

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Docket No. 18-2574

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SHARONELL FULTON, et al., Appellants,  
v.  
THE CITY OF PHILADELPHIA, et al., Appellees.

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APPELLEES' MEMORANDUM IN OPPOSITION TO APPELLANTS'  
EMERGENCY MOTION TO EXPEDITE APPEAL UNDER 3D CIR. L.A.R. 4.1

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Dated: August 1, 2018

Appellant Catholic Social Services (“CSS”) and its three foster parent co-plaintiffs (collectively “Appellants”) seek an expedited briefing schedule for their appeal pursuant to Local Appellate Rule 4.1.

This case does not warrant expedition, and Appellees cannot agree to the proposed schedule. In the spirit of compromise, we proposed to Appellants an alternative expedited schedule allowing an appropriate amount of time for briefing and accounting for attorney vacations and other intervening obligations. The City’s proposed schedule provides CSS until August 28 to file its opening brief and the City until September 27 to file its response. This schedule would allow the parties to fully address the constitutional issues raised by CSS’ appeal, would not unduly burden either party, and would ensure that other interested parties may have the opportunity to be heard.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Appellants filed their complaint in the District Court on May 17, 2018, alleging that on March 15, 2018, the City had ceased to refer foster care children to CSS in violation of CSS’ constitutional and contractual rights.<sup>1</sup> On June 5, CSS filed a motion for temporary restraining order and preliminary injunction seeking an order compelling the City to resume referrals to CSS. Subsequent to a three-day evidentiary hearing, the District Court ruled in the City’s favor and denied CSS’ motion, finding, *inter alia*, that CSS was not likely to succeed on the merits of its

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<sup>1</sup> The procedural history for the District Court case has been set forth in detail in the District Court’s July 13, 2018 Opinion, Dkt. 52, No. 2:18-cv-02075 (E.D. Pa.), Appx.1 *et seq.*

claim and that it would not be irreparably harmed. CSS filed its Notice of Appeal on July 13, 2018. Having been provided the opportunity for extensive briefing and a full hearing in less than a month, CSS nevertheless filed with both the District Court and this Court for an injunction pending appeal. The parties briefed those motions as well and both were denied on July 24, 2018 and July 27, 2018, respectively, four months after the intake closure that CSS challenges. CSS filed the remainder of its case-opening documents with this Court on July 27, 2018, and a Briefing Notice was issued that same day setting a deadline of September 5, 2018 for CSS' brief and appendix.

## **ARGUMENT**

### **A. The City Proposed a Reasonable Schedule in Response to CSS' Request**

On July 27, prior to filing its motion, CSS reached out to counsel for the City inquiring whether the City agreed that expedited treatment is warranted and if it agreed to CSS' proposed schedule in which the City's brief would be due on September 7. We responded that we did not agree that expedited treatment was warranted but, in the interest of cooperation, proposed the following briefing schedule:

- Opening brief due on August 28;
- Response brief due on September 27; and
- Reply brief due on or before October 5.

The City's proposal was based on several factors. First, the City's lead appellate litigator on this case has a prepaid vacation from August 9<sup>th</sup> – August 20<sup>th</sup>,

significantly curtailing her ability to work on a brief for the City that CSS proposes should be due on September 7. Second, other members of the City's litigation team have prepaid vacations in late August and September and/or will be out of the office for Labor Day and religious holidays during that time. These intervening obligations support the City being provided until September 27 to respond to CSS' opening brief. Even complying with this date is a challenge for the City. Our lead litigator has a prepaid vacation starting on September 14, but in the interest of compromise, we have agreed to file in her absence.

In addition, the City has spent two months parrying CSS' emergency efforts to obtain an injunction – responding to a TRO/PI motion, conducting a three-day hearing, filing findings of fact and conclusions of law thereafter, responding to emergency motions in the District Court and this Court, and filing this reply regarding an expedited schedule request.<sup>2</sup> For better or worse, the City's litigation team also has other cases to address during August and September. And while the City has met – and will continue to meet – all deadlines, the fact that the parties previously have filed documents does not mean that briefs filed on an expedited schedule will give the constitutional issues raised in this case the full treatment they deserve. Finally, there remain pending motions in the District Court regarding intervenors who seek to be heard in this case. Foreshortening the

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<sup>2</sup> On July 31, 2018, CSS filed a motion with the Supreme Court seeking both an injunction and an immediate grant of a writ of certiorari, bypassing review by this Court. The Supreme Court has not yet addressed this filing, but further expedited briefing may be required of the City.

briefing schedule will not only burden and prejudice the City, it will limit the ability of other interested parties to be heard.

