

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: modification of injunction pending appeal

Set forth below precise, complete statement of relief sought:

New Hope Family Services asks this Court to modify the preliminary injunction pending appeal the Court issued November 4, 2019, by striking the provision that prohibits New Hope from accepting any new prospective adoptive parents for adoption services.

New Hope remains committed to respectfully referring unmarried and same-sex couples to other providers.

New Hope Family Services, Inc. v. Poole

MOVING PARTY: New Hope Family Services, Inc. OPPOSING PARTY: Sheila J. Poole

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Roger G. Brooks OPPOSING ATTORNEY: Laura Etlinger

Alliance Defending Freedom New York State Office of the Attorney General 15100 N. 90th Street, Scottsdale, AZ 85260 The Capitol, Albany, New York 12224 (480) 444-0020 / rbrooks@ADFlegal.org (518) 776-2028 / laura.etlinger@ag.ny.gov

Court- Judge/ Agency appealed from:

Please check appropriate boxes:

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

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: Oral argument on the merits was conducted November 13, 2019

Signature of Moving Attorney:

Roger G. Brooks Date: 6/18/2020 Service by: CM/ECF Other [Attach proof of service]

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

Has this request for relief been made below? Yes No Has this relief been previously sought in this court? Yes No Requested return date and explanation of emergency: New Hope previously asked for this relief from this Court in the form of a preliminary injunction on remand to the district court. Because the appeal remains pending, the Court has not yet ruled on that request, and New Hope fears further delay will cause irreparable harm to its ministry and to its ability to remain open. New Hope requests a decision as soon as possible, or at least within 14 days of this filing, meaning by July 2, 2020.

**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 MOTION TO MODIFY
INJUNCTION PENDING APPEAL**

On November 4, 2019, this Court granted New Hope a preliminary injunction pending appeal, allowing New Hope to continue engaging in some adoptive services while the Court processed this “expedited” appeal challenging New York’s unconstitutional actions.¹ Oral argument was held on November 13, 2019, approximately five months ago. But the Court has not yet issued a decision, and the prolonged delay now places New Hope’s entire adoption ministry at risk. Accordingly, New Hope respectfully asks that the Court modify the injunction and strike the provision prohibiting New Hope from “accept[ing] any new prospective adoptive parents for adoption services.”

¹ Order Granting Prelim. Inj. Pending Appeal at 5, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. Nov. 4, 2019), ECF No. 160.

In its order, the Court allowed New Hope to “continue the adoption study process for any individuals who [already had] completed New Hope’s orientation” and to “continue to accept surrenders of children and to place out children with approved adoptive applicants.”² The Court added, though, that “New Hope shall not accept any new prospective adoptive parents for adoption services.”³

New Hope itself proposed that temporary solution in the motion it filed on August 14, 2019.⁴ At the time, New Hope anticipated the Court would resolve this appeal on an expedited basis since the Court had placed the appeal on its Expedited Appeals Calendar.⁵ That appeared to mean a decision within as little as 200 days from when New Hope had filed its notice of appeal.⁶

New Hope filed its notice of appeal in the district court on June 10, 2019.⁷ That means 375 days have now passed since New Hope filed

² *Id.*

³ *Id.*

⁴ Appellant’s Emergency Mot. for Interim Protection Under Fed. R. App. P. 8 at 6–7, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. Aug. 14, 2019), ECF No. 56-1.

⁵ Notice of Expedited Appeal, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. July 11, 2019), ECF No. 34.

⁶ Decl. of Kathy Jerman in Opp’n to OCFS’s Mot. to Remove Case from Expedited Appeals Calendar at 2, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. Aug. 6, 2019), ECF No. 38 (citing Jon O. Newman, *REPORT: The Second Circuit’s Expedited Appeals Calendar for Threshold Dismissals*, 80:2 Brooklyn L. Rev. 429, 433 (2015)).

