

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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.

**NEW HOPE’S OPPOSITION TO OCFS’S MOTION TO REMOVE
CASE FROM EXPEDITED APPEALS CALENDAR**

Preliminary Statement

As an “alternative” to removal from the Expedited Appeals Calendar, Defendant-Appellee (“OCFS”) requests a 30-day extension of time to file its appellee’s brief in response to the appeal brought by New Hope Family Services, Inc., (“New Hope”) from the district court’s dismissal of New Hope’s complaint. 2d Cir. ECF No. 36 at 7. Upon learning of OCFS’s request—and consistent with customary professional courtesy—New Hope immediately informed counsel for OCFS that New Hope consents to that 30-day extension. This relief will alleviate *all* of the personal and institutional time constraints recited in OCFS’s declaration. *Id.* at 8.

Removal from the Expedited Appeals Calendar, however, would slow the resolution of New Hope's appeal more broadly, and that request should be denied. OCFS is correct that the court below failed to apply the standard appropriate to a motion to dismiss and instead purported to decide the case "based on a full review of the merits," *id.* at 6–7, failing to give the legally required deference to New Hope's allegations, failing to give New Hope an opportunity to develop its case through discovery, and wrongly resolving multiple factual disputes in the State's favor. This Court's Expedited Appeals Calendar was created precisely to get such early misfires "back on track" as soon as possible. Jodi S. Balsam, *The New Second Circuit Local Rules: Anatomy and Commentary*, 19 J.L. & POL'Y 469, 518 (2011). OCFS is also correct that this case is of immense constitutional significance. 2d Cir. ECF No. 36 at 6–7. This is all the more reason why it is important for this Court to review the decision below quickly so that a proper and thorough litigation of the facts and issues may get underway.

Finally, while it is true that the parties are negotiating an agreement that will permit New Hope to continue limited adoption operations during the pendency of the appeal, the shadow of the State's

threat of closure will inevitably be severely damaging to a charitable ministry supported by voluntary contributions. This injury should be alleviated as soon as possible.

The 30-day extension of time to file its brief requested by OCFS is sufficient. OCFS's motion to remove this case from the Court's Expedited Appeals Calendar should be denied.

A. OCFS correctly admits that the court below failed to apply the proper standard in ruling on New Hope's motion to dismiss.

1. Since its founding in 1958 as an explicitly Christian ministry serving families and children in need, New Hope has placed over 1,000 children in adoptive homes. Dist. Ct. ECF No. 1 at 1–2. New Hope receives no state funds. *Id.* at 9. In late 2018, OCFS threatened to shut down New Hope's adoption ministry because New Hope's faith-based convictions and policies prevent it from devoting its own energy and resources to placing children with unmarried or same-sex couples. *Id.* at 32–34.

2. New Hope filed suit, asserting its First Amendment rights to freely exercise its religion by continuing to serve children in a manner consistent with its religious beliefs, to choose which messages it wants

to express, and to expressively associate only with prospective adoptive parents who share New Hope's beliefs about marriage and the family.

Id. at 40–46. New Hope also moved for a preliminary injunction to stem the irreparable harm that New Hope is suffering due to OCFS's threats, Dist. Ct. ECF Nos. 15 and 15-1, and OCFS moved to dismiss, Dist. Ct. ECF Nos. 34 and 34-1.

3. After oral argument—and five months after New Hope had filed its motion for a preliminary injunction—the district court issued a 42-page decision granting OCFS's motion to dismiss and denying New Hope's preliminary injunction motion as moot. Dist. Ct. ECF No. 38 at 11, 42.

4. In its opinion, the district court acknowledged the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), Dist. Ct. ECF No. 38 at 11–12, but failed to apply the teaching of those decisions correctly. Instead, the district court repeatedly refused to credit New Hope's plausible factual allegations, refused to draw reasonable inferences in New Hope's favor, credited OCFS's contrary factual assertions, weighed the “evidence” in the undeveloped record, and dismissed New Hope's claims.

5. In its motion here, OCFS concedes this fatal defect, asserting that the dismissal below “was based on a full review of the merits of [New Hope’s] constitutional claims . . . rather than a review of whether the allegations of the complaint satisfy pleading standards.” 2d Cir. ECF No. 36 at 6–7.

