19-1715

IN THE 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
Case No. 5:18-cv-1419, Hon. Mae A. D'Agostino

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns a portion of any of them.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are civil-rights organizations united in commitments to religious freedom and to ensuring that lesbian, gay, bisexual, transgender, and queer ("LGBTQ") persons, and all Americans, remain free from officially sanctioned discrimination. *Amici* share the firm belief that our Nation's fundamental promises of equal treatment, equal dignity, and equal respect should never be eroded or tainted by misusing the language of religious liberty to afford official imprimatur to discrimination against people based on their religion, race, sex, sexual orientation, gender identity, or any other protected characteristic.

The *amici* are:

- Lambda Legal Defense and Education Fund, Inc.
- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- COLAGE.
- Family Equality.
- Human Rights Campaign.

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

Amici write to explain why religious-freedom protections do not override New York's prohibition against discrimination in adoption services and why accepting New Hope's position would undermine rather than further religious freedom by inviting discrimination against people because of their faith.

Individual statements of interest of the *amici* are contained in Exhibit A to this brief.

INTRODUCTION

Out of respect for the rights, dignity, and well-being of LGBTQ people, the New York Office of Children and Family Services prohibits state-licensed adoption agencies from discriminating against prospective adoptive parents because of, among other characteristics unrelated to the ability to care for a child, the prospective parents' sexual orientation, gender identity, or gender expression. The regulation challenged here ensures that members of the LGBTQ community will not suffer the degradation of having their ability or worth as parents rejected based on nothing more than their identity when they seek to provide a loving and safe home to a child.

Governmental efforts to protect people against discrimination may at times be offensive to the deeply held beliefs of others. In a diverse nation, where all manner of religious beliefs are represented, disagreement is inevitable, arising in matters as varied as the administration of the Social

Security program and the enforcement of drug laws. When these conflicts arise, they warrant a consistent judicial response to ensure that vulnerable persons are protected and community goals for safety and well-being are met.

The Supreme Court set forth the governing framework for that response in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The antidiscrimination regulation challenged here fully meets *Smith*'s and *Lukumi*'s requirements: It is neutral and generally applicable, reflecting no discriminatory intent toward religion; and it easily satisfies rational-basis review under those cases because it serves the government's legitimate interests in protecting marginalized persons against discrimination and in expanding the pool of families available to care for children.[2] It should therefore be upheld.

But even if this Court were instead to conclude that strict scrutiny applies, the result would be the same because the State has a compelling interest in prohibiting discrimination in adoption services. That discrimination has a pernicious effect on the mental and physical health of

[2] While *amici* agree that the State's interest in expanding the pool of families for children is critically important and indeed compelling, this brief focuses on the State's interest in preventing discrimination.

LGBTQ people and risks violating constitutional guarantees of equal treatment in the provision of these services. Moreover, the exemption sought here has no limiting principle and would lead inevitably to increased discrimination on the basis of other characteristics—including religion itself.

To grant an exemption from the equal-treatment requirements challenged here not only would wrongly permit discrimination against LGBTQ persons, but also would undermine key state efforts to combat the harmful effects of discrimination and abandon the framework that the Supreme Court has provided for solving the inevitable conflicts that arise in a diverse society. The judgment should therefore be affirmed.

ARGUMENT

I. NEW HOPE IS NOT ENTITLED TO A RELIGIOUS EXEMPTION FROM THE ANTIDISCRIMINATION REGULATION.

New Hope argues that because it is a religious entity and because it believes that complying with the challenged regulation contradicts its religious teachings, it is entitled to an exemption from the State's antidiscrimination requirement. Not so. The Religion Clauses of the First Amendment "mandate[] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S.

97, 104 (1968)). Hence, while a religious practice must not be specially targeted for maltreatment *because* it is religious, *see Lukumi*, 508 U.S. at 532–33, 542; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017), disagreement with the law does not excuse noncompliance even when it is premised on religious belief. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, in effect to permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)).

