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

BRIEF OF AMERICAN ATHEISTS, AMERICAN HUMANIST ASSOCIATION, CENTER FOR INQUIRY, AND FREEDOM FROM RELIGION FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLEE FOR AFFIRMANCE

GEOFFREY T. BLACKWELL
Counsel of Record
AMERICAN ATHEISTS, INC.
718 7th St. NW
Washington, D.C. 20001
(908) 276-7300, ext. 310
legal@atheists.org

Attorney for Amici Curiae
(Additional counsel listed on following page)

October 28, 2019

MONICA L. MILLER
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place NW
Washington, D.C. 20036
(202) 238-9088
mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

NICHOLAS J. LITTLE
CENTER FOR INQUIRY
1020 19th Street, Northwest
Washington, D.C. 20036
(202) 629.2403
legal@centerforinquiry.org

REBECCA MARKERT
FREEDOM FROM RELIGION FOUNDATION
PO Box 750
Madson, WI 53701
(608) 256-8900
rmarkert@ffrf.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate procedure, American Atheists, American Humanist Association, Center For Inquiry, and Freedom From Religion Foundation, each certify that it is a non-profit corporation, has been granted 501(c)(3) status by the IRS, has no parent company, and has issued no stock.

American Atheists, Inc. is a national educational, nonpolitical, 501(c)(3) non-profit corporation with members, offices, and meeting locations nationwide. American Atheists is a membership organization dedicated to advancing and promoting, in all lawful ways, the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists promotes the stimulation and freedom of thought and inquiry regarding religious belief, creeds, dogmas, tenets, rituals, and practices. American Atheists encourages the development and public acceptance of a humane, ethical system that

stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

The American Humanist Association (AHA) is a national nonprofit membership organization based in Washington, D.C., with over 252 local chapters and affiliates in 43 states and the District of Columbia, and over 34,000 members and supporters. Founded in 1941, the AHA is the nation's oldest and largest Humanist organization. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—a responsibility to lead a meaningful, ethical life that adds to the greater good of humanity. The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state. To that end, the AHA's legal center has litigated dozens of Establishment Clause cases in state and federal courts nationwide, including in the U.S. Supreme Court.

Center for Inquiry (CFI) is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The Freedom From Religion Foundation (FFRF), a national non-profit based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. FFRF has over 30,000 members, including members in every state and the District of Columbia, with over 1,500 current, dues paying members in New York. There are 23 local and regional FFRF chapters across the country. FFRF's two purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state/church entanglements a year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is "Freedom depends on freethinkers," works to uphold the values of the Enlightenment.

TABLE OF CONTENTS

Corporate Disclosure Statement ii

Table of Contents v

Table of Authorities vii

Statement Regarding Consent to File 1

Interest of Amici Curiae 1

Summary of the Argument 2

Argument 4

I. The Free Exercise Clause does not exempt religious entities from complying with neutral laws of general applicability. 5

II. Exempting religiously motivated conduct from legal obligations violates the Establishment Clause when the exemption places a burden on third parties. 6

a. Prioritizing the religious interests of adoption agencies over the secular interests of those seeking to adopt violates the Establishment Clause. 6

b. An exemption permitting sectarian adoption agencies to interpose their religious beliefs into the tightly controlled process of adoption would violate the Establishment Clause. 8

III. Exempting NHFS from New York's anti-discrimination regulations will violate the Establishment Clause by harming third parties in favor of sectarian agencies' religious beliefs 9

a. Children in the adoption process and foster care system will be harmed if sectarian agencies are exempted from government non-discrimination requirements. 10

b. Potential adoptive parents' ability to participate in the adoption process and foster care system will be significantly impaired if sectarian agencies are exempted from government non-discrimination requirements. 12

c. The constitutional and statutory interests of biological parents will be subordinated to the religious beliefs of sectarian agencies if such agencies are exempted from government non-discrimination requirements. 13

