

No. 16-2424

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Michigan
Case No. 2:14-cv-13710, Hon. Sean F. Cox

CONSENT MOTION FOR EXTENSION OF TIME TO FILE *AMICUS* BRIEF

RICHARD B. KATSKEE
CARMEN N. GREEN
KELLY M. PERCIVAL
*Americans United for
Separation of Church and
State
1310 L Street, NW
Suite 200
Washington, DC 20005
(202) 466-3234*

Counsel for Amicus Curiae

BACKGROUND

This case is an appeal by Plaintiff-Appellant Equal Employment Opportunity Commission from a decision of the U.S. District Court for the Eastern District of Michigan granting summary judgment to Defendant Harris Funeral Homes on a sex-discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The court below granted summary judgment to the funeral home, holding that although the EEOC stated a valid claim for relief, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, exempts the funeral home from the pertinent requirements of Title VII.

On January 26, 2017, Aimee Stephens—the victim of the discrimination—filed a motion to intervene as a plaintiff-appellant in this appeal and requested that her opening brief be due on February 26, 2017, to correspond to the EEOC’s due date. Because February 26 is a Sunday, both briefs would thus be due on Monday, February 27, making *amicus* briefs supporting Appellant and the Intervenor presumptively due on March 6.

Appellee filed an opposition to the intervention motion on February 6, and Stephens filed her reply on February 13 (two days ago). The Court has not yet ruled on the intervention motion.

In the meantime, Appellant filed its opening brief on the merits last Friday, February 10, which was seventeen days before its filing deadline. As

a result, *amicus* briefs in support of Appellant are currently due this Friday, February 17 (two days from now).

Amicus respectfully requests an extension of the time to file its brief until Monday, March 6, 2017, one week after the date that the proposed Intervenor has requested to file her brief, or else the alternative relief described below. The parties and the proposed Intervenor have all consented to this motion (as well as to the filing of the *amicus* brief in general), and to all the alternative forms of relief requested here.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in leading church–state cases decided by the United States Supreme Court, this Court, and the other federal courts of appeals. Americans United advocated for passage of the Religious Freedom Restoration Act nearly twenty-five years ago. Since then, Americans United has served as litigant, counsel, or *amicus curiae* in leading cases arising under RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.* Indeed, Americans United proposed the factors for evaluating the constitutionality of RFRA and

RLUIPA that the Supreme Court then adopted in *Cutter v. Wilkinson*, 544 U.S. 709 (2005)—factors that must be met for religious accommodations to be constitutionally permissible and potentially available under RFRA. In *amicus*'s experience, RFRA, when properly interpreted and applied, furthers the fundamental principles in the First Amendment's Religion Clauses, thus protecting the religious freedom of all Americans. Americans United has a strong interest in ensuring that this Courts correctly applies RFRA so that it remains the shield for religious freedom that Congress intended, and does not become a sword in the hands of some to impose their religious beliefs on others.

REASONS WHY THE MOTION SHOULD BE GRANTED

Amicus requests leave to file its brief on March 6, 2017, one week after proposed Intervenor Stephens has requested to file her brief, for the following reasons:

1. Assuming that the pending intervention motion is granted, Intervenor's brief will be due on February 27. *Amicus* intends to speak to the issues presented by the supported parties while avoiding duplication of the parties' arguments. Affording *amicus* seven days after Intervenor's brief is due—the normal period authorized by Federal Rule of Appellate Procedure 29(a)(6)—will allow *amicus* to present a brief that is as helpful to the Court

as possible, while not unnecessarily burdening the Court with duplicative arguments.

2. Should the intervention motion not be decided before this Friday, February 17, or should intervention be denied, *amicus* respectfully requests that the Court grant a seven-day extension of the time to file the *amicus* brief (making the brief due on February 24), or else whatever other extension the Court deems appropriate to allow for the preparation and submission of the brief. In that regard, the following additional considerations warrant the extension.

3. First, as noted, *amicus* anticipated that Appellant would file its opening brief on or about February 27—the due date for that brief. Because Appellant filed its brief seventeen days early, unexpectedly and without advance notice to *amicus*, the time for preparing the *amicus* brief was likewise shortened by seventeen days. And in the meantime, the uncertain posture of the case given the pending motion to intervene has left *amicus* unsure of precisely what its brief should address in order to be pertinent and non-redundant. It simply would not be possible now for *amicus* to prepare and file a brief that will be helpful to the Court by the current presumptive deadline of February 17.

4. Compounding that problem is a second but related consideration. The denial of an extension would cause *amicus* undue hardship because *amicus*

was originally working on a brief jointly with the American Civil Liberties Union, which, however, is now counsel to the proposed Intervenor. The ACLU was to have been the principal drafter of that joint *amicus* brief. To comply with both the letter and the spirit of Federal Rule of Appellate Procedure 29(a)(4)(E), therefore, we had to start fresh on an entirely new *amicus* brief after the filing of the intervention motion to ensure that counsel for a potential party had no hand whatever in the preparation or submission of the *amicus* brief or the arguments made therein.

5. The undersigned has contacted counsel for Appellant, Appellee, and the proposed Intervenor, and all have authorized us to state that they consent to this motion and to the relief from the filing deadline requested in it.

CONCLUSION

If intervention is granted, the Court should extend the deadline for the proposed *amicus* brief until March 6, 2017. If the intervention motion is not ruled on before February 17, or if that motion is denied, the Court should grant *amicus* an extension of its briefing deadline until February 24—seven days after the current due date—or else whatever alternate period the Court deems reasonable given the highly unusual circumstances in which this request is being made.

Respectfully submitted,

/s/ Richard B. Katskee

RICHARD B. KATSKEE

CARMEN N. GREEN

KELLY M. PERCIVAL*

*Americans United for Separation
of Church and State*

1301 L Street NW

Suite 200

Washington, D.C. 20005

(202) 466-3234

Counsel for Amicus Curiae

Date: February 15, 2017

*A member of the California bar. Supervised by Richard B. Katskee, a member of the D.C. bar.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), the undersigned counsel for appellants certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 1,094 words; and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Richard B. Katskee

CERTIFICATE OF SERVICE

I certify that on February 15, 2017 the foregoing motion was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Richard B. Katskee