To navigate safely between these two hazards—the disfavoring of religion and the subversion of the rule of law—the Supreme Court has mandated that courts must uphold laws that are neutral and generally applicable, as long as they survive rational-basis review; in contrast, laws that lack neutrality or general applicability receive the highest constitutional scrutiny. *Lukumi*, 508 U.S. at 531–32. The challenged regulation easily meets the neutrality and general-applicability requirements: It does not discriminate on the basis of religion but instead binds all adoption agencies without regard to religious affiliation, belief, or motivation. It satisfies rational-basis review by serving multiple legitimate state interests, including the State's *compelling* interest in prohibiting the harmful effects of discrimination. And it does all of that without interfering

with the autonomy of houses of worship. Thus, New Hope's religious motivation for providing adoption services does not excuse that entity from the obligation to comply with the regulation. New Hope's Free Exercise claim should fail as a matter of law.

A. The Regulation is a Neutral Law of General Applicability.

1. The regulation meets the neutrality requirement.

The Free Exercise Clause's neutrality requirement prohibits laws that "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). Discriminatory intent may be apparent on the face of the law, *see Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014), or it may be revealed through the law's practical effects, *see Lukumi*, 508 U.S. at 534. But a litigant that relies on a law's effects to prove impermissible religious targeting, as New Hope seeks to do here, bears the burden to establish that the law has been gerrymandered with the goal of deterring or punishing religious activity and lacks "a neutral, secular basis for the lines government has drawn." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (2d Cir. 2012) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)); *see also Lukumi*, 508 U.S. at 536 (striking down city ordinances that purportedly protected animal welfare and public health because "careful [legislative] drafting ensured that, although

Santeria [faith's practice of animal] sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished"). New Hope fails to make the required showing here.

Its arguments against the regulation's neutrality boil down to one contention: that the regulation targets New Hope as a religious adoption-service provider simply because it contradicts certain of New Hope's religious teachings. Appellant's Br. 28–30. But as a matter of law, the mere conflict between a religious belief and a legal requirement is not impermissible religious targeting. *Smith*, 494 U.S. at 879. Thus, a Free Exercise claim premised on an allegation of that sort cannot survive a motion to dismiss.

Indeed, the fundamental premise of governing free-exercise doctrine is that claimants must show more than a mere burden on their religious exercise to obtain heightened review. That is so even when one religion is disproportionately affected by a law as compared to other faiths or the public generally. *See, e.g.*, *Lukumi*, 508 U.S. at 531 ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a *particular religious practice*." (emphasis added)); *Smith*, 494 U.S. at 879–80; *Commack*, 680 F.3d at 211–12 (upholding kosher-labelling law against free-exercise challenge); *Stormans v. Selecky*, 586 F.3d 1109, 1131 (9th Cir.

2009) ("The Free Exercise Clause is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct.").

If New Hope were correct that a religion is impermissibly targeted whenever it is affected (or affected more than other religions) by an otherwise neutral and generally applicable law, then *Smith* would have come out the opposite way. Moreover, *Lukumi* would be superfluous, because any person whose religion promoted an activity that the government happened to regulate would automatically be entitled to strict judicial scrutiny. *See Lukumi*, 508 U.S. at 531–32. But the Supreme Court has flatly rejected that approach, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

The Court did so in part because New Hope's proffered approach, if accepted, would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"—from tax laws to drug laws to child-labor laws to traffic laws. *See id.* at 888–89. In this Circuit and its district courts alone, parties have raised Free

Exercise challenges to neutral and generally applicable provisions including laws prohibiting international kidnapping, *see United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997)); laws barring employment of people without legal authorization to work, *see Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990)); laws preventing child abuse, *see Fowler v. Robinson*, No. 94-CV-836, 1996 WL 67994 at *14 (N.D.N.Y. Feb. 15, 1996)); and New York City's handling of the debris left after the attack on the World Trade Center, *see WTC Families for a Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 540 (S.D.N.Y. 2008)). New Hope's argument would have the strict-scrutiny standard applied to all these laws. But the Supreme Court decisively foreclosed that path, straightforwardly holding that "[t]he First Amendment's protection of religious liberty does not require [it]." *Smith*, 494 U.S. at 889.

