic Relation Law (DRL) provision that specifies who may adopt to clarify that two unmarried adult intimate partners may adopt a child together even where neither person is the child's biological parent. In addition, the bill substitutes "married couple" or "spouse" for references to "husband" and "wife" in describing who may adopt.

Currently, the DRL provides that an adult unmarried person or a husband and wife together may adopt. Various courts have interpreted this language as precluding two unmarried adults from adopting together. In *Matter of Jacob* and *Matter of Dana* 85 NY2d 651 (1995), the Court of Appeals construed the existing law as permitting the adoption of a child by the unmarried adult partner of the child's biological parent. The Court held that neither the statutory reference to a husband and wife adopting "together" nor the sexual orientation of the couple precluded such an adoption. However, *Matter of Jacob* and *Matter of Dana* did not address the ability of two single persons to adopt a child together where neither person is the biological parent of the child. This legislation clearly permits such adoptions.

The Office of Children and Family Services supports this bill as it is consistent with public policy to facilitate the placement of children, including foster children, in permanent caring homes when it is the best interest of such children.

Thank you for the opportunity to comment on this legislation.

Sincerely,

Karen Walker Bryce

Karen Walker Bryce, Esq.
Deputy Commissioner and General Counsel

CL #47

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

MARC C. BLOUSTEIN
LEGISLATIVE COUNSEL

July 19, 2010

Hon. Peter J. Kiernan
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Senate 1523-A

Dear Mr. Kiernan:

Thank you for requesting the comments of this Office on the above-referenced measure, which would amend the Domestic Relations Law to permit two adult unmarried intimate partners to adopt a child together. In addition, by replacing current references in the law to husband and wife with the gender neutral term "married couple," this measure also clarifies that all married couples may adopt a child together. This legislation is consistent with the Court of Appeals's decision in *Matter of Dana and Jacobs*, 86 NY2d 651 (1995), which permits adoptions by unmarried intimate partners.

This measure would have no impact on court administration. Accordingly, we have NO OBJECTION to approval.

Very truly yours,

Marc Bloustein

EMPIRE STATE PLAZA, 4 ESP, SUITE 2001, ALBANY, NY 12223-1450 • TEL: 518-474-7469 • FAX: 518-473-5514
MBLOUSTE@COURTS.STATE.NY.US

NEW YORK STATE CATHOLIC CONFERENCE

465 State Street • Albany, NY 12203-1004 • Phone (518) 434-6195 • Fax (518) 434-9796
www.nyscatholic.org e-mail:info@nyscatholic.org

RICHARD E. BARNES
Executive Director

July 29, 2010

Hon. David A. Paterson
Governor of New York State
Executive Chamber
State Capitol
Albany, NY 12224

Re: S.1523-A, Duane/A.5652-B, Rosenthal
Allows for unmarried adoption

Dear Governor Paterson,

The above-referenced bill would allow for adoption by two unmarried intimate partners.

The New York State Catholic Conference strongly **opposes** this legislation.

The Catholic Church teaches that we must treat our homosexual sisters and brothers with dignity and love, as we would all God's children, free of prejudice and hatred. However, evidence tells us that children's welfare is best served by their being reared in a stable home with a married mother and father. Two unmarried adults, whether same-sex or opposite-sex, lack the commitment and incentive to remain together, for the benefit of the adopted child.

Encouraging adoption and marriage between a married man and a woman, therefore, serves the state's interests. Well-reared children who are adopted by a married mother and father are much more likely to grow to be good citizens, thereby, creating wealth, stability and security for the members of the society.

Importantly, this legislation would seemingly mandate religious entities that operate adoption services to facilitate adoption for same-sex intimate partners or same-sex partners married in foreign jurisdictions, in violation of our religious beliefs and faith. Catholic Charities operates adoption services throughout the state. If this legislation was enacted, they might have to stop these invaluable services. Catholic Charities in both the Archdioceses of Boston and Washington, DC had to cease adoption services because of similar legislation and legal opinion.

To address this issue, we propose the following amendment:

"No state or any other governmental agency shall deny, suspend or revoke a license, permission or certification to carry on any activity, including denial of renewal or recertification of such license, permission or certification, against any organization controlled by or in connection with a religious organization or denominational group or entity that refuses to provide any form of assistance or information about adoption on grounds that it would be contrary to the conscience or religious or moral beliefs of that organization or of the

religious organization or denominational group or entity by which it is operated, sponsored or controlled."

For these reasons, the New York State Catholic Conference strongly opposes this legislation and urges its veto.

Very truly yours,

Richard E. Barnes
Executive Director

C509

the Center the Lesbian, Gay, Bisexual & Transgender Community Center

September 17, 2010

Honorable David Paterson
Governor of New York
Executive Chamber
Albany, NY 12224

Dear Governor Paterson:

I am writing on behalf of the Lesbian, Gay, Bisexual and Transgender Community Center, and the 6,000 people who visit us every week to request that you sign Bill A.5652-B. This landmark legislation (permitting unmarried partners, including same-sex couples, to adopt a child together) is important to the LGBT community, as it will permit two unmarried intimate adults – no matter their sexual orientation – to adopt a child and receive full legal guardianship. The right to family creation independent of the gender of the spouses is an important step towards full equality for LGBT New Yorkers, a cause for which you have demonstrated passion.

Under current law, if unmarried parents separate, the parent who is not legally attached to the child may be left with no rights to take part in the child's upbringing. In the event of a death, the child and the surviving partner may be left with no Social Security, life insurance or inheritance benefits. In either such case – separation or death – the event law's effects on the child could be devastating. This law seeks to remedy these harms and will prevent such disastrous situations from occurring.

We encourage you to continue your leadership on this issue and sign this important legislation to better protect LGBT families in New York.

Sincerely,

Glennda Testone
Executive Director

Cc: Assemblymember Linda Rosenthal and Senator Tom Duane

S1523

Lawyers For Children, Inc.
110 Lafayette St., 8th Floor
New York, New York 10013
(212) 966-6420 • Fax (212) 966-0531
www.lawyersforchildren.org

Executive Director
Karen J. Freedman, Esq.

Deputy Executive Director
Glenn Metsch-Ampel, Esq.

August 3, 2010

The Hon. David Patterson
Executive Chamber
State Capitol
Albany, New York

Re: A05652B/S1523-A (Permitting Adoption By Two Unmarried Adult Intimate Partners)

Dear Governor Patterson:

We are writing to urge you to sign into law bill No. A05652B/S1523-A, which would permit two unmarried adult intimate partners to adopt children together.

Lawyers For Children ("LFC") is a not-for-profit corporation dedicated to protecting the rights of individual children in foster care and compelling system-wide child welfare reform in New York. For more than 25 years, LFC has provided award-winning legal and social work services to children in cases involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. Currently, we represent children and youth in more than 6,000 proceedings in New York City's Family Courts each year.

LFC STRONGLY SUPPORTS THIS BILL FOR THE FOLLOWING REASONS

Adoption provides children with safe, permanent homes and nurturing families. Nearly 1,000 children are freed for adoption each year in New York and more than 3,000 freed children are awaiting adoptive homes[1]. A number of those children are living in foster homes with two loving parents who are committed to each other and are committed to raising the child as their own, despite not being married. Because the current statute does not clearly provide that those parents are eligible to adopt, the children are deprived of the opportunity to have both of the people who are raising them be their legal parents. Many studies have shown that children benefit from having legal ties to two parents and receive countless other benefits as children of a two-parent household. We believe that when two qualified adults in a loving relationship want to make themselves available as parents to a child in need of a home, their marital status should not be a factor in their eligibility for consideration. Lawyers For Children enthusiastically supports permitting qualified unmarried partners to be eligible to adopt a child.

[1] Adoption Exchange Association, a cooperative program of the Children's Bureau, the Administration for Children and Families, the Dept. of Health & Human Services, found at http://www.adoptuskids.org/resourcecenter/rrtpackets/NewYork.aspx

We hope that we can count on you to continue to support laws to protect the needs of New York State's most vulnerable children. Please contact us if you have any questions about this bill and its benefits for children and families in New York.