Conclusion 15

Certificate of Service 16

TABLE OF AUTHORITIES

CASES

ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) 6

Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) 8

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 5

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) 6-7, 7

Cantwell v. Conn., 310 U.S. 296 (1940)... 5

Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 7

Cutter v. Wilkinson, 544 U.S. 709 (2005)... 7

Edwards v. Aguillard, 482 U.S. 578 (1987)... 7

Employment Div. v. Smith, 494 U.S. 872 (1990) 5

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)... 6, 7

Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019) 11

George L. v. Commissioner of the Fulton County Dep't of Social Servs., 194 A.D.2d 955 (N.Y. App. Div. 1993) 10-11

Hobbie v. Unemployment Appeals Com., 480 U.S. 136 (1987) 7

Illinois ex rel. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) 7

Larkin v. Grendel's Den, 459 U.S. 116 (1982) 8

Lee v. Weisman, 505 U.S. 577 (1992).. 4

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 5

Matter of Yary, 100 A.D.3d 200 (N.Y. App. Div. 2012)...8, 9, 10

Otten v. Baltimore & O. R. Co., 205 F.2d 58 (2nd Cir. 1953)... 4

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 5

Prince v. Mass., 321 U.S. 158 (1944) 5

Reno v. Flores, 507 U.S. 292 (1993) 11

Reynolds v. United States, 98 U.S. 145 (1878) 5, 5-6

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 4

Santosky v. Kramer, 455 U.S. 745 (1982) 14

Sherbert v. Verner, 374 U.S. 398 (1963) 5

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 7

Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) 5

Troxel v. Granville, 530 U.S. 57 (2000) 14

Walz v. Tax Com. of New York, 397 U.S. 664 (1970) 7

Wis. v. Yoder, 406 U.S. 205 (1972) 7

Zorach v. Clauson, 343 U.S. 306 (1952) 7

STATE STATUTES

N.Y. Dom. Rel. Law § 109 8

N.Y. Dom. Rel. Law § 111 14

N.Y. Dom. Rel. Law § 114 10

N.Y. Soc. Serv. Law §§ 371 8

N.Y. Soc. Serv. Law §§ 373 .... 6, 8, 8-9, 9, 14

Vt. Stat. Ann. title 15A, § 2-203(d) 11

STATE REGULATIONS

Conn. Agencies Regs. § 17a-145-130 11

18 N.Y.C.R.R. § 421 8

18 N.Y.C.R.R. § 421.3 .... 4, 12

18 N.Y.C.R.R. § 421.16 11

COURT RULES

Fed. R. App. P. 26.1 ii

Fed. R. App. P. 29 1

INTERNATIONAL TREATIES

Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, Mar. 31, 1994, 1870 U.N.T.S. 167 11

OTHER AUTHORITIES

David Crary, *As Number of Adoptions Drops, Many US Agencies Face Strains*, Associated Press (Apr. 30, 2017), https://apnews.com /b9f77e34d24c4303af5d601d960dd661 .... 10, 12

Tim Elder, *IAG 051: How to Work with Multiple Adoption Agencies*, Infant Adoption Guide (Nov. 13, 2017), https://infantadoptionguide.com/iag-051-how-to-work-with-multiple-adoption-agencies/ 13

STATEMENT REGARDING CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(c), amici certify that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a)(2) with the consent of all parties.

INTEREST OF AMICI CURIAE

Amici comprise secular and humanist organizations that advocate on behalf of the separation of religion and government and offer a unique viewpoint concerning the scope and propriety of religious exemptions. Amici's missions include addressing and preventing discrimination against atheists, humanists, and all non-theists.

Amici address the Court to emphasize the applicability of the Establishment Clause to the remedy sought by the Appellant. When the government places a burden on third parties in order to exempt an entity's religiously motivated behavior from legal obligations, it violates the Establishment Clause by privileging the practiced belief while disadvantaging those who do not share it.

SUMMARY OF THE ARGUMENT

In an area of law in which the first priority is inarguably the best interests of the child, New Hope Family Services (NHFS) insists that the best interests of the children it serves must be secondary to its own interest in preserving and promulgating its archaic, irrational, and bigoted views of sex and sexuality. NHFS claims the right to place its interests above the best interests of children, as well as adoptive and biological parents, because its interests are religious.