6. But New Hope was entitled to a decision on OCFS’s motion to dismiss based solely on “whether the allegations of the complaint satisfy pleading standards.” *Id.* If New Hope’s complaint satisfies those standards—and it does—New Hope is entitled to the opportunity to develop facts to support its allegations through discovery.

7. As Senior Judge Newman has written, this Court’s Expedited Appeals Calendar was designed “to speed the disposition of appeals from threshold dismissals by district courts in the aftermath of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, and *Ashcroft v. Iqbal*.” Jon O. Newman, *The Second Circuit’s Expedited Appeals Calendar for Threshold Dismissals*, 80 BROOK. L. REV. 429, 429 (2015). *See also Irrera v. Humpherys*, 859 F.3d 196, 197 n.2 (2d Cir. 2017) (same).

8. “Mindful of . . . concerns” that district courts might improperly apply the “more rigorous [pleading] standard” announced in those decisions, this Court “decided to give expedited treatment to some categories of threshold dismissals so that complaints deemed to have been improperly dismissed could be quickly returned to a district court.” Newman, *supra*, at 429–30. That is what happened here, that is the relief New Hope requests in this appeal, and this appeal falls precisely within the very reason for the Expedited Appeals Calendar’s existence.

B. The fact that First Amendment rights are at issue militates for expedited review of the dismissal below.

9. OCFS’s contention that “this appeal is not well-suited to expedited review” because it “involves constitutional issues that implicate important public policies” has it exactly backwards. 2d Cir. ECF No. 36 at 3. The State can hardly threaten the constitutional rights of citizens, then plead that the importance of the issues weighs against speedy resolution. The Expedited Appeals Calendar exists to get cases “back on track with as little disruption [as possible] to the flow of the litigation,” Balsam, *supra*, at 518, and this is all the more important where constitutional rights are at stake, as their denial “for

even minimal periods of time, unquestionably constitutes irreparable injury.” *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996).

10. Further, as a practical matter—and as Judge Newman has explained—“[t]he shortened time for briefing seems appropriate because these threshold dismissals involve no evidentiary record and the legal issues have been thoroughly briefed in the papers supporting and opposing dismissal in the district court.” Newman, *supra*, at 433–34. Here, the constitutional issues have indeed been “thoroughly briefed” below, and the district court dismissed New Hope’s complaint before discovery could occur, so there is “no evidentiary record” for this Court to review in determining whether that dismissal was error. *Id.* at 433. Thus, the “shortened time for briefing” permitted by the Expedited Appeal Calendar is “appropriate,” *id.*, and if there were any lingering concerns on that score, New Hope’s immediate consent to OCFS’s request for a 30-day extension should more than resolve them.

C. Protracting the appeal will harm New Hope even with an expected agreement allowing New Hope to engage in limited adoption activities during the appeal.

11. OCFS is correct that the parties are currently negotiating the precise wording of a “partial stay of OCFS’s enforcement activities,

which would allow New Hope to engage in specified adoption activities during the pendency of this appeal.” 2d Cir. ECF No. 36 at 9. Indeed, New Hope appreciates the collegial manner in which those discussions have proceeded, believes the parties have reached an agreement in principle, and trusts that the agreement will be formalized. Still, time is not on New Hope’s side. For a faith-based ministry that lives by relationships and contributions, each day of delay further impairs New Hope’s ability to exercise its First Amendment rights.

12. As New Hope Executive Director Kathy Jerman explains in her accompanying declaration, the ruling of the court below dismissing New Hope’s claims—and declaring to the world that New Hope has no right to operate in a manner consistent with its religious beliefs and that OCFS has the right to shutter New Hope’s adoption ministry—is making it more difficult for New Hope to attract the referrals of birthmothers needed to identify infants for prospective adoptive parents already working with New Hope to adopt, and to maintain a reputation in the community that would enable New Hope to return to full-capacity service if and when its First Amendment rights are finally vindicated.

13. Litigation inevitably takes time, so these harms cannot be fully avoided. But this Court's Expedited Appeals Calendar is designed to shorten that time and thus reduce that harm. Removal from that Calendar can only increase that harm. These considerations, too, weigh against removal of this case from the Expedited Appeals Calendar.

Conclusion

For these reasons, New Hope asks the Court to deny OCFS's motion to remove this appeal from the Expedited Appeals Calendar.

