

No. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(CV 09-02371-IEG)

APPELLANTS' MOTION FOR CLARIFICATION

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INTRODUCTION

Pursuant to Ninth Circuit Rule 27-10(a), Plaintiffs-Appellants Edward Peruta, Dr. Leslie Buncher, Mark Cleary, James Dodd, Michelle Laxson, and CRPA Foundation (collectively “*Peruta* Appellants”) hereby move this Court for an Order of Clarification on the applicable deadline under Ninth Circuit Rule 29-2(e)(2) for amicus curiae to file briefs supporting the *Peruta* Appellants during the pendency of rehearing this matter en banc. While it is Appellants’ understanding that those briefs are due 35 days from the entry of this Court’s order granting rehearing en banc, it is not entirely clear how Rule 29-2(e)(2) applies when, as here, the Court grants rehearing on its own initiative. Given the immense interest of amici in this important case, the *Peruta* Appellants accordingly ask this Court to clarify the applicable deadlines.

STATEMENT OF FACTS

On February 13, 2014, a panel of the Ninth Circuit ruled in favor of the *Peruta* Appellants. Appellee William D. Gore chose not to petition for an en banc rehearing of the ruling. The State of California and the Brady Campaign to Prevent Gun Violence separately moved to intervene under Federal Rule of Civil Procedure 24. The California Police Chiefs’ Association and the California Peace Officers’

Association, amici in this case, submitted a petition for rehearing en banc. Noting that amici cannot file petitions for rehearing en banc, the panel construed the petition as a motion to intervene. On November 12, 2014, the panel denied all intervention motions.

On December 3, 2014, the panel issued an order stating that a judge of the Ninth Circuit had made a sua sponte call for a vote on whether the case should be reheard en banc. As such, the parties were ordered to file briefs setting forth their respective positions on whether the case should be reheard. As the prevailing party, the *Peruta* Appellants filed an opposition to the sua sponte call for rehearing en banc on December 24, 2014. And on the same day, Appellee William D. Gore, as the unsuccessful party, filed a brief in support of rehearing en banc.

On March 26, 2015, the Court ordered the present matter to be reheard en banc and set the date for oral argument during the week of June 15, 2015. Subsequent to these orders, organizations and individuals have approached counsel for the *Peruta* Appellants asking for consent to the filing of an amicus curiae brief in support of Appellants. Declaration of Sean A. Brady (“Brady Decl.”) ¶ 2. Because Rule 29-2(e)(2) speaks in terms of the “petitioning” and “responding” parties, and the Court did not grant any party’s petition here, amicus curiae have expressed uncertainty about the deadline for filing such briefs.

On April 2, 2015, counsel for the *Peruta* Appellants contacted counsel for Appellees to ascertain counsel's position with respect to this instant Motion for Clarification. Brady Decl. ¶ 3. Opposing counsel indicated that Appellees are not opposed to this Motion for Clarification. Brady Decl. ¶ 4. Pursuant to Circuit Rule 27-10(a)(2), this motion for clarification is timely.

ARGUMENT

Appellants respectfully request that the Court clarify the deadline under Ninth Circuit Rule 29-2(e)(2) for filing amicus curiae briefs supporting their position before the en banc panel, or, in the alternative, exercise its authority under that Rule to order an appropriate deadline for such amicus curiae briefs to be filed. Under either approach, the *Peruta* Appellants respectfully submit that the deadline should be 35 days from the entry of the order to rehear the case.

Ninth Circuit Rule 29-2 provides that amicus curiae may file a brief when the Court has granted rehearing en banc. 9th Cir. R. 29-2(a). While this Rule covers the deadlines for filing of such briefs in any case where rehearing en banc is granted, the deadlines it establishes are framed in terms of whether an amicus supports the "petitioning" or "responding" party. Specifically, Rule 29-2(e)(2) states:

Unless the Court orders otherwise, an amicus curiae supporting the position of the *petitioning* party or not supporting either party must serve its brief, along with any necessary motion, no later than 21 days after the petition for rehearing is granted. Unless the Court orders otherwise, an amicus curiae supporting the position of the *responding* party must serve its brief, along with any necessary motion, no later than 35 days after the petition for panel or en banc rehearing is granted.

9th Cir. R. 29-2(e)(2)(emphasis added).

Because review in this case resulted from a sua sponte call, it is unclear from the Ninth Circuit rules whether there is a “petitioning” or “responding” party.¹ The *Peruta* Appellants submit that they are the “responding” party, as they prevailed before the panel, did not seek rehearing en banc, and have affirmatively opposed rehearing en banc in their briefing before this Court. Accordingly, they submit that amici supporting their position should be governed by the 35-day deadline that applies for briefs supporting the responding party.

Even if that result does not follow directly from Rule 29-2(e)(2) itself, the *Peruta* Appellants respectfully submit that the Court should exercise its discretion to set a 35-day deadline for the filing of amicus briefs in support of the *Peruta* Appellants. The evident purpose of the default deadlines under Rule 29-2(e)(2) is to give the amici supporting the vacated panel decision a chance to see to the

¹ Although the Attorney General has petitioned for rehearing of the Court’s November 12, 2014 denial of its motion for intervention, the Court has not made a ruling on that petition.

arguments made by the amici who are seeking different result before they must file their own briefs. In that respect, the rule operates much like the rule that the party seeking to reverse the judgment below files its brief before the party seeking to defend that judgment. Because the *Peruta* Appellants are effectively defending the vacated panel decision, they are still positioned just like a “responding” party even if there is no technical “petitioning” or “responding” party in this matter.

Accordingly, whether the Court does so by concluding that Appellants are the “responding” party under Rule 29-2(e)(2) or by exercising its discretion thereunder to order a schedule for the filing of amicus briefs, Appellants respectfully request that the Court enter an order clarifying that amicus briefs in support of their position be filed within 35 days of the entry of the order granting rehearing en banc, i.e., by April 30, 2015.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the *Peruta* Appellants respectfully request an Order of Clarification that amicus briefs in support of the *Peruta* Appellants are due April 30, 2015.

Dated: April 3, 2015

Respectfully Submitted,

/s/ C.D. Michel
C. D. Michel
Counsel for Appellants

DECLARATION OF SEAN A. BRADY

I, Sean A. Brady, declare as follows:

1. I am an attorney at law duly licensed to practice before all courts in the State of California and the Ninth Circuit Court of Appeals. I am an associate attorney of the law firm Michel & Associates, P.C., counsel of record for Plaintiffs-Appellants Edward Peruta, Dr. Leslie Buncher, Mark Cleary, James Dodd, Michelle Laxson, and CRPA Foundation. I submit this declaration in support of Appellants' Motion for Clarification. I have personal knowledge of each fact stated in this declaration and if called as a witness I could and would competently testify thereto.

2. After the Ninth Circuit panel ordered the present matter to be reheard en banc on March 26, 2015, organizations and individuals have approached our office asking for consent to file an amicus curiae brief in support of Appellants.

3. On April 2, 2015, I contacted counsel for Appellees to ascertain Appellees' position with respect to this instant Motion for Clarification.

4. On April 3, 2015, counsel for opposing counsel indicated that Appellees are not opposed to this Motion for Clarification.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this third day of April, 2015 at Long Beach, California.

/s/ Sean A. Brady
Sean A. Brady
Declarant

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2015, an electronic PDF of APPELLANTS' MOTION FOR CLARIFICATION was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: April 3, 2015

/s/ C.D. Michel
C. D. Michel
Attorneys for *Plaintiffs-Appellants*