The United States Constitution guarantees the free exercise of religion. But this guarantee is not absolute. Like the proverbial right to swing one's fist, one's right to freely exercise her religion must end at the tip of another's nose. While the government may accommodate an individual's religious practice, the government cannot countenance any religious conduct, no matter how sincerely held the motivating belief, when that conduct inflicts harm on another. Yet this is precisely what NHFS is asking this Court to do. It demands the right to harm the children placed in its care, the prospective parents who wish nothing more than to provide a child with a loving, healthy home in which to thrive, and the biological parents who trust NHFS to act in the best interest of their children, all because it draws its definition of what is best for a child from church history and religious doctrine, rather than objective study.

NHFS demands that this Court place its interest in promoting its religious viewpoint above the interests of the people of New York because its interests are

religious. Doing so would undermine the program the state authorized NHFS to administer while simultaneously resulting in an establishment of religion. The rights and interests of individual children, adoptive parents, and birth parents are of compelling and warrant protection. If NHFS, or any other entity, cannot place the best interests of children above its own interests, it should not be in the business of serving children.

ARGUMENT

NHFS seeks to retain its authorization from the State of New York to continue administering adoption services to that state's residents. New York law explicitly prohibits discrimination in adoption services on a number of bases, including religion, marital status, and sexual orientation. 18 N.Y.C.R.R. § 421.3(d). NHFS nonetheless insists it is entitled to engage in prohibited discrimination solely because of its religious beliefs.

If NHFS's demand is met, for New York residents to avail themselves of NHFS's services, they would be required to conform their behavior to the demands of NHFS's religious beliefs. But the First Amendment:

> gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the iniquitous dens, no matter what economic loss his change of domicil entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

Otten v. Baltimore & O. R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (majority opinion of Judge Learned Hand); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)). If NHFS sincerely believes that it cannot provide adoption services in accordance with New York law without violating its religious scruples, it can cease providing adoption services.

I. The Free Exercise Clause does not exempt religious entities from complying with neutral laws of general applicability.

The right to believe or not to believe as one chooses is inviolable, and amici fully support and defend this freedom. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940); *Reynolds v. United States*, 98 U.S. 145, 166 (1878). The right to *act* on those beliefs, however, is necessarily subject to limitation. *Smith*, 494 U.S. at 878-79; *Bob Jones Univ.*, 461 U.S. at 603; *Sherbert*, 374 U.S. at 403; *Cantwell*, 310 U.S. at 303-04; *Reynolds*, 98 U.S. at 166. "Conduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 304. To conclude otherwise "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds*, 98 U.S. at 167; *see also Smith*, 494 U.S. at 885 (Scalia, J). The courts have thus upheld government actions in the face of free exercise challenges in areas as varied as land management, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-49 (1988), the provision of unemployment benefits, *Smith*, 494 U.S. at 890, labor, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985); *Prince v. Mass.*, 321 U.S. 158 (1944), and, crucially, both statutory nondiscrimination requirements, *Bob Jones Univ.*, 461 U.S. at 604; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (describing defendant's free exercise

defense as "patently frivolous"), and family law, *Reynolds*, 98 U.S. at 166-67 (upholding prohibition against bigamy).

New York state law goes to considerable lengths to protect the religious rights of children and birth parents throughout the adoption process and in foster care. N.Y. Soc. Serv. Law § 373. Wisely, the state's legislature did not give sectarian agencies the ability to override these considerations

New York's neutral and generally applicable laws and regulations governing adoption do not require NHFS to violate its religious beliefs. New York requires only that NHFS, should it *choose* to facilitate adoptions, abide by the law. Exempting NHFS from compliance with such laws and regulations cannot be sustained under the Free Exercise Clause.

II. Exempting religiously motivated conduct from legal obligations violates the Establishment Clause when the exemption places a burden on third parties.

a. Prioritizing the religious interests of adoption agencies over the secular interests of those seeking to adopt violates the Establishment Clause.

