No. 22-50690

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS STATE LULAC; VOTO LATINO,

Plaintiffs - Appellees,

v.

BRUCE ELFANT; ET AL.,

Defendants,

LUPE C. TORRES, IN HER OFFICIAL COMPACITY AS THE MEDINA COUNTY ELECTIONS ADMINISTRATOR; TERRIE PENDLEY, IN HER OFFICIAL COMPACITY AS THE REAL COUNTY TAX ASSESSOR-COLLECTOR; KEN PAXTON, TEXAS ATTORNEY GENERAL,

Intervenor Defendants - Appellants.

On Appeal from the United States District Court for the Western District of Texas,
Austin Division, No. 1:21-cv-00546-LY
The Honorable Lee Yeakel, U.S. District Judge

COUNTY DEFENDANTS' MOTION FOR LEAVE TO FILE LETTER BRIEF REGARDING THE FIFTH CIRCUIT'S APPELLATE JURISDICTION

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MOTION FOR LEAVE TO FILE LETTER BRIEF

Movants El Paso County Elections Administrator Lisa Wise and Harris County Elections Administrator Clifford Tatum respectfully request leave to file the attached letter brief in response to this Court's September 15, 2022, Directive to file letter briefs of no more than two pages addressing this Court's appellate jurisdiction. That Directive followed Movants' and County Defendant Scarpello's timely filed Motion for Reconsideration and/or Clarification of the Court's August 2, 2022 Order and Judgment in the district court. *See* Case No. 1:21-cv-000546-LY, ECF No. 184 ("Motion for Reconsideration").

In its August 2 Order on Cross-Motions for Summary Judgment, the district court concluded that Movants and other County Defendants may be enjoined under 42 U.S.C. § 1983 because they have a "policy or custom" related to enforcement of SB 1111 that was the "moving force" behind Plaintiffs' injuries. *See* ECF No. 171 ("Order") at 15 (quoting *Monell v. New York City Dep't of Social Servs.*, 436 U.S.

658, 694 (1978)). Plaintiffs, however, neither pleaded nor moved to enjoin County Defendants under a *Monell* theory of liability. Indeed, Plaintiffs brought only a facial challenge to the contested provisions of SB 1111, and *neither* the Plaintiffs *nor* the State Defendants raised the *Monell* issue. Rather, in response to Plaintiffs' motion, Defendant Yvonne Ramon—citing *Monell* and *Los Angeles County v. Humphries*, 562 U.S. 29, 36–37 (2010)—contended that "in order to establish their entitlement to [injunctive] relief [against Ramon], Plaintiffs must provide evidence of an official policy promulgated by Defendant Ramon." ECF No. 151 at 1.

Neither of the moving parties responded to Defendant Ramon's contention that *Monell* applied. *See* ECF Nos. 154–1, 156, 165. But after the district court adopted Defendant Ramon's position on *Monell*, and in an effort to have the district court correct that error without the need for this Court's intervention, Movants and other County Defendants timely filed their Motion for Reconsideration, contending that the district court erred in holding County Defendants liable pursuant to *Monell*. *See* Motion for Reconsideration at 6–11. Where—as here—a suit for injunctive relief is brought against a county official who is merely enforcing state law, any injunction against them should issue pursuant to *Ex parte Young*, 209 U.S. 123, 160 (1908). *See Daves v. Dallas Cnty., Tex.*, 22 F.4th 522, 532–33 (5th Cir. 2022) (recognizing whether local officials are acting "for a local governmental unit or the

state" determines whether the standard Section 1983 inquiry or the heightened *Monell* municipal liability inquiry applies).

For the reasons explained in the proposed Letter Brief, Movants respectfully contend that their and County Defendant Scarpello's Motion for Reconsideration holds in abeyance Intervenor-Defendants' notice of appeal, which cannot become effective until the District Court rules on their motion.

As Movants have an interest in seeing that their Motion for Reconsideration is resolved in the district court before any appeal of the Order at issue commences, Movants respectfully request that they be permitted to file the attached letter brief in response to the Court's inquiry about its jurisdiction over the appeal.[1]

[1] If the Court does not decide the jurisdictional issue by Thursday, September 22, or if the Court concludes it retains jurisdiction over the appeal, Movants plan to timely file a motion for leave to file an *amicus curiae* brief addressing the *Monell* issue pursuant to Fed. R. App. P. 29(a)(6).