The same is true of New Hope's related argument that the State impermissibly "pass[es] judgment upon" the entity's religious beliefs merely by enforcing a law that proscribes conduct that New Hope's religion prescribes. Appellant's Br. 30 (quotation omitted). The challenged regulation no more passes unconstitutional judgment on religious beliefs than did the university rule requiring official student groups to accept all comers in *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010). Government is permitted to regulate conduct, even when it happens

to be religiously motivated, if the conduct is "a legitimate concern of government for reasons quite apart from [religious] discrimination." *Lukumi*, 508 U.S. at 535. That is so even when the government responds with a law that happens to "affect one religion that practices the excluded conduct while not affecting other religions that do not." *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 196 (2d Cir. 2014).

Nor does this case involve evidence of animus in an enforcement decision premised on "hostility to a religion or religious viewpoint." *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). New Hope has not sufficiently alleged that the State has acted with any motive other than a desire to prevent discrimination in adoption services uniformly.

2. The regulation meets the general applicability requirement.

The challenged regulation likewise satisfies the requirement of general applicability, which is that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. The key question in assessing general applicability is whether a law has been drawn in a way that "is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the

legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong.*, 763 F.3d at 197; *see also Lukumi*, 508 U.S. at 543–44.

The analysis here is straightforward: The challenged regulation's purpose is to eliminate discrimination on the basis of certain protected characteristics in the provision of adoption services. It achieves that end by prohibiting all adoption agencies from discriminating against applicants on those grounds. *New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d 194, 202 (N.D.N.Y. 2019). The regulation is thus generally applicable because it applies uniformly, regardless of any agencies' beliefs, motivations, or religious (or nonreligious) affiliations.

New Hope nowhere argues that it has been selectively targeted for a special burden not imposed on all other adoption agencies. Indeed, it appears to acknowledge the opposite. *See* Appellant's Br. 30 (arguing that New York is disrespecting New Hope's religious beliefs because the State "'cannot contemplate any case' in which an exception to its ban on preferring married mothers and fathers would be tolerated"). Instead, New Hope erroneously asserts that New York's requirements to serve the best interests of adoptive children are exceptions to the challenged nondiscrimination regulation that render the regulation not generally applicable. Appellant's Br. 20–22.

Specifically, New Hope points to regulations that facilitate providing for the best interests of children by, for example, encouraging adoptive-parent recruitment in communities with characteristics similar to those of the largest number of children awaiting adoption, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 421.10(a)), and by preferring placements with adoptive parents who share a child's faith and thus would respect the child's own religious exercise, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 421.18(c). These provisions are not "exceptions" to the challenged regulation because, among other reasons, none excuse adoption agencies—religious or secular—from compliance with the nondiscrimination requirement. Far from disfavoring anyone based on a protected characteristic, the State is protecting vulnerable children by helping to ensure that they are placed with families who can meet their individual needs.

But even if these legal requirements were sufficiently analogous to New Hope's blanket bar on same-sex couples being adoptive parents—which they are not—they still would not negate the general applicability of the antidiscrimination regulation. "All laws are selective to some extent." *Lukumi*, 508 U.S. at 542. So the mere existence of exceptions is not proof that a law lacks general applicability. *See, e.g.*, *Ungar v. N.Y.C. Hous. Auth.*, 363 Fed. App'x 53, 56 (2d Cir. 2010) (exception to first-come-first-served housing policy for victims of domestic violence and others in high

need did not entitle Orthodox Jews to religious exception); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) ("Consistent with the majority of our sister circuits, . . . we have already refused . . . the proposition that a secular exemption automatically creates a claim for a religious exemption.").

What matters is whether there is different treatment *because of* religion, whether in gross or through individualized, *ad hoc* determinations. *See, e.g.*, *Smith*, 494 U.S. at 884; (explaining that in *Sherbert v. Verner*, 374 U.S. 398, 401 (1964), the state did not treat religious reasons for unemployment like secular reasons in evaluating whether there was good cause for not working so as to entitle one to unemployment benefits); *Chabad-Lubavitch v. Litchfield Historic Dist.*, 768 F.3d 183, 193 (2d Cir. 2014) (describing effect on religious applicant of essentially standardless discretion in land-use determinations); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298–99 (10th Cir. 2004) (considering whether there were "ad hoc discretionary" exemptions from curricular requirements that were non-neutral with respect to religion). New Hope's attempt to equate the State's regulatory program with a suspect scheme of individualized exceptions, Appellant's Br. 23, fails in part because the challenged regulation contains *no* discretionary exceptions and, as New Hope acknowledges, the State does not contemplate allowing any.

