

No. 17-50762

In the United States Court of Appeals for the Fifth Circuit

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, MAYOR, CITY OF EL CENIZO; TOM SCHMERBER, COUNTY SHERIFF; MARIO A. HERNANDEZ, MAVERICK COUNTY CONSTABLE PCT. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS,; MAVERICK COUNTY; CITY OF EL PASO,

Plaintiffs – Appellees.

CITY OF AUSTIN, JUDGE SARAH ECKHARDT, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY JUDGE; SHERIFF SALLY HERNANDEZ, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY SHERIFF; TRAVIS COUNTY, CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; THE CITY OF HOUSTON,

Intervenors - Plaintiffs - Appellees

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS, IN HIS OFFICIAL CAPACITY, KEN PAXTON, TEXAS ATTORNEY GENERAL,

Defendants - Appellants

EL PASO COUNTY; RICHARD WILES, SHERIFF OF EL PASO COUNTY, IN HIS OFFICIAL CAPACITY; TEXAS ORGANIZING PROJECT EDUCATION FUND; MOVE SAN ANTONIO,

Plaintiffs - Appellees

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR; KEN PAXTON, ATTORNEY GENERAL; STEVE MCCRAW, DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,

Defendants - Appellants

CITY OF SAN ANTONIO; BEXAR COUNTY, TEXAS; REY A. SALDANA, IN HIS OFFICIAL CAPACITY AS SAN ANTONIO CITY COUNCILMEMBER; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INCORPORATED; WORKERS DEFENSE PROJECT,

Plaintiffs - Appellees

CITY OF AUSTIN,

Intervenor Plaintiff - Appellee

v.

STATE OF TEXAS; KEN PAXTON, SUED IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; GREG ABBOTT, SUED IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS,

Defendants – Appellants.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division, Nos. 5:17-cv-00404; 5:17-cv-459; 5:17-cv-489

**APPELLEES’ OPPOSITION TO STATES’ MOTION FOR LEAVE TO FILE AMICUS
BRIEF IN SUPPORT OF APPELLANTS’ MOTION FOR STAY**

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Appellee City of Houston¹ respectfully opposes the untimely motion of the States of West Virginia, Louisiana, Alabama, Arkansas, Georgia, Missouri, Oklahoma, and South Carolina for leave to file an amicus brief in support of Appellants' motion for a stay pending appeal.

The district court entered its preliminary injunction order on August 30, 2017. On September 5, Texas filed its emergency motion for a stay of the injunction pending appeal. Pursuant to this Court's order, Appellees responded on September 12, and Appellants replied on September 19. At that point, after all parties had finished briefing the stay motion, and just three days before oral argument, the eight potential amici states sought leave to file a brief as amici curiae in support of the stay.

The Court should deny the motion for leave to file an amicus brief as untimely. Federal Rule of Appellate Procedure 29(a)(6) provides that an amicus curiae "must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed." Fifth Circuit Rule 29.1 likewise provides that "Those wishing to file an amicus

¹ The following Appellees join in the City of Houston's opposition: City of Dallas, El Paso County, City of El Cenizo, League of United Latin American Citizens, Raul L. Reyes, Tom Schmerber, Mario A. Hernandez, Maverick County, Texas Organizing Project Education Fund, MOVE San Antonio.

curiae brief should file a motion within 7 days after the filing of the principal brief of the party whose position the amicus brief will support.”

The potential amici here support Texas, which filed its “principal brief” on September 5. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359, 361 (4th Cir. 2006) (“The term ‘principal brief’ would appear to refer to the lead brief filed by a party in anticipation of argument . . . and not to something such as a reply brief . . .”). The seven-day deadline was therefore September 12, which itself (had these amici filed then) would have been prejudicial since Appellees’ briefs were due that day under the accelerated briefing schedule. Instead, amici filed the motion for leave a week late on September 19. Consequently, their motion for leave to file should be denied. *See Kreisberg ex rel. N.L.R.B. v. Healthbridge Mgmt., LLC*, 2013 WL 690977, at *1 (2d Cir. 2013) (denying, as untimely under former Rule 29(e), leave to file amicus brief on motion for a stay of an injunction).

Although a “court may grant leave for later filing,” Fed. R. App. P 29(a)(6), these potential amici have not sought permission for an untimely brief or even tried to excuse their late filing. *See also* Fed. R. App. P. 26(b) (permitting extension of time for “good cause”). Needless to say, given the widespread notoriety of SB-4 and sophistication of these states’ legal representation, this is *not* a situation where ignorance of deadlines or lack of resource can be an excuse.

In addition, granting leave at this late stage will significantly prejudice Appellees, who would have no opportunity to respond to amici's arguments in writing and would potentially be forced to sacrifice a disproportionate share of their oral argument time to do so. The seven-day deadline was designed to permit the opposing party to "have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading." Fed. R. Civ. P. 26, 1998 committee notes on subdivision (e). At this point, the parties are preparing for oral argument on Friday, September 22, after complying with a compressed briefing schedule. Requiring Appellees to review, analyze, and respond in two days to a late-filed amicus brief – for which the requesting filers give no excuse for its delay – will distract Appellees from critical preparation for oral argument in this significant matter.

If the potential amici wish to participate in merits-stage briefing, they should follow the Rules and seek to do so at the appropriate time. At this juncture, they lack any interest or explanation sufficient to warrant permission for a late and materially prejudicial filing. And since the Court is addressing a stay pending appeal of an injunction which applies only to Texas, other states will not be significantly impacted by these preliminary proceedings.

CONCLUSION

For these reasons, Appellees respectfully request that the Court deny the untimely motion for leave to file an amicus brief by potential amici.

Dated: September 20, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on September 20, 2017. I certify that a true and correct copy of this document has been served on all counsel of record via the Court's CM/ECF system.

/s/R. Paul Yetter

R. Paul Yetter

CERTIFICATE OF COMPLIANCE

I certify that:

1. This document complies with the length limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 734 words and does not exceed 5,200 words, exclusive of the parts of the document exempted by Federal Rule of Appellate Procedure 27(d)(2).

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1) because it was prepared in Microsoft Word 14-point, proportionally spaced Times New Roman font.

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