Exempting religious entities from legal obligations in a manner that directly harms others "contravenes a fundamental principle of the Religion Clauses." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). A religious exemption that gives "preference [to] some at the expense of others" goes beyond mere accommodation and is an unconstitutional establishment of religion. *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1488 (3d Cir. 1996); *see also Burwell v. Hobby Lobby Stores, Inc.*,

573 U.S. 682, 729 n.37 (2014); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 28 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 617-18 (1987); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987); *Thornton*, 472 U.S. at 710; *Wis. v. Yoder*, 406 U.S. 205, 220-21 (1972). Such preferential treatment bends the "play in the joints" between the religion clauses beyond the breaking point. *Walz v. Tax Com. of New York*, 397 U.S. 664, 669 (1970); *Presiding Bishop*, 483 U.S. at 334-35 ("At some point, accommodation may devolve into an unlawful fostering of religion." (internal quotation marks omitted)). It is a perversion of religious liberty and turns the intent of the Framers on its head.

The Supreme Court has regularly struck down government actions that place the burden of a religious exemption on the shoulders of those not benefiting from the exemption, *Thornton*, 472 U.S. at 710 (statute's "unyielding weighting in favor of Sabbath observers over all other interests" was invalid); *see also Texas Monthly*, 489 U.S. at 15 (accommodation not necessitated by Free Exercise Clause that burdened non-beneficiaries conveyed message of religious endorsement), while exemptions that have a *de minimus* impact on the interests of third parties have been deemed permissible accommodations, *Hobby Lobby*, 573 U.S. at 732; *Hobbie v. Unemployment Appeals Com., 480 U.S. 136, 144-45 (1987)*; *Yoder*, 406 U.S. at 234; *Walz*, 397 U.S. at 673; *Zorach v. Clauson*, 343 U.S. 306, 315 (1952). *Compare Illinois* ex rel. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) *with Zorach v. Clauson*, 343 U.S. 306 (1952).

The obligations placed on the government by the Establishment Clause are germane in the context of adoption and foster care services. As the state has delegated substantial authority to non-governmental service providers in this area, the rights and interests of individual children, birth parents, and adoptive parents are of paramount importance.

b. An exemption permitting sectarian adoption agencies to interpose their religious beliefs into the tightly controlled process of adoption would violate the Establishment Clause.

In large sections of the country, permitting sectarian agencies to discriminate between prospective adopting parents would effectively give such agencies the power to veto potential adoptions of which they disapprove. Allowing a religious entity's sectarian beliefs to control the administration of a governmental program, such as adoption, would violate the Establishment Clause. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 709-10 (1994); *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982).

Domestic adoption and foster care are, in every respect, a creature of state law. *Matter of Yary*, 100 A.D.3d 200, 205 (N.Y. App. Div. 2012). Detailed state statutes and regulations govern the process at every stage and the final outcome is dependent on judicial approval. N.Y. Dom. Rel. Law §§ 109, *et seq.*; N.Y. Soc. Serv. Law §§ 371, *et seq.*; 18 N.Y.C.R.R. §§ 421-24. New York's legislature has enacted detailed provisions protecting the religious faith of birth parents, N.Y. Soc. Serv. Law § 373, anticipating and making special provisions for situations in which the faith espoused by a sectarian agency does not correspond to that of the birth parents. N.Y. Soc. Serv. Law § 373(5).

The state's objective in enacting these requirements was to protect, to the greatest possible extent, the religious beliefs of children. N.Y. Soc. Serv. Law § 373(4).

To permit sectarian agencies to overlay their own religious requirements on the adoption process would undermine this objective, particularly when the circumstances are such that placing the child with a sectarian agency sharing the religious views of the child and birth parent is not "practicable." Id. at (1)-(3), (5). Permitting such agencies to interpose their own religious beliefs with no regard for the views of children and birth parents regarding religion would violate the Establishment Clause.

III. Exempting NHFS from New York's anti-discrimination regulations will violate the Establishment Clause by harming third parties in favor of sectarian agencies' religious beliefs.

A decision about adoption, whether to offer a child up for adoption or to adopt that child, is among the most important choices a family can make and will irrevocably change the lives of birth parents, adoptive parents, and children. State laws governing the process of adoption protect and facilitate this deeply intimate decision by ensuring that the rights and interests of the child, adoptive parents, and birth parents are protected. *Yary*, 100 A.D.3d at 205. Exempting sectarian agencies from the requirements of state adoption statutes by permitting them to categorically exclude entire classes of prospective adopting parents would deny children the best opportunity for a loving home, impede the excluded adoptive parents' ability to adopt, and limit birth parents' ability to select the best home for their child. NHFS believes that certain couples are, *per se*, less capable of acting as parents because of their lack of

religious faith, their sexual orientation, or their gender identity, and it seeks to act on that belief in direct contravention of state law.

a. Children in the adoption process and foster care system will be harmed if sectarian agencies are exempted from government non-discrimination requirements.

Permitting sectarian agencies to discriminate based on religious beliefs will directly harm children, whom the adoption process is designed to serve above all others. To do so would artificially limit the pool of potential homes based solely on factors having no bearing on the capacity of those families to provide a loving and healthy environment, thereby restricting the opportunities for children to be placed in fit homes. This limitation would be particularly acute for children in foster care programs, where adoptive families are increasingly hard to come by. David Crary, *As Number of Adoptions Drops, Many US Agencies Face Strains*, Associated Press (Apr. 30, 2017), https://apnews.com/b9f77e34d24c4303af5d601d960dd661. Allowing sectarian adoption agencies to place artificial limits on prospective adopting parents undermines the very purpose of state adoption laws: protecting the best interests of children.

The process of adopting a child "is 'solely the creature of, and regulated by, statute[.]'" *Yary*, 100 A.D.3d at 205. It is designed to ensure that, above all else, an adoption serves the best interests of the child. N.Y. Dom. Rel. Law § 114(1); *George L. v. Commissioner of the Fulton County Dep't of Social Servs.*, 194 A.D.2d 955, 956 (App. Div. 1993); *see also Reno v. Flores*, 507 U.S. 292, 303-04 (1993); *Convention on Protection of*

Children and Co-Operation in Respect of Intercountry Adoption, art 1(a), Mar. 31, 1994, 1870 U.N.T.S. 167. In order to ensure that the adoption process serves the "best interests of the child," New York, like other states, has enumerated specific criteria to be considered when making a determination, each geared toward determining the fitness of the prospective adopting parent to provide an adequate, loving, healthy home for the child. 18 N.Y.C.R.R. § 421.16; *see also* Conn. Agencies Regs. §§ 17a-145-130, *et seq.*; Vt. Stat. Ann. title 15A, § 2-203(d).

NHFS, as well as similar sectarian agencies, *Fulton v. City of Phila.*, 922 F.3d 140, 148 (3d Cir. 2019), seek to graft their own arbitrary, religiously motivated requirements onto these considerations, including a refusal to serve unmarried or same-sex prospective adopting parents. In so doing, they limit the spectrum of potential homes based not on criteria aimed at identifying homes suited to serve the best interests of the child, but rather on the agencies' subjective prejudices and scriptural edicts. These limitations would be detrimental to the interests of the children placed through these agencies.

Permitting sectarian agencies to artificially and arbitrarily exclude prospective adopting parents would place the burden of exempting those agencies' beliefs squarely on the shoulders of the children whose interests those agencies are tasked with protecting. Prioritizing the religious interests of adoption agencies over the secular interests of the children in their care would violate the Establishment Clause.

b. Potential adoptive parents' ability to participate in the adoption process and foster care system will be significantly impaired if sectarian agencies are exempted from government non-discrimination requirements.

Allowing sectarian agencies to discriminate in the provision of adoption services will, for many prospective adopting parents, make what is already a long, difficult, and expensive endeavor all the more challenging. For some, it could make the process all but impossible. This would be felt particularly by nonreligious couples. Numerous adoption agencies both in New York and around the country are expressly sectarian. For many communities these agencies may be the only practical option available to prospective adopting parents. If such agencies are permitted to discriminate on the basis of sexual orientation, marital status, or gender identity, no rationale precludes the same exemption from extending to discrimination along religious lines. 18 N.Y.C.R.R. § 421.3(d). Prospective adopting parents who are atheist, humanist, nonreligious, or members of minority religious groups would be particularly vulnerable to discrimination if sectarian agencies are exempted from state nondiscrimination provisions.