In short, the touchstone in determining general applicability is whether New York has decided "that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542–43. There is no allegation that the State has singled out for regulation only those adoption agencies that discriminate for religious reasons while ignoring those that discriminate for secular ones. New Hope's claims thus cannot survive a motion to dismiss.

B. The Regulation Does Not Intrude on Church Autonomy.

New Hope also argues that it should be exempt from the regulation because of the important role that adoption services play in its faith. *See* Appellant's Br. 18 (comparing child-placement services to the selection of ministers). But this argument also fails. The First Amendment absolutely bars governmental interference with the selection of ministers by houses of worship because of the special role that ministers play in determining and disseminating religious doctrine. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012). This "ministerial exception" is, however, a narrowly defined rule to safeguard the religious autonomy of houses of worship in the selection of their ministers. It does not, as New Hope represents, extend to every law that in any way touches on the "faith and mission of the church"; nor does it create an absolute shield for activities that play "an important role in transmitting the . . . faith to

the next generation." Appellant's Br. 17–18. An exception of the magnitude that New Hope proposes would swallow the *Smith–Lukumi* rule whole, by placing all religious organizations outside the reach of the civil and criminal law. Arguably, all manner of laws could fit within New Hope's proposed categories of absolute protection from governmental interference, including child-protection laws and health-and-safety regulations. That outcome is one that the Supreme Court has explicitly rejected: "To make an individual's obligation to obey [the] law contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885.

Because "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim" (*Smith*, 494 U.S. at 888–87), New Hope's argument would create absolute immunity from the law based on the bare assertion of a sincerely held religious objection to a legal requirement. As explained above, it cannot be that any action that believers deem important to their faith or its dissemination will be automatically exempt from all legal requirements. New Hope's unworkable and untenable proposed framework cannot be squared with the standard that the Supreme Court mandated in *Smith* and *Lukumi*.

II. THE STATE HAS COMPELLING INTERESTS IN PROHIBITING DISCRIMINATION IN ADOPTION SERVICES.

Even if New Hope were correct that the antidiscrimination regulation challenged here should be subject to strict scrutiny—which, under *Smith* and *Lukumi*, it is not—New Hope's argument would still fail because the State has compelling interests in prohibiting discrimination in state-licensed adoption services.

New York, through the challenged regulation, protects its LGBTQ constituents "from a number of serious social and personal harms" that would follow from discrimination in the provision of adoption services. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). Discrimination based on "overbroad assumptions about the relative needs and capacities of" certain groups "forces individuals to labor under stereotypical notions that . . . deprive[them] of their individual dignity and den[y] society the benefits of wide participation in political, economic, and cultural life." *Id.* at 625. "That stigmatizing injury" is inflicted by anti-LGBTQ discrimination just as it is by other forms of discrimination. *See id*; *see also Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (classifications based on sexual orientation subject to heightened scrutiny), *aff'd*, 570 U.S. 744 (2013). Given the "great weight and respect" that courts must give to the right of LGBTQ people to "exercise . . . their freedom on terms equal to

others," *Masterpiece*, 138 S. Ct. at 1727, states have a compelling interest in "eradicating discrimination" so that LGBTQ people may enjoy "equal access to publicly available goods and services" (*see Roberts*, 468 U.S. at 623–24).

Allowing New Hope to turn away prospective adoptive parents simply because of their identity licenses discrimination against LGBTQ people, not only denying them dignity and belying the fundamental American promise of equality for all, but also giving rise to a wide array of negative mental and physical health effects on LGBTQ adults and children alike. The state has a compelling interest in avoiding these outcomes.