⁷ Notice of Appeal, *New Hope Family Services, Inc. v. Poole*, 5:18-cv-1419 (N.D.N.Y. June 10, 2019), ECF No. 40.

its notice of appeal. And it has now been 219 days since oral argument without a decision. Thus, New Hope’s request for a more fulsome preliminary injunction on remand also remains unresolved.⁸

In the Court’s order granting an injunction, the Court observed that the “likelihood of New Hope succeeding on the merits requires careful review of complex precedent,” including *Employment Division v. Smith*, 494 U.S. 872 (1990).⁹ *Smith* established the competing “principles” that this Court would have to “[n]avigat[e]” in order to resolve New Hope’s free-exercise claim.¹⁰

But on February 24, 2020, the Supreme Court granted review in a case where another faith-based provider asked the Court to “revisit” and “reconsider” *Smith*.¹¹ That case is factually similar to this one—although here New Hope (which accepts no government money for the services it provides) has made an even *stronger* showing that the challenged law must survive strict scrutiny, which it cannot do.¹² As a result, there is a strong probability that if the Supreme Court reverses the Third Circuit’s decision in *Fulton*, that outcome will control the analysis in this case. Moreover, while the outcome in *Fulton* likely will

⁸ Opening Br. of Appellant at 59, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. Aug. 15, 2019), ECF No. 62.

⁹ Order Granting Injunction, *supra* note 1, at 3.

¹⁰ *Id.*

¹¹ Pet. for a Writ of Cert. at i, 31–34, *Fulton v. City of Philadelphia*, No. 19-123 (S. Ct. July 22, 2019), 2019 WL 3380520.

¹² Opening Br. of Appellant, *supra* note 8, at 37.

not be known until next spring, there is a strong likelihood the Supreme Court granted review to reverse the Third Circuit's decision: the Roberts Court reverses lower court decisions in roughly 70% of decided cases.¹³

With *Fulton* pending before the nation's highest court and *Smith* apparently on the chopping block, this Court may reasonably wish to wait to decide this appeal in the interest of judicial economy. But even if the Court does not wait for *Fulton*, the Supreme Court's review there guarantees that this litigation will remain unresolved *at least* until next spring when the Supreme Court is expected to issue its *Fulton* decision.

In an earlier affidavit filed in this case, New Hope Executive Director Kathleen Jerman explained how “a prolonged period before the decision below is reversed will significantly damage New Hope's ability to preserve its adoption and foster care ministry.”¹⁴ “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

¹³ See Stephen Wermiel, *SCOTUS for law students (sponsored by Bloomberg Law): Scoring the circuits*, SCOTUSblog (Jun. 22, 2014, 10:28 PM), <https://www.scotusblog.com/2014/06/scotus-for-law-students-sponsored-by-bloomberg-law-scoring-the-circuits/>; Ballotpedia, *SCOTUS case reversal rates (2007 - Present)*, [https://ballotpedia.org/SCOTUS_case_reversal_rates_\(2007_-_Present\)](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)) (compiling “end of term data gathered by *SCOTUSblog*”).

¹⁴ Decl. of Kathy Jerman in Opp'n, *supra* note 6, at 2.

professionals in place; and it would further imperil the viability of New Hope’s adoption and foster care ministry.”¹⁵

On that last point, Jerman worried that a prohibition on accepting new adoptive parents would “effectively function[] as a sunset provision for New Hope’s adoption and foster care services.”¹⁶ “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.”¹⁷

Unfortunately, it has now been a “prolonged period” since Jerman submitted her affidavit—and then some. And Jerman’s concerns have proven prescient. New Hope recently supervised its first placement *in more than a year*.¹⁸ To put that number in context, before this case, New Hope “placed on average about 8 children per year with adoptive parents.”¹⁹ New Hope currently has only 10 couples remaining on its list

¹⁵ *Id.* at 2–3.

¹⁶ *Id.* at 3. Counsel expressed the same concern at oral argument. Oral Argument at 6:35–45, 14:04–21, *New Hope*, No. 19-1715 (Nov. 13, 2019), <https://www.ca2.uscourts.gov/decisions/isysquery/5fe37c78-6c02-4a1a-a7d0-2beaf59ff2c3/141-150/list/>.