Very truly yours,

Karen Freedman
Executive Director

Betsy Kramer
Public Policy and Special Litigation
Project Director

STATE OF NEW YORK

1523--A

Cal. No. 185

2009-2010 Regular Sessions

IN SENATE

February 2, 2009

Introduced by Sens. DUANE, BRESLIN, KRUEGER, SCHNEIDERMAN, SQUADRON -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [~~or~~], an adult [~~husband and his adult wife~~] *married couple* together, *or any two unmarried adult intimate partners together* may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor [~~husband and his adult or minor wife~~] *married couple* together may adopt a child of either of them born in or out of wedlock and an adult or minor [~~husband or an adult or minor wife~~] *spouse* may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD01449-08-0

Debates

ACTING PRESIDENT SAVINO: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT SAVINO: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT SAVINO: Announce the results.

THE SECRETARY: Ayes, 59. Nays, 2. Senators Bonacic and Larkin recorded in the negative.

ACTING PRESIDENT SAVINO: The bill is passed.

THE SECRETARY: Calendar Number 185, by Senator Duane, Senate Print 1523A, an act to amend the Domestic Relations Law.

ACTING PRESIDENT SAVINO: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT SAVINO: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT SAVINO:

Senator DeFrancisco, to explain his vote.

SENATOR DeFRANCISCO: Yes, I'm going to vote no on this bill.

This provides for adoption by permitting two unmarried persons, adult intimate partners, to adopt a child. I have no clue, since the bill does not say anything about it, what the definition of "intimate partners" are.

I would think that if we're going to make a category of individuals that could adopt children that are not husband and wife, it would seem to me that category of individuals should be sufficiently defined. "Intimate" means different things to different people. In fact, to our former president, sex means different things to different people.

So I think we have to truly have a definition in order to provide a new right, and I vote no for that reason.

ACTING PRESIDENT SAVINO: Senator DeFrancisco to be recorded in the negative.

Announce the results.

THE SECRETARY: Those recorded in the negative on Calendar Number 185 are

Senators Aubertine, Bonacic, DeFrancisco, Farley, Golden, Griffo, Hannon, O. Johnson, Larkin, Leibell, Libous, Maziarz, McDonald, Nozzolio, Ranzenhofer, Saland, Seward, Skelos, Volker and Young. Also Senator Diaz.

Ayes, 40. Nays, 21.

ACTING PRESIDENT SAVINO: The bill is passed.

THE SECRETARY: Calendar Number 188, by Member of the Assembly O'Donnell, Assembly Print Number 5537A, an act to amend the Penal Law and others.

ACTING PRESIDENT SAVINO: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT SAVINO: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT SAVINO: Announce the results.

THE SECRETARY: Ayes, 61.

ACTING PRESIDENT SAVINO: The bill is passed.

THE SECRETARY: Calendar Number

[page intentionally blank]

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER JOHN: The Clerk will record the vote.

(The Clerk recorded the vote.)

Are there any other votes?

The Clerk will announce the results.

(The Clerk announced the results.)

The bill is passed.

Mr. Canestrari.

MR. CANESTRARI: Yes, Madam Speaker, we will now go to Page 16, Rules Report No. 427, Ms. Linda Rosenthal. Colleagues, the necessary messages from the Governor are at the Rules Committee now, so we can begin the Rules Committee meeting now.

Thank you.

ACTING SPEAKER JOHN: Page 16, Rules Report No. 427, Ms. Rosenthal -- Colleagues, some quiet in the Chamber so that we can hear the Clerk -- the Clerk will read.

THE CLERK: Bill No. 5652-B, Rules Report No. 427, Rosenthal, Dinowitz, Glick, Hoyt, Jaffee, Lavine, O'Donnell, Paulin, D. Weprin, Titone. An act to amend the Domestic Relations Law, in relation to authorizing two unmarried adult intimate partners to adopt a child.

ACTING SPEAKER JOHN: On a motion by Ms. Rosenthal, the Senate bill is before the House. The Senate bill is

advanced.

Ms. Rosenthal, an explanation has been requested.

MS. ROSENTHAL: This bill amends Section 110 of the Domestic Relations Law to permit two adult unmarried intimate partners to adopt a child together.

ACTING SPEAKER JOHN: Mr. Conte.

MR. CONTE: Thank you, Madam Speaker. Will the sponsor yield for a couple of questions?

ACTING SPEAKER JOHN: Ms. Rosenthal, will you yield?

MS. ROSENTHAL: Yes.

MR. CONTE: Can you define "two unmarried adult intimate partners" together may adopt?

MS. ROSENTHAL: Yes. Two adult unmarried intimate partners means two same-sex or opposite-sex couples who have their lives intertwined in terms of bank accounts, living lives that are considered as a couple.

MR. CONTE: Where in State law is the term "unmarried adult intimate partners?" Where is that defined in State law?

MS. ROSENTHAL: I'm sorry. Say that again?

MR. CONTE: Where in State law is the definition of two "unmarried adult intimate partners"?

MS. ROSENTHAL: This is common terminology that is understood the way I just explained.

MR. CONTE: Okay. Are these domestic partners?

MS. ROSENTHAL: They may be, or they may not be.

MR. CONTE: Right. So, the problem that I have with this bill is that we have passed numerous laws in this State that have, one, defined marriage; two, defined domestic partners. And we have detailed with the definition of domestic partners a list of things that would qualify a person to be a domestic partner. I don't see anywhere in State law that defines an intimate partner, and I'm just wondering how the courts or how adoption agencies are going to be able to define what an inmate partner is.

MS. ROSENTHAL: "Intimate partner" is a well-used term that courts understand when they rule on cases involving intimate partners.

MR. CONTE: Can you state any of those?

MS. ROSENTHAL: I mean, it's a common term in marital and other kinds of law.

MR. CONTE: But if it's a common term, we would have used it in other areas of law. We're creating a new law that says "intimate partners." It doesn't say "domestic partners," it doesn't say "two unmarried individuals" can adopt. You're saying an intimate partner, and I'm just wondering where in State law and where the courts are going to be able to define what an inmate partner is.

MS. ROSENTHAL: Well, in the case of *Jacob* and in the case of *Dana*, those terms were used.

MR. CONTE: Those term were used?

MS. ROSENTHAL: Yes.

MR. CONTE: So, is there any other section of State law that defines "intimate partner"?

MS. ROSENTHAL: Not that I know of.

MR. CONTE: Okay. And in this particular bill, we don't have a definition of what an intimate partner is. So, we're not giving the courts any true definition of a what an intimate partner is.

MS. ROSENTHAL: As I said already, courts know know what "intimate partner" means. It's been commonly used in courts.

MR. CONTE: But, so has the term "domestic partner." It's been around for a number of times and we have made sure that in this State we have defined domestic partner. We have defined what marriage is in this State. But, we have never, in the years that I have -- I have never seen a bill that says an unmarried adult intimate partner. I guess they could be a married adult -- but no, if they're married, it doesn't matter. But, an intimate partner. I'm just wondering --

MS. ROSENTHAL: That's exactly the point. If they're married, it doesn't matter.

MR. CONTE: I understand.

MS. ROSENTHAL: But these are couples who either cannot get married by law or choose not to get married by law, and we want them to be able to have the same rights to adopt as

people who are married.

MR. CONTE: Right now, many adoption agencies --

MS. ROSENTHAL: You know, in the New York State Court of Appeals *Braschi* case, it does define family, even with same-sex couples, so I think that answers your intimate partner question.

MR. CONTE: No, it defines what a same-sex couple is, and we have defined it in other portions of law dealing with whether it's income taxes, whether it's dealing with being able to go to emergency rooms, we have defined what a domestic partner is. We never defined intimate partner.

I'll get off of that for a second. Right now, there are many religious organizations in New York State that provide for the adoption services and they try to facilitate adoptions for people. Is it your intention that they are going to have to provide for adoptions for same-sex intimate partners or same-sex partners married in other jurisdictions?

MS. ROSENTHAL: You mean if this becomes law?

MR. CONTE: Yes.

MS. ROSENTHAL: It is their choice whether to follow the law, as it is any of our choices to follow or not follow a law. You know, we're actually codifying case law, so it's current policy. Whether groups follow it or not follow it, I can't speak to that. But, if something is the law then it ought to be followed.

MR. CONTE: Well, if we're codifying law, then as

the sponsor of this bill, I think that we should have a definition of what an unmarried adult intimate partner is. I don't see it here. You tell me that it's in case law and we're codifying case law, but you have failed to define what any two unmarried adult intimate partners are and I just think that that's a glaring mistake from this Legislature.

