

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-1715

Caption [use short title]

Motion for: Removal of the case from the expedited appeals calendar pursuant to Local Rule 31.2(b)(2), or, in the alternative a 30-day extension to file appellee's brief

Set forth below precise, complete statement of relief sought: Defendant-appellee requests that the Court remove this case from the expedited appeal calendar, or, in the alternative, grant appellee a 30-day extension to file her brief to October 21, 2019

New Hope Family Services, Inc. v. Poole

MOVING PARTY: Appellee Shelia Poole

OPPOSING PARTY: New Hope Family Services, Inc.

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Laura Etlinger

OPPOSING ATTORNEY: Roger G. Brooks

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: U.S. District Judge Mae A. D'Agostino, Northern District New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ Laura Etlinger Date: July 29, 2019

Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

No. 19-1715

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

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**DECLARATION OF LAURA ETLINGER IN  
SUPPORT OF MOTION TO REMOVE THE  
APPEAL FROM THE EXPEDITED APPEAL  
CALENDAR**

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family (“appellee” or “OCFS”).<sup>1</sup>

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<sup>1</sup>At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She

2. I submit this declaration in support of appellee's motion pursuant to Local Rule 31.2(b)(2) to remove the appeal from the Expediated Appeal Calendar ("XAC") or, in the alternative, to extend the time for the filing of appellee's brief in this matter. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. As explained below, this appeal is not well-suited to expedited review for two reasons: (1) the appeal involves constitutional issues that implicate important public policies and merit sufficient time for briefing, argument, and decision, and (2) the District Court dismissed the complaint following a full substantive review of the merits of appellant's constitutional claims, which is not the type of dismissal for which the XAC was developed.

4. Appellant New Hope Family Services ("New Hope") is a faith-based not-for-profit agency that operates, among other things, an adoption program in New York State. New Hope commenced this action pursuant to 42 U.S.C. § 1983 to challenge an OCFS regulation that

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was subsequently appointed to serve as Commissioner of the agency.

prohibits public and private adoption agencies from discriminating against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. *See* N.Y. Code Rules & Reg., tit. 18, (“18 N.Y.C.R.R.”) § 421.3(d). Dist. Ct. No. 18-cv-01419, ECF No. 1.<sup>2</sup> New Hope maintains a policy of not placing children with adoptive couples who are unmarried or of the same sex. Dist. Ct. No. 18-cv-01419, ECF No. 1, at 24. Upon learning of this policy during an on-site review, OCFS advised New Hope that if it failed to bring its policies into compliance with the non-discrimination regulation, OCFS would be unable to approve continuation of New Hope’s adoption program. Dist. Ct. No. 18-cv-01419, ECF No. 1-7, at 3. New Hope then commenced this action, seeking a permanent injunction prohibiting enforcement of the non-discrimination regulation to its adoption program, claiming the regulation violates its free exercise, free speech, and equal protection rights and constitutes an unconstitutional condition. Dist. Ct. No. 18-cv-

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<sup>2</sup> Citations to the record are to documents filed with the District Court in Docket No. 18-cv-01419 or with this Court in Docket No. 19-1715. Documents are referred to by document number and page in the courts’ electronic court filing (“ECF”) systems.

01419, ECF No. 1, at 24, 40, 44, 46, 48.

5. Immediately after commencing this action, New Hope filed a motion for a preliminary injunction. Dist. Ct. No. 18-cv-01419, ECF No.15. Shortly thereafter, OCFS moved to dismiss the complaint for failure to state a claim on the ground that the neutral, generally-applicable non-discrimination regulation could be constitutionally applied to New Hope's adoption program as a matter of law. Dist. Ct. No. 18-cv-01419, ECF Nos. 34, 34-1. In a thorough, 42-page decision, the District Court for the Northern District of New York (D'Agostino, J.) rejected all New Hope's constitutional claims on the merits, holding that the OCFS non-discrimination regulation could be constitutionally applied to New Hope's adoption program. The court accordingly denied the motion for a preliminary injunction and dismissed the complaint. Dist. Ct. No. 18-cv-01419, ECF No.38.