Dated: September 19, 2022

Respectfully submitted,

By: */s/ Kathleen Hartnett*

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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 appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Via ECF

September 19, 2022

Honorable Lyle W. Cayce
Clerk of Court
United States Court of Appeal for the Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: Texas State *LULAC v. Paxton*, No. 22-50690
USDC No. 1:21-CV-546

Dear Mr. Cayce,

County Defendants El Paso County Elections Administrator Lisa Wise and Harris County Elections Administrator Clifford Tatum respectfully submit this letter in response to the Court's September 15, 2022 Directive to file letter briefs of no more than two pages addressing this Court's appellate jurisdiction. County Defendants are not presently parties to this appeal, but they are interested parties as to the question of this Court's jurisdiction over the appeal while their Motion for Reconsideration and/or Clarification of the Court's August 2, 2022 Order and Judgment is considered in the district court. *See* Case No. 1:21-cv-000546-LY, ECF No. 184 ("Motion for Reconsideration"). The El Paso, Harris, and Dallas County Defendants timely filed their Motion for Reconsideration within 28 days of the district court's August 2, 2022, Order and Judgment under Federal Rule of Civil Procedure 59(e) (or in the alternative under Rule 60(b)).

This Circuit treats a timely filed motion for reconsideration "as a Rule 59(e) motion that suspends the time for filing a notice of appeal." *Bass v. U.S. Dep't of Agric.*, 211 F.3d 959, 962 (5th Cir. 2000) (citing *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998)). A timely filed Rule 59(e) motion is among those motions specified under Federal Rule of Appellate Procedure 4(a)(4)(A) that "suspends or renders dormant a notice of appeal until all such motions are disposed of by the trial court[,] . . . regardless of whether the motion was filed before or after the notice of appeal." *Ross v. Marshall*, 426 F.3d 745, 751–52 (5th Cir. 2005); *see also Tripati v. Henman*, 845 F.2d 205, 206 (9th Cir. 1988) ("Because the purpose of Rule 4(a)(4) is to prevent duplication of effort by the courts, appellate review of the underlying merits of [appellant's] summary judgment appeal would be premature prior to the district court's consideration of the motion to alter or amend the judgment."); Fed. R. App. P. 4 Advisory Committee Note to Paragraph (a)(4) (1993) ("A notice filed before the filing of one of the specified motions 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.").

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In their Opening Brief, the Intervenor Defendants-Appellants contend that this Court retains jurisdiction over the appeal because County Defendants' Motion for Reconsideration was "not a proper Rule 59 motion," suggesting that it seeks only "a change to the district court's order . . . *not* its final judgment." Brief for Intervenor Defendants-Appellants ("Br.") at 4. This contention is wrong, for several reasons.

First, County Defendants' Motion sought reconsideration of both the district court's "Order *and* Judgment." *See* Motion for Reconsideration at 1 (emphasis added). The Motion asked the district court to reconsider the basis for liability underpinning its order and judgment, and since the legal reasoning challenged by the County Defendants underpinned the district court's judgment, the motion certainly relates to the merits. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) ("[A] postjudgment motion will be considered a Rule 59(e) motion where it involves reconsideration of matters properly encompassed in a decision on the merits." (citation and internal quotation marks omitted)).

Second, even if County Defendants' Motion only sought a change to the Order, not the Judgment, such a distinction is without a difference. This Court and district courts throughout this Circuit regularly treat a Motion for Reconsideration of a court's *order* as a properly filed Rule 59(e) motion. *See Charles L.M. v. Ne. Indep. Sch. Dist.*, 884 F.2d 869, 869 (5th Cir. 1989) (recognizing that "motion for reconsideration of the *order* granting the motion to dismiss" is "treat[ed] as a Fed. R. Civ. P. 59(e) motion that tolls the running of the thirty-day period for filing notice of appeal" and that "[o]nce the rule 59(e) motion was ruled upon, the thirty-day period for appeal began running anew" (emphasis added)); *see also Flynn v. Terrebonne Par. Sch. Bd.*, 348 F. Supp. 2d 769, 771 (E.D. La. 2004) (reviewing motion for reconsideration "under Rule 59(e)" that seeks "reconsideration of a prior *order*" (emphasis added)); *Fields v. Pool Offshore, Inc.*, No. CIV. A. 97-3170, 1998 WL 43217, at *2 (E.D. La. Feb. 3, 1998) (same).

Third, even assuming that the County Defendants' Motion was "not a proper Rule 59 motion," Br. at 4, County Defendants moved in the alternative under Federal Rule of Civil Procedure 60(b), which provides relief from a judgment, order, or proceeding. *See* Motion for Reconsideration at 2 n.2. A timely Rule 60(b) motion also "suspends or renders dormant a notice of appeal until all such motions are disposed of by the trial court[,] . . . regardless of whether the motion was filed before or after the notice of appeal." *Ross*, 426 F.3d at 751–52; *see* Fed. R. App. P. 4(a)(4)(A)(vi).

Accordingly, this Court presently lacks appellate jurisdiction over the instant case.

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Sincerely,

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