

No. 12-57049

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOROTHY MCKAY et al.,

Plaintiffs-Appellants,

v.

SHERIFF SANDRA HUTCHENS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(SACV 12-1458JVS)

**REQUEST FOR CERTIFICATION OF PLAINTIFFS-APPELLANTS'
POTENTIAL CONSTITUTIONAL CHALLENGE TO THE
STATE ATTORNEY GENERAL**

C. D. Michel (S.B.N. 144258)
Glenn S. McRoberts (S.B.N. 144852)
Sean A. Brady (S.B.N. 262007)
Anna M. Barvir (S.B.N. 268728)
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 908502
Tel. No. (562) 216-4444
Fax No: (562) 216-4445
e-mail: cmichel@michellawyers.com

Counsel for Plaintiffs-Appellants

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Federal Rule of Appellate Procedure 44(b) obliges the party raising a constitutional challenge to a state statute to file notice of that challenge with the court if a state actor is not a party to the proceeding. Upon the filing of this notice, Rule 44(b) mandates that the “clerk must then certify that fact to the attorney general of the State.” Thus, Rule 44(b) implements the statutory duty imposed on courts by 28 U.S.C. § 2403(b) to “notify the attorney general of a state of a constitutional challenge to any statute of that state.” Fed. R. App. P. 44 advisory committee’s note.

Moreover, unlike Federal Rule of Civil Procedure 5.1’s requirement that the challenging party and the district court clerk both notify the state attorney general of a constitutional challenge, because “Rule 44 has been working well,” it does not “impose the ‘double notice’ obligation” and charges the clerk alone to notify the state attorney general. Advisory Committee on Appellate Rules at 9, Agenda for Spring 2004 Meeting of Advisory Committee on Appellate Rules (April 13-14, 2004).

Because Plaintiffs-Appellants have filed a notice of potential constitutional challenge in the Court of Appeals,¹ this Court is respectfully requested to certify this fact to the Attorney General of the State of California pursuant to its duty under 28 U.S.C. § 2403(b) and Federal Rule of Appellate Procedure 44(b).

Date: December 10, 2012

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel

C. D. Michel

Attorney for Plaintiffs/Appellants

¹ Plaintiffs-Appellants reiterate that while they do not believe they are under any duty to notify the state Attorney General because this case primarily challenges the official policy of a local officer and/or a specific exercise of delegated power rather than state law, and because they have already sued a state actor in Sheriff Hutchens, the Ninth Circuit's interest in this issue in the related cases of *Peruta v. County of San Diego*, No. 10-56971, and *Richards v. Prieto*, No. 11-16255, has prompted Plaintiffs' Rule 44(b) notice of potential constitutional challenge. See Notice of Potential Claim of Unconstitutionality, Dec. 5, 2012.

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2012, an electronic PDF of Request for Certification of Plaintiffs-Appellants' Potential Constitutional Challenge to the State Attorney General 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.

I hereby further certify that on December 10, 2012, a hard copy of the Request for Certification of Plaintiffs-Appellants' Potential Constitutional Challenge to the State Attorney General is being served via U.S. Certified Mail on the following: Kamala D. Harris, California Attorney General, Office of the Attorney General, 1300 "T" Street, Sacramento, CA 95814.

Date: December 10, 2012

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel

C. D. Michel

Attorney for Plaintiffs-Appellants