MS. ROSENTHAL: Well, it's a common term and not all terms used in all bills are defined as such. It's understood within the courts and lawyer communities what intimate partner means.

MR. CONTE: So, in terms of intimate partners -- and I want to just get right back to that -- they have to be living in the same home?

MS. ROSENTHAL: They may be.

MR. CONTE: Maybe.

MS. ROSENTHAL: Yes.

MR. CONTE: Are they brothers and sisters?

MS. ROSENTHAL: Actually, they are not. They are intimate partners, which precludes them from being brothers and sisters.

MR. CONTE: Okay, but intimate in what sense of the word? Is it intimate in the sexual sense of the word or intimate in that they --

MS. ROSENTHAL: As if intimate were a sexual sense with married couples. I don't pry in their bedroom.

MR. CONTE: Marriage has been defined in this

country and in this State in a variety of ways.

MS. ROSENTHAL: We're not talking about domestic partners, we're talking about --

MR. CONTE: But domestic partners has been defined --

MS. ROSENTHAL: Okay, but we're not talking about domestic partners here, we're talking about couples, and surely you understand the definition of a couple.

MR. CONTE: Okay. It's two people, it's a couple.

MS. ROSENTHAL: Well, not just any two people.

MR. CONTE: They have to be intimate. That's what I'm asking. What is the definition of intimate? Is it they have bank accounts together? Is it they have a house together? Do they have a home to raise this child together with or is it just two people who basically say we kind of like each other, so we will be able to adopt a child?

MS. ROSENTHAL: You know, in relation to adoption, when the courts look at couples, they look to see if they have a commitment to each other, if they have built a life together. They may have the same bank account. They're clearly committed to living lives that are enmeshed and interconnected with each other.

MR. CONTE: But they're not married because they haven't made that much of a commitment --

MS. ROSENTHAL: Well, some --

MR. CONTE: And they're not domestic partners --

MS. ROSENTHAL: Let me finish.

MR. CONTE: -- because they haven't made that much of a commitment.

MS. ROSENTHAL: Wait a minute. I didn't say that they were or weren't. They could be domestic partners, they might not be. And some cannot get married and some choose not to get married.

MR. CONTE: Okay. So, why didn't we add domestic partners in here?

MS. ROSENTHAL: Not all places have domestic partnerships, so we wanted to include everybody who was adult unmarried intimate partners, couples.

MR. CONTE: Okay. But whether or not they have a bank account together, whether or not they have a home together, that's not going to make a difference, but we're going to leave it up to the courts to decide?

MS. ROSENTHAL: Well, yes. Those qualifications that you just mentioned are among the considerations of the court when they examine adoption cases.

MR. CONTE: But we don't outline that in any particular section of law.

MS. ROSENTHAL: Well, we haven't needed to thus far.

MR. CONTE: So, again, going back to the issue of Catholic Charities or some Jewish organizations that provide for adoptions and their faith does not believe in same-sex marriages,

same-sex couples, are they going to be forced to --

MS. ROSENTHAL: They can do what they choose to do.

MR. CONTE: Well, if it's the law -- that's what I'm asking. So, they can choose what they want to do. So right now, if two unmarried intimate adults walk into Catholic Charities or walk into a Jewish adoption agency or whatever, and they say that we would like to adopt a child and Catholic Charities says, "Well, are you married?" And they say, "No, we're intimate partners." "Well, we don't do that. You have to go somewhere else." Are they going to have any legal action against Catholic Charities for discriminating against them because they're not married?

MS. ROSENTHAL: Let me explain to you that this is already existing case law, so the question is whether they turn intimate partners away right now. We are codifying what's existing law, existing case law. So, they are under the same obligation now as they would be were this to be law.

MR. CONTE: But if they do not want to facilitate adoptions for same-sex intimate partners or same-sex partners married in other jurisdictions, are they going to be in violation if this State statute and are the individuals who get turned away going to be able to sue that religious organization for not helping them try to adopt a child? Because this can get very emotional for a number of people.

ACTING SPEAKER JOHN: Mr. Titone, why do you rise?

MR. TITONE: Mr. Conte, will you yield for a question?

ACTING SPEAKER JOHN: Mr. Conte, do you yield?

MR. CONTE: Yes, sure.

ACTING SPEAKER JOHN: The gentleman yields.

MR. TITONE: Mr. Conte, back home we have the Knights of Columbus and they have catering halls. Are you saying that because of their religious beliefs they have the option to not comply with health code?

MR. CONTE: No.

MR. TITONE: So, when a religious institution is involved in the business of social services, are you saying because of their religious beliefs they don't have to comply with our laws?

MR. CONTE: No.

MR. TITONE: Thank you.

MR. CONTE: On the bill, very quickly.

ACTING SPEAKER JOHN: On the bill.

MR. CONTE: My objections are two things: Mainly that the sponsor of this legislation does not define what an adult intimate partner is. We have gone through great debates in this House and across this country to, one, define marriage; two, to define what a domestic partner is, and we have allowed each of those individuals specific rights under New York State law, under United States law, to be able to have the benefits of certain things in this

country, and this is the perfect spot for that debate to happen, here in the New York State Legislature. But, my problem with this piece of legislation is that there's no definition in this law, in this particular bill, dealing with two unmarried adult intimate partners, allowing them to -- it doesn't say in the law, as we do with domestic partnerships, that we set out a criteria of things that say that you're a domestic partnership, that you've gone to a governmental agency which says you are a domestic partnership, or you have gone to a governmental agency and you have a marriage certificate. Again, we have allowed them to have certain rights and responsibilities under New York State law. So, I believe that this particular law -- and I'll just finish up very quickly -- is going to cause more court cases and also hamper some religious organizations to practice their religious beliefs.

ACTING SPEAKER JOHN: Mr. Titone.

MR. TITONE: On the bill, Madam Speaker.

ACTING SPEAKER JOHN: On the bill.

MR. TITONE: A little bit over eight years ago, a friend of mine, Daniel Stewart, was on his way to work during rush hour. As he got out of the train at the Union Street Station on 14th Street, he noticed that in the garbage at that train station there was what he thought was a doll's leg. He really couldn't believe how realistic it looked, except that by this hour hundreds of people had already been passing by. He noticed that the doll's leg was actually twitching ever so slightly. As you can imagine, that doll's leg actually

turned out to be a newborn baby boy.

Madam Speaker, this story that I told you did make almost every publication in New York City and certainly the 11 o'clock news that evening. It was very sensationalized. But, I am happy to report -- well, almost happy to report -- that it almost has a happy ending. What happened next was that the little boy, the infant, was taken to the hospital and over several days with medical care he was nursed back to health. Daniel Stewart, along with his partner, Pete Mercurio, went to visit that little boy every day, and every day they saw that he got healthier and healthier and that was great. In order for that little boy to be placed into foster care and then to be put up for adoption, the courts had to have a termination of parental rights hearing. Of course, my friend Dan was subpoenaed to go to that hearing because he had to give testimony of how he found the little boy that was left in the garage there. At that time, the the little boy's name was John Doe, origin unknown. He was subpoenaed, he went to the court, the judge brought him in just to assure him that he would be okay throughout the whole proceeding and explained what the proceedings were. Pete and Danny were there. What was supposed to be a 5- to 15-minute meeting with the judge turned out to be several hours as they got to know each other. They finally had the hearing that day, and during the hearing -- and remember, this is a New York City Family Court Judge whose job it is to determine the best interest of the child -- the judge turned to both Pete and Danny and said, "Why don't you adopt this boy? You seem like a good, healthy, intimate

couple, stable, loving and actually have a genuine concern and care for this child." Well, eight years later, I'm happy to say that they did adopt -- Kevin is his name, actually. I want to be clear to this Chamber, make absolutely no mistake about it, that this bill -- and I commend my colleague, Linda, for this bill -- this bill is not about gay rights, it's not about civil unions, it's not about domestic partnership. This bill is about the best interest of a child.

Dizzy, or Kevin, but he's known to all his friends as "Dizzy" because he's just so enthusiastic and full of energy, especially when he plays baseball, has everything that we think a child should have growing up. He has loving grandparents on both Pete and Danny's side. He has cousins and aunts and uncles to take him to Disney World and to the Grand Canyon. While Kevin may have a whole family, he certainly does not have all the rights of that family. He only has half of those rights. Should Danny pass away, Peter will no longer be that legal parent. He will no longer have the rights that would be inherited to him from Peter. So, I say that this is not about Daniel and Peter, this is about Kevin and his rights and our obligation, responsibility, to ensure that Kevin's rights are fully protected.

Once again, I want to commend the sponsor and I will be voting yes on this, Mr. Speaker. I do so not only for Peter and for Danny and Kevin, but I also do it for Sal and Wayne who, over 23 years ago, became the very first gay couple in the State of New York to adopt a child. They're from Staten Island. They named that child Hope, and I think that's an appropriate name. I hope today that we all

see clearly that this is about children, not about gay rights.

Thank you, Mr. Speaker.

ACTING SPEAKER P. RIVERA: Ms. Jaffee.

MS. JAFFEE: Thank you, Mr. Speaker. I want to applaud the sponsor of this legislation and I want to echo what Assemblyman Titone noted. This is about children. This is about children who otherwise would not have a home. This is about children who otherwise might be in foster homes or in group homes but not have loving parents; that is what this legislation is about. Many years ago in my community, two friends of mine who lived nearby wanted to adopt a child, wanted a child. These two men were strong, intelligent and loving human beings and they were having a difficult time. One day they had found out through the system that there was this baby that was in the hospital, had been born to parents with very severe addictions. One of the parents passed away. The other one was incapable emotionally and physically of caring for any child, let alone herself. We worked through the system and were finally able to provide an opportunity for these two men to take this little girl as a foster child and I went to visit them a couple months later. What a lucky little girl. What a lucky little girl. She had the most beautiful room with beautiful paintings, a crib that was magnificent, toys you can't imagine and she was having a normal life. Years later, I met them with the grandparents of this little girl now. Now she was four years old. She was charming and sweet and they were delightful parents and the grandparents were so much involved

in her life. This is what this legislation is about, providing the opportunity for children to have a home, to have loving parents.

I would urge my colleagues to support this, to support the opportunity for children to grow up in an environment where they can thrive. Thank you.

ACTING SPEAKER P. RIVERA: Mr. Gordon.

MR. GORDON: Yes, Mr. Speaker. Will the sponsor yield for a question, please?

ACTING SPEAKER P. RIVERA: Ms. Rosenthal, do you yield?

MS. ROSENTHAL: Yes.

MR. GORDON: Yes, Linda. If the legislation that we're looking at here is enacted into law and this intimate couple that adopts, that relationship is dissolved, what would the process be for determining custody, or joint custody, shared custody, for moving ahead?

MS. ROSENTHAL: Each parent will have a right to custody the way that happens with other partners, as in current law when relationships dissolve. As you know, this will be determined by the court on what is in the best interests of the child, so custody law would determine that.

MR. GORDON: Okay. So, either the two parties, the two parents either would come to a mutual agreement or, perhaps, resolve the issue in family court then?

MS. ROSENTHAL: Yes.

MR. GORDON: Thank you.

ACTING SPEAKER P. RIVERA: Ms. Mayersohn.

MS. MAYERSOHN: I was prepared to oppose this bill because I feel that the Senate sponsor has no interest in the well-being of children. He rejected, set aside and killed my "no smoking with kids in the car" bill, and that tells me that his agenda is not as most of us would like it to be. I think I do not know what his agenda is. I know that the interests of kids is not his interest. I vote in the affirmative. Because of my dear friend, Assemblyman Titone and some of the others, I am supporting the bill, but I just want to send a message.

Thank you.

ACTING SPEAKER P. RIVERA: Colleagues, if we can just stay to the merits of the bill, the bill that we are discussing.

Ms. Rosenthal to close.

MS. ROSENTHAL: On the bill. In the past, adoption was viewed as a service to parents who could not conceive their own children, and so we wanted to please them by giving them a little bundle of joy to take care of. In more modern times, we have rightly come to view the issue as taking care of a child who has no one to care for them and that is the focus of this legislation. It is not about institutions. It is not about parent or family structure. It is about who will take the best care of the child. A two-parent family, where you have two people committed to each other who are willing and able to open their homes and provide a stable and full life to a child is the

ideal goal. To say that this might hurt an institution is to totally deny what this legislation is about. It is about helping children.

The American Association of Pediatrics says, "Children of one or two gay parents fare as well emotionally, cognitively and socially as do children of heterosexuals. A legally-sanctioned co-parent relationship provides important benefits for children as well." And that was an interesting question I was asked earlier by one of my colleagues about what happens if the relationship is dissolved. Well, if they have two parents, they are in a much better situation. Now, among the rights that children get who have two parents are the right to have two names on a birth certificate; the right to get Social Security death benefits; the right, if one of the parents dies, to have a continued stable home with somebody who loves them; the right to inherit under the rules of intestacy; life insurance benefits in the event of a parent's death; the right to have two parents participate in medical decisions in an emergency; and the right to continue the relationships with both parents and extended families in the event of separation. These are things that we want all of our children to have, and to say that that is not the focus of this bill is to be a bit mean spirited and to look for ways to defeat it when, in fact, this is all about children.

In determining whether the child's best interests would be promoted by the the proposed adoption, the adoption court considers the degree of commitment that the petitioners have toward each other. The goal of adoption is not just to place children in

suitable homes, but to place them in permanent, stable families. There are thousands upon thousands of children in America who are "waiting on the shelf," as a friend of mine who was adopted called his situation. He was sitting on the shelf. Now, it took a while for him to be adopted, but had couples who are either heterosexual or gay come forward to adopt him, his life would have been better earlier. To deny two committed adults who are willing to open their heart and their home with full love to a child is the goal of this legislation and this is what I hope happens when it's passed and signed. This codifies existing law in the matter of *Jacob* and in the matter of *Dana*. It also clarifies any confusion that may have happened. There was another case of *Caroline B.* I think that all of us can find our way, even if we aren't proponents of marriage equality, that the public welfare is not served if parents who have the ability to take care of children are not given the opportunity to do so. Children belong in stable homes. This bill would allow many, many more of them to be put in stable homes and carry on with their lives.

One last thing I wanted to say is there was recently a study which the Journal of Pediatrics printed about. It was a U.S. national longitudinal lesbian family study psychological adjustment of 17-year-olds who had been brought up by lesbian mothers. It turns out that those children were found to fare better in terms of academic, social and psychological competence than a comparable group raised in a more traditional home. They were less likely to be rule breakers or to exhibit aggressive behavior. They were more likely to be

deliberately planned, these children, and the mothers were more likely to have resources to raise them and the time to devote to them.

So, the point of the bill is to codify existing case law to ensure that children have the ability and the opportunity to have safe and secure lives, and it's a long time coming that New York State become one of the few already which allows adoption by two adults, unmarried couples. Thank you.

ACTING SPEAKER P. RIVERA: Mr. Conte, why do you rise?

MR. CONTE: Would the sponsor yield for a question, please?

ACTING SPEAKER P. RIVERA: Ms. Rosenthal, will you yield for a question?

MS. ROSENTHAL: Yes.

MR. CONTE: Thank you. The Catholic Conference specifically asked for an amendment to this particular bill. Have you seen their request for an amendment?

MS. ROSENTHAL: You know, I've had this bill for about a couple of years now. Yesterday they approached me, so there's no time for an amendment.

MR. CONTE: Okay. Thank you.

On the bill.

ACTING SPEAKER P. RIVERA: On the bill, Mr. Conte.

MR. CONTE: Thank you. The Catholic Conference

asked for an amendment for this particular bill because -- and they basically say they want to have the following amendment: "No State or any other governmental agency shall deny, suspend or revoke a license, permission or certification to carry on any activity, including denial of renewal or recertification of such license, permission or certification against any organization controlled by or in connection with a religious organization or denominational group or entity that refuses to provide any form of assistance or information about adoption on grounds that it would be contrary to the conscience or religious or moral beliefs of that organization or of the religious organizations or denominational group or entity by which it is operated, sponsored or controlled." They go on to say that, "Because bills like this have been enacted in Boston, Massachusetts and Washington, Catholic Charities in both the Archdioceses of Boston and Washington, D.C. have ceased adoption services because of similar legislation and legal opinion." They offered up this amendment, which I believe is fair. It basically does not penalize religious organizations for doing what they would like to do and place children in families that they feel are the most beneficial. They feel if this becomes law, that they may be ceasing operations here in New York State, like Boston and like Washington, D.C. And for that reason, Mr. Speaker, I'm going to be opposing this legislation.

ACTING SPEAKER P. RIVERA: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER P. RIVERA: The Clerk will record the vote.

(The Clerk recorded the vote.)

Mr. Lavine to explain his vote.

MR. LAVINE: Thank you, Mr. Speaker. An issue arises that, I believe, accounts for some of the no votes with respect to this outstanding bill, and that issue is that some have said that they really don't know how any judge or any court ought to be able to interpret the phrase "intimate couples" or "intimate unmarried adults." So, I just want to say that one of the things I had the privilege of doing when I practiced law was appellate work, very often in the Federal courts. We can go to the classic work on this, which is Sutherland on Statutory Construction that says that when a Legislature passes a bill, you take the words for what the Legislature means. I don't think there is anything at all that's ambiguous about this term. We are talking about people who have particularly close interpersonal relationships. And for anyone, I would submit, who would vote against this because they've got some semantic problem, I think that that is a vote that, with respect to the thousands and thousands of children who are awaiting adoption and who need homes, that is a vote that goes beyond cruel; that is a vote that is destructive.

I'm withdrawing my request and casting my vote in the affirmative.

ACTING SPEAKER P. RIVERA: Mr. Lavine in the affirmative.

Mr. Kellner to explain his vote.

MR. KELLNER: Thank you, Mr. Speaker. I really want to personally thank the sponsor of this bill. I know how important this piece of legislation is, having been adopted by one of my two parents. You know, one of the things my family greatly feared when my mother got remarried, when she got sick with cancer was what happened if she died if we had not been able to be adopted by my father, who might possibly attempt to take us away if that did occur. So, you know, what the sponsor is doing, what this bill is doing, is keeping families intact, ensuring that we have families in New York State and I thank her for this bill and I vote in the affirmative.

Thank you, Mr. Speaker.

ACTING SPEAKER P. RIVERA: Mr. Kellner in the affirmative.

Ms. Glick to explain her vote.

MS. GLICK: Thank you, Mr. Speaker. I just want to applaud the sponsor for her efforts in trying to address the importance of stability for children who are in the situation where there are, in fact, two unmarried parents. When there's an emergency, both parents should be able to act on behalf of the child. If there's an emergency, as we experienced in my district in 2001, parents had to race to schools to pull their children out of an emergency situation. If one parent is traveling on business and is out of town, there has to be clarity that both parents can act on behalf of those children. Whether

there's a medical emergency or a public safety emergency, this is the kind of situation where the interests of the child must trump all other considerations. That is why it is important for the legal system to recognize that both parents have the right to act on behalf of that child.

So, I would urge a yes vote and I, again, want to applaud the sponsor for all of her efforts. I will be voting in the affirmative.

ACTING SPEAKER P. RIVERA: Ms. Glick in the affirmative.

Are there any other votes?

The Clerk will announce the results.

(The Clerk announced the results.)

The bill is passed.

Mr. Canestrari.

MR. CANESTRARI: Yes, sir. We will now go to Page 41, Calendar No. 663, Ms. Helene Weinstein, please.

ACTING SPEAKER P. RIVERA: Page 41, Calendar No. 663, the Clerk will read.

THE CLERK: Bill No. 8735-A, Calendar No. 663, Weinstein, Brodsky. An act to amend the Civil Practice Law and Rules, in relation to increasing the property values which are exempt from the satisfaction of a money judgment; and to amend the Debtor and Creditor Law, in relation to increasing the exemptions in bankruptcy.

Related/Prior Legislation

A8329 Grannis (MS) No Same as
Domestic Relations Law
TITLE....Relates to permitting two unmarried persons to adopt a child together
05/18/05 referred to judiciary
01/04/06 referred to judiciary

STATE OF NEW YORK

8329

2005-2006 Regular Sessions

IN ASSEMBLY

May 18, 2005

Introduced by M. of A. GRANNIS, GLICK, O'DONNELL, DINOWITZ, BRADLEY, LAFAYETTE, PAULIN, HOYT, SEDDIO, LAVINE -- Multi-Sponsored by -- M. of A. BING, BRENNAN, CAHILL, A. COHEN, DiNAPOLI, JOHN, N. RIVERA, WEISENBERG -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

Who may adopt; effect of article. An adult unmarried person [~~or~~], an adult husband and his adult wife together **or any two unmarried adults together** may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD11396-01-5

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A8329

SPONSOR: Grannis (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does "not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dan including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents health insurance policies;

* The right to have 2 parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY: New bill

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: Immediately

A 3239 Grannis (MS) Same as S 4756 KRUEGER
Domestic Relations Law
TITLE....Relates to permitting two unmarried persons to adopt a child together
This bill is not active in the current session.
01/23/07 referred to judiciary
04/20/07 enacting clause stricken

S4756 KRUEGER Same as A 3239 Grannis (MS)
Domestic Relations Law
TITLE....Relates to permitting two unmarried persons to adopt a child together
This bill is not active in the current session.
04/23/07 REFERRED TO SOCIAL SERVICES, CHILDREN AND FAMILIES
06/04/07 RECOMMIT, ENACTING CLAUSE STRICKEN

STATE OF NEW YORK

3239

2007-2008 Regular Sessions

IN ASSEMBLY

January 23, 2007

Introduced by M. of A. GRANNIS, GLICK, O'DONNELL, DINOWITZ, BRADLEY, LAFAYETTE, PAULIN, HOYT, LAVINE -- Multi-Sponsored by -- M. of A. BING, BRENNAN, CAHILL, DiNAPOLI, GOTTFRIED, JOHN, N. RIVERA, WEISENBERG -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

Who may adopt; effect of article. An adult unmarried person [or], an adult husband and his adult wife together or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05407-01-7

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A3239

SPONSOR: Grannis (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does "not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents health insurance policies;

* The right to have 2 parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY: 2005-06: Judiciary

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: Immediately

STATE OF NEW YORK

4756

2007-2008 Regular Sessions

IN SENATE

April 23, 2007

Introduced by Sen. KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Social Services, Children and Families

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

Who may adopt; effect of article. An adult unmarried person [or], an adult husband and his adult wife together or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05407-01-7

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S4756

SPONSOR: KRUEGER

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does "not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

*Social security benefit in the event of a parent's death or disability;

*Life insurance benefits in the event of a parent's death;

*The right to sue for wrongful death of a parent;

*The rule to inherit under the rules of intestacy;

*Eligibility for health insurance coverage under both parents health insurance policies;

*The right to have 2 parents participate in medical decisions in the event of an emergency;

*The right to receive economic support from two parents;

*The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;

*The right to continue the relationships with both parent and extended families in the event of a separation; and

*The right to have both parents named on the birth certificate.

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: Immediately

A 7449-A Rosenthal (MS) Same as S 7321 DUANE
Domestic Relations Law
TITLE....Relates to permitting two unmarried persons to adopt a child together
04/16/07 referred to judiciary
01/09/08 referred to judiciary
03/20/08 amend and recommit to judiciary
03/20/08 print number 7449a

S7321 DUANE Same as A 7449-A Rosenthal (MS)
ON FILE: 04/01/08 Domestic Relations Law
TITLE....Relates to permitting two unmarried persons to adopt a child together
03/31/08 REFERRED TO SOCIAL SERVICES, CHILDREN AND FAMILIES

STATE OF NEW YORK

7449--A

2007-2008 Regular Sessions

IN ASSEMBLY

April 16, 2007

Introduced by M. of A. ROSENTHAL, GLICK, O'DONNELL, DINOWITZ, BRADLEY, LAFAYETTE, PAULIN, HOYT, LAVINE, JAFFEE -- Multi-Sponsored by -- M. of A. BING, BOYLAND, BRENNAN, CAHILL, GOTTFRIED, JOHN, KELLNER, MAISEL, PHEFFER, N. RIVERA, TITONE, WEISENBERG -- read once and referred to the Committee on Judiciary -- recommitted to the Committee on Judiciary in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

Who may adopt; effect of article. An adult unmarried person [or], an adult husband and his adult wife together ,or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05407-02-8

in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A7449A

SPONSOR: Rosenthal (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does ~not preclude an unmarried person in a relationship with another unmarried person from adopting.u