Just as the City has offered to work with CSS to address the impact of the intake closure, *see infra* at 5, we offered to work with CSS by proposing a schedule that would, nonetheless, be difficult for the City to meet. But CSS has rejected that offer, instead seeking a schedule that is not warranted and would prejudice the City's ability to fully respond to CSS' brief. The City's proposed schedule is reasonable and appropriate for this case and should be entered by the Court.

#### **B. There Is No Exceptional Reason Warranting Expedited Treatment**

Local Appellate Rule 4.1 provides that a motion for expedited treatment must set forth "the exceptional reason that warrants expedition." L.A.R. 4.1. The record clearly demonstrates that CSS' repeated attempts to portray this case as requiring immediate or exceptional treatment are misplaced. This Court hears constitutional challenges to governmental action on a daily basis, and there are many corporate parties before this Court whose business interests are negatively impacted by district court rulings who must absorb that impact during the pendency of the litigation. CSS' argument that exceptional reasons warranting expedition are present should be rejected.

CSS first argues, as it has done throughout this litigation, that there is ongoing harm to foster children that "will only grow worse during the pendency of this appeal." Mot. at 2. This was CSS' main argument in its various motions for injunctive relief, and that argument has been rejected at every turn. Indeed, the

district court specifically credited Commissioner Figueroa's testimony on intake closures, concluding that "closure of CSS' intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system." Appx.11, *see also* CityAppx.401-03, 482-83.<sup>3</sup> Simply put, and despite CSS' failed attempts to argue otherwise, DHS has been acting and continues to act in the best interest of the children in its care.

CSS also argues that it requires an expedited schedule because it will have to "lay off some staff members in August and will close completely within a matter of months." Mot. at 2. But this is both belied by the record and also well within CSS' control. The foster care services at issue in this appeal are but a portion of the foster care work CSS performs. CSS has foster care contracts with other counties as well as large contracts with Philadelphia for other foster care services. City.Appx.200-21, 273-74, 346. This led the District Court to conclude that CSS did not establish that its financial collapse was imminent. Appx.560. Moreover, as DHS Commissioner Figueroa testified, in the past when an agency's intake is closed and work is diminishing, DHS has negotiated specific payment arrangements with that agency to ensure that they can maintain a set amount of staff despite a shrinking group of children. In fact in one instance this included DHS offering bonuses to ensure that sufficient staff remained until closure.

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<sup>3</sup> Citations to "Appx." are to the appendix CSS filed with this Court in support of the Emergency Motion for Injunction Pending Appeal. Citations to "City.Appx." are to the appendix the City filed with its Opposition to CSS' Motion for Injunction Pending Appeal.

City.Appx.406-08. DHS has made clear that it would work with CSS in a similar manner. *Id.*

Since the inception of this case, CSS has raised the specter of imminent layoffs to support requests for emergency and expedited treatment. But CSS' prediction has not come to pass and on July 10 it had to admit it can repurpose employees during the pendency of this case. *See* Appx.80. On July 27, in its briefing on this Motion, CSS again represented that it would "have to lay off some staff members in August," Mot. at 2, only to admit in a filing to the Supreme Court four days later that it "anticipated laying off additional employees in August, but has been able to stave off layoffs for the short term." Ex. A (Second Supplemental Declaration of James Amato). The harm CSS continues to say it will suffer has not yet come to pass and, even if it did, would not support expedited treatment in this case. Rather, CSS should work with DHS to meet the needs of the children in its care and to ensure employees remain in place to do so.

Finally, Appellants quote the District Court and argue that the individual foster parent plaintiffs may be placed in a "difficult, uncertain, and emotionally challenging" situation if CSS closes. Mot. at 3 (citing Appx.60). But the District Court noted immediately thereafter that "transferring to other agencies is neither impossible nor unlikely to be successful." Appx.60. Indeed, none of the individual foster parent plaintiffs testified that they would not continue to provide foster care services if CSS closed. *See id.*; CityAppx.53, 63, 68 (foster parent plaintiffs' testimony). The City appreciates the work these foster parents do and is sympathetic to their situation, but it simply does not support expediting this appeal,

particularly where both the District Court and this Court have rejected requests for injunctive relief based upon similar arguments.

In short, our proposed schedule only extends Appellants' requested schedule by 22 days. CSS has not demonstrated that an additional three weeks of briefing will materially impact its situation. Indeed, if harm is this imminent, again, the City remains ready and willing to discuss the provision of administrative supplemental assistance to allow CSS to comfortably maintain its level of service to its remaining foster children. And that three weeks will allow the City's attorneys to accommodate vacations that have been planned for many months, and at the same time, prepare a brief that can properly address the large record and numerous constitutional issues raised by Plaintiffs.

### **CONCLUSION**

The City has proposed a reasonable briefing schedule that accommodates the complexity of the case, attorney schedules, and all interested parties. CSS has not demonstrated an exceptional reason to expedite the schedule and the additional time included in the City's schedule will not materially impact CSS' situation.

For all the reasons set forth above, Appellees respectfully request that this Court deny the Appellants' Emergency Motion to Expedite Appeal and enter the schedule proposed by the City.

Respectfully submitted,  
CITY OF PHILADELPHIA  
LAW DEPARTMENT  
Marcel Pratt, City Solicitor

Date: August 1, 2018

By: /s/ Eleanor N. Ewing

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## CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) and 32(a)(7)(B) because this brief contains 1,848 words, excluding the parts of the brief exempted by Federal R. App. Proc. 32(f).

1. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.
2. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.
3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using McAfee VirusScan Enterprise 8.8.0, and that no virus was detected.

/s/ Eleanor N. Ewing  
Chief Deputy City Solicitor  
City of Philadelphia Law Department  
Attorney for Appellees

**CERTIFICATE OF SERVICE**

I, Eleanor Ewing, hereby certify that I electronically filed the attached document on August 1, 2018 on the Court's electronic filing system, where it is available for printing and viewing.

/s/ Eleanor N. Ewing  
Chief Deputy City Solicitor  
City of Philadelphia Law Department  
Attorney for Appellees

# **EXHIBIT A**

App. No. \_\_\_-\_\_\_\_\_

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In the Supreme Court of the United States

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SHARONELL FULTON, CECELIA PAUL, TONI LYNN SIMMS-BUSCH,  
CATHOLIC SOCIAL SERVICES,

*Applicants,*

v.

CITY OF PHILADELPHIA, DEPARTMENT OF HUMAN SERVICES FOR THE CITY OF  
PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS,

*Respondents.*

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**SUPPLEMENTAL DECLARATION OF JAMES AMATO**

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Dated: July 31, 2018

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## **SUPPLEMENTAL DECLARATION OF JAMES AMATO**

1. My name is James Amato. I am over the age of 21 years old and capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or been convicted of a crime of dishonesty. I have personal knowledge of all the contents of this declaration.

2. Catholic Social Services today has at least 35 spots available for foster child placement. Catholic typically has only 4 to 5 vacancies at any given time. These additional vacancies are a direct result of the City's intake freeze.

3. Because of the intake freeze, Catholic has already transferred two employees to other departments within the broader organization. Catholic anticipated laying off additional employees in August, but has been able to stave off layoffs for the short term by relying upon staff from other programs and increasing their duties. This is not a long-term solution, and Catholic will have to make additional layoffs as it continues the wind-down process.

4. Catholic is also in danger of losing experienced staff because employees are aware that we are winding down operations and are worried about their job security. Whether through layoffs or voluntary departures of valued, long-term staff, our program will lose the experience and relationships we rely on.

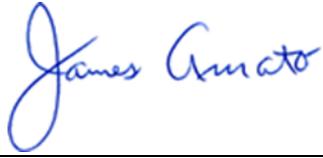
5. Unless the City ends the intake freeze, it is likely that Catholic's foster care program will be forced to close in a matter of months.

6. We cannot make up for the loss of foster care work in Philadelphia by relying on our contracts with neighboring counties. Our contracts with other counties

account for only a small fraction of our foster care work. Foster care regulations prioritize keeping children in their current schools and placing them close to their birth families, where possible. Because of those rules, it is difficult for a foster agency based in one county to provide services in other counties.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 31, 2018.

A handwritten signature in blue ink that reads "James Amato". The signature is written in a cursive style with a large initial "J".

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James Amato