

No. 18-50811

In the United States Court of Appeals
For the Fifth Circuit

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION,
INCORPORATED,

Plaintiffs - Appellants

CONN WILLIAMSON

Appellant

v.

UNITED STATES DEPARTMENT OF STATE; MIKE POMPEO,
SECRETARY, U.S. DEPARTMENT OF STATE; DIRECTORATE OF
DEFENSE TRADE CONTROLS, Department of State Bureau of Political Military
Affairs,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, Austin Division; No. 1:15-CV-372

**Appellants Response to
Appellees' Motion for Leave to File a Declaration
to Correct Statement in the Answering Brief**

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Response

The State Department's motion seeks two things. Only one is unopposed.

First, the State Department's motion seeks "leave from the Court to file a declaration to correct a statement in the answering brief." Specifically, it seeks to "correct the erroneous statement in the government's answering brief that the government had complied fully with its obligation to pay the settlement amount." Decl. ¶ 9. The motion is accurate in saying that Appellants do not oppose that relief.

But then the motion goes further, apparently (or at least arguably) seeking relief that the Appellants are not in agreement with. This warrants clarification.

Page two of the State Department's motion seeks "leave from the Court . . . to reflect that the government had now paid the plaintiffs \$39,581 in settlement no later than September 23, 2019." Mot. at 2. The Appellants do not know what it means to "reflect" that. So the Appellants do not agree to that. Here is Appellants' position.

Filing the State Department's new declaration is unobjectionable *to the extent that* it merely "correct[s] the erroneous statement in the government's answering brief that the government had complied fully with its obligation to pay the settlement amount." Decl. ¶ 9. That concession is true insofar as it goes—the State Department's brief was, indeed, wrong to argue that it "had complied fully with its obligation to pay the settlement amount"—and the Appellants have no problem with the State Department using the declaration to show that their brief's error was *unintentional*. But beyond that, the declaration cannot "reflect" anything else.

Most importantly, the State Department’s new declaration cannot constitute part of the “record on appeal.” Fed. R. App. P. 10; *see* 9A Charles A. Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 3956.1 (5th ed. 2019). So to the extent that the State Department’s motion wants the new declaration to “reflect” *something that might impact the appeal’s disposition on the merits*, the Appellants oppose the motion. This declaration cannot change the action’s merits.

When the district court made the decision at issue, the record before it had no evidence of payment *because the State Department had not paid*. So when the Plaintiffs filed their appellants’ brief, the appellate record had no evidence of payment; and when the State Department filed its appellees’ brief, the appellate record still had no evidence of payment. And yet the State Department’s brief still took the opposite position. Its assertion of having paid the settlement did not just contradict the actual state of affairs at the time (though it did). It also contradicted what matters most—the actual appellate record.

The State Department’s new declaration speaks only to the error’s first aspect (contradicting reality at the time of filing). It says nothing about the more important mistake of contradicting the appellate record. That error cannot ever be remedied.

Because of this, the Court’s decision of the appeal’s merits should *not* do as the motion suggests and “reflect” (whatever that means) that payment occurred after all of the briefs were filed. Mot. at 2. The distinction boils down to this: The State Department’s new declaration can be used only to retreat—not to advance.

Conclusion

Appellants do *not* oppose the State Department’s request for leave to file the declaration “to correct the erroneous statement in the government’s answering brief that the government had complied fully with its obligation to pay the settlement amount.” Decl. ¶ 9.

Appellants *do* oppose the motion’s request for anything more than that, including leave to make the new declaration “reflect” anything about how the Court should resolve the appeal’s merits.

October 11, 2019

Respectfully submitted,

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Certificate of Service

I filed this document on October 11, 2019, with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service on all participating counsel will be accomplished by the appellate CM/ECF system.

/s/ Chad Flores

Chad Flores

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/s/ Chad Flores

Chad Flores