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of" two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY:; 2005-06: A.8329 referred to Judiciary

FISCAL IMPLICATIONS:; None

EFFECTIVE DATE: Immediately

STATE OF NEW YORK

7449

2007-2008 Regular Sessions

IN ASSEMBLY

April 16, 2007

Introduced by M. of A. ROSENTHAL, GLICK, O'DONNELL, DINOWITZ, BRADLEY, LAFAYETTE, PAULIN, HOYT, LAVINE -- Multi-Sponsored by -- M. of A. BING, BRENNAN, CAHILL, GOTTFRIED, JOHN, N. RIVERA, WEISENBERG -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

Who may adopt; effect of article. An adult unmarried person [or], an adult husband and his adult wife together or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05407-01-7

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A7449

SPONSOR: Rosenthal (MS)

TITLE OF BILL: An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL: To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS: Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION: Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does "not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dan including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents health insurance policies;

* The right to have 2 parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY: 2005-06: A8329 referred to Judiciary

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: Immediately

STATE OF NEW YORK

7321

IN SENATE

March 31, 2008

Introduced by Sen. DUANE -- read twice and ordered printed, and when printed to be committed to the Committee on Social Services, Children and Families

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

Who may adopt; effect of article. An adult unmarried person [or], an adult husband and his adult wife together ,or any two unmarried adults together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05407-03-8

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S7321

SPONSOR: DUANE

TITLE OF BILL:
An act to amend the domestic relations law, in relation to authorizing two unmarried adults to adopt a child

PURPOSE OR GENERAL IDEA OF BILL:
To allow the adoption of a child by two unmarried adults in keeping with the state's policy to ensure the best interests of a child.

SUMMARY OF SPECIFIC PROVISIONS:
Section 110 of domestic relations law, which governs who may adopt, is amended to permit any two unmarried adults together to adopt.

JUSTIFICATION:
Current New York State law allows an adult unmarried person or an adult husband and his adult wife together to adopt a child. In Matter of Jacob and Matter of Dana the Court of Appeals asserted that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one Spouse does not adopt a child without the other spouse's knowledge or over the other's objection. It does not preclude an unmarried person in a relationship with another unmarried person from adopting.

Despite these decisions, there are still known court cases which have ruled that New York law does not permit a joint adoption of two unmarried adults, neither of which is the biological parent. Unmarried couples seeking to have a child adopted by the second parent are finding that some courts are terminating the rights of one parent and simply granting rights to the other parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State.

Allowing two unmarried adults together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;

* Life insurance benefits in the event of a parent's death;

* The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;
* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody; * The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

PRIOR LEGISLATIVE HISTORY:
2005-06: A.8329 Referred to Judiciary

FISCAL IMPLICATIONS:
None.

EFFECTIVE DATE:
Immediately.

Press Releases

Assemblymember
Linda B. Rosenthal
Assembly District 67

Translate this page

Rosenthal Expands Adoption Rights for Unmarried and Same-Sex Couples

July 1, 2010

New York, NY – New York State Assemblymember Linda B. Rosenthal (D/WF, Manhattan) announced that her bill, A.5652-B, landmark legislation permitting unmarried partners, including same-sex couples, to adopt a child together had passed both the Assembly and the Senate and would soon reach the Governor's desk.

"This is a terrific victory for children lucky enough to have two people committed to raising them with the full protection of the law," said Assemblymember Rosenthal. "It is unfair and mean-spirited to deny children in these circumstances their parents' life insurance payments, right to health insurance and other crucial benefits. Allowing both parents full legal guardianship will guarantee children the ability to have continued access to both parents and extended family in the event of separation and help them avoid the heartbreak and uncertainty that could emerge in the event of one parent's death."

Although this right was previously affirmed in the 4-3 New York State Court of Appeals' ruling *Matter of Jacob and Matter of Dana* in a majority opinion authored by then Chief Judge Judith S. Kaye, the court did not specifically address instances in which neither adult is a biologically related to the child. Unmarried couples have continued to experience difficulties in attaining the rights afforded to them in this decision, and must file two different applications and go through two separate certification processes. This bill would codify the Court of Appeal's decision and end existing legal ambiguities. Current statutory provisions in New York State law permit only an adult person or adult husband and wife to adopt a child.

A New York State Supreme Court Appellate Division reached a similar conclusion in *Matter of Adoption of Carolyn B*, upholding "both the letter and the spirit of the statute as it has developed: 'encouraging the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them.'"

In her opinion on the *Matter of Jacob and Matter of Dana*, former Chief Judge Judith S. Kaye wrote "Because the two adoptions sought--one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother--are fully consistent with the adoption statute, we answer this question in the affirmative. To rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them."

In the State Senate, the proposal was sponsored by Senator Tom Duane. Twenty seven other states offer varying degrees of this protection, although many of these court cases have adjudicated below the state-wide level. This achievement comes at the conclusion of Gay Pride Month. Said Assemblymember Rosenthal, "I look forward to assisting families that seek to take advantage of this new law."

Under existing application of the law, parents face onerous legal burdens and unnecessary anxiety. The full protections offered by the bill include:

- Social security benefit in the event of a parent's death or disability;
- Life insurance benefits in the event of a parent's death;
- The right to sue for wrongful death of a parent;
- The rule to inherit under the rules of intestacy;
- Eligibility for health insurance coverage under both parents' health insurance policies;
- The right to have two parents participate in medical decisions in the event of an emergency;
- The right to receive economic support from two parents;
- The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
- The right to continue the relationships with both parents and extended families in the event of a separation; and
- The right to have both parents named on the birth certificate.

Assemblymember Rosenthal represents the Upper West Side of Manhattan and parts of Clinton/Hell's Kitchen.

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Assemblymember
Linda B. Rosenthal
Assembly District 67

Translate this page

Governor Signs Rosenthal Legislation Expanding Adoption Rights for Unmarried and Same-Sex Couples

September 20, 2010

New York, NY – New York State Assemblymember Linda B. Rosenthal (D/WFP, Manhattan) and Senator Thomas K. Duane (D – WFP Manhattan) announced that their landmark legislation permitting unmarried partners, including same-sex couples, to adopt a child together was signed into law by Governor David A. Paterson. The new law not only specifies that two unmarried intimate partners may adopt a child together but it also replaces prior references to “husband” and “wife” with the gender neutral term "married couple,” so that the law applies to all married couples.

“This is a terrific victory for the LGBT community and for children lucky enough to have two people committed to raising them with the full protection of the law, and I am excited that Governor Paterson has signed this legislation into law,” said Assemblymember Rosenthal. “Previously, children without two legal guardians could be denied life insurance payments, and had to fight for the right to health insurance and other crucial benefits. By correcting this situation children will be able to have continued access to both parents and extended family in the event of separation and help them avoid the heartbreak and uncertainty that could emerge in the event of one parent’s death. While my goal is nothing less than full marriage equality for all New Yorkers, this is an important interim step for same-sex couples seeking to raise children."

Senator Duane said, “Until now, same-sex couples who wanted to jointly adopt in New York State had to rely on judicial interpretations of court cases and vague language in State regulations, which may not be the same in Potsdam and Jamestown as in Manhattan and Brooklyn. No longer will same-sex couples who want to jointly adopt be subject to the whims of geography.”

Although this right was previously affirmed in the 4-3 New York State Court of Appeals’ ruling Matter of Jacob and Matter of Dana in a majority opinion authored by then Chief Judge Judith S. Kaye, the court did not specifically address instances in which neither adult is a biologically related to the child. Unmarried couples have continued to experience difficulties in attaining the rights afforded to them in this decision, and must file two different applications and go through two separate certification processes. This bill would codify the Court of Appeals’ decision and end existing legal ambiguities. Current statutory provisions in New York State law permit only an adult person or adult husband and wife to adopt a child.

A New York State Supreme Court Appellate Division reached a similar conclusion in Matter of Adoption of Carolyn B, upholding “both the letter and the spirit of the statute as it has developed: ‘encouraging the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them.’”

In her opinion on the Matter of Jacob and Matter of Dana, former Chief Judge Judith S. Kaye wrote “Because the two adoptions sought – one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother – are fully consistent with the adoption statute, we answer this question in the affirmative. To rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them.”

Twenty seven other states offer varying degrees of this protection, although many of these court cases have been adjudicated below the state-wide level. Assemblymember Rosenthal said, “I look forward to assisting New York families that seek to take advantage of this new law.”

Under existing application of the law, parents face onerous legal burdens and unnecessary anxiety. The full protections offered by the bill include:

- Social security benefit in the event of a parent's death or disability;
- Life insurance benefits in the event of a parent's death;
- The right to sue for wrongful death of a parent;
- The rule to inherit under the rules of intestacy;
- Eligibility for health insurance coverage under both parents' health insurance policies;
- The right to have two parents participate in medical decisions in the event of an emergency;
- The right to receive economic support from two parents;
- The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;
- The right to continue the relationships with both parents and extended families in the event of a separation; and
- The right to have both parents named on the birth certificate.

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000090

Kerwin
Exhibit B

19-1715

United States Court of Appeals for the Second Circuit

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

v.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York,

Defendant-Appellee.

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

BRIEF FOR APPELLEE

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ANDREA OSER
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Dated: October 21, 2019

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PRELIMINARY STATEMENT

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

QUESTIONS PRESENTED

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

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

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

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

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The State has a vital interest in ensuring that prospective adoptive parents provide safe and appropriate homes for adopted children, and that adoptive placements serve each child's best interests. N.Y. Domestic Relations Law ("DRL") § 114(1); *see also* N.Y. Comp. Codes R. & Regs. tit. 18 ("18 N.Y.C.R.R.") § 421.2(a) (explaining need to place children where they will have the opportunity for growth, development, and parental guidance). In furtherance of these interests, the State stringently regulates those who provide authorized adoption services according to established standards and criteria. Although it may well be that historically adoptions were arranged by private parties with little government oversight, that system was long ago replaced with a highly regulated regime in which the State partners with both public and private entities.

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

[1] Private placement adoptions are allowed in New York and are separately regulated. Those situations do not involve adoptive services.

(*continued on the next page*)

"authorized agency" is an agency organized under New York law with corporate authority to care for children, place out children for adoption or care, or board out children for foster care. SSL § 371(10).

The statutory scheme bestows significant authority on authorized agencies. Authorized agencies accept applications from prospective adoptive parents, conduct adoption studies regarding applicants' suitability to serve as adoptive parents based on specified factors, *see* 18 N.Y.C.R.R. §§ 421.13, 421.15, 421.16, and approve or disapprove applicants for adoption based on applicable regulatory standards, *id.* § 421.15(g). State law also vests authorized agencies with authority to accept surrender of a child from its parents, which transfers legal custody and guardianship of the child to the authorized agency. SSL § 384; 18 N.Y.C.R.R. § 421.6. And authorized agencies choose prospective adoptive homes for children accepted for placement, making decisions on the basis of the "best interests" of the respective children, taking into consideration the factors specified in 18 N.Y.C.R.R. § 421.18(d). Guardianship and legal custody of a child accepted for adoption remain with the authorized

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

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

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

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

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

B. OCFS's Nondiscrimination Regulation

In 2013, OCFS promulgated a series of regulatory amendments designed to eliminate discrimination on the basis of sexual orientation and gender identity in the provision of "essential social services" for children, including adoption services. N.Y. State Register (Nov. 6, 2013), at 3.[3] One of these amendments added the regulatory provision at issue here prohibiting authorized adoption agencies from "discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability."[4] 18 N.Y.C.R.R. § 421.3(d).[5] This nondiscrimination regulation is consistent with, and

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

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

[5] As part of the same regulatory package, OCFS prohibited discrimination on all of these bases in the provision of foster-care services and eliminated existing regulatory language that indicated that adoption applicants could be rejected on the basis of marital status or homosexuality. *See* N.Y. State Register (August 7, 2013), at 4, *available*

(*continued on the next page*)

implements, state laws prohibiting discrimination. New York Civil Rights Law § 40-c prohibits such discrimination against any person in the exercise of civil rights and New York Executive § 296 prohibits such discrimination in the provision of public accommodations. Moreover, the New York Court of Appeals has long recognized that neither marital status, nor sex, nor sexual orientation "may alone be determinative in an adoption proceeding." *In re Jacob*, 86 N.Y.2d 651, 663, 667 (1995). And the New York Legislature has expressly amended the law to confirm the right of unmarried and same sex-couples to adopt on equal terms as married, heterosexual couples. *See* N.Y. Laws 2010, ch. 509 (*codified at* DRL § 110); *see also* Memorandum of Senate Sponsor, Bill Jacket for same, at 6-7 (describing legislation as codifying *In re Jacob* and ensuring that same-sex couples have "equal rights to adopt a child together").

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

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

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

C. Factual Background and Procedural History

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

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

(*continued on the next page*)

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

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

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

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

(*continued on the next page*)

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

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

D. The District Court Decision

On May 16, 2019, the U.S. District Court for the Northern District of New York (D'Agostino, J.), rejected New Hope's constitutional claims, granted OCFS's motion to dismiss the complaint, and dismissed as moot New Hope's motion for a preliminary injunction. (JA282.)

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

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

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

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

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

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

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

E. Subsequent Events

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

ARGUMENT

POINT I

NEW HOPE FAILS TO STATE A FREE-EXERCISE CLAIM

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

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

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

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

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

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

On its face, the nondiscrimination rule is neutral toward religion and generally applicable. By its terms, all private and public adoption agencies must "prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d). Thus, on its face, the regulation is neutral toward religion because it simply requires authorized agencies to serve adoption applicants in a nondiscriminatory manner. The regulation thus does not have as its object to regulate, target, or punish religious beliefs. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533; *Smith,* 494 U.S. at 877. The regulation is also generally applicable because *all* authorized agencies must comply with its nondiscrimination mandate.

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

provision of adoption services and expanding the pool of prospective adoptive parents available to accept specific placements. (*See* JA266.) As discussed, *infra* at 34-37, the regulatory history confirms that the regulation was adopted to specifically serve those two interests. As the Supreme Court has recently reaffirmed, if a nondiscrimination requirement is neutral and generally applicable, religious objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services." *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n,* 138 S. Ct. 1727 (2018).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The statutory and regulatory provisions on which New Hope relies do not single out any specific religious practices or views. They do not, as New Hope argues (Br. at 20), in effect provide "secular exceptions" to the nondiscrimination regulation. The subject provisions merely allow an authorized agency to focus recruitment efforts and prioritize parents for home studies based on the needs of children and, in making a placement determination, to consider various factors (including religion) to further the interest in obtaining for each child the most appropriate placement from the pool of approved applicants.

For example, 18 N.Y.C.R.R. §§ 421.10 and 421.13 direct authorized agencies to focus recruitment efforts on, and give first priority in home studies to, parents seeking a child with the age, race, disability and other significant characteristics of the largest proportion of waiting children. These regulations recognize that where an agency has limited resources to serve adoption applicants, priority should be given to those applicants who will meet the needs of the majority of waiting children. And consistent with federal law, 18 N.Y.C.R.R. § 421.13 additionally requires agencies to give first priority in home studies to Indian prospective adoption applicants seeking to adopt Indian children. This provision

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

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

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

same). 18 N.Y.C.R.R. § 421.18(d) allows consideration of "the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background" as part of an agency's best-interest placement decision.

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

The provisions on which New Hope relies thus do not address which applicants or prospective adoptive parents will be served or allow an authorized agency to turn away a prospective adoption applicant on the basis of any of the pertinent characteristics. They simply allow authorized agencies to consider specified protected characteristics in focusing their recruitment and home-study efforts and in making placement decisions in order "to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Fulton v.*

Philadelphia, 922 F.3d at 158 (rejecting similar argument to application of nondiscrimination rule to exclusionary policy of a foster care agency).

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

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

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

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

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

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

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

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

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

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

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

OCFS adopted the challenged regulation as part of a regulatory package that had the valid and neutral purpose of eliminating discrimination on the basis of sexual orientation and gender identity in the provision of essential social services, a quintessentially valid public purpose. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995). The regulatory package also sought to "promote fairness and equality in the child welfare adoption program" by eliminating outdated regulatory language that had indicated that the marital status of applicants and the sexual orientation of gay, lesbian, and bisexual individuals were relevant to applicants' evaluation as appropriate adoptive parents. N.Y. State Register (August 7, 2013), at 5.