6. New Hope filed its notice of appeal on June 10, 2019. Dist. Ct. No. 18-cv-01419, ECF No. 40. On July 11, 2019, this Court issued a Notice of Expedited Appeal, placing the appeal on the Court's XAC, and directing that New Hope's opening brief be due by August 15, 2019 and appellee OCFS's brief be due by September 19, 2019. Second Cir. No.

19-1715, ECF No. 34.

7. There is good cause to remove this appeal from the XAC. First, the constitutional issue presented—whether a non-discrimination regulation may be constitutionally applied to a not-for-profit agency engaged in the regulated, public service of facilitating adoptions—involves important matters of public policy. The importance of this issue is demonstrated by the fact that fifteen amici briefs were filed in connection with a recent Third Circuit appeal involving an analogous issue—whether a similar non-discrimination policy may be constitutionally applied to a foster-care program operated by a faith-based not-for-profit agency. *See Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019). In addition, the plaintiff not-for-profit agency in that case has recently filed a petition for certiorari seeking review in the U.S. Supreme Court of the Third Circuit’s decision rejecting its constitutional challenges to application of the non-discrimination policy. *See Fulton v. City of Philadelphia*, Supreme Court Docket No. 19-123 (pet. for cert. filed July 22, 2019).

8. Although plaintiff’s appeal is from a judgment dismissing the complaint for failure to state a claim, that dismissal was based on a

full review of the merits of appellant's constitutional claims and application of substantive law, rather than a review of whether the allegations of the complaint satisfy pleading standards. Thus, the appeal does not involve the type of dismissal for which the XAC was designed. *See* Hon. Jon O. Newman, *Report: The Second Circuit's Expedited Appeals*<sup>80</sup> *Brook. L. Rev.* 429, 429-30 (2015) (stating that the Court's XAC was instituted in the aftermath of Supreme Court decisions requiring a more rigorous pleading standard so that cases in which the new pleading standards were deemed to have been improperly applied could be returned more quickly to the district court).

9. For these reasons, OCFS respectfully submits that there is good cause to remove this appeal from the XAC in order to allow sufficient time for the important constitutional issues presented by this appeal to be briefed, argued, and decided.

10. In the alternative, if the appeal is not removed from the XAC, appellee OCFS respectfully requests that it be granted a 30-day extension of the deadline for its brief, to October 21, 2019.

11. An extension is needed because it would be extremely difficult for my office to adequately research the issues and prepare a

brief within the timeframe contemplated under the current briefing schedule.

12. My own schedule is especially busy from now through mid-September, when among other work I will be preparing four other appellate briefs and presenting oral arguments in three appeals, including one in this Circuit and one in the New York Court of Appeals. Moreover, reassigning this matter to someone else is not feasible, as my office is currently short three attorneys due to extended family leaves and a recent departure.

13. In addition, the brief in this matter will require review by both a deputy solicitor general and the New York Solicitor General. The current expedited briefing schedule does not allow sufficient time for the necessary review process to take place.

14. Finally, New Hope has been able to continue to engage in some adoption service activities, even though its motion for a preliminary injunction was denied. Indeed, during the pendency of the litigation in District Court, OCFS permitted New Hope to continue to engage in certain of its adoption program services. *See* Dist. Ct. No. 18-cv-01419, ECF No. 32, at 4. And the parties are currently negotiating a

more formal partial stay of OCFS's enforcement activities, which would allow New Hope to engage in specified adoption activities during the pendency of this appeal.

15. Accordingly, for all of these reasons, OCFS respectfully requests that the Court remove this appeal from the XAC or, in the alternative, that the Court grant OCFS a 30-day extension to file its brief, to October 21, 2019.

Dated: Albany, New York  
July 29, 2019

/s/ Laura Etlinger  
LAURA ETLINGER  
Assistant Solicitor General