A. Discrimination is Detrimental to the Mental and Physical Health of LGBTQ People.

Discrimination against LGBTQ people inflicts long-lasting mental and physical harm on both the people personally discriminated against and the community at large. "[B]ecause of stigma, prejudice, and discrimination, lesbian, gay, and bisexual people experience more stress than do heterosexuals and . . . this stress can lead to mental and physical disorders." Ilan Meyer & David Frost, *Minority Stress and the Health of Sexual Minorities*, HANDBOOK OF PSYCHOL. & SEXUAL ORIENTATION 252 (Charlotte Patterson & Anthony D'Augelli, eds., 2012), https://tinyurl.com/MeyerStress; *see also* Ilan Meyer, *Prejudice, Social*

Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, 129 PSYCHOL. BULL. 674 (2003), https://tinyurl.com/MeyerIssues. These negative outcomes are not limited to the individual effects of directly experienced discrimination; general anti-LGBTQ cultural stigma is a stressor that worsens the health of members of the community, contributing to mental illness, psychological distress, risky behaviors like smoking or unsafe sex, and a reduced sense of well-being. Meyer & Frost, *supra*, at 252.

A growing body of research also shows that lesbian, gay, and bisexual ("LGB") individuals suffer physical health disparities relative to their heterosexual peers as a result of stress. David Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 PERSP. PSYCHOL. SCI. 521 (2013), https://tinyurl.com/LickMinStress. Negative physical health effects include poor general health; increased risk of cancer; higher rates of diagnosis of cardiovascular disease, asthma, diabetes, allergies, osteoarthritis, serious gastro-intestinal problems, and other chronic conditions; and younger onset of disabilities. *Id.* at 521–27.

Similarly, "exposure to antigay attitudes can lead to greater shame about LGB identity and more negative feelings about LGB group membership"—attitudes that are correlated with increased rates of substance abuse, mood disorders, and generalized anxiety disorder. Mark

L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUB. HEALTH 452, 453, 456 (2010), https://tinyurl.com/HatzenbuehlerProspective. These conditions are "characterized by hopelessness, chronic worry, and hypervigilance, which are common psychological responses to perceived discrimination." *Id.* Many LGBTQ people also experience "rejection sensitivity," which leads to social inhibition, withdrawal, isolation, and poorer mental and physical health. Lick et al., *supra*, at 534–35.

These negative effects extend to LGBTQ youth, who in general report much higher rates of mood disorders, depression, anxiety, alcohol and drug use, and lower self-esteem than their heterosexual and cisgender peers. *See 2018 LGBTQ Youth Report*, HUMAN RIGHTS CAMPAIGN 6 (2018), https://tinyurl.com/HRC2018YR (citing Michelle Birkett et al., *Does It Get Better? A Longitudinal Analysis of Psychological Distress and Victimization in Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 56 J. ADOLESCENT HEALTH 280 (2015), https://tinyurl.com/BirkettGetBetter). Recent research shows that disparities in LGBTQ minors' mental health are likely the result of stigma, discrimination, and victimization tied to their identity. *See* Birkett et al., *supra*, at 6. Conflicts related to the disclosure of their sexual orientation to family members, negative responses of others to

gender-atypical behavior, and mistreatment in community settings are also associated with psychosocial risk-taking in LGB youth and can "promote feelings of helplessness and hopelessness that may develop into depression and suicidality." Michael P. Marshal et al., *Suicidality and Depression Disparities Between Sexual Minority and Heterosexual Youth: A Meta-Analytic Review*, 49 J. ADOLESCENT HEALTH 115, 116 (2011), https://tinyurl.com/MarshalSuicidality; *see also* Meyer & Frost, *supra*, at 255 ("Higher rates of suicide attempts among members of sexual minorities are related to minority stress encountered by youth due to coming out conflict with family and community.").

The injuries suffered by the community at large are amplified by individual instances of discrimination. The psychological stress of membership in a culturally stigmatized group is compounded when individuals are rejected or denied services because of their identity: Discriminatory rejections compromise many LGBTQ people's basic sense of safety, causing them to alter their lives significantly. *See* Edward Alessi et al., *Prejudice Events and Traumatic Stress among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, 22 J. AGGRESSION, MALTREATMENT & TRAUMA 510, 519 (2013), https://tinyurl.com/AlessiPrejudice. One natural response is "avoidance behavior," in which people make "subtle but profound changes to their everyday lives to minimize the risk of