¹⁷ *Id.* at 8–9.

¹⁸ Decl. of Kathleen Jerman in Supp. of New Hope’s Mot. to Modify Inj. Pending Appeal, attached as Exhibit A, at 7.

¹⁹ Decl. of Kathy Jerman in Opp’n, *supra* note 6, at 10.

of approved adoptive parents.²⁰ And it can take six months to a year to help new applicants through the application, orientation, home-study, and approval processes.²¹ Thus, even while New Hope expects an uptick in referrals of children needing to be placed, the dwindling pool of adoptive parents will likely severely hamper its ability to place children.²² If that happens, those inquiries may dry up again—this time for good.²³ And New Hope may be forced to close its doors even while this case remains pending,²⁴ the very harm this Court tried to prevent when it initially entered its injunction.

Conclusion

New York's unconstitutional actions have significantly impaired New Hope's ability to place children in loving adoptive homes. New York should not be allowed to achieve through litigation delay that which the Constitution prohibits—permanently shuttering New Hope's ministry because of its religious beliefs and speech. Handing New York such a victory would be particularly painful if New Hope were forced to close its doors only months before the Supreme Court issues a decision vindicating New Hope's First Amendment rights.

²⁰ Exhibit A at 6.

²¹ *Id.* at 9.

²² *Id.* at 9–10.

²³ *Id.* at 10.

²⁴ *Id.* at 3, 8–10.

Accordingly, New Hope asks the Court to modify its injunction to strike the provision prohibiting New Hope from “accept[ing] any new prospective adoptive parents for adoption services.”²⁵ If the Court deems it appropriate, it may add a requirement that New Hope refer unmarried and same-sex couples to other providers, a practice New Hope intends to continue if allowed to accept new prospective adoptive parents.²⁶

Consistent with Local Rule 27.1(b), counsel for New Hope notified counsel for OCFS of the intended filing of this motion. Counsel for OCFS indicated that OCFS opposes the motion, and counsel for OCFS intends to file a response.

Dated: June 18, 2020

Respectfully submitted,

s/Roger G. Brooks

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²⁵ Order Granting Injunction, *supra* note 1, at 5.

²⁶ *See id.* at 4, n.3.

Certificate of Compliance

This document complies with the type-volume limit set forth in Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,435 words.

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Dated: June 18, 2020

s/ Roger G. Brooks
Attorney for Appellant

Certificate of Service

I hereby certify that on June 18, 2020, 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

EXHIBIT A

**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.

**DECLARATION OF KATHLEEN JERMAN
IN SUPPORT OF NEW HOPE'S MOTION TO
MODIFY INJUNCTION PENDING APPEAL**

I, Kathleen 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
and the people we serve are suffering and will continue to suffer as long
as New Hope is not permitted to accept any new prospective adoptive
parents for adoption services while our appeal remains pending, even if
New Hope's constitutional rights are finally recognized and New Hope
is later allowed to fully resume operations.**

A. The existing injunction pending appeal

3. I understand that on November 4, 2019, the Second Circuit Court of Appeals entered an interim order proposed by New Hope’s counsel. Order Granting Preliminary Injunction Pending Appeal at 5, *New Hope Family Services, Inc. v. Poole*, No. 19-1715 (2d Cir. Nov. 4, 2019), ECF No. 160. This order allowed New Hope, “pending decision on this appeal,” to “continue to accept surrenders of children and to place out children with approved adoptive parents,” but the order also prevents New Hope from “accept[ing] any new prospective adoptive parents for adoption services.” *Id.* New Hope has complied with these provisions and will continue to unless the Court grants additional relief.

4. During oral argument, counsel explained this is not a viable long-term solution: “The injunction that we want on remand . . . is the same as the [November 4, 2019] injunction, minus Paragraph 2, which restricts my client’s ability to take new applicants. Because otherwise, it will kill them.” Oral Argument at 6:35–45, *New Hope*, No. 19-1715 (Nov. 13, 2019), www.ca2.uscourts.gov/decisions/isysquery/c4f24b38-b49a-40dd-a270-a795b4fb34c0/141-150/list/.

5. Later in the argument, counsel added that if the restriction on taking new applicants were “left in place throughout a discovery and trial period, it will kill New Hope by strangulation as surely as the effort by OCFS a few weeks ago would have done.” *Id.* at 14:04–21.

6. I provide this declaration to explain why this is true, and to explain how the passage of half a year since that hearing has now made this “strangulation” effect a real threat to New Hope’s continued operations as a Christian adoption agency.

7. During the oral argument, the Court asked New Hope’s counsel if we would “agree to commit [our]selves to referrals of any . . . gay or unmarried couples who sought to adopt with [us] in the interim,” if the Court lifts the restriction preventing us from accepting new prospective adoptive parents. *Id.* at 6:52–59. Our counsel responded, “Yes, Your Honor.” *Id.* at 7:00. I want to confirm that New Hope fully endorses counsel’s statement—if the Court allows us to accept new applicants, we will respectfully refer unmarried and same-sex couples to one of the other adoption agencies in the area while this litigation proceeds, as has been our policy all along.

B. The importance of the size of our pool of adoptive couples

8. New Hope often receives referrals of birth mothers from hospitals, social service agencies, or crisis pregnancy centers, in part because New Hope has a reputation that it will never say “no” to an infant in need of a loving family. New Hope often receives these referrals within a month or less of the expected birth of the child—or even after the child is born.

9. Because of the situations leading to these last-minute referrals, New Hope often places infants considered “hard to place.” This includes infants born with addiction due to the mother’s addiction, infants with physical disabilities or unusual medical needs, infants whose mothers suffer from mental health problems, and infants of a race different than the race shared by most of parents seeking to adopt.

10. In part because of our own faith-based orientation, and also because of the faith and sense of ministry and mission that many of the couples who come to New Hope as adoptive parents bring with them, New Hope has been consistently able to find loving homes even for newborn infants with hard-to-place characteristics.

11. For example, about five years ago we successfully placed an infant with Down syndrome in a loving adoptive home. Three years ago, we did the same for a baby girl who had been born with many of her organs outside her body—an extremely rare condition that necessitated emergency surgery and countless doctors’ appointments since. We also regularly place children born with Neonatal Abstinence Syndrome (NAS), which means the child was exposed to drugs in-utero and often requires time in the Neonatal Intensive Care Unit (NICU).

12. Understandably, not every couple seeking to adopt is prepared to take on the challenges certain children present. Further, even setting aside those challenges, some couples have specific requests with regard to the sex or ethnicity of the child they hope to adopt.

13. In addition, as my predecessor Judith Geyer explained in the district court, New Hope works hard to give each birthmother a meaningful role in choosing a family for her child, giving her portfolios of up to five couples for her to consider before selecting a couple.

Affidavit of Judith A. Geyer in Support of New Hope Family Services’ Motion for Preliminary Injunction at 11, New Hope Family Services, Inc. v. Poole, 5:18-cv-1419 (N.D.N.Y. Dec. 12, 2018), ECF No. 15-2.

14. For all these reasons, when a birthmother entrusts her child to New Hope for placement, it is essential for us to have a substantial pool of approved adoptive couples available so that we can find a couple that is both able and willing to adopt the child, no matter what unique challenges the child may present.

C. Our dwindling pool of adoptive couples and reduced number of placements

15. Before this litigation, New Hope typically averaged between 14 and 20 couples on our list of couples approved to adopt. Affidavit of Judith A. Geyer at 12, *New Hope*, 5:18-cv-1419, ECF No. 15-2. We also had been averaging between 8 and 12 placements of children in adoptive homes per year in recent years. *Id.* at 8.

16. Under the Court's November 4, 2019 order, New Hope has only been allowed to work with prospective adoptive couples "who completed New Hope's orientation prior to the commencement of this lawsuit." Order at 5, *New Hope*, No. 19-1715, ECF No. 160. Under this limitation, New Hope is currently working with a total of 18 adoptive couples. Of these, only 10 are approved and waiting for a placement. 1 more couple is in the home-study process and will likely be approved

and ready for a placement within the next 2 months, 3 couples are on hold, 2 couples are waiting to go through the home-study process with us once we become more legally secure, and 2 couples have received placements but have not yet had their adoptions finalized.

17. New Hope receives most of its referrals for adoption placement services from pregnant birthmothers, pregnancy resource centers, and social workers.

18. We filed our lawsuit almost a year and a half ago, on December 6, 2018. For some period between when OCFS threatened to close our adoption ministry and when we filed our lawsuit, many of our traditional referral sources believed that we had already lost our authorization to handle adoptions. As a result, referrals reduced to a trickle, and New Hope did not place any infants *for the next 14 months*.

19. In May of this year, New Hope received a very short-notice referral from a local hospital of a child whose birthmother had mental health issues. Within two days, we were able to place the child with one of the couples that the Court has allowed us to continue working with during our appeal. This was our first placement in 14 months, after

previously averaging between 8 to 12 placements per year. This also, of course, reduced our pool of approved adoptive couples by one.

20. Meanwhile, since we filed our lawsuit in 2018, several couples have withdrawn their names or put their applications on hold for various personal and family reasons, as inevitably happens over time among any group of couples who apply to adopt.

21. As a result of placements and couples' choices to withdraw or place their applications on hold, New Hope currently has 10 couples who stand ready to consider adopting a child if called, with 1 more couple who could be approved within the next two months.

22. I am deeply concerned that with this small number of active candidate adoptive parents, a very few more placements will leave New Hope with an inadequate pool of adoptive parents to allow us to have confidence that we will be able to find a home for each child entrusted to our care, including infants with hard-to-place characteristics.

23. Should this occur, New Hope will not be able in good conscience to accept referrals of birthmothers who want to place their newborns through New Hope. This, in my opinion, would be gravely harmful to the infants involved, to birthmothers, and to New Hope's

reputation among service providers who would otherwise refer birthmothers to New Hope.

24. Unfortunately, once our pool of approved adoptive parents becomes depleted, that problem cannot be fixed quickly. From the time a prospective adoptive couple first contacts us, it can take between six months to a year to help them through the application, orientation, home-study, and approval processes.

25. Our dwindling pool of prospective adoptive couples is especially troubling because, through active outreach efforts that have included calls, in-person conversations, and a new brochure, New Hope has recently succeeded in informing organizations that we have worked with previously that we remain open and able to accept referrals and place infants. As a result of these efforts, a large faith-based pregnancy support ministry in New York recently told me they want to use New Hope as their primary adoption service that they refer birthmothers to—mainly because of our shared beliefs about marriage and family and the best interests of children.

26. Having to turn referrals away based on our dwindling pool of couples will harm New Hope's reputation as an adoption provider that

has been able to place every child entrusted to our care. In my opinion, that harm will have a lasting negative effect on our ability to attract referrals of birthmothers from social-service providers, and also our ability to attract new prospective adoptive parents once we are allowed to do so.

27. In sum, if New Hope's pool of prospective adoptive parents becomes too small, this will inflict exactly the "strangulation" of our ability to continue our historic adoption ministry that our counsel warned of during oral argument. Oral Argument at 14:04–21.

28. Since we filed our lawsuit in December of 2018, we have received calls from *more than 80 couples* who are interested in adopting a child through New Hope. We have had to turn away all of these couples, explaining that we are not presently able to accept any new applications.

29. If the Court allows us to do so, we will begin accepting new applications right away, while respectfully referring to other agencies any unmarried or same-sex couples who approach us seeking to adopt.

I, Kathleen 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 12 day of June, 2020, at Syracuse,
New York.

Kathleen Jerman
Kathleen Jerman