

**United States District Court
Southern District of Texas
Victoria Division**

STATE OF TEXAS, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
et al.,

Defendants.

Case 6:23-cv-00007

**PLAINTIFF STATES' OPPOSITION TO
INTERVENORS' MOTION FOR LEAVE TO AMEND WITNESS AND EXHIBIT LIST
AND NOTICE OF WITHDRAWAL OF NON-OPPOSITION TO SAME**

Plaintiffs previously indicated no opposition to Intervenor's Motion for Leave to Amend Witness and Exhibit List, ECF No. 215, while simultaneously jointly filing a request to extend Plaintiffs' deadlines to file objections and motions to exclude to exhibits not listed on Intervenor's previous Witness and Exhibit List that was filed on August 2. *Id.*

Plaintiffs had quickly indicated no opposition to the Motion with an eye toward allowing objections and motions to exclude, and oppositions to the same, to be completed in advance of trial. Intervenor filed their Motion on Thursday, August 10. However, the volume of previously undesignated declarations and exhibits listed as an attachment to the Motion—76 newly designated exhibits, including 25 declarations—makes it impossible for Plaintiffs to consider them and submit objections and motions to exclude by the end of today, August 14. Allowing Intervenor to reopen this so close to trial is prejudicial to Plaintiffs' preparation for it—the wisdom of the Court's deadline for all exhibit lists to be filed by August 2, ECF No. 159 at 6(c)(i), is evident. Plaintiffs hereby withdraw their lack of opposition to the Motion.

Intervenor has maintained that the following provision of the Court's scheduling order relieved them of the need to designate on their Witness and Exhibit List any of their exhibits and declarations attached to their earlier briefing on the preliminary injunction motion:

1. The Parties' previous briefing and exhibits, including any supplemental briefing or extra-record evidence including affidavits or declarations, on Plaintiffs' Motion for Preliminary Injunction, (Dkt. No. 22), are incorporated and consolidated with this Court's consideration of the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). The evidentiary materials attached to the Parties' previous briefing, and any supplemental exhibits, affidavits, or declarations they may submit, are admitted as authentic and without need of a sponsoring witness and are presumptively admitted as "part of the trial record and need not be repeated at trial." Fed. R. Civ. P. 65(a)(2).

ECF No. 159.

But that provision merely made all the previously submitted exhibits part of the trial record and therefore eligible to be relied on by the parties—if they so designated them on their exhibit lists, as indicated by another provision of the scheduling order:

No later than August 2, 2023: Defendants shall file an Exhibit List identifying any affidavits, declarations, or documentary evidence, other than the administrative record, that they may wish the Court to consider, including any documents they may seek to introduce through live testimony. Defendants are not required to identify documents they may potentially rely upon in cross-examination for purposes of impeachment. Except for the administrative record, Defendants shall produce courtesy copies to the Court and the Plaintiffs of the proposed Exhibits but shall not file them.

ECF No. 159 at 6(c)(i).

It would make no sense to require designation of "affidavits, declarations, or documentary evidence" but not require the Intervenor to put the parties on notice of all such documents they will rely on at trial, especially as this latter provision enumerates the *only* exceptions for designation: the administrative record and documents the parties may rely on for cross-examination for purposes of impeachment.

Intervenor should be limited to relying on exhibits designated in their Witness and Exhibit List timely filed on August 2. ECF No. 207. Plaintiffs respectfully ask the Court to deny the Motion.

Dated: August 14, 2023

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CERTIFICATE OF SERVICE

I certify that on August 14, 2023, I filed this motion through the Court's CM/ECF system, which served it on all counsel of record.

/s/ Ryan D. Walters