Dated: August 6, 2019

Respectfully submitted,

s/Roger G. Brooks

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, a copy of this response was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ Roger G. Brooks _____
Attorney for Appellant

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**DECLARATION OF KATHY JERMAN IN OPPOSITION TO
OCFS'S MOTION TO REMOVE CASE FROM EXPEDITED
APPEALS CALENDAR**

I KATHY JERMAN, hereby declare:

1. I am the Executive Director of New Hope Family Services (“New Hope”). I assumed this position on February 25, 2019.

2. I make this declaration to explain the harm that New Hope will suffer if its appeal of the dismissal of its lawsuit and the denial of its request for a preliminary injunction is protracted, including by removal of its appeal from the Expedited Docket of the Second Circuit Court of Appeals.

3. I am informed that if New Hope’s appeal proceeds on the

Expedited Docket, we may receive a ruling on this appeal within as little as 200 days from when New Hope filed its notice of appeal, while if our appeal is removed from the Expedited Docket, we likely would not receive a decision until more than 300 days had elapsed. *See* Jon O. Newman, *REPORT: The Second Circuit's Expedited Appeals Calendar for Threshold Dismissals*, 80:2 Brooklyn L. Rev. 429, 433 (2015).

4. If the New York State Office of Child and Family Services (“OCFS”) terminates New Hope’s authorization to provide adoption and foster care services because New Hope cannot, consistent with its faith convictions, place children with unmarried or same-sex couples, that will of course destroy New Hope’s half-century old adoption and foster care ministry, which has across the decades placed more than 1,000 children into permanent, loving, adoptive homes.

5. Even if the courts uphold New Hope’s right to perform its ministry consistently with its faith, a prolonged period before the decision below is reversed will significantly damage New Hope’s ability to preserve its adoption and foster care ministry. In particular, a prolonged delay would impair the ministry’s fundraising ability; it would jeopardize New Hope’s ability to keep its team of competent professionals in place;

and it would further imperil the viability of New Hope's adoption and foster care ministry.

6. OCFS's threat has already started to take its toll on New Hope's ministry. First, it has damaged New Hope's ministry reputation and has created confusion about whether New Hope still provides *any* placement services at all. And second, it has stopped New Hope from accepting new adoptive parents for placement services, which will soon force New Hope to make structural and operational changes.

7. New Hope will suffer, or continue to suffer, the harms listed in the paragraphs above even though New Hope and OCFS recently reached agreement in principle on a standstill agreement.

8. While that standstill agreement will allow the ministry to keep serving adoptive parents who had already completed their orientation with New Hope before this lawsuit was filed, without fear of immediate closure by OCFS, it forbids New Hope from accepting any new adoptive parents. This prohibition effectively functions as a sunset provision for New Hope's adoption and foster care services, unless and until New Hope can obtain protection and relief from the court.

Delaying This Appeal Would Hamper New Hope's Fundraising Efforts

9. New Hope depends solely on private donations to fund its adoption and foster care ministry. It does not accept any money from federal, state, or local government programs.

10. New Hope operates this way to preserve its independence and its freedom to operate consistently with the dictates of its faith.

11. News about this litigation and OCFS's threat to shut down New Hope's adoption and foster care ministry has raised many questions, not only from prospective adoptive parents and birth mothers, but also from donors who support the ministry.

12. New Hope must often explain to its donors the potential impact of this litigation on the ministry, which includes shutting down its adoption and foster care ministry.

13. This grim possibility could discourage potential donors from financially supporting New Hope.

14. Another way New Hope funds its adoption and foster care ministry is through service fees charged to prospective adoptive parents.

15. Because the current standstill agreement prevents New Hope

from accepting new adoptive parents for placement services, New Hope cannot collect new application fees or home study fees from prospective adoptive parents who would seek New Hope's services.

Delaying This Appeal Would Curb New Hope's Ability to Retain Critical Team Members

16. A delay in this appeal would also create a more personal impact for New Hope's dedicated team members.

17. New Hope has approximately eight team members who work in or oversee its adoptions and foster care ministry.

18. These team members fill various ministry roles, including performing case work for birth parents, adoptive parents, and foster parents, in addition to coordinating correspondence, preparing home studies, and providing administrative support and executive leadership.

19. If the time before New Hope obtains injunctive relief against OCFS's threat of closure is protracted, New Hope will likely be forced to lay off some of its team members. In particular, New Hope employs two case workers who prepare home studies for adoptive parents; because New Hope cannot accept new adoptive parents at this time, these team members will have little to no work to do once the current adoptive

parents pass through the home study part of the adoption process.