This, in turn, will significantly impair the ability of these prospective parents to participate in adoption. It is generally agreed that there are currently far more families seeking to adopt than there are children up for voluntary adoption. Crary, *Number of Adoptions Drops*, *supra*, at 10. Prospective adopting parents face increasing wait times, burgeoning expenses, and a shrinking number of children available for adoption and so, in order to improve their chances of adopting and reduce the wait between the

decision to adopt and completing the adoption process, they could benefit significantly by applying with multiple agencies. Tim Elder, *IAG 051: How to Work with Multiple Adoption Agencies*, Infant Adoption Guide (Nov. 13, 2017), https://infantadoptionguide.com/iag-051-how-to-work-with-multiple-adoption-agencies/. If, however, an agency is permitted to discriminate against a class of parents based on its religious beliefs, that class of parents will be at a distinct disadvantage. Their opportunities for adopting will be limited by immutable characteristics with no bearing on their ability to provide a healthy, loving home to a child.

No data is available quantifying the extent to which sectarian agencies currently exclude prospective adopting parents who are atheists, nonreligious, or members of minority religious communities. If sectarian agencies are permitted to discriminate on the basis of their sincerely held religious beliefs, however, this religious discrimination is likely to proliferate.

c. The constitutional and statutory interests of biological parents will be subordinated to the religious beliefs of sectarian agencies if such agencies are exempted from government non-discrimination requirements.

Just as placing artificial and arbitrary limitations on the ability of children to be placed in loving, healthy homes that would otherwise be perfectly acceptable harms those children, excluding prospective adopting parents from the pool of prospective homes harms biological parents by limiting their options when selecting the home that they believe would best provide the upbringing they want for their child.

In the context of voluntary adoption, the final decision-maker is the child's biological parent. N.Y. Dom. Rel. Law § 111(1)(b)-(e). The decision they face is a daunting one and one protected by the Due Process Clause of the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A parent's interest in guiding the upbringing of her child "is an interest far more precious than any property right." *Santosky*, 455 U.S. at 758-59. Biological parents are tasked with choosing which of the many prospective adopting parents are best positioned to meet their hopes for their child's future. This decision is difficult enough without concerns that the adoption agency has excluded parents for reasons entirely its own. Even in situations in which parental rights have been forcibly terminated, the religious beliefs of the birth parent(s) are to be honored. N.Y. Soc. Serv. Law § 373(7).

The New York legislature saw fit to protect the religious interests of birth parents. It did not extend that same protection to sectarian agencies, nor could it. Although a birth parent may, of their own volition, choose not to place their child with prospective adopting parents who are atheist, humanist, or nonreligious, id., sectarian agencies operating at the behest of the state may not deprive them of that choice. A birth parent, engaging in a voluntary adoption, who has no personal objection to their child being raised in a non-religious or same-sex household is entitled to the opportunity to assess interested prospective adopting parents on their

merits. An agency's decision to reject those potential homes because of that agency's irrelevant religious views and beliefs deprives birth parents of that opportunity.

In sum, prioritizing the religious interests of sectarian adoption agencies over the secular interests of birth parents seeking to find the best home for their child would violate the Establishment Clause.

CONCLUSION

For these reasons, the amici respectfully request that this Court affirm the decision of the court below.

Respectfully submitted,

/s/ Geoffrey T. Blackwell
GEOFFREY T. BLACKWELL
American Atheists, Inc.
718 7th St. NW
Washington, D.C. 20001
(908) 276-7300
legal@atheists.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

In accordance with Local Rule 25.1(c), this brief is being filed electronically via the Court's CM/ECF system on this day, October 28, 2019, and six paper copies will be delivered to the Court within three days. Counsel for the Parties are being served with electronic copies via the Court's CM/ECF system and email.

/s/ Geoffrey T. Blackwell
Geoffrey T. Blackwell
Counsel for Amici Curiae