

No. 18-2574

**United States Court of Appeals
for the Third Circuit**

SHARONELL FULTON, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,
Defendants-Appellees.

On Appeal from the U.S District Court for the
Eastern District of Pennsylvania,
No. 2:18-cv-02075-PBT (Hon. Petrese B. Tucker, U.S.D.J.)

**PLAINTIFFS-APPELLANTS' EXPEDITED MOTION
FOR LEAVE TO FILE OVERLENGTH BRIEF**

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In accordance with Appellate Rule 27 and Circuit Rules 27.3 and 27.7, Plaintiffs-Appellants respectfully request leave to file an overlength brief. Defendants-Appellees and Intervenor-Appellees do not consent to this motion, but state they do not plan to file any opposition.

Plaintiffs-Appellants' reply brief is due on October 5, 2018, on an expedited schedule. The brief responds to separate briefs filed by City-Appellees (12,806 words) and Intervenor-Appellees (12,004 words). Plaintiffs-Appellants respectfully request leave to file a reply brief of no more than 9,750 words.

ARGUMENT

After a three-day evidentiary hearing and expedited briefing, the District Court denied Appellants' motion for a preliminary injunction. The court ruled against Appellants on eight separate claims for relief arising under the Pennsylvania Religious Freedom Act ("RFPA"), as well as the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the United States Constitution, as well as other factors relevant to granting a preliminary injunction.

Following Appellants' notice of appeal, the District Court on limited remand granted the motion by Support Center for Child Advocates and

Philadelphia Family Pride to Intervene as Defendants-Appellees. On appeal, the City and Intervenors filed separate briefs. The City's brief totaled 12,806 words and Intervenors' brief totaled 12,004 words.

The City's brief and Intervenors' brief assert distinct legal arguments which require separate responses from Appellants. For example, the City's brief contends that shutting down the foster care intake of Catholic Social Services ("Catholic") complies with the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment. In a single sentence, the City adds that ruling for Catholic on these grounds "would likely" violate the Establishment and Equal Protection Clauses. CityBr.46. Intervenors' brief then argues at length that the Establishment and Equal Protection Clauses not only permit but compel the City to end its decades-long relationship with Catholic. Intr.Br.39-46.

This Court reserves overlength briefs for "extraordinary circumstances." *See Third Circuit Standing Order Regarding Motions To Exceed The Page Limitations Of The Federal Rules Of Appellate Procedure* (January 9, 2012). Appellants meet that standard.

Appellants must answer two distinct merits briefs in a single responsive brief on important questions of constitutional law. As this Court's Standing Order itself acknowledges, an overlength brief is probably necessary where an appellee's "single responsive brief" must answer multiple merits briefs in a consolidated appeal. *Id.* Appellants here face the same difficulty as an appellee in a consolidated appeal: their responsive brief must answer two distinct merits briefs raising independent arguments.

If anything, Appellants here have a more substantial need for overlength briefing because Intervenors' constitutional arguments were discussed only briefly by the parties and only mentioned in a footnote in the District Court's ruling below. *See* Appx.0036 (District Court's footnote). Ordinarily, a reply brief identifies arguments that the appellee failed to address and answers an appellee's counterpoints—not arguments that are new on appeal. *See* Bar Ass'n for the Third Federal Circuit, *U.S. Court of Appeals for the Third Circuit Practice Guide* 18 (3d ed. 2016). Leave to file an overlength reply brief is necessary so Appellants can meaningfully respond to the Intervenors' arguments.

Appellants have also received and granted requests for consent for five separate *amicus* briefs, which will surely raise additional arguments and to which Appellants will have very limited time and space to respond.

Appellants request leave to file a reply of no more than 9,750 words. That 50% length increase is modest; the City and Intervenors' combined briefing will still exceed that of Appellants by over 2,000 words.

Plaintiffs-Appellees have substantial need for filing the overlength brief and are exercising diligence in making every effort to reduce the size of the brief.

CONCLUSION

For all the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court grant the motion for overlength brief and permit Plaintiffs-Appellants to file a reply brief of no more than 9,750 words.

Respectfully submitted,

Dated October 2, 2018

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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 Ninth Circuit by using the appellate CM/ECF system on October 1, 2018.

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

Dated October 2, 2018

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(A) AND
LOCAL RULE 31.1**

I hereby certify that the following statements are true:

1. This motion complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 635 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 32.
2. This motion complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.
3. This motion complies with the electronic filing requirements of Local Rule 25. The latest version of Bitdefender Endpoint Security Tools has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 2nd day of October, 2018.

/s/ Mark L. Rienzi
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