20. In my judgment, the degradation of New Hope's team—should that occur—will harm New Hope's reputation as an adoption and foster care service provider, as well as its ability to resume its full ministry quickly and effectively if and when a court affirms that New Hope has a right to do so that is protected by the First Amendment.

21. New Hope's team members by no means perform merely clerical functions. They build trusted relationships with birth mothers and adoptive parents. They love these people in emotionally difficult times. And they do their work with excellence. New Hope's strong reputation as an adoption and foster care ministry depends on the skill, love, and reputations of its dedicated and in many cases long-serving and extremely experienced team members.

22. If New Hope loses any of its team members, it is likely that those lost team members would need to secure new jobs and that New Hope would not be able to quickly re-hire them if it were allowed to resume its placement services without limitation. Rebuilding the team would mean rebuilding New Hope's reputation, conducting new rounds of training, and winning back the trust of its referrals sources.

Delaying This Appeal Would Jeopardize New Hope's Ability to Attract Referrals of Birth Mothers and Thus of Infants in Need of Placement.

23. A delay in New Hope's ability to obtain a ruling on its constitutional claims, including a delay to this appeal, would also increase the risk that New Hope will suffer harm to its ability to attract referrals of birth mothers who desire to place their infants for adoption.

24. New Hope receives most of its referrals for adoption placement services from pregnant birth mothers, pregnancy care centers, or social workers.

25. These referral sources often value New Hope's religious character. Some birth mothers will not choose to entrust the future of their children to an agency unless it has a reputation for placing children promptly and permanently into homes that are not only loving, but meet birth mothers' other desires for their children—which sometimes includes preferences for a specific religious upbringing.

26. But New Hope has learned that because of the OCFS threat to its ministry, many of New Hope's referral sources incorrectly think that the ministry can no longer offer any placement services, even though it can still provide these services for adoptive parents who had already

completed New Hope's orientation before this lawsuit began.

27. In response to this misperception, New Hope has now tasked its birth parent case worker with notifying possible referral sources that New Hope is still providing placements.

28. But even when New Hope comes in contact with possible referral sources, it must now warn them that the ministry cannot guarantee that it will be able to serve them in the future, because of the possible consequences of an adverse court decision.

29. That disclaimer discourages referral sources from using New Hope's adoption and foster care services. This is especially true for pregnant mothers who are already in crisis and do not wish to think about more unexpected change or a possible disappointment.

30. When referral sources persevere through the confusion and accept the risk of moving forward with New Hope's placement service, New Hope increasingly faces a different threat from prolonged delay—its dwindling pool of adoptive parents waiting for children.

31. A dwindling pool of adoptive parents not only decreases the number of opportunities for New Hope to place children with adoptive parents over time; it increases the chance that New Hope will not be able

to place children who are presented to it because adoptive parents often have highly specific placement preferences.

32. Those adoptive parent preferences substantially narrow the pool of *children* that New Hope can place and will prevent New Hope from placing certain children whom it could otherwise place if its adoptive parent pool were larger. Indeed, this has already occurred.

33. New Hope recently had one adoptive couple indicate that they would accept a placement, but then back out because the child did not meet one of the couple's specific preferences. New Hope could not then locate another adoptive parent within its pool to accept the child. So the ministry had to decline the placement opportunity. During my years with the ministry, this was the first time that New Hope was unable to find a home for a child that it was asked to place.

34. Situations like that create heartbreak for everyone involved. Any more delay in this litigation increases the risk that such sorrow will become common, as New Hope's pool of approved adoptive parents shrinks.

35. Obviously, New Hope's reputation among referral sources as a trusted and effective adoption service will be destroyed if time passes

and New Hope's adoptive parent pool dwindles to such a small number that New Hope cannot consistently place children with adoptive parents when asked to do so.

36. The reputational and practical problems described above have already contributed to a drastic decline in New Hope's child placements since this litigation began. New Hope has placed only two children with adoptive parents so far in 2019. But since 2012, and before OCFS threatened to shut down New Hope's adoption and foster care services in 2018, New Hope placed on average about 8 children per year with adoptive parents. That span includes one year in which New Hope placed up to 13 children with adoptive parents.

DECLARATION

I, Kathy Jerman, a citizen of the United States and a resident of the State of New York, hereby declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 5 day of August, 2019, at Syracuse,
New York.



Kathy Jerman