experiencing discrimination, often hiding their authentic selves." Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. AM. PROGRESS (May 2, 2017), https://tinyurl.com/SinghDursoDiscrim. A national survey published in January 2017 found that at least half the people who had experienced sexual-orientation or gender-identity discrimination in the past year altered future decisions about where to live, where to shop, and what social situations to enter into in response to that experience. *Id.* For the people who had *not* experienced a discriminatory event in the past year, those rates were dramatically lower. *Id.* The social inhibition, withdrawal, and isolation that results from rejection sensitivity are additionally associated with poor mental and physical health outcomes. Lick et al., *supra*, at 534-35. LGBTQ people who experience prejudice-related events are three times more likely to suffer a serious physical health problem in the next year. *See* Meyer & Frost, *supra*, at 255.

The government's endorsement or allowance of discrimination against the LGBTQ community adds another layer of harm: LGBTQ people living in states that have either denied the LGBTQ community protection from discrimination or affirmatively passed anti-LGBTQ laws have higher rates of psychological disorders and distress. *See* Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in LGB Populations*, 99 AM.

J. PUB. HEALTH 2275 (2009), https://tinyurl.com/HatzenbuehlerPolicy; Sharon S. Rotosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. COUNSELING PSYCHOL. 56 (2009), https://tinyurl.com/RotoskyMarriage. According to one recent study, laws permitting denials of service to same-sex couples, including denials of adoption services, are associated with a "46% relative increase in the proportion of sexual minority adults reporting mental distress." Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA PSYCHIATRY 674 (2018), https://tinyurl.com/RaifmanDenial.

Governmental approval of anti-LGBTQ discrimination also emboldens society to join in: Discrimination begets discrimination. When a community sees anti-LGBTQ discrimination as socially acceptable, the frequency and intensity may increase. *See* Christian Crandall et al., *Social norms and the expression and suppression of prejudice: The struggle for internalization*, 82 J. PERSONALITY & SOC. PSYCHOL. 359 (2002) (examining effect of group norms on individual opinions), https://tinyurl.com/CrandallNorms. Some members of the community may even find tacit approval for violence in governmental discrimination against LGBTQ people. *See* Christopher R. Leslie, *Creating Criminals: The Injuries*

Inflicted by 'Unenforced' Sodomy Laws, 35 HARV. C.R.-C.L. L. REV. 103, 124, 137–43 (2000) (describing how violence and other anti-LGBTQ discrimination were rationalized by reference to anti-sodomy laws), https://tinyurl.com/LeslieCriminals.

LGBTQ youth are especially vulnerable when they see the government approving discrimination against them. "When young people who are gay or transgender receive these messages, the struggles they already may be facing in coming out or transitioning may become compounded." Daniel E. Shumer et al., *The Effect of Lesbian, Gay, Bisexual, and Transgender-Related Legislation on Children*, 178 J. PEDIATRICS 5 (2016), https://tinyurl.com/ShumerLegislation. "[Y]outh reporting perceived discrimination were more likely to also report self-harm, suicidal ideation, and depressive symptoms." *Id.*

What is more, permitting discrimination in a service dealing specifically with family formation sends harmful messages to children. It tells children of same-sex parents that their families are invalid and that their parents are inferior and not equal in the eyes of law, which may inflict deep emotional and psychological wounds. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015) (noting the "harm and humiliat[ion]" for children of same-sex couples resulting from stigma and discrimination against their parents). And LGBTQ youth hear the stigmatizing message that they

cannot be good parents and that the government permits their kind to be excluded from adopting. Hence, allowing adoption agencies to discriminate would be detrimental to the welfare of countless LGBTQ children across the state.

In contrast, when the government acts to protect the LGBTQ community from "prejudice, discrimination, and violence, [it] help[s] to reduce the occurrence of prejudice-related stressors." Meyer & Frost, *supra*, at 252, 259. The result is that states with codified protections against sexual-orientation discrimination may see lower rates of psychological disorders among LGBTQ people. *See* Hatzenbuehler et al., *State-Level Policies*, *supra*, at 2278. States thus can protect LGBTQ individuals from unnecessary and damaging stressors by passing and enforcing laws that "respect gay men and lesbians' intimate relationships by providing them . . . the benefits afforded to heterosexual married people and their families." Meyer & Frost, *supra*, at 252, 259. This is exactly what New York has done here.

B. Discrimination Against LGBTQ People Violates the Equal Protection Clause.

The State has a critical interest in avoiding violations of the Constitution that would result from giving official approval to anti-LGBTQ discrimination. When "the imprimatur of the State itself [is put] on an

exclusion that soon demeans or stigmatizes" a group, that group's "liberty is then denied." *Obergefell*, 135 S. Ct. at 2602. The Supreme Court has condemned discrimination against same-sex couples, noting that it demeans not only the couples but also their children. *See id.* at 2590; *United States. v. Windsor*, 570 U.S. 744, 772 (2013). The Court's warnings apply with full force here, where no less than the validation of same-sex couples' marriages and their ability to create families is at stake.

New York properly recognizes that it is forbidden to treat LGBTQ people "as social outcasts or as inferior in dignity and worth," *Masterpiece*, 138 S. Ct. at 1727, for to do so would "diminish their personhood" and "work[] a grave and continuing harm" on them. *Obergefell*, 135 S. Ct. at 2602, 2604. Depriving same-sex couples of equal access to state-licensed adoption services would "result[] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws." *Masterpiece*, 138 S. Ct. at 1727. And it would deny their "'personal dignity and autonomy.'" *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). New York thus enacted the challenged regulation to prevent state-licensed adoption agencies from undercutting the State's constitutional obligations to its LGBTQ residents—a compelling state interest.

III. ACCEPTING NEW HOPE'S ARGUMENTS WOULD UNDERMINE RELIGIOUS LIBERTY BY INVITING RELIGIOUS DISCRIMINATION.

While New Hope frames its challenge as an attempt to protect religious freedom, its argument would, if accepted, open the door to increased religious discrimination by state-licensed adoption agencies. Hence, rather than offending religious freedom, antidiscrimination provisions like the one here advance that fundamental value.

In addition to prohibiting discrimination based on sexual orientation and gender identity and expression, the regulation prevents discrimination on the basis of religion. N.Y. Comp. Codes R. & Regs. tit. 18, § 421.3. But there is no limiting principle to the religious exemption that New Hope seeks to establish. If its religious beliefs grant it license to turn away same-sex couples because they do not comport with New Hope's religious beliefs, New Hope and other agencies may also exclude families because they are of the "wrong" faith or of no faith. The end result would be an adoption system in which religious agencies could decide which rules to follow and which to ignore, with no guarantee that there would be sufficient, open-to-all agencies available to serve the diverse pool of adoptive-parent applicants that the State seeks to recruit and the children who need loving homes.

What is more, the case law shows, and *amici*'s organizational experience and the experiences of our members confirm, that disfavor

toward, unequal treatment of, and denials of service to members of minority faiths, persons adhering to a different faith, and atheists are all too common.[3] And religious discrimination by child-welfare agencies against Catholics, Jews, and other religious minorities who do not adhere to the agencies' preferred faiths is far from hypothetical. *See* Complaint, *Rogers v. Dep't of Health & Human Servs.*, 6:19-cv-01567 (D.S.C. filed May 30, 2019) (family turned away by foster-care agency because they were not "active in a Christian church"), https://tinyurl.com/LambdaWelch; Complaint, *Maddonna v. Dep't of Health & Human Servs.*, 6:19-cv-00448 (D.S.C. filed Feb. 15, 2019) (foster-care agency turned away applicant because of her Catholic faith), https://tinyurl.com/AUMaddonna; Complaint, *Marouf v. Azar*, 18-cv-00378 (D.D.C. filed Feb. 20, 2018) (couple turned away from

[3] *See, e.g.*, *Huri v. Office of the Chief Judge of the Circuit Court*, 804 F.3d 826 (7th Cir. 2015) (Muslim child-care attendant was harassed by Christian supervisor); *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014) (Muslim hotel owner ordered the closing of a poolside event hosted by a Jewish group); *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384, 385 (D. Conn. 2016) (Muslim family refused service at a restaurant because of their faith); Complaint ¶¶ 24, 32, 34, *Fatihah v. Neal*, No. 6:16-cv-00058 (E.D. Okla. Feb. 17, 2016), http://tinyurl.com/ycgey87l (alleging that range owners posted sign declaring facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the facility, and accused him of wanting to murder them because "[his] Sharia law required" it); *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007 (D.N.J. Aug. 21, 2015) (Catholic maintenance worker repeatedly harassed by supervisor and colleagues who identified as Protestant and Reformed Christian).

fostering because they did not "mirror the Holy family"), https://tinyurl.com/LambdaMarouf.

