



10 G Street NE, Suite 600 | Washington, DC 20002

Via Electronic Filing

Uzoma Nkwonta
UNkwonta@elias.law

September 19, 2022

United States Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130
Attn: Lyle W. Cayce, Clerk

Letter Brief Addressing this Court's Jurisdiction in *Texas State LULAC v. Paxton*, No. 22-50690

As requested by the Court's directive, dated September 15, 2022, Plaintiffs-Appellees Texas State LULAC and Voto Latino file this letter brief to address this Court's jurisdiction following the filing of a motion for reconsideration and/or clarification under Federal Rule of Civil Procedure 59(e) in the district court on August 30, 2022. For the reasons below, under Federal Rule of Appellate Procedure 4(a)(4), this Court has not had jurisdiction over the appeal since the Rule 59(e) motion was filed below. This Court has discretion to either stay this appeal until the Rule 59(e) is resolved or dismiss the appeal outright.

Under Rule 4, "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of [a motion for reconsideration under Federal Rule of Civil Procedure 59(e)]—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i). This Court has accordingly "found that the timely filing of a [Rule 59(e) motion] suspends or renders dormant a notice of appeal until all such motions are disposed of by the trial court." *Ross v. Marshall*, 426 F.3d 745, 751-52 (5th Cir. 2005). "This holds true regardless of whether the motion was filed before or after the notice of appeal." *Id.*

Jurisdiction vests in the court of appeals once the notice of appeal becomes effective. As this Court explained in *Ross*, "a notice filed before the filing of [a Rule 59(e) motion] or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon the previously filed notice effectively places jurisdiction in the court of appeals." *Ross*, 426 F.3d at 752 n.13 (quoting Fed. R. App. P.4 Advisory Committee note (1993 Amendments)). Thus, for example, this Court held that it lacked jurisdiction where the appellant filed a notice of appeal after a motion for reconsideration was filed but before the motion was resolved. *See Simmons v. Reliance Standard Life Ins. Co.*, 310 F.3d 865, 868 (5th Cir. 2002) ("Because [appellant] timely filed its motion for reconsideration, and the district court has not yet disposed of that motion, it seems clear that the district court's decision is not final. Therefore, we have no jurisdiction over this appeal."); *see also Katerinos v. U.S. Dept. of Treasury*, 368 F.3d

733, 738 (7th Cir. 2004) (“A premature notice of appeal is . . . merely suspended; it becomes effective when the order disposing of the last such remaining motion is entered. Nevertheless, until a notice of appeal becomes effective, this court lacks jurisdiction.”).

This Court lacks jurisdiction because the notice of appeal has not yet become effective. Defendants-Appellants Ken Paxton, Lupe C. Torres, and Terrie Pendley filed a notice of appeal of the district court’s summary judgment order on August 4, 2022. Several County Defendants later filed a motion for reconsideration of the summary judgment on August 30, 2022. The district court has not disposed of the motion as of this filing. This Court has made clear that Defendants-Appellants’ notice of appeal is “suspend[ed]” and not “effective” until the County Defendants’ motion for reconsideration is disposed of, and that it lacks jurisdiction until that time. *Ross*, 426 F.3d at 751-52; *Simmons*, 310 F.3d at 868.

In their merits brief, the Defendants-Appellants contend that this Court presently has jurisdiction over the appeal because the County Defendants’ Rule 59(e) motion “did *not* ask the trial court to change its judgment,” and, as a result, “is not a proper Rule 59 motion.” Apps.’ Br. at 4 (emphasis in original). Appellants are correct that the Rule 59(e) motion does not seek to amend the judgment, but that does not change the fact that “a district court responding to a motion for reconsideration ‘necessarily has discretion . . . to reopen a case’ and may change its ruling on the merits.” *Simmons*, 310 F.3d at 868 (quoting *United States v. O’Keefe*, 128 F.3d 885, 891 (5th Cir. 1997)). Regardless of the relief sought by the movants, the district *could* amend its judgment now that a timely motion for reconsideration has been filed. *Id.* Appellants, in effect, ask this Court to assume the district court will not amend its judgment, or will find the motion improper. While Appellees agree that nothing in the County Defendants’ motion provides a reason for the final judgment to be amended, this Court may not rest its jurisdiction on mere assumption about how the district court will resolve the pending motion.

While the authorities make clear that this Court currently lacks jurisdiction, the consequences for this appeal are less certain. Several courts of appeals—including this Court in *Simmons*—have dismissed appeals as premature even where the parties had already filed their principal merits briefs. *See, e.g., Simmons*, 310 F.3d at 869-870; *Miller v. Marriott Int’l, Inc.*, 300 F.3d 1061, 1065 (9th Cir. 2002) (same); *Square D Co. v. Fastrak Softworks, Inc.*, 107 F.3d 448, 450 (7th Cir. 1997) (same). However, as Appellants note in their merits brief, in *Katerinos*, the Seventh Circuit explained that “the court of appeals may choose to stay the appeal until the motion is decided” if “the premature notice of appeal is not discovered until significant judicial and attorney resources have been expended.” *Katerinos*, 368 F.3d at 738. Appellees do not object to that outcome here, where Appellants have already filed their opening brief and Appellees’ own brief is due in only a few days. Appellees defer to the Court’s discretion as to which remedy is most appropriate.

Respectfully submitted,

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta

cc: counsel of record via CM/ECF