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

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

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

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

In a July 2011 Informational Letter, OCFS explained:

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

OCFS Informational Letter 11-OCFS-INF-05, at 3 (July 11, 2011).[13] OCFS confirmed that under state law, applicants did not have to be married to adopt; thus, while the length of the relationship could be considered, the length of marriage was not a valid basis on which to reject applicants. *Id.* at 4. OCFS also advised agencies that "discrimination based on sexual orientation in the adoption study assessment process" is prohibited. *Id.* OCFS further stated that it could not

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

> contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent. The capacity of the prospective adoptive parents to meet the needs of children freed for adoption should be the primary consideration when making approval or rejection decisions of an adoptive applicant.

Id.

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

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

Nor are New Hope's remaining allegations sufficient to suggest that OCFS has applied its regulation in a manner hostile toward religion. New Hope relies on allegations that (1) OCFS by December 2018 removed from its website the names of several voluntary faith-based agencies authorized at the start of year to make adoption placements, some of

which may share New Hope's views on cohabitating and same-sex couples, and (2) OCFS officials made four statements indicating they would not tolerate discriminatory policies.

As to the first allegation, any alleged disparate impact of the regulation on religiously affiliated agencies flows not from any hostility to religion, but rather from the fact that social services agencies with similarly discriminatory policies often have religious affiliations. After all, there is a long history of social service by religious institutions, as well as a history of opposition by certain religious groups to cohabitation outside of marriage and same-sex marriage. *See, e.g.*, Human Rights Campaign, *Religion and Faith: Faith Positions*, available at https://www.hrc.org/resources/faith-positions (last accessed Oct. 16, 2019). "The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015).

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

neutral landmarks preservation law would have a disparate impact on religious institutions because many such institutions have buildings that fit the statutory criteria, i.e., a building having "special character or special historical or aesthetic interest or value." *Id.* The Court concluded, however, that any such disparate impact was "not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites." *Id.* So too here. The fact that New Hope's "conduct springs from sincerely held and strongly felt religious beliefs does not imply that [OCFS's] desire to regulate that conduct springs from antipathy to those beliefs." *Fulton*, 922 F.3d at 159.

Critically, New Hope has not alleged that OCFS declines to enforce its regulation against authorized agencies who discriminate against unmarried or same-sex couples on the basis of secular beliefs. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1730-31 (fact that nondiscrimination policy was enforced against religiously motivated conduct but not against analogous secular conduct evidences hostility toward religion). As the Third Circuit explained in *Fulton*, in rejecting a free-exercise challenge to the application of a similar nondiscrimination policy in the foster-care context, "a challenger under the Free Exercise Clause must show that it

was treated differently because of its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Fulton*, 922 F.3d at 154. Because New Hope does not allege it was treated more harshly than secular agencies that similarly discriminate against unmarried and same-sex couples, its allegations of disproportionate impact do not give rise to an inference of disparate treatment. *See Rector, Wardens, & Members of Vestry of St. Bartholomew's Church*, 914 F.2d at 354.

As to the remaining allegations involving statements by OCFS officials, which New Hope quotes in its complaint but misleadingly describes in its brief, they establish only that OCFS does not tolerate discrimination, whatever its source. New Hope alleges four statements for this purpose: (1) a statement by an OCFS spokesperson that "[t]here is no place in New York for providers that choose not to follow the law" (JA43);[14] (2) a statement that the repeal of the regulations that allowed

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[14] Rather than quote the statement in its brief, New Hope misleadingly describes it as OCFS's "avowed goal of driving providers

(*continued on the next page*)

an adoption applicant to be rejected on the basis of marital status and allowed unfavorable consideration of homosexual orientation was intended to "eliminate archaic regulatory language" (JA35);[15] (3) a staff member's reference to the fact that "[s]ome Christian ministries have decided to compromise and stay open" (JA40); and (4) a statement in the policy directive, issued in response to the 2010 amendment to DRL § 110, that "OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent" (JA34).

Contrary to New Hope's argument (Br. at 30, 32-33), these statements do not resemble the statements of the adjudicatory administrators that troubled the Supreme Court in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1729. Unlike those statements, which evinced an "animosity to religion or distrust of its practices," *id.* at 1731, the statements at issue here are neutral toward religion and indicate only

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

[15] New Hope misleadingly characterizes this statement as OCFS labeling New Hope's beliefs as "archaic." (Br. at 30 (citing JA35).)

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

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

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

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

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

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

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

POINT II

NEW HOPE FAILS TO STATE A FREE-SPEECH CLAIM

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

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

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

In FAIR, the Supreme Court confirmed the longstanding principle that prohibitions on discrimination regulate conduct, not speech, even if they may impact statements about access to goods or services. "Congress,

for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62.

Similarly here, when New York prohibits adoption-service providers from discriminating against same-sex couples and unmarried couples, it is prohibiting conduct. Its regulation does not constitute a prohibition on speech merely because it prevents an agency from announcing that it will accept "Single and Married Heterosexual Applicants Only."

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

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

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

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

to exercise its statutory powers in a manner that is neutral as to marital status and sexual orientation; the regulation does not compel New Hope to disseminate an ideology with which it disagrees. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713-14 (1977) (individual may not be forced to disseminate state's ideological message on his license plate).

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

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

To the extent New Hope argues (Br. at 40) that complying with the regulation will dilute its message, its claim fares no better. "The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Natl. Inst. of Family & Life Advocates v Becerra*, 138 S. Ct. 2361, 2373 (2018) (internal quotation omitted). As the Court explained in *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992), the State could require the use of specific informed-consent language because the requirement regulated speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." Similarly here, any effect that OCFS's regulation has on New Hope's speech is incidental to the regulation of New Hope's conduct.

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

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

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

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

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

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

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

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

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

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

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

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

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

POINT III

New Hope Fails to State An Expressive-Association Claim

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

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

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

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

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

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

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

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

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

To be sure, requiring New Hope to provide equal access to its services without regard to marital status or sexual orientation will compel it to associate with unmarried and same-sex couples in the sense of interacting with them for the purpose of assisting them to become adoptive parents. But just as the right of association was not infringed by a rule requiring law schools to interact with military recruiters by allowing them on campus and providing the same incidental services provided to other recruiters, *see FAIR*, 126 S. Ct. 1297, New Hope's right

of association is not infringed here. The right of association is infringed only when a group is organized for expressive purposes and is forced to alter its selection of members or constituents, interfering with the critical means by which a group "express[es] those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648.

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

Even if OCFS's nondiscrimination regulation implicates New Hope's expressive-association right, any burden on that right is merely incidental, and is thus insufficient to state a claim. "Mere incidental burdens on the right to associate do not violate the First Amendment; rather, to be cognizable, the interference with plaintiffs' associational rights must be direct and substantial or significant." *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (internal quotation and alteration from original omitted); *accord Fighting Finest v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (citing *Lyng v. Intl. Union*, 485 U.S. 360, 367 & n.5 (1988)). Here, they are neither. As the district court correctly reasoned (JA272), the nondiscrimination rule does not burden any expressive-association right that may exist here in either a direct or substantial way.

Although New Hope asserts a viewpoint about the marital status and sexual orientation of adoptive parents, it does not accept those individuals as members of its organization merely by providing services to them as required by state law. *See Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (dance hall patrons do not associate for expressive purposes). Indeed, were the rule otherwise, no organization that engaged in expressive activities could be required to serve members of the general public in a nondiscriminatory manner. Such transactional association does not directly or substantially interfere with any of New Hope's alleged associational rights.

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

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

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

Finally, OCFS is not enforcing its nondiscrimination regulation for the very purpose of altering New Hope's expression. OCFS's enforcement merely "assur[es] its citizens equal access to publicly available goods and services"—a goal "which is unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624 (rejecting challenge to application of equal-access law that required Jaycees to include women as full voting members). Thus, as the district court found (JA272-273), even if the nondiscrimination regulation impairs New Hope's right to expressive association in some minimal way, enforcement of the regulation would not unconstitutionally violate that right. *See id.* (finding no constitutional violation where state's compelling interest in public accommodation law outweighed any minimal impact on organization's expressive activities).

POINT IV

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

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

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

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

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

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

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

CONCLUSION

Judgment dismissing the complaint should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Laura Etlinger, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 12,191 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Laura Etlinger