If the Free Exercise Clause were reinterpreted to require that New Hope be allowed to discriminate against same-sex couples, the door would then be open to all other religiously motivated denials of service—including those based on disapproval of applicants' faiths. That would not be religious freedom but religious factionalism—the civic "divisiveness based upon religion" that the Religion Clauses of the First Amendment were designed to prevent. *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

CONCLUSION

"[I]t is a general rule that [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 under a neutral and generally applicable public accommodations law." *Masterpiece*, 138 S. Ct. at 1727. New York has lawfully sought to root out discrimination in the provision of adoption services based on sexual orientation, gender identity, and gender expression. It has done so through a regulation that equally affects all adoption agencies and protects prospective adoptive parents from being excluded based on factors that the State has rightly determined have no bearing on fitness to provide loving, nurturing homes for children in need.

See Commack, 680 F.3d at 211. What New Hope seeks here is not "equality of treatment," for it has that, but rather "a private right to ignore" the laws that govern everyone else. *See Smith*, 494 U.S. at 886. The Constitution affords no such special dispensation.

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ *Cathren Cohen*

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 29(a)(4)(G) and 32(g)(1), the undersigned certifies that this brief:

(i) complies with the type-volume limitations of Federal Rules 29(a)(4)(G) and 32(a)(7)(B)(i) and Second Circuit Rule 29.1(c) because it contains 6,058 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Cathren Cohen*

CERTIFICATE OF SERVICE

I certify that on this 28th day of October, 2019, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Cathren Cohen*

EXHIBIT A

EXHIBIT A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of LGBTQ people and everyone living with HIV through impact litigation, education, and policy advocacy. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has represented same-sex couples or appeared as *amicus curiae* in numerous cases in which religious freedom was asserted to justify discrimination. *See, e.g., Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (remanding for reconsideration in light of *Masterpiece Cakeshop*), *on remand*, 441 P.3d 1203 (Wash. 2019); *Klein, dba Sweetcakes by Melissa v. Oregon Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017), *review denied*, 434 P.3d 25 (Or. 2018), *cert. granted, judgment vacated*, 139 S. Ct. 2713 (2019) (remanding for reconsideration in light of *Masterpiece Cakeshop*); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018), *cert. rejected*, 2018 WL 3358586 (Haw.), *cert. denied*, 139 S. Ct. 1319 (2019); *Gifford v.* McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016).

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by federal and state courts throughout the country. Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, innocent third parties.

ADL (Anti-Defamation League)

ADL (Anti-Defamation League) was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil rights for all. To this end, ADL is a steadfast

supporter of anti-discrimination laws as well as the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL staunchly believes that the Free Exercise Clause is a critical means to protect individual religious exercise, but it must not be used as vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

COLAGE

COLAGE is the only national organization for and led by people with an LGBTQ parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Based on its direct experience in working with thousands of youth over the past 28 years, COLAGE can attest to the critical importance of recognizing and respecting these families on every level — socially, institutionally, politically and legally.

Family Equality

Family Equality (formerly "Family Equality Council") is a national organization that connects, supports, and represents LGBTQ parents and

their children. The organization is committed to changing attitudes and policies to ensure that all families are respected, loved, and celebrated. For 40 years, Family Equality has been a community of parents, children, grandparents, and grandchildren, reaching across the country and raising voices toward fairness of all families. Family Equality spearheads the "Every Child Deserves a Family" Campaign, a national effort to end anti-LGBTQ discrimination in the child welfare system and promote the best interests of all children in the foster care and adoption system by increasing their access to loving, stable, forever homes.

Human Rights Campaign

Human Rights Campaign ("HRC") is the largest national lesbian, gay, bisexual, and transgender advocacy organization. HRC envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights are freedom from discrimination and access to equal opportunity and government services.