

# Wiley Files *Amicus* Brief with Supreme Court Supporting Local Government Organizations Challenging Fifth Circuit Decision That District Courts Lack Discretion to Assess Appellate Costs

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March 8, 2021

Washington, DC – Along with co-counsel Lisa E. Soronen, F. Andrew Hessick, and Luke H. Everett, Wiley filed an *amicus* brief on March 3, 2021, with the Supreme Court of the United States in *City of San Antonio, Texas v. Hotels.com, L.P.* on behalf of the National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, and International Municipal Lawyers Association. The brief supports the City of San Antonio’s challenge to the U.S. Court of Appeals for the Fifth Circuit’s decision that district courts may not exercise discretion in assessing appellate costs under Fed. R. App. P. 39(e).

The City of San Antonio brought a class action on behalf of 173 Texas municipalities against certain online-travel companies for failing to pay hotel-occupancy taxes. After the district court ruled for the cities, the companies posted appellate bonds to stay execution on the judgment pending further proceedings. On appeal, the Fifth Circuit reversed and ordered costs taxed against the City. Under Fed. R. App. P. 39(e), four categories of “costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule,” specifically (a) costs incurred for the preparation and transmission of the record; (b) the reporter’s transcript; (c) premiums paid for a bond or other security to preserve rights pending appeal; and (d) the fee for filing the notice of appeal. On remand, the companies filed a bill of costs that included over \$2 million for

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## Practice Areas

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premiums paid on the appellate bonds, to which the City objected. The district court rejected the City's objections on the grounds that, under Fifth Circuit precedent, it had no discretion under Fed. R. App. P. 39(e) to reduce or deny appellate costs. The Fifth Circuit affirmed.

Wiley's brief argues that the Supreme Court should reverse the Fifth Circuit's decision and hold that in taxing appellate costs, district courts should exercise their sound discretion to assess costs in an equitable manner under all the relevant circumstances of the particular case, including the amount of the costs, the good faith of the losing party, the merit and importance of the legal positions unsuccessfully advanced, the reasons the costs were incurred (including any unreasonable conduct by the prevailing party that increased the costs incurred), and the financial ability of the losing party to pay.

The brief notes that premiums on appellate bonds can be substantial and can impose a substantial financial burden on litigants, particularly litigants frequently involved in litigation – such as local governments – or litigants with limited financial resources.

The brief argues that district courts are in the best position to make the fact-intensive determination of whether appellate costs under Fed. R. App. P. 39(e) should be reduced or denied. The brief explains that district courts have close experience with the particular circumstances and litigation history of each case and generally have broad experience exercising discretion in a broad array of contexts and making the kind of fact-intensive determinations required in assessing appellate costs. Accordingly, the brief explains, in an already expensive system, it makes no sense to depart from the most efficient approach in making determinations as to awards of appellate costs – that is, assigning responsibility to exercise discretion to the district courts.

The brief was written by Richard A. Simpson, a partner in Wiley's Appellate, Litigation, and Insurance practices, and Insurance associate Emily S. Hart, along with Lisa E. Soronen, Executive Director of the State and Local Legal Center, and F. Andrew Hessick and Luke H. Everett of the University of North Carolina School of Law, assisted by law student Jaazaniah Q. Catterall and Wiley legal assistant Eden Hankin.

To read the brief, please [click here](#).