

No. 10-56971 [DC# CV 09-02371-IEG]

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

**APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE
AMICUS BRIEF BY LAW CENTER TO PREVENT GUN VIOLENCE AND
MARIN COUNTY SHERIFF ROBERT DOYLE**

C. D. Michel (S.B.N. 144258)
Lead Counsel
Glenn S. McRoberts (S.B.N. 144852)
Sean A. Brady (S.B.N. 262007)
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Tel. No. (562) 216-4444
Fax No: (562) 216-4445
e-mail: cmichel@michellawyers.com

Paul D. Clement
Bancroft PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
Tel. No.: (202) 234-0090
e-mail:
pclement@bancroftpllc.com

Paul Neuharth, Jr.
(S.B.N. 147073)
PAUL NEUHARTH, JR.,
APC.
1140 Union St., Suite 102
San Diego, CA 92101
Tel. No.: (619) 231-0401
Fax No.: (619) 231-8759
e-mail:
pneuharth@sbcglobal.net

Counsel for Plaintiffs-Appellants

On February 27, 2014, the Law Center to Prevent Gun Violence (“LCPGV”) and Marin County Sheriff Robert Doyle purported to file an amicus curiae brief “In Support of California Attorney General Kamala Harris’ Motion for Intervention and Petition for Rehearing En Banc” concerning the above-titled action. Because they did not seek leave of court or the consent of any existing party as required by the Federal Rules of Appellate Procedure and this Court’s rules, *see* Fed. Rules App. Proc. 29(a) and Circuit Rules 29-2 and 29-3, that filing was invalid.

On March 4, 2014, Plaintiffs-Appellants notified counsel for LCPGV and Sheriff Doyle (“Proposed Amici”) that they would move this Court to strike the improperly filed brief. That same day, counsel for Proposed Amici responded in an electronic mail that because they were uncertain about from whom to obtain consent for their filing, they would be refiling their brief with either a motion or a statement that all parties consent. [Michel Decl. ¶¶ 2 -7].

Proposed Amici essentially seek to rectify their procedural errors by filing a motion for leave to file an amicus brief that was already before the Court. Even if this motion does indeed cure Proposed Amici’s procedurally defective filing, Plaintiffs-Appellants continue to oppose the motion on the grounds that there is no basis for it at this time.

First, Proposed Amici cite no authority that allows them to file an amicus curiae brief in support of a motion to intervene. All indications are that amicus curiae briefs are solely contemplated for arguing the ultimate disposition of an appeal, not for arguing peripheral issues. *See* Fed. Rules App. Proc. 29(e) (providing that an amicus “must” file its brief within seven days of a “principal brief”); Fed. Rules App. Proc. 29(c) (requiring an amicus brief to “indicate whether the brief supports affirmance or reversal”).

Even if amicus briefs in support of mere motions are proper, the brief Proposed Amici seek leave to file does not address the Attorney General’s motion to intervene at all, except in its caption. Instead, it focuses solely on arguments supporting the Attorney General’s proposed petition for rehearing en banc. This is fatal to the proposed brief insofar as it concerns the motion to intervene because amicus curiae briefs “must include” — among other things — “an argument.” Fed. Rules App. Proc. 29(c)(6).

Further, Proposed Amici improperly seek leave to file an amicus brief in support of an en banc petition that has not yet been filed.

“An amicus curiae may be permitted to file a brief *when the Court is considering a petition* for panel or en banc rehearing or when the Court has granted rehearing.” Circuit Rule 29-2(a) (emphasis added). That brief must be filed

“*after* the petition or response *of the party* the amicus wishes to support is filed or due.” Cir. Rule 29-2(e)(1) (emphasis added). “And under Federal Rule of Appellate Procedure 35(b), only a party to a matter before this court may petition for rehearing or rehearing en banc.” *Day v. Apoliona*, 505 F.3d 963, 964 (9th Cir. 2007).

The Court has not yet ruled on Attorney General Kamala Harris’s motion to intervene in this matter on behalf of the State of California. The Attorney General is therefore not a party to this action at this time, and no petition for en banc review is currently being considered by this Court. Because there is not yet any party or petition for their brief to support, the filing of Proposed Amici’s brief is premature and improper.

For these reason Plaintiffs’ - Appellants’ oppose the Proposed Amici’s Motion for Leave to file its brief in support of the Attorney Generals’ Petition for Rehearing.

Date: March 17, 2014

MICHEL & ASSOCIATES, P.C.

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

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, an electronic PDF of **APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS BRIEF BY LAW CENTER TO PREVENT GUN VIOLENCE AND MARIN COUNTY SHERIFF ROBERT DOYLE** 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: March 17, 2014

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