

No. 18-20780

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEPHEN E. STOCKMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON
DIVISION, NO. 4:17-CR-00116-2, HON. LEE H ROSENTHAL

**EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND'S
UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS
CURIAE* BRIEF IN SUPPORT OF REHEARING *EN BANC***

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CERTIFICATE OF INTERESTED PERSONS

The case number is No. 18-20780. The case is styled as *United States v. Stockman*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the appellant’s list of persons and entities having an interest in the outcome of this case – as supplemented with respect to *amici curiae* by the list provided by *amicus* American Target Advertising, Inc., *et al.* – is complete, to the best of the undersigned counsel’s knowledge. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund is a nonprofit corporation with no parent corporation, and that no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: January 31, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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MOTION FOR LEAVE TO FILE

Pursuant to FED. R. APP. PROC. 27 and by analogy to FED. R. APP. PROC. 29(a), the Eagle Forum Education & Legal Defense Fund (“EFELDF”) respectfully requests leave to file the accompanying *amicus curiae* brief in support of the appellant’s petition for rehearing *en banc*. Counsel for the parties indicated that the plaintiff-appellee does not oppose this motion for leave to file an EFELDF *amicus* brief, and the defendant-appellant consents to the motion and the filing of the brief.

IDENTITY, INTEREST AND AUTHORITY TO FILE

Eagle Forum Education & Legal Defense Fund is a nonprofit Illinois corporation. Founded in 1981, EFELDF has consistently defended adherence to the Constitution as written, including robust protection of speech under the First Amendment. For these reasons, EFELDF has a direct and vital interest in the issues before this Court.

AUTHORITY TO FILE EFELDF’S BRIEF

Rule 29 requires identifying the movant’s interest and “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” FED. R. APP. P. 29(a)(3)(B), (b)(3). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that “[t]he amended rule [Rule 29(b)] ... requires that the motion state the relevance of the matters asserted to the disposition of the case.” The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court’s attention to relevant matter

not raised by the parties:

An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (quoting Sup. Ct. R. 37.1). “Because the relevance of the matters asserted by an *amicus* is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.” *Id.*

As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the Third Circuit, “I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Now-Justice Alito quoted the Tigar treatise favorably for the statement that “[e]ven when the other side refuses to consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.” 293 F.3d at 133. As explained in the next section, the EFELDF brief meets Rule 29’s criteria.

**FILING EFELDF’S BRIEF WILL SERVE THE COURT’S
RESOLUTION OF THE ISSUES RAISED**

This Court should grant EFELDF’s motion for leave to file the accompanying *amicus* brief because the brief will aid the Court by addressing the following issues.

- The *amicus* brief discusses the disconnect between the panel decision and this Court’s en banc precedent, *In re Cao*, 619 F.3d 410, 418 (2010) (*en banc*), including the prescient partial dissents by then-Chief Judge Jones and Judge Clement on the issue of coordinated expenditures. *See Amicus Br.* at 4-8.
- The *amicus* brief collects additional authority on not only the existence of jury confusion but also the de novo review that such confusion requires when it falls into the area of misstating or confusing the statutory elements of a crime. *See id.* at 8-10.
- Finally, because the *amicus* brief raises some arguments in support of the issues that the petitioner raises, the *amicus* brief also addresses the distinction between issues raised by a party and arguments in support of those issues for purposes of waiver. *See id.* at 10-11.

For the foregoing reasons, movant EELDF respectfully submits that its brief will aid the Court’s consideration of the issues presented here.

CONCLUSION

The Court should grant leave to file the EFELDF *amicus* brief.

Dated: January 31, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF COMPLIANCE

No. 18-20780, *United States v. Stockman*.

1. The accompanying motion for leave to file complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because the motion contains 696 words, excluding the parts of the document exempted from counting.

2. The foregoing document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: January 31, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

No. 18-20780, *United States v. Stockman*.

I hereby certify that, on January 31, 2020, I electronically filed the foregoing motion for leave to file – together with the accompanying *amicus* brief – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system’s service-list report showed that all participants in the case were registered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph